

# FAKE NEWS AND INTERNET SHUTDOWNS IN INDONESIA: SYMPTOMS OF FAILURE TO UPHOLD DEMOCRACY

Rofi Aulia Rahman\*

Faculty of Law, Universitas Surabaya, Indonesia  
rofiauliarahman@staff.ubaya.ac.id

Shu-Mei Tang\*\*

Professor of Law, Department of Financial and Economic Law, Asia University,  
tangshumei@asia.edu.tw

Received: 22 March 2022 | Last Revised: 6 May 2022 | Accepted: 30 May 2022

## Abstract

The Indonesian government limited or shut down internet access during separate riots in Jakarta and Papua in 2019. The justification for blocking the internet and disabling certain features of social media platforms was to quell the unrest by ceasing the spread of fake news. Nevertheless, the government did not declare a state of emergency in response to either situation, triggering debate on whether the internet restrictions had any strong constitutional basis or if they were out of proportion and unconstitutional. This study evaluates the government's policy on internet shutdowns to reduce the spread of fake news amid riots, and explicates when the state of emergency "feature" might be activated. The research method of this article is a doctrinal legal approach, which critically examines whether the government policy was excessive, and to what extent a state of emergency can be implemented by minimum standard requirements. The result of this study shows the riots in Jakarta and Papua ought not be categorized as national threats; hence, the internet shutdown was out of proportion. Fake news is part of the price we pay for a free society; thus the article argues that an internet shutdown is not a proper way to combat fake

---

\* Faculty of Law, Universitas Surabaya, Indonesia

\*\* Professor of Law, Department of Financial and Economic Law, Asia University, Taiwan

news. Furthermore, the government has failed to fulfill the minimum standards to justify the internet shutdowns. Access to the internet is a new face of democratic pillars, so blocking internet access without any sufficient legal instruments and correct constitutional interpretation might indicate symptoms of a failure to uphold democracy.

**Keywords :** *Democracy, Fake News, Human Rights, Internet Shutdown, State of Emergency.*

## I. INTRODUCTION

The Indonesian government restricted access to certain features of social media platforms in Jakarta and some other cities over May 22–25, 2019, amid concerns that dissemination of fake news would exacerbate riots in the city's center, following the announcement of the results of that year's presidential election. From August 21 to 11 September, 2019, the government blocked<sup>1</sup> internet access in Papua in response to widespread rioting that had been sparked by the arrest of Papuan students in Surabaya, East Java, for allegedly disrespecting the Indonesian flag.<sup>2</sup> The government announced the internet restrictions through press releases, Number 106/HM/KOMINFO/05/2019 and Number 155/HM/KOMINFO/08/2019, issued by the Minister of Communication and Information.<sup>3</sup> During the unrest, the government also blocked 2,184 websites and restricted social media access to counter the spread of what it deemed to be fake news. The shutdowns were criticized as a potential violation of the constitutional right to freedom of access to information. Indeed, the media and information are pillars of democracy, protected under Article 28F of Indonesia's 1945 Constitution, which states, "Every

<sup>1</sup> Internet shutdown means that an intentional disruption of internet or electronic communication, rendering them inaccessible or effectively useless to exert control over the flow of information, see Media Defence, "What is an Internet Shutdown?", Media Defence, 2020, <https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-3-access-to-the-internet/what-is-an-internet-shutdown/>, accessed on May 30, 2022.

<sup>2</sup> Desy Setyowati, "Kominfo Tutup 2.184 Akun dan Situs Selama Pembatasan Media Sosial [Kominfo Closes 2,184 Accounts and Sites During Social Media Restrictions]," Kata Data, 2019, <https://katadata.co.id/desysetyowati/digital/5e9a5189f1e60/kominfo-tutup-2184-akun-dan-situs-selama-pembatasan-media-sosial>, accessed on April 2020.

<sup>3</sup> The Ministry of Communication and Information in 2019 issued a series of press releases to announce social media restrictions and internet bans. The press release was used to become the legal basis of the Ministry of Information and Technology to declare the state of emergency and internet shutdown in Papua.

person has the right to communicate and to obtain information for the purpose of self-development and social environment, and has the right to seek, obtain, possess, store, process and convey information using any channels available.”

The internet shutdown sparked a major debate over whether internet shutdowns were proper and constitutional when merely using a press release as a legal basis. Article 28J (2) of the 1945 Constitution states, “In exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society”. In other words, the state may limit a person’s human rights, but such restrictions must be regulated by law and in accordance with considerations of morality, religion, security and public order. In addition, when Indonesia wants to determine a state of emergency, as regulated in Article 12 of the 1945 Constitution, the President declares a state of emergency through law.

During the periods of blocking social media features and the internet, the government used Indonesia’s mainstream media to dominate coverage of the events, as most of the country’s media owners are partisan and support the coalition of the incumbent president. The country’s media therefore carried the government’s press conferences and press releases on the issues. The underlying reason for blocking social media features, such as video and photo sharing, and pushing the official news, was to combat the spread of fake news. This approach was not in line with the international standard on protecting human rights: freedom to access information and freedom of expression.

Thus, this article critically evaluates several matters. First, it evaluates the government’s action on the social media restrictions and the internet shutdown. It then discusses the relation between a state of emergency and the spread of fake news. Next, the analysis explicates the minimum standard and criteria of the state of emergency doctrine. It also examines online speech freedom and internet curbs in both India and the United States of America.

## II. RESEARCH METHOD

This article uses a doctrinal legal research method with a conceptual and comparative approach to critically evaluate the government's policy on the social media restrictions and internet shutdown during the Jakarta and Papua riots to identify whether such action was constitutional or unconstitutional. It also analyzes in what conditions and cases a state of emergency "feature" can be declared, as such a measure will affect basic rights and freedoms. This study begins by analyzing the doctrine of the state of emergency and considers whether the government should activate a state of emergency to combat fake news. It also explicates that the local riots cannot be categorized as a national threat since the impact was only at local level. The government could use ordinary substitutional efforts rather than an internet shutdown. In addition, some jurisprudence from other democratic societies indicate that internet shutdowns to tackle fake news are unconstitutional. A precautionary principle plays an important role prior to declaring a state of emergency.

## III. RESULT AND DISCUSSION

### 3.1. Brief Introduction of Fake News

The Fake News Challenge, a project that encourages the development of algorithms aimed at reducing the spread of misinformation, states that fake news means an utterly fabricated claim or story created and intended to deceive, often for secondary gain. Likewise, economists Hunt Allcott and Matthew Gentzkow<sup>4</sup> have said fake news is news articles that are intentionally and verifiably false and could mislead readers. Eventually, the domino impact of this phenomenon is social conflict, mistrust toward the media, and defamation.

As a propaganda technique, fake news was famously termed a "firehose of falsehood" by Russia's *Komitet Gosudarstvennoy Bezopasnosti*

---

<sup>4</sup> Hunt Allcott and Matthew Gentzkow, "Social Media and Fake News in the 2016 Election," *Journal of Economic Perspective* 31, no.2 (2017): 213.

(Committee for State Security) during the annexation of the Crimean Peninsula to disseminate partial truths or outright fictions. In these circumstances, Christopher Paul and Miriam Mathews<sup>5</sup> give some analysis. In the firehose of falsehood technique, there shall be high volume, repetitive and continuous information, no commitment to objective reality, and no commitment to consistency.

To manifest the firehose of falsehood technique, the content creator has to produce fake news in huge quantities without considering the truth. Before discussing how governments or private entities may address the widespread issue of fake news, it is necessary to define the background that contributes to the current problem. A definition for fake news should consider past appearances of misinformation, disinformation, and propaganda, analyze their purposes, and examine their effects for the current incarnation to be addressed.

### **3.2. Basic Right to Use Internet and Social Media: Indonesian Constitutional and International Perspectives**

The internet and social media are now classified as modern democratic forums, even though they carry the harmful risks of fake news, false statements, misinformation, and misleading information. Despite those risks, the media is a part of the democratic tools to embody the sovereignty of the people. Fake news is one of the most talked about topics in the world, especially since the 2016 United States presidential election, in which Donald Trump attacked the media by labeling critical coverage as “fake news”, while at the same time using social media to disseminate propaganda. Republicans used fake news as a campaign model to influence voters, a move that was echoed in Indonesia’s 2019 presidential election.<sup>6</sup>

Fake news causes horizontal conflict, which threatens the way of life of Indonesian society and can also affect national security. This has prompted the

<sup>5</sup> Christopher Paul and Miriam Mathews, “The Russian “Firehose of Falsehood” Propaganda Model: Why It Might Work and Options to Counter It,” Rand Corporation, 2019, <https://www.rand.org/pubs/perspectives/PE198.html>, accessed on January 30, 2020.

<sup>6</sup> Kate Lamb, “Fake News Spikes in Indonesia ahead of Elections,” The Guardian, March 20, 2019.

government of Indonesia to filter, block and even shut down the internet, as well as restrict social media. This repressive policy action is taken on the grounds of protecting the positive development of the internet and social media from such negative impacts.<sup>7</sup>

### 3.2.1. Indonesian Perspective

Freedom of expression embodies the spirit of democracy and is a fundamental right guaranteed by Indonesia's 1945 Constitution. Article 28E Paragraph (3) of the Constitution states that every person has the right to freedom of association, assembly, and expression. This freedoms of speech is limited by Article 28J Paragraph (1) and (2), which state:<sup>8</sup>

- (1) Every person shall respect human rights of others in the order of life of the society, nation, and state.
- (2) In exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society.

