



## What Constitutes as Limitation of (Human) Rights in Indonesian Legal Context?

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### ABSTRACT

This article reviews the interpretation of the Constitutional Court (the Court) on the Article 28J paragraph (2) of the 1945 Constitution by looking into the rulings related to the Information and Electronic Transaction Law. These rulings are chosen because, in those rulings, tensions between individual and public interest are apparent. For example, the tension between the right to privacy and freedom of expression, and the tensions between freedom of expression and public order. The rulings that will be studied in this writing are Ruling No. 50/PUU-VI/2008, Ruling No. 2/PUU-VII/2009, Ruling No. 5/PUU-VIII/2010, Ruling No. 52/PUU-XI/2013, and Ruling No. 20/PUU-XIV/2016. In studying those rulings, this article use a legal method namely the interpretation of arguments, e.g. what are the arguments provided by the claimants in the case in relation to the Article 28J paragraph (2) of the 1945 Constitution and how does the Court responds to such arguments. Additionally, this writing will also compare the rulings to each other to portray the "variety" of interpretation by the Court over the time. Furthermore, this article will compare the Article 28J paragraph (2) of the 1945 Constitution and the Court's interpretation of it to other standards of limitation in other human rights instruments such as European Convention on Human Rights (ECHR) and International Covenant on Civil and Political Rights (ICCPR) in order to depict what are the distinctive features of limitation of rights in Indonesian regime in comparison to other regimes. Last but not least, this article analyze what are the lesson learned from studying the Court's interpretation and the possible consequence of such interpretation to the human rights protection in Indonesia.

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### 1. Introduction

The human rights provisions were embedded in the 1945 Constitution (hereinafter, "the Constitution") in the second amendment of the 1945 Constitution. In discussing the provisions, those who involved in the amendment process were inspired by the international human rights instruments specifically Universal Declaration of Human

Rights.<sup>1</sup> Nevertheless, unlike the international human rights instruments, those who involved in the amendment wanted that Indonesia has distinctive human rights regime from the others.<sup>2</sup> In doing so, one of the way making the human rights regime in Indonesia distinctive is by adding Article 28J especially its paragraph (2) (hereinafter, "Article 28J para. (2)") to the Constitution.<sup>3</sup> Article 28J para. (2) of the Constitution applies as the general rule to limit the human rights provisions in the Constitution and any human rights provision in Indonesian legal context for that matter. The application of Article 28J para. (2) of the Constitution as a general rule is to be found in the rulings of the Constitutional Court of Indonesia (hereinafter, "the Court"). This writing then will study what constitutes as the limitation of rights in Indonesian legal context by perusing the Court rulings in order to see the Court's interpretation on the Article 28J para. (2) of the Constitution.

There are three reasons why the Court's interpretation on Article 28J para. (2) of the Constitution become the focus of this writing. Those three reasons are the paramount role of the Court in Indonesia, the significant importance of Article 28J para. (2) of the Constitution especially in terms of human rights protection, and the possible consequences of having the Article 28J para. (2) of the Constitution itself.

First of all, the Court's pivotal role in interpreting the 1945 Constitution. As stipulated in the Article 24C para. (1) of the Constitution, the Court is the one state body that has a legitimate power to interpret the Constitution through the constitutional review presented before the Court. In exercising its power, the Court has the aim to safeguard the Constitution itself and protect the constitutional rights of Indonesian people.<sup>4</sup> That being said, through that interpretation of Article 28J para. (2) of the Constitution -or any interpretation for that matter- the Court works toward upholding the constitutional values. Even more, the Court furthers the importance of democracy of Indonesia. Therefore, take into account both the significant importance of Article 28J para. (2) of the Constitution and the role of the Court itself, it is important to study how does the Court interprets the Article 28J para. (2) of the Constitution.

Furthermore, the significant importance of the Article 28J para. (2) of the Constitution itself. The Article has a significant importance in a sense that this Article, as far as the rulings from the Court concern, becomes the general rule in limiting rights in Indonesia<sup>5</sup> and as such, the interpretation of the Article will influence the way that policymakers and law enforcers in balancing the existing rights in Indonesia. However, the interpretation of the Article will also provide a possible room for abusive power or human rights violation if such interpretation is not understood correctly.

Last but not least, the reason why it is important to study how does the Court interprets the Article 28J para. (2) of the Constitution is that the possible consequences of having a general rule to limit human rights provisions -at least the provisions that stipulated in the 1945 Constitution after the second amendment- in the light of furthering human right protection in Indonesia. The general rule here is the Article 28J para. (2) of the Constitution. The possible consequences such as abuse of power or

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<sup>1</sup> Sekretariat Jenderal Mahkamah Konstitusi. (2010). *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama*. Jakarta: Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, p. 280-281.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, p. 344-345 and p. 362.

<sup>4</sup> Asshiddiqie, J. (2008). *Menuju Negara Hukum yang Demokratis*. Jakarta: Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, p. 39.

<sup>5</sup> See further Constitutional Court of the Republic of Indonesia, Ruling 2-3/PUU-V/2007, p. 412-413.

human rights violation could occur if the interpretation of Article 28J para. (2) of the Constitution, as mentioned above, is not understood comprehensively. Specifically for the human rights violation, having the Article 28J para. (2) of the Constitution itself can be problematic. It is problematic in the sense that since each right stipulated in the Constitution has a distinct demand, having the Article 28J para. (2) as the single and general rule limitation that applies to all provisions will not probably fulfill such demand or will potentially create almost-endless clash of interests. For example, having a “*religious values*” as one of the basis to limit rights will probably make the fulfillment of right to freedom of religion and beliefs become more complicated in a sense that such limitation will make a tension between religions, beliefs, and the values they uphold more likely to occur. In such tension, the Court’s judges are more likely to become the arbitrary power to determine which religious value(s) to be uphold. The possible consequences will be elaborated more in the Part II of this writing when discussing the lesson learned from the Court’s interpretation of Article 28J para. (2) of the Constitution in the IET Law-related rulings.

