THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

THE SUMMARY OF THE DECISION OF CASE NUMBER 81/PUU-XVIII/2020

Concerning

Government Authority in Terminating Access to Illegal Content

Petitioner	:	**Arnoldus Belau and the Association of Independent Journalists Alliance (*Aliansi Jurnalis Independen* or AJI) represented by Abdul Manan as General Chairman and Revolusi Riza Zulverdi as General Secretary AJI Association**
Type of Case	:	Review over Law Number 19 of 2016 concerning Amendment to Law Number 11 of 2008 concerning Information and Electronic Transactions (UU 19/2016) against the 1945 Constitution of the Republic of Indonesia (UUD 1945)
Subject Matter	:	The Government's authority in the provisions of Article 40 paragraph (2b) of Law 19/2016 is in contrary to Article 1 paragraph (3), Article 28F, Article 28D paragraph (1) of the 1945 Constitution.
Verdict	:	To dismiss the Petitioners' petition in its entirety.
Date of Decision	:	Wednesday, October 27, 2021.
Overview of Decision	:	

Petitioner I is an Indonesian citizen who qualifies as a journalist on the Suarapapua.com website. Petitioner I feels that his constitutional rights and authorities have been impaired due to the termination of access to the Suarapapua.com site, which is suspected to have content that is unlawful according to the provisions of Article 40 paragraph (2b) of Law 19/2016. Furthermore, Petitioner II is an association legal entity that has the vision and mission to carry out various advocacy aimed at creating press freedom and fulfilling the public's right to information, Petitioner II is also the owner of the aji.or.id website, who thinks that his constitutional rights and authorities are potentially being impaired by the enforcement of the provisions in Article 40 paragraph (2b) of Law 19/2016;

In relation to the authority of the Court, because the Petitioners are requesting a judicial review of the Law *in casu* Law 19/2016 against the 1945 Constitution, the Court has the authority to hear the *a quo* petition*;*

Regarding the legal position, Petitioner I and Petitioner II have explained about their constitutional rights which in their opinion are impaired by the enactment of the legal norms petitioned for review, namely Article 40 paragraph (2b) of Law 19/2016. The assumption that the intended constitutional impairment is specific and actual or at least has the potential to occur. Therefore, the assumption of the impairment of constitutional rights as described by Petitioner I and Petitioner II has a causal relationship (*causal verband*) with the enactment of the legal norms for which a review is requested which, if the *a quo* petition is granted, the constitutional impairment as described will not or no longer happening. Therefore, the Petitioner has the legal standing to act as the Petitioner in the *a quo* petition;

Regarding the review of the constitutionality of norms in the provisions of Article 40 paragraph (2b) of Law 19/2016 as argued by Petitioners I and Petitioners II (hereinafter referred to as the Petitioners), the Court is of the opinion as follows:

1. Whereas according to the Court, to comprehensively understand the provisions of Article 40 paragraph (2b) of Law 19/2016, it cannot be separated from the provisions of Article 40 paragraph (6) of the *a quo* Law, because technical matters regarding the termination of access to electronic information and/or electronic documents whose contents violate the law are further regulated in the implementing regulations of the *a quo* Law namely PP 71/2019, furthermore, *a quo* PP explain the category and classification limits regarding electronic information and/or electronic documents whose contents violate the law as referred to in Article 40 paragraph (2b) of Law 19/2016. In line with that, technical matters regarding the normalization procedure for terminating internet access containing illegal content are further regulated in accordance with the mandate of PP 71/2019 in the Minister of Communication and Information Technology Regulation Number 5 of 2020 concerning Private Scope Electronic System Operators (Permenkominfo 5/2020). This means that the Government has opened a complaint room for review and recovery (normalization) and has a Standard Operating Procedure (SOP), both for reporting negative content and for normalizing sites with negative content;
2. Whereas according to the Court, what is really a concern for the petitioners is the government's action to cut off access to the electronic information and/or electronic documents, of course it will not happen because the action is only carried out if there is an element of content that violates the law. Therefore, in this context, the state is required to be present to protect the public interest from all forms of interference due to misuse of content in using electronic information and/or electronic documents. In relation to the termination of access, rules have also been provided regarding the procedures for normalizing or restoring it so that a balance between the rights and obligations of all parties is maintained in the use of electronic information and/or electronic documents as a reflection of life in a legal state. Therefore, the Petitioners' argument regarding the conflicting norms of Article 40 paragraph (2b) of Law 19/2016 with the principle of the rule of law as stipulated in Article 1 paragraph (3) of the 1945 Constitution is groundless according to law;
3. Whereas according to the Court, in order to understand further about the Government's actions in the provisions of Article 40 paragraph (2b) of Law 19/2016, it is important to refer to the provisions of Law Number 30 of 2014 concerning Government Administration (UU 30/2014), Law 30/201 in essence explains that the legality of the Government's actions cannot be distinguished from the KTUN in writing. KTUN must also be interpreted as a written determination which is also a factual action. This means that the Government's actions are also a form of administrative obligation that can be legally accounted for, as is the case with a State Administrative Court. Furthermore, any community members who feel aggrieved by the KTUN and/or Government actions may file objections and appeals;
4. Whereas according to the Court, the Government's authority as stipulated in Article 40 paragraph (2b) of Law 19/2016 which is manifested by the government's action to cut off access can be submitted for a legal settlement mechanism through the judiciary (due process of law). Therefore, there is no issue of the constitutionality of the norms of Article 40 paragraph (2b) of Law 19/2016, regarding the legal uncertainty and equal rights as guaranteed in Article 28D paragraph (1) of the 1945 Constitution. Therefore, the argument of the Petitioners that states the *a quo* Article is in contrary to the 1945 Constitution is unreasonable according to law.
5. Whereas the pattern of information and communication technology that is currently widely used is the internet which is a digital communication platform that can involve anyone with the characteristics of very fast, broad, and massive dissemination of electronic information and/or electronic documents without knowing space and time. If the electronic information and/or electronic documents that are violating the law have been accessed first, before blocking is carried out, the adverse effects will be much faster and massive which within the limits of reasonable reasoning can cause noise, anxiety and/or disrupt public order. For

this reason, it is necessary to have the speed and accuracy measured by the Government to be able to immediately prevent it by cutting off access to electronic information and/or electronic documents that are violating the law. Therefore, it is not possible for the government to first issue the KTUN in writing as requested by the Petitioners in its petitum, then terminate access or order the electronic operator to terminate access as specified in Article 95 of PP 71/2019. This is because the process of issuing a written KTUN takes time, which cannot be faster than the time for distributing electronic information and/or electronic documents with prohibited contents. Moreover, if the prohibited (illegal) content is already in the private communication area, its distribution will be even more out of control.

6. Whereas the government's action to cut off access does not mean eliminating the rights of the Petitioners to communicate and obtain information as guaranteed by the constitution, but the use of these rights must not also eliminate the state's right to protect the public interest, especially the interests of children from the dangers of information containing prohibited (illegal) content quickly. However, in accordance with the development of digital technology related to the government's actions to cut off access to content that has prohibited (illegal) content, the Government may simultaneously submit digital notifications, in the form of notifications to parties whose access to electronic information and/or electronic documents are being cut off. Therefore, the Government's actions are still guaranteed the principle of openness as a reflection of the General Principles of Good Governance (*Asas-asas Umum Pemerintahan yang Baik* or AUPB). Therefore, there is also no issue of the constitutionality of the norms of Article 40 paragraph (2b) of Law 19/2016 on the right to communicate and obtain information guaranteed by Article 28F of the 1945 Constitution, thus the arguments of the Petitioners stating that the *a quo* articles are in contrary to the 1945 Constitution is unreasonable according to law.

Whereas based on the entire description of the considerations above, according to the Court, the subject matter of the Petitioners' petition has no legal basis. Accordingly, the Court subsequently issued a decision which verdict is to dismiss the petition of the Petitioners in its entirety.

DISSENTING OPINION

Against the *a quo* decision of the Constitutional Court, 2 (two) Constitutional Justices, namely Constitutional Justice Suhartoyo and Constitutional Justice Saldi Isra have dissenting opinions regarding the material review of Law 19/2016 for the following reasons:

Whereas legal certainty in relation to the authority granted by a law to any government agencies/officials is related to the limits and how the relevant authority is used. In the *a quo* norm, the limit of the Government's authority in terminating access and/or ordering the Electronic System Operator is if certain electronic information or electronic documents have contents that violate the law. To this extent, the authority to terminate access has a fairly clear limit. With these restrictions, if an electronic information or document has any content that violates the law, the government has the authority to terminate its access.

Even so, in principle, the *a quo* norm also contains something procedural, namely related to the process of how the government should take action in terminating access and/or ordering the termination of access to the electronic information or documents. Termination of access is a procedure that can or has the right to be taken or carried out by the government in conducting the prevention of the dissemination and use of any electronic information that has any content that violates the provisions of laws and regulations.

Whereas such procedure is also related to the right to information held by citizens as regulated in Article 28F of the 1945 Constitution. Therefore, the procedure for terminating access and/or ordering the termination of access must take into account the rights to information held by every citizen as a human right. In that context, even though it has the authority, the procedures that must be followed by the government in terminating access to information and/or electronic documents must also be regulated with certainty so that the opportunity for abuse of authority in implementing the termination of access to any information does not occur, or at least can be reduced.

Whereas the norm of Article 40 paragraph (2b) of the Information and Electronic Transactions Law does not at all contain any procedures that must be carried out by the government in terminating access and/or ordering the termination of access. In fact, within the limits of reasonable reasoning, the authority given in the norms of Article 40 paragraph (2b) of the Information and Electronic Transactions Law to the government is related to or has an impact on limiting human rights or the constitutional rights of citizens, so that it should also be clearly regulated. In this case, the norms in the law should provide certainty about how the limitation of rights is carried out so that citizens or institutions affected by the limitation of rights know the basis or considerations of the government in deciding and/or taking action to limit the right to the relevant information.

Whereas by establishing a legal construction which requires provisions for the government in terminating access through a clear process, it can be placed as part of the form of ethics in the administration of government. In addition, the process with clear reasons can also be placed as part of the working mechanism of mutual checks and mutual supervision (checks and balances) so that there is no abuse of power which abuse is very likely increasing from time to time along with the strength of the state in carrying out its authority (power tends to corrupt, absolute power corrupts absolutely). In that context, the government must be burdened with the obligation to use authority in a clear legal construction and can be held accountable to the public by issuing a written explanation in carrying out the relevant authority.

Whereas even though there is an obligation for the government to issue a written explanation in carrying out the relevant authority, the government's obligations do not have to be the same as that requested by the Petitioner in the form of: **"after issuing a written government administrative decision or state administrative decision"**, but it is sufficient with a written explanation in the form of a notification either by written letter or via digital which shall be delivered to the users of electronic information. Because, if it is required as the Petitum requested by the Petitioner, such government action or decision can actually be on trial through the state administrative court because it includes actions and decisions. When the *a quo* norm interpreted as requested by the Petitioner, this may close the space for government "actions" in the administration of the state.

Whereas if placed in the way of thinking above, the Petitioner does not at all want to eliminate the government's authority in terminating access and/or ordering the electronic system operator to terminate access to any electronic information and/or electronic documents which have content that violates the law as set forth in norms of Article 40 paragraph (2b) of the Information and Electronic Transactions Law. This means that the Petitioner is aware that the government's authority is needed in controlling electronic information and/or electronic documents that have any unlawful content. However, for the users of electronic information, including the users other than the Petitioner, an explanation regarding the reason for terminating access to electronic information and/or documents needs to be made, stated and submitted in writing by the government to the users of electronic information.

Whereas based on the above considerations, with reasons to build and maintain ethics in the administration of government, embody the principles of checks and balances, and to realize a fair legal certainty in a democratic rule of law, the Court should state that Article 40 paragraph (2b) of the Law is constitutional as long as it is interpreted as: "In carrying out the prevention as referred to in paragraph (2a), the Government has the authority to terminate access and/or instruct the Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents that have content that violates the law after issuing or accompanied by a written/digital explanation".

Whereas based on the foregoing considerations, the Petitioners' petition should have been declared legally grounded in part.