Those two articles mean that human rights fulfilment in Indonesia can be restricted for the sake of protecting national security and the public interest. This restriction may be construed as cultural relativism or particularism, as it appears contrary to the universalism principle. The government has argued that internet and social media shutdowns were relevant because Indonesia faced the threat of violence, as well as separatist sentiments in Papua province.<sup>9</sup>

The original intent of the 1945 Constitution's drafters allowed limitations on human rights. When the Constitution was amended over 1999-2002, such limitations were clearly stipulated in Article 28J, which comes at the end of the section on human rights provisions.<sup>10</sup> The interpretation of Article 28J can

<sup>7</sup> Ika Karlina Idris, "The Internet Shutdown in Papua Threatens Indonesia's Democracy and Its People's Right to Free Speech," *The Jakarta Post*, <https://www.thejakartapost.com/academia/2019/09/02/the-internet-shutdown-in-papua-threatens-indonesias-democracy-and-its-peoples-right-to-free-speech.html>, accessed September 2, 2019.

<sup>8</sup> The 1945 Constitution of Indonesia Article 28E Paragraph (3) and Article 28J Paragraph (1) and (2).

<sup>9</sup> Idris, "The Internet Shutdown."

<sup>10</sup> Colman Lynch, "Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case," *Columbia Human Rights Law Review* 40, (2009): 582.

be seen in the Constitutional Court's decision Number 21/PUU-VI/2008 on the case of the "Bali nine" heroin smugglers. The Constitutional Court argued that the death penalty could be imposed in Indonesia by taking Article 28J as a legal basis. This means that the restriction of human rights is lawful as long as regulated into law.<sup>11</sup>

Soeharto, Mahathir Mohamad, and Lee Kuan Yew were three leaders of Southeast Asian nations who rejected the universalist conception of human rights and instead espoused "Asian values" that put communitarian values over individual rights. They believed that universalism comes from liberal Western human rights, and that particularism is a nationalist ideology with local values. A relatively similar view was shared by former Indonesian president B.J. Habibie, who led the country over 1998 to 1999 in the initial stage of its transition from authoritarianism to democracy. He argued that the international human rights conception has no absolute value. He said that even though human rights are inherent to all human beings, humans do not live alone as a "*zoon politicon* (political animal)" or human society. Hence, people must respect the rights of other people for the sake of social stability.

Consequently, in addition to defending individual rights, humans also must respect other people's rights, namely the obligation of human rights.<sup>12</sup> Even though human rights are inherent in each individual, humans cannot avoid social interaction. Because of that, under human nature, a balance and harmony between the freedom of individual rights and social responsibility should be kept.<sup>13</sup> Another principle that must be upheld is the balance between universal human rights values and recognition of national values. This means that the international community must also recognize and agree that implementing human rights values is the authority and responsibility of the government or country concerned. Habibie emphasized the importance of respecting the rights

<sup>11</sup> Constitutional Court Decision No. 21/PUU-VI/2008 (2008).

<sup>12</sup> Habibie, *Detik-Detik yang Menentukan: Jalan Panjang Indonesia Menuju Demokrasi* [Decisive Moments: Indonesia's Long Road Towards Democracy] (Jakarta: THC Mandiri, 2006): 44.

<sup>13</sup> *Ibid.*, 44.

of others. Respecting other people's rights is an obligation of humans; hence, there is the theory of right and obligation.<sup>14</sup>

The social obligation concept is also clearly stipulated in Decree No. XVII/MPR/1998 on Human Rights, issued by the People's Consultative Assembly, and in Article 28J paragraph (1) of the 1945 Constitution. Indonesia realizes and recognizes that each individual is part of society. The community consists of people who have rights, which means they also have to respect the rights of others in order to balance the nation's life. This means that in addition to having human rights protection, humans must also respect, protect, and fulfil the rights of others as an obligation for everyone.

Polarization of thinking about human rights is also reflected in the 1945 Constitution, with particularism on human rights stemming from Article 28J. The theoretical debate and implications of human rights protection and obligations also arise from existing law, especially in the Indonesian Criminal Code, which was inherited from the Dutch colonial government. Article 53 and Article 54 of the Criminal Code regulate particularism that restricts freedom of the press. The purpose of those articles is the protection of newsmakers and publishers. As long as they can provide correct information, they would be free from prosecution. Otherwise, they could face punishment under criminal law for defamation.<sup>15</sup> This arrangement is different from the principle of freedom of the press in a universal perspective that does not recognize any exceptions. Universalism may be regarded as another name of liberal human rights.

In 2004, the Constitutional Court rejected a challenge to Article 43 of the Human Rights Court Law submitted by former East Timor governor Abilio Jose Osorio Soares, who was being prosecuted for alleged human rights violations. Soares wanted his trial at the Human Rights Court halted, arguing there was no legal basis for retroactive prosecution. His petition challenged Article 43

---

<sup>14</sup> Ibid., 480.

<sup>15</sup> Suparman Marzuki, "Perspektif Mahkamah Konstitusi Tentang Hak Asasi Manusia: Kajian Tiga Putusan Mahkamah Konstitusi: Nomor 065/PUU-II/2004; Nomor 102/PUU-VII/2009 dan Nomor 140/PUU-VII/2009 [Perspective of the Constitutional Court on Human Rights: A Study of Three Decisions of the Constitutional Court: Number 065/PUU-II/2004; Number 102/PUU-VII/2009 and Number 140/PUU-VII/2009]," *Journal of Yudisial* 6, no. 3 (2013): 194-195.



Paragraph (1) of the Human Rights Court Law as being contrary to Article 28I of the 1945 Constitution. He argued the Human Rights Court had no jurisdiction to examine his case because the alleged violations had occurred in 1999, before the Human Rights Court existed. Using the retroactive principle, the Human Rights Court can examine past cases of human rights violations.

According to the petition, the Human Rights Law contradicts Article 28I Paragraph (1) of the 1945 Constitution on the right not to be prosecuted on the basis of a retroactive law. Soares's lawyers therefore argued that Article 43 Paragraph (1) should be declared null and void. But the Constitutional Court, in decision Number 065/PUU-II/2004, decided that Article 43 (1) is constitutional because the right to be free from retroactive prosecution could be set aside under Article 28J of the Constitution.

Even though Indonesia recognized cultural relativism by having Article 28J Paragraphs (1) and (2), which became the legal basis for the government to conduct internet and social media shutdowns, the government failed to explain or formally declare a state of emergency. The government can block internet access in Papua as long as it fulfills the formal requirement of the declaration of a state of emergency, prescribed by law, especially through a government regulation-in-lieu-of-law. Constitutional emergency powers mean that the executive body under the president can declare a state of emergency and rule by extraordinary actions and policies.

### **3.2.2. Internet and Social Media Use: An International Perspective**

The right to freedom of expression and access to information is provided in Article 19 of the Universal Declaration of Human Rights, stating that everyone has the right to freedom of opinion and expression. The declaration regulates the right to hold opinions without interference and seek, receive, and impart information and ideas through any media regardless of frontiers. It was regulated in the International Covenant on Civil and Political Rights (ICCPR), Article 19, that 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 print, in the form of art, or

through any other media of his choice. Therefore, the internet has become an important tool for expression.<sup>16</sup>

All rights are universal, indivisible, interdependent and interrelated. While international human rights law allows legitimate limitations, derogations and reservations, they must be exercised under strict circumstances. Even in exceptional situations, particular core human rights must apply at all times.<sup>17</sup> According to the ICCPR, which Indonesia ratified in 2005, some rights can never derogate, even in times of public emergency that threaten the state's life. Those non-derogable rights under the ICCPR are: the right to life (Article 6); prohibition of torture, cruel, inhuman and degrading treatment (Article 7); prohibition of medical or scientific experimentation without consent (Article 7); prohibition of slavery, slave trade and servitude (Article 8); prohibition of imprisonment because of inability to fulfill contractual obligation (Article 11); principle of legality in criminal law (Article 15); recognition everywhere as a person before the law (Article 16); and freedom of thought, conscience, and religion (Article 18).

According to General Comment 34 of the ICCPR, the United Nations (UN) Human Rights Committee considers freedom of opinion is an element that can be restricted. Restrictions on human rights need to follow certain principles to be legitimate. The ICCPR underlines the criteria of necessity and transparency. The principle of proportionality is also cited.

Article 4 of the Indonesian Human Rights Law states that freedom of expression and thoughts are part of non-derogable rights. In that article, freedom of expression and thoughts must align with social values and religion.<sup>18</sup> Furthermore, the restriction of human rights must be prescribed in the law. Unfortunately, the Indonesian government did not declare a state of emergency and stipulate it into law when it cut or limited internet access.<sup>19</sup> The government only acted through the Minister of Communication and Information, who said

<sup>16</sup> Iland, "Freedom of Expression and Opinion in Wartime: Assessing Ukraine's Ban on Citizen Access to Russian-Owned Websites," *American University of International Law Review* 33, no. 4 (2018): 955-956.