To briefly sum up, it is important to study the interpretation of Article 28J para. (2) of the Constitution because through such interpretation, the Court upholds the constitutional values and democracy of Indonesia. Additionally, such interpretation has both a significant importance and possible consequences of having the Article 28J para. (2) of the Constitution as the general rule of limitation of rights especially to the human rights protection in Indonesia.

## 2. Method

As mentioned above, this writing concerns about the limitation of rights in Indonesian legal context. Therefore, this writing sets the main question: *What constitutes as limitation of rights in Indonesian legal context?* In order to answer the main question, this writing sets three sub-questions namely:

- a) How does the limitation of rights is regulated under Article 28J paragraph (2) of the 1945 Constitution?
- b) How does the Constitutional Court of Indonesia interpret the Article 28J paragraph (2) of the 1945 Constitution?
- c) What are the lessons learned from perusing the interpretation of the Court on Article 28J paragraph (2) of the 1945 Constitution?

This writing will employ legal method namely the interpretation of arguments in answering the above three questions. Meaning this writing will study the presented arguments with regard to the above three questions by looking into relevant legal instruments (e.g. the 1945 Constitution and the rulings of the Constitutional Court of Indonesia) and scholarly writings related to the issue. For the *first sub-question*, this writing will peruse the 1945 Constitution specifically Article 28J para. (2) of the Constitution. Moreover, this writing will explain Ruling 2-3/PUU-V/2007 in order to portray the significance of Article 28J para. (2) of the Constitution.

For the *second sub-question*, this writing will specifically study the Court’s rulings in the constitutional reviews of the provision stipulated in the Information and Electronic Transaction Law (hereinafter, “IET Law”). The rulings are Ruling No. 50/PUU-VI/2008, Ruling No. 2/PUU-VII/2009, Ruling No. 5/PUU-VIII/2010, Ruling No. 52/PUU-XI/2013, and Ruling No. 20/PUU-XIV/2016. This writing also will compare those rulings to each other to portray the degree of variety of interpretation by the Court over the time. These rulings are chosen because, in these rulings, the tensions

between individual and public interest are apparent. For example the tension between the right to privacy and freedom of expression, and the tensions between freedom of expression and public order. In other words, these rulings are the relevant source for researching about the limitation of rights in Indonesian legal context. Moreover, this writing will further compare the interpretation of limitation of rights by the Court in its rulings to other standards of limitation in other human rights instruments such as European Convention on Human Rights (hereinafter, "ECHR") and International Covenant on Civil and Political Rights (hereinafter, "ICCPR"). This comparison aims to show what are the distinctive and similar features of limitation of human rights regime in Indonesia to the other regimes namely ECHR and ICCPR.

For the *third sub-question*, this writing will first explain what the Court's roles in Indonesian legal context in upholding the constitutional values and furthering the democracy of Indonesia. Then, this writing will analyze how does the interpretation of the Article 28J para. (2) of the 1945 Constitution relate to the Court's role in Indonesia. Furthermore, this writing will discuss what are the possible consequences of the interpretation of the Court on the Article 28J para. (2) of the 1945 Constitution to the human rights protection in Indonesia.

### **3. Analysis and Discussion**

This part will discuss the issue of what constitutes as the limitation of rights in Indonesian legal context. To do so, this part will first explain the limitation of rights under the Article 28J para. (2) of the Constitution. Secondly, this part will discuss the rulings of the Court in the context of IET Law in order to know how does the Court interprets the Article 28J para. (2) of the Constitution so far. Additionally, this part will also discuss the comparative note between the Court's interpretation on limitation of rights and other international human rights instruments namely ECHR and ICCPR. Thirdly, this part will describe the lesson learned from perusing the interpretation of Article 28J para. (2) of the Constitution by the Court. The lesson learned includes the relation between the role of the Court in upholding the constitutional values and furthering the democracy of Indonesia and the interpretation of the Article 28J para. (2) of the Constitution, and the possible consequences of such interpretation to the human rights protection in Indonesia.

#### **3.1. Limitation of Rights under the Article 28J paragraph (2) of the 1945 Constitution**

This sub-part will explain the limitation of rights under the Article 28J para. (2) of the Constitution. Article 28J para. (2) of the Constitution stipulates that: *"In exercising rights and freedom, every person must submit to the limitation that is determined by law/in accordance with law with the sole aim to guarantee the recognition and respect toward rights and freedom of others and to fulfill a just aim in accordance with the moral, religious values, security and public order consideration in a democratic society"* (Unofficial translation by the author).

Based on the literal stipulation of Article 28J para. 2 of the Constitution, there are at least four elements of justification in limiting the exercise of rights and freedom of a person in Indonesia. Those four elements are:

- a) determined by/in accordance with law.
- b) to guarantee the recognition and respect toward rights and freedom of others.
- c) to fulfill a just aim in accordance with the moral, religious values, security and public order consideration.
- d) in a democratic society.

It is still unclear whether these four elements are cumulative or not. Nevertheless, the Court often referred the Article 28J para. 2 of the Constitution for its entirety.<sup>6</sup> As for the meaning of each element, it will be elaborated more in sub-part 3.2 of this writing below.

Regarding the significance of the Article 28J para. (2) of the Constitution, in Ruling 2-3/PUU-V/2007 –a ruling about the constitutionality of death penalty provision, the Court explained that all the human rights provision from Article 28A to Article 28I of the Constitution submit to the limitation of rights stipulated in the Article 28J para. (1) and (2).<sup>7</sup> However, in relation to this Ruling, it argued that in term of the non-derogable rights mentioned in the Article 28I para. (1) of the Constitution -those rights including the right to life, the right not to be tortured, the right to freedom of thoughts and beliefs, the right to the freedom of religions, the right not to be enslaved, Article 28J of the Constitution is not applicable to those non-derogable rights.<sup>8</sup>

### 3.2. The Constitutional Court's Interpretation on the Article 28J paragraph (2) of the 1945 Constitution

This sub-part will discuss the Court's interpretation on the Article 28J para. (2) of the Constitution in the Court's ruling. Furthermore, this sub-part will also analyze the comparison between the Court's interpretation on limitation of rights and other international human rights instruments namely ECHR and ICCPR.

