JURIDICAL ANALYSIS OF ARTICLE 40 PARAGRAPH (2) OF INFORMATION AND ELECTRONIC TRANSACTIONS ACT ON PAPUA'S INTERNET BLOCKING CASE IN 2019

A THESIS

Written by

FARADIBA SURYANINGRUM (18230088)

CONSTITUTIONAL LAW DEPARTMENT (SIYASAH)

FACULTY OF SHARIA

STATE ISLAMIC UNIVERSITY OF MAULANA MALIK IBRAHIM MALANG

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MALANG

2022

STATEMENT OF THE AUTHENTICITY

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Demi Allah,

Dengan kesadaran dan rasa tanggung jawab terhadap pengembangan keilmuan, penulis menyatakan bahwa skripsi dengan judul:

ANALISIS YURIDIS PASAL 40 AYAT (2) UU NO. 19 TAHUN 2016 TENTANG INFORMASI DAN TRANSAKSI ELEKTRONIK PERSPEKTIF SIYASAH DUSTURIYAH (Studi Kasus Pemblokiran Internet oleh Pemerintah Saat Demonstrasi di Papua)

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Penulis,

Faradiba Suryaningrum
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Setelah membaca dan mengoreksi skripsi saudari Faradiba Suryaningrum dengan NIM 18230088, mahasiswi Program Studi Hukum Tata Negara (Siyasah) Fakultas Syariah Universitas Islam Negeri Maulana Malik Ibrahim Malang dengan judul:

Analisis Yuridis Pasal 40 Ayat (2) Undang-Undang Nomor 19 Tahun 2019 Tentang Informasi dan Transaksi Elektronik Perspektif Siyasah Dusturiyah (Studi Kasus Pemblokiran Internet oleh Pemerintah Saat Demonstrasi di Papua)

Maka pembimbing menyatakan bahwa skripsi tersebut telah memenuhi syarat-syarat ilmiah untuk diajukan dan diuji oleh Majelis Dewan Penguji.

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MOTTO

Indeed, Allah commands you to return trusts to their rightful owners; and when you judge between people, judge with fairness. What a noble commandment from Allah to you. Surely Allah is All-Hearing, All-Seeing. (QS. An-Nisa: 58).

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Not forgetting the *shalawat* and greetings we pour out to the Prophet Muhammad who has brought us out of the dark ages to the era of bright light today, namely Islam. May we all get intercession on the end, *Aamiin Allahumma Aamiin.*

The author realizes that this thesis could not have been completed without the support, assistance, guidance, and advice from various parties during the preparation of this thesis. In this opportunity, the writer would like to express deep gratitude to:

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As an ordinary person, the author realizes that this thesis still has many shortcomings and mistakes, therefore all constructive criticism and suggestions will be accepted by the author. With the completion of this thesis report, the author hopes that the knowledge that has been obtained

during the study process can provide benefits as a charity for life in this world and the hereafter.

Malang, May, 16th 2022

Writer,

Faradiba Suryaningrum

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ABSTRAK

Suryaningrum, Faradiba (18230088), 2022 ***Analisis Yuridis Pasal 40 Ayat (2) Undang-Undang Nomor 19 Tahun 2016 Tentang Informasi dan Transaksi Elektronik Terhadap Kasus Pemblokiran Internet di Papua Tahun 2019***, Skripsi, Jurusan Hukum Tata Negara (Siyasah), Fakultas Syariah Universiras Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Yayuk Whindari, S.H., M.H., LL.M.

Kata Kunci : UU ITE, Pemblokiran Internet, Siyasah Dusturiyah

Pada bulan Agustus 2019 lalu, pemerintah melakukan pemblokiran internet di daerah Papua ketika terjadi demonstrasi di beberapa wilayah Papua. Pemblokiran internet yang dilakukan oleh pemerintah bertujuan untuk mengkondusifkan situasi yang disebabkan beredarnya berita hoax di media sosial. Pemblokiran tersebut berdampak dengan tidak bisa diaksesnya segala hal yang membutuhkan layanan data, serta warga Papua kehilangan haknya untuk mendapatkan informasi dan juga berkomunikasi.

Tujuan dari penelitian ini adalah untuk menelaah Pasal 40 ayat (2) Undang-Undang Nomor 19 Tahun 2016 tentang Informasi dan Transaksi Elektronik dalam kasus pemblokiran internet oleh pemerintah saat demonstrasi di Papua dan untuk mengkaji tindakan pemblokiran internet oleh pemerintah dalam kasus pemblokiran tersebut dari perspektif *siyasah dusturiyah*. Jenis penelitian yang digunakan dalam penelitian ini adalah penelitian hukum normatif dengan pendekan penelitian *statute approach* (pendekatan perundang-undangan) dan *case approach* (pendekatan kasus).

