THE CONSTITUTIONAL COURT

REPUBLIC OF INDONESIA

SUMMARY OF DECISION

ON CASES NUMBER 39/PUU-XVIII/2020

Concerning

Internet-based service providers/Over The Top (OTT) services

Petitioner	**: PT. Visi Citra Mitra Mulia (INEWS TV) represented by David Fernando Audy in his position as President Director and Rafael Utomo as Director, and PT. Rajawali Citra Televisi Indonesia (RCTI) represented by Jarod Suwahjo and Dini Aryanti Putri in their position as Directors.**
Case	**:** Testing of Law Number 32 of 2002 concerning Broadcasting (UU 32/2002) against the 1945 Constitution of the Republic of Indonesia (UUD 1945).
Case of Lawsuit	**:** Article 1 number 2 of Law 32/2002 contradicts the 1945 Constitution.
Injunction	**:** Reject the petition of the Petitioners in its entirety.
Date of Decision	**:** Thursday, January 14, 2021
Decision Overview	**:**

Whereas Petitioner I is a Private Legal Entity in the form of a company engaged in television broadcasting which was established based on Deed Number 3 dated July 7, 2007, drawn up before Notary Kurnia Ariyani, SH, as last amended by Deed Number 18 dated August 20, 2019, drawn up in before Notary Anne Djoenardi, SH, MBA. Based on the Articles of Association, those who are entitled to represent the company inside and outside the court are the directors and those who are entitled and authorized to act for and on behalf of the board of directors and represent the company are the president director, and if the President Director is absent or unable to attend, two Directors may be replaced jointly. In submitting this application, Petitioner I was represented by David Fernando Audy as the President Director and Rafael Utomo as the Director.

Whereas Petitioner II is a Private Legal Entity in the form of a company engaged in television broadcasting established based on Deed Number 101 dated August 21, 1987, drawn up before Notary Rachmat Santoso, SH, as last amended by Deed Number 96 dated March 17, 2020, made in before Notary Jimmy Tanal, SH, M.Kn., based on the Statement of Shareholders' Decision Amendment to the Articles of Association, who is entitled to represent the company inside and outside the court is the next Board of Directors, who is entitled to represent the company is the President Director. If the President Director is unable to attend, the Deputy President Director is accompanied by a Director. If the Deputy President Director is unable to attend, two Directors are jointly entitled and authorized to act for and on behalf of the Board of Directors and represent the company. In submitting this application, Petitioner I was represented by Jarod Suwahjo and Dini Aryanti Putri as Director. Whereas Jarod Suwahjo is a foreign citizen (Australian citizen) but by Deed Number 96 dated March 17, 2020, Jarod Suwahjo occupies the position of Director of Finance, then based on the provisions of Article 16

paragraph (2) of Law 32/2002 the person concerned can become an administrator at a Broadcasting Institution. Private 2 and his placement as Director of Finance have obtained permission from the Ministry of Manpower.

Whereas the Petitioners' petition is an application to examine the constitutionality of the norms of the Act, in casu Law Number 32 of 2002 concerning Broadcasting of the 1945 Constitution, so that the Court has the authority to hear the *a quo* petition.

Whereas, the provisions of Article 1 number 2 of Law 32/2002 have caused constitutional losses for the Petitioners because it causes unequal treatment between the Petitioners as conventional broadcasting operators using radio frequency spectrum and internet-based broadcasting providers, such as Over the Top (OTT) services in broadcasting activities. The different treatment is because conventional broadcasting is bound by the provisions of Law 32/2002, while broadcasting using the internet such as OTT services is not bound by the provisions of Law 32/2002. Moreover, internet-based broadcasting providers, such as OTT services, are not subject to the Broadcasting Code of Conduct and Broadcasting Program Standards (P3SPS) in creating broadcast content and if they violate, they will be subject to sanctions by the Indonesian Broadcasting Commission (KPI) as part of their supervisory duties. Therefore, regardless of whether or not the unconstitutionality of the norms of Law 32/2002 request for review is proven, the Court believes that the Petitioners have the legal standing to file the *a quo* petition.