#### 3.2.1. A Case Analysis: IET Law-related rulings

The Court's ruling that will be studied here is the IET Law-related rulings namely Ruling No. 50/PUU-VI/2008 (hereinafter, "**Ruling I**"), Ruling No. 2/PUU-VII/2009 (hereinafter, "**Ruling II**"), Ruling No. 5/PUU-VIII/2010 (hereinafter, "**Ruling III**"), Ruling No. 52/PUU-XI/2013 (hereinafter, "**Ruling IV**"), and Ruling No. 20/PUU-XIV/2016 (hereinafter, "**Ruling V**").

##### i. Ruling I

In **Ruling I**, the claimants challenged the constitutionality of Article 27 para. (3) and Article 45 para. (1) of IET Law. The former Article stipulates about the prohibition on defamation and the latter regulates about the penalty when a violation of the former occurs. These two Articles were challenged against the Article 28D para. (1), Article 28E para. (2) and (3), and Article 28F of the Constitution. However, the claimants' arguments on these constitutional Articles *per se* are not the major interest in this writing. This writing is more interested in the way the claimants used Article 28J para. (2) of the Constitution to emphasize their main point. In essence, the main point of the claimants were the aforementioned IET Law provisions jeopardizes the claimants' right to freedom expression and/or press. With regard to the Article 28J para. (2) of the Constitution, the claimants argued that: (a) the claimants acknowledged that the Article 28J para. (2) of the Constitution provides a justification to limit the exercise of

<sup>6</sup> See further Constitutional Court of the Republic of Indonesia, Ruling No. 50/PUU-VI/2008, Ruling No. 2/PUU-VII/2009, Ruling No. 5/PUU-VIII/2010, Ruling No. 52/PUU-XI/2013, and Ruling No. 20/PUU-XIV/2016.

<sup>7</sup> See Constitutional Court of the Republic of Indonesia, Ruling 2-3/PUU-V/2007, p. 412

<sup>8</sup> Osgar S. Matompo (2014), "Pembatasan Terhadap Hak Asasi Manusia dalam Perspektif Keadaan Darurat," *Jurnal Media Hukum*, 21 (1): 57-72.

certain rights<sup>9</sup>, and (b) nonetheless, if such limitation is preventing the advancement of human rights protection, even though such limitation is carried out in accordance with law, such limitation is still violating the human rights at stake.<sup>10</sup> Against these arguments, the Court said that though there is a guarantee of freedom of expression and/or press, it does not necessarily mean that the exercise of such freedom cannot be limited and as such, the state has the power to limit the exercise of such freedom.<sup>11</sup> The Court then referred to the Article 28J para. (2) of the Constitution as one of the justifications in the Constitution for such state power and the limitation that the state wants to carry out.<sup>12</sup>

Additionally, the Court's interpretation on Article 28J para. (2) of the Constitution can actually be seen throughout its consideration in **Ruling I**. As explained in the previous sub-part, the Article 28J para. (2) of the Constitution contains four prerequisites elements of limitation namely: (a) *determined by/in accordance with law*, (b) *to guarantee the recognition and respect toward rights and freedom of others*, (c) *to fulfill a just aim in accordance with the moral, religious values, security and public order consideration*, and (d) *in a democratic society*.

In **Ruling I**, with regard to *determined by/in accordance with law*, the Court says that the Articles of IET Law challenged in this constitutional review are legal provisions that meant to balance between the individual's right to freedom of expression and the protection of (an)other individual's dignity.<sup>13</sup> That being said, in such consideration, the Court indirectly also emphasizes that the Articles of IET Law challenged in this constitutional review are meant to *guarantee the recognition and respect toward rights and freedom of others*. As for the *just aim* element, in this **Ruling I**, the Court takes into account *a moral consideration*. The Court explained that Indonesia does not recognize the separation of morality within an individual –whether it is a civil morality, a communal one or an institutional one- but rather such individual is seen as a holistic being namely as a person, a social being and a citizen in which such individual has a dignity and that dignity is a bliss coming from the Almighty God.<sup>14</sup> The consequence of viewing an individual person and his or her dignity this way, as the Court argued, is that the dignity of that individual person is important especially in a society that upholds democratic value like Indonesia and as such, the dignity of that individual person cannot be jeopardized by negative activities like defamation.<sup>15</sup> In other words, the Court says that not only a dignity of a person has a moral importance but also *in a democratic society*, such dignity takes such significance that it must and will be protected. Moreover, in **Ruling I**, the Court also took into account the *security and public order consideration* that in an online world, there is a chance for using the advancement of technology to commit crimes and other negative activities that potentially threaten one's dignity.<sup>16</sup>

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<sup>9</sup> Constitutional Court of the Republic of Indonesia, Ruling No. 50/PUU-VI/2008, p. 18-19.

<sup>10</sup> *Id.*

<sup>11</sup> Constitutional Court of the Republic of Indonesia, *Supra note 9*, para. 3.16.6-3.16.7.

<sup>12</sup> *Id.*

<sup>13</sup> Constitutional Court of the Republic of Indonesia, *Supra note 9*, para 3.16.3.

<sup>14</sup> *Id.*, para. 3.15.1.

<sup>15</sup> *Id.*, para. 3.15.2.

<sup>16</sup> *Id.*, para. 3.15.7-3.15.8.

## ii. Ruling II

In **Ruling II**, the claimants challenged the constitutionality of Article 27 para. (3) of IET Law. The Article was challenged against the Article 1 para. (2), Article 1 para. (3), Article 27 para. (1), Article 28, Article 28C para. (1) and (2), Article 28D para. (1), Article 28E para. (2) and (3), Article 28F, and Article 28G para. (1) of the Constitution. Again, this writing is not interested in the arguments against these constitutional Articles *per se* but rather to the claimants' argument on limitation of rights. With regard to the limitation of rights, the claimants argued that though the right to freedom of expression is a part of derogable rights, the limitation of it must be in accordance with law and in a circumstance where the limitation is really needed.<sup>17</sup> To support this argument, the claimants referred to the ICCPR and its General Comment 10 that essentially says there must be a justification of limitation of rights from the member states.<sup>18</sup> Furthermore, the claimants argued that in the context of Article 27 para. (3) of IET Law, the Article does not really fulfill such need and there is a little justification for it as the Article itself will potentially cause a violation of human rights.<sup>19</sup> Unlike the **Ruling I**, the claimants in **Ruling II** does not explicitly cited the Article 28J para. (2) of the Constitution in their claims.

