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NATIONAL LAW DEVELOPMENT AGENCY
MINISTRY OF LAW AND HUMAN RIGHTS OF RI

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EDITORIAL BOARD

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FROM EDITOR'S DESK

We thank God Almighty for the publication of the Indonesian Law Journal (ILJ) Volume 14, No. 1 of 2021. The ILJ is a peer-reviewed journal published in English and intended to disseminate scientific articles and analyze legal issues from academics, researchers, observers, practitioners, and patrons in Indonesia. As one of the scientific journals in law published by the National Law Development Agency – Ministry of Law and Human Rights of Republic Indonesia, the ILJ is here to provide a forum for legal ideas to respond to legal problems in recent times. The ILJ is in line with the function of the National Law Development Agency, which is to develop and foster national law in Indonesia.

In this 4.0 era, society forms an interactive and dynamic pattern of communication and information. Ease of access to information allows the public to express its opinion or information to the public. People frequently use public media in constructing and representing opinions and information, such as print media or social media. It becomes the culture of public participation. It has a positive impact on other communities to be able to access information faster.

Therefore, the ILJ Volume 14 No. 1 of 2021 has the theme "Legal Perspective on Freedom of Speech in Social Networks Era." Freedom of speech refers to a right to speak freely without any censorship or restriction, but this does not include things to spread hatred. In Indonesia, freedom of speech is guaranteed by the 1945 Constitution, Article 28, for citizens to express their opinions freely, both orally and in writing.

ILJ Volume 14 No. 1 of 2021 includes 5 (five) articles from various writers discussing this matter. Start with the article of Rizky Pratama Putra Karo Karo, which raised the title related to "The Reason to Amendment of Article 27 Paragraph (1), Article 28 Paragraph (1) and (2) of the ITE Law that are Considered to have Multiple Interpretation of the ITE Law in The Time of The Covid-19 Pandemic for Legal Certainty". The author tries to explain the urgency of changing articles considered multi-interpreted in the ITE Law during the Covid-19 pandemic.

The following article written by Titis Anindyajati is "Limitation of the Right to Freedom of Speech on the Indonesian Constitutional Court Consideration." This article analyzes the decision of the Constitutional Court on the polarity of the right to freedom of expression. In the article, the author points out the importance of restricting freedom of expression to protect the people's constitutional rights.

The third article written by Vidya Prahassacitta is "Offences Principles and A Limitation for Disinformation via The Internet in Indonesia." The author criticizes the restriction on the spread of disinformation through the internet based on offenses principles. Those principles are exercised by analyzing the relevance and the criminalization definitions in the Article 14 and 15 of Law Number 1 of 1946.

The fourth article, related to “Possibility to Correct the Freedom of Speech in Indonesian Law: Comparison Between Singapore Law and Indonesian Law Broadcasting,” was written by Christian Nugraha and Dian Narwastuty. In this paper, the author compares freedom of speech and broadcasting in Indonesia and Singapore, mainly related to the laws in broadcasting.

Discussing freedom of expression as a human right cannot be separated from cases of discrimination against human rights. In this regard, there is an article related to "The International Criminal Court as a Veritable Tool for the Protection of the Rights of Ethnic Minorities: Examing The ICC's Decisions Regarding The People of Rohingya" written by Ikechukwu P. Ugwu.

Furthermore, an article related to “The International Criminal Court as a Veritable Tool for the Protection of the Rights of Ethnic Minorities: Examing the ICC’s Decisions Regarding The People of Rohingya” written by Ikechukwu P. Ugwu. In his writing, the author examines the applicable laws and the history of discrimination against the Rohingya ethnic minority in Myanmar and examines the ICC’s jurisdictional decisions against the Rohingya people.

We would like to express our gratitude and most profound appreciation to all contributors, Editorial team members, Reviewers, and Mitra Bestari for their progressive contribution and excellence to the ILJ this edition. We hope that this fine collection of articles will be a valuable resource for legal practitioners, readers, and researchers and will stimulate further research into the vibrant area of law and social sciences and contribute to the development of national law in the future.

Editor

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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

Rizky Pratama Putra Karo Karo
Faculty of Law, Universitas Pelita Harapan
MH Thamrin Boulevard 1100, Klp. Dua, Kec. Klp. Dua, Tangerang, Banten 15811
e-mail: rizky.karokaro@uph.edu

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[1]

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[2]. 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[3]. 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

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[4].

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[5] 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[6]. 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,

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 Budianto, 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[7]. In daily conversation, there are 3M's in bahasa Indonesia (*mengunduh*, *menggunggah*, *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

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*"[8]).

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[9].

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[10]. 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[11].

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).

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.[12]

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

12 R. Soesilo, *Kitab Undang-undang Hukum Pidana serta Komentar-komentar Lengkap Pasal Demi Pasal*, (Jakarta: Penerbuit 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[13]. 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).

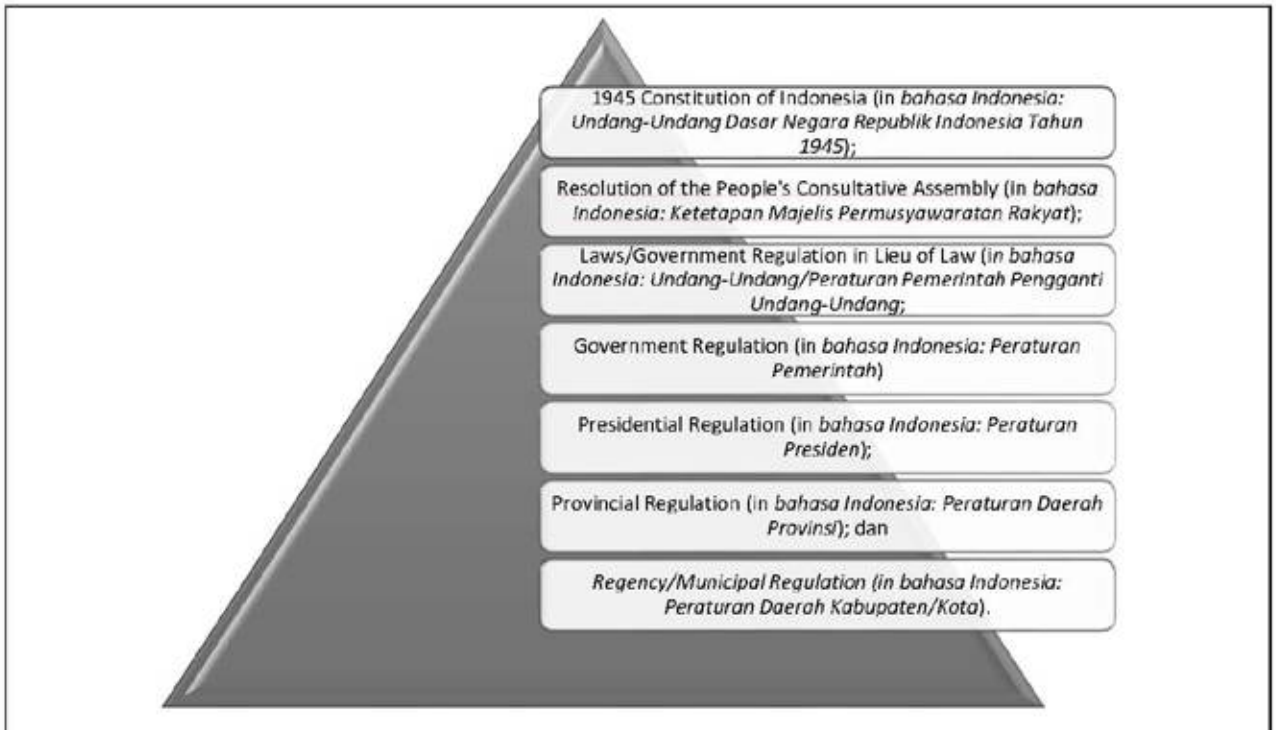
In 2017, Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law conducted a judicial review to the Constitutional Court (MK) and based on the Constitutional Court Decision No. 76 / PUU-XV / 2017 the application was declared rejected. One of the considerations of the Constitutional Court 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[14].

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[15].

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:



Pict. 1. Indonesias Hiearchy Legislation. Processed by the Author

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[16]. The definition of government regulations in lieu of laws is the laws and regulations that are established by the president in compelling emergencies[17]. The definition of Government Regulation is the laws and regulations stipulated by the President to carry out laws properly[18]. 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[19]. 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[20]. 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[21].

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

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[22];
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[23];
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[24];
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[25];
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[26];

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[27];
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[28];
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[29]

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.

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[30].

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[31].

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[32].

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

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 (accesed 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[33].

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[34].

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[35].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[36].

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

33 Prianter Jaya Hairi "Kontra d iksi 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, *Pembentu k an Hukum Melalui Putusan Pengadilan dalam Perkara Pidana*, (Bandung: Publisher, 2005), p. 119-120.

35 Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, (Yogyakarata: 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[37].

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[38]. 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[39].

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

37 Bambang Sutiyoso, *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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Curriculum Vitae of Author

Rizky P.P. Karo Karo completed his S-1 and S-2 (Magister of Law) at the Faculty of Law, Gadjah Mada University. Rizky is a Permanent Lecturer at the Faculty of Law, Universitas Pelita Harapan (FH UPH), and serves as Secretary/Advocate at the Legal Aid and Consultation Institute (LKBH) FH UPH. Some of the latest scientific papers that have been published are 1. The book "Regulation of Personal Data Protection in Indonesia Perspective of Dignified Justice Theory" was written with Prof. Dr. Teguh Prasetyo, S.H., M.Si (in 2020), 2. The book "Cyber Crime Law Enforcement Through Criminal Law (in 2019), and writes actively in SINTA accredited journals, and National Newspapers (Kompas, Tempo).

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LIMITATION OF THE RIGHT TO FREEDOM OF SPEECH ON THE INDONESIAN CONSTITUTIONAL COURT CONSIDERATION

Titis Anindyajati
The Indonesian Constitutional Court
Jl.Medan Merdeka Barat No.6 Jakarta Pusat,10110
e-mail: titis.anindya79@gmail.com

ABSTRACT

Nowadays, everyone tends to use the right to freedom of speech without limitation, such as emergences of hate speech expression on various social media platforms. However, such expression is regulated by Article 28, paragraph (2) of the ITE Law and deemed to be contrary to public order. On the other hand, this law was considered by some people as a criminalization towards the right to freedom of speech. This paradox becomes a big issue that never ceases to be discussed. That is why Constitutional Court had conducted judicial review on some norms related to freedom of speech. This study aims to analyze the Constitutional Court decision towards the polarity of the right to freedom of speech and the public order. This study uses normative research with the statutory, analytical and comparative approach. Therefore, the results show the importance of limitation in implementing the freedom of speech to protect the constitutional right of society as stated in the 1945 Constitution. Despite the already decided judicial review by the Court, there is still an urgency to revise The ITE law in order to clarify certain rules related to hate speech in social media.

Keywords: Constitutional Court, freedom of speech limitation, public order, Constitutional Rights

A. Introduction

Freedom of expression is an integral part of a democratic law country. In a democratic country, human rights' protection, particularly the freedom of speech, should have been guaranteed and regulated. The right to freedom of speech as part of the freedom of expression is one of the main elements of acknowledging the people's sovereignty in a democratic country. As a constitutional democratic country, Indonesia upholds the protection of human rights that is proven by regulating the right to freedom of speech in Article 28E paragraph (3) of the 1945 Constitution and ratification of the Universal Declaration of Human Rights (UDHR). Moreover, the regulation of freedom of opinion had specifically existed in a separate law, namely Law Number 9 of 1998 on Freedom of Speech. Although this law does not control the expression of opinions through the mass media, both printed and electronic, this law guarantees the rights of every citizen to express their thoughts orally and in writing freely and responsibly subject to the provisions of the prevailing rules and regulations.

Along with the development of information technology and the emergence of social network freedom and accessibility, people had more freedom and access to easily express their freedom of speech and opinions. In this paper, the freedom to express views is focused on the freedom to express opinions in social media. The revolution in communication through social media, especially the massive online social media platform, has created a new technology phenomenon. Nowadays, people tend to use social media as the main instrument in communicating and expressing their opinions. The Ministry of Communication and Informatics of Indonesia revealed that internet users in Indonesia currently reach 63 million people. Out of these, 95 percent use the internet to access social networking. According to the Director of International Information Services at the Directorate General of Information and Public Communication of the Ministry of Communication and Information Technology, Selamatta Sembiring, Indonesia is ranked 4th for Facebook users and in the 5th largest Twitter user in the world.[1] Another fact that is also very interesting is that the types of social media that are most often used in Indonesia, namely, YouTube, WhatsApp, and Facebook are in the top three rankings.

Table 1. The rank of The Most Often Used social media[2]

No	Media social	Amount (%)
1	Youtube	88
2	WhatsApp	84
3	Facebook	82
4	Instagram	79
5	Twitter	56

source: katadata.co.id (2020)

However, even though YouTube is in the first place for the most used, according to the data in a report released by SafeNet (Southeast Asia Freedom of Expression Network), the social media most often used by perpetrators in committing internet-related crimes, namely Instagram (534 cases), WhatsApp (431 cases) and Facebook (304 cases).[3] Matters related to crimes against freedom of speech are pretty attention-grabbing because the perpetrators in Instagram are public figures, for example, the case experienced by I Gede Ari Astina or often called Jerinx. The drummer for Superman Is Dead was sentenced to one year and two months imprisonment and a fine of 10 million Rupiah in the case of " IDI (Indonesian Doctor Association) lackeys of WHO ". The Panel of Judges at the Denpasar District Court (PN) found Jerinx guilty of spreading information to show hatred towards specific individuals or groups based on ethnic groups, religions, races,

1 Kementerian Komunikasi dan Informatika Republik Indonesia, "Kominfo:Pengguna Internet di Indonesia 63 Juta Orang," Kementerian Komunikasi dan Informatika (kominfo.go.id), (accessed 30 March 2021).

2 Katadata, "10 Media Sosial yang Paling Sering Digunakan di Indonesia," https://databoks.katadata.co.id/datapublish/2020/02/26/10-media-sosial-yang-paling-sering-digunakan-di-indonesia, (accessed 20 March 2021).

3 Safenet, "Laporan Situasi Hak-hak Digital Indonesia 2019," https://s.id/lapsafenet2019, (accessed 20 March 2021), p.25.

and intergroups.

Jerinx's case is not the first. There are several perpetrators of criminal acts against freedom of speech, as quoted from the SafeNet complaint and monitoring data on media coverage from January to October 2020. There were at least 59 cases of convictions against netizens. Out of these, 14 people (31 percent) were charged under Article 28, para. 2 of the Information And Electronic Transaction Law (ITE Law)[4]. Article 28 para. (2) states, "Any Person who knowingly and without authority disseminates information aimed at inflicting hatred or dissention on individuals and/or certain groups of community based on ethnic groups, religions, races, and intergroup (SARA)." This article can cause difficulties in its implementation because it contains vague Norment rules in the concept of "intergroup". The article does not provide an unambiguous explanation regarding the meaning and criteria of the concept of "intergroup" so that the article can lead to different interpretations, which can be interpreted broadly or narrowly.[5]

The number of criminal cases using Article 28, para. (2) of the ITE Law is a paradox for the ITE Law's Spirit. The ITE Law was issued in 2008 during the administration of President Susilo Bambang Yudhoyono (SBY) as a response and a form of state responsibility in national development through the use of information technology. This law is a government attempt to provide explicit and legally binding protections against various kinds of negative electronic transactions. Therefore, forms of legal violations in electronic trading transactions and legal actions in cyberspace are now a worrisome phenomenon with the emergence of carding, hacking, cracking, phising, pornography, and dissemination of destructive information of how to treat internet crimes.[6] However, at that time, the draft of the ITE Law received a lot of criticism from the public. One of the reasons is that what should be regulated to affect the technology on the lives of citizens and not the technology that is dynamically developing.[7] Therefore, several problems to the catchall articles in the implementation had a severe impact that had never been predicted before, either by the legislators, the law enforcers, and the society itself.

The development and advancement of information technology are very rapid and provide a direct and significant response. There are changes in human activities covering almost all aspects, such as economic, legal, social, and cultural. However, as stated in the general explanation of the ITE Law, legal issues that often arise

4 Safenet Voice Rilis Pers, "Hentikan Pelintiran Pasal Ujaran Kebencian dan Frasa "Antargolongan" Untuk Membungkam Ekspresi," https://id.safenet.or.id/2020/11/rilis-pers-hentikan-pelintiran-pasal-ujaran-kebencian-dan-frasa-antargolongan-untuk-membungkam-ekspresi/(accessed 20 March 2021).

5 Tiara Kumalasari. "Konsep "Antargolongan" dalam Pasal 28 Ayat (2) Undang-Undang Nomor 19 Tahun 2016 Tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi Dan Transaksi Elektronik (UU ITE)". Media Iuris Vol. 3 No. 2 (2020),p.204-205.

6 Raida L Tobing et al., *Efektivitas Undang-Undang Nomor 11 Tahun 2008 tentang Infromasi dan Transaksi Elektronik* (Jakarta:Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM,2012),p.6.

7 Tobias Basuki,et.al., "Unintended Consequences: Dampak Sosial dan Politik UU Informasi dan Transaksi Elektronik (ITE) 2008". (Jakarta: CSIS Working Paper Series WPSPOL, 03/2018), p.8.

are related to the delivery of information, communication, and electronic transaction, especially in terms of evidence and matters on legal acts carried out through electronic systems. It has not been adequately realized by the public regarding the impact on easy access to technological advances, particularly in terms of social media use. The public cannot distinguish the boundary between private and public aspects in the right to freedom of expression. Sometimes, their opinions may violate the law without realizing it. The activity of disseminating information to create hatred or hostility to specific individuals and/or groups of people based on ethnic groups, religions, races, and intergroup (SARA) through social media is a violation of the law related to the delivery of information and /or communication via electronic systems.

The provisions of Article 28 para. (2) the ITE Law was petitioned for review to the Constitutional Court in 2017 by an individual applicant who is an advocate in Case Number 76/PUU-XV/2017. The Petitioner explained that the provisions of Article 28 para. (2) and para. 45A (2) of the ITE Law can be used to criminalize the petitioner in issuing an opinion due to the unclear definition of the word "intergroup". They believe that because of the indefinite boundaries of the term "intergroup", activists who have issued opinions in the form of criticism to the government through social media have reportedly violated Article 28 para. (2) and para. 45A (2) of the ITE Law several times. Even though the activist did not make statements that provoked hatred based on ethnic groups, religions, or races, he was accused of causing group-based hatred. Eventually, it will create difficulties for the public to express their opinion because they are at risk of getting into legal trouble.

In its decision, the Court providing an explanation and meaning of the concept of "intergroup", which the applicant considers unclear and multiple interpretations, causing injustice in its application, primarily related to Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law. The Court explained that when a statutory regulation is applied arbitrarily, such a thing is terrible and dangerous. However, it is not a problem of the constitutionality of norms but a problem of law enforcement, for which there are legal remedies to deal with it. The Constitutional Court believes that freedom of opinion, including the spread of information orally or through specific media, needs to be limited by the obligation to respect the human rights of others as stipulated in Article 28J paragraph (1) of the 1945 Constitution. Respect for the human rights of others is essential to be implemented in addition to the constitution stipulated. It also aims at public order in a constitutional democracy.