<sup>17</sup> UNHR, Core Human Rights in the Two Covenants, September (2013).

<sup>18</sup> Indonesian Human Rights Law 1999, 4.

<sup>19</sup> *Ibid.*, 73.

Papua was in a serious situation, so the government would shut down internet activity in the province to prevent provocation through the internet and social media.<sup>20</sup>

### 3.3. National Security Justifications

The internet and social media have been subjected to shutdowns in countries such as Myanmar, Venezuela, Sudan, Sri Lanka, and India.<sup>21</sup> The ten countries with the most censorship are Eritrea, North Korea, Turkmenistan, Saudi Arabia, China, Vietnam, Iran, Equatorial Guinea, Belarus, and Cuba. The general motive of repressive action to restrict the internet, social media and the press is to secure a regime's power and order.<sup>22</sup> Some countries said they restrict the internet to ensure their sovereignty amid a state of emergency.

There are various reasons for declaring a state of emergency. German legal scholars A. Hamann and Hans-Ernst Folz divided emergencies into seven categories. Hamann identified them as: foreign invasion, public actions aimed at subversion of the constitutional regime (*coup d'état*), serious violations that threaten public order and security, disasters, public riots in vital areas of the economy, public service disruptions, and problems in financial and economic development.<sup>23</sup>

In 2019, the Indonesian government restricted access to certain social media features in Jakarta and shut down the internet in Papua. The government said the action was necessary to prevent the spread of fake news that could provoke Papuans and destabilize Papua's political situation. Unrest had occurred in Papua following the racial abuse and arrest of 43 Papuan students in Surabaya, East Java, for allegedly disrespecting the Indonesian flag. However, the rioting was only at the local level in Papua. The central government could have solved the problem in Papua without turning off the internet in the province. Government

<sup>20</sup> Ministry of Communication and Information Press Release No. 159/HM/KOMINFO/08/2019.

<sup>21</sup> Richie Koch, "All the Internet Shutdowns of 2019 so far," Security Boulevard, 2019.

<sup>22</sup> Committee to Protect Journalists, "10 Most Censored Countries," Committee to Protect Journalists, September 10, 2019., <https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist/>, accessed April 10, 2021.

<sup>23</sup> Domrin Alexander, *The Limits of Russian Democratization Emergency Powers and State of Emergency* (London: Routledge, 2012): 206.

officials in Papua and East Java said the unrest was due to miscommunication between Papuans and the government in Surabaya. In Jakarta, the government restricted social media access in May 2019 in response to riots that occurred after losing presidential election candidate Prabowo Subianto made unsubstantiated allegations of massive, systemic voting fraud. Specifically, the sharing of videos and images was slowed or stopped on certain social media platforms, such as WhatsApp and Facebook. Opponents of the move claimed the restrictions were unjustified. Demonstrations are a normal situation in a democratic society and guaranteed as freedom of expression.<sup>24</sup> Therefore, the reason to switch off the internet in Papua and curb social media functions in Jakarta to quell demonstrations was deemed baseless as it did not fulfill the requirement of a state of emergency. The riots were part of a domestic problem and could be solved by the respective local governments.

The government must formally declare the enforcement of a state of emergency, describing the situation as an emergency. This action has an important role to let people know the current condition, so they will see the scope of what is going on with the state and the effect on human rights protection.<sup>25</sup> That action could be the justification for the government to violate or restrict human rights lawfully. That action also reduces the possibility of negative social reactions that could prompt calls for impeachment of the government. The question arises as to who should be given the authority to decide that the country is experiencing an emergency. It is important to maintain the principles of legality and legal certainty when an emergency is enacted. Carl Schmitt argued that the authority to decide is the holder of sovereignty. He wrote,<sup>26</sup>

*“Sovereign is he who decides on the exception.... Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations.... For a legal order to make sense, a normal situation*

<sup>24</sup> Emily Howie, “Protecting the Human Right to Freedom of Expression in International Law,” *International Journal of Speech-Language Pathology* 20, no. 1 (2018): 13.

<sup>25</sup> Osgar S. Matompo, “Pembatasan Terhadap Hak Asasi Manusia Dalam Prespektif Keadaan Darurat [Restrictions on Human Rights in the Perspective of Emergencies],” *Journal of Media Hukum* 21, no. 1 (2014): 67-68.

<sup>26</sup> *Ibid.*, 77-79.

*must exist, and he is sovereign who definitely decides whether this normal situation actually exists.”*

According to the principles above, Indonesia unfortunately did not give a clear explanation or firm legal basis when curbing or shutting down the internet. The authority to shut down the internet was exercised by the Ministry of Communication and Information by issuing a press release and holding a press conference. Issuance of a ministerial press release was not a strong enough basis to warrant such serious action. According to legal principle, if the government wants to shut down the internet, it must declare first that Indonesia is in a state of emergency and the government will take over all forms of mass communication, including the internet. Any internet shutdown must also be stipulated into law as martial law or emergency law, as mandated by Article 28J of 1945 Constitution on human rights restriction. A shutdown is only valid by prescription of the law and the restriction must be in line with moral, social, and public order values. A press release or a press conference by the Minister of Communication and Information is not part of legislation and not equivalent to law.

Under Article 12 of the 1945 Constitution, the president has the right to declare a state of emergency. The conditions for such a declaration and the subsequent measures regarding a state of emergency are regulated by law. In the case of the internet restrictions in Jakarta and Papua, the government failed to show that Indonesia was in a state of emergency that required a shutdown of the internet.

The conditions for limiting and reducing human rights are interpreted in more detail in the Siracusa Principles, which state that restrictions on human rights must not jeopardize the essence of the rights. All limitation clauses must be interpreted expressly and aimed at supporting rights. This principles also emphasize that rights restrictions must not be enforced arbitrarily. Restrictions on human rights can only be done if they meet the following interpretive principles: prescribed by law, in a democratic society, public order, public health, public morals, national security, public safety, rights and freedoms of others or the rights or reputations of others.

General Comment No. 29 on Article 4 of ICCPR outlines two requirements that must be met for the restriction of human rights: the situation must amount to a public emergency that threatens the nation's life, and the state party must have officially proclaimed a state of emergency.<sup>27</sup> If we go back to the internet curbs in Indonesia, the government failed to describe that Indonesia faced an emergency that would bring the country to a detrimental situation. The situation in Papua was a local conflict that could be settled without violating human rights via the internet shutdown. The government said the legal basis of its action was the Electronic Information and Transactions Law, but that law is for prohibiting illegal electronic transactions and documents that are deemed immoral, defamatory or hate speech.

Implementing a state of emergency principle in a country is essential to legitimize the state action of declaring an emergency. The government must follow the declaration principle, legality principle, communication principle, temporary principle, special threat principle, and proportionality principle.<sup>28</sup> Those principles are notable because they will give legal certainty, so the restriction of human rights will have a strong legal basis and reasoning. Due process must also be respected since it is the heart of the law. Therefore, if the state respects human rights, the rule of law must be implemented, even in a state of emergency.

When the Indonesian government curbed social media features in Jakarta and shut down the internet in Papua, it could not prove that Indonesia was in an emergency. The government used its power for political purposes. When demonstrations took place in Jakarta in May 2019, the government was afraid that the protesters would be provoked by the spread of fake news that the presidential election was unfair.<sup>29</sup>

<sup>27</sup> Jennifer Corrin, "Cultural Relativism vs. Universalism: The South Pacific Reality," in *The Universalism of Human Right*, ed. Rainer Arnold (Dordrecht: Springer, 2013): 103.

<sup>28</sup> Jimly Asshiddiqie, *Hukum Tata Negara Darurat [Emergency Constitutional Law]* (Jakarta: Raja Grafindo Persada, 2007): 9.

<sup>29</sup> Anthony Cuthbertston, "Indonesia Blocks Facebook and Whatsapp Features after 'Fake News-Inspired' Riots and Deaths", *The Independent*, May 23, 2019, <https://www.independent.co.uk/tech/indonesia-facebook-whatsapp-ban-blocked-election-riots-a8926706.html>, accessed August 17th, 2019.

### 3.4. State of Emergency and Derogation of Human Rights

Derogation refers to the legally mandated authority of states, which are otherwise bound by the obligations of treaties or constitutions, to suspend certain civil and political liberties in response to crises. Derogation can be justified solely by the state's aim to return to normality.<sup>30</sup> This mechanism has several purposes – defining specific human rights, allowing states to derogate from certain rights, and outlining the situations in which these actions are considered lawful – to provide necessary flexibility with minimal or monitored rights infringement. The legal consequences of adopting international treaties into national law is that the state must respect and commit to the agreement it signed.<sup>31</sup>

There are some important legal bases for derogating human rights in Indonesia during an emergency. Those three legal bases are the ICCPR General Comment No. 29 on the Derogations of Human Rights during a State of Emergency, the Siracusa Principles, and Articles 12 and 28J (2) of the 1945 Constitution. First, in ICCPR, the derogation of human rights is allowed as long as extreme conditions occur. Several requirements, outlined in the previous section, must be fulfilled, such as wartime, illegal impeachment, disasters, etc. These provisions are broadly reproduced in the ICCPR, which means that the human rights are not absolute. As the ICCPR underlines, the exercise of the rights provided carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be provided by law as necessary:

- a) For respect of the rights or reputations of others
- b) For the protection of national security or public order, or public health or morals.