Toward the claimants' argument on limitation of rights, the Court argued that the Article 27 para. (3) of IET Law is not meant to unreasonably limit the right to freedom of expression or curtailing it for that matter<sup>20</sup> but rather to achieve the balance between right to freedom of expression and right to privacy including one's right to the protection of one's honor and dignity so that one can live as a blissful human being.<sup>21</sup> Moreover, the Court added, the balance between the right to freedom of expression and the right to privacy is needed in order to make the internet or cyberspace as a place that not only people freely express themselves but also, in so doing, people respect other people's privacy including their honor and dignity.<sup>22</sup>

In **Ruling II**, the Court does not explicitly cited the Article 28J para. (2) of the Constitution and rather it referred to Article 28G para. (1) of the Constitution on the right to privacy.<sup>23</sup> The Court's reference to the Article 28G para. (1) of the Constitution and the argument on balancing right to freedom of expression and right to privacy can be seen as the Court's move in limiting the right to freedom of expression itself and indirectly relate its argument to the basis of limitation provided in the Article 28J para. (2) of the Constitutional namely the limitation in order to *guarantee the recognition and respect toward rights and freedom of others*. Last but not least, the inexplicit argument from the Court with regard to the Article 28J para. (2) of the Constitution might be connected to the Court's note on the case that the Court noted **Ruling II** is essentially similar to **Ruling I** -in term of the Article of IET Law that was challenged and the argument on freedom of expression- therefore the Court did not feel the necessity to repeat certain arguments.<sup>24</sup>

<sup>17</sup> Constitutional Court of the Republic of Indonesia, Ruling No. 2/PUU-VII/2009, para. 149.

<sup>18</sup> Constitutional Court of the Republic of Indonesia, *Supra note 17*, para. 160.

<sup>19</sup> *Id.*, para. 161-162.

<sup>20</sup> *Id.*, para. 3.17.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, para. 3.18.

<sup>23</sup> *Supra note 20*.

<sup>24</sup> Constitutional Court of the Republic of Indonesia, *Supra note 17*, para. 3.14-3.15.

### iii. Ruling III

In **Ruling III**, the claimants challenged the constitutionality of Article 31 para. (4) of IET Law. This Article stipulates that the procedures of interception/surveillance will be further regulated by the Government Regulation. This Article was challenged against the Article 28G para. (1) and Article 28J para. (2) of the Constitution. In this case, the claimants argued that the procedures of interception/surveillance must be done with the Law instead of Government Regulation.<sup>25</sup> Moreover, the claimants argued that having a Government Regulation will (potentially) violate the claimants' right to privacy guaranteed in the Article 28G para. (1) of the Constitution and the prerequisites of limitation stipulated in the Article 28J para. (2) of the Constitution.<sup>26</sup> As mentioned before, in analyzing the Court's ruling, this writing is interested in the claimants' argument on limitation of rights and since the claimants in **Ruling III** presented a direct argument on the Article 28J para. (2) of the Constitution, this writing will put closer look to such argument.

With regard to the Article 28J para. (2) of the Constitution, the claimants presented at least two major arguments. The first one is the claimants acknowledged that right to privacy is a part of derogable rights and it is justifiable for the state to limit it.<sup>27</sup> Nonetheless, the limitation must not be regulated by the Government Regulation as stipulated in the Article 31 para. (4) of IET Law.<sup>28</sup> Rather the limitation must be regulated by a Law since other kind of laws such as Ministerial Regulation and Government Regulation are not enough to sufficiently regulate the interception/surveillance procedures.<sup>29</sup> To support this argument, the claimants referred to the Article 28J para. (2) of the Constitution that says a limitation of right must be *determined by/in accordance with law*. Secondly, the claimants proposed that, having in mind the Article 28J para. (2) of the Constitution and the gravity of the violation of right to privacy when interception/surveillance is carried out, the procedures of interception/surveillance themselves and any necessary requirements for that matter must be regulated under the Criminal Procedural Law or a new Law on interception/surveillance.<sup>30</sup>

Toward the claimants' argument, the Court explained two things. Firstly, the Court agrees with the claimants' argument that right to privacy is a part of derogable rights and as such, it can be limited.<sup>31</sup> Based on this line of thinking, even though the interception/surveillance hampers one's right to privacy, it can be carried out insofar it fulfills the criteria in the Article 28J para. (2) of the Constitution.<sup>32</sup> One of the criteria is the *determined by/in accordance with law*. In this case, the Court seems to agree with the claimants' interpretation of the word "law" (*undang-undang*) that it refers to specific form of law namely the "Law" (*Undang-Undang*) and in relation to the interception/surveillance, the Court agrees with the claimants that interception/surveillance can only be regulated by the Law not by the Government Regulation. The Court explained that Law is more suitable form of law rather than Government Regulation because the Government Regulation is only an administrative regulation and as such, it does not

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<sup>25</sup> Constitutional Court of the Republic of Indonesia, Ruling No. 5/PUU-VIII/2010, para. 25-para. 26.

<sup>26</sup> *Id.*, para. 31.

<sup>27</sup> Constitutional Court of the Republic of Indonesia, *Supra note 25*, para. 49.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, para. 49 and para. 53.

<sup>30</sup> *Id.*, para. 54.

<sup>31</sup> *Id.*, para. 3.21.

