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Freedom of Opinion After the Constitutional Court Ruled the Fake News Dissemination Crime Unconstitutional

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Abstract

Decree of the Constitutional Court No. 78/PUU-XXI/2023 protects freedom of opinion in a public place. That decree rules Article 14 and Article 15 Law No. 1 of 1946 on the Fake News Dissemination Crime unconstitutional. However, does this decree of the Constitutional Court really protect the people's right to freedom of opinion in a public place? This study is aimed at analyzing freedom of opinion in Indonesia after the decree of the Constitutional Court No. 78/PUU-XXI/2023 was issued. The document study employing a case approach, and a law approach shows us that there are still things posing a threat to freedom of expression in a public place. Article 263 and Article 264 Law No. 1 of 2023 on the Penal Code and Article 28 (3) Jo. 45A (3) Law No. 1 of 2024 on the Second Amendment to Law on Electronic Information and Transactions still criminalize a fake news dissemination act. Decree of the Constitutional Court No. 78/PUU-XXI/2023 does not directly

rescind the crime in those two laws. Furthermore, the provisions in the content moderation as stipulated in Law on Electronic Information and Transactions may present an obstacle to freedom of opinion in a public place. In the end, we need to request the Constitutional Court to judicially review the other laws on the fake news dissemination crime and to improve the provisions regulating the content moderation.

Keywords *Expression of Opinion, Crime, Fake News, The Constitutional Court, Indonesia*

Introduction

Indonesia criminalizes a fake news dissemination act. Article 14 and Article 15 Law No. 1 of 1946 on the Penal Code (Law No. 1 of 1946) prohibits a person from disseminating fake news causing upheaval within the community. These articles are legacies of the Dutch Indies colonial government.[1] Originally, Article 171 *Wetboek van strafrecht voor Nederlandsch-Indië* prohibited any act deliberately disseminating fake news causing unrest in the community. In the process, the Dutch Indies Military Authority issued a *Verordening Miliitair Gezag* No. 18/Dvo/VII A-3 dated May 21, 1940, criminalizing any act negligently disseminating fake news that might cause upheaval. Then, the Dutch Indies Military Authority also issued a *Verordening Miliitair Gezag* No.19/Dvo./VII A-3 dated June 8, 1940, criminalizing any act of disseminating uncertain news, exaggerated news, and incomplete news that may cause unrest in the community. After Indonesia proclaimed its independence, the Indonesian government still deemed it necessary to maintain the presence of those articles due to the precarious situation and condition in Indonesia at that time.[2] However, after seventy-nine years of its independence, Indonesia still maintains

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1 Vidya Prahassacitta, *Kriminalisasi Penyebaran Berita Bohong Di Indonesia: Batas Intervensi Hukum Pidana Terhadap Kebebasan Berekspresi Di Ruang Publik* (Yogyakarta: Nas Media Pustaka, 2023). pp. 40-44.

2 Elucidation of Articles XIV and XV Law No. 1 of 1946.

the presence of these articles criminalizing a fake news dissemination act.

Harkrisnowo and I think that the presence of Article 14 and Article 15 Law No. 1 of 1946 is no longer consistent with Indonesia's current situation and condition.[3] Indonesian people are free and independent people. Moreover, Indonesian people have the right to express their opinions in a public place. However, when expressing his or her opinions in a public place, one has to pay attention to several boundaries in order to maintain the harmony and balance of the relations between a person and his or her group in the community.

My and Harkisnowo's previous studies showed us that the formulations of Article 14 and Article 15 Law No. 1 of 1946 posed several problems.[4] The formulations of the fake news dissemination crime pose several problems since they do not clearly define a reproachable act worth criminalizing. Furthermore, the term 'upheaval' stipulated in Article 14 and Article 15 Law No. 1 of 1946 is deemed to be insufficient to constitute a harm worth criminalizing.

I also has done a study on the court verdicts on fake news dissemination crime cases issued from 2018 to 2023.[5] Of the final and legally binding forty-two court verdicts using Article 14 or Article 15 Law No. 1 of 1946, there are several weaknesses found in the application of these articles. The first is in regard to the term 'upheaval' serving as a requirement to criminalize the act of disseminating unclear, fake news. Secondly, there are no clear differences between the form of deliberation and negligence in that fake news dissemination act. Thirdly, there are no clear criminal responsibilities between a fake news dissemination act and the indirect consequences resulting from that act.

The results of that study confirm a notion stating that criminalizing a fake news dissemination act has restricted freedom of

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[3] Vidya Prahassacitta and Harikristuti Harkrisnowo, "Criminal Disinformation in Relation to the Freedom of Expression in Indonesia A Critical Study," *Comparative Law Review* 27, no. Desember (2021): 123–65, https://doi.org/https://doi.org/10.12775/CLR.2021.005. p. 153 and 165.

[4] Vidya Prahassacitta and Harkristuti Harkrisnowo, "The Criminalization Of Fake News: Critique on Indonesia's New Penal Code," *Criminal Law Forum* 35 (2024): 83–120, https://doi.org/10.1007/s10609-024-09478-y. pp. 95-93.