Most of the research related to freedom of opinion tends to agree with the existence of freedom as a whole and calls for a revision of the ITE Law because many catchall articles lead to the criminalization of the right to freedom of speech by Indonesian citizens. For example, the research of Vidya Prahassacitta and Batara Mulia Hasibuan (2019) entitled Disparity Freedom of Expression Protection in The Implementation of Defamation Article in Information and Transaction Electronic Law: An Analysis of

Court Decisions Year 2010-2016 Period. *They analyze the formulation of the problem of how inconsistent the application of the defamation article in Article 27 paragraph (3) juncto Article 45 of Information and Electronic Transactions Law, along with the aspect of freedom of expression protection through the district court decisions around the period 2010-2016.*[8] Marwandianto and Hilmi Ardani Nasution's (2020) research entitled The Rights to Freedom of Opinion and Expression in the Corridors of Article 310 and 311 of KUHP (the criminal law code). This research concludes that the proper formulation regarding the implementation of law related to freedom of opinion and expression, namely the performance, must be carried out sufficiently and proportionally.[9] The implementation other than punishment needs to be encouraged by law enforcers to prevent the disruption of freedom of opinion and expression in Indonesia. Next is the research conducted by Iman Amanda P and Junior Hendri Wijaya (2019) entitled Implementation of Electronics Information and Transaction in Completion of the Problem of Hate Speech on Social Media. This research examines the implementation of the ITE Law, which is under the objectives of the 1945 Constitution. However, it is always bound to the catchall article in solving the hate speech issue, namely articles 27, 28, and 29 of the ITE Law.[10] However, only a few studies are examining how the Constitutional Court responded to questions regarding the constitutionality of restricting the freedom of expression in the ITE Law related to aspects of public order.

As a constitutional democracy based on the constitution, the state guarantees its citizens' rights of speech. Even though freedom of expression is an expansive provision, it is still necessary to carry out restrictions in its implementation to protect other rights [vide Art.28J para.2]. However, the constitution limits the freedom of speech t to keep in line with the morality, religion, values, security, and public order principle as a Syracuse principle (1985) does.[11] Therefore, this study objects to analyze how the consideration decision Constitutional Court's on the polarity of the right to freedom of opinion and the public order principle as one of the state's goals as stated in the preamble to the 1945 Constitution.

B. Research Method

This study uses a normative legal research method because it uses the basis for considering a judge's decision that contains legal principles or legal doctrines used as a basis for consideration (*ratio decidendi*) to arrive at an (*obiter dicta*). It also uses a statute, comparative, and analysis approach.

8 Vidya Prahassacitta dan Batara Mulia Hasibuan. "Disparitas Perlindungan Kebebasan Berekspresi Dalam Penerapan Pasal Penghinaan Undang-Undang Informasi Dan Transaksi Elektronik: Kajian Atas Putusan Pengadilan Periode Tahun 2010-2016". Jurnal Yudisial, Vol 12 No 1 (2019), p.61-79.

9 Marwandianto dan Hilmi Ardani Nasution. "The Rights to Freedom of Opinion and Expression in The Corridors of Article 310 and 311 of KUHP". Jurnal HAM Volume 11, Nomor 1 April (2020), p. 1-25.

10 Iman Amanda P dan Junior Hendri Wijaya. "Implementasi Undang-Undang Informasi dan Transaksi Elektronik Dalam Penyelesaian Masalah Ujaran Kebencian Pada Media Sosial". Jurnal Penelitian Pers dan Komunikasi Pembangunan, Vol.23 No.1 (2019), p.27-42.

11 R.Herlambang Perdana Wiratraman. "In Search of Constitutionality: Freedom of Expression And Indonesia's Anti-Pornography Law". Jurnal Yuridika, Vol.7 No.2 (2012), p.111-118.

Statute approach analyses the law and the 1945 constitution and the regulations related to the freedom of speech and its limitations. A comparative approach is to compare the regulation of freedom of speech and its boundary with other countries. this research will use some countries that have similarities with Indonesia, that regulate the limitation of freedom of speech in their constitution. Meanwhile the analytical approach analyses the Court decisions related to the ITE Law and the constitutionality of freedom limitation, such as decision Number 76/PUU-XV/2017, Number 065/PUU-II/2004, etc.

The primary source of data in normative legal research is library data or also known as legal materials. The legal materials studied and analyzed consist of primary legal materials such as the 1945 Constitution and the international and national laws such as UDHR, ICCPR, ITE Law, human rights law, and other laws. Then, secondary legal materials such as books, journals, and working papers related to the freedom of speech and tertiary legal materials such as the sizeable Indonesian and English dictionary.[12]

C. Discussion

1. Freedom of Speech Limitation: Public Order and Constitutional Right

Freedom of speech comes from the word free (freedom), which is freedom or the state of freedom. Meanwhile, speech is to speak, to say, to have a conversation, to utter a language, to give birth to opinions, and to confer (by word, writing, etc.).[13] Thus freedom of speech is the freedom of opinion (by word, writing, etc.). Speaking of freedom of speech should have related to the hate speech. Unfortunately, hate speech is very ambiguous since there is no clear definition given by the law about freedom of speech, particularly for hate speech. The law only gives the criteria of limited freedom of speech without any specific explanation of what freedom of speech or hate speech is. Gavan Titley mentioned that there is no consensus on what constitutes hate speech and the differences that are manifested in legal and regulatory approaches in different countries.[14] According to Herlambang P. Wiratraman, hate speech in Indonesia's juridical basis originally from the Netherlands Indies' penal code known as "haatzaai artikelen", which means 'hate speech' or 'hatred sowing' (*ujaran kebencian in Indonesian*). There are three classifications of hate speech in Indonesia law. First, hatred against the government and country badge [Art 154 and Art 155 Penal Code], the second, hatred against a person or the public [Art 156 and Art 157 Penal Code], the third, hate speech in digital media [Art 28 para 2 ITE law].[15]

12 Salim et al., *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi* (Jakarta:PT RajaGrafindo Persada,2017), p.17-8.

13 Tim Penyusun Kamus Bahasa Indonesia, *Kamus Besar Bahasa Indonesia*, (Jakarta: Pusat Bahasa Departemen Pendidikan Nasional, 2008), p.153&p.196.

14 Gavan Titley, "Hate Speech Online: considerations for the proposed campaign", Council of Europe, 2014, https://rm.coe.int/1680665ba7 (accessed May 25, 2021), p.9

15 Herlambang P. Wiratraman and Sebastien Lafrance. "Protecting Freedom of Expression in Multicultural Societies: Comparing Constitutionalism in Indonesia and Canada". Jurnal Yuridika, Vol.36 No.1 (2021), p.75-120.

Therefore, the issue of hate speech in Indonesia should be analyzed, whether it is about implementing the norm or the right that should be protected. That is why many judicial reviews related Article 28 para (2) to Constitutional Court. As an authorized institution, the Constitutional Court legally has the authority to interpret the meaning of the provisions contained in the constitution. This interpretation is binding when the Court issues a decision of the Constitutional Court on the petition submitted to it.

Because Indonesia has ratified ICCPR and DUHAM, there must be an equivalence concept about hate speech in ITE law and ICCPR. These ITE law, DUHAM, and ICCPR principally protect all the subjectivity ideas and opinions that spread to other people by giving some limitation. The limitation of freedom of speech in Indonesia is stipulated in Article 28J para.2 of the Constitution that explicitly provides the limitation with parameters. Meanwhile, Article 19 para.3 and Article 20 ICCPR regulates the restriction of freedom of speech. Fundamentally, everyone has the right to freedom of expression, but it carries special duties and responsibilities. In conclusion, the limitation of freedom of speech based on the Indonesian constitution and ICCPR has the similarity, that is to protect the public order and to respect other people's rights.

However, in the United States, both Judge Oliver Wendell Holmes and Scholars Robert Post believe that America's first amendment can limit freedom of speech without violating the constitution. The meaning in the first amendment of America is not limited to syntax, semantics also has its values.[16] It means that in a democratic country such as America, the right to freedom of speech is possible to implement. Alexander Tsesis explained that, however, in a pluralist society, they must protect freedom of speech and protect the principle of respect for the dignity of others. Public policy does not condone hate speech which results in a violation of peace or public order. The Supreme Court has found that the government has a countervailing social interest in order and morality that justifies speech limitations.

The Supreme Court has found that the government has a countervailing social interest in order and morality that justifies some limitations on speech.[17] Moreover, sustaining public order becomes another social value of government to countervail the freedom of speech. A state can promulgate narrowly tailored criminal regulations against intimidation that threatens public safety to protect democracy. In combating the threat of hate speech, the states committed to adopting laws that prevent the dangerous dissemination of messages without interfering with legitimation.[18] There are several cases that the state uses the concept of public order to restrict expressions. For instance, the Pakistani Supreme Court

16 Alexander Tsesis, "Dignity and Speech: The Regulation of Hate Speech in a Democracy," *Wake Forest Law Review* (2009), https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1040&context=facpubs (accessed 10 April 2021), p.498.

17 Alexander Tsesis, "Dignity and Speech: The Regulation of Hate Speech in a Democracy," *Wake Forest Law Review* (2009), https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1040&context=facpubs (accessed 10 April 2021), p.498.

18 *Ibid*.p.501.

postulated that the public expressions of the Ahmadi community banning the public display of Kalimah and claiming that they are 'moslem' would provoke outrage among the Sunni majority based on public order [case of Zaheeruddin v. State (1993)]. The other example is the Chile government restricting the expression of the fortieth anniversary of the military coup d'etat by removing the banners to prevent potential disruption to public order arising out of the burning of the banners [case of Claudia Andrea Marchant Reyes et al. v. Chile (2017)][19].

In Indonesia, the Article 28E para.3 1945 Constitution regulates 3 (three) kinds of constitutional rights: freedom of association, freedom of assembly, and freedom of opinion. However, the freedom of speech as a human right also includes a constitutional right in the Constitution of Indonesia. A Constitutional right is a right related to the human rights guaranteed in the 1945 Constitution. According to Jimly Asshiddiqie, not all constitutional rights are human rights, but all human rights are the constitutional rights of citizens. Meanwhile, the difference between constitutional rights and legal rights is that legal rights arise based on guarantee of laws and statutory regulations under them. In contrast, constitutional rights are rights guaranteed in and by the 1945 Constitution.[20]

Article 28J para. 2 states that in exercising their rights and freedom, everyone should conform to any restrictions established by law solely to ensure the recognition and respect for the rights and freedom of others and fulfilling the morality, religious values, security, and public order in a democratic society. Thus, there should be an obligation to respect others' personal rights and freedom. The duty to respect others' rights is needed to balance the public interest and the individual or the community's rights. Therefore, both the United States constitution and the Indonesian Constitution included freedom of speech as a constitutional right. Yet, there should be a limitation in implementing the right itself to protect the public order.

Since Indonesia ratified the Human Rights Declaration and the ICCPR, several norms regulate the right to freedom of speech in Indonesian laws and regulations, including:

a. Article 23 paragraph (2) and Article 73 of Law Number 39 of 1999 on Human Rights.
b. Article 2 of Law Number 9 of 1998 on Freedom of Speech
c. Law Number 40 of 1999 on the Press
   For the Press to function optimally as mandated by Article 28 of the 1945 Constitution, it is necessary to establish a law on the press. In carrying out its functions, rights, obligations, and roles, the press respects everyone's human rights. Therefore it demands a professional and open press that is controlled by public.
d. Articles 4 and 16 of Law Number 40 of 2008 on the Elimination of Racial and

19 Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression," *Human Right Review* (2020), Justifying Limitations on the Freedom of Expression | SpringerLink (accessed 12 April 2021), p.100.

20 Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia* (Jakarta:PT Bhuana Ilmu Populer,2007), p.616-7.

Ethnic Discrimination also prohibit racial discrimination.

Whereas the law mentioned above contains the rights to freedom of expression, the norms are also followed by several restrictions on these rights. As long as an individual's rights also have a relationship with the obligations of others, these rights are relative and not absolute. Quoting Masyhur Effendi's opinion, human beings cannot be separated from the legal system that applies at a particular time. Therefore, humans must always be reminded of the nature of having a state, living in society as befits a subject of the law that is limited by the rules of the law in force. Therefore, the implementation of human rights is never absolute and is bound by formal rules, namely rules that respect the existence of human rights themselves.[21] However, the state has the responsibility to protect the citizen's constitutional rights as stated in Article 28I para. (4) the 1945 Constitution, the states simultaneously imposing restrictions on the fulfillment of rights and the obligations of its citizens. The states can intervene in the right to free speech in certain circumstances as stipulated in Article 4 of the ICCPR.

Moreover, the spirit in Article 19 UDHR is freedom of opinion for some countries is considered enormous. Later, ICCPR reconstructing with the addition of a paragraph in Article 19 of the ICCPR, namely the exercise of the rights. Provided in para. 2 of this article carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others, (b) for the protection of national security or public order, or of public health or morals. The right to freedom of expression is a Derogable Right, namely rights that can be reduced or limited by the state. States parties to the ICCPR are allowed to concentrate or deviate from their obligations to fulfill these rights. Still, such variations can only be made if they are proportional to the threat that disturbs national security or the emergency faced and do not discriminate against races and ethnic groups. Nevertheless, freedom of speech is a constitutional right guaranteed by the state; it can reduce as long as it is to achieve the state's goals, one of which is to protect the entire Indonesian nation and public order. In their research, the Institute for Criminal Justice Reform (ICJR) explained that restrictions on the right to raise an opinion and expression are permitted if it is the only way to achieve the objectives, and objectives of protection by the ICCPR. Nevertheless, the limitation of rights must be proportional or not excessive. Proportionality when drafting laws that impose its implementation in the administrative framework and a judicial application. The principle of proportionality is used to assess expressions, the process of dissemination, and outreach to the public.[22]

One of the laws' nature is that the law can be enforced because it contains an obligation that the law-abiding person must

21 Satya Arinanto et al., *Memahami Hukum: Dari Konstruksi sampai Implementasi* (Jakarta:Rajawali Press,2009), p.83.

22 Adhigama A. Budiman et al., *Mengatur Ulang Kebijakan Tindak Pidana di Ruang Siber:Studi Tentang Penerapan*

conduct. As the equivalent of obligations, law and the state guarantee the rights of citizens. Therefore, the state can interfere with the duties and rights of its citizens. Coercion, responsibility, and rights on citizens to uphold a system of order designed by law or also known as the concept of public order.[23]

Thus, in the context of efforts to prevent disorder in all walks of life due to non-freedom without rules, it is necessary to place restrictions on freedom, particularly freedom of speech in Indonesia. Freedom becomes valuable if it is accompanied by efforts to respect the rights and dignity of others to create public order and maintain the unity and integrity of the Indonesian nation. It is in line with constitutional values and the goals of the Indonesian state as stated in the 1945 Constitution and Pancasila.

2. The Freedom of Speech in Several Countries

According to Ronald Leenes et al., in the new millennium, many countries have issued policy documents to promote information society, e-commerce, e-government, and stimulating the new media. Noticeable in these initiatives is an emphasis on facilitating universal access (e.g., Sweden, France, U.S., Canada), guaranteeing and promoting access to public information (Sweden, Germany, France, U.S.), and self-regulation as a significant way of regulating the internet and new media (France and U.S.), indicating a limitation for state intervention. Therefore, most countries are protecting fundamental rights, but the role of protection partly depends on whether there is a constitutional review by the courts.[24]

The latitude of freedom of speech is broad. Thus, this study finds similarities between Indonesia and several countries that regulate restrictions on freedom of speech in their constitutions, among others, Sweden, France, and Germany. Furthermore, the hate speech issue became an intensely political problem across Europe.[25] In Germany, for instance, the freedom of speech is regulated in Art 5, paragraph 1 and 2 of the Basic Law of the Federal Republic of Germany of 1949. But these rights are limited by the provision of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor.

Another example is Sweden which has amended Article 2:1 of the Regeringsform 1974 to read “The Freedom to communicate information and to express ideas, opinions, and emotions, whether orally, in writing, in pictorial representations, or in any other way”. Sweden also introduced the fundamental law on freedom of expression in 1991 as part of its constitution.[26] There was a similarity between Sweden and Indonesia; Article 20 and Article 21 of the Sweden Constitution limit freedom of speech. Meanwhile, the French protection of freedom of speech is based on lower legislation and active courts.

UU ITE di Indonesia (Jakarta:Institute for Criminal Justice Reform (ICJR),2021), p. 25.

23 Munir Fuady, *Teori-Teori Besar (Grand Theory) Dalam Hukum* (Jakarta:Kencana Prenada Media Group, 2013),p.105.

24 Susan W. Brenner et al. Constitutional Rights and New Technologies: A Comparative Study (The Netherlands: T.MC.Asser Press, 2008),p.6-7.

25 Gavan Titley, *Ibid*.,p.7.

26 Susan W. Brenner, *Ibid*.,p.8.

The Council d'Etat (high advisory board to the government), in a 1998 advice, proclaimed that radical changes in legislation as a result of internet developments were non-essential[27]. The French Constitutional Right to freedom of expression is recognized the accessible communication of thoughts and opinions as one of the most critical human rights, specifying that every citizen can speak, write, or print freely, being responsible for the abuses established by the law (Art.11 Declaration of the Rights of Man and the Citizen).

Herlambang P. Wiratraman and Sebastien Lafrance research about The Comparison Constitutionalism Freedom of Expression in Multicultural Societies between Indonesia and Canada (2021) gives new insight on how besides the similarity regulation of freedom of expression in the constitution as multicultural countries, there are differences of approach or influence on judicial decisions.[28] Thus, the freedom of expression is interpreted scarcely. On the other hand, in Canada, the freedom of expression is interpreted predominantly because the Supreme Court has a particular goal to unify and strengthen the multiculturalism bond. In Indonesia, the term of political discourse is freedom of expression forms customarily neglected by law enforcers. In some cases, the political speech assumed as expressing the will of insurgents or separatist. Furthermore, the religion-based pressure aspect has a significant impact on judicial decisions. The limitation is justified proportionally based on the reasonable law evidence in the democratic society[29]. Therefore, those comparisons are not the same object as the researchers also said. The freedom of expression in Indonesia should be interpreted as restricted because the implementation tends to spread hatred against people and government and eventually potentially destroy the unity and multiculturalism of Indonesian society. Herlambang P. Wiratraman quoting Cherian George, who named hate speech as hate spin, believes that several hate-spins configurations are precisely using religion to threaten certain groups and get support from people.[30]

General freedom of expression is thus recognized, leaving the legislator to limit its exercise according to other constitutional principles and values. Thus, general freedom of expression is recognized, leaving the legislator to limit its exercise according to other constitutional principles and values.[31] It can terminate that even though the freedom of speech is fundamentally regulated in the state constitution, it is not an absolute right. It is because freedom of speech is classified as derrogable right. In some democratic countries, the necessity of respecting the right of each other and public order becomes the priority issue in the implementation of right to freedom of speech.

3. The Court's Deliberation on the Right to Freedom of Speech

27 *Ibid.,*p.8-9.
28 Herlambang,et.al., Ibid. p.110.
29 *Ibid*.
30 *Ibid.,*p.88.
31 Susan W. Brenner,*Ibid*.,p.122-123.

Freedom of speech is one of the human rights guaranteed by the constitution, but it requires limitations regulated in the constitution. Indonesian law prohibits actions that create hatred or hostility towards groups using any media, including online media. The regulation of hate speech in the Article of the Criminal Code Law and the ITE Law is still quite broad in defining the intent of hatred, so it must be interpreted referring to the definitions in various formulations of human rights norms. It prevents the use of the norm excessively and easily religious expressions that are considered hostile and encourage hatred. Moreover, Article 28, para. (2) of the ITE Law is considered to criminalize the right to freedom of speech in Indonesia. Furthermore, related to the criminal act of defamation, it has been regulated separately in Article 310 and Article 311 of the Criminal Code. The Criminal code rules related to defamation and slander in the Criminal Code have different dimensions. In Article 28 para. (2) of the ITE Law, there is an emphasis on the phrase "creating a sense of hatred or enmity for individuals and/or certain groups of society based on ethnic groups, religions, races, and intergroup (SARA)", which is not regulated rigidly by the Criminal Code. This provision is a prerequisite to prevent divisions and to maintain the unity and integrity of the Indonesian nation. The phenomenon of hate speech against a group increases with the ease of access to social media.

