

Urgency of Private Data Protection in The Digital Communication Era ¹

Flora Pricilla Kalalo, Frans Maramis

Faculty of Law, Sam Ratulangi University, Manado

e-mail: flora.kalalo@unsrat.ac.id

Abstract

The purpose of this paper is to find out how the basis for personal data protection and the urgency of its protection in the era of digital communication now, which is the normative legal research method concluded that personal data is constitutionally protected by The 1945 Constitution in Article 28G paragraph (1) and Article 28H paragraph (4) , as well as by Law, especially Law No. 11 Year 2008 concerning Information and Electronic Transactions in Article 26, where the urgency of protecting personal data as part of Privacy rights / privacy rights because: a. interference with personal data results in financial losses due to fraud, etc. b. the community right now also seems to be more sensitive so that it is easier to file criminal reports and/ or civil lawsuits because there needs to be more certainty about what personal data is protected; and c. disruption of personal data has great potential to cause citizens to feel disturbed and uncomfortable, thereby disrupting government efforts to encourage the development of digital communications reception; where the regulation should be in the form of a Law, the Law on the Protection of Personal Data, which will be a companion to the Information and Electronic Transactions Law, which makes guidelines for details of personal data that need to be protected and need to be included in the provisions criminal offenses relating to certain acts that violate personal data.

Keywords: Personal Data, Privacy Rights.

Introduction

The current era is the era of the development of Information and Communication Technology. Convergence is an extensional term for information technology that emphasizes the role of integrated communication and integration

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of telecommunications (telephone lines and wireless signals) and computers. As well as the required corporate software, middleware, storage, and audiovisual systems, which allow users to access, store, send and manipulate information.

Information and Communication Technology (ICT) has influenced aspects of human life broadly and deeply, where in 2000, someone wrote that if in the 1990s only a few people had heard of email and the Internet, then 10 years later this technology has been institutionalized and is well known broadly. It is still difficult to give the final word on the impact of this on society, but it is clear that the world with an electronic fast track, in many ways, has functioned differently from the world ten years ago. This has an impact on the law (Bert-Jap Koops (ed.), 2000: 83).

These developments had many positive impacts, although they also included negative impacts. One of them, namely regarding personal data, which in the past few decades was not given much attention because usually only existed in the government or parties in agreements such as banks, making it more difficult to spread, but now with the advancement of digital communication, personal data has the possibility to spread far and wide. Regarding to the Director General of Population and Civil Registry of the Ministry of Home Affairs told reporters that "there are currently 1,227 institutions working with the Ministry of Home Affairs, including private companies and government agencies", which have raised pros and cons on the issue of private access. Population data, including criticized by an Ombudsman member (Detik.com, 2019). This raises questions about the urgency of protecting personal data in the era of digital communication.

Methodology

This writing about personal data is descriptive writing using normative legal research methods (Soerjono Soekanto and Sri Mamudji, 2014: 13-14) or also called doctrinal legal research methods (Suteki and Galang Taufani, 2018: 255). Authors analyses some regulation in Indonesia which has relation with personal data protection, including norms stipulated in the constitution of Republic of Indonesia.

Discussion

1. Statutory Regulations

The 1945 Constitution Article 28G paragraph (1): "Every person has the right for protection of personal, family, honor, dignity, and property under his/her authority, and is entitled to a sense of security and protection from the threat of fear to do or not do something that is a right basic ". Article 28G paragraph (1) the right for self-protection, family, honor, dignity, and property protection under their

authority; and 2) the right for security and protection from the threat of fear to do or not do something that is a human right.

The 1945 Constitution Article 28H paragraph (4): "Every person has the right to have private property rights and such property rights must not be taken arbitrarily by anyone". Article 28H paragraph (4) of the 1945 Constitution states about the right to have private property rights and that such property rights may not be taken arbitrarily by anyone.

These articles show that the 1945 Constitution recognizes the right for protection of personal, family, respect, dignity, and property under its authority, also the existence of private property rights, where what is determined in the two provisions automatically includes personal data. Personal data is private property and protection of personal data is part of the protection of personal, family, honor, dignity, and property under someone's authority.

Under the 1945 Constitution Law No. 11 Year 2008 concerning Information and Electronic Transactions as amended by Law Number 19 Year 2016, which in Article 26 provides provisions:

- (1) Unless otherwise stipulated by legislation, the use of any information through electronic media that involves a person's personal data must be done with the approval of the person concerned.
- (2) Any person whose rights have been violated as referred to in paragraph (1) may file a claim for damages incurred under this Law.
- (3) Every Electronic System Operator is obliged to delete irrelevant Electronic Information and / or Electronic Documents under its control at the request of the Person concerned based on a court decision.
- (4) Every Electronic System Operator must provide a mechanism for deleting Electronic Information and / or Electronic Documents that are no longer relevant in accordance with statutory provisions.
- (5) Provisions regarding the procedure for deleting Electronic Information and / or Electronic Documents as referred to in paragraph (3) and paragraph (4) shall be regulated in government regulations.