[5] Vidya Prahassacitta, "Kriminalisasi Penyebaran Berita Bohong di Indonesia" (Dissertation, Universitas Indonesia, 2023). pp. 450-454.

expression. Soepanto, Saefudin, Ismail, Susanti and Adi stated that employing criminal law in eradicating the act of fake news dissemination could erode the people's trust since there were indications that those articles would be able to restrict the people's freedom of opinion.[6] Fernando, Pujiyono, Razah and Rochaeti stated that employing criminal law in restricting information traffic in the social media would lurk and restrict the people's freedom of opinion.[7] Armiwulan stated that employing criminal law to restrict a fake news dissemination act of dissemination fake news during the Covid-19 pandemic with the aim of reducing tumults in the community had restricted freedom of expression and had harmed the people.[8]

The latest development is that, on March 6, the Constitutional Court issued Decree No. 78/PUU-XXI/2023 ruling Article 14 and Article 15 Law No. 1 of 1946 on the fake news dissemination crime unconstitutional, so they were declared to have no legally binding force of law.[9] This decree gives a fresh jolt to people's efforts to express their opinions and criticisms especially to the government in a public place. This decree is part of an appeal for the judicial review of Article 14 and Article 15 UU No. 1 of 1946, Article 310 Penal Code/*Wetboek van Strafrecht* (Old Penal Code), Article 27 verse (3) and Article 45 verse (3) Law on Electronic Information and Transactions filed by Haris Azhar, Fatiah Maulidiyanty and Indonesian Legal Aid Foundation (*Yayasan Lembaga Bantuan Hukum Indonesia*). At the time of the appeal for that judicial review, Haris Azhar and Fatiah Maulidiyanty, human rights activists, were facing a lawsuit filed by a government official named Luhut Binsar Panjaitan, who served as the Coordinating Minister for

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6 Supanto et al., "Regulating Fake News and Hoaxes: A Comparative Analysis of Indonesia and Malaysia," *Journal of Human Rights, Culture and Legal System* 3, no. 3 (2023): 656–77, https://doi.org/10.53955/jhcls.v3i3.113, p. 664.

7 Zico Junius Fernando et al., "The Freedom of Expression in Indonesia," *Cogent Social Sciences* 8, no. 1 (2022): 1–11, https://doi.org/10.1080/23311886.2022.2103944.zi. p. 5.

8 Hesti Armiwulan, "The Limitation of Freedom of Expression by State as a Crime during Pandemic Covid-19 in Indonesia," *International Journal of Criminal Justice Sciences* 17, no. 2 (2022): 101–13, https://doi.org/10.5281/zenodo.4756113. p. 101.

9 Decree of the Constitutional Court No. 78/PUU-XXI/2023 also ruled Article 310 Penal Code unconstitutional and not legally binding as long as it did not mean that the defamation is made verbally.

Maritime and Investment of the Republic of Indonesia, since they criticized the minister. Alternatively, both, were indicted with the violation of several articles of a law. Then, they appealed the judicial review of the law.[10]

After the Constitutional Court issued the Decree of the Constitutional Court No. 78/PUU-XXI/2023, what will be the future of freedom of opinion after that fake news dissemination crime is ruled unconstitutional? The annulment of Article 14 and Article 15 Law No. 1 of 1946 surely gives the people sufficient opportunities to express their criticisms and opinions in a public place without worrying about whether the facts or the data that they present are appropriate or not. Is this what is really happening? This is an interesting question since not only is the fake news dissemination crime regulated in Article 14 and Article 15 Law No. 1 of 1946, but it is also regulated in Article 263 Article 264 Law No. 1 of 2023 on the Penal Code (the new Penal Code) and Pasal 28 (3) Jo. 45A (3) Law No. 1 of 2024 on the Second Amendment to Law on Electronic Information and Transactions (Law on Electronic Information and Transactions of 2024).

Moreover, when a person expresses his or her opinion or criticism with inaccurate data and facts and that opinion or criticism is widely broadcasted on the Internet, the content can be categorized as a content containing fake news. On the one hand, the presence of fake news content is a problematic content. Law on Electronic Information and Transactions endows the government the authority to moderate any problematic content, one of which is by taking down its access. Rahman and Tang stated that an access takedown intended to eradicate the dissemination of fake news without being based on any adequate legal instruments and correct interpretation of the constitution was not an appropriate way.[11] The arrangement of a content moderation including the arrangement of an access takedown plays a crucial role in guaranteeing freedom of opinion. Therefore, matters regarding freedom

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[10] Verdict of East Jakarta District Court No. 202/Pid.Sus/2023/PN Jkt.Tim of 2023 acquitted the defendant Haris Azhar of all charges. Verdict of East Jakarta District Court No. 203/Pid.Sus/2023/PN Jkt.Tim of 2023 acquitted the defendant Fatiah Maulidiyanty of all charges.

[11] Rofi Aulia Rahman and Shu Mei Tang, "Fake News and Internet Shutdowns in Indonesia: Symptoms of Failure to Uphold Democracy," *Constitutional Review* 8, no. 1 (2022): 151–83, https://doi.org/10.31078/consrev816. P. 151.

of opinion after the fake news dissemination crime is ruled unconstitutional shall go hand in hand with the arrangement of a content moderation which is part of Law on Electronic Information and Transactions.

Based on discussion above, its urgent to discuss the freedom of opinion at public place after the Constitutional Court Decree No. 78/PUU-XXI/2023. The philosophical basis of justifying freedom of speech lies in its connection to self-actualization, discovering the truth and participation on democracy.[12] Legally, according to Article 19 (3) of the International Covenant on Civil and Political Rights, freedom of opinion entails specific obligations and accountability in relation to protecting the reputation of others, maintaining public order, and safeguarding national security. Opinions are safeguarded even if they contain inaccurate or erroneous claims. Sociologically, disputes in society sometimes arise due to the widespread and rapid circulation of false or misleading statements through technology information sources. Example, during general election period 2019. The Constitutional Court Decree No. 78/PUU-XXI/2023 provides additional provisions respecting freedom of opinion in a free society and in the information technology era. Nevertheless, the decriminalization of fake news dissemination on Article 14 and 15 Law No. 1 of 1946 shall not guarantees the excurses freedom of opinion. Therefore, it also urgent to address fake news dissemination on other penal and non-penal legislations, New Penal Code and Law on Electronic Information and Transactions.

Accordingly, this paper is aimed at studying and analyzing freedom of opinion in a public place after Decree of the Constitutional Court No. 78/PUU-XXI/2023 ruled the fake news dissemination crime as stipulated in Article 14 and Article 15 Law No. 1 of 1946 unconstitutional. This paper serves as a reaction to Decree of the Constitutional Court No, 78/PUU-XXI/2023 constituting the latest legal development in the issues of the criminalization of fake news dissemination. Different from previous studies only partially talking about them, this study will discuss freedom of expression and fake news in terms of both criminal law and administrative law. This paper will

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[12] Eric Barendt, *Freedom of Speech* (New York: Oxford Univeristy Press, 2005). pp. 9-21.

discuss provisions in both the New Penal Code and Law on Electronic Information and Transactions.