Hasil dari penelitian ini adalah substansi dari Pasal 40 ayat (2) Undang-Undang Nomor 19 Tahun 2016 tentang Informasi dan Transaksi Elektronik tidak melanggar konstitusi dan telah sesuai dengan tujuan dan fungsi pembuatan undang-undang, namun jika dikaitkan dengan tindakan pemblokiran internet oleh pemerintah secara teoritis pasal tersebut menunjukkan kegagalan pemerintah menyeleraskan isi pasal undang-undang dengan implementasi produk hukum tersebut. Selain itu, hasil dari penelitian ini juga adalah tindakan pemblokiran internet oleh pemerintah merupakan sebuah perbuatan melawan hukum dan telah melanggar prinsip umum sistem politik dan ketatanegaraan dalam hukum Islam.

ABSTRACT

Suryaningrum, Faradiba (18230088), 2022 ***Juridical Analysis of Article 40 Paragraph (2) of Information and Electronic Transactions Act on Papua's Internet Blocking Case in 2019***, Thesis, Constitutional Law (Siyasah), Faculty of Sharia, State Islamic University of Maulana Malik Ibrahim Malang. Supervisor: Yayuk Whindari, S.H., M.H., LL.M.

Keywords : UU ITE, Internet Blocking, *Siyasah Dusturiyah*

On August 2019, the government blocked the internet in Papua during demonstrations in several Papuan areas. The internet blocking carried out by the government aims aims to make the situation conducive caused by the spread of hoaxes on social media. The blocking has an impact on inaccessibility of everything that requires data services, and Papuans lose their right to obtain information and also to communicate.

The purpose of this study is to examine Article 40 paragraph (2) of Information and Electronic Transactions Act in the case of internet blocking by the government during demonstrations in Papua and to examine the internet blocking action by the government in the blocking case from a *siyasah dusturiyah* perspective. The type of research used in this study is normative legal research with a statute approach and a case approach.

The results of this study are the substance of Article 40 paragraph (2) of Electronic Information and Transactions Act does not violate the constitution and is in accordance with the purpose and function of making laws, but if it is associated with internet blocking actions by the government, theoretically, the article shows the government's failure to harmonize the contents of the article with the implementation of its legal product. In addition, the results of this study are also that the act of blocking the internet by the government is an act against the law and has violated the general principles of the political and constitutional system in Islamic law.

ابستراك

، فاراديبا سوريانينغروم (18230088) ، 2022 التحليل القانوني للمادة 40 الفقرة (2) من القانون رقم 19 لسنة 2016 بشأن المعلومات والمعاملات الإلكترونية ضد قضايا حجب الإنترنت في بابوا في عام 2019 ، أطروحة ، قسم القانون الدستوري (سياسة) ، كلية الشريعة في جامعة الدولة الإسلامية مولانا مالك إبراهيم مالانغ. المشرف: يايوك ويندارى، ..S.H., ..M.H., L.L

الكلمات المفتاحية : قانون ITE ، حجب الإنترنت ، الحصة الصناعية

في أغسطس/آب 2019، حجبت الحكومة الإنترنت في منطقة بابوا عندما كانت هناك مظاهرات في عدة أجزاء من بابوا. يهدف حجب الإنترنت الذي تقوم به الحكومة إلى تحسين الوضع الناجم عن تداول الأخبار الكاذبة على وسائل التواصل الاجتماعي. يؤثر الحظر على عدم إمكانية الوصول إلى كل ما يتطلب خدمات البيانات ، ويفقد البابويون حقهم في الحصول على المعلومات والتواصل أيضا.

الغرض من هذه الدراسة هو فحص الفقرة (2) من المادة 40 من القانون رقم 19 لسنة 2016 بشأن المعلومات والمعاملات الإلكترونية في حالة حجب الإنترنت من قبل الحكومة أثناء المظاهرات في بابوا وفحص إجراءات حجب الإنترنت من قبل الحكومة في حالة الحجب من وجهة نظر السياسة الدستورية. نوع البحث المستخدم في هذه الدراسة هو البحث القانوني المعياري مع نهج النظام الأساسي ونهج الحالة.

نتيجة هذه الدراسة أن مضمون الفقرة (2) من المادة 40 من القانون رقم 19 لسنة 2016 بشأن المعلومات والمعاملات الإلكترونية لا يخالف الدستور ويتوافق مع غرض ووظيفة سن القوانين، ولكن إذا كان مرتبطا بعمل حجب الإنترنت من قبل الحكومة نظريا فإن المادة تبين فشل الحكومة في مواءمة محتوى مادة القانون مع تنفيذ المنتج القانوني. بالإضافة إلى ذلك ، فإن نتيجة هذه الدراسة هي أيضا أن فعل حجب الإنترنت من قبل الحكومة هو عمل مخالف للقانون وينتهك المبادئ العامة للنظام السياسي والدستوري في الشريعة الإسلامية.

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CHAPTER 1

INTRODUCTION

A. Research Background

The right to get information is a basic right that every citizen has. In the Universal Declaration of Human Rights (UDHR), the right to information is one of the pillars of transparent and participatory governance that provides a clear way to ensure the fulfillment of fundamental rights and other freedoms. Article 19 of the UDHR states that everyone has the right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. In addition, the right to information has also been further strengthened in its position in the 1966 International Covenant On Civil and Political Rights (ICCPR), which was ratified by Indonesia through Law Number 12 of 2005 concerning Ratification of the International Covenant On Civil and Political Rights. Article 19 of the ICCPR states that everyone shall have the right to hold opinions without interference, namely that everyone has the right to freedom of expression. The Indonesian government is then obliged to comply with the provisions contained in the International Human Rights instrument and at the same time confirms that the provisions of the 1CCPR, including the right to information that applied in Indonesia.