The Information and Electronic Transaction Law, which consists of 13 chapters and 57 articles, a new legal regime to regulate cyberspace activities in Indonesia, contains several aspects, one of which is protecting the public interest. The government has the authority to protect public interests from all kinds of disturbances resulting from the misuse of information and electronic transactions that disrupt public order and national interests.[32] However, in practice, the judicial review of the ITE and several laws related to freedom of expression, including freedom of speech, is often carried out by the Constitutional Court. The Constitutional Court's role as a constitutional review institution provides explanations and answers ambiguities with rational reasoning regarding the right to freedom of speech in Indonesia, particularly Article 28 para. (2) of the ITE Law.

The Constitutional Court Case Number 76/PUU-XV/2017 on Judicial Review of Article 28 para. (2) ITE Law is registered by the applicant because the phrase "group" in the article indeterminate and criminalizes some people, such as Dandhy Dwi Laksono, Ustad Alfian Tanjung, and Bambang Trimulyono. The applicants believe that expressing an opinion should be defined as criticism toward power holders unrelated to hatred based on ethnic groups, religions, and races. The spirit of guaranteeing the right to express an opinion needs legal protection from the state to the person who expresses an opinion if the party in power does not like his idea. The person who speaks that opinion should not be intimidated by those who use power. In the decision, the Court refused the petition by the reason that the issue of the term "group" is more of implementation problem, otherwise, if it is

32 Raida L. Tobing et al., *Op.Cit.* p.52.

void, will create the uncertainty of law and *rechtsvacuum*. The Court believes that the use of the term/word "class" in the ITE Law and the Criminal Code indefinite because both have clear differences in context. The formulation of each article in which Article 28 paragraph (2) and Article 45A paragraph (2) of the ITE Law regulates crimes in the context of the dissemination of electronic information, while Article 156 of the Criminal Code emphasizes statements of feelings of hostility, hatred or humiliation in public. To make these provisions clearer, it is sufficient to explain through this Court decision. It is emphasized that the term "intergroup" 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. Thus, the Court also stressed that the meaning of "expressing an opinion" includes disseminating information both verbally and through specific media, including social media. Freedom of expression should be limited by the obligation to respect the human rights of others as stipulated in Article 28J para. (1) of the 1945 Constitution. Furthermore, the Constitutional Court provided an interpretation of Article 28 para. (2) based on the literal stipulation of Article 28J para. (2) of the Constitution, there are at least four elements of justification in limiting the exercise of rights and freedom of a person in Indonesia. Those four elements are a) determined by the law, b) guarantee recognition and respect toward the rights and freedom of others. c) fulfill a just aim under the moral, religious values, security, and public order consideration d) in a democratic society.

The cogitation of the constitutional court towards the limitation of human rights began in the Constitutional Court Decision Number 065/PUU-II/2004 on a review of Article 43 para. 1 law Number 26/2000 on Human Rights Court. The applicant stated that the implementation of the Ad Hoc Human Rights Court has the authority to examine serious human rights violations that occurred before the promulgation of the law contrary to the constitution. For this reason, the applicant, Abilio Jose Osorio Soares, former Governor of KDH Level I East Timor, considers that his constitutional rights have been impaired because he has been tried and punished based on retroactive legal provisions. The Court believed that the non-retroactive principle could dismiss to respect the human rights of others for the sole purpose of ensuring the upholding and respecting of the rights and liberties of others and fulfilling fair demands following moral considerations, values, religion, security, and public order in a democratic society. However, it can be applied only to extraordinary crimes and the most serious crimes of concern to the international community. In addition, the Constitutional Court uses the extent to which the public interest must be protected as the foremost consideration in assessing the constitutionality of the norms being tested. Thus, the Court declines the petition of the applicants.

Then in the Constitutional Court Decision Number 14/PUU-VI/2008 on the Review of the Criminal Code, the issue is about the constitutionality of imprisonment as regulated in Article 207, Article 310 para.

1 and para.2 Article 311 para.1 and Article 316 of the Criminal Code. The Petitioner has already been legally proven to have committed defamation as stated in Article 310 paragraph (2) of the Criminal Code. The Court refuses the petitioners' petition because it includes as implementation norm than the constitutional norm issues. The Court stated that the Constitution guarantees the right to issue opinions. The state is obliged to protect these rights and protect other constitutional rights equal to the right to honor and dignity. Therefore, the state is justified in imposing restrictions on the right to freedom of expression and attitude under conscience, expressing opinions, and communicating freely. In fact, without the provisions of Article 28J para. (2) of the 1945 Constitution, each person of the right to freedom should be aware that there will always be an obligation in every right, at least the obligation not to abuse that right, especially for rights with the substance of freedom, awareness of the limitations inherent in those rights is a must.

In the legal considerations of the Constitutional Court Decision, Number 140/ PUU-VII/2009 is a review of the Law on the Prevention of Blasphemy of Religion. The reason for the petition is because some of the articles contained discrimination. After all, it had gives the state the right to determine the "interpretation of which deviating "and" deviant religious activities." It is not right for the state to do so. In addition, several articles contain the offense of "hostility", "abuse", and "defamation", as contained in Article 156a is not measurable because it is related to the process of assessing the nature, feelings of religion, religious life, and worship which is subjective. The Court declined the petition because The Blasphemy Prevention Law to be particularly important to prevent conflict between society. Furthermore, the Court believes that a universal human rights norm cannot automatically transcend philosophical values and religious values in an Indonesian and spiritual perspective as other countries can do. The Court stated that the aspect of internal freedom or the inner dimension (*internum forum*) of religious freedom is absolute freedom that the state cannot interfere with. However, on another occasion, The Court locked up the debate by saying that there is a possibility to interpret freely in the internal dimension (*internum forum*) based on the principles of religious teachings. Therefore, there should be a limitation behind the religious right itself.

In determining what according to applicable law, the rights and obligations in positive law, the answer is always in the form of a decision. For this reason, the Constitutional Court Decision can be an answer to the problem of conflicting rights to freedom of speech.[33] The concept of the rule of law state adopted by the Republic of Indonesia puts forward the 1945 Constitution as the highest law, which must be used as a reference for all statutory regulations under it. However, some considerations of the Court have not been thoroughly discussed in several decisions related to the ITE Law. The Court has not explained deeply about

33 Bernard Arief Sidharta, *Ilmu Hukum Indonesia: Upaya Pengembangan Ilmu hukum Sistematik Yang Responsif Terhadap Perubahan Masyarakat* (Yogyakarta:Genta Publishing,2013),p.79.

the differentiated treatment towards the instrument of spreading hate speech. As explained before, there are various kinds of social media which has their characteristic. The question is whether the law enforcement officers should either treat the offender differently or the same. Therefore, it is necessary to guard and interpret the constitution to remain authoritative to establish a constitutional Court institution. As stated in Article 24 para. (1) and para. (2) of the 1945 Constitution, the Constitutional Court as the actor of judicial power and the Supreme Court established on August 14, 2003.[34] As the protector of human rights and the protector of the citizen's constitutional right, the Constitutional Court shows the stance through decisions based on the 1945 Constitution.

D. Conclusion

It can be concluded that national law and international law essentially guarantee a person's right to freedom of expression. However, to protect the public order, the right to freedom of expression cannot be used without any restrictions. When it does, it will be considered against the 1945 Constitution and international law. The Court's stance and interpretation on freedom of speech are primarily based on the constitution and refer to universal human rights in international law, such as the UDHR and ICCPR, as additional considerations. Freedom of speech classified as a constitutional right that needs to be restricted by Article 28J para.2 of the 1945 Constitution. However, the challenge is to create certainty on the definitions and boundaries related to the implementation of these regulations.

The government and the House of Representatives need to immediately rearrange or revise the ITE Law so that the regulatory boundaries between information crime and electronic transactions in the realm or aspects and regulation of public behavior through electronic media become more intelligible. There is an immense need for guidelines on law enforcement related to implementing this regulation, especially toward various activities on various social media platforms. These guidelines are essential to creating balances between the necessity of public order and the guarantee of freedom of speech and expressing opinions in public spaces while keeping it in lieu with the constitutional aspect of the said law.

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34 Jazim Hamidi et al., *Teori Hukum Tata Negara: A Turning Point of the State* (Jakarta:Salemba Humanika, 2012),p.136.

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4. Law Number 39 of 1999 on Human Rights
5. Law Number 9 of 1998 on Freedom of Speech
6. Law Number 40 of 1999 on the Press
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Curriculum Vitae of the Author

Titis Anindyajati, S.E., S.H., M.H. graduated from **formal education**: Bachelor of Economics (2007), Bachelor of Law (2018), Magister in Business Law (2010); **non-formal education**: Training of Research Assessors (2008), Functional Researcher Advanced Training Level at the Indonesian Institute of Sciences/LIPI (2018), Procuria Judicial Training Programmed for Legal Officers-Constitutional Court of Indonesia at De Haagse Hogeschool, Netherlands (2019). Currently, she is working as a researcher for The Deputy Chairman at the Indonesian Constitutional Court. **Articles:** Legal Policy of Region Enlargements According to The 1945 Constitution: An Analysis to MK Decisions (2013); The Constitutionality of Criminal Sanction Norms as Ultimum Remedium in the Making of Laws (2015); Legal Politics On the Role of the Constitutional Court In Protecting The Existence Of The Adat Law Society In Indonesia (2017); Implication of Constitutional Court Decision Number 85/PUU-XIV/2016 on Tender Conspiracy (2018).

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OFFENSES PRINCIPLES AND A LIMITATION FOR DISINFORMATION VIA THE INTERNET IN INDONESIA

Vidya Prahassacitta
Business Law Program, Law Department Faculty of Humanities,
Bina Nusantara University Jakarta
Jl. Kemanggisan Ilir III No.45, Palmerah, Jakarta Barat,
Daerah Khusus Ibukota Jakarta, 11480
e-mail: vidya.prahassacitta@binus.ac.id

ABSTRACT

Actors utilize the internet to spread disinformation. The content might be irritated the public but does not cause direct distribution to public order. Article 14 and Article 15 of Law No. 1 of 1946 on Criminal Law Regulation prohibit the publication of disinformation that causes the distribution to public order. However, the implementation of the legislation shows that the panel of judges punish the actor who publishes disinformation without considering the impact of that disinformation on society. Therefore, the purpose of this research is to criticize the limitation of disinformation distribution through the internet under offenses principles. The principles are used to analyze the relevancy and limitation of criminalization in article 14 and article 15. By using document research with the statute, case, and conceptual approaches, it is concluded that the intervention of criminal law may be justified to protect public order, but the intervention shall be limited which strict requirements.

Keywords: disinformation, internet, offenses principles

A. Introduction

Indonesia faces a critical problem when false, fake, and inaccurate information is spread massively and becomes viral on the internet., The Ministry of Communication and Information of the Republic of Indonesia verified 1.527 false, fake, and inaccurate information on Covid-19 spread through 3.110 contents from January 2020 until April 2021. Internet platforms like Facebook, Instagram, Twitter, and YouTube have taken down 2.687 contents while the authorities are still processing the rest. Ministry of Communication and Information Republic of Indonesia reported 113 unlawful contents to Indonesia National Police for further investigation procedure. [1]

False, fake, and inaccurate information is also known as a hoax. Merriam Webster Online Dictionary defines hoax as "to trick into believing or accepting as genuine something false and often preposterous".[2]

1 Ministry of Communication and Information Technology Republic of Indonesia, "Penanganan Sebaran Isu Hoaks Covid-19 Jumat (16/04/2021)",https://www.kominfo.go.id/content/detail/33916/penanganan-sebaran-isu-hoaks-covid-19-jumat-16042021/0/infografis (accessed 17 April 2021).

2 Merriam Webster Online Dictionary, "Hoax," https://www.merriam-webster.com/dictionary/hoax (accessed 17 April 2021)

The Hoax has a broad term, it includes both harmful and false information which is created for entertainment purposes such as a meme, parody, or satire. On the other hand, some hoaxes are harmful and illegal, such as disinformation, which is defined as false, fake, and inaccurate information that is intentionally created and distributed through the internet to harm others.[3] Merriam Webster Online Dictionary defines disinformation as "false information deliberately and often covertly spread to influence public opinion or obscure the truth." [4] Clair Wadle defines disinformation as content that covers false, fake, lies information that intentionally designs and distribute via the internet with the purpose to harm people or the public. Disinformation is part of information disorder. Disinformation is different from fake news. Disinformation, not a press product because does not produce according to the journalistic code of ethics.[5]

Unfortunately, Law No. 11 of 2008 as amended by Law No. 19 of 2016 concerning Information and Electronic Transaction (Information and Electronic Transaction Law) does not regulate the prohibition of disinformation content. Like Minister of Communication and Information Republic of Indonesia Regulation Number 5 of 2020 concerning Private Electronic System Operator which regulates prohibited electronic information. In practice, the Ministry of Communication and Information Republic of Indonesia categorizes disinformation as prohibited electronic information because it contains illegal content or harmful content that disturbs public order. However, it does not clearly define the boundaries between disinformation that serves as part of illegal or harmful content.

Disinformation is part of the prohibited electronic information. Article 14 and Article 15 Law No.1 of 1946 concerning Criminal Regulation (Law No. 1 the Year 1946) ban the distribution of disinformation. This provision is controversial because some argue that the prohibition against freedom of expression. First, Article 14 and Article 15 of Law No. 1 of 1946 originate from the colonial period. The regulation adopts from Article 171 Wetboek van strafrecht voor Nederlandsch-Indië which only apply in the Netherlands colony.[6]

There are previous researches related to criminal law and the distribution of false, fake, and inaccurate information. Yanto Irianto has researched hoax regulations under the Indonesian legal system and Islamic law. [7] Mompang L Panggabean in his

3 Claire Wardle, *Information Disorder* (London: FirstDraft, 2019). P. 15.

4 Merriam Webster Online Dictionary, "Disinformation," accessed 17 April 2021, https://www.merriam-webster.com/dictionary/disinformation?utm_campaign=sd&utm_medium=serp&utm_source=jsonld. (Accessed 17 April 2021)

5 Claire Wardle, *Information Disorder*. P. 15.

6 Han Bing Siong, *Verhandelingen Van Het Koninklijk Instituut Voor Taal-, Land- En Volkenkunde An Outline of the Recent History of Indonesian Criminal Law* (Berlin: Springer-Science+ Business Media, B. V., 1961). P. 23; and Moeljatno, *Kejahatan-Kejahatan Terhadap Ketertiban Umum (Open Bare Orde)* (Jakarta: Bina Aksara, 1984). P. 132-141.

7 Yanto Irianto, "Enforcement Of Criminal Law In False News (Hoax) Management According To Law No. 11 In 2008 That Has Been Amended To Be Law No.19 Of 2016 Concerning Electronic Information And Transactions In Islamic Law And Positive Laws," The 5th PROCEEDING " Legal Reconstruction in Indonesia (2019).P.208–

research concludes that Article 14 and Article 15 of Law No. 1 of 1946 are not suitable to enforce the distribution of disinformation, subsequently, a new formulation is required for Indonesia's current situation.[8] Both previous kinds of research discussed Indonesian legislation that regulated the distributions of disinformation. However, both researchers do not discuss the limitation of criminalization of distribution of disinformation, especially via the internet. This research aims to criticize the limitation of the distribution of disinformation through the internet using offenses principles.

The research starts with a discussion about offenses principles as theoretical background to analyze the criminalization of the distribution of disinformation. Then, the researcher gives a critical review regarding the provision and the implementation problems on Article 14 and Article 15 of Law No. 1 of 1946. Next, the researcher analyses the limitations of the distribution of disinformation, mainly via the internet. In this part, first, the researcher refers to the international practice of the limitation of disinformation. In the second part, the researcher analyzes the limitation for the criminalization of disinformation using offenses principles. It is a recommendation to regulate the criminalization of the distribution of disinformation.

B. Research Method

The method of this research is legal research as well as systematic study regarding legal regulation, legal principle, legal concept, legal theory, legal doctrine, court verdict, law institution which covers issues or problems that may also be a combination of all those aspects.[9] The study does not limit to applicable law but also ideas and perception which is a part of the aims and functions of law. Researchers use legal documents and non-legal documents including previous research related to criminal law, freedom of expression, and disinformation as well as other available data. [10] The result of this research is to give critical recommendations and guidelines for law practice.

Three approaches were used in this research. First, the statue approach, the researcher reviewed and analyzed the polemic between philosophical values on an act and research problems. Second, the case approach to review the legislation implementation, to analyze the implication and recommend legislation process.[11] The researcher analyzes several court decisions that were indicted and sentenced using Article 14 or 15 of Law No. 1 of 1946 to describe problems in implementing Article 14 or 15 of Law No. 1 of 1946. Last, the conceptual approach, the legal doctrine was used to analyze the research problems.[12]

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8 Mompang L Panggabean, "Handling of Hoax News According to Law Number 1 of 1946," International Journal of Advanced Science and Technology 29, No. 08 (2020). P. 1275–1287.

9 A Yaqin, *Legal Research and Writing* (Malaysia: Lexis Nexis Grup, 2011). P.3-4.

10 R Singleton and B C Straits, *Approaches to Social Research* (Oxford: Oxford University Press, 2018). P. 326.

11 Jonaedi Efendi and Johnny Ibrahim, *Metode Penelitian Hukum: Normatif Dan Empiris* (Depok: Prenada Media, 2018), https://books.google.co.id/books?id=5OZeDwAAQBAJ.

12 P M Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005). P. 133-136.

Researchers reviewed and analyzed regulation-related disinformation, especially in article 14 and article 15 Law No. 1 the Year 1946, determining whether this regulation is suitable under freedom of expression value by using offenses principle.

C. Discussions

1. Offenses Principles

Feinberg describes the offense as all types of the miscellany of disliked mental states. An action considers as an offense if fulfills three criteria. First when one suffers a disliked state. Second, when one attributes that state to be wrongful conducts of another. Last, when one resents the others for his role in causing one to be in that state.[13] The seriousness of offenses determined by a balancing test which consists of four criteria, the seriousness of the offense, how widespread it and social value.[14]

The offense principles use to limit criminalization. In this article, criminalization is described as state intervention that declares a behavior as an offense. According to A.P. Simester and Andreas von Hirsch, the offense principles gave the limitation for the state to criminalize intolerant behavior and potentially harmful in the public sphere. [15] In offenses principles, the argument for state intervention is not only the behavior is immoral but also to protect other's people or public interests.

Simester and von Hirsch limit the offense's behavior. Not all nuisance and offensive behaviors are offenses. Only the behavior that shows intolerance, unrespectful to others, and tends to break the law can be categorized as offense behavior. [16] This type of behavior puts the other person in an unpleasant situation. Subsequently, the other person may also be potentially losing their emotional control. Ignoring this offensive behavior will create more serious and harmful behavior.

According to Simester dan, von Hirsch offense principles also require harm as the consequences of the offense behavior. [17] Offenses principles dealing with indirect harm. The psychological harm and eventual harm are part of this indirect harm. Psychological harm is the psychological condition of the person being disturbed by other's offenses behavior. Eventual harm is dealing with a value loss from a violation that happens in the long term. If we ignore and do not address this offense behavior it will become more serious behavior and can cause harm to others.[18]

2. Critics Towards Article 14 and Article 15 of Law No. 1 of 1946 and Its Implementations

Criminalization of disinformation distribution is first regulated in Article 171 of *Wetboek van strafrecht voor Nederlandsch-*

13 R Cohen-Almagor, Speech, Media and Ethics: The Limits of Free Expression (New York: Palgrave Macmillan UK, 2001). P. 9.
14 Joel Feinberg, *The Moral Limits of the Criminal Law: Volume 2: Offense to Others* (New York: Oxford Univeristy Press, 2006). Hlm. 185.
15 A. P. Simester and Andrew von Hirsch, "Rethinking the Offense Principle," *Legal Theory* 8 (2002). P. 278.
16 Andrew von Hirsch, "The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?," *King's Law Journal* 11, no. 1 (2000): 78–89. P. 82-83.
17 Simester and Hirsch, "Rethinking the Offense Principle." P. 273-275.
18 von Hirsch, "The Offence Principle in Criminal Law: Affront to Sensibility or Wrongdoing?" P. 78-80.

Indië. Based on *concordantie* principle in Article 75 of *Regerings Reglement* and Article 131 of *Indiche Staatsregeling, Crimineel Wetboek voor het Koninglijk* was applied in the colony of Netherlands which was adjusted with the colony's situation and conditions. [19] Article 171 *Wetboek van strafrecht voor Nederlandsch-Indië* is one of that adjustment. The provision punishes a person who intentionally creates a riot by distributing disinformation. [20] In 1940, Nederlandsch-Indië military Government issued *Verordening Miliitair Gezag* No. 18/Dvo/VII A-3 dated 21 May 1940 and *Verordening Miliitair Gezag* No. 19/Dvo./VII A-3 dated 8 June 1940. Both regulations amended the Provision 171 of *Wetboek van strafrecht voor Nederlandsch-Indië.*[21]

Netherland only applied this penal policy in their colony. Other than in *Nederlandsch-Indië,* this policy is also applied in Suriname. Article 190 of *Wetboek van Strafrecht voor Suriname,* punishes a person who spread disinformation that potentially disturbs public order. During Suriname's independence in 1975, this provision is maintained. *Crimineel Wetboek voor het Koninglijk Holland* does not have similar article. In Article 142 of *Crimineel Wetboek voor het Koninglijk Holland,* Netherlands only criminalizes false alarm action.

When Indonesia was gaining its independence, Article 171 of *Wetboek van strafrecht voor Nederlandsch-Indië* was invoked and replaced by Article 14 and Article 15 of Law No. 1 of 1946. However, those articles were still preserved the same norm as in Article 171 *Wetboek van strafrecht voor Nederlandsch-Indië.* Law No. 1 of 1946 complements the Penal Code.[22] Then in Draft Penal Code 2019, this norm and formulation were still preserved in Articles 262 and Article 263.

Article 14 and Article 15 Law No. 1 of 1946 requires a publication that provides false or wrong information to the public, [23] if the information is proven to be one hundred percent false. Law No. 1 of 1946 official explanation stated that if a person publishes correct information, then the person shall not be punished. Article 14(1), 14(2), 15 of Law No. 1 of 1946 have a different formulation. Article 14(1) of Law No. 1 of 1946 prohibits a person who intentionally distributes disinformation to create chaos. Then, Article 14(2) of Law No. 1 of 1946 punishes a person whose recklessness distributes disinformation which has the potential to create chaos. Article 15 of Law No. 1 of 1946, punishes a person whose negligence distributes uncertainty or incomplete information that potentially causes chaos.

The true information element in Article 14 and Article 15 of Law No. 1 of 1946 shall be a highlight. The problem of this element is who shall authorize that information as

19 Andi Hamzah, *Asas-Asas Hukum Pidana* (Jakarta: Rineka CIpta, 2005). P. 16-20.

20 Balai-poestaka, *Wetboek Vaan Strafrecht Voor Nederlandsch Indie Kitab Oendang-Oendang Hoekoeman Bagi Hindia Belanda* (Weltevreden: Balai-poestaka, 1921). Article 171.

21 Moeljatno, *Kejahatan-Kejahatan Terhadap Ketertiban Umum (Open Bare Orde)*. P. 132 and 141; Siong, *Verhandelingen Van Het Koninklijk Instituut Voor Taal-, Land- En Volkenkunde An Outline of the Recent History of Indonesian Criminal Law*. P. 23.

22 Andi Hamzah, *Asas-Asas Hukum Pidana*. P. 12-13.

23 Moeljatno, Kejahatan-Kejahatan Terhadap Ketertiban Umum (Open Bare Orde).

false or true. Each party has its version of the truth. on the other hand, only a part of the information is false or wrong. Some contain accurate information, and it is used to manipulate and convince internet users so they believe that information is based on accurate information.[24] The person who intentionally spread this information and potentially creates chaos cannot be punished under Law No. 1 of 1946. In disinformation, only a part of the information is false or wrong. Some contain accurate information, and it is used to manipulate and convince internet users so they believe that information is based on accurate information.[25] The person who intentionally spread this information and potentially creates chaos cannot be punished under Law No. 1 of 1946.

In 1990, South Jakarta District Court punish a journalist who publishes disinformation news using Article 14 paragraph (2) of Law No. 1 of 1946. Abdul Wahid a journalist and an editor of Ekonomi Berita Buana magazine publish an article with title "Banyak Makanan yang Dihasilkan Ternyata Mengandung Lemak Babi". He writes the article based on Tri Susanto research regarding forty types of food that contain lard. The article is based on several facts but the defendant using incorrect words, he should use the word "diragukan ("doubt") rather than "ternyata". Subsequently, food manufacture that produces the suspect product experienced a decrease in their sales.[26]

The court only considers the incorrect information without considering properly that the defendant's intention and the serious impact of the news on society. As a journalist, the defendant's main intention to publish news is to deliver information to the public. Not all information that in the news was wrong. The problem is the defendant chose incorrect words that caused a stir in the community. According to the official explanation of Articles 14 and 15 of Law No. 1 of 1946, the defendant shall not be punished if the information published contains accurate facts or information. Then the public reluctance to buy the suspect product that causes food manufacture to decrease in their sales also shall not justify the chaos that requires in Article 14 paragraph (2) of Law No. 1 of 1946.

The court maintains its judgment when cases of disinformation widely spread via the internet. Like in Balikpapan District Court Decision Number 255/Pid.Sus/2019/PN.Bpp, a panel of Judges argues that the defendant Lisa Tri Ekawati is reckless because she, without checking the fact of the information, posted the disinformation message on her wall of Facebook account and forwarded the disinformation message to the WhatsApp Group. In this case, the defendant distributes the disinformation message regarding seven hundred ballots that arrived at Tanjung Priok port which were to be used to win particular presidential candidates during the 2018 general election.

24 Claire Wardle, Information Disorder.
25 Ibid.
26 Nyanda Fatmawati Octarina, *Pidana Pemberitaan Media Sosial* (Malang: Setara Press, 2018). P. 27 -28; and ARM and Indrawan, "Buntut Berita Lemak Babi," *Tempo* (Jakarta, 1990), https://majalah.tempo.co/read/hukum/19384/memvonis-nama-lengkap. (17 April 2021).

However, the panel of Judges does not consider that the defendant does not know and does not have any relation with the owner of the social media account that post previous disinformation messages.[27] Then, the panel of judges failed to describe which society was being disadvantaged from that disinformation message.

Similar to Singkawang District Court Decision Number 216/Pid.Sus/2020/PN SKW, the defendant Eko Febriyansyah posted a picture with a false statement regarding the Covid-19 patient in Singkawang hospital on his Facebook. The panel of judges argues that the defendant is reckless because he creates and publishes a statement only based on his assumption and does not check the facts. Although the defendant purpose is only to alert people regarding the spread of the Covid-19 virus in Singkawang. In this decision, the public defined as 926 members of the defendant's friends in his Facebook.[28] However, it is not in line with the chaos element described by the panel of judges as the cause of the defendant's statement that creates anxiety and commotion in Singkawang society.

In those court decisions, the court prioritizes false information rather than culpability and harm. Criminalization shall consider proportionality and subsidiarity principles. We shall evaluate the benefit and harm of the disinformation to publish the disinformation. Then, we also shall evaluate alternative procedures to deliver accurate information to the public. To a possible extent, sharing information shall be without potential harm. No person shall be liable to punishment if the person does not have an evil mind and the disinformation publication does no serious harm. Only disinformation that publishes with bad intention and causes serious harm to the public that shall be punished.

Next, those court decisions are unclear on what type of disinformation that is prohibited. Those relate to types of content and how the disinformation is delivered. Those three court decisions have different content disinformation start from consumer good, politic-related general election, to health. Article 14 and Article 15 of the Law No. 1 of 1946 are part of the offense against public order, and the disinformation must be related to public concern. Then, how the defendants present the disinformation that made public disturbed. Unfortunately, the panel of judges does not discuss and describe these issues.

4. Limitation for Disinformation in International Practice

In those court decisions, the defendants guilty if they spread information that contains false or fake information. This rise debate whether publishing disinformation to the public is protected or unprotected speech. International conventions and a free nation's practice give reference to the debate.

International conventions do not state clearly whether publication and distribution of disinformation are prohibited. The disinformation relates to freedom of expression which part of civil and political

27 Balikpapan District Court Decision Number 255/Pid.Sus/2019/PN.Bpp dated 21 October 2019. P. 22-32.
28 Singkawang District Court Decision Number 216/Pid.Sus/2020/PN SKW dated 19 November 2020. P. 30-38.

rights. Article 19 (3) International Covenant on Civil and Political Rights stated that national law shall limit the freedom of expression only to protect a person's reputation, public order, and national security. According to this provision, only defamation that part of disinformation that is prohibited. Then in the International Convention on Freedom of Information 1949, disinformation that disturbs world peace is prohibited. Disinformation is part of state propaganda that is distributed by the press to distribute and threatens the security of other countries.[29] Both international conventions do not regulate the disinformation that disturbs public order.

The European Court of Human Rights provides guidelines for delivering false and inaccurate information in the public sphere. In Chauvy and others vs France,[30] and in Perinçek v Switzerland [31] the court argues that the truth of history information or statement shall be protected only if that information or statement is built based on 'established historical fact'. In this case, the truth about a statement is important but the statement delivers under purpose and value that is protected by the European Convention on Human Rights. The speech shall protect another person's reputation, public order, national security, disclosure of confidential information, and shall prevent disorder or crime.

Then in several countries, harm as a cause of disinformation is required to limit the speech. The German Supreme Court is providing limitations for false publishing and inaccurate information in the public sphere which shall balance the public order from harm. In BVerfGE 90, 241 (1994) or Ausschwitz Lie' case[32] and BVerfGE 54, 208 1 BvR 797/78 Böll-decision,[33] the supreme court argues that information about a false or inaccurate fact that harms others is not a protected speech. It does not deserve protection because the aims of that information do not promote public opinion. In the United States of America, harm towards other parties is required to criminalizing a speech. In 2012 United States Supreme Court on United States v Alverez decriminalized a provision in the Stolen Valor Act that prohibits a person to publish a false statement regarding a military medal because this statement does not cause harm. [34]

Singapore has different perfective which the harm does not main require to limitation a speech. In 2019 Singapore issued Protection

29 T McGonagle and Y Donders, *The United Nations and Freedom of Expression and Information* (Cambridge: Cambridge University Press, 2015). P.10-19.

30 *Chauvy and Others vs France* (2004) https://hudoc.echr.coe.int/fre#%7B%22itemid%22:(%22001-61861%22)%7D (Accessed 15 March 2021).

31 *Perinçek v. Switzerland* (2015) https://www.echr.coe.int/Documents/Press_Q_A_Perinçek_ENG.pdf (Accessed 15 March 2021).

32 BVerfGE 90, 241 (1994), https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621 (Accessed 15 March 2021).

33 *BVerfGE 54, 208 1 BvR 797/78 Böll-Decision* (1980), https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=642 (Accessed 15 March 2021).

34 Rahel Boghossian Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer, "The Constitutionality Of Criminalizing False Speech Made On Social Networking Sites In A Post- Alvarez, Social Media-Obsessed World," *OctoHarvard Journal of Law & Technology* 31, no. 1 Fall (2017): 65–109. P. 68-69.

from Online Falsehoods and Manipulation Act. In this legislation, Singapore criminalizes the person or corporation that fabricates, alternate, and distribute disinformation and the person or corporation that uses an inauthentic account or bot to distribute and to accelerate the disinformation communication. However, Singapore does not use criminal law as a priority. Singapore also introduces a correction direction. It is a government order for a person to correct or to clarify the statement. In all that provisions Singapore does not require harm to public order. The limitation is based on necessary or expedient principles stated in Singapore Constitution.[35] The purpose of this limitation is to maintain neutrality communication among Singapore citizens, especially on the internet, by intervention in the communication.

The above analyses show that the prohibition of the spread of disinformation is justified with a clear threshold. The truth of information shall proportionally review with the negative impact of the disinformation. Limitations of disinformation based on a free nation's purpose and value that wants to be protected. In Germany and the United States of America political speech has more protected than other kinds of speech, therefore the limitation of disinformation related to political speech is looser,[36] including the intervention of criminal law. This kind of situation deference in Singapore where the right of its citizen to deliver their opinion is an act of the government to serves society interest.[37]

5. Limitations for Criminalization Using Offences Principles

The intervention against the distribution of disinformation via the internet, in particular, is relevant because of its negative impact of the disinformation itself. The actor uses technology information and communication to distribute disinformation via the internet. Actors create disinformation and distribute it massively using the bot and fake accounts. On several occasions, the actor uses buzzer services and adversities to distribute disinformation content. [38] The peril of disinformation is the snowball effects. It starts with cognitive bias, then produces post-truth and polarization in the society. The dangers of disinformation are showed on analyses of seven container ballot paper disinformation. During the general election year 2019, this disinformation spread massive and viral notions on social media and became trending topics. Analysis of that trending topic shows that it produces polarization in society. [39] Although this disinformation does not indicate direct harm, it may incite chaos in a polarized society. Its

35 David Tan and Jessica Sijie Teng, "Fake News, Free Speech and Finding Constitutional Congruence," Singapore Academy of Law Journal 32, no. 1 (2020): 207–248.P. 210.

36 Victoria L. Killion, "The First Amendment: Categories of Speech," *Freedom of Speech: Background, Issues and Regulations* (2020): 1–5.

37 L. a. Thio, "Singapore: Regulating Political Speech and the Commitment 'to Build a Democratic Society,'" *International Journal of Constitutional Law* 1, no. 3 (2003): 516–524.

38 Samantha Bradshaw and Philip N Howard, *The Global Disinformation Order 2019 Global Inventory of Organised Social Media Manipulation*, *University of Oxford*, 2019. P. 10-19.

39 Ismail Fahmi, "Hoax 7 Kontainer:"Stop Hoax Mari Kawal Suara," https://pers.droneemprit.id/hoax-7-kontainer-stop-hoax-mari-kawal-suara/. (Accessed 25 November 2020)

causes psychological and eventual harm.

Three previous court decisions show that those kinds of disinformation may be irritated and nuisance public, but those actions shall not deserve punishment. Indonesia needs a new threshold to criminalize the distribution of disinformation via the internet. The offenses principles can be applied to limit the criminalization of the disinformation distribution- via the internet because these principles deali with irritation and nuisance action.

The criminalization using offenses principles should be approached with caution. Mediating principles require examination of whether the offense deserves to be criminalized. Simester and von Hirsch require four elements of mediating principles to limit criminalization to supervise the freedom of speech. The requirements are social tolerance, a constraint of ready avoidability, the requirement for immediacy, the importance of the public sphere.[40]

5.1. The Intolerance Message and Presentation

First, a society shall not allow offensive behavior, even though a member of a society does not realize that the behavior is harmful. Social tolerance is a tool to measure the objectivity of offensive behavior. [41] How society reacts to this nuisance and offensive behavior, determines whether this offensive behavior deserves criminalization or not.

In disinformation, social tolerance relates to the content and presentation of the message. How the content is accepted by society depends on the value of the message itself. The situation and condition of a society is an important factor. In a plural and democratic society, the interaction is more complex, thus social tolerance should be more flexible. This type of society has a thicker skin than a traditional and homogeneous society. The presentation of the message relates to how the speaker delivers the message to the audience. When the speaker delivers the message with harsh, insulting words, aggressive and offensive style, it shows that the speaker does not tolerate the member of society. When a society rejects disinformation, it is a strong reason to criminalize the author/speech.

5.2. Publish in Public Sphere that Accessible

Next, *a constraint of readily avoidability* element relates with other elements, *the importance of the public sphere*. The avoidability against offensive behavior shall stay in the public area.[42] The limitation of freedom of expression, be applied in a public area because when people exercise their freedom, they generate the risk to harm others, as well as disturbing public order and national security. It is only spoken in the public sphere that harms others or disturbs public order shall be criminalized.

The spread of disinformation via group chat in instant messaging applications such as WhatsApp, Line, or Telegram criminalization is more difficult to be traced.

40 A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011). P. 123-134.
41 Ibid.
42 Ibid.

Members of the group chat who dislike and become uncomfortable with disinformation can easily remove or block the member from a group.

However, it is different compared to the spread of disinformation via social media such as Facebook. Disinformation spreads widely because the speaker utilizes hashtags, bots, fake accounts, and algorithms. Several parties advertise the disinformation and engage buzzers to spread and incite conversation regarding the disinformation.[43] In this case, even though a social media account is locked, disinformation can still appear on the social media wall. Social media users may report or block the account, but another advertisement, buzzer bot, or fake accounts are nevertheless may still appear on the social media wall. It is quite inevitable, therefore, the reason to criminalize this behavior is more important.

5.3. Limited to intentionally action

The last limitation is *immediacy.* The nuisance behavior conducts with mens rea or evil mind. [44] When a nuisance behavior instigates to gain more followers in the public sphere, then it becomes a strong reason to criminalize the behavior. However, in the spread of disinformation through the internet this requirement shall be applied carefully. People have the right to express their opinion in the public sphere if that opinion is accepted in society. Including expressing their political view. On other hand, we must protect the internet so that it does not become propaganda that may disturb public order.

When disinformation spreads on the internet and becomes a trending topic, this phase still is yet to meet the requirement to be labeled as criminalization. However, when the trending topics lead to negative conversation such as producing polarization and hatred to other ethnicities, races, or religious groups in the society then it becomes a strong reason to criminalize the disinformation. It shows that disinformation has the potential to disturb public order. Not everyone can build a harmful conversation on the internet. Buzzers and public figures have this capability. Therefore, this requirement only relates to the speaker's capability to distribute disinformation on the internet.

In this case, criminalization only applies to the distribution of disinformation via the internet that is conducted intentionally. The defendant's purpose in publishing the disinformation is to disturb and manipulate other internet users. Then the defendant knows to expand the spread of disinformation and to build the internet user conversation using disinformation, so the disinformation becomes massive and viral that disturb and irritate the public.

In the end, offense principles limit the criminalization of distribution disinformation via the internet. This principle provides a threshold which disinformation that shall be enforced by criminal law and shall be

43 Rinaldi Camil, Natasha Hassan Attamimi, and Klara Esti, "Dibalik Fenomena Buzzer: Memahami Lanskap Industri Dan Pengaruh Buzzer Di Indonesia," *Centre for Innovation Policy and Governance* (2017): 1–28.; and Bradshaw and Howard, *The Global Disinformation Order 2019 Global Inventory of Organised Social Media Manipulation*. P. 10-16. Buzzer is a person or influencer that has the ability to build conversation in social media and the internet with a certain motive.

44 Semester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*.

enforced by administrative law, Information and Transaction Electronic Law.

D. Closing

The spread of disinformation via the internet is relevant to criminalization. The intervention of criminal law does not only criminalize harmful behavior but also prevents harm. [45] A preemptive investigation might be required, but with clear and strict boundaries, so it will not violate the freedom of expression. Criminalization is limited to serious disinformation. Criminalization is only intended for a person who intentionally fabricates and distributes disinformation that contains aggressive and provocative words, which then irritates members of society. In this case, the suspect has the knowledge and skills to spread disinformation massively on the internet and also to start harmful conversations that carry the risk of creating public disorder.

The new formulation requires, especially in the draft of Criminal Code, Article 14 (1) of Law No. 1 of 1946 that only applies to a person who intentionally produces and distributes disinformation that creates direct harm. This provision can still be adopted in the draft of Criminal Code. However, Article 14 (2) and Article 15 of Law No. 1 of 1946 shall be revoked. The new formulation requires that criminalizing a person who intentionally fabricates and distributes disinformation with a potential risk of disturbing public order is lawful.

Alignment between the penal code and the Information and Electronic Transaction Act is required to determine disinformation that categorizes as illegal content or harmful to public order. The only disinformation that fits with the offense principles threshold shall be classified as illegal content. Therefore, the internet intermediary has the right to take down the disinformation content, and law enforcement is obligated to investigate.

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45 Andrew Ashworth, *Principles of Criminal Law*, *Principles of Criminal Law*, 4th ed. (New York: Oxford University Press, 2003). P. 88, 158-159 and 445-447.

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Curriculum Vitae of the Author

Vidya Prahassacitta, SH. M.H. is a lecturer and faculty member of the Department of Business Law, Faculty of Humanity, Binus University, Jakarta. Vidya is a licensed advocate from Peradi since 2010. She holds her bachelor of law and master of law degrees both from the Faculty of Law, University of Indonesia. Currently, Vidya is a PhD candidate from the Faculty of Law, University of Indonesia, major in Criminal law and Criminal Justice System. Her dissertation title is Indonesian criminal law policy in the distribution of disinformation through the internet. Vidya can be reached via the following email vidya.prahassacitta@binus.ac.id or phone +628119770576

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POSSIBILITY TO CORRECT THE FREEDOM OF SPEECH IN INDONESIAN LAW: COMPARISON BETWEEN SINGAPORE LAW AND INDONESIAN LAW ON BROADCASTING

Christian Nugraha and Dian Narwastuty
Maranatha Christian University
Prof. drg. Surya Sumantri M.P.H, Street No. 65, Bandung 40164 West Java
e-mail: fchrist224@gmail.com, diannarwastuty@gmail.com

ABSTRACT

Freedom of speech is a principle that supports the freedom of an individual or a community to articulate their opinions and ideas without fear of retaliation, censorship, or legal sanction. This principle is one of the Human Rights principles that are necessary for the progress of humanity itself. But its existence has always triggered a dispute because of the abuse of the right. The abuse of the rights consists of Hate Speech and Hoaxes. This research is normative legal research that uses a comparative approach and conceptual approach. And also, this research will compare the Freedom of Speech and Broadcasting laws in Indonesia and Singapore, especially law in the broadcasting sector. Theoretically, the benefits of this research are to answer the problem of correcting Freedom of Speech, especially in broadcasting law. Practically, it is helpful for society to know much more about hate speech and hoaxes also the possibility to correct the broadcasting law in Indonesia based on the same regulation in Singapore.

Keyword: Freedom of Speech, Human Rights, Hate Speech, Comparison, Broadcasting

A. Introduction

Freedom of Speech is the right to seek, receive and impart information and ideas of all kinds, by any means.[1] Freedom of Speech is an important principle that strengthens the other principles to allow society to be developed and grow. Freedom of Speech is a fundamental and vital right among the other Human Rights principle.

According to Professor Chris Frost, if someone's views or policies are that appalling then they need to be challenged in public for fear they will, as a prejudice, capture support for lack of challenge. If we are unable to defeat our opponent's arguments then perhaps it is us that is wrong.[2] Frost also be concerned with the fascism of a majority (or often a minority) preventing views from being spoken in public merely because they don't like them and find them difficult to counter. Whether it is through violence or the abuse of power such as no-platform we should always fear those who seek to close down debate and impose their view, right or

1 Ana Matronic, Amnesty International UK, "What is Freedom of Speech", https://www.amnesty.org.uk/free-speech-freedom-expression-human-right, Accessed at June 23rd, 2021, 6.12 PM

2 Index on Censorship Team, "Why is Free Speech Important?", https://www.indexoncensorship.org/2016/04/free-speech-important, Accessed at March 30th, 2021, 12.05 AM

wrong.[3]

Also, according to Media Legal Defense Initiative, there are a few reasons why freedom of expression is important. One of them is, without the freedom itself, journalism would be restrained and cannot accurately tell the story because of the restrain and censorship applied to the media.[4] The same source also includes the statement that the importance of freedom of expression also could be used as the discovery of truth where the journalism should deliver accurate information without any kind of cover-ups. Those 3 reasons are concluded in the importance of freedom of speech is to deliver the news as accurately as possible and to help people for making decisions based on the truth that is delivered.

Freedom of speech is also having some principles. Freedom of speech is a fundamental and inalienable right of all individuals. And it follows another principle that said every person has the right to seek, receive, and impart information and opinions freely. The other principles are every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary, to update, correct it and/or amend it.[5]Freedom of Speech is a part of numerous rights of the one called Human Rights. Freedom of Speech supports the other rights to be synchronized and applied as a one single right and not as a separate principle. Freedom of speech is the heart of the Human Rights itself because freedom of speech is strengthening the other rights..

In this modern era, freedom of speech uses radio signal broadcasting to reach more audiences. According to John Durham Peters, broadcasting is the distribution of audio or video content to a dispersed audience via any electronic mass communications medium, but typically one using the electromagnetic spectrum (radio waves) in a one-to-many model.[6]

Broadcasting makes the news spread faster. With broadcasting people can spread the word about everything within a second or two. And that makes the news and entertainment are easier to be accessed. In this field of broadcasting, the freedom of speech principle has a huge role. Broadcasting technology enables people to speak up to express their opinion about something. And to prevent something that could cause a bigger problem, the authorities are commencing the Broadcasting Act, which in Indonesia is known as Broadcasting Act no. 32/2002. The two main issues to be discussed in this paper are: how is Indonesian government implementing the concept of Freedom of Speech regarding Broadcasting Act no. 32/2002? And how is

3 *Ibid*

4 MLDI Team, "10 Reasons Freedom of Expression is Important", https://10years.mediadefence.org/10-reasons-freedom-of-expression/#:~:text=Freedom%20of%20expression%20is%20a%20core%20value%20in%20the%20democratic,others%2C%20without%20censorship%20or%20reprisals., Accessed at March 30th, 2021, 12.43 AM

5 Inter-American Commission on Human Rights, "Declaration of Principles on Freedom of Expression", https://www.cidh.oas.org/basicos/english/basic21.principles%20freedom%20of%20expression.htm, Accessed at March 30th, 2021, 12.57 AM

6 Peters, John Durham, 1999, "Speaking into the Air", University of Chicago Press, Chicago, IL

Singapore government implementing the concept of Freedom of Speech regarding Singapore Broadcasting Act?

B. Research Methods

The method used in this scientific writing is the normative legal research method that is legal research carried out by examining literature or secondary data.[7] Secondary materials are book materials on Human Rights, Freedom of Speech, and law regarding broadcasting. Freedoms of speech were born as a concept. And the companion of this concept is necessary for this writing. And the Author would like to put broadcasting as the central theme of this scientific writing. The first Broadcasting Act was created in 1997, registered as Broadcasting Act no. 24/1997 when Indonesia was taking a loan to the International Monetary Fund (IMF) by signing a Letter of Intent.

In order to convince IMF to grant the loan, the Indonesian government was required to make some statutes that asked as the conditions in purpose to fulfill Washington Consensus that consists of three main policies which are liberalization, privatization, and deregulation. The telecommunication sector is the one that should be liberalized in Indonesia. And that is when the idea of the Broadcasting Act was conceived.[8] And at September 26th 1997, the first Broadcast Act in Indonesia was commenced, called The Broadcasting Act no. 24/1997. That act remains the only legal product that managed the broadcasting, until Suharto announced his resignation from the presidency in 1998. And the statutes are revised in 2002 into The Broadcasting Act no. 32/2002.

The approaches used in this scientific writing are the comparative approach and the conceptual approach. The comparative approach is a research method that compares one subject with the other, identical or a different object studied as an input for the other subject. Comparative approach or some referred to it as statute approach, is a research method that delivers analyses through the values contained in the statutes or the other law products.

C. Discussion

1. The Law of Broadcasting and Freedom of Speech in Indonesia

Broadcasting is a media that use a radio signal to transmitting sound or images to the receiver media such as radio or television. Broadcasting is the most popular method to spread the news to a larger audience.

In Indonesia, there are no statutes or law products that regulate anything related to broadcasting and press until 1997. Instead, the Indonesian government in 1966, applied a policy that gave the authority to the Department of Information to censor or retract the news to control the media that consists of newspapers, magazines, and broadcasted sources included, in this case, radio and television.

Numerous Criminal Code provisions continue to limit the right to freedom of speech in the press. The Broadcasting Act no. 32/2002 is the significant development

7 Soerjono Soekanto, 2001 Introduction to Legal Research, Jakarta: Rajawali, p. 15

8 Rahayu, Bayu Wahyono, dkk, 2015, "Menegakkan Kedaulatan Telekomunitasi dan Penyiaran di Indonesia", Yogyakarta:PR2Media, p.227

towards a more democratic press signaled by the enactment and commencement of The Broadcasting Act 1997. Under the Broadcasting Act 1997; there are too many limitations to the freedom of speech, such as the centralization broadcasting system.[9] However, recent cases show that a lot cases of freedom of speech abuse happened because of pressures from the press and community.[10] By bringing defamation charges to the courts under other laws can result in the imposition of harsh criminal penalties and extensive periods of imprisonment. Thus, the freedom of speech needs to be set right and wisely.

The first statute that regulated broadcasting was enacted in 1997, known as Broadcasting Act no. 24/1997. The statute was made with the purpose to receive a loan from the International Monetary Fund (IMF) by signing a Letter of Intent from Indonesian Government to the IMF. The signing and the loan itself required several statutes that supposed to be made to grant the loan, and the broadcasting sector is the one that is affected because the liberalization of the mass media is required.[11] In 2002, the statute was renewed by another Broadcasting-related statute called Broadcasting Act no. 32/2002. It changes several Sections that remain irrelevant to the future.

The reason why Broadcasting Act exist is to regulate the direction and purposes of Indonesia Broadcasting Commission, broadcasting services, and several broadcasting institutions such as the public, private, subscription-based, and foreign broadcasting institution. Also to regulate the licensing of the broadcasting activities in the process.

The problem of press reporting in Indonesia these days is impartial news that only gives an advantage to one individual or group, which could cause disadvantages to each individual or group that was affected by the news. According to Imam Wahyudi, a Chief Officer of Society Complaints of Press Council, quoted from Tirto.id, he said that the only one that broke the integrity of journalism is a media business where news is a commodity to be sold as a product.[12]

And also quoted from the same source, Abdul Manan, a Chief Officer of Independent Journalist Alliance, that problem of the journalism is the excessive intervention from the editor in chief to their journalist to every content that they should write. He said that if the media showing their supports for a particular political choice, they will force their journalist to write everything about that choice and show their supports for that.[13]

Some defiance on Journalism Ethics was found these days. They consist of the exploitation of the news headline, illegitimate

9 Clara Staples, *FREEDOM OF SPEECH IN INDONESIAN PRESS: INTERNATIONAL HUMAN RIGHTS PERSPECTIVE,* Brawijaya Law Journal vol.3 n.1 2016, https:www.brawijaya.ac.id, hlm.41-59

10 Naomita Royan, 'Increasing Press Freedom in Indonesia: the Abolition of the Lese Majeste and 'Hate-Sowing Provisions' (2008)10 *Australian Journal of Asian Law* 291, 297.

11 Rahayu, Bayu Wahyono, dkk, 2015, "Menegakkan Kedaulatan Telekomunitasi dan Penyiaran di Indonesia", Yogyakarta:PR2Media, p.227

12 Fadiyah Alaidrus, "*Dewan Pers: Yang Merusak Kemerdekaan Pers adalah Bisnis Media*", https://tirto.id/dewan-pers-yang-merusak-kemerdekaan-pers-adalah-bisnis-media-dnAy, Accessed at April 1st 2021, 2.18 PM

13 *Ibid*

news source, and also the domination of the opinion created by majority society and elites.[14] These problems could make the public opinion about one issue to be polarized and it could be difficult to be undone. Those problems of press freedom to publish news are affecting the Freedom of Speech in general. Freedom of Speech was established as a principle where people could speak and express their opinions freely without any kind of coercion from anyone, but restraining the journalist is against that principle.

Freedom of Speech principle and Indonesian Broadcasting Act no.32/2002 already provide the space for the press to write and publish news independently without any kind of intervention. But, those happen because people with power always want a good image of themselves and they are capable to hire a media to write or broadcast the news. This problem happened because the Indonesian Broadcasting Commission as the authority in charge of the television content in Indonesia, refuse to take action about it, and that makes the law regarding broadcasting and freedom of speech seems polarized, because the pure principle of Freedom of Speech is letting the people speak freely without any surveillance of any kind.

The freedom of speech applied in broadcasting is for the broadcasting company to speak and appear any content. But, as written in Article 36line(5b) of Broadcasting Act no.32/2002, censorship is applied to the content if it contains aspects, such as sexual content, hoaxes, violence, usage of narcotics. Also, if the contents carry a mockery of any kind regarding race, ethnicity, religion, or groups as written in Article 36 line (5c). The same guidelines regarding the content are also appeared in Article 48 line(4).The Broadcasting Act also regulates the spread of fake news. As written in Article 36 line (5a) that the broadcast should not be the content that contains defamation, incitement, and contains misleading or false information. After all, spreading fake news is a serious one in every aspect.

In this part of the discussion, we could reach a few conclusions regarding this section. The Indonesian government guarantees the freedom of speech as written in their constitution and the Broadcasting Act no. 32/2002, with some boundaries regarding sexual content, violence, and mockery against race, religions, or groups.

2. The Law of Broadcasting and Freedom of Speech in Singapore

Mass media in Singapore is consists of broadcasting, publishing, and the internet that is available in the state. And Singapore Mass Media is under the control of the government.[15] The history of mass media in Singapore is rough. In 1990, the late Prime Minister of Singapore, Lee Kwan Yew, restricted the foreign press movement in

14 Anom, Erman. "Wajah Pers Indonesia 1999-2011." *Jurnal Komunikasi: Malaysian Journal of Communication* 27, no. 1 (2011).

15 Branigin, William, "Singapore Vs The Foreign Press", https://www.washingtonpost.com/archive/politics/1990/12/17/singapore-vs-the-foreign-press/71642106-d3cb-4ba6-9df9-9542176a0c10/, Accessed at April 2nd, 2021, 10.55 AM

Singapore to control foreign intervention in the domestic politics of Singapore. Lee said that regardless of the pontifications of foreign correspondents and commentators, it is the values of the elected Singapore government that must and will prevail.[16]

And there are no statutes or law products on broadcasting published in Singapore until 1994 when The Singapore Government published the statute regarding broadcasting called "Singapore Broadcasting Act no.15 of 1994". The statute was experiencing some amendments until it reaches its final form in 2016 as "Singapore Broadcasting Act no. 19 of 2016" which is more updated than the previous version. The censorship in Singapore involves the age restriction system for each content based on their demography. Therefore, the censorship regarding sexual content and violence nor narcotic product and tobacco usage is not applied.

According to Freedom of the Press, press freedom in Singapore is 154 of 178 in the Press Freedom Index of the report itself.[17] It is a sign that freedom of speech, especially for the press in Singapore, is rated as not free.

The Singaporean Government published the statute called Protection from Online Falsehood and Manipulation Act (POFMA) or Fake News Law to handle the misleading information and hoaxes that spread on television nor online. The POFMA existence enables the authorities to tackle the spread of fake news or false information. Though POFMA is suspected as the censorship tool against the freedom of speech principle as raised among the netizens and international community, the Singapore Government response to the critics of the act as a false allegation.[18]

3. Comparative Studies Regarding 2 Broadcasting Law Between Indonesia and Singapore

Through these 2 different Broadcasting Law in Indonesia and Singapore, there some differences were found between these 2 laws. The differences are consisting of:

a. Censorships

Indonesian Broadcasting Act no. 32/2002, as written in Article 35 line (5), the broadcast contents with a sexual element, excessive violence, tobacco use, and narcotics are prohibited. Words or visual content containing a mockery of a particular religion, race, or group in the society. The same guidelines are written in Article 48 line (4) of Broadcasting Act no. 32/2002. Singapore Broadcasting Act no. 19 of 2016 does not regulate anything related to content censorships. The act only regulates the administrations regarding the broadcasting institution and broadcast licensing in Singapore for foreign and subscription-based broadcasting institutions, which the same thing did in Indonesia.

16 *Ibid*

17 AFP, "World Press Freedom index Finds Journalism Blocked in Over 100 Countries", https://www.straitstimes.com/world/freedom-index-finds-journalism-blocked-in-over-100-countries. Accessed on May 26th, 2021

18 Channel News Asia team, 'Singapore Government says Washington Post Article on Online Falsehood Law is "Perpetuating False Allegations", https://www.channelnewsasia.com/news/singapore/singapore-government-fake-news-pofma-the-washington-post-12188644, Accessed at April 2nd, 2021, 1.42 PM

But regarding content censorship, instead of inserting the regulation in the Broadcasting Act, Singapore Government form an institution called the Info-communications Media Development Authority (IMDA) to put the contents into a group of age advisory and age restrictions. The age rating for age advisories is General (G), Parental Guide (PG), and PG-13. G is for a general audience that is suitable for all ages. PG is for Parental Guidance that advises parents to accompany their children in watching content that contains a mild reference to violence, drug or tobacco, and sexual. While PG-13 is suitable for a person aged 13 and above but parental guidance is advisable for viewers under 13 because of moderate Besides Age Advisory ratings, IMDA also applies the Age Restricted ratings consists of NC 16, M-18, and R-21. Nc-16 or no children below 16 restrict the contents that may have moderate sexual content, same-sex references, and frightening scenes portraying injuries and gory images without further details. M-18 or mature 18 is for persons 18 years above, for content with frontal nudity and sexual activities, implied same-sex activities, and intense violence that triggers horror. The last one in this category is R-21 that is restricted and only for 21 years and above. The content that contains this rating can only be viewed in Over-the-Top (OTT) streaming services.

b. Fake News Case Regulation

The Broadcasting Act no. 32/2002 provides the regulation regarding the fake news spread as written in Article 36 line (5a). The referred line says that the broadcast should not be content that containing defamation, incitement, and also containing misleading or fake news. No further records regulating the fake news spread by broadcasting. Instead, more complete regulations regarding fake news in Indonesia is contained in Information and Electronic Transaction Act Article 45A line (1) that says:

> "Each people in purpose and without any rights spreading the misleading and fake news would be charges by serving 6 years in prison and fine maximum at Rp. 1.000.000.00 (one billion rupiahs)"

In Singapore, same with the age restrictions and censorships, the regulation is separated through an Act that is called Protection from Online Falsehood and Manipulation Act or commonly abbreviated as POFMA and known collectively as Fake News Law. POFMA enable the authorities to track and arrest the netizens that were suspected or proven to spread the fake news.

Part 2 of the POFMA Act criminalized the communication of false statements of facts in Singapore through Section 7 even if the person communicating it is not in Singapore, and that the false statement is detrimental to "the security of Singapore", "public health, public safety, public tranquility or public finances", friendly international relations with other countries, influence the outcome of parliamentary and presidential elections or referendums, incite tension between different groups of people, or diminish public confidence in the public service or general governance of Singapore.

c. The Comparison Handling of current case in Freedom of Speech

Singapore has The Public Order Act (Cap 257A, 2012 Rev Ed) ("the POA") as a constitutionally valid derogation from Article 14(1) of the Constitution of the Republic of Singapore (1985 Rev Ed).

Based on this act, the Applicant was charged and convicted on one charge under s 16(1) (*a*) of the POA of having organized and held a public assembly without having obtained the permit for it that the POA required. Art 14 of the Constitution grants citizens of Singapore constitutional rights to freedom of speech, assembly and association, subject to certain restrictions. The regulation of public assemblies under the POA involves two control mechanisms. **The first** regulates which assemblies require a permit. **The second**, where a permit is required, regulates the grounds for refusing to grant such a permit.

As a starting point, permits are required for public assemblies unless they are exempted by the Minister under s 46 of the POA. These include sporting events, celebration of certain festivals, charitable events and some election events. Indoor public assemblies organized by and only involving Singapore citizens are generally exempt from the permit requirement. In this case, a permit was required as Mr. Wong, a non-Singaporean, had been asked to speak at (and did speak at) the Event.

Art 14 rights are not unlimited. These rights are expressly made subject to the limitations that Parliament may impose on them under the powers granted to it by Art 14(2). In determining whether any legislation passed by Parliament to limit any of the Art 14 freedoms improperly derogates from any of those freedoms, a close examination must be made of the purpose and language of such legislation.

Despite the broad language used in Art 14(2)(*b*), this does not prescribe a wholly subjective approach. In any law that Parliament passes which restricts the right of peaceable assembly is deemed valid. The earlier decision of the Court of Appeal (for example, Tan Seet Eng v Attorney-General and another matter [2016] 1 SLR 779) might be inconsistent with the subjective approach. The key question whether the derogation is objectively something that Parliament thought was necessary or expedient in the interests of public order and whether Parliament could have objectively arrived at this conclusion.

There is no presumption of legislative constitutionality. In the analysis of the constitutionality of any law, the court must bear in mind the following principles:

a. Each branch of Government has its own role and space. The separation of powers is part of the basic structure of the Westminster constitutional model. The Constitution both confers a constitutional right and permits that right to be derogated from for the purposes listed under Art 14 (2)
b. It is unequivocally for the judiciary to determine whether that derogation falls within the relevant purpose.

A three-step framework must be applied in determining whether a law impermissibly derogates from Art 14 of the Constitution. First, it must be assessed whether the legislation restricts the constitutional right in the first place. Second, if the legislation

is found to restrict the Art 14 right, it must be determined whether the restriction is one which Parliament considered "necessary or expedient" in the interests of one of the enumerated purposes under Art 14(2)(*b*) of the Constitution. Third, the court must analyses whether, objectively, the derogation from or restriction of the constitutional right falls within the relevant and permitted purpose for which, under the Constitution, Parliament may derogate from that right. In the final analysis, it is imperative to appreciate that a balance must be found between the competing interests at stake. This is proving that even in Singapore, there is such a restricted ways to expressing freedom of speech.

While in Indonesia, the regulation that restrict the right to freedom of opinion and expression is not justified if other ways do not restrict the rights to freedom of opinion and expression. The provisions for defamation are also regulated in the Civil Code but are also regulated in the Criminal Code, considering that punishment is the *ultimum remedium*, then the civil mechanism needs to be put forward, that the 4th principle point (a) Article 19 of the ICCPR recommends countries that have signed the ICCPR to abolish the crime of good name and transfer it to the mechanism of civil law, that in principle 4 point (b), the party who feels that his name has been defamed must prove that it is true that there has been defamation and that there has been a loss he has suffered. Such construction requires the formulation of articles in material form, namely formulating the consequences arising from criminal acts, and that sanctions for criminal acts of defamation should not be carried out in excessive levels.

Solutions in harmonizing freedom of opinion and expression with Article 310 and 311 of the Criminal Code can be carried out using a proportional application, namely not by imprisonment which is judged from the aspect of rights Human Rights as an exaggeration to deal with the issue of freedom of opinion and expression. The abolition of imprisonment and replacing it with a fine can have a better effect on society. Especially people who work as activists or journalists.

Article libel which is often used to indict perpetrators of defamation is dominated by Article 310 Paragraph (1) of the Criminal Code, then Article 311 Paragraph (1) of the Criminal Code, Article 310 Paragraph (2) of the Criminal Code, and Article 317 of the Criminal Code. Another solution of alignment is decriminalization by doing the change from the criminal realm to the civil domain which is considered more appropriate in the context of human rights and does not burden the parties involved, of course while still upholding proportionality.

D. Closing

The conclusions that can be concluding within these writings are: the Indonesian Government deals with Freedom of Speech within broadcasting is by publishing the Broadcasting Act No. 32/2002 that regulates the content censorships, licensing of the broadcasting activity, and regulate the relationship between broadcasting institutions. Also, the Indonesian government forming the Indonesian Broadcasting Commission as the authority to supervise

the content that is broadcasted on Indonesia television channels.

And the Broadcasting Act provides the space for the press to submit themselves to Journalism Ethics Codes. Singaporean Government also deals with Freedom of Speech within broadcasting by publishing their own Broadcasting Act that is called Singapore Broadcasting Act no. 19 of 2016 that regulating the administration within the broadcasting activity and licensing of the broadcasting institution. And also releasing the statute that is a companion to the Broadcasting Act like POFMA or better known as Fake News Law.

Therefore, for Indonesian government, the authors are agreed that they should done the same by releasing the companion statute for the current Broadcasting Act and renew some sections in the current Broadcasting Act, especially the sections regarding censorship in Indonesia. Therefore, to fight hoaxes and its massive spread in Indonesia, Indonesian government might be considering to compose a Fake News related law like POFMA from Singapore and applied some of its points to this future fake news law product.

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Curriculum Vitae of The Authors

Christian Nugraha

The author is an undergraduate student in Maranatha Christian University. The author is an active student and recently interesting on writing about Freedom of speech right. Author is in his final year at MCU and projecting this journal as final paper in this college.

Dian Narwastuty, S.H., MK.n.

Born in Palembang on the 18th of August, she has been actively teaching international law since becoming an Assistant to Mr. Huala Adolf in 2012 at Maranatha Christian University Bandung. She is interested in participating in research in International Law since becoming a student at the State University in Bandung. International Law has its dance power for her, therefore, she always dedicates her thoughts in the international law class which has been her subject up now.

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THE INTERNATIONAL CRIMINAL COURT AS A VERITABLE TOOL FOR THE PROTECTION OF THE RIGHTS OF ETHNIC MINORITIES: EXAMINING THE ICC'S DECISIONS REGARDING THE PEOPLE OF ROHINGYA

Ikechukwu P. Ugwu
Faculty of Law and Administration
University of Silesia in Katowice, Poland
e-mail: ikechukwu.ugwu@us.edu.pl

ABSTRACT

Notwithstanding obstacles to the power and jurisdiction of the ICC, the judges' posture is that the court is ever ready to protect ethnic minorities against any form of violations. Regarding the situation of the Rohingya people in Myanmar, the Pre-Trial Chamber 1 and III of the ICC held that the ICC could exercise jurisdiction over Myanmar, a non-party State to the Rome Statute, for the deportation of the Rohingya people to Bangladesh. With these decisions, international observers hope for accountability for those responsible for the crimes committed against the Rohingya people. It examines the applicable law and history of discrimination of the Rohingya people using the descriptive method and then examines the jurisprudence behind these rulings using the analytical method. Finally, this article suggests that the Rome Statute should be consistently interpreted by the ICC judges to advance the Rome Statute's intention, especially when ethnic minority groups are involved.

Keywords: International Criminal Court, International Court of Justice, Jurisdiction, Human Rights, Rohingya People.

A. Introduction

Over the years, there have been agitations by ethnic minorities worldwide to protect their rights against violations by different actors like States,[1] multinational corporations,[2] or even other citizens in their various countries.[3] The ethnic minorities face various acts of violations, including the

1 Jernej Letnar Černič, "State Obligations Concerning Indigenous Peoples' Rights to their Ancestral Lands: Lex Imperfecta?", *American University International Law Review* 28 (2013): 1129, 1130. See also Zaka Firma Aditya and Sholahuddin Al-Fatih, "State Liability for Violation of Constitutional Rights Against Indigenous People in Freedom of Religion and Belief", *Brawijaya Law Journal* 4 (2017):29, 29 where the authors recognise that the government of Indonesia are perceived as the main perpetrator of the violation of rights of indigenous peoples.

2 Maxi Lyons, "A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress", *Denver Journal of International Law and Policy* 32 (2004): 701, 701; Emilio C Viano, "The Curse and Theft of Natural Riches: Environmental Crimes and Violations of Indigenous Rights Throughout History Facilitated by Legal and Financial Systems", *International Annals of Criminology* 52 (2014): 93; Sascha Dov Bachmann and Ikechukwu P. Ugwu, "Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?", *Oil and Gas, Natural Resources, and Energy Journal* 6 (2021): 547.

3 See Aileen Moreton-Robinson, "Citizenship, Exclusion and the Denial of Indigenous Sovereign Rights",

forceful takeover of their ancestral lands, denial of the right to a healthy environment due to pollution emanating from mining their natural resources, displacement and deportation, genocide. However, in 2018, there was a decision[4] by the Pre-Trial Chamber I (the PTC I) of the International Criminal Court (the ICC) that the ICC has jurisdiction over the deportation of the Rohingya people, an ethnic minority in Myanmar, from Myanmar to Bangladesh. This decision has again stirred up some of the controversies surrounding the ICC, to wit, the ICC's jurisdiction over States that are not parties to the Rome Statute of the International Criminal Court (the Rome Statute)[5], the effectiveness of the ICC in protecting some of the identified human rights abuses, and most importantly, the ICC as a veritable tool to protecting the rights of ethnic minority groups.

Again, in 2019, the Pre-Trial Chamber III (The PTC III) gave the prosecutor authorization to carry out a full investigation into the situation in Myanmar.[6] These issues are even more important seeing that The Gambia has gone ahead to institute an action against Myanmar at the International Court of Justice (ICJ),[7] and a court in Argentine has accepted a petition to try Myanmar officials under the universal jurisdiction principle in an apparent conviction that the rights of the Rohingya people must be established and protected. Therefore, this article gives a historical background to the Rohingya people's situation, the jurisdiction of the ICC, its legislative history, and the mischief it was set to remedy. The article also reviews the majority decision and the dissenting view of Judge Marc-Perrin de Brichambaut [8] of the PTC I, a summary of the ruling of the PTC III authorizing a full investigation into the crises, and finally, some of the factors that oppose the ICC regarding the protection of the rights of ethnic minority groups. Again, countries are beginning to stand up for the rights of the Rohingya people, like the Gambian case at the ICJ and the Rohingya case in Argentina under the universal jurisdiction, and this is an indication that the world is ready to hold the Myanmar leadership accountable for decades of their persecution of the Rohingya people.

From these decisions, a question that

ABC, 30 May 2017, https://www.abc.net.au/religion/citizenship-exclusion-and-the-denial-of-indigenous-sovereign-rig/10095738 (accessed 28 January 2021). Here, the writer, a professor of Indigenous Studies, pointed out "that the majority of white Australians voted in favour of a referendum that did not give Indigenous people citizenship rights" in the 1967 referendum organised by the Australian government.

4 The International Criminal Court, *Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* 6 September 2018, ICC Pre-Trial Chamber 1-RoC46 (3)-01/18 (herein referred to as the Majority Decision.

5 United Nations General Assembly, *Rome Statute of the International Criminal Court* 17 July 1998, 2187, UNTS 90.

6 The International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 14 November 2019, ICC Pre-Trial Chambers III ICC 01/19 27 (hereinafter referred to as the PTC III Decision).

7 The International Court of Justice, *Application Instituting Proceedings and Request for additional Measures (Republic of The Gambia v Republic of the Union of Myanmar)* 11 November 2019, Press Release 2019/47.

8 The International Criminal Court, *Partially Dissenting Opinion of Judge Marc Perrin De-Brichambaut*, ICC-RoC46(3)-01/18/1, 6 September 2018 (herein referred to as the Dissenting Decision).

this article would answer is whether the ICC is creating a new norm of customary international law where the court can exercise jurisdiction over States that are not party to the Rome Statute? Put differently, is the jurisdiction of the ICC and the Rome Statute now part of customary international law so that States that are not parties to the Rome Statute would be bound by its provisions, especially when ethnic minority groups are involved?

B. Research Method

This article is on two decisions by the Pre-Trial Chamber of the ICC regarding the situation in Myanmar where the members of the Rohingya ethnic minority group were displaced and deported to Bangladesh. First, using the descriptive research method, this article tells the history of the Rohingya people, why they were deported from Myanmar to Bangladesh, and their difficulties in obtaining justice. Again, using the same method, this article traces the history of the ICC and the various resolutions adopted at the Rome Conference in 1998 that finally culminated into the Rome Statute. Second, the analytical research method is employed to look at the Pre-Trial Chamber I and III decisions critically. The merits of the majority decisions in PTC I are analyzed to discover if the judges followed the Rome Statute's intention. The provisions of the Rome Statute are analyzed side-by-side with the decisions of the PTC I and III. Also, the analytical method enables us to discover that the core crimes provided in the Rome Statute and the jurisdiction of the ICC, even though the jurisdiction has been objected to by a small percentage of States, are gradually becoming part of customary international law.

Primary and secondary data sources are used in this article. For instance, international legal instruments, previous decisions of the ICC and other international courts, and national laws serve as the primary source of data. Opinions in textbooks and journal articles of recognized scholars on the ICC and minority groups are the secondary data sources.

C. Discussions

1. Historical Background and the Situation of the Rohingya People

The Rohingya people, an ethnic minority group in Myanmar, were stripped of their citizenship for failing to establish that their forefathers inhabited Burma before 1823,[9] making them one of the seven stateless populations of the world.[10] The stance of Myanmar, a non-party State to the Rome Statute, is that the Rohingya people are nationals of Bangladesh, but because of the British partitioning, they found themselves in Myanmar.[11] Myanmar's stance is despite evidence that shows that the Rohingya

9 See Burma Citizenship Law [], MMR-130, 15 October 1982.

10 Syed Mahmood et. al., 'The Rohingya people of Myanmar: health, human rights, and identity' *The-Lancet* 389 (2017): 1841.

11 The Economist, "Myanmar's Rohingyas: No help, please, we're Buddhists", The Economist, 20 October 2012, https://www.economist.com/asia/2012/10/20/no-help-please-were-buddhists (accessed 13 April 2019).

people have been in Myanmar since 1799.[12] The Myanmar government has gone ahead to classify them as "illegal immigrants from Bangladesh".[13] Being stateless implied that they would not be allowed to work at the civil service jobs, they were denied state education, and their freedom of movement was restricted.[14] Their situation is only comparable to the apartheid regime in South Africa,[15] the Rohingya people were in 2013 described as the most persecuted group of people in the world by the United Nations.[16]

The immediate cause for which the ICC Prosecutor initiated a case was killing the Rohingya people in August 2017 as a response by Myanmar's military to an attack on a police post.[17] Because of the "clearance-operation" launched by the military, many of the Rohingya people fled the country to Bangladesh. Many people were killed while fleeing. Within weeks, among the one million Rohingya people in Myanmar, around 700,000 were already taking refuge in Bangladesh.[18] From August to November 2017, reporters alleged that the Burmese Military (Myanmar was officially known as Burma) had killed, raped, detained arbitrarily, and committed arson against the Rohingyas.[19] Landmines were laid by the military, which killed many when they attempted crossing the border between Myanmar and Bangladesh.[20] In an attempt to conceal evidence of international crimes, especially crimes against humanity, Myanmar's authorities allegedly bulldozed graves of murdered Rohingya people.[21]

It has been recognized that the long persecution and prosecution of the Rohingya in Myanmar reveals the shortcomings of current international attempts to thwart abuses of human rights and the need for systemic solutions to address gaps in moral and political ideology.[22] Nevertheless, the

12 Nicholas Kristof, "Myanmar's Appalling Apartheid", New York Times, 28 May 2014, https://www.nytimes.com/2014/05/29/opinion/kristof-myanmars-appallingapartheid.html (accessed 28 January 2021).

13 Mikael Gravers, *Exploring Ethnic Diversity in Burma* (Copenhagen: NIAS Press, 2007) x.

14 Human Rights Watch, "Burma/Bangladesh Burmese Refugees in Bangladesh: Still no Durable Solution", *Human Rights Watch*, 12, No 3 (C) (2000), https://www.hrw.org/reports/2000/burma/index.htm (accessed 19 May 2020).

15 Azeem Ibrahim, "War of Words: What's in the Name "Rohingya"?" *Yale Global Online* (2020) https://yaleglobal.yale.edu/content/war-words-whats-name-rohingya (accessed 16 May, 2020).

16 Lennart Hofman, "Meet the most persecuted people in the world", The Correspondent, 25 February 2016, https://thecorrespondent.com/4087/meet-the-most-persecuted-people-in-the-world/293299468-71e6cf33 (accessed 19 May 2020).

17 Rajika Shah, "Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis", *Loyola of Los Angeles International and Comparative Law Review* 41 (2018): 181.

18 *ibid*, 182.

19 *ibid*.

20 See Zeid Ra'ad Al Hussein, "High Commissioner for Human Rights, U.N. Human Rights Council", (Opening Statement before 36th Session 11 September 2017), cited in Shah (n 17).

21 Shah (n 17) 182; Stephanie Nebehay and Simon Lewis, "Acts of genocide" suspected against Rohingya in Myanmar – UN", Reuters, 7 March 2018 https://www.reuters.com/article/us-myanmar-rohingya-rights/acts-of-genocide-suspected-against-rohingya-in-myanmar-u-n-idUSKCN1GJ163 (accessed 19 May 2020).

22 Carlos E Gomez, "The International Criminal Court's Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights" *California Western International Law Journal* 50 (2020):177, 179.

ICC Prosecutor seized this opportunity to test the ICC's continued relevance by filing a Request on 9 April 2018 titled "Request for a Ruling on Jurisdiction under Article 19(3) of the Statute."[23] On 6 September 2018, in what could be described as judicial activism by the ICC judges, the PTC I delivered its decision accepting jurisdiction over the deportation of the Rohingyas.[24] Again, in July 2019, the PTC II confirmed the PTC I's ruling that the ICC can exercise jurisdiction over Myanmar, a non-party to the Rome Statute, and consequently authorized the ICC Prosecutor to initiate investigations into the situation of the Rohingya people in Myanmar. To further show that the world is not oblivious of the happenings in Myanmar, the ICJ, in January 2020, gave provisional measures by ordering the authorities in the country to stop killing and carrying out other discriminatory acts against the Rohingya people. This article is based on the PTC I and III decisions while referring to the ICJ's provisional measures rulings. However, before analyzing these decisions, we would first look at the jurisdiction, the legislative history, and the mischief the ICC was set to remedy.