In order to be able to achieve those objectives, this study shall be arranged as follows. After the introduction and method parts, the result and discussion part shall discuss four sub-parts. Sub Part A will discuss various philosophical views serving as the basis for Decree of the Constitutional Court No. 78/PUU-XXI/2023. In this sub part, we are going to discuss the Constitutional Court judges' legal considerations on freedom of opinion and fake news. Sub Part B discusses the Constitutional Court's view on the criminalization of fake news dissemination. In this part, we are going to discuss various considerations of the Constitutional Court on the upheaval element which will be connected to the serious or trivial harm and its impacts on freedom of opinion. Sub Part C discusses the impacts of Decree of the Constitutional Court No. 78/PUU-XXI/2023 on the fake news dissemination crime as regulated in the New Penal Code and Law on Electronic Information and Transactions of 2024 and freedom of opinion. Last but not least, Sub Part D discusses provisions regulating the moderation of a content especially that of fake news content that may pose a threat to freedom of opinion on the Internet. This paper will be concluded in the Conclusion part, in this part, we are going to draw some conclusions on freedom of expression after that decree of the Constitutional Court and make some recommendations intended to guarantee freedom of opinion better in Indonesia.

This study is a study of documents. Moreover, in this study, we employ various secondary data originating from various documents in the forms of existing data available in various formats.[13] The literatures employed in this study were obtained from various books, laws and regulations and other supporting scientific materials such as pertinent journals.

In this study, a legislative approach and a case study approach are employed. The legislative approach is employed by identifying various legal norms in a hierarchical manner in order for us to understand the implications of the relations among the norms with the aim of

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[13] Malcolm Tight, *Documentary Research in the Social Sciences* (London: SAGE Publications Ltd, 2019). p. 58.

interpreting various applicable laws and regulations.[14] The case study approach is employed in order for us to observe the court's views regarding a norm in a law adjusted to a certain situation and condition.[15] Broad and contextual analysis of some certain cases or court verdicts is aimed at obtaining the legal knowledge.[16] This approach employs a deciding ratio to evaluate various important facts found in those legal principles which the judges then interpret to be a conclusion.[17] By analyzing various court verdicts, this method attempts to examine the implementation of legal standards in various legal practices.[18]

The materials obtained from the document study are then qualitatively processed and analyzed. We attempt to explain the results of the study as a legal phenomenon as elaborately as possible.[19] The results of the analysis of those materials are then categorized and presented for us to analyze them with the aim of answering the problems of the study that have been put forth. Not only are the results of this study descriptive but they are also prescriptive in that they serve as a direction to the authorities to formulate and make their legal guidelines and codes.[20]

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[14] P. Ishwara Bhat, *Idea and Methods of Legal Research*, *Idea and Methods of Legal Research* (New Delhi: Oxford Univeristy Press, 2020), https://doi.org/10.1093/oso/9780199493098.001.0001. p. 170.

[15] Stephen Elias, *Legal Research How to Find & Understand the Law*, 19th ed. (Berkeley, California: Nolo, 2019). p. 136.

[16] Mateusz Stepien, "Using Case Studies for Research on Judicial Opinions. Some Preliminary Insights," *Law and Method*, no. November (2020): 1–20, https://doi.org/10.5553/rem/.000045. p. 2.

[17] Kristiawanto, *Memahami Penelitian Hukum Normatif* (Jakarta: Prenada Media, 2022). p. 29.

[18] Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: MNC Publishing, 2022). p. 321.

[19] William Lawrence Neuman, *Social Research: Qualitative and Quantitative Approaches.*, Seventh Ed (Edinburgh:Pearson Education Limited, 2020), https://doi.org/10.1234/12345678. pp. 19-20.

[20] Adriana Placani, "Prescriptive Rules in Legal Theory," *Public Governance, Administration and Finances Law Review* 8, no. 2 (2023): 2–12, https://doi.org/10.53116/pgaflr.6827. p. 2.

The Constitutional Court's Philosophical Views on Freedom of Opinion and Fake News

The Constitutional Court underlines that it is important that the State provide its citizens enough space to freely actualize themselves by expressing their opinions or proposing their thoughts as guaranteed by the Constitution.[21] The Constitutional Court's view is based on three important and interesting points in regard to freedom of expression and fake news. The first important point is the view of the Constitutional Court in regard to measurement of righteousness in a heterogenous community. The Constitutional Court deems it important not to restrict incorrect statements in a public place in the construction of a heterogeneous community. The Constitutional Court views that there are such unclear measurements and parameters of what is called the truth especially when that truth is valued from the viewpoint of various parties possessing different religious, cultural and social values.[22]

The second important point is the Constitutional Court's view in regard to freedom of opinion in the framework of democracy. The Constitutional Court underlines that it is of great importance to protect freedom of opinion especially a political statement in the framework of democracy. The Constitutional Court views that even limiting a statement deemed to be correct will restrict people's right to express their creativity of thought in order to seek the truth itself. As a result, the people no longer freely express their opinions as a form of their public participation in the democratic rule. In fact, a democratic decision made by the State shall require the citizens' opinion. Therefore, under no circumstances can the State reduce its citizens' freedom of opinion by requiring an absolute condition namely that only the correct statements can be presented in a public place.[23]

The last important point is the view of the Constitutional Court regarding the stance of the State towards a criticism. The Constitutional Court stresses on the State's duty of taking into considerations any

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[21] Decree of the Constitutional Court of the Republic of Indonesia No. 78/PUU-XXI/2023, pp. 346-347.

[22] Decree of the Constitutional Court of the Republic of Indonesia No. 78/PUU-XXI/2023, pp. 346-347.