<sup>32</sup> *Id.*, para. 3.24.



have the quality of regulating something that will potentially have an impact on one's constitutional rights which in this case is the impact of carrying out interception/surveillance to one's right to privacy.<sup>33</sup>

Secondly, as for the suggestion from the claimants, the Court says it agrees with the claimants that there is, in fact, a need for further regulation of interception/surveillance.<sup>34</sup> To support this agreement, the Court explained that it has observed that there are indeed laws and regulations on interception/surveillance but that laws and regulations are problematic in a sense that it still lack certain details such as the exact period of interception/surveillance and the limit of access to the result of interception/surveillance.<sup>35</sup> To emphasize its point, the Court also quoted its own ruling namely Ruling No. 066/PUU-I/2003 in which through this ruling, the Court underlined the need for further regulation in order to prevent abuse of power when the state authority conducts an interception or a surveillance.<sup>36</sup>

#### iv. Ruling IV

In **Ruling IV**, the claimant challenged the constitutionality of Article 28 para. (2) of IET Law against the Article 28E para. (2) and Article 28F of the Constitution. Article 28 para. (2) of IET Law regulates about the prohibition on spreading informations that aim to incite hate towards an individual or a certain group based on their ethnicity, religions, races, and intergroups. The claimant argued that this Article 28 para. (2) of IET Law hampers the claimant's right to freedom of expression. In this ruling, the Court simply disagreed with the claimant in making the Article 28 para. (2) of IET Law unconstitutional. It is because the Court viewed that even though one has the right to freedom of expression as stipulated in the Constitution, such right can be limited in a way that justified by the Article 28J para. (2) of the Constitution.<sup>37</sup> The Court added that spreading informations that the Article 28 para. (2) of IET Law is in accordance with the aim to protect honor and dignity of the nation and it is inline with the value of the Almighty God as there is no religion that justify the propagation of hatred.<sup>38</sup> In this ruling, rather than elaborate more on the Article 28J para. (2) of the Constitution, the Court seems want to emphasize the importance of having the Article 28 para. (2) of IET Law in keeping the nation peace and safe.

#### v. Ruling V

In **Ruling V**, the claimant challenged the constitutionality of Article 5 para. (1) and (2) and Article 44 letter b of IET Law. These Articles were challenged against the Article 1 para. (3), Article 28D para. (1), and Article 28G para. (1) of the Constitution. Article 5 para. (1) and (2) of IET Law is essentially about the use of electronic information and/or electronic document as a legitimate evidence and the usage of such electronic pieces is a part of the expansion of existing procedural laws in Indonesia. As for Article 44 letter b of IET Law, the article is basically emphasize the use of electronic information and/or electronic document as a legitimate evidence. The core issue in this case is whether the recording obtained by the state authority can be used as a legitimate evidence against the claimant since, as the claimant argued, the

<sup>33</sup> Constitutional Court of the Republic of Indonesia, *Supra Note 25*, para. 3.23.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, para. 3.21-3.22.

<sup>36</sup> *Id.*, para. 3.24.

<sup>37</sup> Constitutional Court of the Republic of Indonesia, Ruling No. 52/PUU-XI/2013, para. 3.12 – 3.13.

<sup>38</sup> *Id.*, para. 3.14.

aforementioned IET Law provides a little guidance to the use of such recordings as a legitimate evidence.<sup>39</sup>

The interesting part of this ruling is that the claimant emphasizes the state's obligation to fulfill human rights in which such fulfillment is in a form of having a sufficient laws and regulations -as stipulated in the Article 28I para. (5) of the Constitution.<sup>40</sup> The claimant did not make direct reference to the Article 28J para. (2) of the Constitution.

Toward the claimant's argument, the Court responded that there is indeed not yet a specific Law that regulated about interception or recording.<sup>41</sup> To support this response, the Court referred to its previous rulings namely Ruling No. 006/PUU-I/2003 and **Ruling III** as these two rulings have already elaborated the existing laws that regulate on interception/surveillance but yet such laws are not sufficient enough to fulfill the criteria on limitation in Article 28J para. (2) of the Constitution. This way, the Court was partially agreed on the claimant's argument on the insufficiency of the aforementioned IET Law provisions.<sup>42</sup> Nevertheless, there was one dissenting opinion from a judge in this case in relation to the Article 28J para. (2) of the Constitution. The judge said that IET Law actually have satisfied the criteria in the Article 28J para. (2) of the Constitution on having a law to regulate a recording -e.g. to determine whether it can be used as a legitimate evidence or not- and as such, there is no need a further interpretation on the aforementioned IET Law provisions.<sup>43</sup>

#### vi. Analysis of Ruling I-Ruling V

This analysis part will comprise of the comparison of above rulings (**Ruling I - Ruling V**) namely what are the differences and similarities between them. This analysis part will also summarize the Court's interpretation on the four elements of justification of limitation of rights prescribed in the Article 28J para. (2) of the Constitution.

Based on the above explanation about the Court's rulings on IET Law-related constitutional review, there are differences and similarities between those five rulings. The differences and similarities are as follow:

- The first difference is about the core issue in the rulings. **Ruling I** and **Ruling II** are focused on the contention between the issue of defamation, the right to privacy, and the right to freedom of expression; **Ruling III** and **Ruling V** are focused on the contention between the issue of interception/surveillance and the right to privacy; and **Ruling IV** are focused on the contention between the issue of online hate speech and the right to freedom of expression.
- The second difference is the focus of the Court when interpreting the Article 28J para. (2) of the Constitution. Such focus depends on the core issue of the rulings. In **Ruling I** and **Ruling II**, the Court elaborates its interpretation on Article 28J para. (2) of the Constitution more on the importance of *guaranteeing the recognition and respect toward rights and freedom of others*. The Court agreed with the claimants for most of the times that the right to freedom of expression is important. Nevertheless, the Court emphasized that the protection of right to privacy also has an equal importance. Since both the right to freedom of expression and right to privacy are pivotal, the Court then explained the need to balance those two. The balancing is

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<sup>39</sup> Constitutional Court of the Republic of Indonesia, Ruling No. 20/PUU-XIV/2016, p. 10-11.

<sup>40</sup> *Id.*, p. 89-90.

<sup>41</sup> *Id.*, para. 3.10.

<sup>42</sup> *Id.*, p. 97.

