

# THE REASON TO AMENDMENT OF ARTICLE 27 PARAGRAPH (1), ARTICLE 28 PARAGRAPH (1) AND (2) OF THE ITE LAW THAT IS CONSIDERED TO HAVE MULTIPLE INTERPRETATION OF THE ITE LAW IN THE TIME OF THE COVID-19 PANDEMIC FOR LEGAL CERTAINTY

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## ABSTRACT

Indonesian Law No. 11 of 2008 on Electronic Information and Transactions as amended by Law No. 19 of 2016 (ITE Law) provides benefits for the community and the business world on justice, legal certainty, and legal protection for activities in cyberspace using electronic media. However, there is an assumption that several articles in the ITE Law have multiple interpretations so that it is potentially to criminalize someone and make law enforcers have different perceptions. The formulation of the problem that the author raises are, first, what is the urgency of changing articles that are considered to have multiple interpretations in the ITE Law during the Covid-19 pandemic? Second, what is the ideal legal product to deal with articles that are considered to have multiple interpretations? The method used is a normative juridical method, the authors use secondary data and analyzed qualitatively. The results of the first research shows that the interpretation of the ITE Law alone is not sufficient and must be revised to support the amendment of the ITE Law. The second research result is that an appropriate legal product is a legally binding legal product for law enforcement officials in conducting investigations, prosecutions, and judicial process, namely Supreme Court Regulations and Attorney General Circulars.

**Keywords:** ITE Law, Article Multiple Interpretations, Legal Interpretation.

## A. Introduction

Indonesian Law No. 11 of 2008 on Electronic Information and Transactions as amended by Law No. 19 of 2016 (hereinafter referred to as the ITE Law) aims to provide legal protection, justice, and legal certainty for the public and business world for activities in cyberspace. Based on Article 3 of the ITE Law, "Utilization of Information Technology and Electronic Transactions is carried out based on the principles of legal

certainty, benefits, prudence, good faith, and freedom to choose technology or technology neutrality".

According to the Indonesia's President, Mr. Joko Widodo (during the 2019-2024 government), the spirit of the ITE Law is to protect Indonesia's digital space so that it will be cleaner, healthier, ethical, and can be used productively, and does not want the implementation of the ITE Law to cause injustice. The President asked the Chief of

the Indonesian National Police (Kapolri) to respond to reports on violations of the ITE Law and to be careful in translating articles that have multiple interpretations<sup>1</sup>

According to Damar Juniarto, Executive Director of Southeast Asia Freedom of Expression Network (Safenet) as published in *kompas.com*, there are 9 (nine) problematic articles in the ITE Law, and the main problem are Article 27 to Article 29 of the ITE Law<sup>2</sup>. The author does not agree if Article 27 paragraph (1) to paragraph (4) of the ITE Law is considered to have multiple interpretations. Instead, the author is of the view that the articles that are considered to have multiple interpretations are Article 27 paragraph (3), Article 28 paragraph (1), and Article 28 paragraph (2) of the ITE Law. In this paper, the author will analyze Article 27 paragraph (3), Article 28 paragraph (1), and Article 28 paragraph (2) of the ITE Law.

Based on the 2019 Supreme Court Report, the number of ordinary cases on information and electronic transactions at the High Courts throughout Indonesia in 2019 are, firstly, the remaining cases in 2018 were 10, secondly, cases entered in 2019 were 128, and thirdly, the rest of cases in 2019 were 127<sup>3</sup>. The Supreme Court Report did not specify what offenses were being investigated.

In the author's opinion, the ITE Law does not conflict with human rights (HAM), does

not limit freedom of opinion, instead the ITE Law was established to protect the human rights of others as well. This is as mandated in Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) that "In exercising his rights and freedoms, everyone is obliged to submit to the restrictions established by law with the sole intention of guaranteed recognition and respect for the rights and freedoms of others and to fulfill just demands following considerations of moral, religious values, security and public order in a democratic society".

During the Covid-19 pandemic and until this article was written (February 2021) there was a discourse to change the ITE Law because there were articles that were considered to have multiple interpretations (*haatzaai artikelen*). Non-governmental organizations in Indonesia such as the Institute for Criminal Justice Reform (ICJR), LBH Press, and the Indonesian Judicial Research Society (IJRS) urge the Government and the House of Representatives (DPR) to revise the ITE Law. This urge is to encourage people to be critical. According to ICJR, LBH Pers, and IJRS, catchall articles are often used as a tool to criminalize and eliminate freedom of expression. In addition, criminal articles such as hate speech, fake news, treason, and affront against individuals are still often

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1 Rangga P.A. Jingga, "Menanti Revisi UU ITE Jilid 2", *antaranews.com*, <https://www.antaranews.com/berita/2006061/menanti-revisi-uu-ite-jilid-2> (Accessed 20 Feb 2021).  
2 Galuh Putri Riyanto, "9 'Pasal Karet' dalam UU ITE yang Perlu Direvisi Pengamat", *kompas.com*, <https://tekno.kompas.com/read/2021/02/16/12020197/9-pasal-karet-dalam-uu-ite-yang-perlu-direvisi-menurut-pengamat?page=all> (Accessed 20 Feb 2021).  
3 Mahkamah Agung RI (RI Supreme Court), "Tabel Kinerja Penyelesaian Perkara Kasasi Pidana Khusus Tahun 2019, p. 102.

used to silence legitimate expressions<sup>4</sup>.