[23] Decree of the Constitutional Court of the Republic of Indonesia No. 78/PUU-XXI/2023, pp. 346-347.

constructive criticisms as a form of freedom of opinion. In fact, the State is not supposed to criminalize any inappropriateness of an opinion.[24]

The Constitutional Court bases its view on the views of two Western philosophers, namely John Milton and John Stuart Mill. Milton viewed that a lie was permitted since it served as an effort to reveal the truth.[25] He stated that the truth could not be monopolized by means of a censor. The truth could be found through various learning processes. Censors were not allowed since they took away one's capability of thinking and finding the truth. Mill thought that various different opinions should be expressed, and it would be so harmful to restrict one's different opinion.[26] If that opinion turned out to be true, prohibiting the dissemination of an incorrect opinion would make a wrong opinion lose its chance to seek the truth. Milton and Mill required that all information and opinions, both correct and incorrect, be openly expressed, so it could be examined in a free discussion in order to come up with the truth in the community.

Mill's views are firmly confirmed in the second and the third views of the Constitutional Court. The truth is not based on the most votes. Mill thought that the opinion of a minority group also had the same truth value, so it was supposed to be treated like that of a majority group.[27] On the other hand, the opinion of a majority group was not automatically valued higher; therefore, the opinion of a minority group could not be restricted and criminalized since it could cause the tyranny of a majority group. Therefore, Mill thought that the restriction of a statement could only be justified after it inflicted some harm.[28] Even an incorrect opinion was worth expressing in a public place if it did not harm any party or jeopardize the community.

By issuing that decree, the Constitutional Court recognizes the justification of freedom of opinion as an effort to seek the truth and as a form of people's participation in democracy. There is a need of

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[24] Decree of the Constitutional Court of the Republic of Indonesia No. 78/PUU-XXI/2023, p. 349.

[25] John Milton, *Areopagitica* (Chicago: Independently published, 2020). p. 11, 42 and 55.

[26] John Stuart Mill, *On Liberty* (New York: G&D Media, 2020). pp. 8, 19 and 45.

[27] Mill.

[28] Mill. p. 3, 19-34.

opinion exchanges in order to obtain the truth bringing the goodness to both individuals and social affairs. There are no such single absolute truths, so people need to provide some alternative serving as a process of seeking various available truths.[29] Freedom of opinion is affiliated with the making of a democratic decision. A democratically made decision requires its citizens' opinions and information.

Thus, the Constitutional Court wants to lay a philosophical foundation on freedom of opinion serving as the constitutional right of a citizen. In a heterogeneous community, anybody has the right to express his or her opinion in a public place. The restriction against freedom of opinion is not supposed to be based on the unrighteousness of a statement since the truth is no single and not based on the most votes It is the State's duty to take into consideration any constructive criticisms and the opinion of a minority group serving as a kind of public participation in the democratic life.

The Constitutional Court's View on the Criminalization of a Fake News Dissemination

The Constitutional Court emphasizes the importance of restricting the criminalization of an incorrect statement in a public place since that kind of statement serves as part of freedom of opinion guaranteed by the Constitution. That restriction has to do with elements of the fake news dissemination crime and Indonesian people's social justice at present.

The Constitutional Court views that clauses in Article 14 and Article 15 Law No. 1 of 1946 are not clear and may generate multiple interpretation, so they will potentially turn into 'rubber articles'[30] especially that of the upheaval element deemed to have lack of clarity on the definition of harm. The term upheaval does not have a sole meaning since it has several meanings such as uproar, commotion and riot. Hence, this situation creates such an uncertain parameter used to criminalize the perpetrator of the crime. The term upheaval is no longer

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[29] Matteo Bonotti and Jonathan Seglow, "Freedom of Speech: A Relational Defence," *Philosophy and Social Criticism* 48, no. 4 (2022): 515–29, https://doi.org/10.1177/01914537211073782. p.517.

[30] Decree of the Constitutional Court of the Republic of Indonesia No. 78/PUU-XXI/2023, pp. 350-351.

in accordance with the development of the current information technology since everybody can have easy and quick access to various pieces of information through various kinds of media. When a person disseminates some news the truth of which is still disputable and it becomes a discourse in a public place, it will not automatically result in upheaval within the community that can be criminalized with imprisonment.

Taking into account those considerations, the Constitutional Court stresses on serious harm inflicted to criminalize the perpetrator. In criminal law, the State is justified to criminalize the perpetrator if only there is a certain legal interest to be protected from any harm. According to the Anglo-American view, this is known as harm principles, while in term of the Continental European view, this is known as a principle of legal interest protection.[31] An act can only be criminalized if it is a disgraceful act that will result in serious danger. The clearer and the more present the danger resulting from that disgraceful act is, the stronger the reason to criminalize it will be. [32] On the other hand, the State is not justified to criminalize an act that will result in a trivial harm since it will contradict with the *de minimis no curat lex* principle since criminal law does not deal with trivial matters.[33] Criminalizing a trivial matter will actually inflict more harm to both the perpetrator and the community.

The implementation of Article 14 and Article 15 Law No. 1 of 1946 has posed a lot of problems. Based on my notes, from 2018 to 2023, there were at least 41 (forty-one) court verdicts indicting and convicting the defendants by using Article 14 or Article 15 Law No. 1 of 1946. Those verdicts showed that most of the defendants' acts did not produce such serious effects in the community. For instance, in Decree of Central Jakarta District Court No. 562/Pid.Sus/2019/PN

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[31] Johannes Keiler, *Actus Reus and Participation in European Criminal Law* (Cambridge: Intersentia, 2013), https://doi.org/10.26481/dis.20130412jk. pp. 24-26.

[32] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford: Oxford University Press, 2003), https://doi.org/10.1093/0195059239.001.0001. pp. 191-193 and 216.

[33] S Coughlan, "Why De Minimis Should Not Be a Defence," *Queens Law Journal* 44, no. 2 (2019): 262–83. p. 262.