Second, under General Comment No. 29 on the Derogations of Human Rights during a State of Emergency, a situation must amount to a public emergency that threatens the nation's life, and the state party must have

<sup>30</sup> Emilie M. Hafner-Burton et al., "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization* 65, no. 4 (2011), 673; See also N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Commission on Human Rights, 35th Sess., Agenda Item 10 at 20, UN Doc. E/CN.4Sub.2/1982/15 (1982), 69.

<sup>31</sup> Hafner-Burton et al., "Emergency and Escape: Explaining Derogations from Human Rights Treaties," 674.

officially proclaimed a state of emergency. The latter requirement is essential for maintaining the principles of legality and the rule of law when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the ICCPR, states must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers. It is the task of the UN Human Rights Committee to monitor the laws in question, concerning whether they enable and secure compliance with Article 4 of the ICCPR. In order for the Committee to perform its monitoring task, state parties of the ICCPR should include in their reports sufficient and precise information about their law and practice in the field of emergency powers.<sup>32</sup>

Looking at the internet shutdown in parts of Indonesia, the government did not fulfill those criteria mentioned above, such as declaring an emergency and prescribing emergency law. The government only made an announcement based on its perspective without considering the voice of the people. The government decided that Indonesia was in an emergency, but the Papua conflict is a local conflict that the local government could have handled. If the government was worried about the rise of separatism, it could use local police to deal with the issue.

Furthermore, there are the Siracusa Principles on the limitation and derogation of provisions in the ICCPR. The UN High Commissioner for Human Rights noted that national security and public order are often pretexts to safeguard a government. National security may be used as a reason for arbitrary restrictions. Even suppressing opinions in certain cases is allowed when there is a severe political or military danger to the state. Complete internet shutdowns will rarely meet the necessity test.<sup>33</sup> The aforementioned instruments require states to comply, for example, in restricting the right to freedom of expression. Such limitations must pursue a legitimate aim and be necessary for a democratic society.

---

<sup>32</sup> General Comment No. 29 Article 4 on the Derogations of Human Rights during a State of Emergency.

<sup>33</sup> Wolfgang Benedek and Matthias, *Freedom of Expression and The Internet* (Strasbourg: Council of Europe Publishing, 2013): 112.



In Indonesia, the Constitution states that conditions for a declaration of emergency and the subsequent measures shall be regulated by law. Thus, if the government intends to block internet access, it must declare and enact martial law or emergency law. Article 28J (2) states the human rights may be restricted under law. If the restriction of human rights is not established by law, it is an abuse of power which is not in line with the rule of law.

Therefore, if the government shuts down the internet, it must declare a state of emergency to prove Indonesia is facing a serious threat which affects national security or public order, so extraordinary action is required to tackle the problem. However, the internet curbs and shutdowns showed the government refused to comply with the standards laid down in the instruments of legal basis. The right to freedom of expression is not the only right violated. Other rights such as access to information, freedom of association and assembly and right to privacy are violated together with other socio-economic rights. If the government wants to derogate such rights, then the above principles must be followed. Unfortunately, this important prerequisite was ignored by the government in shutting down the internet.

While the Indonesian government has legal bases, from international and national standards, for restrictions of human rights, it must ensure they are heeded. Article 12 of the Constitution allows the president to declare a state of emergency, while Article 28J Paragraph (1) states that every person shall respect human rights of others in the order of life of the society, nation, and state. Article 28J Paragraph (2) states that in exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society.

An internet shutdown could be done if it meets the absolute requirements that must be fulfilled. If the government cannot fulfill those requirements, then it has violated human rights. Put simply, the internet shutdown is unconstitutional. Moreover, as Indonesia is a law-based state, all state conduct must align with

existing law. According to Julius Stahl, the concept of the state of law has three characteristics. First, the protection of human rights. This means there is constitutional protection of human rights by a fair legal process. The establishment of state and government shall not derogate the core of fundamental rights. So, if the state cannot give fairness to people and fails to settle human rights violations, the state cannot be called a rule of law state (*rechtstaat*).

Second, is the division of power, which means dividing powers within state organs by implementing the concept of separation of powers vertically or horizontally. The separation of powers to prevent the government from having absolute power. As Lord Acton said, power tends to corrupt and absolute power corrupts absolutely. The separation of power is for avoiding abusive government action. In this regard, an internet shutdown is an abusive policy as it is baseless.

The third characteristic is a government based on law. In exercising its authority, the government must obey various organs of law in conducting state policy or meeting the state's needs, and the last of these is the Administrative Court. In every *rechtstaat* there shall be transparency for all people, so there will be scrutiny if the government (executive) commits misconduct in its decision-making.<sup>34</sup> This highlights that every government action must have a legal basis. In the context of the internet curbs and shutdown, when the government has no legal basis for internet blackouts, it conspicuously displayed authoritarianism and violated the concept of the rule of law state envisioned by Indonesia's founding fathers.

### 3.5. Internet and Social Media Shutdowns in Some Countries

Fake news is a threat to democracy. If the phenomenon of fake news cannot be solved, it will lead to chaos. Nevertheless, if Indonesia is heavy-handed in curbing freedoms in its effort to quash fake news, it may be accused of democratic backsliding or be labeled as a "flawed democracy".<sup>35</sup> Many nations have been

<sup>34</sup> Bahder Johan Nasution, *Negara Hukum dan Hak Asasi Manusia [Rule of Law State and Human Rights]* (Bandung: Mandar Maju, 2011): 1.

<sup>35</sup> Rofi Aulia Rahman, et al., "Calon Tunggal Pilkada: Krisis Kepemimpinan dan Ancaman Bagi Demokrasi [Single Candidate Pilkada: Leadership Crisis and Threat to Democracy]," *Jurnal Konstitusi* 19, no. 2 (2022): 64.

afflicted by the problem of biased popular media. In Italy, for example, media tycoon Silvio Berlusconi, who served three times as prime minister, used his media power for his election campaigns. His media companies endorsed his political statements with the aim of influencing voters, no matter whether it was true or false news, regardless of the negative impact on society.<sup>36</sup> Public trust in the media is essential for the development of democracy since the press is a pillar of democracy that can balance government power, becoming a mouthpiece of public opinion to deliver aspirations to the government.<sup>37</sup> Hence, the media must be independent and neutral, ensuring its news is valid.

### 3.5.1. Indonesia

On May 22, 2019, the Indonesian government partially restricted social media and instant messaging platform features in Jakarta. On August 21, 2019, it blocked telecommunications data services in parts of Papua and West Papua provinces, effectively shutting down the internet.

Through Press Release No. 106/HM/KOMINFO/05/2019 issued on May 22, 2019, Communication and Information Minister Rudiantara said the government had temporarily and gradually restricted access to social media platforms and instant messages with the aim of limiting the spread or virality of hoax information related to demonstrations following announcement of the results of the 2019 presidential election. The release said the consequence of this restriction will be a slowdown in access, especially for uploading and downloading image and video content. It said the restrictions were aimed at “avoiding the negative impact of the dissemination of irresponsible and provocative content and messages”. The minister said the restrictions are based on the Electronic Information and Transactions (ITE) Law. “So the ITE Law basically has two points. First, increasing literacy, ability, capacity and capability of the community to go digital. And second, content management, one of which is content restriction,” he said.

<sup>36</sup> Roberto Mastroianni, “Fake News, Free Speech and Democracy: A (Bad) Lesson from Italy?” *Southwestern Journal of International Law* 25, no. 1 (2019): 50.

<sup>37</sup> Andrea Butler, “Protecting the Democratic Role of the Press: A Legal Solution to Fake News,” *Washington University Law Review* 96, no. 2 (2018): 426.

On May 27, 2019, the Ministry issued Press Release No. 108/HM/KOMINFO/05/2019, which outlined three steps the government was taking “to keep the cyber world peaceful”:

1. Blocking access to content links or accounts that are indicated to be spreading hoaxes.
2. Cooperating with digital platform providers to close accounts.
3. Restricting access to some digital platform features or file sharing.

On August 21, 2019, the minister issued Press Release No. 155/HM/KOMINFO/08/2019, which simply stated that telecommunication data services were being blocked in Papua and West Papua in order to speed up the process of restoring security and order in Papua and its surroundings. A follow-up press release, issued on 23 August, said the data blocking was continuing. It said at least 33 pieces of content and 849 hoax and provocative information links related to the Papua issue had been distributed to hundreds of thousands of social media account holders on Facebook, Instagram, Twitter and YouTube.