In addition to the right to information, in our national legal instruments we also recognize the right to communicate. These two rights are stated in Article 28F of the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945)

which shows that everyone has the right to communicate and obtain information to develop his personal and social environment, and has the right to seek, obtain, possess, store, process, and convey information using all available channels.

Therefore, the right to communicate and obtain information is a constitutional right that must be fulfilled by the State. In addition, these two rights are also guaranteed in Article 14 of Law Number 39 of 1999 concerning Human Rights which states that everyone has the right to seek, obtain, possess, store, process, and convey information by using all available facilities.

Communication and information in addition to this right mentioned in the law that has been explained, are also included in the scope of public services. This is clearly stated in Article 5 paragraph 2 of Law Number 25 of 2009 concerning Public Services which states that the scope as referred to in paragraph (1) includes education, teaching, work and business, housing, communication and information, the environment. , health, social security, energy, banking, transportation, natural resources, tourism, and other strategic sectors.

The government has also specifically making a law about communication and information that enacting in Law Number 11 of 2008 concerning Information and Electronic Transactions which has been changed to Law Number 19 of 2016 concerning Information and Electronic Transactions which is used as a reference for all the do’s and don’ts in the digital space.

On August 2019, the government blocked the internet in Papua during demonstrations in several Papuan areas. In the KBBI (Indonesian dictionary),

blocking is an activity to freeze or terminate. Internet blocking means stopping or freezing the internet network so as to make everything that requires an internet network inaccessible. Through the Ministry of Communication and Information Technology, internet blocking in Papua is intended to protect the public interest. The blocking was carried out by referring to Article 40 paragraph (2) of the Information and Electronic Transactions Act.[1] The article mandates that the government protects the public interest from all kinds of disturbances as a result of the misuse of Electronic Information and Electronic Transactions that disrupt public order, in accordance with the provisions of the Laws and Regulations.

The beginning of demonstrations in several areas in Papua and West Papua in August 2019 occurred due to alleged acts of racism in Papuan student dormitories in Surabaya.[2] The act of racism that has already spread through social media has finally triggered demonstrations in several areas in Papua and West Papua. The action was colored by chaos and some public facilities were damaged. According to data released by CNN Indonesia in June 2020, the government through the Ministry of Communication and Information of the Republic of Indonesia took a throttling policy on August 19, 2019, which was announced through Press Release Number 155/HM/KOMINFO/08/2019 concerning Service Blocking Internet in Papua and West Papua. The internet slowdown was followed by internet access restrictions (blocking) in the Papua region on August 21.

[1] Siti Chaerani Dewanti, Pembatasan Internet Dalam Mengatasi Konflik di Papua, *Info Singkat Badan Keahlian DPR RI*, no. 17(2017): 27.
[2] Dewanti, *Pembatasan Internet Dalam Mengatasi Konflik di Papua*, 25.

The internet blocking in Papua region has caused huge losses to the people in Papua, especially in terms of internet-based services and being unable to communicate or access information. In a journal written by Noviyanti, Mohammad Rifqi Noval, and Ahmad Jamaludin explained that the total loss due to internet blocking in Papua reached 187.7 million US dollars, which if converted into rupiah amounted to Rp. 2.5 trillion. In this research report, it was also found that Indonesia had blocked the internet for 338 hours, which was only valid in Papua and West Papua.[3]

The State Administrative High Court issued a decision stating that the act of blocking the internet carried out by the government was against the law. The statement was conveyed through a decision Putusan Nomor 230/G/TF/2019/PTUN-JKT which was read out on June 3, 2020. In addition, in society, this policy also triggers pros and cons. The Indonesian Police (Suara.com, September 4, 2019) considers that internet restrictions need to be carried out so as not to aggravate the situation. However, according to the Ombudsman, the internet restriction policy has harmed the public because it interferes with the public service process (ombudsman.go.id, September 1, 2019). Director of SAFEnet, Damar Juniarto, in an event held by the Indonesian Legal Aid Foundation (YLBHI) commenting on the government's actions to block internet access in the Papua area, Damar stated that the government's policy of cutting internet access was not accompanied by a clear mechanism. there is a mitigation plan to guarantee public services during

[3] Noviyanti, Mohammad Rifqi Noval, and Ahmad Jamaludin, Pembatasan Akses Internet oleh Pemerintah saat Terjadi Unjuk Rasa dan Kerusuhan di Papua dan Papua Barat ditinjau dalam Perspektif Hak Asasi Manusia, *Jurnal Logika*, No. 01(2021): 43.

internet disconnection, and there is no clear time limit on when this internet disconnection is stopped.[4]

The internet blocking is considered by some to have robbed the public of human rights protected by the constitution, namely the right to communicate and the right to obtain information. If we refer to Article 28J of the 1945 Constitution of the Republic of Indonesia, there are 3 conditions for limiting human rights; a) determined by law; b) aims to ensure the recognition and respect for the rights and freedoms of others; c) fulfill just demands in accordance with considerations of morals, religious values, security, and public order in a democratic society.