Jkt.Pst, Decree of Central Jakarta District Court No. 563/Pid.Sus/2019/PN Jkt.Pst; Decree of Central Jakarta District Court No, 564/Pid.Sus/2019/PN Jkt.Pst; Decree of Central Jakarta District Court No. 565/Pid.Sus/2019/PN Jkt.Pst, and Decree of South Jakarta District Court No. 203/Pid.SUS/2019/PN.Jkt.Sel, The Panels of Judges ruled that the "upheaval" element was fulfilled since the fake news disseminated by the defendants had become viral and a trending topic. Moreover, it had created such controversies among the Internet users. However, in those verdicts, the Panels of Judges did not elaborate the impacts of that fake news dissemination on the real life of the community. Hence, this showed us that the implementation of the "upheaval" element in Article 14 and Article 15 Law No. 1 of 1946 only produced trivial harm. Consequently, this harmed the perpetrators as well as the community since it restricted them to freely express their opinion in a public place. When we observed the profiles of the defendants disseminating the fake news, most of them (31 out of 34 perpetrators) were ordinary people, and very few of them are prominent figures widely known in the community. Article 14 and Article 15 Law No. 1 of 1946 were employed to punish incorrect statements of whatever materials widely circulated in the community. These articles were not specifically aimed at an activist or a prominent figure criticizing the government's policies, but they were aimed at the people in general especially at the Internet users talking about issues serving as the hot topics at that time such as the general election (2018) or the Covid-19 pandemic (2020-2021).

Hence, the Decree of the Constitutional Court ruling Article 14 and Article 15 Law No. 1 of 1946 unconstitutional is the right decision. The restriction on freedom of opinion does not lie in the righteousness of an opinion expressed in a public place, but it lies on the presence of the clear and present danger of the statement. The 'upheaval' element in Article 14 and Article 15 Law No. 1 of 1946 does not refer to the clear and present danger in order to be worth criminalizing. Therefore, these articles have inflicted more harm to the people's and the community's freedom of expression in a public place.

The Presence of Fake News Dissemination Crime in Other Laws and its Impact on Freedom of Expression After the Decree of the Constitutional Court

Other than in Article 14 and Article 15 Law No. 1 of 1946, the fake news dissemination crime is regulated in two other laws namely Article 263 and Article 264 New Penal Code and Article 28 (3) Jo. 45A (3) Law on Electronic Information and Transactions of 2024. Article 624 New Penal Code stipulates that the fake news dissemination crime shall take in effect in early 2026. Article 28 (3) Jo. 45A (3) Law on Electronic Information and Transactions of 2024 is temporary since, pursuant to Article II Law on Electronic Information and Transactions of 2024, the articles on the fake news dissemination crime will be applicable until New Penal Code takes in effect. With the issuance of Decree of the Constitutional Court No. 78/PUU-XXI of 2023, how will the existence of those articles on the fake news dissemination crime in those two laws be?

The Constitutional Court is constrained in deciding appeal cases of the judicial review of a law. Article 45A Law No. 8 of 2011 on the Amendment to Law No. 24 of 2023 on the Constitutional Court (Law on the Constitutional Court) stipulates that the Constitutional Court shall not decide unsolicited matters or matters exceeding the scope appealed by the applicant. It means that the Constitutional Court must not make an *ultra petita* decision although in practice, Article 45A Law on the Constitutional Court is overruled by Decree of the Constitutional Court No. 48/PUU-IX/2011 of 2011 and Decree of the Constitutional Court No. 49/PUU-IX/2011 of 2011. The Constitutional Court's *ultra petita* decision is limited to the judicial review of a law related to Indonesian people's fundamental importance especially in the case of economic rights.[34]

The applicants of the case No. 78/PUU-XXI/2023 of 2023 only filed an appeal for the judicial review of Article 14 and Article 15 Law No. 1 of 1946, Article 310 (1) Old Penal Code and Article 27 (3) and

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[34] Emy Hajar Abra and Rofi Wahanisa, "The Constitutional Court Ultra Petita As a Protection Form of Economic Rights in Pancasila Justice," *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 187–224, https://doi.org/10.15294/jils.v5i1.35965. p. 191.

Article 45 (3) Law on Electronic Information and Transactions. Especially regarding the fake news dissemination crime, the applicants did not appeal to the Constitutional Court to judicially review articles regulating the fake news dissemination crime regulated in the New Penal Code and Law on Electronic Information and Transactions of 2024.

Furthermore, the Decree of the Constitutional Court cannot automatically enhance an existing applicable law. The Constitutional Court's decree in a judicial review of a law is a *declaratoir-constitutief* decision. It means that the decree only rules a norm in a law either unconstitutional or constitutional. At the same time, that decree annuls a legal situation or forms a new legal situation.[35] The Constitutional Court serves as a negative legislator, which means that it revokes any unconstitutional norms of a law.[36] Nevertheless, that Constitutional Court's decree does not require that the House of Representatives enhance those revoked norms. Moreover, in practice, the House of Representatives does not always enhance the new norms stipulated by the Constitutional Court.

Such is the case with Decree of the Constitutional Court No. 78/PUU-XXI/2023. It is a *declaratoir-constitutief* decree. Moreover, that decree does not recommend or require that the House of Representatives enhance those unconstitutional norms found in other applicable laws. The House of Representatives is fully authorized to make any changes to those unconstitutional norms of the fake news dissemination crime.

Furthermore, the formulation of the fake news dissemination crime in Article 14 and Article 15 Law No. 1 of 1946 is different from that of Article 263 Article 264 New Penal Code as well as that of Article 28 (3) Jo. 45A (3) Law on Electronic Information and Transactions of

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[35] Intan Permata Putri, Mohammad Mahrus Ali, and Pusat, "Karakteristik Judicial Order Dalam Putusan Mahkamah Konstitusi Dengan Amar Tidak Dapat Diterima Characteristics of Judicial Order in with Unacceptable Verdict," *Jurnal Konstitusi* 16, no. 4 (2019): 883–903, https://doi.org/DOI: https://doi.org/10.31078/jk16410. p. 894.