The government justified its decisions on the basis of the Ministry of Communication and Information’s Regulation No. 19 of 2014 on Controlling Internet Websites Containing Negative Content, as well as on the basis of the ITE Law. However, the ITE Law does not cover a blanket shutting down of the internet. The law was originally intended for validating electronic documents and transactions. Any internet shutdown must be regulated through a special law. If there is a state of emergency, the government must use the constitutional emergency powers stipulated in a government regulation-in-lieu-of-law to declare Indonesia faces a serious threat in settling the problem of Jakarta’s post-election violence and the unrest in Papua. Using ministerial press releases and regulations is the wrong way to derogate such rights. Also, the regulation has no legal basis for legalizing the internet shutdown, as Indonesia has never had such a specific regulation for that purpose.<sup>38</sup>

<sup>38</sup> Hesti Rika, “Dasar Hukum Kemenkominfo Blokir Internet [The Legal Basis of the Ministry of Communication and Information Blocking the Internet],” CNN Indonesia, September 4, 2019, <https://www.cnnindonesia.com/teknologi/20190904081344-185-427339/dasar-hukum-kemenkominfo-blokir-internet>, accessed on February 15, 2020.

On January 22, 2020, Jakarta State Administrative Court began hearing a lawsuit, against the internet shutdown, filed by the Press Freedom Defender Team, which consisted of the Alliance of Independent Journalists, SafeNet, the Indonesian Legal Aid Foundation (YLBHI), the Legal Aid Institute for the Press (LBH Pers), the Commission for Missing Persons and Victims of Violence (KontraS), the Institute for Policy Research and Advocacy (Elsam), and the Institute for Criminal Justice Reform (ICJR). Proceedings commenced without the presence of one of the defendants, Indonesian President Joko Widodo. The president was sued for not exercising due control and correction of his subordinates in the internet shutdown.

In the absence of the president, the court heard a response from the co-defendant, the Ministry of Communication and Information.<sup>39</sup> The petitioners claimed the government's action has violated the freedom of the press and the core of democracy, which is the freedom to obtain information. They said the government should never repeat such action because it was an abuse of power.

On June 3, 2020, Jakarta State Administrative Court ruled the government violated the 1959 State of Emergency Law because it had conducted the internet blackout without declaring a state of emergency. The bench said the government failed to prove during the trial that Indonesia was in a state of emergency that required authorities to shut down the internet. The judges ruled that the act of throttling and reining in internet access in parts of Papua and West Papua provinces in August and September by Defendant I (the Ministry of Communication and Information) and Defendant II (the President of the Republic of Indonesia) was against the law. The judges ordered the defendants to pay the court's costs of 457,000 Indonesian rupiah (equivalent to about USD30).

The judges considered the act of obstructing access to the internet violated several statutory provisions. Among others, Article 40 Paragraphs (2a) and (2b) of the ITE Law had become the legal basis for the Communication and Information

<sup>39</sup> Safenet, "President Jokowi Is Absent from the First Court of Internet Shutdown Lawsuit," Safenet, January 22, 2020, <https://safenet.or.id/2020/01/president-jokowi-is-absent-from-the-first-court-of-internet-shutdown-lawsuit/>, accessed March 21st, 2020.

Ministry in curbing and blocking internet access. The panel of judges viewed that the authority granted in the Article was limited to terminating access or instructing the electronic system operators to terminate access to electronic information and or electronic documents with unlawful content. The interpretation Article 40 paragraph (2b) of the ITE Law as grounds for restricting the right to internet access only applies to electronic information and or electronic documents with unlawful content and does not warrant termination of internet access, the panel of judges said in their ruling.

Moreover, the judges said the Communication and Information Ministry's reason of exercising its discretion to obstruct and curb the internet did not meet requirements regulated in the 2014 Government Administration Law. The discretionary arrangement as regulated in the Administration Law is a cumulative unit, not an alternative, that is to: streamline government administration, fill a legal vacuum, provide legal certainty, and overcome government stagnation in exceptional circumstances for the advantage and benefit of the public.

The judges considered the Communication and Information Ministry's citing of a legal vacuum as justification for the internet blocking was inappropriate. Measures that restrict human rights, such as curbing and blocking the internet, are only permissible when based on law – for instance, the 1959 State of Emergency Law, and not on anything inferior to it. The government did not apply such a law when dealing with the spread of hoaxes in Papua. The judges believed the termination of internet access did not follow the procedures to restrict human rights as regulated in the Constitution and other human rights conventions. The internet shutdown was therefore deemed to be against those regulations.

On October 27, 2021, the Indonesian Constitutional Court ruled the government had acted lawfully by implementing the internet shutdown in Papua. The Court decided the government's blocking and throttling of the internet is within reason and constitutionally acceptable, as the government has a responsibility of "preventing the dissemination and use of electronic information and/or electronic documents that have prohibited contents in accordance with statutory provisions".

### 3.5.2. The United States

In American law, a definition of fake news cannot be too broad lest it come under the scope of freedom of speech protected under the First Amendment. False information is protected under US law because its suppression could also lead to the curtailment of factual information and free expression. Hence, the First Amendment allows “breathing space” so that individuals are not afraid to express their thoughts and ideas. This explains, in part, why fake news should be narrowly defined.<sup>40</sup> The internet kill switch has been used in the US several times to prevent the spread of fake news.<sup>41</sup>

According to Soroush Vosoughi et al., false news stories are 70% more likely to be retweeted than true stories, and it takes true stories about six times as long to reach 1,500 people as it takes false stories to achieve the same number of people. Falsehoods are also retweeted more widely than true statements at every depth of a cascade – an unbroken tweet chain. Such chains travel 10 to 20 times more quickly than facts.<sup>42</sup> *The Washington Post’s* Fact Checker column in March 2019 calculated that then-US President Donald Trump had made 9,179 misleading claims up to that point of his presidency.<sup>43</sup> Misleading claims by politicians have become an increasing phenomenon in the US.

The First Amendment of the US Constitution protects the right to freely exchange ideas and points of view, regardless of whether they are controversial or false. Censorship and prior restraint, a government action prohibiting speech or other expressions before it can occur, are generally unconstitutional. This implies that fake news cannot be banned. This statement is strengthened by the decision of the US Supreme Court in *New York Times vs. Sullivan* in 1964<sup>44</sup> that false speech must also be protected to ensure that the First Amendment is for everyone, but with a special occasion, which is actual malice and the

<sup>40</sup> Ahran Park and Kyu Ho Youm, “Fake News from A Legal Perspective: The United States and South Korea Compared,” *Southwestern Journal of International Law* 25, no. 1 (2019): 103.

<sup>41</sup> William D. Toronto, “Fake News and Kill-Switches: The U.S. Government’s Fight to Respond to and Prevent Fake News,” *Air Force Law Review* 79 (2018): 177.

<sup>42</sup> Soroush Vosoughi, et.al, “The Spread of True and False News Online,” *Science* 359, no. 6380 (2018): 1149-1150.

<sup>43</sup> Fact Checker, *The Washington Post*, “In 787 Days, President Trump Has Made 9,179 False or Misleading Claims,” *The Washington Post*, March 17, 2019.

<sup>44</sup> *New York Times Co. v. Sullivan*, 376 US 254 (1964).



case was categorized as defamation. Actual malice is the standard of proof that public figures must satisfy to win a defamation lawsuit. Essentially, actual malice is present when a defendant knowingly publishes or broadcasts a false statement as fact. Reckless disregard for the truth amounts to actual malice in some jurisdictions.

Moreover, in other claims, a plaintiff must prove actual malice to recover presumed or punitive damages.<sup>45</sup> In plain English, actual malice is when someone deliberately lies to hurt another person. When famous people sue over lies, they must prove that the mendacity of the defendants was intentional.

A landmark case involving free speech and falsehood is *The United States v. Alvarez*. This case centered around Xavier Alvarez, who falsely claimed to have received the Congressional Medal of Honor for military service, when he had actually never served in the US military. He was later convicted for violating the Stolen Valor Act of 2005, which makes it a crime to lie about military service or awards. Alvarez appealed, arguing the statute had violated his First Amendment right to free speech. The US Supreme Court in 2012 decided that the act was unconstitutional. Justice Anthony M. Kennedy argued that false news is not unprotected by the First Amendment. The Court emphasized other mechanisms to counter the false speech rather than criminally punishing the speaker.<sup>46</sup> An alternative legal effort to punish fake news or false newsmakers is through the Defamation Law, otherwise known as slander and libel. Defamation involves the publication of material that causes serious harm to the reputation of an individual. Libel can be in many forms, such as broadcasts and printed media, which are permanent. Slander relates to the spoken word.

The US Supreme Court has handled several cases related to internet access and blocking. One such case was *Packingham v. North Carolina*, in which the Supreme Court considered a law that prohibited registered sexual offenders from accessing any social media website. While the Court found the government may be permitted to restrict specific conduct on the internet, it held that

<sup>45</sup> Black's Law Dictionary.

<sup>46</sup> *United States v. Alvarez*, 567 U.S. 709 (2012).



altogether banning a person from accessing any websites integral to the fabric of our modern society and culture violates their First Amendment rights. The Court's decision in *Packingham* means that even if the government identifies an individual responsible for spreading harmful fake news, it will not protect the public by banning that person's access to social media.<sup>47</sup> Justice Samuel Alito agreed with the judgment but warned that the Supreme Court "should be cautious in applying our free speech precedents to the internet".