Based on the background of this problem, the problem formulation that the writer raises are first, what is the urgency of amending articles that are considered to have multiple interpretations in the ITE Law during the Covid-19 pandemic? Second, what is the ideal legal product to amend within the article which is considered to have multiple interpretations?

## B. Research Method

The research method used is a normative juridical research method<sup>5</sup> using secondary data. The secondary data referred to data obtained indirectly, meaning that the data is only material, either in the form of legislation, books, research results, study results, and others<sup>6</sup>. The data used is library material which consists of a. primary legal materials consisting of laws and regulations relating to the topic of the author; b. secondary legal materials consisting of scientific articles and research results, c. tertiary legal materials consist of dictionaries. The author uses qualitative analysis to draw a comprehensive conclusion.

## C. Discussion

### 1. The Urgency of Revising Articles that are Considered to have Multiple Interpretations and Containing Hate Speech (Haatzaai Artikelen) in The ITE Law

The spirit of the ITE Law is to protect the people, businessmen, and to develop human life. Individuals and corporations use information technology and the internet to work, to have electronic transaction, to shop, and as of this writing (2021), the use of technology during the Covid-19 pandemic is a priority to prevent the spread of the Covid-19 virus.

Based on the author's study, the ITE Law regulates administration, authorization over electronic system, digital signature, (administrative law) related to electronic systems, and electronic system operators. However, the ITE Law also regulates offenses and criminal acts that are prohibited in the ITE Law (principle of legality). The ITE Law protects individuals, corporations, and the state as legal subjects, and electronic systems as objects that must be protected.

The author will explain the classification as follow, firstly, protection for individuals, corporations, and the state is mentioned in: a. Article 27 paragraph (1), (2), (3), (4). b. Article 28 paragraph (1), (2). c. Article 29 of the ITE Law. Secondly, that protection for electronic systems as mentioned in a. Article 30 paragraph (1), (2), (3). b. Article 31 paragraph (1), (2), (3), (4). c. Article 32 paragraph (1), (2), (3). d. Article 33. e. Article 34 paragraph (1), (2). The prohibited acts originated from the nomenclature and activities namely distributing, transmitting,

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4 Felldy Utama, "Pemerintah dan DPR Didesak Revisi Pasal Karet di UU ITE", *sindonews.com*, <https://nasional.sindonews.com/read/330818/12/pemerintah-dan-dpr-didesak-revisi-pasal-karet-di-uu-ite-1612940527> (accessed 20 Feb 2021).  
5 Soedjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 1994), p. 13.  
6 Budiarto, Agus. "Legal Research Methodology Reposition in Research on Social Science." *International Journal of Criminology and Sociology* 9 (2020).

and making accessible.

The ITE Law has explained distributing, transmitting, and making accessible. “Distributing” means sending and/or distributing electronic information and/or electronic documents to people or various parties via electronic systems. “Transmitting” means sending electronic information and/or electronic documents to other party via an electronic system. “Making accessible” means any act other than distributing and transmitting via electronic systems that causes electronic information and/or electronic documents to be known by other parties or the public<sup>7</sup>. In daily conversation, there are 3M’s in bahasa Indonesia (*mengunduh, mengunggah, mem-posting*) those are the form of activities of downloading, uploading, posting (writing something on social media), by sending electronic information in the form of video and audio from one device to another, from one social media to another social media.

The author will describe and analyze articles in the ITE Law which are considered to have multiple interpretations and have the potential to contain hate speech against a person, group, country (*Haatzaai Artikelen*), and several groups who consider this article to be amended because it has the potential to discriminate against someone. Are these articles urgently need revision during the Covid-19 pandemic? Or is it enough to make a guideline for the interpretation of the ITE Law by the competent agency? Further question, which agency?

#### **a. Article 27 Paragraph (3) jo. Article 45 Paragraph (3) of the ITE Law on The Prohibition of Dissemination of Affront and/or Defamation Content**

The author will describe these provisions. According to Article 27 paragraph (3) of the ITE Law, “any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents with contents of affronts and/or defamation.” Based on the explanation of Article 27 paragraph (3) of the ITE Law, the provision in this paragraph refers to the provision of defamation and/or slander as regulated in the Criminal Code (KUHP). If proven to be against the law, under Article 45 paragraph (3) of the ITE Law, the perpetrator will be punished with imprisonment for a maximum of 4 (four) years and/or a maximum fine of Rp750.000.000,00 (seven hundred and fifty million rupiah).

Based on the results of the author’s research, Article 27 paragraph (3) has been subjected to two judicial reviews at the Constitutional Court (In Indonesia: *Mahkamah Konstitusi/MK*). First, Decision No. 50 / PUU-VI / 2008 which was decided on May 4, 2009, with a ruling stating that it “rejected” the application in its entirety. The Constitutional Court Decision No. 50 / PUU-VI / 2008 provides an interpretation of a good name.