[36] Simon Butt and Prayekti Murharjanti, "What Constitutes Compliance? Legislative Responses to Constitutional Court Decisions in Indonesia," *International Journal of Constitutional Law* 20, no. 1 (2022): 428–53, https://doi.org/https://doi.org/10.1093/icon/moac014. p. 432.

2024. The lawmakers no longer use the term upheaval in Article 263 and Article 264 New Penal Code as well as Article 28 (3) Jo. 45A (3) Law on Electronic Information and Transactions, but they replace it with the term riot.

TABLE 1. The Difference of the Formulation of the Fake News Dissemination Crime regulated in Law No. 1 of 1946, New Penal Code and Law on Electronic Information and Transactions of 2024

Law No. 1 of 1946	**New Penal Code**	**Law on Electronic Information and Transactions of 2024**
Article 14 (1) Any person who disseminates fake news which deliberately issue upheaval within the community	Article 263 (1) Any person who disseminates news that he or she knows that the news is fake resulting in riot within the community	Article 28 (3) Jo. Article 45A (3) Any person who deliberately disseminates information or a document that he or she knows contains fake news resulting in riots within the community
Article 14 (2) Any person who disseminates news which can issue upheaval within the community, while he or she should be able to think that the news or the notification is fake	Article 263 (2) Any person who disseminates news although it should reasonably be suspected that the news is fake which may result in riots within the community	
Article 15 Any person who disseminates uncertain news or exaggerated or incomplete news, while he understands or at least should be able to suspect that such news will or can easily issue upheaval within the community	Article 264 Any person who disseminates news that is uncertain, exaggerate, or incomplete, while he or she knows, or it is reasonably suspected that such news may result in riots within the community	

Sources: Edited from the Laws

The term riot means the presence of serious harm. It means that the unlawful act shows a clear and present danger to take place.[37] The Elucidation of Article 190 (2) New Penal Code defines the term riot as a state resulting in violence inflicted to other people or any destruction of property perpetrated by at least three people. A riot shows the presence of a clear and present danger. It means that the danger has already taken place in the forms of an attack endangering or harming other people. Therefore, riot is different from trouble. The Elucidation of Article 14 Law No. 1 of 1946 elaborates that not only is upheaval defined as restlessness shaking the consciousness of so many citizens, but, more than that, it is also turmoil. The presence of restlessness and chaos (disorder) has not shown any clear and present danger against both other people and the community. There is obvious gradation among unrest, chaos and riot over the level of the seriousness of harm.

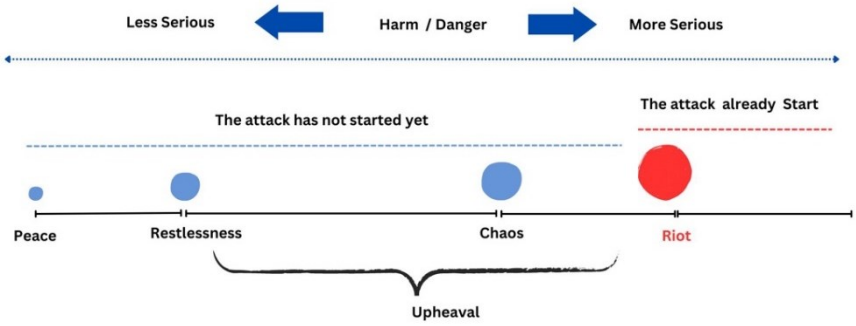

FIGURE 1. Gradation of Restlessness, Chaos with Riot
Source: The Author

Decree of the Constitutional Court No. 78/PUU-XXI/2023 cannot automatically rule articles on the fake news dissemination crime in Article 263 and Article 264 New Penal Code and Article 28 (3) Jo. 45A (3) Law on Electronic Information and Transactions unconstitutional, either. Other applicants must file another appeal to the Constitutional Court for the new judicial review of those articles in those two laws.

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[37] Ronald J. Krotoszynski Jr, "The Clear and Present Dangers of the Clear and Present Danger Test: Schenck and Abrams Revisited." *SMU Law Review* 72, no. 3 (2019): 415-440. p. 423.

On the one hand, the riot element in those two laws makes the formulation of the fake news dissemination crime tighter. However, this situation does not automatically provide freedom of opinion with broader space since Article 263 (2) and Article 264 New Penal Code still have broad and loose formulations.

Article 263 (2) New Penal Code criminalizes a person negligently disseminating fake news that will potentially create riot. This formulation is similar to that of Article 14 (2) Law No. 1 of 1946. This article is formulated as negligence delict. An act perpetrated due to negligence is not worth criminalizing since it will also inflict a person who has no malicious intent especially the one receiving a message from another party without his or her knowing the righteousness of the message that he or she receives. He or she simply disseminates the message to another party. Therefore, the perpetrator is indicted due to his or her lack of prudence and lack of knowledge of the righteousness of the message that he or she receives. In its verdict No.225/Pid.Sus/2019/PN.Bpp., Balikpapan District Court declared the perpetrator guilty of violating Article 14 (2) UU No. 1/1946 due to his lack of prudence when disseminating a chain message that he received from a chat group without verifying the righteousness of the message that he received. He posted the message stating that there were several containers in Tanjung Priok harbor containing ballots that had been voted on that were supposed to be used in the upcoming 2019 general election. Before the message became viral, the perpetrators having fabricated and disseminated that fake news for the first time had undergone their trial.

