



CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 36/PUU-XX/2022

Concerning

**Insults and Defamation and the Inconsistent Article
in the Electronic Information and Transactions Law**

- Petitioner** : Eriko Fahri Ginting, et al
Type of Case : Examination of Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (ITE Law), against the 1945 Constitution of the Republic of Indonesia (UUD 1945)
Subject Matter : Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law are in contrary to Article 1 paragraph (2) and paragraph (3), Article 27 paragraph (1), Article 28, Article 28C paragraph (1), Article 28D paragraph (1), Article 28E paragraph (3), Article 28F, Article 28G paragraph (1), Article 28I paragraph (1), paragraph (2), and paragraph (4), as well as Article 28J paragraph (1) and paragraph (2) of the 1945 Constitution
Verdict : To dismiss the petition of the Petitioners in its entirety
Date of Decision : Wednesday, July 20, 2022

Overview of Decision :

The Petitioners are individual Indonesian citizens who work as Content Creator on Legalpoint.id digital platform which focuses on legal content and information for both legal and general people as well as on digital platform Voicedlaw.id which focuses on conducting webinars and publications in the field of law.

Regarding the Authority of the Court, since the Petitioners petitioned for a review of the constitutionality of legal norms, *in casu* Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law against the 1945 Constitution, therefore the Court has the authority to hear the petition of the Petitioners.

Whereas regarding the legal standing, the Petitioners argue that they have the constitutional rights as stipulated in Article 1 paragraph (2) and paragraph (3), Article 27 paragraph (1), Article 28, Article 28C paragraph (1), Article 28D paragraph (1), Article 28E paragraph (3), Article 28F, Article 28G paragraph (1), Article 28I paragraph (1), paragraph (2), and paragraph (4), as well as Article 28J paragraph (1) and paragraph (2) of the 1945 Constitution. The Petitioners believe that their constitutional rights have been prejudiced by the promulgation of the provisions of Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law because the provisions of Article 27 paragraph (3) and Article 28 paragraph (2) of the *a quo* ITE Law have created legal uncertainty, vagueness, and ambiguity both normative and implementation, so that it violates or threatens the constitutional rights of the Petitioners as content creator in creating and sharing ideas, concepts, opinions, thoughts, criticisms, and/or suggestions regarding certain legal issues or phenomena through the use of information and communication technology through the digital media or platform.

According to the Petitioners, there is a causal relationship (*causal verband*) between the loss of constitutional rights and the promulgation of Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law because it threatens the rights of the Petitioners as content creator to have the freedom to express their thoughts and attitudes, in accordance with their conscience and the right to seek, obtain, possess, store, process, and convey information using all available channels.

Based on the descriptions of the Petitioners regarding the legal standing and the evidence presented, the Court is of the opinion that the Petitioners have been able to explain the perceived potential loss of constitutional rights and the existence of a causal relationship (*causal verband*) between the perceived loss of constitutional rights of the Petitioners and the promulgation of the norms being petitioned for review. Therefore, if the Petitioners' petition is granted, the potential loss of the Petitioners' constitutional rights will not occur. Therefore, regardless of whether or not the arguments of the Petitioners' petition regarding the unconstitutionality of the norms of Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law, the Court is of the opinion that the Petitioners have legal standing to act as Petitioners in this *a quo* case.

Whereas because of the *a quo* petition is clear, therefore the Court is of the opinion that there is no urgency to request the statements from the parties as stated in Article 54 of the Constitutional Court Law

Before considering the subject matters of the petition of the Petitioners any further, since previously there have been the review of the constitutionality of the norms of Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law and the petition for review has been submitted, the Court will first consider whether the *a quo* petition has complied with the provisions of Article 60 paragraph (2) of the Constitutional Court Law and Article 78 of PMK 2/2021, to determine whether the *a quo* norms can be re-reviewed. The Court once issued a decision regarding the review of the norms of Article 27 paragraph (3) of the ITE Law, in the Decision of the Constitutional Court Number 50/PUU-VI/2008 as stated in a session open to the public on May 5, 2009. The basis for review as used in the decision is Article 28E paragraph (2), paragraph (3), Article 28D paragraph (1), and Article 28F of the 1945 Constitution. Meanwhile, regarding the review of the norms of Article 28 paragraph (2) of the ITE Law, the Court has also issued a decision in the Decision of the Constitutional Court Number 52/PUU-XI/2013 as stated in a hearing open to the public on August 28, 2013. The basis of review as used in the decision is Article 28E paragraph (2) and Article 28F of the 1945 Constitution. In addition, in the Decision of the Constitutional Court Number 76/PUU-XV/2017 as stated in a hearing open to the public on March 28 2018, the Court has also issued a decision regarding Article 28 paragraph (2) of the ITE Law by using Article 1 paragraph (3), Article 28D paragraph (1), Article 28E paragraph (3), and Article 28G paragraph (1) of the 1945 Constitution as the basis for review. Meanwhile, the Petitioners in the *a quo* case, both in relation to the review of norms of Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law are using the same basis for review, namely Article 1 paragraph (2) and paragraph (3), Article 27 paragraph (1), Article 28, Article 28C paragraph (1), Article 28D paragraph (1), Article 28E paragraph (3), Article 28F, Article 28G paragraph (1), Article 28I paragraph (1), paragraph (2), and paragraph (4), as well as Article 28J paragraph (1) and paragraph (2) of the 1945 Constitution. Therefore, there are differences in the basis for review in the *a quo* case, namely Article 1 paragraph (2), Article 27 paragraph (1), Article 28C paragraph (1), Article 28I paragraph (1), paragraph (2), and paragraph (4), as well as Article 28J paragraph (1) and paragraph (2) of the 1945 Constitution. Meanwhile regarding the reasons for review, after the Court has carefully examined the *a quo* case, there is a difference with the one that has been decided by the Court because the Petitioners argue that the articles being petitioned for review is an "inconsistent articles" even though it has been decided by the Court, but in fact according to the Petitioners the Court's decision was not implemented by the law enforcement officials so that it does not provide legal certainty over the rights that are guaranteed by the 1945 Constitution. Therefore, the Petitioners petition for the legal considerations of the Decision of the Constitutional Court

Number 50/PUU-VI/2008 and the Decision of the Constitutional Court Number 76/PUU-XV/2017 to be declared in the verdict or included in the revision of the ITE Law. Whereas although the object of the *a quo* petition filed by the Petitioners is the same as Case Number 50/PUU-VI/2008, Case Number 52/PUU-XI/2013, Case Number 76/PUU-XV/2017, but because the *a quo* case

has different basis for review and also have different reasons, then regardless of whether the *a quo* petition is substantially proven or not, formally the *a quo* petition, based on the provisions of Article 60 paragraph (2) of the Constitutional Court Law and Article 78 of PMK 2/2021, can be re-submitted.

Whereas regarding the arguments of the Petitioners who question the constitutionality of the norms of Article 27 paragraph (3) of the ITE Law because it is implemented, according to the Petitioners, as "inconsistent articles" and do not protect the rights of the Petitioners guaranteed by the 1945 Constitution because law enforcement officials do not implement the Decision of the Constitutional Court Number 50/PUU-VI/2008, it has been found that the Court, in its opinion as declared in the verdict, states that the Petitioners' petition is entirely dismissed. In other words, the Court has stated that the norms being petitioned for review in the *a quo* petition have been declared as not in contrary to the 1945 Constitution in the previous decisions and therefore they still have binding legal force.

After the Court carefully examined the reasons for the Petitioners' petition and the basis for review as submitted, even though there were differences with the cases that had been decided previously, what was questioned by the Petitioners in principal was the vagueness or ambiguity of the norms of Article 27 paragraph (3) of the ITE Law so that it did not provide the legal protection to the right to freedom of expression, the enforcement of which is not in line with the Decision of the Constitutional Court Number 50/PUU-VI/2008. Therefore, the Petitioners in their alternative *petitum* has petitioned for the Court, particularly in *petitum* letter b, to declare Article 27 paragraph (3) of the ITE Law as in contrary to 1945 Constitution. However, after the Court carefully examined the arguments as established by the Petitioners to declare the unconstitutionality of the norm of Article 27 paragraph (3) of the ITE Law, there is no fundamental reason for the Court to change its position as has been decided in the Decision of the Constitutional Court Number 50/PUU-VI/2008, therefore the Court remains in its position. Meanwhile, if it is related to the next alternative *petitum* letter b, in principal the Petitioners petition for the things that have been considered by the Court in the legal considerations of the Decision of the Constitutional Court Number 50/PUU-VI/2008 to be stated in the verdict or included in the revision of the ITE Law. In relation to what was petitioned for by the Petitioners, it is important for the Court to reaffirm that the provisions of Article 27 paragraph (3) of the ITE Law are an affirmation of the criminal law norms of insults contained in the Criminal Code into new legal norms in accordance with the developments in the cyber world because the Criminal Code cannot reach the offences of humiliations and insults that are carried out online, due to the element of "in public". Therefore, the enforcement of the norms of Article 27 paragraph (3) of the ITE Law cannot be separated from the norms of humiliation in the Criminal Code, namely Article 310 and Article 311 of the Criminal Code as the main norms (*genus delict*). Regarding this, the Court has considered such matter in the legal considerations of the Decision of the Constitutional Court Number 50/PUU-VI/2008 Sub-paragraph [3.16.1] page 104.

Whereas despite the concerns of the Petitioners over the enforcement of the norms of Article 27 paragraph (3) of the ITE Law which is not actually within the domain of the Court's authority to judge it, the Government has actually followed up on the Decision of the Constitutional Court Number 50/PUU-VI/2008 by issuing a Joint Decree of the Minister of Communications and Information Technology of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Chief of the National Police of the Republic of Indonesia Number 229 of 2021, Number 154 of 2021, and Number KB/2/VI/2021 concerning Guidelines for the Implementation of Certain Articles in Law Number 11 of 2008 concerning Information and Electronic Transactions as Amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic

Transactions. In the Joint Decree, the guidelines have been formulated for the enforcement or implementation of certain articles of the ITE Law, namely Article 27 paragraph (1), paragraph (2), paragraph (3), Article 28 paragraph (1) and paragraph (2), Article 29, and Article 36 of the ITE Law, without the Court intending to assess the legality of such Joint Decree, the *a quo* Joint Decree is intended so that the implementation of certain articles of the ITE Law will no longer cause multiple interpretations and controversies in the community, therefore the implementation guidelines for the law enforcement officers are drawn up in carrying out their duties and authorities [*vide* Consideration letter b of the Joint Decree]. Regarding this Joint Decree, the Petitioners have also referred to this in their petition [*vide* the petition of the Petitioners page 15]. With these guidelines, the law enforcement officers have received guidelines or manuals so that in implementing the provisions of the norms of the article for which the review is being petitioned, it shall not be repressive but conducted carefully so that its implementation can be accounted for, as this is determined in the Joint Decree, especially in providing the guidelines for the implementation of Article 27 paragraph (3) of the ITE Law [Attachment to the Joint Decree, page 9-14], which was disputed by the Petitioners.

Therefore, without the Court intending to assess the legality of the Joint Decision as described above, the issue regarding the implementation of the enforcement of the norms of Article 27 paragraph (3) of the ITE Law which concerns the Petitioners has been answered through the guidelines for law enforcement officers in the Joint Decree which currently guides the enforcement of the norms of the *a quo* articles. Therefore, there is no issue regarding the constitutionality of norms, therefore the Petitioners who petition for the legal considerations of the Decision of the Constitutional Court Number 50/PUU-VI/2008 be declared in the verdict is legally unjustifiable. Meanwhile, regarding the Petitioners who petition for immediate revision of the ITE Law, it is not within the authority of the Court but is within the authority of the legislators.

Furthermore, regarding the arguments of the Petitioners who disputed the constitutionality of the norms of Article 28 paragraph (2) of the ITE Law which the Petitioners considered to have created arbitrariness so as to deviate from the restrictions on rights as stipulated in Article 28J paragraph (2) of the 1945 Constitution. Regarding the norms of Article 28 paragraph (2) of the ITE Law, the Court has already decided in the Decision of the Constitutional Court Number 52/PUU-XI/2013 as stated in a hearing open to the public on August 28, 2013, where the legal considerations are stated in Paragraph **[3.11]**, Paragraph **[3.12]**, Paragraph **[3.13]**, Paragraph **[3.14]**. In the Decision of the Constitutional Court Number 52/PUU-XI/2013, the Court stated in its verdict that the norms of Article 28 paragraph (2) of the ITE Law are not in contrary to the 1945 Constitution. Furthermore, in Case Number 76/PUU-XV/2017 which questioned the phrase “intergroup” in the norms of Article 28 paragraph (2) of the ITE Law, the Court has also decided in a hearing open to the public on March 28, 2018, where the legal considerations are stated in Sub-Paragraph **[3.13.2]**, Paragraph **[3.14]**, Sub-Paragraph **[3.14.1]**, Sub-Paragraph **[3.14.2]**, Paragraph **[3.15]**, Paragraph **[3.16]**.

Regarding the petition of the Petitioners who are concerned about the implementation of the law enforcement of the norms of Article 28 paragraph (2) of the ITE Law, therefore in the alternative *petitum* letter b, specifically to Article 28 paragraph (2) of the ITE Law, the Petitioners petition for the Court to declare the legal considerations of the Decision of the Constitutional Court Number 76/PUU-XV/2017 in the verdict of the *a quo* case. Regarding the concerns and the petition of the Petitioners, they have actually been answered with the follow-up of the Decision of the Constitutional Court Number 76/PUU-XV/2017 in the Joint Decree as considered above in the Sub-Paragraph **[3.11.4]**. In the Joint Decree, the guidelines for the enforcement or implementation of Article 28 paragraph (2) of the ITE Law are also determined so as not to cause multiple interpretations and controversies in the community [*vide* Considering letter b of the Joint Decree]. As for the implementation guidelines, in particular it is regarding Article 28 paragraph (2) of the ITE Law. Therefore, without the Court intending to assess the legality of the Joint Decision, the main substance of

which has followed up on the decision of the Constitutional Court, therefore the Petitioners' concerns have no relevance for the implementation of the norms of Article 28 paragraph (2) of the ITE Law. Therefore, the *a quo* arguments of the Petitioners are legally unjustifiable.

Whereas based on the entire description of the legal considerations as described in the previous paragraphs, the Court considered that the provisions of the norms of Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law did not create legal uncertainty and had provided legal protection to everyone as guaranteed by the 1945 Constitution. Therefore, the petition of the Petitioners, regarding Article 27 paragraph (3) and Article 28 paragraph (2) of the ITE Law which is deemed as in contrary to the 1945 Constitution, is legally unjustifiable. Meanwhile, the arguments and other matters shall not be considered because they are deemed as irrelevant.

Whereas based on the assessment of the facts and laws as mentioned above, the Court issued a decision which verdict states that the petition of the Petitioners is entirely dismissed.