Whereas Article 1 number 2 of Law 32/2002 which is questioned by the Petitioners is part of the General Provisions Chapter. If referring to the systematic formation of laws and regulations as stipulated in Law Number 12 of 2011 concerning the Establishment of Legislations (Law 12/2011), the General Provisions of law contain an understanding or

definition that will become a reference for the overall substance of a paragraph, article or chapter of law. The main elements of the definition of "Broadcasting" in Article 1 number 2 of Law 32/2002 are: (1) its activities are in the form of broadcasting; (2) using radio frequency spectrum over the air, cable and/or other media; (3) received simultaneously and in unison by the public with a broadcast receiving device. These elements cannot be separated from each other, therefore a new activity can be said to be broadcasting if it fulfills these three elements. Therefore, if changes are made to the meaning or definition in “General Provisions”, the consequence will be to change the overall substance of the law, *in casu* Law 32/2002. Moreover, the term broadcasting whose meaning is based on the definition of Article 1 number 2 of Law 32/2002 is used 278 times in the *a quo* Law. Therefore, within the limits of reasonable reasoning, the argument of the Petitioners stating that adding norms in the meaning or definition of “Broadcasting” in Article 1 number 2 of Law 32/2002 will not change the articles of the *a quo* Law which are difficult to understand, both from the technical side of the formation laws and regulations and their substance. Because simply including the implementation of internet-based broadcasting in the formulation of the meaning or definition of "broadcasting" as argued by the Petitioners without changing the entirety of Law 32/2002 will create legal uncertainty issues. Moreover, OTT services in principle have a different character from conventional broadcasting operations. This means that it cannot equate broadcasting with OTT services only by adding the definition or definition of “Broadcasting” with a new phrase as requested by the Petitioners because the internet is not a medium (transmission) in the sense of broadcasting. After all, in the basic communication system, the communication system consists of a transmitter, media or channel, and a receiver. Meanwhile, if it is associated with the phrase "other media" what is meant in the sense of Article 1 number 2 of Law 32/2002 is terrestrial (air media), cable, and

satellite. This is clearly stated in the broadcasting operation carried out by the Subscription Broadcasting Agency, where the operation is intended for direct reception by the receiving system of subscription broadcasting providers and is only transmitted to subscribers. However, Private Broadcasting Agency can also broadcast its broadcasts through the terrestrial system for the classification of AM/MW radio broadcasting, FM radio broadcasting, and television broadcasting, in which the three operations are conducted analogously or digitally, as well as multiplexed broadcasting. Meanwhile, the broadcasting of Private Broadcasting Agency with a satellite system is determined for radio and television broadcasting, both of which are carried out analogously or digitally, as well as multiplexed broadcasting. Meanwhile, for Community Broadcasting Institutions in broadcasting only through the terrestrial system with coverage for AM/MW radio broadcasting, FM radio broadcasting and television broadcasting, all three of which are carried out analogously and digitally. Based on the provisions that describe the scope of other media as referred to in Article 1 number 2 of Law 32/2002 in the implementing regulations, the wireless media (transmission) is satellite, not the internet.

The internet and conventional broadcasting are two different things because on the internet there is a connection between various devices based on the TCP/IP protocol, while broadcasting is a broadcasting activity but both of them use media in their distribution or broadcasting, but the other media referred to in broadcasting activities is not the internet. Therefore, the dissimilarity in character between conventional broadcasting and internet-based broadcasting does not correlate with the issue of discrimination which, according to the applicants, is caused by the existence of multiple interpretations of the meaning or definition of "Broadcasting". Moreover, the Court has repeatedly emphasized the definition of discrimination, for example in the Decision of the Constitutional Court Number 028-029/PUU-IV/2006, dated

April 12, 2007, which states that "…discrimination must be defined as any restriction, harassment, or exclusion based on human differences based on religion, race, color, sex, language, political unity…". Therefore, it is clear that the definition or definition of “Broadcasting” in Article 1 point 2 of Law 32/2002 does not have multiple interpretations because it is the basis for conventional broadcasting regulations. Therefore, it is not relevant to use the argument of discrimination against the difference between conventional broadcasting and OTT services which do have different characters. On the other hand, if the Petitioners' petition is granted, it will create confusion between conventional broadcasting and OTT services.