Therefore, unlike Article 14 and Article 15 Law No. 1 of 1946, Article 264 New Penal Code states that unlawfulness element is formulated in the "*proparte dolus proparte culpa*" form which means that this crime formulation requires that the deliberation and negligence elements simultaneously take place by placing some of these elements in the form of deliberation and the other elements in the form of negligence.[38] On the one hand, the lawmakers do not wish any

[38] Topo Santoso, *Principles of Indonesian Criminal Law (Studies in International and Comparative Criminal Law), Angewandte Chemie International Edition, 6(11), 951–952.*, 1st ed. (Oxford: Hart Publishing, 2023), https://doi.org/http://dx.doi.org/10.5040/9781509950959. p. 96.

exaggerated restrictions by requiring various too tight deliberation conditions. On the other hand, they do not wish a too loose condition by objectifying many elements of crimes. The presence of this *proparte dolus proparte culpa* element makes this article a rubber article.

Article 263 (2) and Article 264 New Penal Code do not require the riot element, but they only require an act potentially resulting in riot. This formulation poses a problem since to what extent should the State deem a harm to be a serious harm, so it will be worth criminalizing? Ashworth and Zedner[39] stated that the higher the risk and the more serious the impacts of the harm were, the higher the State's authority to criminalize that unlawful act would be. It is intended to prevent or reduce a more serious harm from taking place. Consequently, it is also possible to criminalize an act leading to riot. For instance, the dissemination of fake news has impacted on the riot potential. A mob has gathered at a place and is ready to create a commotion although the commotion has not turned into a riot. Thus, that situation has shown a clear and present danger. Nevertheless, if the risk limit of the harm is not appropriate, it will impede freedom of expression in a public place.

Accordingly, Decree of the Constitutional Court No. 78/PUU-XXI/2023 does not automatically rule the fake news dissemination crime unconstitutional in Indonesia. Currently, the fake news dissemination crime in Law on Electronic Information and Transactions is still applicable, and so will the article on the fake news dissemination crime in New Penal Code which will be in effect in 2026. It is true that the element stipulated in those two laws has been enhanced. The riot element shows the presence of a clear and present danger. It shows us that the formulation of the fake news dissemination crime is tighter especially in Article 263 (1) New Penal Code and Article 28 (3) Jo. 45A (3) Law on Electronic Information and Transactions of 2024. With this tight formulation, the people will be able to express their opinion more freely in a public place. Nevertheless, Article 263 (2) and Article 264 New Penal Code pose a problem in that they do not have a tight formulation of the fake news dissemination crime especially

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[39] Lucia Zedner and Andrew Ashworth, "The Rise and Restraint of the Preventive State," *Annual Review of Criminology* 2, no. September 2018 (2019): 429–50, https://doi.org/10.1146/annurev-criminol-011518-024526. p. 431.

on the formulation of the negligence element, the '*proparte dolus proparte culpa*' principle, and the formulation of those two articles serving as a formal delict. The presence of those two articles may restrain freedom of opinion in a public place.

The Impacts of the Content Moderation Arrangement of Freedom of Expression

Decree of the Constitutional Court No. 78/PUU-XXI/2023 does not automatically make the people freely express their opinions in a public place especially in the Internet. Other than the facts that there are still articles criminalizing a fake news dissemination act, there is still a content moderation arrangement deserving attention since it will impact on the implementation of freedom of opinion.

The Internet users use the term hoax to refer to any contents having fake information. That the contents of various kinds of hoaxes do not always harm the community makes the arrangement of a hoax content in this Law on Electronic Information and Transactions regime quite unclear. On the one hand, a hoax is a content unsettling people and disturbing public order. On the other hand, a hoax may serve as an unlawful content.[40] For instance, a hoax on health matters during the Covid-19 pandemic had a content disturbing public order since it makes the people believe in various drugs claimed to be capable of curing Covid 19 without having clinically been tested in the laboratory to identify their effects on human health. However, this hoax did not constitute the fake news dissemination crime, so it could not be categorized as an unlawful content. It is sometimes difficult to differentiate between a hoax containing a content unsettling people and disturbing public order from an unlawful hoax. Nevertheless, both of the contents unsettling people and disturbing public order are parts of the prohibited contents.

Law on Electronic Information and Transactions authorizes the government to prevent the dissemination any prohibited contents with the aim of protecting public interests. Therefore, the government can take any measures such as taking down access or ordering the internet

[40] Article 9 Decree of the Minister of Communication and Informatics of the Republic of Indonesia Number 5 of 2020 on the Electronic System Operator for the Private Scope.

intermediaries to take down access to those prohibited contents. These provisions may threaten freedom of opinion. When there is a content containing an opinion or a criticism criticizing the government and it is based on the inaccurate data or deemed to be incorrect by the government, that content can be categorized as a prohibited content. The government can order the internet intermediaries to take down access to that content despite the fact that the content is a form of freedom of expression intended as an effort to seek the truth and as part of a democratic participation.

Specifically, Law on Electronic Information and Transactions of 2024 stipulates independent moderation over a prohibited content. In the framework of protecting public interests, the government can order the Internet intermediaries to independently moderate the content by taking advantage of the technology against any unlawful contents including hoaxes. This provision affects the Internet intermediaries' responsibility in that they must adjust to the arrangement of their system to the standard stipulated by the government. Those Internet intermediaries not fulfilling those obligations can be imposed an administrative sanction. This provision is the government's effort to equate the government's and the Internet intermediaries' view in regard to the arrangement of the circulation of prohibited contents in a self-regulatory manner committed by the Internet intermediaries.

Law on Electronic Information and Transactions imposes broader legal responsibilities on the Internet intermediaries to moderating the prohibited contents including hoax contents. Before 2024, Article 11 Regulation of the Minister of Communication and Informatics of the Republic of Indonesia Number 5 of 2020 on Electronic System Operator in the Private Scope stipulates safe harbor. Moscon[41] and Smith[42] stated that this provision served as a safe harbor legally protecting the Internet intermediaries showing a goodwill gesture as a publisher. Those Internet intermediaries are exempted from any legal

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[41] Valentina Moscon, "Free Circulation of Information and Online Intermediaries – Replacing One 'Value Gap' with Another," IIC International Review of Intellectual Property and Competition Law 51, no. 8 (2020): 977–82, https://doi.org/10.1007/s40319-020-00982-3. p. 979.