An instance of telecommunication blocking occurred when mobile phone services in San Francisco Bay Area subway stations were shut down for three hours in July 2011 in an effort to prevent protests after Bay Area Rapid Transit (BART) police fatally shot a man.<sup>48</sup> The shutdown prompted criticism that it was an excessive restriction of free speech.

Civil libertarians contend that fake news is a necessary evil if a society is to be truly free. It is part of the marketplace of ideas, an economic analogy – taken from Justice Oliver Wendell Holmes's dissent in *Abrams v. United States* – that has often been invoked by US judges to oppose censorship. In essence, it holds that an open battle between ideas will allow society to choose what is right. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," wrote Holmes.<sup>49</sup>

The US has a law to tackle fake news, as well as online defamation, libel and slander. The issue of online content is covered in the Communications Decency Act of 1996, Section 230:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

In this section, the law protects the internet service provider (ISP), developer, or republisher. The reason for this is to prevent ISPs, developers, and republishers

<sup>47</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1744, 198 L. Ed. 2d 273 (2017).

<sup>48</sup> See Jennifer Spencer, "No Service: Free Speech, the Communications Act, and Bart's Cell Phone Network Shutdown," *Berkeley Technology Law Journal* 27 (2012): 767.

<sup>49</sup> Ari Ezra Waldman, "The Marketplace of Fake News", *University of Pennsylvania Journal of Constitutional Law* 20, no. 4 (2018): 847-848.

from being prosecuted under common-law defamation.<sup>50</sup> Even if they republish fake news, the users cannot be convicted under the defamation act because their status is not the publisher or speaker. The publisher or speaker here is the one who created the news first, no matter whether false or actual news.

The Federal Communications Commission prohibits the media from broadcasting information that it knows to be false on crime and catastrophes, stating:

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if:

1. The licensee knows this information is false;
2. It is foreseeable that the broadcast of the information will cause substantial public harm, and
3. Broadcast of the information, in fact, directly causes substantial public harm.
4. Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer characterizes the program as fiction and is presented in a way that is reasonable under the circumstances.<sup>51</sup>

This is part of the prevention method to avoid the spread of dangerous fake news in society. Even though fake news may present a danger to democracy, its regulation poses a greater threat. Neither the US federal government – its legislators, courts, or judges – nor the social media companies who would bear the burden of identifying fake news are in a good position to determine what constitutes the same.<sup>52</sup>

Besides the legal litigation approach to tackling fake news, the US has also prepared some technology and websites such as *politifact.com* and *factcheck.org*, to combat fake news. These fact-checkers are platforms to neutralize fake news, so that US citizens can double-check the veracity of content and claims.<sup>53</sup>

<sup>50</sup> Brittany Vojak, "Fake News: The Commoditization of Internet Speech," *California Western International Law Journal* 48, no. 1 (2017): 150.

<sup>51</sup> FCC Broadcast Radio Services, 47 C.F.R. 73.1217 (2017).

<sup>52</sup> Nina I. Brown and Jonathan Peters, "Say This, Not That: Government Regulation and Control of Social Media," *Syracuse Law Review* 68 (2018): 542.

<sup>53</sup> See, Emily Gillespie, "69% of Americans Don't Think Trump's Border Wall is a Priority, Poll Says," *Fortune*, December 13, 2018, <https://fortune.com/2018/12/12/trump-border-wall-poll/>, accessed January 29, 2020.

### 3.5.3. India

The internet was shut down 95 times in India in 2019, according to a local monitoring organization.<sup>54</sup> Authorities usually demand internet providers postpone services on the pretext of upholding public order. Under Indian law, the government can direct telecom companies to shut down services or take down websites, among other measures. For example, the Indian government directed internet restrictions in the country's only Muslim-majority state, Jammu and Kashmir, following student protests and political unrest there.

Internet services were shut down in Kashmir in August 2019, after a local organization called for a general strike to protest rising incidents of mob lynchings. An altercation between a television journalist and Aligarh Muslim University students resulted in internet services being switched off in the city. Services were restored in February 2021, but the area has remained subject to intermittent shutdowns, despite the Indian government saying it had already secured Kashmir. Kerala High Court declared the right to access the internet as a fundamental right. The court was hearing a petition by a student who was denied access to the internet in a hostel at night. Internet access cannot be denied on arbitrary grounds.<sup>55</sup>

Indian Prime Minister Narendra Modi in 2019 introduced a new citizenship bill that excluded Muslim immigrants from three neighboring countries. The Citizenship Amendment Act upset Indian Muslims because it excludes Muslim immigrants from Afghanistan, Bangladesh and Pakistan from gaining Indian citizenship<sup>56</sup> The law, which came into effect in January 2020, resulted in nationwide protests. The right of citizenship is a fundamental right, but the law discriminates against Muslims. During the demonstrations against the law, at

<sup>54</sup> Syadab Nazmi, "Why India shuts down the Internet more than any other democracy," BBC News, December 19, 2019.

<sup>55</sup> Arpan Chatirvedi, "Indian Internet Shutdown Rules Need a Relook: Expert Say," Bloomberg, October 27, 2019, <https://www.bqprime.com/law-and-policy/indias-internet-shutdown-rules-need-a-relook-experts-say>, accessed April 2021.

<sup>56</sup> Amit Chauduri, "The BJP Wants to Silence Indian Voices. But We Will only Grow Louder," The Guardian, December 22, 2019, <https://www.theguardian.com/commentisfree/2019/dec/22/bjp-citizenship-amendment-act-indians>, accessed January 29, 2020.

least 65 died in clashes with the police and Modi's followers. The tension raised concern over the potential for civil war between Indian Muslims and Hindus.<sup>57</sup>

To stabilize the situation, the government shut down the internet around Kashmir, resulting in criticism that it was against the Constitution, as internet access is part of the fundamental right to freedom of speech. The case was brought to the Supreme Court of India, where judges decided the internet shutdown was unconstitutional, "Freedom of internet access is a fundamental right," said Supreme Court Justice N.V. Ramana.<sup>58</sup>

The cases above show that governments have blocked internet access for security and political reasons, with the stated aim of preventing violence. Court rulings have tended to regard internet blocking and shutdowns as unconstitutional in India and Indonesia.

#### IV. CONCLUSION

The Indonesian government erred on two points when it blocked internet access to quell the spread of fake news during separate riots in Jakarta and Papua in 2019. First, the spread of fake news in Jakarta and Papua could not be categorized as a national threat because fake news is the price we pay for a free society. The only way to counter the spread of fake news is by producing more true news than there is fake news. Second, the riots were local cases that regional officials could resolve peacefully without resorting to the extraordinary action of curbing or shutting down internet access. The government did not declare a state of emergency, as such a declaration would have failed to meet standards and criteria, and the local riots were not part of the emergency doctrine. Therefore, the internet curbs and shutdown, which lacked sufficient legal instruments and strong argument, were a failure to uphold the rights inherent in democracy.

---

<sup>57</sup> Suhasini Raj and Maria Abi-Habib, "2 Dead in Protests over India's Religion-Based Citizenship Bill," *New York Times*, December 12, 2019, <https://www.nytimes.com/2019/12/12/world/asia/india-protests-citizenship-bill.html>, accessed December 28, 2020.

<sup>58</sup> Sankalp Phartiyal and Fayaz Bukhari, "India's Top Court Says Indefinite Kashmir Internet Shutdown is Illegal," *Reuters*, January 10, 2020, <https://www.reuters.com/article/us-india-kashmir-internet-idUSKBN1Z9oFR>, accessed on February 14, 2020.

## BIBLIOGRAPHY

- Alexander, Domrin. *The Limits of Russian Democratisation Emergency Powers and State of Emergency*. London: Routledge, 2012.
- Allcott, Hunt and Matthew Gentzkow. "Social Media and Fake News in the 2016 Election." *Journal of Economic Perspective* 31, no. 2 (2017).
- Asshiddiqie, Jimly. *Hukum Tata Negara Darurat [Emergency Constitutional Law]*. Jakarta: Raja Grafindo Persada, 2007.
- Bahder, Johan Nasution. *Rule of Law State and Human Rights*. Bandung: Mandar Maju, 2011.
- Benedek, Wolfgang and Matthias. *Freedom of Expression and the Internet*. Strasbourg: Council of Europe Publishing, 2013.
- Butler, Andrea. "Protecting the Democratic Role of the Press: A Legal Solution to Fake News." *Washington University Law Review* 96, no. 2 (2018).
- Brown, Nina I. and Jonathan Peters. "Say This, Not That: Government Regulation and Control of Social Media." *Syracuse Law Review* 68 (2018).
- Chauduri, Amit. "The BJP Wants to Silence Indian Voices. But We will only Grow Louder." *The Guardian*, December 22, 2019. <https://www.theguardian.com/commentisfree/2019/dec/22/bjp-citizenship-amendment-act-indians>.
- Chatirvedi, Arpan. "Indian Internet Shutdown Rules Need a Relook: Expert Say." *Bloomberg*, October 27, 2019. <https://www.bloombergquint.com/law-and-policy/indias-internet-shutdown-rules-need-a-relook-experts-say>.
- Constitutional Court of the Republic of Indonesia, Decision No. 21/PUU-VI/2008 (2008).
- Corrin, Jennifer. "Cultural Relativism vs. Universalism: The South Pacific Reality." In *The Universalism of Human Right*, edited by Rainer Arnold. Dordrecht: Springer, 2013.