<sup>43</sup> *Id.*, p. 103-104.

possible to occur if the Article 27 para. 3 of IET Law is in place. As for other justification for limiting a right namely *to fulfill a just aim in accordance with the moral, religious values, security and public order consideration, and in a democratic society*, in **Ruling I** and **Ruling II**, the Court provided explanation that the balancing between the right to freedom of expression and the right to privacy serves a just aim especially the moral, security and public order consideration. The Court also explained that such balancing is the essential elements of a democratic society like Indonesia. In **Ruling III** and **Ruling V**, the Court elaborates its interpretation on Article 28J para. (2) of the Constitution more on the justification of *determined by/in accordance with law*. In **Ruling III** and **Ruling V**, the Court explained that though interception/surveillance is regulated in various laws in Indonesia, such laws are problematic as they lack certain pivotal details. Here, the Court interpreted that *determined by/in accordance with law* is not only that there must exist a law that regulate certain matter but also such law must be adequate and provide details that reduce the possibility of having an abuse of power by state authority. In **Ruling III** and **Ruling V**, the Court emphasized the importance to prevent the abuse of power by state authority when one's right to privacy is being compromised by the interception/surveillance. In **Ruling IV**, the Court was not so much elaborate the Article 28J para. (2) of the Constitution. It seems that the Court was quite surprise that Article 28 para. (2) of IET Law was constitutionally challenged as the Court viewed such Article is pivotal in regulating hate speech in Indonesia.

- The first similarity between those rulings are the issue at stake involved a recent development of technology either it is about the internet or the usage of interception/surveillance. In those rulings, the Court managed to balance the development of technology with the constitutional values in the 1945 Constitution. The Court managed to do so in a way that on hand hand, the Court acknowledged the development of technology that occur, and on the other hand, the Court explained that inasmuch it values the development of technology, such development must not forget to balance the rights at stake in accordance with the Constitution especially Article 28J para. (2) of the Constitution.
- The second similarity is the significance of the right to privacy of a person and its relation to the Article 28J para. (2) of the Constitution. It is often said that in the light of the rapid development of technology such as the use of internet and the so-called necessity of interception/surveillance for security, the right to privacy is essentially no longer "exist". However, in the Court's rulings on IET Law-related provisions, the rulings shown the contrary that the right to privacy is still "exist" and the Constitution provides a guarantee to protect such right. For example, in **Ruling III** and **Ruling V**, the Court focused the explanation on protecting one's honor and dignity as a human being in which, though the right to privacy of a person can be limited in accordance with the Article 28J para. (2) of the Constitution, such limitation must not compromise the honor and dignity of that person. This example shows that inasmuch the Article 28J para. (2) of the Constitution limit the human rights at stake, in term of the right to privacy and interpreting the Article 28J para. (2) of the Constitution, the Court put emphasis on the protection of one's honor and dignity against the interception/surveillance activities.

Other than above differences and similarities of the IET Law-related rulings, it is also paramount to highlight the Court's interpretation of the four elements in justifying the limitation of rights in those rulings. Following is the Court's interpretation:

- a) determined by/in accordance with law

In **Ruling I** and **Ruling II** as well as **Ruling IV**, the Court was not focus in interpreting this element. However, in **Ruling III** and **Ruling V**, the Court put more elaboration what it means by limitation must be *determined by/in accordance with law*. The Court interpreted that: (a) the word "law" here refers to specific form of law namely "Law" (*Undang-Undang*), and (b) in order to limit certain rights, the mere existence of law is not enough that such law must be adequate and provide details in order to prevent the abuse of power from the state authorities.

- b) to guarantee the recognition and respect toward rights and freedom of others

From **Ruling I** to **Ruling V**, the Court dealt with contention of various rights. For example, when discussing the importance of the right to freedom of expression in **Ruling I** and **Ruling II**, the Court also put emphasis on the importance of the right to privacy. Another example is in **Ruling III** and **Ruling V**, when discussing the practice of interception/surveillance, the Court put a highlight on the protection to the right to privacy.

- c) to fulfill a just aim in accordance with the moral, religious values, security and public order consideration

The interpretation of this element is more apparent the **Ruling I** and **Ruling IV** compare to other rulings that are studied in this part. In **Ruling I**, the Court elaborated on the moral consideration and its relation to the right to privacy. In the context of **Ruling I**, the *moral* consideration is to see a person's dignity as a bliss from the Almighty God and as such, the dignity of that person must and will be protected. Furthermore, in **Ruling I**, as explained above, the Court also gives explanation on the *security and public order* in term of using the internet or cyberspace that without a proper regulation such as Article 27 para. (3) of IET Law, security and public order can be compromised. As for **Ruling IV**, the Court highlighted that the prohibition on spreading informations that can incite hatred is needed to preserve the unity and peace of Indonesia. As for the term *religious values*, based on **Ruling I - Ruling V**, this writing does not found any interpretation of it. It is because in the rulings analyzed in this writing, the issue is not so much focus on the religions and beliefs in Indonesia. Further look to the relevant rulings of Court's about the interpretation of *religious values* is needed. The relevant rulings here include Ruling No. 84/PUU-X/2012 on Blasphemy Law and Ruling No. 68/PUU-XII/2014 on Marriage Law.

- d) in a democratic society

In **Ruling I - Ruling V**, the Court does not specifically explain what it means by the phrase of *in a democratic society* or what constitutes as *a democratic society*. Nevertheless, in **Ruling I**, the Court noted one element of *a democratic society* namely the protection of one's right to privacy including one's honor and dignity. Furthermore, even though the Court does not specifically explain the meaning of *in a democratic society*, one could see that throughout **Ruling I - Ruling V**, the Court puts efforts in emphasizing that Indonesia is a democratic society and as such, Indonesia respects human rights. The respect is not only about fulfilling certain right but also balancing the rights themselves which in

the case of IET Law-related rulings, the balance needed is mostly between the right to privacy and the right to freedom of expression.