2. Jurisdiction, Legislative history, and the mischief prior to the ICC.

The ICC's substantive jurisdiction is restricted to the most severe offenses of concern to the international community. These crimes are war crimes, the crime of aggression, crimes against humanity, and genocide.[25] They are the so-called core crimes, and they constitute a violation of "*jus cogens*[26] norms of international law, giving rise to so-called erga omnes (State) responsibility to either prosecute or extradite."[27] The debate on the ICC's territorial jurisdiction was heated, unlike its substantive jurisdiction during the Rome Conference of 1998 (the Rome Conference).[28] Many representatives of States at the Rome Conference, it should be remembered, had proposed that the ICC be given universal jurisdiction over the four core crimes so that it can prosecute any international crime regardless of whether it was committed on the territory of or by a citizen of a State Party.[29] States like India, China, and the USA that opposed the idea of the conferment of universal jurisdiction on the ICC feared for their sovereignty, and they envisaged a possibility of them being unable to protect their citizens; they instead favored a "weak and more symbolic court"

23 The International Criminal Court, *Prosecution's Request for a Ruling on Jurisdiction under Article* 19(3) of the Statute, ICC RoC46(3)-01/18-1, 9 April 2018.
24 The Majority Decision (n 4) para 73.
25 The Rome Statute (n 5) art 5.
26 John F Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" *Harvard Human Rights Journal* 12 (1999): 1, 6, 9.
27 Sascha Dominik Dov Bachmann and Eda Luke Nwibo, "Pull and Push – Implementing the Complementarity Principle of the Rome Statute of the ICC within the African Union: Opportunities and Challenges" *Brooklyn Journal of International Law* 2 (2018): 457, 462.
28 Kevin Jon-Heller, "The Rome Statute in Comparative Perspective" in Kevin Jon Heller and Markus Dirk Dubber, (eds), *The Handbook of Comparative Criminal Law* (California: Stanford University Press 2010) 593.
29 *ibid*; Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (England: 3rd ed, Oxford Press 2014) 20.

that should only be activated by the United Nations Security Council when there is a crisis.[30]

Generally, for the ICC to have jurisdiction over persons and territories, one of the following preconditions must be present, 1) the core crimes have been committed by a citizen of a State Party to the Rome Statute, regardless of where they committed the crime;[31] and for States not being parties to the Statute 2) if such a State accepts ICC jurisdiction on an *ad-hoc* basis;[32] and 3) where the United Nations Security Council (the Security Council) refers a matter to the ICC[33] under Chapter VII of the United Nations Charter.[34] Referral by the Security Council would mean that in the case of a non-party State, the jurisdiction of the ICC will remain dormant until triggered by a referral.[35] In other words, the ICC jurisdiction remains inactive until a state party makes a referral or the Security Council and/or the ICC Prosecutor makes an initiation in line with article 15.[36] The initiation must be concerning crimes committed 'within the jurisdiction of the Court.'[37] As seen already, the territorial jurisdiction is limited to state parties or States not being a party by special agreement.[38]

Before the Rome Statute, sources of international criminal law were fragmented, starting from the Versailles Treaty, the establishment of the Nuremberg and Tokyo Tribunals, the constitution of the International Criminal Tribunal for the former Yugoslavia, the making of the International Criminal Tribunal for Rwanda, and finally the Rome Conference of 1998 that gave birth to the Rome Statute. It was an attempt at bringing together all these sources, together with existing customary international law, to have one codified source of international criminal law.[39] During the Rome Conference, States like Germany and South Korea failed to convince the United Nations General Assembly on the need to confer universal jurisdiction on the ICC, i.e. power to exercise jurisdiction over any state whether or not such state has ratified the Rome Statute.[40] A writer had argued elsewhere that the enthusiasm that greeted the Rome Statute's ratification would have been affected if they had succeeded.[41]

30 *ibid*, 19 – 20.
31 The Rome Statute (n 5) art 12(2)(b).
32 *ibid*, art 12(3).
33 *ibid* art 13(b).
34 UN, *Charter of the United Nations*, 24-October-1945, 1 UNTS XVI.
35 Sascha and Luke (n 27) 480.
36 The Rome Statute (n 5) art 13.
37 ibid, art 15(1).
38 ibid, art 4(2).
39 ibid, Preamble, para 9; Carsten Stahn and Larissa Herik "Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?" in Larissa Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (The Netherlands: vol 1, Koninklijke Brill nv., 2012) 22.
40 Cedric Ryngaert "The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?" *New Criminal Law Review: An International and Interdisciplinary Journal* 12 (2009): 498, 500.
41 William Schabas, *An Introduction to the International Criminal Court* (England: 5th edn, Cambridge-Press

The mischief/defect the Rome Statute remedied was, therefore, the lack of a single source of international criminal law for the prosecution of persons who commit crimes that 'deeply shock the conscience of humanity,'[42] 'reveal the vanity of man and wickedness of the human heart'[43] and 'threaten the peace and security of the world'.[44] The remedy is more so seeing that the 'horrors of the Second World War'[45] did not prevent a repeat of such heinous crimes. Because of the reason for the establishment of the ICC, we will argue later that the legislative history of the Rome Statute should not have more weight and indeed should not be preferred over the mischief rule whenever the Rome Statute is to be interpreted and applied. This preference is because relying on the legislative history, rather than the defect for which the Rome Statute was set to correct, would still lead to the international community's inability to prosecute acts that "deeply shock the conscience of humanity".

3. The Majority and Dissenting Decisions of the Pre-Trial Chamber I

The preceding part looked at the ICC jurisdiction and how, during the Rome Conference, the participants rejected the idea of universal jurisdiction for the ICC. We shall now consider the PTC I's majority decision to discover whether the court followed sound international jurisprudence or not.

The ICC Prosecutor's request was for the ICC to determine if it can exercise its jurisdiction over the forcible deportation, a constitutive element of the crime against humanity,[46] against the Rohingya people. The majority decision by Judges Peter Kovacs and Reine Adélaïde Sophie Alapini-Gansou is that the ICC has jurisdiction over the expulsion from Myanmar to Bangladesh of members of the Rohingya people[47] despite Myanmar not being a state party to the Rome Statute. Judge Marc Perrin de Brichambaut dissented on the ground that a Request to rule on jurisdiction is premature at this stage until the Prosecutor must have done 'preliminary investigation and subsequently seeking authorization to commence an investigation according to article 15 (3)'.[48]

a. Areas of Novelty

1). Article 19(3) of the Rome Statute – Compétence-de-la-Compétence

The power of courts to rule on their jurisdiction is referred to as ***Kompetenz-Kompetenz*** or the *Compétence-de-la-*

2017) 66.

42 Marion Beckerink, "Justice Jackson Delivers Opening Statement at Nuremberg November 21, 1945", Robert H Jackson Centre, 8 January 2016 https://www.roberthjackson.org/article/justice-jackson-delivers-opening-statement-at-nuremberg-november-21-1945/ (accessed 15 April 2020).

43 Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction* (Enugu: Catholic Institute for Development Justice and Peace, 1999) 35 cited in Sascha and Luke (n 27) 461.

44 Sascha and Luke (n 27) 461.

45 Kofi Annan, "Address to the International Bar Association in New York", (UN-Press-Release SG/SM/6257, 12 June 1997) https://www.un.org/press/en/1997/19970612.sgsm6257.html (accessed 15 April 2020).

46 The Rome Statute (n 5) art 7 (1) (d).

47 The Majority Decision (n 4) para 73.

48 The Dissenting Decision (n 8) para 40.

Compétence principle.[49] Relying on the ICJ's judgment in *Liechtenstein v Guatemala*, the PTC I ruled on this concept thus: "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."[50] The ICC has exercised this power[51] concerning article 19(3) of the Rome Statute. Article 19(1) provides that the Court shall satisfy itself that it has jurisdiction in any *case* brought before it and, in any case, where the jurisdiction of the court is in question, the Prosecutor may seek the Court to determine whether it has jurisdiction or not.[52] It is a court's inherent power.[53]

There is a controversy as to what stage a court can determine whether it has jurisdiction, whether this power arises after the Court is seised of an issue or whether the Court can go into determining its jurisdiction without having a case before it.[54] In his dissent, Judge Marc Perrin de Brichambaut thought that raising and relying on this doctrine at the pre-preliminary stage would amount to the ICC 'exceeding and transgressing its mandate'[55] because there was no "proper case or dispute" before the court. He held that giving "a contextual interpretation of Article 19(3)" of the Rome Statute would reveal that the "scope of the application suggests that this article [19] applies only once a case has been defined by a warrant of arrest or a summons to appear according to article 58 of the [Rome] Statute."[56] Judge Marc Perrin de Brichambaut's opinion should not be preferred because even article 119 (1) of the Rome Statute provides that "[a]ny *dispute* concerning the judicial functions of the Court shall be settled by the decision of the Court". Although article 119 is headed 'Final Clauses', we agree with the majority view that article 119(1) also includes questions "related to the [ICC's] jurisdiction.[57] Judge Marc Perrin de Brichambaut's argument that

49 International Court of Justice, *Nottebohm case (Liechtenstein v Guatemala)* (Preliminary Objections) (Judgment) 18-November-1953, [1953] ICJ Rep111, 119.

50 *ibid*; The Majority Decision (n 4) para 30.

51 *Prosecutor v Jean-Pierre Bemba Gombo* (Pre-Trial Chamber III Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-14-tENG (10-June-2008) [11]; Pre-Trial Chamber II, *Situation in Uganda, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission* Filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, paras 22-23.

52 The Rome Statute (n 5) art 19 (3).

53 *Prosecutor v Duško Tadić,* (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) [18-19].

54 See Ibrahim Shihata, *The Power of The International Court to Determine its own Jurisdiction: Competence de la Competence* (Leiden: Martinus Nijhoff 1965) cited in Boisson Laurence, 'The Principle of Compétence-de-la-Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals' in Arsanjani, Cogan and S Weissner, *Looking to the Future: Essays in Honor of W Michael-Reisman*, (Leiden: Martinus Nijhoff, 2010): 1027, 1039; *Northern Cameroons* (Cameroon v UK), Preliminary Objections, [1963] ICJ 15, 102 (separate opinion of Judge Fitzmaurice).

55 The Dissenting Decision (n 8) para 30.

56 *ibid*, para 10.

57 The Majority Decision (n 4) para 28; Roger S Clark, "Article 119: Settlement of disputes", in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd ed Kooperationswerke Beck - Hart – Nomos 2016) 2276.

since article 119 was not mentioned in the Request, it should not be relied upon by the PTC can be countered on the ground that whenever a court is interpreting a statute, the court must make a wholistic interpretation of that statute. All the articles of the statute must be read as a whole to find the intention of the draftsmen.[58]

Historically, article 119 elicited some commentaries. Since the International Law Commission has the practice of not drafting the final provisions of any article, it merely suggested that the ICC should have the power to "determine its own jurisdiction" and would have to deal with any issue that may arise with regards to the interpretation and application of the statute.[59]The final draft report of the Preparatory Committee contained Four Options in Article 108 on how disputes should be settled: Option 1) *disputes* should be settled by the decision of the Court; Option 2) *disputes* on the interpretation or application of the Statute which is not resolved through negotiations should be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute; Option 3) the decision of the Court shall settle *disputes* concerning the judicial functions of the Court; and Option 4) no provision on dispute settlement.[60] These Options capture the three opposing parties to the settlement of disputes by the Court at the Rome Conference. First, delegations that wanted the Court to handle all disputes relating to the functioning of its power.[61] Second, delegations that wanted the settlement of inter-state disputes to be under Article 33 of the UN Charter by allowing States to choose means of peaceful resolution.[62] and finally, those that wanted inter-state disputes to be referred to the ICJ.[63] Consequently, article 119 is a compromise to contain all the above Options and views.[64] While article 119(1) relates to the power of the ICC to settle *any dispute* concerning the *judicial functions* of the Court itself, article 119(2) is to the effect that where any dispute relating to the interpretation and application of any clause of the Statute between two or more States that has failed to be settled through negotiations within three months, shall be referred to the Assembly of States Parties. The Assembly of States Parties may seek

58 See the following English cases, *Attorney-General v Prince Ernest Augustus of Hanover* (1957) AC 436, 461, 473; *Maunsell v Olins* (1975) AC 373, 386; *Black-Clawson Ltd v Papierwerke AG* [1975] UKHL 2; (1975) AC 591, 613.

59 International Law Commission, *Yearbook of the International Law Commission,* Vol II, Part Two, A/CN.4/SER.A/1994/Add.l (Part 2) 1994): 70.

60 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, Italy 15 June - 17 July 1998, A/CONF.183/2).

61 Roger S Clark, "Article 119" in Otto Triffterer and K Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (London: Hart Publishing, 1999) 1241.

62 *ibid*.

63 *ibid*, Timothy O'Neill, "Dispute Settlement under the Rome Statute of the International Criminal Court: Article 119 and the Possible Role of the International Court of Justice" *Chinese Journal of International Law* 5 (2006): 67, 69.

64 Mark Klamberg, *Commentary on the Law of the International Criminal Court* (Brussels: TorkelOpsahl Academic EPublisher, 2017) 739.

further settlement or refer the dispute to the ICJ.

Article 119(1) is of more importance to this article. According to Timothy O'Neill, there are two limitations to the ICC's competence regarding this provision – there must be a "dispute" and the dispute must relate to "the judicial function" of the ICC.[65] As the ICJ has held, a dispute exists "where there is a disagreement on the point of law or fact, a conflict of legal views or interest between *parties*"[66] and "it must be shown that the claim of one party is positively opposed by the other".[67] Although Myanmar vehemently refused to engage with the Court in any formal reply, perhaps because Myanmar has consistently made it known that they are not a party to the Rome Statute.[68] Their refusal to engage the Court should not be interpreted as no case or dispute or positive opposition between the ICC Prosecutor and the Republic of Myanmar. Rather the ICC Prosecutor's Request should be seen as merely asking the Court to rule on its jurisdiction. Again, an authorization request to commence an investigation under article 15 is based on a "reasonable basis". A reasonable basis is arrived at after the Prosecutor has determined 1) the seriousness of the allegation; 2) whether the ICC has material or territorial jurisdiction; 3) admissibility issues and the interest of justice to be served by commencing such trial.[69] So, the Prosecutor merely wanted to be sure that the ICC has jurisdiction before seeking authorization.

2) International Legal Personality (ILP) of the ICC

In what could be judicial activism, the PTC I established the ICC as having an international legal personality, even though the argument for it was not advance by the ICC Prosecutor.[70] By doing so, the PTC I successfully navigated through the complex request of the ICC Prosecutor. The ICC's international legal personality would mean that the ICC has been "clothed it with the competence" required to enable it [to] perform its functions effectively.[71] The reasoning that the ICC has been conferred the status of international legal personality, and by implication, jurisdiction over all countries because 'over 120 States have ratified the […] Statute',[72] has a far-reaching effect in international criminal law. In justifying its decision, the PTC 1 has this to say:

"…it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international

65 O'Neill (n 63) 69.
66 *East Timor (Portugal v Australia)*, Judgment [1995] ICJ Rep at 90.
67 *South West Africa, (Ethiopia v South Africa, Liberia v South Africa)*, ICJ Reports (21 December 1962), 328.
68 Notice of the Public Statement Issued by the Government of Myanmar, ICC-RoC 46 (3)-01/18-36 (2018) para 1.
69 ICC, *Policy Paper on Preliminary Examinations*, ICC-OTP 2013, 1<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 17 April 2020.
70 The Majority Decision (n 4) paras 34 – 49.
71 International Court of Justice, *Reparation for Injuries Suffered in the Service of the UN* [1949] I.CJ. Rep. 174. (Reparations Case) [178].
72 *ibid*, para 48.

community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions".[73]

In 2001, before the Rome Statute entered into force, Scharf had opined that the ICC's universal jurisdiction does not give it the power to prosecute States not parties to the Rome Statute without referral by the Security Council.[74] It would seem that the conferment of international legal personality on the ICC does not mean that it has universal jurisdiction. If the ICC had such jurisdiction, then there would have been no need for countries to sign up to the Statute as its jurisdiction, in any case, would bind them. The provision that consents of a non-party State be obtained or that the Security Council should refer a case involving States not being parties to the ICC,[75] shows that the drafters of the Statute never intended it to have universal jurisdiction[76] as it would present some difficulties,[77] including States pulling out or refusing to ratify the Statute. This fact was also recognized by the PTC I when it decided to limit the Prosecutor's investigatory power to deportation only. In this way, an element of deportation, border crossing, happened on the territory of Bangladesh, a state party to the Rome Statute.

It is important to note that the initial thought regarding the obligation of States that are not parties to the Rome Statute is only to assist.[78] While recognizing the importance of the principle of *pacta tertiis nec nocent nec prosunt* – "a treaty does not create either obligations or rights for third parties without their consent"[79] – reiterated in article 34 of the Vienna Convention on the Law of Treaties,[80] the PTC I held that there are exceptions to it.[81] These exceptions include rules recognized by nations as customary international law rules[82] and peremptory norms of international law (*jus cogens*).[83] The PTC I brings the ICC into a relationship with the UN, whose Security

73 The Majority Decision (n 4) paras 48.
74 Michael Scharf, "The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position" *Scholarly Commons* 64 (2001): 67, 76.
75 The Rome Statute (n 5) art 13.
76 David Scheffer, "International Criminal Court: The Challenge of Jurisdiction" (address at the Annual Meeting of the American Society of International Law, 26 March 1999) http://www.iccnow.org/documents/DavidSchefferAddressOnICC.pdf (accessed 17 April 2020).
77 Madeline Morris, "The Jurisdiction of the International Criminal Court over Nationals of Non-Party States" *ILSA Journal of International and Comparative Law* 6 (2000): 363, 365.
78 The Rome Statute (n 5) art 87 (5); Gennady M. Danilenko, "The Statute of the International Criminal Court and Third States" *Michigan Journal of International Law* 21 (2000): 445, 447.
79 *ibid*, art 34.
80 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155, UNTS, 331.
81 The Majority Decision (n 4) para 36.
82 Vienna Convention (n 80) art 38.
83 The Majority Decision (n 4) para 36.

Council can refer a case against a non-party State to the Rome Statute.[84] This means that the "objective legal personality of the UN assists the ICC to act accordingly."[85]The consequence of this decision is that the Rome Statute regarding its relationship with third parties, that is, States not being parties to it, is no longer that of *res inter alios acta,*[86] but those States are bound to cooperate.[87]

3) Elements of Deportation

To expand its jurisdiction to protect the rights of ethnic minority groups, the PTC I held that since an element of deportation, that is crossing the border, occurred in a State-Party's territory, the ICC has jurisdiction.[88] The PTC I held that "the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, *inter alia*, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is on the territory of a State Party".[89] The PTC I arrived at this after analyzing article 12(2)(a), which provides that where conduct has taken place in a state-party, the ICC will be vested with jurisdiction because there is no contemplation regarding the destination of those deported. Whether those deported were taken to a no man's land provided an element of it, that is, the crossing of a border, took place in a state party to the Rome Statute, the ICC would exercise its jurisdiction.

The PTC I decision also confirmed that article 7(1)(d) of the Rome Statute contemplates two distinct offenses, as confirmed by the Elements of Crimes[90] - "deportation and forcible transfer" because of the use of "or" in article 7 (1)(d). The said article provides that "crime against humanity means… [d]eportation or forcible transfer of population".[91] Therefore, in this reasoning, a "forceful transfer" entails the displacement of a group within a state's borders. At the same time, deportation involves the displacement of persons lawfully residing in a country to another country.[92]

In support of this argument is article 12 (2)(a) that provides that the ICC may exercise its jurisdiction if "… [t]he State on the territory of which the conduct in question occurred" is a State party to the Rome Statute.[93] International law allows a state to exercise jurisdiction over a criminal act if an element of that crime occurred in its territory.[94] This decision is significant on two grounds:

84 *ibid*, para 43.
85 *ibid*.
86 Latin for "a thing done between others does not harm or benefit others".
87 *ibid*, para 43.
88 The Majority Decision (n 4) para 71-72.
89 *ibid*, para 71.
90 International Criminal Court, "Elements of crimes", https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (accessed 13 April 2020).
91 The Majority Decision (n 4) para 54.
92 *ibid*, para 55.
93 *ibid*, para 62.
94 Cedric Ryngaert, "Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law" *International Criminal Law Review* 9 (2009): 187, 187.

1) the broadens the ICC's jurisdiction over States that have refused to become parties to the Rome, and 2) the "reasoning could be applied to other crimes within the Court's jurisdiction, such as persecution and []other inhumane acts[] committed in connection with deportation, even though those crimes would not necessarily occur on the territory of more than one state."[95]

Gomez has argued that the PTC I's broad interpretation of the jurisdiction of the ICC "may not have been the best approach",[96] and he goes ahead to recommend that the PTC should have followed the alternative of "propos[ing] an amendment to the Rome Statute."[97] He argues that such amendment should be made to article 12(2)(a), which provides that the ICC can exercise jurisdiction to investigate crimes over "[t]he State on the territory of which the conduct in question occurred"[98] to now read that the ICC has jurisdiction over "[t]he State on the territory of which the entirety or part of the conduct in question occurred."[99]

Gomez's proposition would not have served the justice required by the Rohingya people because at the heart of international criminal law is the principle of *nullum crimen, nulla poena sine lege* with its core element rule of non-retroactivity,[100] and amending the Rome Statute after the events in Rohingya had taken place, would make the case to be caught up by the non-retroactivity principle. The Rome Statute even forbids the retroactive application of the Statute. In other words, [a] person shall not be criminally responsible under [the Rome Statute] unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the [ICC],"[101] and "[n]o person shall be criminally responsible under this Statute for conduct before the entry into force of the [Rome] Statute".[102]

95 Sarah Freuden, "Introductory Note to Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (Int'l Crim. Ct.)" *International Legal Materials* 58 (2019): 120, 121.

96 Gomez (n 22) 26 – 27.

97 *Ibid*, 27.

98 The Rome Statute (n 5) art 12(2)(a).

99 Gomez (n 22) 27.

100 Valentina Spiga, "Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga", *Journal of International Criminal Justice* 9 (2011): 5 – 23; Yudan Tan, "The Identification of Customary Rules in International Criminal Law", *Utrecht Journal of International and European Law* 34 (2018): 92, 110; Talita de Souza Dias, "The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem", *Journal of International Criminal Justice* 16 (2018): 65; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2010): 3, 8 – 9.

101 The Rome Statute (n 5) art 22(1).

102 ibid, art 24(1). Some authors have identified possibilities where the Rome Statute can be applied retroactively – 1) where there is a violation of customary international law (see Bruce Broomhall, "Article 22" in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* – Observers' Notes, Article by Article (Leiden: 2nd edn, Beck/Hart 2008) 713, 720; The Prosecutor v Omar Al Bashir (Decision on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I) ICC-02/05-01/09-139 (12 December 2011) (Al Bashir Malawi Cooperation Decision)), 2) where the Security Council referred a non-party State to the Rome Statute to the ICC (see Souza Dias (n 100) 66 – 67; art 13 (b) of the Rome Statute), and finally, 3) "where when a situation originates from an ad hoc declaration under Article 12(3), i.e. a declaration

The Prosecutor in 2019 initiated a series of processes for authorization to commence an investigation into the whole scenario. As a result, the authorization was granted to her in the decision of the Pre-Trial Chamber III.

4. The Pre-Trial Chamber III Decision

On the 4th of July 2019, the Prosecutor requested the Chamber for authorization to commence an investigation into the situation in Bangladesh/Myanmar from 9 October 2016 and continuing.[103] The Prosecutor must make this Request, accompanied by relevant materials, for the commencement of investigation into any situation if the Prosecutor concludes that there is a reasonable basis for an investigation.[104] After this request has been made, "[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, *without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case*."[105] At a closer look at the emphasized phrase, it would appear that even after the Pre-Trial Chamber has authorized the commencement of investigation and had determined its jurisdiction, the ICC is not precluded, during the trial, to revisit the issue of jurisdiction. In order words, the ICC can still conclude that it does not have the jurisdiction to entertain a case already investigated.

During the PTC III, the victims were represented, wherein their views and concerns were collected as per article 68 (3) of the Rome Statute. Three hundred thirty-nine representations in English were received (311 representations were submitted in written form, and 28 were put forward in video format).[106] These representations were either from families or those living in the same refugee camp, and multiple other representations from individuals were also made.[107] The victims' representation presented gory abuses of human rights perpetrated against the Rohingya, including indiscriminate shootings of villagers, especially targeting children, and some of them were thrown into water or fire to die.[108] Many women were gang-raped, and their sexual organs mutilated,[109] homes and schools belonging to the Rohingya people were burnt, and some of their valuables were taken away.[110] All of these, the victim representations claimed, were done

by which a state (party or not) grants the Court jurisdiction over a situation that took place when such state had not accepted the application of the Rome Statute" (see Souza Dias (n 100) 67.

103 *Request for authorisation of an investigation pursuant to article* 15, ICC-01/19-7 and 10 annexes (hereinafter referred to as the Investigation Request).

104 The Rome Statute (n 5) art 15 (3).

105 ibid, art 15 (4). Emphasis added.

106 The PTC III Decision (n 6) para 20.

107 ibid, para 22.

108 ibid, para 29.

109 ibid, para 31.

110 ibid, para 32.

because they were Rohingya and Muslims,[111] and these forced them to flee Myanmar to Bangladesh and other countries.[112]

Based on the victim representation, the PTC III determined that authorizing an investigation would be in the interest of justice and that the case passed the admissibility test. The PTC III also decided that the case falls within the jurisdiction of the ICC. While agreeing with the PTC I on ICC jurisdiction, it held that "[f]or the reasons given below, the Chamber agrees with the conclusion of Pre-Trial Chamber I that the Court may exercise jurisdiction over crimes when *part of the criminal conduct takes place on the territory of a State Party*."[113]

a. Types of jurisdictions

The PTC III decision was extensive in its discussion of jurisdiction and "conduct" that constitutes a crime. Four components of jurisdiction must be considered while determining whether a court has jurisdiction or not – jurisdiction *ratione materiae*, jurisdiction *ratione temporis*, jurisdiction *ratione loci*, and jurisdiction *ratione personae*. These components will be discussed below and how the PTC III justified them to arrive at the fact that the ICC has jurisdiction over Myanmar.

1) Jurisdiction *ratione materiae* and jurisdiction *ratione temporis*

Jurisdiction *ratione materiae* also known as subject matter jurisdiction, implies that a court has jurisdiction to adjudicate only on those cases "that raise those factual and legal questions which the constitutive instruments have defined and/or that one or more of the parties have agreed to refer to adjudication."[114] For the ICC, its jurisdiction *ratione materiae* is limited to those core crimes mentioned in article 5 of the Rome Statute. In the case of Myanmar, the atrocities committed against the Rohingya are covered under the Rome Statute as the victim representations indicated.[115]

An international court's jurisdiction may also be time-bound; that is to say, a court cannot adjudicate a case until the statute establishing the subject matter comes into force. It "denotes the effect of the passage of time on obligations or a tribunal's power to decide a dispute"[116] and that treaties should not be applied retroactively.[117] This is called jurisdiction *ratione temporis*. Article 11 (1) of the Rome Statute provides that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute", and for a state that becomes a party to the Rome Statute after

111 ibid, para 33.
112 ibid, para 28.
113 ibid, para 43. Emphasis added.
114 Yuval Shany, "Jurisdiction and Admissibility", in Cesare P R Romano, Karen J Alter, and Chrisanthi Avgerou (eds), *Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013): 788; Alexander Proelss, "The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunal" *Hitotsubashi Journal of Law and Politics* 46 (2018): 47, 48.
115 The PTC III Decision (n 6) paras 26 – 33.
116 Barton Legum, Obioma Ofoego, and Catherine Gilfedder, "Ratione Temporis or Temporal Scope" in Barton Legum (ed), *The Investment Treaty Arbitration Review* (London: 4th ed Law Business Research Ltd 2019): 26.
117 ibid, 27.

the entry into force of the Statute, the ICC can only exercise jurisdiction "with respect to crimes committed after the entry into force of this Statute for that State".[118] The Rome Statute came into force on 1st July 2002, and although the alleged crimes committed by Myanmar took place after the entry into force of the Statute, Myanmar is not yet a party to the Rome Statute. The PTC III interpreted the four elements of the *chapeau* to article 7 – "attack", "civilian population", "policy", and "widespread and systematic" – in the context of the Rohingya people.[119] It concluded that "there exists a reasonable basis to believe that… security forces and with some participation of local civilians, may have committed coercive acts that could qualify as the crimes against humanity of deportation [under] article 7(1)(d) of the Statute…."[120]

2) Jurisdiction *ratione personae*

Under jurisdiction *ratione personae,* a court is limited to try a specific type of persons. The ICC is to "have the power to exercise its jurisdiction over persons for the most serious crimes of international concern,"[121] and these persons must be nationals of a state party to the Rome Statute,[122] or a non-party State by special arrangement or declaration.[123] Organizations, States, multinational corporations, and other legal personalities are excluded from the ICC jurisdiction.[124] Michael Scharf, while arguing on the universal nature of the Article 5 crimes, stated that the universality of those crimes does not "imply that the ICC may exercise universal jurisdiction in the sense that it is empowered to prosecute non-party nationals without a referral by the Security Council or the consent of the state in which the crime was committed".[125] In extending its *ratione personae* jurisdiction, the PTC III authorized the ICC Prosecutor to "investigate alleged crimes … irrespective of the nationality of the perpetrators."[126] In other words, the ICC Prosecutor was authorized to investigate Myanmar officials who are most responsible for the crimes committed against the Rohingya people since an element of the crime of deportation took place in the borders of a state party to the Rome Statute.

It has been noted elsewhere that prosecutions at the ICC have all been based on territoriality rather than the accused person's nationality.[127] The ICC Prosecutor had investigated but dismissed the prospect of nationality-based cases instead of territorial claims in 2003. In his first report on communications submitted according

118 The Rome Statute (n 5) art 11 (2).
119 The PTC III (n 6) paras 63 – 91.
120 ibid, para 110.
121 The Rome Statute (n 5) art 1.
122 ibid, art 12 (2)(b).
123 ibid, art 12 (3).
124 Ibid, art 25 (2).
125 Scharf (n 74) 76.
126 The PTC III (n 6) para 125.
127 Felix E Eboibi, "Jurisdiction of The International Criminal Court: Analysis, Loopholes and Challenges" *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 3 (2012): 28, 34.

to Article 15 of the Rome Statute, the Prosecutor stated that several allegations of acts perpetrated by coalition forces' nationals during the 2003 invasion of Iraq had been made.[128] In his second report in February 2006, particularly in the statement on Iraq-related prosecutions, he pursued that in greater depth. There he indicated that inquiries had been made regarding United Kingdom nationals about the acts perpetrated on Iraq's territory, a non-state party.[129] He stated further that "in accordance with Article 12, acts on the territory of a non-party state fall within the jurisdiction of the Court only when the person accused of the crime is a national of a State that has accepted jurisdiction (Article 12(2)(b))."[130] Because Iraq and some of the coalition forces were not parties to the Rome Statute, the Prosecutor then concluded that the ICC "do[es] not have jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq."[131] Even though there were alleged connections with States parties, the Prosecutor opined that those connections were not enough to establish territorial jurisdiction.[132] The position of the ICC Prosecutor in 2006 appears to have been discarded by the PTC III decision because now, nationals of Myanmar (a non-State party) who committed crimes against the Rohingya people at the borders of Bangladesh (a State party) would be investigated.

3) Jurisdiction ratione loci

This is the most important in this ruling by the PTC III because of its interpretation of "conduct" and "crime" as used in article 12 (2) (a). Jurisdiction *ratione loci* is the power of a court to prosecute crimes committed within its locality or territory. The "territorial theory" represents the acceptance of the global community that a State does not exist without the right to regulate actions or events occurring within its territory.[133] As earlier indicated, this principle is embodied in article 12 (2) of the Rome Statute, and it states that:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) *The State on the territory of which the conduct in question occurred* or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

This method adopted in the Rome Statute

128 Office of the Prosecutor, *Communications Received by the Office of the Prosecutor of the ICC*, No.: pids.009.2003-EN (16 July 2003) 2; See also ibid, 34.

129 Office of the Prosecutor, "Thank you for your communication concerning the situation in Iraq 9 February 2006" https://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed 4 June 2020).

130 ibid.

131 ibid.

132 ibid.

133 Thomas Buergenthal and Sean D Murphy, *Public International Law in a Nutshell* (Minnesota: West Academic Publishing, 6th ed, 2007) 205.

ensures that the ICC would exercise its jurisdiction once one of the core crimes has been committed in a State Party's territory regardless of the offender's nationality.[134] Agreeing on the ICC's territorial jurisdiction during the Rome Conference was very contentious as territoriality primarily is the hallmark of a state's sovereignty and States do not find it easy to waive their sovereignty. One thing was common no matter the different proposals submitted by States during the Rome Conference: that to exercise jurisdiction in a state, the State's consent was paramount.[135]

The PTC III, in maintaining the decision arrived at by the PTC I that the ICC has jurisdiction over the situation in Myanmar, interpreted the word "conduct" as used in article 12 (2) (a) with regards to deportation. It defines it as "a form of behavior encompassing more than the notion of an act"[136] Although the drafters of the Rome Statute deliberately used the word "conduct" with regards to a state's territory and "crime" committed on vessel or craft, the PTC III concluded, "that the notions of 'conduct' and 'crime' in article 12(2)(a) of the Statute have the same functional meaning".[137]

In her Request, the Prosecutor alleged that the Crime of deportation was completed when the Rohingya fled their ancestral homes to Bangladesh due to the "clearance operation" initiated by the Myanmar military.[138] While agreeing with the Prosecutor, the PTC III concluded that the crossing of the border of Bangladesh was conducted that "clearly establishes a territorial link on the basis of the *actus reus* of [deportation]".[139] The PTC III rationalized this using the constructive and the constitutive territorial principles as bases to assume jurisdiction since the crime of deportation was completed in a state party and that a constitutive element of the crime, that is the crossing of a border, all happened in Bangladesh.[140] The objective territorial principle allows national courts to assume jurisdiction over activities that occurred outside their national borders but with impacts and effects on their territories. In other words, this principle allows a state to prosecute and punish crimes committed outside the State consummated within its territory.[141] Again, the authorization granted the ICC Prosecutor is so broad that it even covers "investigation to alleged crimes committed at least in part on the territory of other States Parties or States which would accept the jurisdiction of this Court in

134 Dominik Zimmerman, "Article 12: Preconditions to the Exercise of Jurisdiction" in William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: 2nd ed., Oxford University Press, 2016): 351-352

135 Elizabeth Wilmshurst, "Jurisdiction of the Court" in Roy S Lee (ed), *The International Criminal Court: The Making of the Statute: Issues, Negotiations, Results* (Alphen aan den Rijn: Kluwer Law International, 1999): 127-139.

136 The PTC III Decision (n 6) para 46.

137 ibid, para 48.

138 The PTC III Decision (n 6) para 53.

139 ibid, para 62.

140 ibid.

141 Hannah L. Buxbaum, "Territory, Territoriality, and the Resolution of Jurisdictional Conflict, and the Resolution of Jurisdictional Conflict", *The American Journal of Comparative Law* 57 (2009): 631, 638.

accordance with article 12(3) of the Statute, insofar as they are sufficiently linked to the situation as described in this decision."[142]

5. Other attempts for Justice

Apart from the ICC decisions, attempts have been made at the International Court of Justice and national levels. For instance, The Gambia's Minister of Justice and Attorney General filed a case against Myanmar at the International Court of Justice[143] for violating the Genocide Convention,[144] where the ICJ has, on the 23 January 2020, issued its decision on the provisional measures request,[145] by ordering Myanmar to immediately stop the killing of the Rohingya people, the destruction of their property, and other discriminatory acts.[146] Again, a court in Argentina has accepted the petition by the Burmese Rohingya Organization UK (BROUK), and has asked for more information on the Rohingya genocide. This move by the Argentinian court is based on the universal jurisdiction principle. According to the petition, genocide and crimes against humanity can be prosecuted in any country, notwithstanding where those offenses took place and the nationality of the offenders and victims.[147] Even though these cases would complement one another in bringing justice to the Rohingya people and sending a strong signal to Myanmar leadership that the whole world is determined to hold them accountable for the persecution of the Rohingya people,[148] a final decision by the ICC will be most effective.[149] ICC judgment would have more far-reaching effects, including holding persons accountable for the crimes committed, unlike the ICJ's decision that would merely establish Myanmar's responsibility.[150]The PTC decisions established the ICC's jurisdiction over Myanmar through the judges' ingenuity and desire for justice for the Rohingya people. This ingenuity is despite oppositions from different States and actors that try to

142 The PTC III Decision (n 6) para 124.

143 International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* 11 November 2019.

144 UN General Assembly, *Prevention and Punishment of the Crime of Genocide*, 9 December 1948, A/RES/260.

145 International Court of Justice, *Order, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* 23 January 2020.

146 ibid, paras 79 – 84.

147 Md. Kamruzzaman, "Argentinian court decision brings hope for Rohingya", AA, 2 June 2020 https://www.aa.com.tr/en/americas/argentinian-court-decision-brings-hope-for-rohingya/1861967#:~:text=A%20court%20in%20South%20American,and%20persecution%20against%20Rohingya%20community.&text=1%20has%20accepted%20its%20petition,information%20on%20the%20Rohingya%20genocide (accessed 3 February 2021); Arunav Kaul, "Argentina Is Taking a Unique Route to Try Myanmar's Leaders for Crimes on Rohingya", The Wire, 10 December 2020 https://thewire.in/rights/argentina-universal-jurisdiction-myanmar-rohingyas (accessed 3 February 2021).

148 Tun Khin, "Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide", OpinioJuris, 23 October 2020 http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/ (accessed 3 February 2021).

149 Gomez (n 22) 6.

150 Thomas Van Poecke, Marta Hermez, and Jonas Vernimmen, "The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya" EJIL: Talk, 21 November 2019, https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmars-alleged-genocide-against-rohingya/ (accessed 16 November 2020).

weaken the jurisdiction of the ICC.[151]

D. Conclusion

Despite some difficulties, justice for the Rohingya people is gradually obtained, firstly, by the creative interpretation of the Rome Statute by the PTC I and III, and secondly, by other countries taking innovative steps regarding the plight of the Rohingya people. The Majority Decision of the PTC I and the PTC III decision are a welcome development in international criminal law. They establish the fact that the jurisdiction of the ICC has been recognized by many nations who have signed and ratified the Rome Statute. While it is good to look at a law's legislative history while interpreting it, it is even better to consider the mischief that existed before the law. In the case of the Rome Statute, it codified the hitherto scattered sources of international criminal law and aimed at holding accountable those who commit acts that "deeply shock the conscience of humanity,"[152]"reveal the vanity of man and wickedness of the human heart,"[153] and "threaten the peace and security of the world".[154] In other words, the PTC decisions followed the spirit behind the Rome Statute as the ICC is the first permanent international criminal court charged with prosecuting those that threaten the peace and security of the world. Finally, these ICC decisions have reiterated that the core crimes under article 5 of the Rome Statute are customary international laws. With these decisions also, the trend is that the jurisdiction of the ICC, in the bid to protect all human beings from "the wickedness of the human heart", is being elevated to universal jurisdiction.

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151 For instance, the African Union alleges partiality against African leaders on the part of the ICC. See Sascha-Dominik Dov Bachmann and Naa A. Sowatey-Adjei, "The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice" *Washington International Law Journal* 29 (2020): 247; Benedict Chigara and Chidebe Nwankwo, "To be or not to be?" The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)" *NORDIC Journal of Human Rights* 33 (2015): 243, 243; Priya Pillai, "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability", *American Society of International Law* 22 (2018), https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court (accessed 17 November 2020). Again, three members of the Security Council – Russia, the USA, and China – are not members of the Rome Statute, and it is improbable that China and Russia will allow a referral by the Security Council. See Freuden (n 83) 121; Michelle Nichols, "U.N. Security Council mulls Myanmar action; Russia, China boycott talks", Reuters, 7 December 2018, https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ (accessed 4 February 2021).

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154 Sascha and Luke (n 27) 461.

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Curriculum Vitae of the author

Ikechukwu P. UGWU is a Doctoral Researcher at the University of Silesia in Katowice, Poland. He holds two master's degrees; LL.M Public International Law from Bournemouth University, UK, 2019 (Distinction); LL.M Intellectual Property Rights from the University of Nigeria, Nsukka. The British government awarded Ikechukwu the Commonwealth Shared Scholarship in conjunction with Bournemouth University for his LLM in Public International Law at Bournemouth University. He holds an LLB degree from the University of Nigeria, Nsukka, 2014. He is a qualified barrister and solicitor in Nigeria. Email: ikechukwu.ugwu@us.edu.pl. ORCID: 0000-0002-0271-9364.
Publications: Sascha Dov Bachmann and Ikechukwu P. Ugwu, "Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?", Oil and Gas, Natural Resources, and Energy Journal 6 (2021): 547; Ikechukwu Ugwu, Anna Stephanie Elizabeth Orchard, Argyro Karanasiou, "Driverless Vehicles and Liability" in Philip L. Frana and Michael J. Klein (eds), Encyclopedia of Artificial Intelligence: The Past, Present, and Future of AI (California: ABC-CLIO, 2021) 131; Ikechukwu P. Ugwu, "The Tragedy of the Commons: Indigenous Peoples' Rights as Catalyst for Environmental Protection", Bournemouth University (2019).

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      - Journal Articles: John Maynard Smith, “The Origin of Altruism,” *Nature* 393 (1998): 639.
      - On-line Journal Articles: Mark A. Hlatky et al., “Quality-of-Life and Depressive Symptoms in Postmenopausal Women after Receiving Hormone Therapy: Results

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- Papers of a Seminar: Brian Doyle, "Howling Like Dogs: Metaphorical Language in Psalm 59" (paper at the Annual International Meeting for the Society of Biblical Literature, Berlin, Germany, 19-22 June, 2002).
- Website/internet**:** Evanston Public Library Board of Trustees, "Evanston Public Library Strategic Plan, 2000–2010: A Decade of Outreach," Evanston Public Library, http://www.epl.org/library/strategic-plan-00.html (accessed 1 June 2005).

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