- Cuthbertston, Anthony. "Indonesia Blocks Facebook and Whatsapp Features after 'Fake News-Inspired' Riots and Deaths." *The Independent*, May 23, 2019. <https://www.independent.co.uk/life-style/gadgets-and-tech/news/indonesia-facebook-whatsapp-ban-blocked-election-riots-a8926706.html>.
- Defence, Media, "What is an Internet Shutdown?", Media Defence, 2020, <https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-3-access-to-the-internet/what-is-an-internet-shutdown/>, accessed on May 30, 2022.
- General Comment No. 29 Article 4 on the Derogations of Human Rights during a State of Emergency.
- Gillespie, Emily. "69% of Americans Don't Think Trump's Border Wall is a Priority, Poll Says." *Fortune*, December 13, 2018. <http://fortune.com/2018/12/12/trump-border-wall-poll/>.
- Habibie. *Detik-Detik yang Menentukan: Jalan Panjang Indonesia menuju Demokrasi [Decisive Moments: Indonesia's Long Road to Democracy]*. Jakarta: THC Mandiri, 2006.
- Hafner-Burton, Emilie M. et al. "Emergency and Escape: Explaining Derogations from Human Rights Treaties." *International Organization* 65, no. 4 (2011).
- Holland, Natalie. "Freedom of Expression and Opinion in Wartime: Assessing Ukraine's Ban on Citizen Access to Russian-Owned Websites." *American University of International Law Review* 33, no. 4 (2018).
- Howie, Emily. "Protecting the Human Right to Freedom of Expression in International Law." *International Journal of Speech-Language Pathology* 20, no. 1 (2018).
- Idris, Ika Karlina. "The Internet Shutdown in Papua Threatens Indonesia's Democracy and Its People's Right to Free Speech." *The Jakarta Post*, September 2, 2019. <https://www.thejakartapost.com/academia/2019/09/02/the-internet-shutdown-in-papua-threatens-indonesias-democracy-and-its-peoples-right-to-free-speech.html>.

Indonesian Human Rights Law 1999, Article 4.

Indonesian Human Rights Law 1999, Article 73 on the Restriction of Human Rights.

Koch, Richie. "All the Internet Shutdowns of 2019 so far." Security Boulevard, 2019. <https://securityboulevard.com/2019/06/all-the-internet-shutdowns-of-2019-so-far/>.

Lamb, Kate. "Fake News Spikes in Indonesia ahead of Elections." The Guardian, March 20, 2019. <https://www.theguardian.com/world/2019/mar/20/fake-news-spikes-in-indonesia-ahead-of-elections>.

Lynch, Colman. "Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Nine Case." *Columbia Human Rights Law Review* 40 (2009).

Mastroianni, Roberto. "Fake News, Free Speech and Democracy: A (Bad) Lesson from Italy?" *Southwestern Journal of International Law* 25, no. 1 (2019).

Marzuki, Suparman. "Perspektif Mahkamah Konstitusi tentang Hak Asasi Manusia: Kajian Tiga Putusan Mahkamah Konstitusi: Nomor 065/PUU-II/2004; Nomor 102/PUU-VII/2009 dan Nomor 140/PUU-VII/2009 [Perspective of the Constitutional Court on Human Rights Human: Study of Three Decisions of the Constitutional Court: Number 065/PUUII/2004; Number 102/PUU-VII/2009 and Number 140/PUU-VII/2009]." *Jurnal Yudisial* 6, no. 3 (2013).

Matompo, Osgar S. "Pembatasan terhadap Hak Asasi Manusia dalam Prespektif Keadaan Darurat [Restrictions on Human Rights in Perspective Emergency state]." *Journal of Media Hukum* 21, no. 1 (2014).

Nazmi, Syadab. "Why India Shutdown the Internet more than any other Democracy." BBC News, December, 19, 2019. <https://www.bbc.com/news/world-asia-india-50819905>.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Packingham v. North Carolina, 137 S. Ct. 1730, 1744, 198 L. Ed. 2d 273 (2017).

- Park, Ahran and Kyu Ho Youm. "Fake News from a Legal Perspective: The United States and South Korea Compared." *Southwestern Journal of International Law* 25, no. 1 (2019).
- Paul, Christopher and Miriam Mathews. "The Russian "Firehose of Falsehood" Propaganda Model: Why It might Work and options to Counter It." Rand Corporation, 2019, [https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE198/RAND\\_PE198.pdf](https://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE198/RAND_PE198.pdf).
- Phartiyal, Sankalp and Fayaz Bukhari. "India's Top Court Says Indefinite Kashmir Internet Shutdown is Illegal." Reuters, January 10, 2020. <https://www.reuters.com/article/us-india-kashmir-internet/indias-top-court-says-indefinite-kashmir-internet-shutdown-is-illegal-idUSKBN1Z9oFR>.
- Press Release by the Ministry of Information, Telecommunication and Informatic No. 159/HM/KOMINFO/08/2019.
- Rahman, Rofi Aulia, et al. "Calon Tunggal Pilkada: Krisis Kepemimpinan dan Ancaman Bagi Demokrasi [Single Candidate Pilkada: Leadership Crisis and Threat to Democracy]." *Jurnal Konstitusi* 19, no. 2 (2022): <https://doi.org/10.31078/jk1913>.
- Raj, Suhasini and Maria Abi-Habib. "2 Dead in Protests over India's Religion-Based Citizenship Bill." *New York Times*, December 12, 2019. <https://www.nytimes.com/2019/12/12/world/asia/india-protests-citizenship-bill.html>.
- Rika, Hesti. "Dasar Hukum Kemenkominfo Blokir Internet [The Legal Basis of the Ministry of Communication and Information Blocking the Internet]." *CNN Indonesia*, September 4, 2019. <https://www.cnnindonesia.com/teknologi/20190904081344-185-427339/dasar-hukum-kemenkominfo-blokir-internet>.
- Report. The Committee to Protect Journalists, "10 Most Censored Countries." Committee to Protect Journalists, September 10, 2019. <https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist.php>.



- Safenet. "President Jokowi is Absent from the First Court of Internet Shutdown Lawsuit." Safenet, January 22, 2020. <https://safenet.or.id/2020/01/president-jokowi-is-absent-from-the-first-court-of-internet-shutdown-lawsuit/>.
- Setyowati, Desy. "Kominfo Tutup 2.184 Akun dan Situs selama Pembatasan Media Sosial [Kominfo Closes 2,184 Accounts and Sites during Media Restrictions Social." Data Word]." Kata Data, 2019. <https://katadata.co.id/berita/2019/05/27/kominfo-tutup-2184-akun-dan-situs-selama-pembatasan-media-sosial>.
- Spencer, Jennifer. "No Service: Free Speech, the Communications Act, and Bart's Cell Phone Network Shutdown." *Berkeley Technology Law Journal* 27 (2012).
- The 1945 Constitution of Indonesia Article 28E Paragraph (3) and Article 28J Paragraph (1) and (2).
- The Washington Post. "In 787 Days, President Trump Has Made 9,179 False or Misleading Claims." The Washington Post, March, 17, 2019. [https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm\\_term=.246cbo455ef3](https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.246cbo455ef3).
- Toronto, William D. "Fake News and Kill-Switches: The U.S. Government's Fight to Respond to and Prevent Fake News." *Air Force Law Review* 79 (2018).
- UNHR, Core Human Rights in the Two Covenants, September (2013).
- United States v. Alvarez, 567 U.S. 709 (2012).
- Vojak, Brittany. "Fake News: The Commoditization of Internet Speech." *California Western International Law Journal* 48, no. 1 (2017). Vosoghi, Soroush, et.al. "The Spread of True and False News Online." *Science* 359, no. 6380 (2018).
- Waldman, Ari Ezra. "The Marketplace of Fake News." *University of Pennsylvania Journal of Constitutional Law* 20, no. 4 (2018).