Therefore, the argument of the Petitioners stating the meaning or definition of "Broadcasting" in Article 1 number 2 of Law 32/2002 is multi-interpreted which creates legal uncertainty and forms of discrimination over the application of the norms of the *a quo* article so that it is contrary to the 1945 Constitution is a lawless argument.

Whereas if the addition of the definition or definition of Article 1 number 2 of Law 32/2002 is not granted as requested by the Petitioners, it will cause injustice because internet-based broadcasting does not have any control arrangements as is the case with broadcasting which is strictly monitored by Indonesian Broadcasting Commission (KPI). This also causes unequal treatment between broadcasting and OTT services. Regarding the arguments of the Petitioners, it has been found that there are differences in character between conventional broadcasting and OTT services. The existence of these differences does not mean that there is a legal vacuum of supervision for OTT services as argued by the Petitioners because the supervision or control of OTT service content transmitted through the electronic system is subject to the provisions of the ITE (Electronic Information and Transactions) Law. In the ITE

Law, a supervisory mechanism for the content of OTT services has been determined so that it remains in line with the philosophy and basis of the state, namely Pancasila and the 1945 Constitution, the Government, in casu the Minister of Communication and Information, has the authority to terminate access to electronic information and/or electronic documents (internet content) whose contents violate the law. This is done by the government to protect the wider public interest due to the misuse of electronic information and electronic transactions that disrupt public order. Starting from this provision, law enforcement for violations of OTT service content is not only emphasized on the repressive aspect (actions) as argued by the Petitioners but instead on preventive actions (prevention) due to the provisions of Article 40 of Law 19/2016 as an amendment to Law 11/2008 Instead, it lays the foundations for preventive action to protect the wider public interest to guarantee the recognition and respect for the rights and freedoms of others and to fulfill fair demands following considerations of security and public order in a democratic society under the principles of the rule of law as enshrined in Article 1 paragraph (3) of the 1945 Constitution.

Meanwhile, supervision of OTT service content that violates the law is part of the government's role in facilitating the use of information technology and electronic transactions so that the use of such technology is truly carried out based on the principles of prudence and good faith. Concerning this aspect of supervision, in Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions as the implementing regulations of the ITE Law, further provisions have been made regarding steps to prevent the dissemination of the use of electronic information and/or electronic documents that have prohibited content (illegal electronic content). In this context, the government may terminate access and/or order the electronic system operator to terminate access to illegal electronic

content. The termination of access is conducted on electronic information and/or electronic documents with the following classifications: 1) violate the provisions of laws and regulations; (2) disturbing the public and disturbing public order and (3) notify the way or provide access to electronic information and/or electronic documents that have prohibited content by the provisions of the legislation. Regarding the procedure for applying for termination of access to electronic information and/or electronic documents, Article 97 of PP 71/2019 states that the public can apply for termination of access to the Minister of Communication and Information (Menkominfo). Furthermore, the Ministry of Communication and Information or related institutions coordinate with the Minister of Communication and Information to terminate access to electronic information and/or electronic documents. In addition to the public, law enforcement officers may request termination of access, including judicial institutions may order a termination of access to electronic information and/or electronic documents. With the termination of the access, the operator of the electronic system which includes the provider of internet access services, the operator of the network and telecommunications services, the provider of content, and the operator of the link that provides the electronic information traffic network and/or electronic document, is required to sever access to electronic information and/or electronic documents, as a form of enforcement of administrative sanctions. The existence of this administrative sanction arrangement shows that there is no legal vacuum in the supervision of OTT services as argued by the Petitioners.

In addition to administrative sanctions that can be imposed on electronic system operators, the ITE Law also determines the form of criminal sanctions (ultimum remidium) to any person who knowingly and without rights distributes and/or transmits and/or makes accessible electronic information and/or electronic documents containing content that violates

decency, gambling, insults and/or defamation, extortion and/or threats. Including actions that are prohibited and threatened with criminality are without the right to spread false and misleading news that results in consumer losses in electronic transactions, without the right to spread information aimed at causing hatred or hostility to certain individuals and/or community groups based on ethnicity, religion, race, and between groups (SARA) and/or without the right to send electronic information and/or electronic documents that contain threats of violence or intimidation aimed at personally. If the crime involves decency or sexual exploitation of a child, the punishment is increased by one-third of the main punishment. This sentence is also imposed on corporations that violate the actions prohibited by Law 11/2008 which are sentenced to a principal penalty plus two-thirds.