The first two verses, paragraph (1) and paragraph (2), are directly related to personal data; whereas paragraphs (3) and (4) are useful for the deletion of personal data published without permission. Elucidation of Article 26 paragraph (1) determines that, in the use of Information Technology, protection of personal data is one part of privacy rights. Privacy rights contain the following meanings:

- a. Privacy rights are the rights to enjoy private life and are free from all kinds of distractions.
- b. Privacy rights are the right to be able to communicate with others without spying.
- c. Privacy rights are the right to supervise access to information about one's personal life and data.

The law that may be the basis for exceptions is Law No. 14 Year 2008 concerning Openness of Public Information, which in Article 1 number 2 defines that, Public Information is information that is produced, stored, managed, sent, and / or received by a public institution relating to the organizer and organization of the state and / or organizer and the administration of other public institutions which are in accordance with this Law and other information relating to the public interest. In Article 17 about excluded information, it also does not mention data from the Department of Population and Civil Registry.

However, on the other hand, it can be a concern because even if some say that the data available at the Department of Population and Civil Registry is information that is stored and / or received by a public institution relating to the administration, so it is public information; but the data is personal data that the possibility of abuse can be done by anyone. If just personal data such as the name that is already listed on the Identity Card (KTP) may not be too likely to interfere; but if it goes further than that it can be felt as a disturbing thing.

On the one hand, the granting of access to personal data to institutions, including private companies and government agencies, according to news from Detik.com earlier, is intended to prevent fraud, crime of falsification of data and documents, and also improve the quality of public services; which in this case is essentially Law No. 14 Year 2008 concerning Openness of Public Information is associated with exceptions based on statutory regulations as referred to in Article 26 paragraph (1) of the ITE Law.

On the other hand there is protection of personal data as part of Privacy rights in the 1945 Constitution Article 28G paragraph (1) and Article 28H paragraph (4), as well as ITE Law Article 26 paragraph (1) and the article's explanation. Internationally Privacy rights have also been mentioned in Article 12 of the Universal Declaration of Human Rights: "No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks" (United Nations, 2019: 26). Here it is mentioned about the right of every person to get legal protection against his privacy.

2. Privacy Rights and Personal Data.

Elucidation of Article 26 paragraph (1) of Law No. 11 Year 2008 in conjunction with Law Number 19 Year 2016 mentions the recognition of *Hak Pribadi* which is equivalent in English, namely privacy right. The term Privacy rights in the explanation of this article may be more appropriate if referred to as the right of privacy because the word privacy has become an Indonesian word in the Big Indonesian Dictionary where *Pribadi* is defined as "privacy" (The Compilation

Team of the Language Center Dictionary, 2002: 896). In this case, Privacy rights include, among others, protection of personal data.

The understanding the right of privacy, according to Black's Law Dictionary is "the right of a person and a person's property to be free from unwarranted public scrutiny or exposure" (Bryan A. Garner, 2009: 1439), this is the right of a person and someone's property to be free from unwarranted public scrutiny or exposure. According to the Black's Law Dictionary the United States Constitution does not explicitly mention privacy rights, but Supreme Court repeatedly emphasizes the norm that privacy rights are implicit in the privacy zone created by specific constitutional guarantees (Ibid). According to Wikipedia (Wikipedia, 2019b) more than 150 state constitutions mention this privacy right.

Based on Privacy rights, according to Article 26 of Law No. 11 Year 2008 in conjunction with Law No. 19 Year 2016 the use of any information through electronic media that involves a person's personal data must be done with the approval of the person concerned (paragraph 1); the offender may be sued for compensation (paragraph 2). Article 26 paragraph (1) also determines exceptions to the use of information through electronic media concerning a person's personal data, that is, if determined otherwise by legislation. So, based on statutory regulations, information can be used through electronic media involving personal data.

Exceptions based on these laws and regulations are appropriate if done under the Act because the provisions of personal data protection as part of Privacy rights are provisions of the Law, which is regulated in Law No. 11 Year 2008 in conjunction with Law No. 19 Year 2016 concerning Information and Electronic Transactions (UU ITE) This is in accordance with the provisions relating to the hierarchy of laws and regulations according to Law No. 12 Year 2011 concerning Formation of Regulations and Regulations. According to Article 7 paragraph (1) of Law No. 12 Year 2011, types and hierarchy of legislation consisting of: a. The 1945 Constitution of the Republic of Indonesia; b. Decree of the People's Consultative Assembly; c. Government Act / Regulation in Lieu of Law; d. Government regulations; e. Presidential decree; f. Provincial Regional Regulations; and g. Regency / City Regulations. Furthermore, in paragraph (2) it is determined that the legal force of the legislation in accordance with the hierarchy as referred to in paragraph (1).

From a theoretical aspect, the existence of a hierarchy of statutory regulations (norms) is supported by the famous teachings of *Stufenbau der Rechtsordnung* from Hans Kelsen (Hans Kelsen, 2011: 179).

Challenges to Privacy rights and protection of personal data are also not absent. According to Wikipedia (2019b), the right to privacy is an element of various legal traditions against government and private actions that threaten individual privacy. Since the disclosure of global surveillance in 2013, initiated by former NSA employee Edward Snowden, irrevocable human rights over privacy have been the

subject of international debate. Government agencies, such as the NSA, CIA, R&AW and GCHQ, have been involved in mass and global surveillance. Some current debates about privacy rights include whether privacy can coexist with the ability of current intelligence agents to access and analyze many details of a person's life; whether or not privacy rights are removed as part of a social contract to increase defense against supposed terrorist threats; and whether the threat of terrorism is a valid reason to spy on the general population. Private sector actors can also threaten privacy rights - especially technology companies, such as Amazon, Apple, Facebook, Google, and Yahoo that use and collect personal data. This concern has been reinforced by scandals, including the Facebook-Cambridge Analytica data scandal, which focuses on the psychographic company Cambridge Analytica using personal data from Facebook to influence large groups of people.

Of course besides human rights, every citizen has certain obligations. Article 26 paragraph (1) also mentions "unless otherwise stipulated by statutory regulations". Universal Declaration of Human Rights Article 29 paragraph (2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

But the exceptions to personal data as part of Privacy rights, as stated earlier, need to be regulated in legislation so that if restrictions are needed, these restrictions can be considered in a transparent and mature manner by many parties.

3. Urgency of Personal Data Protection

The urgency of protecting personal data in the era of digital communication is now very important because first, it is a daily occurrence of disruption of personal data that causes financial losses due to fraud, and so on, such as there are already enough events where people receive short message services (SMS) with the purpose of committing fraud. The SMS starts from requesting credit, up to the trick of calling in advance with the promise of a reduction in the Halo card if you can call the code number that will be sent by SMS and SMS sent later by Telkomsel is actually a confirmation for the purchase of large amounts of credit, as well as telephone- a phone call about relatives who were suddenly ill or caught by the police. In the event of fraud via SMS or telephone, not a few people have been fooled.

People in the era of digital communication also seem to be more sensitive to things that offend so it is easier to cast criminal reports and / or civil lawsuits. Every day we can read news in online media about someone who reports another person to the police agency because they feel offended by the statements of the reported. Things like body shaming that used to be nothing can now be a legal problem.

In addition, the urgency of protecting personal data today such as interference with personal data, people will at least feel disturbed and uncomfortable. This discomfort can develop into fear when dealing with matters related to digital communication. This development is certainly something that is not expected in the era of digital communication like now, where digital communication is really encouraged by the government to develop in people's daily lives in order to accelerate the development of the Indonesian economy more quickly. In other words it is related to culture, especially legal culture, with regard to communication, especially communication using digital communication media.

Things that needed right now are certainty about what kind of personal data which are protected. The laws governing the protection of personal data need to create guidelines for details of personal data that need to be protected. This uncertainty regarding personal data may be reduced if there are definite details about what personal data is accessible and what is not. An example, for example the maiden's name which is usually the question of checking a credit card holder because it is the most difficult question, will be lost meaning if personal data about it can be accessed by other parties.

4. The Need for Criminal Provisions Relating to Violations of Personal Data Protection

Article 26 paragraph (2) of Law No. 11 Year 2008 in conjunction with Law Number 19 Year 2016 states that every person whose rights are violated as referred to in paragraph (1) - any information through electronic media relating to a person's personal data must be carried out with the approval of the person concerned -, can file a claim for losses incurred based on this Law. The ITE Law in Article 26 paragraph (2) only links violations of personal data with a civil claim; also in prohibited acts (Chapter VII: Prohibited Acts, Article 27 to Article 37) in relation to criminal provisions (Chapter XI: Criminal provisions, Article 45 to Article 52), no one mentions acts in Article 26. So, the act of violating a person's personal data only has the consequences of a civil suit.

If the Law on Personal Data Protection is established, it is necessary to consider criminal provisions against certain acts that violate the protection of personal data. The existence of criminal provisions will have more power to prevent people from committing prohibited acts compared to civil sanctions, on the condition that what is prohibited and threatened by criminal formulation is definite enough so that there is no clear formulation to fulfill the *lex certa* requirements (Schaffmeister et al 1995: 6).

Conclusion

The current situation shows the urgency of regulating personal data in Indonesia, including fraud, people's sensitive feelings about matters related to personal data, and the culture of using digital communication. Personal data protection arrangements should be in the form of a law, such as the Law on Personal Data Protection, which is a companion to the Electronic Information and Transaction Law, which will encourage greater recognition and protection of personal data as part of the right privacy. In the relevant law, guidelines need to be made for details of personal data that need to be protected. Besides, criminal provisions regarding certain acts that violate personal data need to be included.***

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