In addition to being regulated in the constitution, the requirements for limiting human rights are also regulated in other laws and regulations, such as in Article 21 and Article 22 paragraph 2 of the ICCPR which emphasizes that the conditions for limiting human rights are; a) determined by law; b) necessary in a democratic society; c) in the interest of national security, security and public order; d) maintain public health and morals or protect the rights and freedoms of others. Apart from the constitution and the ICCPR, in Article 70 of Law no. 39 of 1999 concerning Human Rights also allows for restrictions on human rights, as long as they fulfill 3 principles in human rights instruments, namely; a) carried out by law; b) solely to ensure the recognition and respect for human rights and the freedom of others; c) respect for decency, public order and the interests of the nation.

[4] Elvita WW, "Pembatasan Akses Internet: Kebijakan, Batasan, dan Dampaknya", YLBHI, 3 September 2019, https://ylbhi.or.id/informasi/kegiatan/pembatasan-akses-internet-kebijakan-batasan-dan-dampaknya/

In some cases, government agencies or officials often act outside the rules of positive law with the excuse of protecting the public interest, but at the expense of individual rights of a person or a group, so that the act makes the government considered to have committed an unlawful act. In Islam itself, from the beginning it has introduced the character of the leadership of the Prophet Muhammad who should be a role model for later leaders. He has given five main principles of a leader: which basically can be spelled with the nature of *shiddiq, istiqamah, fathanah, amanah*, and *tabligh*. In Islam, leaders must be able to follow the leadership principles of the Prophet Muhammad, so that at the level of implementation they will not deviate from their main duties and functions.[5]

The government has the duty to implement the laws and regulations. Therefore, in addition to government actions that must not violate the principle of legality, laws must also have substance that aims to protect the interests of mankind. In the study of siyasa dusturiyah science, a statutory regulation must have two main principles, namely the principle of guaranteeing individual rights and the principle of equality.[6] The purpose of making laws and regulations that are put in place or made by law enforcers is to maintain order and benefit and regulate the situation.[7] The government's actions in carrying out its government must be based on the principles contained in the Qur'an, such as the principle of upholding legal certainty and justice, the principle of leadership, the principle of deliberation, the principle

[5] Muhammadong, *Good Governance dalam Perspektif Hukum Islam*, (Makassar: Edukasi Mitra Grafika, 2017), 68.
[6] Abdul Wahhab Khallaf, *Politik Hukum Islam*, (Yogyakarta: Tiara Wacana, 2005), 33.
[7] Beni Ahmad Beni Saebani, *Fiqh Siyasah (Pengantar Ilmu Politik Islam)*, (Bandung: Pustaka Setia, 2007), 21.

of equality, the principle of human rights, the principle of good deeds and forbidding evil, and the principle of determining the officials or implementers of an affair.[8]

Based on this, the author will examine how the arrangement of Article 40 paragraph (2) of the Information and Electronic Transactions Act as the government's legal standing for blocking internet actions during demonstrations in the Papua region in 2019. Along with this, the author will also provide an overview from the *siyasah dusturiyah* perspective.

B. Statement od Problem

Based on the description of the background above, the researchers determined the formulation of the problem as follows:

1. How is the juridical analysis of Article 40 paragraph (2) of the Information and Electronic Transactions Act in the case of internet blocking by the government during demonstrations in Papua?
2. How is the case of Papua's internet blocking based on the *siyasah dusturiyah* perspective?

C. Objective of Research

1. To examine Article 40 paragraph (2) of Information and Electronic Transactions Act in the case of internet blocking by the government during demonstrations in Papua.

[8] J. Suyuthi Pulungan, *Fikih Siyasah*, (Yogyakarta: Penerbit Ombak, 2014), 5-17.

2. To examine the case of Papua's internet blocking based on *siyasah dusturiyah* perspectives.

D. Benefit of Research

This research has 2 (two) research benefits, namely theoretical benefits and practical benefits which are explained as follows.

1. Theoretical Benefits

   The results of this research are theoretically expected to be able to add to the wealth of knowledge and contribute in the form of new ideas related to Article 40 paragraph (2) of the Information and Electronic Transactions Act and internet blocking actions carried out by the government in the perspective of siyasah dusturiyah.

2. Practical Benefits

   Practically, the results of this study are expected to be used as evaluation material for the government against internet blocking actions in Papua, so that in the future it can optimally conceptualize the policy direction taken in dealing with similar cases so that it does not cause new problems and can be carried out according to law applicable.