In addition to monitoring the content of OTT services conducted under the ITE Law, it is also based on various other sectoral laws following the content of the violated OTT services. For example, Law 36/1999 stipulates a prohibition on the operation of telecommunications that is contrary to the public interest, morality, security and public order by stipulating the obligation for telecommunications service providers to block content that violates the prohibition after obtaining information that is reasonably suspected and believed that the operation of telecommunications violates the public interest, decency, security or public order. This action is conducted in line with the underlying principles in the operation of telecommunications which must be based on the principles of benefit, fairness and equity, legal certainty, security, partnership, ethics and self-confidence. Concerning the ethical principle, it requires that the operation of telecommunications is always based on the spirit of professionalism, honesty, decency and openness.

Therefore, law enforcement for violations of OTT service content has turned out not only

to be stipulated in the ITE Law and Law 36/1999 but also based on various other sectoral laws that correlate with the violated content as determined by the law enforcement mechanism for example in Law Number 44 of 2008 concerning Pornography (Law 44/2008), Law Number 28 of 2014 concerning Copyright (UU 28/2014), Law Number 7 of 2014 concerning Trade (UU 7/2014), the Criminal Code (KUHP), and Law Number 40 of 1999 concerning the Press (UU 40/1999). With the determination of the law enforcement aspect for violations of OTT service content in the ITE Law, Law 36/1999 and various sectoral laws, both with the imposition of administrative sanctions and criminal sanctions, the Circular Letter of the Minister of Communication and Information No. 3 of 2016 which in substance regulates the prohibition as argued by the Petitioners is not justifiable because the imposition of sanctions as part of the limitation of human rights, the arrangement of which must be stated in the law as a form of representation of the will of the people. The inclusion of the prohibition aspect in the Circular which states that it is prohibited for OTT service providers to provide content that is contrary to Pancasila and the 1945 Constitution, threatening the integrity of the Unitary State of the Republic of Indonesia; create conflict or conflict between groups, ethnicities, religions, races, and groups (SARA), insults, harasses, and/or tarnishes religious values; encourage the general public to take actions against the law, violence, abuse of narcotics, psychotropics and other addictive substances, demeaning human dignity, violating decency and pornography, gambling, humiliation, extortion or threats, defamation, hate speech, Violation of rights to the property is a substance that has been regulated in the ITE Law, Law 36/1999, and various sectoral laws as described above. If the Circular Letter is under the intent and purpose, it is to provide understanding to OTT service providers and telecommunications operators to prepare themselves to comply with regulations for providing application services and/or content via the

internet (OTT) which is currently being prepared by the Government *casu quo* the Ministry of Communication and Information and aims to: to allow sufficient time for OTT service providers to set things up, related to the enactment of regulations for the provision of application services and/or content via the internet, for such purposes and objectives, the substance should be stated in implementing regulations of the law. Or, if the legislators want to comprehensively regulate the substance of conventional broadcasting and OTT services, including their current developments in law, then this is a law-making policy that is very possible considering that currently Law 32/2002 has been included in the list of the 2020-2024 National Legislation Program (Prolegnas). However, about the *a quo* Circular Letter in question by the Petitioners, it is not within the jurisdiction of the Court to judge it.

Therefore, the argument of the Petitioners stating that there is no preventive action against illegal content services because it is not regulated in Law 32/2002, thus asking the Court to change the meaning or definition of "Broadcasting" so that illegal content of OTT services can be subject to preventive action is an unfounded argument. Therefore, there is no question of the constitutionality of the norms of Article 1 number 2 of Law 32/2002 as long as it is related to the arguments of the Petitioners. Therefore, the arguments of the *a quo* Petitioners are groundless according to law.

Based on the considerations above, the Court subsequently issued a decision that rejected the petition of the Petitioners in its entirety.