(“That a person’s good name, dignity, or honor is one of the legal interests protected by criminal law because it is part of the constitutional rights of citizens guaranteed

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7 Elucidation of Article 27 paragraph (1) of the ITE Law

by the 1945 Constitution and international law, and therefore if the criminal law provides the threat of certain criminal sanctions against the act that attacks someone's good name, dignity or honor, it is not against the 1945 Constitution" In Bahasa Indonesia :*"bahwa nama baik, martabat, atau kehormatan seseorang adalah salah satu kepentingan hukum yang dilindungi oleh hukum pidana karena merupakan bagian dari hak konstitusional warga negara yang dijamin oleh UUD 1945 maupun hukum internasional, dan karenanya apabila hukum pidana memberikan ancaman sanksi pidana tertentu terhadap perbuatan yang menyerang nama baik, martabat, atau kehormatan seseorang, hal itu tidaklah bertentangan dengan UUD 1945"*<sup>8</sup>).

According to the Constitutional Court, the interpretation of norms mentioned in Article 27 paragraph (3) of the ITE Law regarding affront and/or defamation cannot be separated from the norms of criminal law as mentioned in Chapter XVI concerning defamation mentioned in Article 310 and Article 311 of the Criminal Code. Therefore, the basic legal norms (genus delict) derive from the Criminal Code, whereas the legal norms in Article 27 paragraph (3) of the ITE Law are provisions for the specific application of this law<sup>9</sup>.

Second, the Constitutional Court Decision No. 2 / PUU-VII / 2009, which was decided on May 4, 2009, with the consideration of a decision stating that the

applicant's petition was "unacceptable". The Constitutional Court concluded that the norms in Article 27 paragraph (3) of the ITE Law are constitutional and do not contradict democratic values, human rights, and the principles of the rule of law<sup>10</sup>. According to the Constitutional Court, freedom of expression, speech, expression, and opinion does not mean freedom as freely as possible, because freedom as freely as possible can lead the executor to become a supra power that is untouchable for anybody. In this case, the ITE Law is not intended as a repressive device to shackle freedom of expression, speech, expression of thoughts and opinions, but rather to keep the a quo freedom from entering the supra power circle<sup>11</sup>.

In the author's opinion, the ITE Law has determine that Article 27 paragraph (3) is an offense on complaint, more precisely an offense on the absolute complaint. Therefore, the victim himself must complain if the victim suspects his good name, honor, and dignity have been harmed by the alleged perpetrator either due to information from social media or printed media.

According to the author's analysis, the elements of a person's reputation/dignity consist of 1. Assessed well by the wider community, a group of people, 2. Subjective, and according to yourself, the person has dignity, 3. It is subjective because people's judgments will be different, and generally influenced by background factors, relationships (friendship, work relations).

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8 Putusan MK (Constitutional Court Decision) No. 50/PUU-VI/2008, p. 48.  
9 Putusan MK (Constitutional Court Decision) No. 50/PUU-VI/2008, p. 58.  
10 Putusan MK (Constitutional Court Decision) No. 50/PUU-VI/2008, p. 145.  
11 Putusan MK (Constitutional Court Decision) No. 2/PUU-VII/2009, p. 143.

According to R. Soesilo on the assault against someone's honor and reputation. Those who are attacked usually feel "embarrassed". The "honor" that is being attacked here is only about the honor of "good name", not "honor" in the sexual field, an honor that can be defamed because of being offended by the genitals in an environment of sexual lust.<sup>12</sup>

**b. Article 28 Paragraph (1) jo. Article 45A Paragraph (1) of The ITE Law on the Prohibition of Dissemination of False and Misleading Information Resulting in Consumer Loss**

The author will describe these provisions. Based on Article 28 paragraph (1) of the ITE Law "Any person who knowingly and without authority disseminates false and misleading information resulting in consumer loss in Electronic Transactions". If proven to be against the law, based on Article 45A paragraph (1) of the ITE Law, the perpetrator will be punished with imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp1.000.000.000,00 (one billion rupiah).

Based on the author's experience in providing expert information and the author's analysis, Article 28 paragraph (1) of the ITE Law jo. Article 45A paragraph (1) of the ITE Law cannot stand alone, because of the word 'and' in the offense. Fake news does not always contain news that resulted in consumer loss. However, if investigators continue to use this Article for fake news

cases that do not harm consumers, then the file will not be P-21 and will result in the indictment of the public prosecutor's obscure libel. This offense is appropriate to use based on the example presented by the author, for example, X, the owner of a conventional store that sells clothes, makes electronic posts/information that contain misleading information about Y, who owns a conventional store which also has an online shop that also sells clothes. The misleading information can be considered as fake news and cause harm to Y.

Therefore, if fake news that can cause chaos is spread without loss to consumers, Article 28 paragraph (1) jo. Article 45A paragraph (1) of the ITE Law shall also be imposed, combined with Article 14 paragraph (1), (2) jo. Article 15 Law No. 1 of 1946 on Criminal Law Regulations (Law 1/1946). The author will explain these provisions.

Based on Article 14 paragraph (1) of Law 1/1946 "Any person, by spreading fake information or news, intentionally causing public unrest, shall be sentenced with imprisonment at a maximum of ten years. Based on Article 14 paragraph (2) Law 1/1946 "Any person who publishes news or making information which may cause public unrest, while it can reasonably be suspected that such news or information is fake, shall be sentenced with imprisonment at the maximum of three years. "

Based on Article 15 of Law 1/1946 "Any person who publish news that is uncertain or exaggerated or incomplete, while it is

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12 R. Soesilo, *Kitab Undang-undang Hukum Pidana serta Komentar-komentar Lengkap Pasal Demi Pasal*, (Jakarta: Penerbit Politeia, 1985), p. 225-227.

understood or at least reasonably suspected that such news may cause or is already caused public unrest, shall be sentenced with imprisonment at the maximum of two years. “

According to KBBI (Indonesian Big Dictionary), chaos comes from the word *onar* (Bahasa Indonesia) /troublemaker which means 1. Riot, uproar, 2. The commotion, noise<sup>13</sup>. According to the author’s opinion, fake news whether it causes consumer loss or not, consumer loss will certainly create confusion, make people worry, and can be provoked if fake news is packaged with information that attacks SARA (ethnic groups, religions, races, and intergroups). Based on the author’s research results and until this paper was compiled (February 2021), Article 28 paragraph (1) jo. Article 45A paragraph (1) of the ITE Law has not yet submitted a judicial review to the Constitutional Court.

However, Article 14 paragraph (1), (2) and Article 15 of Law 1/1946, a judicial review has been filed against the 1945 Constitution, particularly Article 1 Paragraph (2), Article 1, paragraph (3), Article 28D Paragraph (1), Article 28G Paragraph (1), and Article 28I Paragraph 2. Based on the Constitutional Court Decision No. 33 / PUUXVIII / 2020 which was decided on July 9, 2020, with a ruling stating that the Petitioner’s pleading cannot be accepted.

**c. Article 28 Paragraph (2) jo. Article 45A Paragraph (2) of the ITE Law on the Prohibition of Spreading Content that**

**Creates Hatred or Hostility to Certain Individuals and/or Groups of People based on Ethnic groups, Religions, Races, and Intergroups (SARA)**

The author will describe these provisions. Based on Article 28 paragraph (2) “Any person who knowingly and without authority disseminates information aimed at inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and intergroups (SARA)”. If a person is proven to be against Article 28 paragraph (2) of the ITE Law, then based on Article 45 paragraph (2), he will be punished with imprisonment for a maximum of 6 (six) years and/or a maximum fine of IDR 1.000.000.000,00 (one billion rupiah).

In 2017, Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law conducted a judicial review to the Constitutional Court (MK) and based on the Constitutional Court Decision No. 76 / PUU-XV / 2017 the application was declared rejected. One of the considerations of the Constitutional Court stated that the term “intergroups” because it accommodates various entities that have not been regulated by law, it is precisely when it is removed/ removed from Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law. Laws for various entities outside the three categories namely ethnic groups, religions, and races. The absence of such legal protection has the potential to violate Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution<sup>14</sup>.

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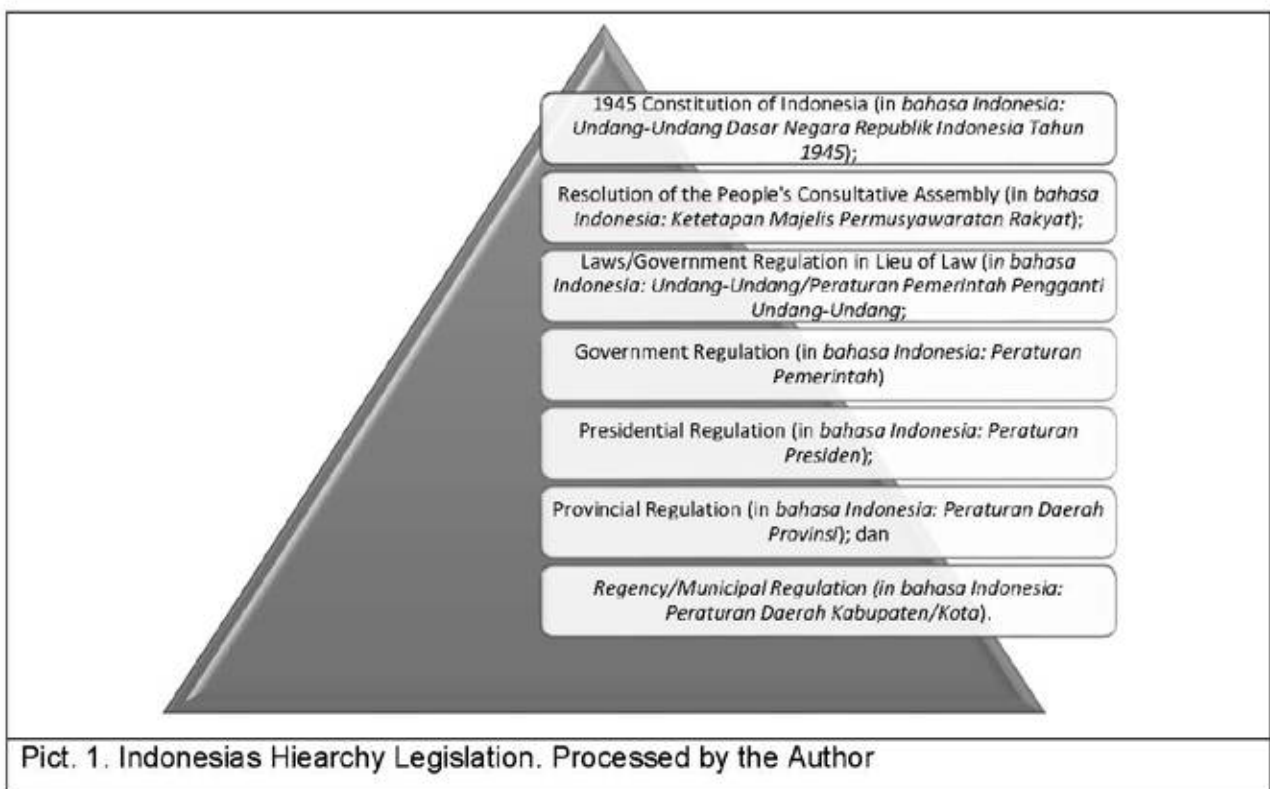
13 (in Bahasa Indonesia: *onar yang berarti: 1. Huru hara; gempar; 2. Keributan; kegaduhan*).  
14 Putusan MK (Constitutional Court Decision) No. 76/PUU-XV/2017, p. 68.