To briefly sum up the analysis on the interpretation of the Court on Article 28J para. (2) of the Constitution in the context of IET Law-related rulings, the analysis shows that the rulings have differences in term of the rights at stake and the focus of the Court when interpreting Article 28J para. (2) of the Constitution. For example, **Ruling I** and **II** focus on the aspect of rights and freedom of others and the consideration for a just aim, **Ruling III** and **V** focus on the aspect of whether existing laws are fulfilling the criteria of “law” prescribed in Article 28J para. (2) of the Constitution, and **Ruling IV** focus on the broad sense of peace and unity. Other than differences, those rulings have similarities. The similarities are those rulings focus on the issue related to development of technology namely the usage of internet or cyberspace and the emphasis of the right to privacy of Indonesian people. Moreover, the analysis also shows the interpretation of the Court toward the four elements in justifying limitation of rights in the Article 28J para. (2) of the Constitution in those IET Law-related rulings.

### 3.2.2. A Comparative Note: ECHR and ICCPR

This comparative part will explain the limitation of rights under the ECHR and ICCPR regime. Since the rights discussed in this writing are the right to privacy and the right to freedom of expression, this comparative note will focus on what the ECHR and ICCPR says about the limitation of rights in the context of the right to privacy and the right to freedom of expression.

#### i. ECHR

##### a) Right to privacy

The right to privacy is guaranteed under the Article 8 of ECHR. Article 8 para. (1) of ECHR stipulates that “*Everyone has the right to respect for his private and family life, his home and his correspondence*”. Furthermore, Article 8 para. (2) of ECHR stipulates that “*There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others*”. Based on this two Articles, it can be seen that (a) ECHR guarantees the right to privacy and (b) the right to privacy in the ECHR regime itself is not an absolute right and it can be limited under the conditions stipulated in the Article 8 para. (2) of the ECHR.<sup>44</sup> Nevertheless, it is important to note that under the ECHR system, there is the so-called margin of appreciation. This margin of appreciation means that “*in determining whether measures taken by the States are compatible with Article 8 the State is afforded certain degree of discretion*”.<sup>45</sup>

The European Court of Human Rights (hereinafter, “ECtHR”), when assessing the case allegedly related to the Article 8 right, will have two stages of assessment. In the first stage, the ECtHR focuses on the Article 8 para. (1). The ECtHR asks whether the case fall within the scope of Article 8 para. (1) and if so, the ECtHR asks whether there is a positive obligation done by the State to respect the right guaranteed in the Article 8 para. (1) and if there is such positive obligation, the ECtHR asks whether such action

<sup>44</sup> Council of Europe (2001), “Human rights handbooks No. 1”, Strasbourg: Council of Europe, <https://rm.coe.int/168007ff47> last accessed 1 September 2017, p. 6

<sup>45</sup> *Id.*, p. 7-8.

fulfill the Article 8 right.<sup>46</sup> In the second stage, the ECtHR focuses on the Article 8 para. (2). The ECtHR asks whether there is an interference with Article 8 right and if there is, then the ECtHR asks whether such interference is in accordance with law, does the interference pursue a legitimate aim, and whether such interference is necessary in a democratic society. This second stage of question determines whether the limitation of the Article 8 can be justified or not.

As this writing is interested more in the limitation of rights under the ECHR regime, this writing will elaborate more on the second stage of questions asked by the ECtHR. In the Human Rights Handbook No. 1, it is explained what constitutes as *in accordance with law, pursue a legitimate aim and necessary in a democratic society*. The criteria *in accordance with law* means that the interference of Article 8 right must have a legal basis and such legal basis –the law in question- must be “...sufficiently precise and contain a measure of protection against arbitrariness.”<sup>47</sup> As for the criteria *pursue a legitimate aim*, the Article 8 para. (2) of ECHR provides the aims -i.e. national security and public safety- and it is the matter of the member States to make a convincing case before the ECtHR on why such aim is pursued and the justification of interference based on that aim.<sup>48</sup> Lastly, for the criteria *necessary in a democratic society*, this criteria is essentially about “...the balance achieved between the rights of the individual and the public interest...”<sup>49</sup> In striking the balance, the ECtHR applies a proportionality test namely a test that entails “...balancing the rights of the individual and the interest of the State...”<sup>50</sup> The ECtHR also takes into account the margin of appreciation when assessing whether the interference is justifiable under the Article 8 para. (2) of ECHR.<sup>51</sup>

#### b) Right to freedom of expression

As for the right to the freedom of expression, ECHR guarantees this right under the Article 10. Article 10 para. (1) of ECHR at least guarantees three parts of the right to the freedom of expression. Those three parts are “*freedom to hold opinions; freedom to impart information and ideas; and freedom to receive information and ideas*”.<sup>52</sup> Furthermore, Article 10 para. (2) of ECHR regulates about the limitation of the right to freedom of expression.

As this writing is more interested in the limitation of rights, this writing will then elaborate more on the Article 10 para. (2) of ECHR. According to the Human Rights Handbook No. 2, with regard to the Article 10 para. (2) of ECHR there are three cumulative conditions of which the exercise of the freedom of expression can be justified. Those three conditions are “*the interference (meaning “formality”, “condition”, “restriction” or “penalty”) is prescribed by law; the interference is aimed at protecting one or more of the following interests or values; national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence, and; maintaining the authority and impartiality of the judiciary; the interference is necessary in a democratic society*”.<sup>53</sup> Based

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<sup>46</sup> *Id.*, p. 9.

<sup>47</sup> *Id.*, p. 25-26.

<sup>48</sup> *Id.*, p. 30.

<sup>49</sup> *Id.*, p. 31.

<sup>50</sup> Council of Europe (2001), “Human rights handbooks No. 1”, Strasbourg: Council of Europe, <https://rm.coe.int/168007ff47> last accessed 1 September 2017, *Supra* note 49.

<sup>51</sup> *Id.*

<sup>52</sup> Council of Europe (2001), “Human rights handbooks No.2”, Strasbourg: Council of Europe, <https://rm.coe.int/168007ff48> last accessed 1 September 2017, p. 7.

<sup>53</sup> *Id.*, p. 29.

on the stipulation in the Article 10 para. (2) of ECHR and these three cumulative conditions, one can see that the limitation on the right to freedom of expression is different from the one on the right to privacy under the ECHR regime.