E. Operational Definition

1. According to Article 1 paragraph 1 Article 40 paragraph (2) of Law Number 19 of 2016 concerning Electronic Information and Transactions, electronic information is one or a set of electronic data, including but not limited to writing, sound, pictures, maps, designs, photo, electronic data interchange

(EDI), electronic mail (electronic mail), telegram, telex, telecopy or the like, letters, signs, numbers, access codes, symbols, or processed perforations that have meaning or can be understood by people who are able to understand it.

2. According to Article 1 paragraph 2 Article 40 paragraph (2) of Law Number 19 of 2016 concerning Electronic Information and Transactions, electronic transactions are legal acts carried out using computers, computer networks, and/or other electronic media.
3. According to the KBBI (Indonesian Dictionary), blocking has a word origin which means to freeze something. On the other hand, according to the KBBI, the internet is an electronic communication network that connects organized computer networks around the world via telephone or satellite. So, internet blocking can be concluded as the act of freezing the internet network as a means of information and communication.

F. Method of Research

1. Type of Research

According to Soerjono Soekanto, research (study) is a scientific activity based on analysis and construction that is carried out systematically, methodologically and consistently and aims to reveal the truth as a manifestation of the human desire to know what he is facing.[9] This study is a type of normative research. Normative legal research is also known as doctrinal legal research. According to Peter Mahmud

[9] Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 1986), 3.

Marzuki, normative legal research is a process to find a rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. In this type of legal research, law is often conceptualized as what is written in statutory regulations or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.[10]

2. Research Approach

The research approaches chosen to write this paper are the statute approach and the case approach. The statute approach is to examine regulations and laws regarding the theme being researched to see the suitability or consistency between a law and other laws and regulations, including the constitution.[11] Case approach is one type of approach in normative legal research to build legal arguments in the perspective of concrete cases that occur in the field.[12] This research will examine the internet blocking case carried out by the government during demonstrations in Papua in 2019, so it really needs a case approach method. In addition, this study will analyze Article 40 paragraph 2 of the Information and Electronic Transactions Act and will be linked to many other laws and regulations according to research needs.

[10] Amiruddin and H. Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta:PT. Raja Grafindo Persada, 2006), h. 118.
[11] Amiruddin and Asikin, *Pengantar Metode Penelitian Hukum*, 133.
[12] Soerjono Soekanto, *Penelitian Hukum*, (Jakarta: Prenada Media Group, 2016), 161.

3. Law Material

a) Primary Law Materials

Primary law materials consist of legislation, jurisprudence, or court decisions. Primary law materials are legal materials that are authoritative which means they have authority. The primary data in this study;

a. 1945 Constitution of the Republic of Indonesia
b. Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights)
c. The Siracusa Principles
d. Law No. 28 of 1999 concerning the Implementation of a Clean and Free State from Corruption, Collusion, and Nepotism
e. Law Number 15 of 2019 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Legislation
f. Law Number 19 of 2016 concerning Information and Electronic Transactions.
g. Law Number 25 of 2009 concerning Public Services
h. Law Number 30 of 2014 concerning Government Administration
i. Law Number 39 of 1999 concerning Human Rights

j. Law Number 23 of 1959 concerning Determination of Danger Conditions.

b) Secondary Legal Material

Secondary legal materials are legal materials that can provide an explanation of primary legal materials. The secondary legal materials in this study, namely; a) related books; b) related research journals, and internet website information related to this research issue. Soerjono Sukamto stated that secondary data is data which includes official documents, books, and research results in the form of reports.

c) Tertiary Legal Material

Tertiary legal materials are legal materials that can provide explanations for primary legal materials and secondary legal materials. The tertiary data in this study are in the form of a legal dictionary and a large Indonesian dictionary

4. Law Material Collection

As stated by Mukti Fajar and Yulianto Achmad, that data collection techniques in normative legal research are carried out by literature studies on legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials.[13] This technique is also known as the documentary technique. So that later, the author will examine the

[13] Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, (Yogyakarta: Pustaka Pelajar, 2010), 160.

information materials that will be used in the form of documents, such as scientific journals, and documents in the form of scientific literature such as scientific books, and documents related to research as sources of information.

5. Analysis of Law

Mukti Fajar and Yulianto Achmad stated that data management was carried out in 3 (three) ways, namely checking data, re-investigative the data obtained, and systematizing data, and all data obtained would later be compiled and collected according to the order.[14] Legal materials that have been obtained are sorted and first reduced and described as needed. The described legal material is then analyzed to explore the nature and existing information so that information can be obtained in the form of legal events and legal consequences of a regulation. To clarify the analysis of this research, the author uses the approach that has been proposed with content analysis techniques (content analysis) as a technique to analyze the legal material that has been collected. The analysis of legal materials that have been focused is then analyzed with various aspects which are finally drawn conclusions after first being verified with various theories put forward.

[14] Fajar dan Ahmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, 160.