# Constitutional Review

- ❑ *The Function of Judicial Dissent in Indonesia's Constitutional Court*  
Nancy Holt
- ❑ *Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction*  
Tim Lindsey
- ❑ *Proportionality Test in the 1945 Constitution: Limiting Political Labor Freedom of Assembly*  
Gilbert Trifunovic
- ❑ *Monitoring Human Rights in the Asian Judiciary*  
Paul Wenzel
- ❑ *Reconciling Liberal Democracy and Asian Values in Contemporary Indonesia*  
Mohammad Rizki Han and Wina Rizka Hanika
- ❑ *The Obligation of the Constitutional Court of Indonesia to Give Consideration to the Process of Dissolution of Social Organizations*  
Fala Falaeva, Ahmad Hafidza



[HOME](#) [ABOUT](#) [LOGIN](#) [REGISTER](#) [SEARCH](#) [CURRENT](#) [ARCHIVES](#) [ANNOUNCEMENTS](#) [AUTHOR GUIDELINE](#) [EDITORIAL BOARD](#)

[Home](#) > [About the Journal](#) > [Editorial Team](#)

## Editorial Team

### Editor-in-Chief

Pan Mohamad Faiz, S.H., M.C.L., Ph.D., The Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia

### Editorial Board

Prof. Richard Albert, B.A., J.D., B.C.L., LL.M., School of Law, The University of Texas at Austin, The United States of America

Prof. Tim Lindsey, B.A., LL.B., B.Litt., Ph.D., Melbourne Law School, University of Melbourne, Australia

Prof. Anis H. Bajrektarevic, IFIMES Department on Strategic Studies of Asia, Austria

Prof. Simon Butt, BA, LL.B., Ph.D., Sydney Law School, University of Sydney, Australia

Prof. Theunis Roux, B.A., LL.B., Ph.D., University of New South Wales, Australia

Prof. Mark Cammack, B.A., J.D., Southwestern Law School, Los Angeles, United State of America

Prof. Dr. Henk Kummeling, Institute of Constitutional and Administrative Law, Utrecht University, the Netherlands

Prof. Yuzuru Shimada, Ph.D., Graduate School of International Development, Nagoya University, Japan

Prof. Dr. Byun Hae Cheol, Law School, Hankuk University of Foreign Studies, South Korea, South Korea

Prof. Farid Sufian Shuaib, LL.B., LL.M., Ph.D., Faculty of Law, International Islamic University Malaysia, Malaysia

Prof. Melissa Crouch, B.A., LL.M., Ph.D., Faculty of Law & Justice, University of New South Wales, Australia

Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D., Faculty of Law, University of Indonesia, Indonesia

Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, SH., MM., Faculty of Law, Sebelas Maret University, Indonesia

Prof. Muhamad Ramdan Andri Gunawan Wibisana, S.H., LL.M., Ph.D., Faculty of Law, University of Indonesia, Indonesia

Prof. Dr. Christoph Enders, Faculty of Law, University of Leipzig, Germany

Prof. Dr. Bertus de Villiers, B.A. Law., LL.B., LL.D., Law School of Curtin University, Australia and Law School of the University of Johannesburg, South Africa

Associate Professor Dr. Ann Black, SJD., B.A., LL.M., TC, Beirne School of Law, University of Queensland, Australia

Associate Prof. Björn Dressel, B.Law., B.A., M.A., Ph.D., Crawford School of Public Policy, Australian National University, Australia

Dr. I Dewa Gede Palguna, S.H., M.H., Faculty of Law, University of Udayana, Indonesia

Dr. Michael Vagias, LL.M., The Hague University of Applied Sciences, the Netherlands

Dr. Matthias Hartwig, Max Planck Institut for Comparative Public Law and International Law, Germany

Stefanus Hendrianto, S.H., LL.M., Ph.D., University of San Fransisco, the United States of America

Dr. Dian A.H. Shah, SJD., LL.M., LL.B., Faculty of Law, National University of Singapore, Singapore

Lalu Muhammad Hayyanul Haq, S.H., LL.M., Ph.D, Faculty of Law, Mataram University, Indonesia

Dr. Muchamad Ali Safa'at, S.H., M.H., Faculty of Law, Brawijaya University, Malang, Indonesia

Dr. Heribertus Jaka Triyana, SH., LL.M., MA., Faculty of Law, Gadjah Mada University, Indonesia

Dhiana Puspitawati, SH., LL.M., Ph.D, Faculty of Law, Brawijaya University, Indonesia

M. Mova Al Afghani, S.H., LL.M.Eur., Ph.D., Faculty of Law, Ibn Khaldun University, Indonesia

Dr. Herlambang Perdana Wiratraman, S.H., M.A., Faculty of Law, Gadjah Mada University, Indonesia

Andy Omara, S.H., M.Pub, Faculty of Law, Gadjah Mada University, Indonesia

### Managing Editors

[Online Submission](#)

[Focus and Scope](#)

[Abstracting and Indexing](#)

[Ethics and Malpractice Statement](#)

[Retraction Policy](#)

[Peer Review Process](#)

[Reviewer Guidelines](#)

[Screening Plagiarism](#)

[Author Fee](#)

[Contact Us](#)

#### USER

Username

Password

Remember me

#### NOTIFICATIONS

[View](#)

[Subscribe](#)

#### CITATION ANALYSIS

[Scopus](#)

[Google Scholar](#)

#### REFERENCE TOOLS



#### PLAGIARISM TOOL



#### PROOFREADING TOOL



#### MEMBER OF

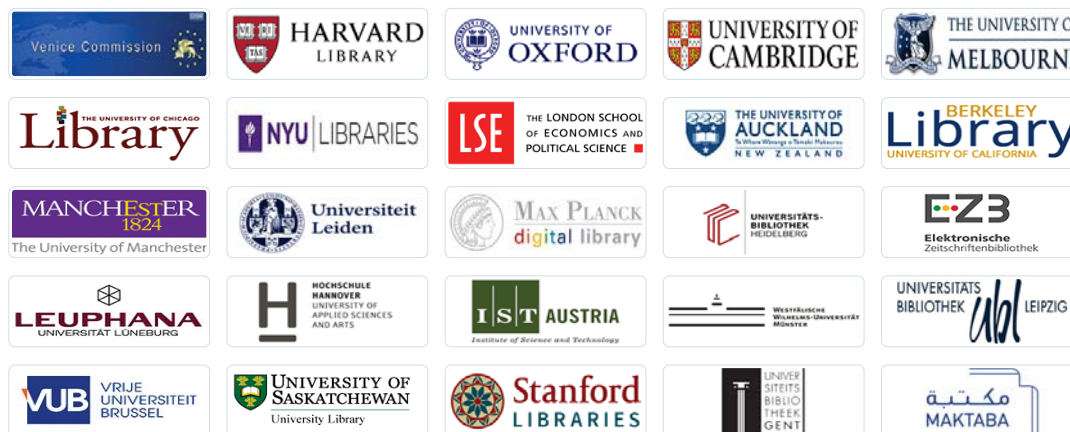


Luthfi Widagdo Eddyono, The Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia  
 M Lutfi Chakim, The Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia  
 Mery Christian Putri, The Constitutional The Court of the Republic of Indonesia, Jakarta, Indonesia  
 Zaka Firma Aditya, The Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia  
 Siti Rosmalina Nurhayati, The Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia  
 Selma Andana, The Constitutional Court of the Republic of Indonesia, Jakarta, Indonesia

Constitutional Review indexed by:



Constitutional Review can also be found on the following library database:



© Copyright of Constitutional Review (p-ISSN: 2460-0016 e-ISSN: 2548-3870). Published by Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia



TEMPLATE



COPYRIGHT AGREEMENT



JOURNAL CONTENT

Search

Search Scope

Search

Browse

By Issue

By Author

By Title

JOURNAL HELP

INFORMATION

For Readers

For Authors

For Librarians

STAT COUNTER

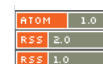
View My Stats

VISITORS

1 Users Online

ID	20845
US	4811
MY	1537
IN	751
CO	506
AU	453
NL	408
FR	359
JO	348
KR	346
Newest:	LY
You:	ID
Today:	31
Month:	406
Total:	36941
Supercounters.com	

CURRENT ISSUE



KEYWORDS

Canada Constitution



HOME ABOUT LOGIN REGISTER SEARCH CURRENT ARCHIVES ANNOUNCEMENTS AUTHOR GUIDELINE EDITORIAL BOARD

Home > Archives > Vol 8, No 1 (2022)

## Vol 8, No 1 (2022)

### Table of Contents

#### Articles

<b>Constitutional Tale of Religious Freedom: Comparative Study in Reference to India and Indonesia</b> <i>Neha Tripathi, Anubhav Kumar</i> 10.31078/consrev811	PDF 1-36
<b>The Development of Islam and Democracy in Indonesia</b> <i>Hamdan Zoelva</i> 10.31078/consrev812	PDF 37-61
<b>Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution</b> <i>Malika Rajan Vasandani, Dwi Putra Nugraha, Susi Susantijo</i> 10.31078/consrev813	PDF 62-86
<b>Unmasking the Devil: The Role of the Civil Court and Islamic Religious Authorities in the Battle Against Religious Extremism and Terrorism in Malaysia</b> <i>Khairil Azmin Mokhtar</i> 10.31078/consrev814	PDF 87-112
<b>The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations</b> <i>Muchamad Ali Safa'at</i> 10.31078/consrev815	PDF 113-150
<b>Fake News and Internet Shutdowns in Indonesia: Symptoms of Failure to Uphold Democracy</b> <i>Rofi Aulia Rahman, Shu-Mei Tang</i> 10.31078/consrev816	PDF 151-183

Online Submission

Focus and Scope

Abstracting and Indexing

Ethics and Malpractice Statement

Retraction Policy

Peer Review Process

Reviewer Guidelines

Screening Plagiarism

Author Fee

Contact Us

#### USER

Username   
 Password   
 Remember me

#### NOTIFICATIONS

View  
Subscribe

#### CITATION ANALYSIS

Scopus  
Google Scholar

#### REFERENCE TOOLS



#### PLAGIARISM TOOL



#### PROOFREADING TOOL



#### MEMBER OF



Constitutional Review indexed by:



Constitutional Review can also be found on the following library database: