##### 237 of 280

# THE CASE OF LAWSUIT;

Considering, whereas the purpose and objectives of the Plaintiff's claim are as mentioned above;

Considering, whereas based on the Plaintiff's claim, the Defendants' Responses and the overall answers to the questions between the Plaintiffs and Defendants connected with the evidence presented at the hearing, the legal issues disputed in the *a quo* case are:

1. Does Defendant I’s Action contravene the statutory regulations and/or the general principles of good governance?
2. What is the responsibility of Defendant II in the occurrence of Government Actions carried out by Defendant I?

Considering, whereas furthermore the Panel of Judges will provide a legal assessment whether the Government Actions, which are the object of the *a quo* dispute, are contrary to the applicable laws and/or violate the general principles of good governance by using 3 (three) parameters of the legal requirements for Government Actions:

1. determined by the authorized official(s);
2. carried out according to procedures; and
3. the substances in accordance with the object of Action;

Considering, whereas the Panel of Judges will first consider the authority of Defendants I and II in conducting the objects of dispute;

Considering, whereas based on the lawsuit of the Plaintiffs, the Defendants' Responses and the overall answers between the Plaintiffs and Defendants that are connected with the valid pieces of evidence presented at the hearing, that is, the piece of evidence

##### 238 of 280

letter P.1.18 which is the same as the piece of evidence of letter P.2.15 and the piece of evidence of letter T. I-1 in the form of Press Release No.154/HM/KOMINFO/08/2019, Monday, 19 August 2019 concerning the Throttling of [Internet] Access in Some Areas of West Papua and Papua; the piece of evidence of letter P.1.19 which is the same as the piece of evidence of letter P.2.16 and the piece of evidence of letter T. I-2 in the form of Press Release No. 155/HM/KOMINFO/08/2019, Wednesday, 21 August 2019 concerning the Blocking of Data Services in Papua and West Papua; and the piece of evidence of letter P.1.20 which is the same as the piece of evidence of letter P.2.17 and the piece of evidence of letter T. I-3 in the form of Press Release No. 159/HM/KOMINFO/ 08/2019, Friday, 23 August 2019 concerning the Continuing Blocking of Data Services in Papua and West Papua, which show the Government Actions of Defendant I that are the objects of the dispute, therefore the objects of dispute in the *a quo* case are:

1. Government Action of throttling or slowing down of access/bandwidth in several regions of West Papua and Papua Province on 19 August 2019 from 13.00 until 20.30 Eastern Indonesian Time (GMT+9);
2. Government Action of blocking data services and/or terminating internet access completely in Papua Province (29 Cities/Regencies) and West Papua Province (13 Cities/Regencies) dated 21 August 2019 until at least 4 September 2019 at 23.00 Eastern Indonesian Time;
3. Government Action of extending the blocking of data services and/or terminating internet access in 4 Cities/Regencies in Papua Province (i.e. Jayapura City, Jayapura Regency, Mimika Regency, and Jayawijaya Regency) and 2 Cities/Regencies in West Papua Province (i.e. Manokwari City and Sorong City) since 4 September 2019 at 23:00 Eastern Indonesian Time up to 9 September 2019 at 18:00 West Indonesia Time / 20:00 East Indonesia Time;

##### 239 of 280

Considering, whereas in their Answer, the Defendants stated that the objects of dispute was conducted by Defendant I in accordance with their authority based on Article 1 number 23, Article 40 paragraph (2), paragraph (2a), and paragraph (2b) as well as General Explanation number I paragraph 9 of Law Number 19 Year 2016 concerning the Amendment to Law Number 11 Year 2008 concerning the Electronic Information and Transactions (hereinafter referred to as the "Electronic Information and Transaction Law"), Article 1 number 17 of Law Number 36 Year 1999 concerning the Telecommunications, and Article 1 number 35 Government Regulation Number 82 Year 2012 concerning the Implementation of Electronic Transactions and Systems;

Considering, whereas regarding the authority, the Panel of Judges further considers that Article 40 paragraph (2), (2a) and (2b) of Law Number 19 Year 2016 regulates that:

(2) The Government protects the public interest from all types of disturbances as a result of misuse of Electronic Information and Electronic Transactions that disturb public order, in accordance with statutory provisions.

(2a) The Government is obliged to prevent the dissemination and use of Electronic Information and/or Electronic Documents that have prohibited content in accordance with statutory provisions;

(2b) In carrying out prevention as referred to in paragraph (2a), the Government has the authority to terminate access and/or order the Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents that have unlawful contents;

Considering, whereas what is meant by "Government" according to Article 1 number 23 of the Law mentioned above is the Minister or other officials

##### 240 of 280

appointed by the President. The Minister, according to Law Number 36 Year 1999 concerning the Telecommunications in Article 1 number 17, is the Minister whose scope of duties and responsibilities is in the field of telecommunications. Likewise, in the provisions of Article 1 number 35 of Government Regulation Number 82 Year 2012 concerning the Implementation of Electronic Transactions and Systems, it is stated that the meaning of the Minister is the minister who carries out government affairs in the field of communication and informatics;

Considering, whereas related to government regulations in the implementation of the Electronic Information and Transaction Law, because Government Regulation Number 71 Year 2019 regarding the Implementation of Electronic Systems and Transactions in lieu of Government Regulation Number 82 Year 2012 only took effect on 10 October 2019 after the Government Actions that are the objects of dispute, then in providing a legal assessment of Government Actions that are the objects of dispute, the Panel of Judges does not use Government Regulation Number 71 Year 2019 as an instrument of analysis, but is based on Government Regulation Number 82 Year 2012 which at the time the Government Actions were carried out was still valid;

Considering, whereas based on the provisions of Article 1 number 23, Article 40 paragraph (2), paragraph (2a) and paragraph (2b) and General Explanation number I paragraph 9 of the Law on Electronic Information and Transactions, Article 1 number 17 of Law Number 36 Year 1999 concerning the Telecommunications, Article 1 number 35 Government Regulation Number 82 Year 2012 concerning the Implementation of Electronic Transactions and Systems and Articles 2 and 3 of Presidential Regulation Number 54/2015 concerning the Ministry of Communication and Information, the Panel of Judges argue that Defendant I has the authority to terminate access and/or order the Electronic System Operator

##### 241 of 280

to terminate access to Electronic Information and/or Electronic Documents that have unlawful contents;

Considering, whereas in terms of legal issues, whether Defendant I’s authority to terminate and/or instruct the Electronic System Provider to make such termination, can only be done in the form of termination of access to Electronic Information and/or Electronic Documents that have unlawful contents, or in the form of termination of access to internet data services, which results in access being cut off not only for Electronic Information and/or Electronic Documents which have unlawful contents, the Panel of Judges will consider that in relation to the use of Defendant I's authority from the aspect of procedure and substance;

Considering, whereas in relation to Defendant II's authority in the objects of dispute conducted by Defendant I, the Panel of Judges consider that in their claim, the Plaintiffs argued among other things that the object of the lawsuit was carried out not in accordance with the principle of limiting human rights in the event of an emergency as referred to in the Government Regulations In lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency which in Article 2 paragraph (2) regulates that the announcement of the statement or elimination of the emergency situation is done by Defendant II;

Considering, whereas in Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, in Article 1 number (1) it is stated in principle that the President/Supreme Commander of the Armed Forces declares all or part of the territory The Republic of Indonesia is in danger with a degree of civil emergency, or military emergency, or war situation. Furthermore, in Article 2 paragraph (2) of the Government Regulation in lieu of the Law,

##### 242 of 280

it is stipulated that the announcement of a statement or the elimination of a state of emergency is carried out by the President. Article 3 paragraph (1), (2) and (3) Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency stipulates that the highest control in a state of emergency is carried out by the President/Supreme Commander of the Armed Forces as the Central authority of Civil Emergency/Central authority of of Military Emergency/Central authority of War, who in exercising control can be assisted by an Agency consisting of parties as mentioned in paragraph (2) of this Article and may appoint Ministers/Officers other than those mentioned in paragraph (2) the article if deemed necessary as stated in paragraph (3) of the said article;

Considering, whereas in Article 13 of the Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, it is stated that the Civil Emergency Authority has the right to make regulations to restrict performances, printing, publishing, announcements, delivery, storage, distribution, trade and pasting any form of writing, paintings, film negatives and drawings. Furthermore, in Article 17 paragraphs (1), (2) and (3) it is also stated that the Civil Emergency Authority has the right:

1. to know all the news and conversations that have been conferred on the telephone exchange/switching office or the radio station, prohibiting or deciding the transfer of news or conversations by telephone or radio.

2. to limit or prohibit the use of codes, secret writing, secret printing, shorthand writing, pictures, signs, as well as the use of languages other than Indonesian;

3. to stipulate regulations that limit or prohibit the use of telecommunications equipment such as telephones, telegraphs, radio transmitters

##### 243 of 280

and other devices which have to do with radio broadcasting and which can be used to reach the general public, including confiscating or destroying such equipment;

Therefore, due to Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency especially Article 13 regulates the provisions on the authority to limit printing, publishing, and delivery of writings in anyform, and Article 17 paragraph (1) and (3) regulate the provisions concerning termination of access, namely "limiting or prohibiting" the use of telecommunications equipment all of which are carried out within the framework of Defendant II's authority based on Article 1 paragraph (1) and Article 2 paragraph (2), namely making announcement statements or elimination of the danger situation, the Panel of Judges draw the conclusion that Defendant II also has authority in relation to Government Actions carried out by Defendant I as long as the Government Actions carried out by Defendant I are carried out in a dangerous or emergency situation as referred to in the Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, while regarding legal issues whether the situation underlying the reasons for the Government Actions, which became one of the objects of dispute, is a state of emergency as referred to in Law Number 23 Prp Year 1959 concerning the State of Emergency or not and related to the legitimate use of Defendant II's authority regarding Government Actions carried out by Defendant I, which is also another object of dispute, will be considered by the Panel of Judges in terms of procedures and substance;

Considering, whereas based on the aforementioned considerations, the Panel of Judges argue that the Defendants have the authority to take Government Actions which are the objects of dispute;

##### 244 of 280

Considering, whereas the Panel of Judges will further assess aspects of the procedures and substance of the Government Actions which are the objects of dispute;

Considering, whereas in their claim, the Plaintiffs essentially argued that the objects of dispute was contrary to various laws and general principles of good governance, and the absence or limitations of internet access resulted in journalists having difficulty doing their work to obtain news, contacting the sources to confirm news, download news to online media and spread the news through internet media, which bring obstacles to press freedom that further impacts on the obstruction of the people's right to information, so that people have difficulty deciding what information is and is not right, thus creating the potentials to make distorted decisions and judgments. Besides having an impact on freedom of information, according to the Plaintiffs, the objects of dispute also have impacted on the non-fulfillment of people's economic rights;

Considering, whereas the Defendants refuted the Plaintiffs' argument by stating that the objects of dispute was not in conflict with various laws and general principles of good governance due to the 1945 Constitution of the Republic of Indonesia (1945 Constitution) and the other laws and regulations, although they give the right to the press and the public to obtain and disseminate information, the right is limited by statutory regulations and this limitation gives the Government the authority to take Government Actions in order to maintain public order and state security including Government Actions, which are the object of a dispute, carried out in order to prevent the spread of hoaxes and

##### 245 of 280

expressions of hatred or racist hostility that has the potential to cause unrest, divide the unity and threaten the security of the state, especially in Papua and West Papua provinces;

Considering, whereas Article 28F of the 1945 Constitution of the Republic of Indonesia (1945 Constitution) states that every person has the right to communicate and obtain information for personal and social-environmental development, and has the right to seek, obtain, possess, store, process, and submit information using all types of available channels. In line with that, Article 14 paragraph (1) and (2) of Law Number 39 Year 1999 concerning Human Rights also regulates the right to communicate and obtain information needed and to seek, obtain, possess, store, process, and convey information by using all types of facilities available. Recognition of the right to obtain and submit such information is in line with the provisions of Article 19 paragraph (2) of the International Covenant on Civil and Political Rights which has been ratified by Indonesia based on Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights which has been ratified through the Law, therefore the Covenant can also be used as an analytical framework to provide a legal assessment in *a quo* dispute;

Considering, whereas the right to seek, obtain and submit information as regulated in the legislation above in the formulation of Article 28F of the 1945 Constitution is stated as being able to be carried out using "all types of available channels", while Article 14 paragraph (1) and (2) of The Human Rights Law refers to it as "all types of means available", while Article 19 paragraph (2) of the International Covenant

##### 246 of 280

on Civil and Political Rights writes it as "through other media of his choice", so according to the Panel of Judges the right to seeking, obtaining and conveying information can be done through all types of channels/facilities/media available including through the internet. Because the internet can send various forms of information that can reach all over the world in a fast and efficient time, in its development the internet has been used not only as a vehicle to channel the right to express opinions and the right to seek, obtain and convey information, but also to be used as media to realize the broad freedom of expression which enables many other human rights to be carried out, including the right to education and teaching, the right to benefit from science and technology, arts and culture, the right to work, political rights, the right to associate and assemble, and the right to health services as acknowledged and guaranteed expressly in Article 28 C, Article 28D paragraph (2), Article 28E and Article 28H of the 1945 Constitution;

Considering, whereas the right to access the internet as a way to realize the right to express opinions and the right to seek, obtain and submit information and other rights, be recognized, respected, protected and guaranteed by the 1945 Constitution and Laws, then these rights must be fulfilled by the state;

Considering, whereas however, in accordance with the provisions of Article 29 paragraph (2) Universal Declaration of Human Rights of the United Nations, Article 28J paragraph (2) of the 1945 Constitution, Article 73 of Law Number 39 Year 1999 concerning Human Rights, and Article 19 paragraph (3) of the International Covenant on Civil and Political Rights stipulates that in exercising their rights and freedoms, including the right to internet access to realize freedom of expression and the right to seek, obtain and submit information, each person is obliged to submit to restrictions imposed by laws

##### 247 of 280

with the sole purpose of ensuring the recognition and respect for the rights and freedoms of others and for fulfilling fair demands in accordance with moral considerations, religious values, security and public order in a democratic society;

Considering, whereas the provisions of Article 29 paragraph (2) of the Universal Declaration of Human Rights of the United Nations, Article 28J paragraph (2) of the 1945 Constitution, Article 73 of the Human Rights Law, and Article 19 paragraph (3) of the International Covenant on Human Rights Civil and Political Rights, and various interpretations related to Article 19 of the International Covenant on Civil and Political Rights in several instruments such as: i) *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, ii) *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* dan iii) *The Camden Principles on Freedom of Expression and Equality*, and the General Comment No. 34 of Article 19 of the International Covenant on Civil and Political Rights provides guidance on restrictions on freedom of expression and the right to seek, obtain and impart information and other rights including those used via the internet;

Considering, whereas from the various international and national human rights law instruments above, in truth Article 28J paragraph (2) of the 1945 Constitution and various national laws governing human rights have clearly stated the criteria for such restrictions, so that in considering the *a quo* dispute, the Panel of Judges will refer more to the 1945 Constitution, Indonesian national laws and international treaties namely the International Covenant on Civil and Political Rights which have been ratified by the law including its interpretation which, according to the Panel of Judges, authentic interpretation is an interpretation issued by United Nations Human Rights Committee in General Comment No. 34, so

##### 248 of 280

the Panel of Judges draw the conclusion that restrictions on freedom of expression and the right to seek, obtain and submit information and other rights used through the internet must fulfill 3 (three) conditions:

1. restrictions must be based in/comply with statutory regulations;
2. restrictions must meet/comply with one of the following objectives:
	1. to guarantee recognition and respect for the rights or reputations of others, or
	2. to meet fair demands in accordance with considerations:
		1. moral,
		2. religious values,
		3. security,
		4. decency,
		5. public order, or
		6. public health.

in a democratic society;

1. it must be proven that the limitation is implemented proportionally;

Considering, whereas although in the 1945 Constitution and various human rights law instruments mention 3 (three) restrictions on human rights are written in the order as mentioned above, but taking into account the logic of legal events in practice is initially an event or condition that is used, or causes a reason to achieve the purpose, so that the purpose referred to in the second restriction is at the same time interpreted as a reason for carrying out restrictions on human rights based on existing concrete events, then the legal basis for that reason or purpose is sought in the law, whether it is possible to take an

##### 249 of 280

action with that reason or purpose in the law, and then it is considered whether the action is indeed necessary and proportional to achieve the goal of negating the event or condition that was originally used as a reason to take action, so with that rationale, in the *a quo* dispute according to the Panel of Judges, the sequence of conditions for limiting human rights as an analytical tool for the disputed object is:

1. whether one of the objectives has been fulfilled or not in guaranteeing the recognition and respect for the rights or reputations of others, or in fulfilling the fair demands in accordance with the moral, religious values, security, decency, public order, or public health considerations in a democratic society;
2. these restrictions must be based on law, and
3. it must be proven that the limitation is implemented proportionally;

Considering, whereas related to the first condition, namely whether one of the objectives or reasons of the objects of dispute was fulfilled or not for one or more of the criterias as mentioned above, the Panel of Judges considered that in their answers, rejoinders and conclusions, the Defendants argued that the objects of dispute were carried out by Defendant I based on the commotion between students — members of the Papuan Student Alliance (AMP), who demanded Free Papua — and citizens and security forces in Malang on Thursday, 15 August 2019. Then on Friday, 16 August 2019 and Saturday, 17 August 2019 there was a siege and heated racist slurs carried out by several community organizations on Papuan Student Dormitory in Surabaya, allegedly for vandalising the Indonesian flag. Following the events in Malang and Surabaya, a flurry of news was spread in online media

##### 250 of 280

that was not necessarily true, triggering mass actions in Manokwari, then Jayapura, and several other places in Papua and West Papua on Monday, 19 August 2019. Furthermore, in relation to the dissemination of the news, Defendant I then verified with the Police and National Army which then identified a piece of news that was categorized as disinformation (news that contains facts but is led to bring viewers to incorrect information) that Surabaya Police kidnapped two food delivery people for Papuan Students, and one hoax news showing a photo of Papuan Students killed by officials in Surabaya which was announced on the Communication and Information Website and stophoax.id on 19 August 2019, so as to prevent the wide spread of hoaxes that triggered mass action, then Defendant I conducted the throttling or slowing down of [internet] access/bandwidth on 19 August 2019 starting at 13:00 Eastern Indonesia Time in several regions of Papua and West Papua, which was carried out in stages as Defendant I Press Release No. 154/HM/KOMINFO/08/2019 dated 19 August 2019 which was then followed by the blocking cellular telecommunications data services though not for voice call and SMS services;

Considering, whereas in order to strengthen the arguments of the objects of dispute, Defendant I had submitted a documentary evidence marked TI-1, TI-2 and TI-3 which is a Press Release of the disputed object, then pieces of evidence of the letter TI-4, TI-5, TI-6 , TI-7, TI-8, TI-9, TI-10, TI-11 and TI-12 in the form of a series of Press Releases that show the chronology of blocking to open internet access blocking. Furthermore, evidence of letters T.I-13, T.I-14, and T.I-15 that showed the massive hoaxes and coordination carried out by the Defendants with other agencies and efforts to accommodate media access. In addition, also presented evidence of letters marked TI-22, TI-23, TI-24, TI-25, TI-26, TI-27, TI-28, TI-29, TI-30, TI-31, TI-32 , TI-33, TI-34, TI-35, TI-36, TI-37, and TI-38 which show media coverage of events in

##### 251 of 280

Papua and West Papua and the actions taken by the Defendants which are also linked to the witness statements of the Police Inspector General Drs. Rudolf Alberth Rodja, who at that time served as Papua Regional Police Chief, and witness Semuel Abrijani Pangerapan, who served as Director General of Informatics Application at Defendant I, who similarly stated that the riots in Papua and West Papua were indeed triggered by the spread of hoaxes and hate speech in terms of Ethnicity, Religious, Race and Intergroup relations (SARA), so that based on the evidence of letters connected to witness statements submitted by Defendant I, the Panel of Judges agreed with the Defendants that the objects of dispute was carried out by Defendant I to control the spread of hoax news, incitement, hate speech in terms of Ethnicity, Religious, Race and Intergroup relations that have the potential to cause unrest which can divide unity and threaten state security, especially in the Papua and West Papua provinces;

Considering, whereas based on the above considerations, the requirements to limit the right to access the internet in the objects of dispute meet the first condition, which is carried out in accordance with the demands on security and public order considerations;

Considering, whereas related to the second condition, namely limitation that must be regulated in legislation in the form of a law, other than explicitly stated in Article 28J paragraph (2) of the 1945 Constitution and Article 73 of Law Number 39 Year 1999 concerning Human Rights, related with the right of internet access to search for, obtain and submit information, General Explanation of the second paragraph of Law Number 19 Year 2016 also confirms that the rights and freedoms through the use and utilization of Information Technology are carried out while taking into account the limitations set out in the law;

##### 252 of 280

Considering, whereas at the level of the law, Law Number 11 Year 2008 concerning the Electronic Information and Transactions as amended by Law Number 19 Year 2016 regulates various civil, criminal and administrative provisions which constitute restrictions on the rights and freedom of use and utilization of Information Technology through the internet. In the civil context, Article 26 paragraph (2) of the Electronic Information and Transaction Law stipulates that an infringed party can file a claim for damages. Furthermore, from the criminal aspect, the act of making access to Electronic Information and/or Electronic Documents having contents that violate decency is threatened by criminal sanctions in Article 27 paragraph (1) and article 45 paragraph (1) of the said law, if it contains gambling contents which is threatened by criminal sanctions in Article 27 paragraph (2) and Article 45 paragraph (2), the distribution of contents of insults and/or defamation are threatened by criminal sanctions in Article 27 paragraph (3) and Article 45 paragraph (3), dissemination of information intended to incite hatred or hostility against certain individuals and/or groups of people in terms of Ethnicity, Religious, Race and Intergroup relations are threatened by criminal sanctions in Article 28 paragraph (2) and 45B paragraph (2), and sending threats of violence or intimidation aimed at a person is threatened by criminal sanctions in Article 29 and Article 45B of the Electronic Information and Transaction Law. While administrative human rights restriction is regulated in Article 40 paragraphs (2), (2a) and (2b) and General Explanation of the 9th paragraph, which in essence is that in order to protect the public interest from all types of disturbances as a result of misuse of Electronic Information and Electronics Transactions that disturb public order, the Government is obliged to prevent the dissemination and use of Electronic Information and/or Electronic Documents which have prohibited or unlawful contents, in accordance with the provisions of the laws and regulations to

##### 253 of 280

do so Article 40 paragraph (2b) states that the Government is authorized to terminate access and/or order the Electronic System Operator to terminate access to the Electronic Information and/or Electronic Documents that have unlawful contents;

Considering, whereas with the formulation of such a law, according to the Plaintiffs, which is supported by expert statements submitted by the Plaintiffs namely Dr. Herlambang Perdana Wiratraman, S.H., M.A., and Oce Madril, S.H., M.A., Defendant I's authority is the termination of access and/or ordering the Electronic System Operator to terminate access to the Electronic Information and/or Electronic Documents that have unlawful contents, not the termination of internet services, so that because the object of the lawsuit is the Government's Act of throttling and terminating internet access in some and/or all Provinces of Papua and West Papua, according to the Plaintiffs, it is against the laws and general principles of good governance;

Considering, whereas in Defendant I answer and on pages 8-10 of their rejoinder, and on page 33 of their conclusions, referring to the formulation of Article 1 number 23, Article 40 paragraph (2a) and (2b) of Law Number 19 Year 2016, Defendant I argued that the Government is obliged to prevent the dissemination and use of Electronic Information and/or Electronic Documents that have prohibited contents in accordance with the provisions of the legislation through 2 (two) authorities, namely:

1. The government has the authority to terminate access; and/or

##### 254 of 280

2. to order the Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents that have unlawful content;

Defendant I stated that the authority to terminate access carried out by the Government, with the authority of the Government to order the Electronic System Operator to terminate access are two matters whose scope/coverage of activities is different. Based on the definition of the Electronic System and the definition of Access in accordance with Article 1 number 5 and 15 of Law Number 19 Year 2016 and the definition of internet (Interconnection Networking) in the Indonesia Dictionary, Defendant I argued that the Government's first authority to terminate access was not only limited to Electronic Information and/or Electronic Documents that have unlawful content, but access as referred to in Article 1 number 15 of Law Number 19 Year 2016 that is in the form of activities to interact with electronic systems that stand alone or in a network, *in casu* is the internet network. Whereas the Government's second authority, namely to order Electronic System Operators to terminate access to Electronic Information and/or Electronic Documents, is limited only to Electronic Information and/or Electronic Documents that have unlawful content whose access can be terminated by the Electronic System Operator upon Government order;

Considering, whereas with respect to the different interpretations above, the Panel of Judges consider that the formulation of Article 40 paragraph (2b) of Law Number 19 Year 2016 is: "In carrying out prevention as referred to in paragraph (2a), the Government has the authority to terminate access and/or

##### 255 of 280

to order Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents that have unlawful contents", so that with this formulation, the Panel of Judges agree with Defendant I in one matter, namely that the authority includes two things, i) carrying out termination of access and/or ii) ordering the Electronic System Operator to terminate access. However, regarding whether the scope/coverage of access that can be terminated both by the government and the Electronic System Provider by the order of the Government is the same or not, because the explanation of the article states that it is clear enough, the Panel of Judges refers to the General Explanation of paragraph 9 of the aforementioned Law which states among them that: "In order to protect the public interest from all types of disturbances as a result of misuse of Electronic Information and Transactions, it is necessary to affirm the Government's role in preventing the dissemination of illegal content by taking action to cut off access to Electronic Information and/or Electronic Documents that have unlawful content so that they cannot be accessed from Indonesian jurisdiction, and investigators are required to request information contained in the Electronic System Operator for the purposes of law enforcement in the field of Information Technology and Electronic Transactions";

Considering, whereas from the General Explanation of the 9th paragraph of Law Number 19 Year 2016 above, it is clearly stated that "the Government's role in preventing the dissemination of illegal content is by cutting off access to Electronic Information and/or Electronic Documents that have unlawful contents, so that it cannot be accessed from Indonesian jurisdiction", not terminating access to the internet network at large;

##### 256 of 280

Considering, whereas this opinion of the Panel of Judges is also strengthened by the provisions in Law Number 12 Year 2011 concerning the Formation of Laws and Regulations as amended by Law Number 15 Year 2019 in Appendix II Technical Formulation of Legislation Chapter III Variety of Language of Legislation, in number 243 letter b it states that the characteristics of the language of the laws and regulations are frugal, stating only the necessary words. Article 40 paragraph (2b) of Law Number 19 Year 2016 according to the Panel of Judges must be read and interpreted that in carrying out prevention as referred to in paragraph (2a), the Government is authorized in only 2 (two) matters, namely:

1. to terminate access to Electronic Information and/or Electronic Documents that have unlawful contents, and/or
2. to order the Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents that have unlawful content;

Because the phrase "to Electronic Information and/or Electronic Documents that have unlawful content" is used twice in both the first authority of the government to terminate access and the second authority of the government to instruct the Electronic System Operator to terminate access, then at the time of the formulation of these two authorities combined, in accordance with the provisions in Law Number 12 Year 2011 concerning the Formation of Legislations that the characteristics of the language of laws and regulations include, for example, only the necessary words used, then the phrase "to Electronic Information and/or Documents Electronics that

##### 257 of 280

have unlawful content" is only written once at the end of the article sentence, but is intended to follow the two government authorities formulated in the previous sentence. The same thing was found in the formulation of the title of Law Number 11 Year 2008 as amended by Law Number 19 Year 2016, namely the terms "Electronic Information" and "Electronic Transactions" are two separate terms, but when combined, the word "Electronic" in front of the two terms is only written once, so the title of Law Number 11 Year 2008 as a result of the merger of the two terms becomes "Electronic Information and Transactions";

Considering, whereas more than that, based on the testimony of witness Semuel Abrijani Pangerapan, in the *a quo* dispute the Defendant I's actual act in slowing down and terminating access was carried out by ordering the Electronic System Operator to do so;

Considering, whereas by referring primarily to the General Explanation of the 9th paragraph of Law Number 19 Year 2016 which explicitly formulates the scope of the Government's authority to terminate access supported by the provisions in Law Number 12 Year 2011 concerning the Formation of Legislations as amended by Law Number 15 Year 2019, the Panel of Judges draw a conclusion that the scope of the government's authority to terminate access and/or order the Electronic System Operator to terminate access as referred to in Article 40 paragraph (2b) of the Law Number 19 Year 2016 is the same, namely terminating access only to Electronic Information and/or Electronic Documents that have unlawful content and do not include termination of access to the internet network;

##### 258 of 280

Considering, whereas the Panel of Judges further consider that the interpretation of restrictions on the right to internet access, as formulated in Article 40 paragraph (2b) of the Electronic Information and Transaction Law, only applies to Electronic Information and/or Electronic Documents which have unlawful contents, and do not include termination of internet access that is in line with the provisions of Article 5 paragraph (1) of the International Covenant on Civil and Political Rights which states that nothing in this Covenant can be interpreted as giving the right to a state, group or individual to carry out activities or actions intended to destroy the rights and freedoms recognized in this Covenant, or to limit it more than what is stipulated in this Covenant;

Considering, whereas the provisions in the Electronic Information and Transaction Law are congruent with the provisions in the case of restrictions on the right to internet access carried out with moral and decency reasons or objectives, which in Article 18 letter a of Law Number 44 Year 2008 concerning the Pornography provides authority to the Government to terminate the network that make and disseminate pornographic products or pornographic services, including blocking pornography via the internet. However, the authority granted by the Pornography Law, and which can be done by the Government, is termination of the network including blocking only the internet content that have pornographic products or providing pornographic services, not by blocking the entire internet network, because if it can cut off access to the entire internet network, not only access to pornographic content that has been severed, but positive content and the fulfillment of other rights through the internet will also be severed;

##### 259 of 280

Considering, whereas Article 28J paragraph (2) of the 1945 Constitution, Article 73 of the Human Rights Law and Article 19 paragraph (3) of the International Covenant on Civil and Political Rights state that various human rights include the right to internet access as a means of seeking, obtaining and submitting information as well as to exercising other rights, restrictions can be made through laws, and laws that limit these in relation to the *a quo* dispute is Law Number 19 Year 2016 as amendments to the Law Number 11 Year 2008 concerning the Electronic Information and Transactions. However it turns out that Indonesian legal politics that are reflected in Article 40 paragraph (2), (2a) and (2b) of the aforementioned law, restrictions on the right to internet access can be done by the government through termination of access only to Electronic Information and/or Electronic Documents that contain unlawful content and do not include termination of access to the internet network;

Considering, whereas in relation to the spread of hoaxes, incitement, hate speech in terms of Ethnicity, Religious, Race, and Intergroup relations that have the potential to cause unrest which can divide unity and threaten national security, especially in the Papua and West Papua provinces, in accordance with human rights restrictions that have been regulated by the Electronic Information and Transaction Law, actions that can be taken by the Government are: from the aspect of criminal law conducting criminal legal processes against parties who commit such acts, namely the act of disseminating information intended to incite hatred or hostility of individuals and/or certain community groups in terms of Ethnic, Religious, Race, and Intergroup, a legal process based on Article 28 paragraph (2) and 45B paragraph (2), while the sending of threats of violence or intimidation aimed at person threatened by Article 29 and Article

##### 260 of 280

45B of the Electronics Information and Transactions Law, while for the dissemination of hoaxes can also be threatened by other laws, namely Article 14 and Article 15 of Law Number 1 Year 1946 concerning Criminal Law Regulations, while in terms of administrative action, the Electronics Information and Transactions Law gives authority to the Government to restrict internet access by terminating access only to Electronic Information and/or Electronic Documents that have unlawful content as mentioned above, but does not include slowing down and/or terminating the internet network as the object of dispute;

Considering, whereas in relation to this situation, Defendant I argued that given the massive distribution of hoax news on 18 August to 8 November 2019 in Papua and West Papua based on the Statistics Summary of Content Distribution of Provocation Hoax, there were 941,282 (nine hundred forty one thousand two hundred eighty-two) hoax contents, then it will not be effective in preventing hoax news if the Government only limits the termination of access to Electronic Information and/or Electronic Documents that have unlawful content, which is also supported by the evidence of the letter submitted by Defendant I marked TI-13 in the form of Statistics Summary of Content Distribution of Papua Riot Provocation Hoax on Period 18 August - 8 November 2019, so that in their rejoinder, Defendant I argued that the objects of dispute were carried out under Defendant I's authority to use discretion to fill the legal vacuum as regulated in Article 22 and 23 of the Government Administrative Law. According to Defendant I, the legal vacuum referred to is the absence of Standard Operating Procedures (SOPs) for carrying out Government Actions for terminating internet access;

##### 261 of 280

Considering, whereas Defendant I's argument that the object of dispute is a discretion, is also supported by expert statements from Prof. Dr. Yos Johan Utama, S.H., M.Hum., who stated that based on Article 9 paragraph (4) of the Government Administration Law that the absence or lack of clarity of the legislation does not preclude the Government Agency and/or Official from being authorized to determine and/or make a Decision and/or Action as long as it provides public benefits and is in accordance with the General Principles of Good Governance, so that discretion can be carried out, then the Panel of Judges will then consider the matter of discretion in the objects of dispute carried out by Defendant I;

Considering, whereas the provision of Article 6 paragraph (1) and (2) letter e of the Government Administration Law states that Government Officials have the right to use the authority in making decisions and/or actions including using discretion in accordance with their objectives. Furthermore, the provision of Article 22 paragraph (2) of the Government Administration Law states that every use of Government Officials' Discretion aims to:

* 1. reinforce governmental administration;
	2. fill the legal vacuum;
	3. provide legal certainty; and
	4. overcome the government stagnation in certain circumstances for public benefit and interest;

According to the book "Law Annotation No. 30 of 2014 concerning the Government Administration" published by the University of Indonesia-Center for Study of Governance and Administrative Reform (UI-CSGAR) in 2017 on page 129 states that:

##### 262 of 280

"The words "and" above indicate that the 4 (four) objectives are not optional, but rather a whole which must be fulfilled as a goal in every use of discretion. In other words, if any one of the 4 (four) is not fulfilled, then the use of discretion does not meet the requirements of clear objectives as regulated in Article 24 paragraph (1). With this provision, the use of discretion by government officials is neither easy nor trivial."

Considering, whereas based on the description above, the four objectives of discretion as referred to in Article 22 paragraph (2) of the Government Administration Law are cumulative rather than alternative, so that all objectives must be fulfilled;

Considering, whereas furthermore the provisions of Article 24 of the Government Administration Law states that Government Officials who use discretion must meet the following requirements:

1. in accordance with the purpose of Discretion as referred to in Article 22 paragraph (2);
2. does not conflict with statutory provisions;
3. in accordance with the General Principles of Good Governance;
4. based on objective reasons;
5. does not cause any conflict of interest; and
6. done in good faith;

Considering, whereas furthermore the Panel of Judges will consider whether the purpose of discretion is fulfilled or not in the objects of dispute as referred to in Article 22 paragraph (2) of the Government Administration Law, which is one of the conditions for discretion according to Article 24 letter a of the Government Administration Law;

##### 263 of 280

Considering, whereas one of the objectives of discretion according to Article 22 paragraph (2) letter b is to fill the legal vacuum. In the perspective of the legal vacuum, Defendant I argued that the legal vacuum occurred in the *a quo* dispute because there were no Standard Operating Procedures (SOPs) for terminating internet access. According to the Panel of Judges, Defendant I conveyed this argument based on the provisions of Article 40 paragraph (2b) of the Electronic Information and Transaction Law, Defendant I has the authority to throttle and/or terminate internet access, not just throttling and/or terminating access to Electronic information and/or Electronic Documents that have unlawful content. While as considered by the previous Panel of Judges, the authority of the government to terminate access and/or order the Electronic System Operator to terminate access as referred to in Article 40 paragraph (2b) of the Law Number 19 Year 2016 is the termination of access only to the Electronic Information and/or Electronic Documents that have unlawful content and do not include the throttling and/or termination of access to the internet network. So according to the Panel of Judges, since restrictions on the right to internet access according to the 1945 Constitution, the Human Rights Law and Law Number 12 Year 2005 must be regulated in a law, if a legal vacuum is deemed to occur, the issue of the legal vacuum is not a matter of whether there is an existence or absence of SOP for throttling and/or terminating internet network access. But the problem is regarding whether there is a law that gives authority to the Government to terminate internet network access, outside of the authority to terminate access to the Electronic Information and/or Electronic Documents that have unlawful content;

##### 264 of 280

Considering, whereas in the *a quo* dispute, in the exception of absolute competence, Defendant I stated that the objects of dispute was carried out in a state of emergency as considered by the previous Panel of Judges, but on pages 12-13 in their conclusion the Defendant I argued that the state of civil emergency as regulated in Government Regulation in Lieu of Law Number 23 Year 1959 is a condition that cannot be equated with the conditions of Papua and West Papua, so that Government Regulation in Lieu of Law Number 23 Year 1959 cannot be applied to the security conditions of Papua and West Papua around August until September 2019. However Defendant I did not explain the difference between the conditions of Papua and West Papua in those months and the conditions referred to in the Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency. Likewise, expert statements submitted by the Defendants namely by Prof. Dr. Yos Johan Utama, S.H., M.Hum., who stated that a state of emergency does not have to always be like an emergency according to Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency because its size is clear, namely qualitative in nature that can influence, hinder or stop the administration of government that is supported by information from officials in the region or by direct monitoring from the center, so that it is based on objective assessment only;

Considering, whereas on the argument of Defendant I supported by the statement of the aforementioned expert, the Panel of Judges considered that the right to internet access in addition to being a tool to enjoy and use the right or freedom of expression and the right to information access, as well as the media to realize many other rights including the right to education and teaching, the right to benefit from science and technology, arts and culture, the right to

##### 265 of 280

work, political rights, the right to associate and assemble, and the right to health services as recognized and guaranteed in Article 28C, Article 28D paragraph (2), Article 28E and Article 28H of the 1945 Constitution and Law Number 11 Year 2005 concerning the Ratification of the International Covenant on Economic, Social and Cultural Rights, Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights, Law Number 40 Year 1999 concerning the Press in the framework of guaranteeing freedom of the press, and various other Laws, so that for restrictions in exercising their rights and freedoms, Article 28J paragraph (2) of the 1945 Constitution confirms that it must be in the form of Laws and such restrictions are carried out for various reasons and the objectives that have been stated in limitative manner in the 1945 Constitution and human rights law instruments above, and must be carried out because they are needed proportionally in a democratic state;

Considering, whereas departing from this thinking, it is logical if the legislators, namely the House of Representatives (DPR) and the Government, formulate in Article 40 paragraph (2b) of the Electronic Information and Transaction Law (Law Number 19 Year 2016) that restriction of the right to internet access in the event of dissemination and use of Electronic Information and/or Electronic Documents that have unlawful content, authority to take precautions by the government through termination of access only to Electronic Information and/or Electronic Documents that have unlawful content and does not include terminating access to the internet network. The logic of the right to the internet access restrictions in the Electronic Information and Transaction Law is in line with the principles of criminal law, namely "no crime without guilt", that is, criminalisation is only carried out against those

##### 266 of 280

who abuse the internet that are in violation of the law carried out by criminal proceedings, and only the perpetrators' right to internet access are restricted by terminating access to Electronic Information and/or Electronic Documents that have unlawful content which is distributed by the perpetrators, so that the perpetrators no longer have the right to have access to disseminate Electronic Information and/or Electronic Documents that have contents that violate the law, likewise the public is also protected from Electronic Information and/or Electronic Documents that have unlawful contents due to the termination of access to that Electronic Information and/or Electronic Documents, so that the perpetrators' will and purpose of abuse are not achieved. Thus the Electronic Information and Transaction Law individualizes restrictions on the right to internet access only to those who use the internet in an unlawful manner and only access to Electronic Information and/or Electronic Documents that have unlawful content can be terminated. The Electronic Information and Transaction Law does not allow termination of access to the internet network that can have impact on the rights of other parties who are not the perpetrator;

Considering, whereas although the Electronic Transaction and Information Law cannot be used as a basis for conducting objects of dispute by the Government, it does not mean that there are no provisions in the statutory regulations that provide the authority for Defendant I to conduct the objects of dispute, this provision is Government Regulations in lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, but that provision requires that the country be in a state of danger or emergency;

##### 267 of 280

Considering, whereas Government Actions that are possible to be carried out by Defendant I pursuant to Article 40 paragraph (2), (2a) and (2b) of the Electronic Information and Transaction Law, are to throttle and/or terminate access to Electronic Information and/or Electronics Documents that have unlawful content, the Panel of Judges argue that the objects of dispute in the form of the throttling and termination of the internet network that exceeds the allowed Human Rights Restrictions in Article 40 paragraph (2), (2a) and (2b) of the Electronic Information and Transaction Law, is no longer a form of restriction of the right to internet access as stipulated in Article 28J paragraph (2) of the 1945 Constitution, Article 73 of the Human Rights Law and Article 19 paragraph (3) of the International Covenant on Civil and Political Rights. But it is a form of derogation to the right to internet access which has implications for other rights as referred to in Article 4 paragraph (1) of the International Covenant on Civil and Political Rights exercised in an emergency. And accordingly, it turns out that Article 13 of the Government Regulations in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency regulates the provision concerning the Government's authority to limit, among them, printing, publishing, announcing, delivering, storing, distributing, trading and attaching writings of any kind, and the provision of Article 17 paragraphs (1) and (3) regulates the Government's authority to establish regulations that limit or prohibit the use, and confiscate or destroy telecommunications equipment that can be used to reach the masses. According to the Panel of Judges, the scope of the authority includes the authority to terminate internet access;

Considering whereas that Defendant I argued that Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959

##### 268 of 280

concerning the State of Emergency cannot bind and cannot be applied to the security conditions of Papua and West Papua around August until September 2019, as well as expert statements from Prof. Dr. Yos Johan Utama, S.H., M.Hum., stated that a state of emergency does not have to always be like an emergency according to Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency because its size is clear, namely qualitative in nature that can influence, hinder or stop the administration of government that is supported by information from officials in the region or direct monitoring from the center, so that it is based on objective assessment only, but the Panel of Judges consider that because the objects of dispute is not only a restriction on the right to the internet access as stipulated in Article 28J paragraph (2) of the 1945 Constitution, Article 73 of the Human Rights Law and Article 19 paragraph (3) of the International Covenant on Civil and Political Rights, however, is a form of derogation of the right to internet access which has implications to other rights as referred to in Article 4 paragraph (1) of the International Covenant on Civil and Political Rights that is carried out in emergencies, and in fact Indonesia has laws that regulate emergencies or danger situations which regulates the Government's authority to take Actions, which are the objects of dispute, the Panel of Judges draws conclusions that the provisions in the Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency can be used as an analytical tool to provide a legal assessment of the objects of dispute;

Considering, whereas based on Article 1 number (1) of the Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, it is stated in principle that

##### 269 of 280

the President/Supreme Commander of the Armed Forces declares all or part of the territory of the Republic of Indonesia is in danger with a degree of civil emergency, military emergency or war. Furthermore, in Article 2 paragraph (2) of the Government Regulation in lieu of the Law, it is stipulated that the announcement of the statement or the elimination of a state of emergency is carried out by the President. Article 3 paragraph (1), (2) and (3) Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency stipulates that the highest control in a state of emergency is carried out by the President/Supreme Commander of the Armed Forces as the Central authority of Civil Emergency/Central authority of Military Emergency/Central authority of War who in exercising control can be assisted by an Agency consisting of parties as mentioned in paragraph (2) of the said Article and may appoint Ministers/Officers other than those mentioned in paragraph (2) of the said article if deemed necessary as stated in paragraph (3) of the said article;

Considering, whereas in the a quo dispute, the Defendants did not submit evidence that showed that Defendant II had declared all or any part of the territory of the Republic of Indonesia in a state of emergency along with the level of emergencies, as previously had been done by Defendant II for other regions including through Presidential Decree Number 88/2000 and Presidential Decree Number 28/2003. Other documentary evidence submitted by Defendant I marked TI-16 through TI-21 and the documentary evidence submitted by Defendant II marked T.2-1 through T.2.12 only in the form of laws and regulations that have become public knowledge and have become part of the deliberations of the Panel of Judges, while the evidence of print out letter T.2.13 of Defendant II's work visit to Papua and West Papua shows events that occurred after the objects of dispute. In line with that, there is also no evidence that shows

##### 270 of 280

the establishment of a body which assisted Defendant II consisting of parties as mentioned in Article 3 paragraph (2) and (3) Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, including the absence of evidence that shows Defendant I is a member of the said body;

Considering, whereas based on these considerations, the Panel of Judges argue that although according to Defendant I, in conducting the objects of dispute, Defendant I had coordinated with the security parties as evidenced by letters marked TI-14, TI-22, TI-33, TI-36a , TI-36b, TI-36c, TI-37, and TI-38 as well as the testimony of witness Semuel Abrijani Pangerapan and witness Police Inspector General Drs. Rudolf Alberth Rodja, however, because the objects of dispute carried out by Defendant I, in the form of either throttling or termination of internet access that was one of the objects of dispute, is a series of Government Actions that are interrelated because they originate from the same will of Defendant I, apparently it was not preceded by a decision on the state of emergency statement by Defendant II, and Defendant I is not a member of the Agency which assisted Defendant II as the Central authority of the Civil Emergency/Central authority of Military Emergency/Central authority of War, then from the aspect of procedure, the Government actions taken by Defendant I is contrary to Article 1 paragraph (1), Article 2 paragraph (2) and Article 3 paragraph (1), (2) and (3) of Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency;

Considering, whereas the Panel of Judges further considers that freedom of expression and information, including freedom of the press by using any means deemed appropriate to express opinions and information so as to reach as many people as possible, is a fundamental human right which is the basis of other rights and freedoms in a democratic society because it enables people to

##### 271 of 280

actualize all their rights and potential for self-development, convey and reveal the truth, and actively participate in the administration of government in order to realize transparent, accountable, responsive, effective and efficient governance (good governance);

Considering, whereas based on the above considerations, then the object of dispute in the form of a throttling and/or termination of the internet network is not only a termination of access to Electronic Information and/or Electronic Documents that have unlawful contents, even though according to Defendant I it was conducted in the context of the purpose of benefit, namely to prevent hoaxes, incitement, hate speech in terms of Ethnicity, Religious, Race and Intergroup relations that have the potential to cause unrest which can divide unity and threaten national security, especially in Papua and West Papua Provinces, and are carried out only on cellular data services, the Panel of Judges consider that since many people use the internet using cellular data services, and there is even almost some dependence among the people on the internet through cellular data in carrying out every activity in their lives, while the objects of dispute conducted by Defendant I was not preceded by Defendant II's Decree which announce the state of emergency in accordance with Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, so that the objects of dispute were carried out by Defendant I in a situation which legally has not been declared as a state of emergency, according to the Panel of Judges it has resulted in other human rights of other parties, who are not the perpetrators of internet abuse, being neglected and even reduced, among them is freedom of the press as witness Joni Aswita Putra stated that he had difficulty in broadcasting news directly due to termination of internet services, witness Ika Ningtyas Unggraini who experienced

##### 272 of 280

 difficulty verifying the truth in Papua and West Papua Provinces, including the disruption of some governmental activities and economic rights of the people dependent on the internet, therefore the Panel of Judges argues that the objects of dispute carried out by Defendant I, which is in a state that has not been declared legally as emergency, from the aspect of the substance is not in accordance with the needs and disproportionate in a democratic state as a third condition of human rights restrictions;

Considering, whereas based on the aforementioned considerations, it turns out that there is a law regulating and giving authority to Defendant I to throttle and terminate the internet, namely Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, so according to the Panel of Judges there is no legal vacuum which governs the objects of dispute conducted by Defendant I;

Considering, whereas in line with that, it turns out that the objects of dispute conducted by Defendant I reviewed from the procedural aspects, are contrary to the law, namely the Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, while from the substance aspect it did not meet the term of limitation of the right to internet access, that is required proportionally in a democratic state, so that it is substantively contrary to the laws and regulations governing the requirements for limiting human rights as regulated in Article 28J Paragraph (2) of the 1945 Constitution, Article 73 of Law Number 39 Year 1999 concerning Human Rights, and Article 19 paragraph (3) of the International Covenant on Civil and Political Rights which has been ratified pursuant to Law Number 12 Year 2005;

Considering, whereas because there is no legal vacuum governing the objects of dispute carried out by Defendant I, while filling

##### 273 of 280

the legal vacuum is one of the objectives of the discretion as specified in Article 22 paragraph (2) letter b of the Government Administration Law, then from the perspective of discretion, the objects of dispute does not fulfill the cumulative purpose of the discretion as specified in Article 22 paragraph (2) of the Government Administration Law. In addition, from the aspect of procedure and substance, the objects of dispute is contrary to the laws and regulations as previously considered, so that the cumulative purpose of discretion and the use of the discretion is not in compliance with the laws and regulations, then the discretionary requirements as regulated in Article 24 letters a and b of the Government Administration Law also becomes unfulfilled in the objects of dispute;

Considering, whereas based on the aforementioned considerations, the objects of dispute carried out by Defendant I in terms of procedures and substance have been in conflict with the applicable laws and regulations, so that the Panel of Judges no longer needs to consider the fulfillment of the general principles of good governance in the objects of dispute;

Considering, whereas because the Supreme Court Regulation Number 2/2019 in the Considering section b states that the act against the law by an agency and/or Government Official (*onrectmatige overheidsdaad*) is a Government Action, the Panel of Judges argue that the Government Actions of Defendant I in the objects of dispute are unlawful act by Government Officials;

Considering, whereas the Panel of Judges further considers that the internet is a neutral tool. What makes the internet not neutral is the users and their use. The use of the internet can be done negatively if it is misused unlawfully for the benefit of one party and harms many other parties. However, by

##### 274 of 280

paying attention to the extraordinary benefits of the convenience provided by internet technology, the use of the internet can also be positive to advance and improve human life and build human civilization in a better direction. In the case of internet abuse through unlawful content distribution, then it is an appropriate and proportional action if restriction on the right of the internet is only aimed at perpetrators and unlawful contents through termination of internet access to the content that is considered as violating the law and do the legal proceedings against the perpetrators, because if it is carried out in its entirety in the termination of the internet network, it will have a greater negative impact in the form of derogating other human rights that can be positively realized through the internet. Therefore, like other human rights, the right to internet access can only be derogated through termination of the internet network if in a state of emergency in accordance with applicable law;

Considering, whereas related to the Defendant II's responsibility, the Panel of Judges considered that based on the evidence of letter P.1.33 which is the same as the evidence of letter P.2.32 and connected with the evidence of letter T.I-29, it show that Defendant II agreed to the objects of dispute conducted by Defendant I;

Considering, whereas the definition of Government Administration Acts according to Article 1 number 8, or Government Actions according to Article 1 number 1 of the Supreme Court Regulation Number 2/2019, is the conduct of Government Officials or other state administrators to carry out and/or not carry out concrete actions in the context of administering government. Article 1 number (1) of the Government Regulation in lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency states in principle that Defendant II

##### 275 of 280

has the authority to declare all or part of the territory of the Republic of Indonesia in danger, with a civil emergency or military emergency or state of war degree. Furthermore, Article 3 paragraphs (1), (2) and (3) regulate that the highest control in a state of emergency is carried out by Defendant II, who in exercising control can be assisted by an agency consisting of parties as mentioned in paragraph (2) of the said article, and may appoint the Minister/Officer other than those mentioned in paragraph (2) of the article if deemed necessary as stated in paragraph (3) of the said article;

Considering, whereas that in the *a quo* dispute, Defendant II approved the Defendant's I Act which was the objects of dispute, but did not exercise its authority to first declare all or part of the territory of the Republic of Indonesia in a state of emergency along with the level of its emergency, and not form/appoint a Agency that assists Defendant II as determined in Article 1 number 1 and Article 3 paragraph (1), (2), and (3) Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 concerning the State of Emergency, so according to the law, Defendant I's Acts, which are the objects of dispute, from the aspects of procedure and substance, become contrary to the laws and regulations. On the contrary, if Defendant II had exercised his legal authority and obligations in accordance with Government Regulation in Lieu of Law Number 23 Year 1959/Law Number 23 Prp Year 1959 about the State of Emergency, Government Actions taken by Defendant I, which are the objects of dispute, will not be judged to be in conflict with the laws and regulations. Therefore, the Panel of Judges argue that Defendant II's Actions, which had the omission of authority and obligations, are a form of not doing any acts within the framework of administering government that are

##### 276 of 280

categorized as Government Actions, that are contrary to Defendant II's legal authority and obligations before agreeing Defendant I's Actions, so as the Panel of Judges' consideration of the procedural and substance aspects of Government Actions taken by Defendant I, then for Defendant II's Government Actions, the procedure and substance also contradicted the statutory regulations;

Considering, whereas due to the Supreme Court Regulation Number 2/2019 in the Considering section letter b, it states that acts against the law by Government agencies and/or Officials (*onrechtmatige overheidsdaad*) are Government Actions, so that Government Actions taken by Defendant II are also actions that violate the law by Government Officials, therefore, related to Government Actions in the form of disputed objects, Defendant I and Defendant II are declared to have committed unlawful acts by Government Agency and/or Officer;

Considering, whereas due to the proven objects of dispute carried out by Defendants I and Defendant II in violation of the law, the Plaintiffs' lawsuit was filed through an organizational legal standing mechanism, so that there were no claims for compensation, therefore Plaintiffs' demands for the Court to declare the Government's actions taken by Defendant I and Defendant II in the forms of:

 1. Government Action of throttling or slowing down of access/bandwidth in several regions of West Papua and Papua Province on 19 August 2019 from 13.00 until 20.30 Eastern Indonesian Time (GMT+9);

2. Government Action of blocking data services and/or terminating internet access completely in Papua Province (29 Cities/Regencies) and West Papua Province (13 Cities/Regencies) dated

##### 277 of 280

 21 August 2019 until at least 4 September 2019 at 23.00 Eastern Indonesian Time;

3. Government Action of extending the blocking of data services and/or terminating internet access in 4 Cities/Regencies in Papua Province (i.e. Jayapura City, Jayapura Regency, Mimika Regency, and Jayawijaya Regency) and 2 Cities/Regencies in West Papua Province (i.e. Manokwari City and Sorong City) since 4 September 2019 at 23:00 Eastern Indonesian Time up to 9 September 2019 at 18:00 West Indonesia Time / 20:00 East Indonesia Time;

as unlawful acts by a Government Agency and/or Officer with a legal reason to be granted;

Considering, whereas based on the evidentiary system in the procedural law of the State Administrative Court that leads to limited proof (*vrije bewijs*), as contained in the provisions of Article 100 and Article 107 of Law Number 5 Year 1986 concerning the State Administrative Court as already amended by Law Number 9 Year 2004 and Law Number 51 Year 2009 which outlines the provisions that Panel of Judges are free to determine what must be proven/scope of evidence, burden of proof along with evidentiary assessment, then in examining and adjudicating this dispute, the Panel of Judges studies and provides legal assessment of the evidence submitted by the Parties, but to consider the arguments of the Parties, the Panel of Judges only uses the valid pieces of evidence that are most relevant and most appropriate to this dispute, whereas for the other pieces of evidence and the rest remain to be attached and become one entity with the case file;

Considering, whereas because the Plaintiff's claim was granted, then based on Article 110 jo. Article 112 of Law Number 5 Year 1986 concerning the State Administrative Court, Defendants I and

##### 278 of 280

Defendant II shall be punished to jointly and severally pay for the costs arising in this case, the amount of which will be determined in the ruling of this Decision;

In view of the provisions of Law Number 5 Year 1986 concerning the State Administrative Court as amended by Law Number 9 Year 2004 and Law Number 51 Year 2009, Law Number 30 Year 2014 concerning the Government Administration and other laws and regulations concerned;

------------------------------------------------**ORDERS** :------------------------------------------------

In Exception:

* To declare that the exception of Defendant I and Defendant II is not accepted;

In Case of Lawsuit:

 1. To grant the Plaintiff's claim;

 2. To declare the Government actions taken by Defendant I and Defendant II in the forms of:

1. Government Action of throttling or slowing down of access/bandwidth in several regions of West Papua and Papua Province on 19 August 2019 from 13.00 until 20.30 Eastern Indonesian Time (GMT+9);

2. Government Action of blocking data services and/or terminating internet access completely in Papua Province (29 Cities/Regencies) and West Papua Province (13 Cities/Regencies) dated 21 August 2019 until at least 4 September 2019 at 23.00 Eastern Indonesian Time;

3. Government Action of extending the blocking of data services and/or terminating internet access in 4 Cities/Regencies in Papua Province (i.e. Jayapura City, Jayapura Regency, Mimika Regency, and Jayawijaya Regency) and 2 Cities/Regencies in West Papua Province (i.e. Manokwari City and Sorong City) since 4

##### 279 of 280

September 2019 at 23:00 Eastern Indonesian Time up to 9 September 2019 at 18:00 West Indonesia Time / 20:00 East Indonesia Time;

Are unlawful acts by a Government Agency and/or Officer;

3. To punish Defendant I and Defendant II to jointly and severally pay lawsuit costs in the amount of Rp. 457,000 (four hundred fifty seven thousand rupiah);

Thus it has been decided in the Consultative Meeting of the Panel of Judges of the Jakarta State Administrative Court on Thursday, May 28, 2020, by three members in the panel of judges, namely, **NELVY CHRISTIN, S.H., M.H**., as Chairman of the Panel of Judges, **BAIQ YULIANI, S.H.** and **INDAH MAYASARI, S.H., M.H.**, respectively as members of the panel of judges. The decision was pronounced in an open public hearing on Wednesday, **3 June 3, 2020,** by the Chairman of the Panel of Judges with the assistance of **Hj. YENI YEANIWILDA, S.E., S.H., M.H.**, as Deputy Registrar at the Jakarta State Administrative Court, attended by the Plaintiffs Attorney, Defendant I Attorney and Defendant II Attorney.

# Chairperson of the Panel of Judges,

**NELVY CHRISTIN, S.H., M.H.**

**Member I of Panel of Judges,** **Member II of Panel of Judges,**

**BAIQ YULIANI, S.H.** **INDAH MAYASARI, S.H., M.H.**

##### 280 of 280

**Deputy Registrar**

**Hj. YENI YEANIWILDA, S.E.,S.H.,M.H.**

Details of Case Fees:

|  |  |  |
| --- | --- | --- |
| - Registration ………………............ | Rp. | 30.000,- |
| - office stationery............................. | Rp . | 125.000,- |
| - Call ……………………………….... | Rp. | 276.000,- |
| - Stamp fee...................................... | Rp. | 6.000,- |
| - Editorial ........................................ | Rp. | 10.000,- |
| - Court costs ................................... | Rp. | 10.000,- |
|  | Rp. | 457.000,- |

(four hundred fifty seven thousand rupiah).