The Constitutional Court also emphasized that even if the term “intergroups” had not been changed or replaced, for the Court this would not make the term norms of Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law which mentioned the term “intergroups” into a vague norm (vague norm). To make these provisions clearer, according to the Court, it is sufficient to explain that even though this is court decision, it is emphasized that the term “intergroups” does not only cover ethnic groups, religions, and races, but includes more than that, namely all entities that are not represented or accommodated by the

terms ethnic groups, religions, and races/people<sup>15</sup>.

## 2. The Ideal Legal Product for Amendments to Articles that are Considered to have Multiple Interpretations

Law No. 15 of 2019 on Amendments to Law No. 12 of 2011 on the Establishment of Legislative Regulations (hereinafter referred to as PPUU Law) has explicitly regulated the types and hierarchy of statutory regulations. The author will describe the hierarchy as regulated in Article 7 paragraph (1) of the PPUU Law with the graphic below:



The ITE Law is at a high level in this hierarchy. Is the discourse of forming a

guideline for interpretation of the ITE Law the right step/solution for the articles in the

15 Putusan MK (Constitutional Court Decision) No. 76/PUU-XV/2017, p. 69.



ITE Law that are considered to have multiple interpretations? Shouldn't the ITE Law be revised just considering the second change was the last in 2016?

Definition of "Ministerial Regulation" is a regulation stipulated by the minister based on the material contained in the context of carrying out certain affairs in government<sup>16</sup>. The definition of government regulations in lieu of laws is the laws and regulations that are established by the president in compelling emergencies<sup>17</sup>. The definition of Government Regulation is the laws and regulations stipulated by the President to carry out laws properly<sup>18</sup>. The definition of Presidential Regulation is the laws and regulations stipulated by the President to carry out the orders of the higher legislation or in exercising governmental power<sup>19</sup>. The definition of Provincial Regulation is the legislation which is formed by the Provincial Regional People's Representative Council with the joint approval of the Governor<sup>20</sup>. Definition of Regency / Municipal Regulation is legislative regulations established by the Regency / Municipal People's Representative Council with the joint approval of the Regent / Mayor<sup>21</sup>.

Based on Article 7 paragraph (1) and Article 8 paragraph (1) of the PPUU Law, other types of laws and regulations are also regulated. Based on Article 8 paragraph (1) of the PPUU Law, types of statutory regulations other than those referred to in Article 7

paragraph (1) includes regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Audit Board. Finance, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions at the same level as established by law or the government at the behest of the law, Provincial Regional People's Representative Council, Governor, Regency / Municipal People's Representative Council, Regent / Mayor, Village Head or equivalent. Based on the elucidation of Article 8 paragraph (1) of the PPUU Law, "Ministerial Regulation" is a regulation stipulated by the minister based on content in the context of implementing certain affairs in government.

Based on Article 8 paragraph (2) of the PPUU Law, "Legislation, as referred to in paragraph (1), is recognized for its existence and has binding legal force as long as it is ordered by a higher level of legislation or is established based on authority." Based on the elucidation of Article 8 paragraph (2) of the PPUU Law, what is meant by "based on authority" is the implementation of certain government affairs following the provisions of the Legislation.

In the author's opinion, changing a law takes an exceptionally long time, the government and the People's Representative Council must agree, have a dialogue

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16 Article 1 point 3 of the PPUU Law  
17 Article 1 point 4 of the PPUU Law  
18 Article 1 point 5 of the PPUU Law  
19 Article 1 point 6 of the PPUU Law  
20 Article 1 point 7 of the PPUU Law  
21 Article 1 point 8 of the PPUU Law

with the community, compile a good and correct academic paper. If it is necessary to formulate a guideline for interpretation of the ITE Law. The guideline for interpreting the ITE Law is one step towards revising the ITE Law. Based on the above regulation, the interpretation guidelines of the ITE Law are not a legal product as stipulated in Article 7 paragraph (1) jo. Article 8 paragraph (1) of the PPUU Law. What are the interpretation guidelines for implementing the General Principles of Good Governance (AUPB)? Based on Article 1 number 17 Law No. 30/2014 on Government Administration (GA Law) is a principle used as a reference for the use of authority for government officials in issuing decisions and/or actions in government administration.

Based on Article 10 paragraph (1) of the AP Law, the AUPB consists of:

- a) Legal certainty. The principle of legal certainty “is the principle in a rule of law that prioritizes the basis for the provisions of statutory regulations, appropriateness, fairness, and justice in every governmental administration policy<sup>22</sup>;
- b) Benefits. The term “principle of benefit” means benefits that must be considered in a balanced manner between (1) the interests of one individual and the interest of another, (2) the interests of individuals and society, (3) the interests of citizens and foreign communities, (4)

- the interests of one community group and the interests of another community group, (5) government interests and community members, (6) the interests of the current generation and the interests of future generations, (7) human interests and the ecosystem, (8) the interests of men and women<sup>23</sup>;
- c) impartiality. “The principle of impartiality” is the principle that obliges government agencies and/or officials in making decisions and/or making decisions and/or actions considering the interests of the parties as a whole and is not discriminatory<sup>24</sup>;
- d) Carefulness. The term “principle of accuracy” means the principle that a decision and/or action must be based on complete information and documents to support the legality of the stipulation and/or implementation of a decision and/or action so that the Decision and/or Action concerned is prepared with be careful before the decision and/or action is stipulated and/or carried out<sup>25</sup>;
- e) Not abusing authority. “The principle of not abusing authority” is the principle that obligates every agency and/or government official not to use their authority for personal interests or other interests and is not by the purpose of granting such authority, does not exceed, does not abuse, and/or does not mix up the authority<sup>26</sup>;

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22 Elucidation of Article 10 paragraph (1) letter a of the GA Law

23 Elucidation of Article 10 paragraph (1) letter b of the GA Law

24 Elucidation of Article 10 paragraph (1) letter c of the GA Law

25 Elucidation of Article 10 paragraph (1) letter d of the GA Law

26 Elucidation of Article 10 paragraph (1) letter e of the GA Law

- f) Openness. The term “principle of openness” is the principle that provides public the access to gain and obtain information that is correct, reliable, and non-discriminatory in the administration of government and still concern of the protection of personal rights, class and state secrets<sup>27</sup>;
- g) Public interest. “The principle of public interest” is the principle that prioritizes public welfare and benefit in a way that is aspirational, accommodating, selective, and non-discriminatory<sup>28</sup>;
- h) Good service. The term “good service principle” is the principle that provides services that are on time, transparent procedures and costs, following service standards and the provisions of laws and regulations<sup>29</sup>

According to the author’s analysis, if the government, in this case, the executive agency, wants to make interpretation guidelines of the ITE Law, the interpretation guidelines should be regulated in the form of written regulations which are regulatory in each law enforcement agency. The Supreme Court as the executor of judicial power, not only issues a Supreme Court Circular (SEMA) but should be able to be firm and courageous in making, stipulating, and enacting Supreme Court Regulations which serve as guidelines for judges in examining cases at every level of the judiciary relating to the ITE Law especially for articles that are considered to have multiple interpretations.

One of the reasons for questioning the

preparation of the interpretation guidelines for the ITE Law is because the preparation of the guidelines for the interpretation of the ITE Law will not have an impact on the space for civil liberties, instead threatens the culture of democracy. During the Covid-19 pandemic, apart from making a study on whether the ITE Law should be revised or not, the government and public should focus on working together to prevent the spread of Covid-19.

The Chief of the National Police of the Republic of Indonesia, who was taking office in 2021 (in bahasa Indonesia: Kepala Kepolisian Republik Indonesia, hereinafter referred to Kapolri), has issued a Circular (SE) No: SE / 2 / II / 2021 on Ethics of Cultural Awareness to Create a Clean, Healthy, and Productive Indonesian Digital Space (hereinafter referred to as SE Kapolri 2 / 2021), SE Kapolri 2/2021 consists of 5 (five) points: point 1 concerning references, references to statutory regulations, point 2 basically on the development of the national situation related to the application of the ITE Law which is considered to be contradicting the right to freedom of expression of society via digital space, point 3 on the police, which always puts forward education and persuasive steps so that it can avoid allegations of criminalization of the reported person and can guarantee Indonesia’s digital space to remain clean, healthy, ethical, and productive with the guidelines in the SE Kapolri 2/201, the fourth and fifth sections are the conclusion of the SE Kapolri 2/2021.

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27 Elucidation of Article 10 paragraph (1) letter f of the GA Law  
28 Elucidation of Article 10 paragraph (1) letter g of the GA Law  
29 Elucidation of Article 10 paragraph (1) letter h of the GA Law

The author will add the number 3 SE Kapolri 2/2021. Based on Number 3 SE Kapolri 2/2021, to enforce a righteous law, the National Police always prioritizes education and persuasive steps so that it can avoid allegations of criminalization of people who are reported and can guarantee Indonesia's digital space to remain clean, healthy, ethical, and productive by observing the following matters:

- a) keep abreast of the development of the use of digital space which continues to grow with all its problems.
- b) understand the ethical culture that occurs in the digital space by taking an inventory of the various problems and impacts that occur in society.
- c) prioritizing pre-emptive and preventive efforts through virtual police and virtual alerts that aim to monitor, educate, provide warnings, and prevent the public from potential cybercrime.
- d) in receiving reports from the public, investigators must be able to clearly distinguish between criticism, input, hoaxes, and defamation that can be sentenced to further determine the steps to be taken.
- e) upon receiving the report, the investigator communicates with the parties, especially the victim (not represented), and facilitates and provides the widest possible space for the disputing parties to carry out mediation.
- f) conduct studies and case titles comprehensively on cases handled by involving Criminal Investigation Agency (Bareskrim)/Cyber Crime Division

(Dittipidsiber) (via zoom meetings) and collectively collegial decisions based on existing facts and data.

- g) Investigators have the principle that criminal law is the last resort in law enforcement (*ultimum remidium*) and prioritizes restorative justice in case resolution.
- h) against parties and/or victims who will take peaceful steps so that they become part of the priority of investigators for restorative justice, except for cases that have the potential to divide, racial and separatist.
- i) the victim who still wants his case to be brought to court but the suspect is aware and apologizes, the suspect is not detained and before the file is submitted to the prosecutor to be given room for mediation again.
- j) for investigators to coordinate with the prosecutor in its implementation, including providing advice on the implementation of mediation at the prosecution level.
- k) to carry out tiered supervision of every step of the investigation that is taken and to provide rewards and punishments for the evaluation of the leadership on an ongoing basis.

According to the author's opinion, during the Covid-19 pandemic, in addition to the guidelines for interpreting the ITE Law which is likely to be issued by the Ministry of Communication and Information of the Republic of Indonesia, every law enforcement apparatus should issue legal products that bind law enforcement

officials in their institutions in examining articles that are considered to have multiple interpretations as mentioned above, fFor example, the Supreme Court issued a Supreme Court Regulation on Guidelines for Adjudicating Cases with the Potential of Multiple Interpretations in Court. The Attorney General issues an Attorney General Circular as a guide for prosecutors to make indictments, pre-charges, and even charges.

### 3. Who is Authorized to Perform Legal Interpretation?

Interpretation according to KBBI (Indonesian Big Dictionary) are giving impressions, opinions, or theoretical views on something, an interesting question to be jointly criticized is who has the authority to make legal interpretations? Is it only the judges examining the case *a quo*? Are the police and/or public prosecutors who are examining the *a quo* case also be given the authority to interpret the law? Or is the Ministry of Communication and Informatics authorized to interpret the ITE Law?

Judges should decide the case being examined, if the statutory regulation does not exist, then according to legal science, the judge can carry out legal construction and legal interpretation. However, in criminal law, judges are obliged to prioritize legal certainty

based on written law<sup>30</sup>.

Law moves between two different worlds, either the world of values or the world of everyday life (social reality). As a result, there is often tension when the law is implemented. Upon the law which is full of values is to be realized, the law must deal with various factors that influence the social environment<sup>31</sup>.

According to Francis Lieber, as quoted by Urbanus U. Werui, et al, the principles of legal interpretation can be grouped into 6 (six), namely: 1. Interpretation is not an end but a means, thus the higher conditions are made possible, 2. Nothing can provide substantial protection for individual freedom other than the habit of carrying out careful construction and interpretation, 3. The main guide to construction is ideology, or more precisely, reasoning through parallelism, 4. The purpose and objective of an instrument, law, and so on, are essential if it is known separately, to interpret it, 5. Likewise, it can happen to legal cases, 6. In ordinary cases, the constitution must be interpreted carefully<sup>32</sup>.

According to the author's opinion, the formulation of the offense interpreted by the police, prosecutors, judges must be interpreted holistically and neutrally. Neutral

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30 H. Enju Juanda, "Konstruksi Hukum dan Metode Interpretasi Hukum", Jurnal Ilmiah Galuh Justisi Vol. 4, No. 2 (2016). <https://jurnal.unigal.ac.id/index.php/galuhjustisi/article/view/322> (accessed 10 Feb 2021) p.161-162.

31 Ahmad Ulil Aedi, Sakti Lazuardi, dan Ditta C. Putri, "Arsitektur Penerapan Omnibus Law Melalui Transplantasi Hukum Nasional Pembentukan Undang-undang", Jurnal Ilmiah Kebijakan Hukum Vol. 14, No. 1 (2020). <https://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/926/pdf> (accessed 10 Feb 2021) p. 13.

32 Urbanus Ura Weruin, Dwi Andayani B, St. Atalim, "Hermeneuitika Hukum: Prinsip dan Kaidah Intepretasi Hukum", Jurnal Konstitusi Vol. 13, No. 1 (2016). <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/1315/0> (accessed 10 Februari 2021). P.102-104.

means that the interpretation of the text is to construct the meaning of a legal text, and holistic means the whole meaning, not word for word which is then connected with the a quo case. According to Moelyanto, as quoted by Prianter Jaya Hairi, one of the principles in criminal law, namely the principle of legality that a. There is no prohibited act and is threatened with punishment if it has not been stated in a statutory regulation, b. criminal act cannot be used as an analogy, c. The rules of criminal law are not retroactive<sup>33</sup>.

The second amendment to the ITE Law was in 2016, and there was a change in discourse when this paper was compiled during the pandemic (February-May 2021), this indicates that positive law is static, and society tends to be dynamic. Will the judge be silent and refuse to decide because there is no legal basis? Based on Article 10 paragraph (1) of Law no. 48 of 2009 on Judicial Power (Law on Judicial Power), "Courts are prohibited from refusing to examine, try and decide a case filed on the pretext that the law does not exist or is unclear, but is obliged to examine and judge it, and judges are obliged to explore the sense of justice in society as regulated in Article 5 paragraph (1) of the Law on Judicial Powers that "Judges and Constitutional Justices are obliged to explore, follow and understand the legal values and the sense

of justice that live in society."

According to Pontang, it is the abstract and general nature of the Law that causes difficulties in its in-concreteness application of judges in court. The judge cannot decide a case, if the judge only functioned as a trumpet of the law, therefore the judge still must do it<sup>34</sup>.

According to Sudikno Mertokusumo, legal discovery is usually defined as the process of forming a law by judges or legal officers who are assigned the task of implementing the law or applying legal regulations to a concrete event<sup>35</sup>. According to Ahmad Rifai, laws and regulations that are unclear, incomplete, static, and cannot keep up with the times have created empty spaces that must be filled. Judges, in addition to carrying out the function of judicial power, also have a role to fill this void. The way that this is done by the judge is by interpreting the article which is deemed unclear or incomplete. Even in the historical flow, judges are seen as lawmakers (judge-made law) even though judges base their views on customary law. That is why, legal discovery by judges does not merely concern the application of laws and regulations to concrete events, but also creates laws and forms laws at the same time<sup>36</sup>.

According to Bambang Sutiyoso, judges, in carrying out legal discovery activities, are

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33 Prianter Jaya Hairi "Kontradiksi Pengaturan Hukum yang Hidup di Masyarakat Sebagai Bagian dari Asas Legalitas Hukum Pidana Indonesia", *Negara Hukum* Vol. 7, No.1. (2016) (accessed 9 Jun 2021), p. 92.

34 Pontang Moerad B.M, *Pembentukan Hukum Melalui Putusan Pengadilan dalam Perkara Pidana*, (Bandung: Publisher, 2005), p. 119-120.

35 Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, (Yogyakarta: Cahaya Atma Pustaka, 2014), p. 49.

36 Ahmad Rifai, *Penemuan Hukum oleh Hakim dalam Perspektif Hukum Progresif*, (Jakarta: Sinar Grafika, 2010), p 58.

faced with concrete events or conflicts to be resolved, then their nature is conflictual. The results of legal findings are legal because they have binding power as law as outlined in the form of decisions. The association as the formulator of decisions is also a source of law<sup>37</sup>.

Legal interpretation occurs when there are statutory provisions that can be directly determined in the concrete event at hand, the method is carried out if the regulations already exist, but it is not clear that they can be applied to concrete events because there are vague/multiple interpretations norms, conflicts between law norms (*antinomy normen*), and the uncertainty of a statutory regulation<sup>38</sup>. Meanwhile, legal construction means that it occurs when no statutory provisions are found that can be directly applied to the legal problem at hand, or in the absence of regulations, so there is a legal vacuum (*Recht vacuum*) or (*wet vacuum*). To fill this gap in the law, the judge uses his logical reasoning to further develop a legal text<sup>39</sup>.

In the author's opinion, it is not just the judge who has the authority to interpret the law, the police, investigators also have authority to determine whether an investigation can be upgraded to an investigation or not. The investigator has the authority to continue the investigation until the file is declared ready for trial or not. Investigators have the authority to issue SP-3 (Letter of Termination of Investigation,

in bahasa Indonesia: *Surat Penghentian Penyidikan*). The investigators' authority is regulated in Article 109 paragraphs (1), (2), (3) of the Criminal Code Procedure. Based on Article 109 paragraph (2) of the Criminal Code Procedure, "If the investigator stops the investigation because there is not enough evidence or the incident does not constitute a crime or the investigation is terminated by law, the investigator shall notify the public prosecutor and the suspect or his family."

#### D. Conclusion

Based on the above discussion, the conclusions obtained are, firstly, that the urgency of revising articles that are considered to have multiple interpretations in the ITE Law during the Covid-19 pandemic is to support freedom of expression and of opinion in digital space. Therefore, as not to violate the laws, freedom of opinion on social media must be implemented, to respect the human rights of others as well. Social media is used for positive things, criticism conveyed on social media should be delivered politely, according to facts, and valid and accountable data.

The second conclusion is that what is the right legal product to deal with articles that are considered to have multiple interpretations is the amendment of the ITE Law, either additions, amendments to articles or paragraphs. The interpretation guide for the ITE Law is not a legal product as regulated in the PPUU Law, it is feared that the interpretation of the ITE Law will not

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37 Bambang Sutyoso, *Metode Penemuan Hukum*, (Yogyakarta: UII Press, 2006), , p. 41.

38 *Ibid*, p. 60.

39 Jazim Hamidi, *Hermeneutika Hukum, Sejarah, Filasafat dan Metode Tafsir*, (Malang: UB Press, 2011), p. 40-41.

bind the law enforcers to examine, conduct investigations, prosecutions, and court proceedings.

Thus, the suggestions given by the author are:

- 1) Amending Article 28 paragraph (1) jo. Article 45A paragraph (1) of the ITE Law on the prohibition of disseminating false and misleading information resulting in consumer loss by adding 1 (one) new paragraph, so that it becomes Article 28 paragraph (1a) which reads thus "Any person who knowingly and without authority disseminates false information aimed at inflicting commotion and destruction in the community".
- 2) The public is obliged to be polite, to convey criticism in a way that is not subjected to subjective affront, for example using or equating people with animals, or using adjectives that have negative and destructive connotations.

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