## ii. ICCPR

The International Covenant on Civil and Political Rights (hereinafter, "ICCPR") is one of the important international human rights instruments. The ICCPR contains a guarantee on civil and political rights which include the right to privacy and the right to freedom of expression.

Under the ICCPR regime, the guarantee of the right to privacy is stipulated under the Article 17. Article 17 para. (1) of ICCPR stipulates that "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*". Furthermore, Article 17 para. (2) of the ICCPR stipulates that "*Everyone has the right to the protection of the law against such interference or attack*". Based on these two Articles, it can be seen that (a) ICCPR guarantees the right to privacy and (b) such right is not absolute as it can be limited by a lawful interference.

As for the right to freedom of expression, the guarantee of this right is stipulated under the Article 19 of the ICCPR. There are two elements of the right to freedom of expression. The first one is the freedom to hold opinion without any interference as stipulated in Article 19 para. (1). The second one is the freedom stipulated in the Article 19 para. (2). The Article says "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*". The freedom of expression in the Article 19 para. (2) can be limited as the justification of limitation is prescribed in the Article 19 para. (3) of ICCPR. The Article says that the Article 19 para. (2) rights are subject to certain limitations in which the limitations must be done only if such limitations are "*...provided by law and are necessary: (a) For respect of the rights or reputation of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*"

## iii. Comparison between Indonesia, ECHR, and ICCPR Regime

There are similarities and differences between the Indonesian understanding of limitation of rights and the other regimes which in this case are ECHR and ICCPR. The similarities in those three regimes are essentially that limitation of certain rights must be prescribed by law and such limitation must pursue (just) aims. Nevertheless, there are at least three differences in understanding the standards of limiting certain rights between Indonesia, ECHR, and ICCPR regime. **The first difference** is the understanding of "prescribed by law". For example: in Indonesian understanding, the term "law" refers to specific form of law namely "Law" (*Undang-Undang*), whereas in the ECHR regime, the term "law" excludes the administrative policy. As for the ICCPR regime, the term "law" could be laws made by the parliament and excludes the traditional or other kind of customary law.<sup>54</sup> **The second difference** is the "variety" of aim and consideration across the mentioned regimes. For example, in Indonesian regime, one of the consideration on limiting certain rights is the consideration of

<sup>54</sup> See United Nations (2011), "General Comment 34 Article 19 Freedom of opinions and expressions", <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> last accessed 1 September 2017.

upholding religion values. This consideration is not apparent both in the ECHR and ICCPR. **The last difference** is the provision of limitation of rights itself. In Indonesian regime, Article 28J para. (2) applies as the general rule and all the human rights provisions in the Constitution are subjected to the limitation prescribed there. Unlike Indonesia, for the right to privacy and the right to freedom of expression, ECHR and ICCPR has different provision of limiting each right. For example in ECHR regime, the provision to limit the right to privacy e.g. Article 8 para. (2) of ECHR is different from the provision to limit the exercise of freedom of expression e.g. Article 10 para (2) of ECHR. One of different aspects in those provisions are the aim to limit the exercise of freedom of expression is way more elaborated in comparison to the right to privacy.

### **3.3. Lessons Learned from The Constitutional Court's Interpretation on the Article 28J paragraph (2) of the 1945 Constitution**

There are at least two lessons here. Firstly, it is about the relation between the role of the Court in Indonesia and the Court's interpretation of the 28J para. (2) of the Constitution. As explained above, the Court has the role as the guardian of Constitution. Meaning that the Court is the one who uphold the Constitution and its values for the sake's of advancing the democracy and human rights protection in Indonesia. This role is strongly related to the way Court interprets the provisions in the Constitution which in the context of this writing is Article 28J para. (2) of the Constitution. Based on the analysis on the Court's interpretation on the mentioned Article in IET Law-related rulings, the Court put its efforts to balance the rights at stake namely the right to privacy and freedom of expression. The Court also take into account the interest of the state, for example, in carrying interception/surveillance. In such interpretation, the Court also put efforts in balancing between the development in the society which in this case is the usage of internet or cyberspace and the preserved constitutional values in the Constitution. That being said, the lesson learned here is that in order to advance democracy and human right protection in Indonesia, it is important to both look at the rights at stake and the development of the society and to put balance between rights, the development of the society, and the constitutional values of the Constitution.

Secondly, it is about the possible consequences of such interpretation to the human rights protection in Indonesia. As described above, there are possible consequences of having a single and general rule of limitation of rights. One possible consequence is that as each right has specific demand, having a general rule to limit it might dismiss the specific demand put by each right. Another possible consequence is that the considerations of limiting certain rights in the Article 28J para. (2) might not be compatible to each right guaranteed in the 1945 Constitution. This writing has given the example of "*religious values*" vis-à-vis the freedom of religion and beliefs. Last possible consequence is that as this writing found it is still unclear whether the requirements for limitation in Article 28J para. (2) is cumulative or not, such unclarity might create a possibility to cherry-pick the justification and therefore such justification is prone to abuse.



#### 4. Conclusion

The limitation of rights is to be found in the Article 28J para. (2) of the Constitution. The Article consists of four elements in justifying the limitation of rights. Those four elements are *determined by/in accordance with law, to guarantee the recognition and respect toward rights and freedom of others, to fulfill a just aim in accordance with the moral, religious values, security and public order consideration, and in a democratic society*. To know more about the meaning of these elements, this writing has studied the Court's ruling in IET Law-related claims as elaborated in the Part II of this writing. Furthermore, Indonesian regime of limitation of rights is different from the ECHR and ICCPR regime in term of the understanding of the term "law", the (just) aims, and the provision on limitation itself in which, unlike ECHR and ICCPR, Indonesia has a single and general provision of limitation namely Article 28J para. (2) of the Constitution. Last but not least, this writing has explored what are the lesson learned from studying the Court's interpretation in relation to the Court's role as the guardian of the Constitution and the possible consequences of such interpretation to the human right protection in Indonesia.

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