[42] Robert Smith, *Harmonisation of Anti-Fake News Legisation in ASEAN* (Eastwood, New South Wales, Australia: AEC Education & Training Pty Ltd, 2021). p. 104.

responsibilities if they have shown a good faith and have actively restricted the dissemination of any prohibited electronic information pursuant to the regulation on the use and the utilization of the electronic system that they make.

To comply with this provision, the Internet intermediaries cannot get rid of their obligation to turn down access to any problematic contents on the grounds that the contents are parts of freedom of expression on the Internet as regulated in those Internet intermediaries' self-regulation.

The presence of this arrangement of a content moderation may become a stumbling block to freedom of opinion especially in an repressive regime. As a result, the people lose their access to being able to participate in democracy as the case of Singapore is. In 2019, Singapore passed Protection from Online Falsehoods and Manipulation Act (POFMA). This law did not pursue criminal law but a content moderation in the forms of a direction namely an order issued by the the Singaporean government to an individual or a corporation to stop communicating an incorrect statement or stop the dissemination of an incorrect statement in Singapore.[43] This direction is part of the Singaporean government's effort to enhance incorrect communication in the community by communicating the correct statement in accordance with that of the Singaporean government. This direction mechanism serves as a form of censor and control over freedom of opinion on the Internet.[44] This law enables the Singaporean government to restrict and even to impede any statements not in accordance with the policy made by the government by stating that the statement is

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[43] David Tan and Jessica Sijie Teng, "Fake News, Free Speech and Finding Constitutional Congruence," *Singapore Academy of Law Journal* 32, no. 1 (2020): 207–48. pp. 208-209.

[44] Kirsten Han, "Big Brother's Regional Ripple Effect: Singapore's Recent 'Fake News' Law Which Gives Ministers the Right to Ban Content They Do Not like, May Encourage Other Regimes in South-East Asia to Follow Suit," *Index on Censorship* 48, no. 2 (2019): 67–69, https://doi.org/10.1177/0306422019858296. p. 67.

incorrect. Smith, Perry and Nuchkoom[45] stated that most of or 85% of the direction acts were aimed at statements aimed at the government.

Taking down access to prohibited contents can be justified on the basis for protecting public interests, but it should be done with clear parameters. There must be clear criteria in regard to contents that the Internet intermediary had to independently take down. In terms of hoaxes, those contents shall have criteria as follows. First, the court has ruled that the contents constitute fake news, and the perpetrator has been convicted. Temporary access take down can be made to fake news contents the perpetrator of which is undergoing an investigation and prosecution process and a trial in the court. Second, that content clearly and presently shall result in riot. In this kind of content, we must pay attention to the people's situation and condition at the time the content is made. In various special circumstances deemed to disturb the national security, for instance during a general election, the Internet intermediaries are obliged to tighten their content moderation regulation. Other than those two forms and special circumstances, the Internet users have the right to obtain the notification and opportunity to clarify their contents before the Internet intermediaries moderate the contents.

Therefore, after the Decree of the Constitutional Court No. 78/PUU-XXI/2023, the presence of the arrangement of a content moderation is worthy of concern since it will affect the implementation of freedom of expression in a public place. Law on Electronic Information and Transactions of 2024 broadens the Internet intermediaries' responsibilities by obliging them to adjust their self-regulation to comply with that of the government and by restricting the provisions on safe harbor. This law enables the government to better oversee the Internet intermediaries in the moderation of their contents including hoax contents. However, on the other hand, to a repressive regime, this law can be taken advantage of to suppress any criticisms against the ruling government. Therefore, moderating a content with the aim of protecting public interests can be made on the condition that it is made with clear parameters and by announcing it to and giving an

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[45] Robert Brian Smith, Mark Perry, and Nucharee Nuchkoom Smith, "'Fake News' in Asean: Legislative Responses," *Journal of ASEAN Studies* 9, no. 2 (2021): 117–37, https://doi.org/10.21512/JAS.V9I2.7506. p. 127.

opportunity to the Internet users to freely make their clarification before the access takedown takes place.

Conclusion

Decree of the Constitutional Court No. 78/PUU-XXI/2023 is supposed to give a fresh jolt to freedom of opinion in a public place. The Constitutional Court lays the philosophical foundation that freedom of opinion should not be based on the presence of an incorrect statement since the truth is no single and not based on the most votes. This view serves as an important view in this heterogeneous Indonesian society. It is already appropriate that the Constitutional Court ruled Article 14 and Article 15 Law No. 1 of 1946 unconstitutional since freedom of opinion is not based on the righteousness of an opinion expressed in a public place, but it is based on the clear and present danger of a statement. The 'upheaval' element stipulated in Article 14 and Article 15 Law No. 1 of 1946 does not refer to a clear and present danger, so the criminalization shall cause more harm to freedom of opinion in a public place. However, Decree of the Constitutional Court No. 78/PUU-XXI/2023 does not automatically rule the fake news dissemination crime unconstitutional in Indonesia. There lie some problems regarding the formulations of the fake news dissemination crime stipulated in Article 263 (2) and Article 264 New Pena Code that are not tight. Moreover, the tight arrangement of a content moderation stipulated in Law on Electronic Information and Transactions of 2024 can be taken advantage of by a repressive regime to suppress any criticisms against the ruling government.

After the Decree of the Constitutional Court No. 78/PUU-XXI/2023 of 2023, the House of Representatives still needs to enhance the legal norms regulating the dissemination of fake news to better guarantee freedom of opinion. First, we recommend that Article 263 (2) and Article 264 New Penal Code be enhanced by encouraging any applicants to file another appeal to the Constitutional Court for a new judicial review. Second, we recommend that the arrangement of a content moderation be enhanced by stipulating clear parameters on contents that the Internet intermediaries must independently take down and by regulating the procedure of a content moderation giving an

opportunity to the Internet users to freely make their clarifications before their prohibited contents are taken down.

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"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

United Nations, Universal Declaration of Human Rights

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