G. Previous Research

1. Noviyanti, Sayid Mohammad Rifqi Noval, and Ahmad Jamaludin, Pembatasan Akses Internet oleh Pemerintah saat Terjadi Unjuk Rasa dan Kerusuhan di Papua dan Papua Barat Ditinjau dalam Perspektif Hak Asasi Manusia, 2021, Research Journal of Universitas Kuningan. This research uses the type of normative research. There are two formulations of the research problem, first, how to limit internet access by the government in Papua and West Papua in the perspective of Human Rights. Second, what are the legal consequences and legal protection for the people of Papua and West Papua against the government's internet access restrictions. The results of this study state that the restrictions on internet access carried out by the government in Papua in 2019 are clearly a violation of human rights because the restrictions do not refer to the law, and the legal consequences of restricting internet access have caused Papuans and West Papuans to lose their digital rights in the form of information access rights.
2. Yusuf Syibly Ramadhan and Adis Imam Munandar, Analisis Kebijakan Pembatasan Akses Internet Di Wilayah Papua Tahun 2019 Dalam Perspektif Keamanan Nasional, 2021, Universitas Indonesia. This study uses the Narrative Policy Framework (NPF) approach to perform the analysis. This study aims to analyze how the narrative strategy used in the internet restriction policy in Papua in 2019 is from a national security perspective. The conclusion of this study is that internet restrictions in the Papua region carried out by the government during the riots in 2019 in order

to prevent the spread of hoaxes were considered inappropriate because they were contrary to human rights principles and actions that were not in accordance with the mandate of Article 40 of the Information and Electronic Transactions. In addition, internet restrictions in Papua have the potential to hamper economic activity, banking, and access to communication between individuals in the Papua region. In addition, there is also a second conclusion, namely to maintain and create stability in national security from the threat of the spread of hoaxes, which is an obligation for the government because the spread of hoaxes has the potential to create social conflict.

3. Emy Rosnawati and Okviani Assa Anggraini, Pembatasan Akses Internet oleh Pemerintah dalam Perspektif Hak Asasi Manusia (Studi Kasus Putusan PTUN Jakarta Nomor: 230/G/TF/2019/PTUN-JKT, 2021, Indonesian Journal of Law and Economics. This study uses a normative juridical research method. This study aims to determine whether the judge's decision, Putusan Nomor 230/G/TF/2019/PTUN-JKT is in accordance with human rights provisions and also to find out whether internet access rights are part of human rights. The action taken by the government is a limitation on Human Rights and the action contains an element of legal vacuum because it is not in accordance with the law and has not met the Standard Operating Procedure (SOP) to terminate or restrict internet network access. So that the final result of the decision states that the government's action is against the law and when viewed in the provisions of Article 19 of the United Nations Universal Declaration of Human Rights (UDHR) and the 1945 Constitution

of the Republic of Indonesia Article 28F paragraph (1), then the right to access the internet is part of human rights, because both have the right to freedom of expression and have the right to receive, seek and convey information without any restrictions and disturbances.

4. Emmanuela Kevin Panggabean. Mal Administrasi oleh Kementrian Komunikasi dan Informatika atas Pemblokiran dan Pelambatan Internet di Provinsi Papua dan Papua Barat, 2021, Faculty of Law, Universitas Surabaya. This research uses normative legal research methods and uses conceptual approach and case approach research methods. The result of this research is that the Ministry of Communication and Information has committed an unlawful act in slowing and blocking internet access as regulated in Article 1365 of the Civil Code whose elements can be described and implemented in this case. Other results also state that the Ministry of Communication and Informatics has committed acts that exceed its authority because it is contrary to what is stipulated in the provisions of the legislation (Article 18 paragraph (1e) of Law No. 30 of 2014 and uses its authority for purposes other than the purpose of that authority (Article 18 paragraph (2b) Law No. 30 of 2014).
5. Khalil Armi and Sophia Listriani. *Temporary Blocking Internet Access on Papuan's People: An Analysis of Article XIX on ICCPR in Handling Hoaxes*. 2021, Jurnal Ilmiah Mahasiswa: Bidang Hukum Kenegaraan. This research uses normative research methods. The results of this study indicate that the temporary blocking of the internet for the Papuan people is regulated

in the ICCPR and Law Number 19 of 2016 concerning Information and Electronic Transactions. Although the temporary blocking action was carried out to maintain public safety, in other ways the action was carried out with wrong procedures which made the action illegal and contrary to Indonesian law, especially Law Number 19 of 2016 concerning Information and Electronic Transactions and Article 19 of the ICCPR which has been ratified by the Indonesian government through Law No. 12 of 2005 concerning the Ratification of the ICCPR.

Referring to 5 (five) previous studies that were used as comparisons, this research has an element of novelty that will specifically discuss the legal basis for the government to block the internet during demonstrations in Papua. This study will focus on the juridical analysis of Article 40 paragraph (2) and will discuss the article as well as government actions from the perspective of *siyasah dusturiyah*.

No.	Writer/Title	Result	Difference	Novelty
1.	Noviyanti, Sayid Mohammad Rifqi Noval, Ahmad Jamaludin/ *Pembatasan Akses Internet*	The restrictions on internet access carried out by the government in Papua in 2019 are clearly a violation of human rights because the	Previous research has only focused on internet blocking from a human rights perspective. In addition, previous research also	Analyzing Article 40 Paragraph (2) of the Electronic Information and Transaction

	oleh Pemerintah saat Terjadi Unjuk Rasa dan Kerusuhan di Papua dan Papua Barat Ditinjau dalam Perspektif Hak Asasi Manusia	restrictions do not refer to the law, and the legal consequences of restricting internet access have caused Papuans and West Papuans to lose their digital rights in the form of information access rights.	discusses the legal consequences and legal protection for Papuans and West Papuans against Internet Restriction Measures carried out by the Government.	Act which is used as a reference for internet blocking actions by the government during demonstrations in Papua and provides a *siyasah dusturiyah* perspective.
2.	Yusuf Syibly Ramadhan, Adis Imam Munandar, Analisis Kebijakan Pembatasan Akses Internet Di Wilayah Papua Tahun 2019 Dalam	The result of the research is that internet restrictions in the Papua region carried out by the government during the riots in 2019 to prevent the spread of hoaxes were	Previous research discussed internet restriction policies in Papua in 2019 from a national security perspective. In addition, this research also uses the Narrative Policy Framework	

	Perspektif Keamanan Nasional	deemed inappropriate because they were contrary to human rights principles and actions that were not in accordance with the mandate of Article 40 of the Electronic Information and Transactions Law.	(NPF) approach to conduct the analysis. And finally, this previous research used the object of research Putusan No. 230/G/TF/2019/PTUN.JKT	
3.	Emy Rosnawati, Okviani Assa Anggraini/ *Pembatasan Akses Internet oleh Pemerintah dalam Perspektif Hak*	Restrictions on Internet Access by the Government in the Perspective of Human Rights (Case Study of Jakarta Administrative Court Decision, Putusan Nomor:	Previous research only focused on the Human Rights Perspective. In addition, the research also uses the object of study for the Jakarta Administrative Court, Putusan	

	Asasi Manusia (Studi Kasus Putusan PTUN Jakarta Nomor: 230/G/TF/2019/PTUN-JKT	230/G/TF/2019/PTUN-JKT	Nomor: 230/G/TF/2019/PTUN-JKT	
.4	Emmanuela Kevin Panggabean/ *Mal Administrasi oleh Kementrian Komunikasi dan Informatika atas Pemblokiran dan Pelambatan Internet di Provinsi*	The result of this research is that the Ministry of Communication and Information has committed an unlawful act in slowing and blocking internet access as regulated in Article 1365 of the Civil Code whose elements can be described and implemented	It only focuses on unlawful acts committed by Kominfo in blocking and slowing down the internet in Papua.	

	Papua dan Papua Barat	in this case. Other results also state that the Ministry of Communication and Information has committed acts that have exceeded its authority.		
5.	Khalil Armi, Sophia Listriani/ *Temporary Blocking Internet Access on Papuan's People: An Analysis of Article XIX on ICCPR in Handling Hoaxes*.	The results of this study indicate that although the internet is temporarily blocked for the Papuan people to maintain public safety, this action was carried out with the wrong procedure which made the action	Previous research only focused on discussing internet blocking in Papua from the perspective of the International Convention on the Elimination of All Forms of Racial Descrimination.	

		illegal and contrary to Indonesian law, especially Law Number 19 of 2016 concerning Electronic Information and Transactions and Article 19 ICCPR which has been ratified by the Indonesian government through Law Number 12 of 2005 concerning Ratification of the ICCPR.		

H. Structure of Discussion

This research will be organized systematically which consists of five parts:

FORMALITY PART. This section consists of the technical requirements of the thesis which contains the cover page, title page, statement of authenticity page, validation page, motto page, introduction, abstract, and table of contents.

CHAPTER I INTRODUCTION. This chapter consists of the background of the problem why the researcher chose the topic of this problem. And starting from that background, a problem formulation emerged containing questions about the problem to be studied, research objectives, problem boundaries, research benefits, research methods, previous research, and systematic discussion.

CHAPTER II LITERATURE REVIEW. This chapter contains juridical thoughts and/or concepts as a theoretical basis for studying and analyzing problems and also contains the development of data and/or information, both substantially and methods relevant to the research problem.

CHAPTER III DISCUSSION OF RESEARCH FINDINGS. This chapter will describe the data that has been obtained from reading or reviewing the literature which is then edited, classified, verified, and analyzed to answer the problem formulation that has been determined.

CHAPTER IV CLOSING. This chapter is the last chapter which will contain conclusions and suggestions. Where the conclusion will contain a brief answer to the formulation of the problem that has been set and suggestions will later contain suggestions or recommendations to related parties regarding the theme being studied for the good of the community, and suggestions for further research with the same theme in the future.

CHAPTER II

LITERATURE REVIEW

A. Rule of Law Theory

The history of the rule of law is actually as old as the history of democracy in which almost all studies of both lead to the era of the trio of philosophers, namely Socrates, Plato, and Aristotle. The thoughts of the three philosophers are often used as an authoritative historical reference which is so highly praised and continues to live in the speed of time. As has been mentioned by experts, that thought in the context of the city-state in the Polis in Greece has special characteristics:[15]

1. *Zoo Politicon*. Every member of the police force is a politically literate citizen, which means that citizens care about matters of state management, and are even directly involved in the administration of the state.
2. *Stats.* Police citizens are formed in stratification groups; upper class, middle class, and ordinary/low class.
3. *Active status*. Every member of the police actively governs.
4. *Staatsgemeinschaft*. All people are citizens who have an obligation to fulfill the duties of the State.
5. *Kultgemeinschaft.* The people are also religious citizens who have the obligation to fulfill religious duties;
6. *Encyclopedia* (circle of knowledge). Society must be taught various kinds of knowledge in order to be productive in governing.

[15] Fajlurrahman Jurdi, *Teori Negara Hukum*, (Malang: Setara Press, 2016), 3.

In classical history, the conception of the rule of law was also developed by Thomas Hobbes, John Locke, Baron de Montesquieu, Jean-Jacque Rousseau, and so on. This has become a new foothold for the development of a modern legal state, even bringing the flow of state of law thought into two, rechstaat and the rule of law. These two concepts are evidence that shows that the thinking of the rule of law in various continents is influenced by the thoughts of these figures. However, the central history of the rule of law remains rooted in the concepts coined by a trio of philosophers.[16]

Many philosophers put forward theoretical thoughts about the rule of law, which later in its development legal experts also formulated general principles about the rule of law, which were later known as the goals of law, namely justice, expediency, and certainty. These philosophers include Plato who bases a state of law (*rechtsstaat* and the rule of law) on a state led by a wise person (the philosophers) and whose citizens consist of wise philosophers (perfect guardians); military and technocrats (auxiliary guardians); farmers and; traders (ordinary people).[17] Furthermore, within a period of hundreds of years the concrete form of the rule of law was formulated by experts into *rechstaat* and the rule of law which are constitutional ideas to guarantee human rights and separation of powers.

Etymologically, the term state of law or state based on law is a term that comes from a foreign language, such as *rechtstaat* (Dutch), *etet de droit*

[16] Jurdi, *Teori Negara Hukum*, 10-11.
[17] Dedy Ismatullah and Asep A. Sahid Gatara, *Ilmu Negara Dalam Multi Perspektif,* (Bandung: Pustaka Setia, 2007), 165.

(France), the state according to law, legal state, and rule of law (English). Historically, the term rule of law has long been known and adopted in many countries since the XVIII century, this term was then popular only in the nineteenth to twentieth centuries. In Indonesia, the term rule of law has been known since the state declared itself as an independent and sovereign state.[18] In Indonesian law itself, another term used is the rule of law, which means a state of law. In addition, Notohamidjojo uses the words "...then the term law state or *rechtsstaat* also arises."[19] The two terms, namely *rechtsstaat* and the rule of law, are actually supported by different legal system backgrounds. *Rechtsstaat* is the fruit of the idea of a rule of law originating from Continental Europe. According to Marzuki Wahid the difference between *rechstaat* and the rule of law; first, *rechstaat* is the result of a struggle against absolutism so that it is revolutionary in nature, and second, *rechstaat* relies on a continental legal system called civil law where the emphasis is on administrative aspects. On the other hand, the rule of law develops evolutionarily, which is based on the Anglo Saxon legal system, which is called common law. In the concept of the rule of law, the judicial aspect is also emphasized. However, the difference between the two is now no longer a problem, because it leads to the same goal, namely the protection of human rights.[20]

As a consequence of the adoption of the rule of law concept, in every

[18] Nany Suryawati, *Hak Asasi Politik Perempuan*, (Gorontalo: Ideas Publishing, 2020), 11.
[19] O. Notohamidjojo, *Makna Negara Hukum*, (Jakarta: Badan Penerbit Kristen, 1970), 27.
[20] M. Syahnan, Perbedaan Konsepsi Rechstaat dan The Rule of Law Serta Perkembangan dan Pengaruhnya Terhadap Hukum Administrasi Negara, *Jurnal Ilmiah Hukum Dirgantara*, No. 1(2014): 50.

legal state regardless of the type adopted, the law must be the basis for every action of the ruler and his people, the law has the highest position in the state, while in the understanding of people's sovereignty, it is the people who are considered sovereign above all else which then gave birth to a democratic system. The principle of the rule of law prioritizes the norms reflected in the laws and regulations, while the principle of democracy prioritizes the participation of the community in the administration of government.[21]

In addition, if we refer to the current legal concept, it can be said that the basic building of the State must be able to respond to existing social realities. The attachment of citizens to law is an attempt to rediscover the essence of why a country was founded. The state was established to protect, as well as protect individual independence, and to maintain and protect it requires a law that will be transformed as a "social aid". Based on this, the rule of law must be able to refer to the essential dimensions in society as a social basis. The state of law has the task of creating social progress for its people with laws that act as social engineering (a tool of social engineering) aimed at generating prosperity.[22]

According to Malian, the concept of the rule of law was first conveyed by Plato which was emphasized by Aristotle. In Plato's book Politeia, it is explained how tyrannical the rulers of his time were. Not only tyrannical, but also very crazy

[21] Jimly Asshiddiqie, <<Konstitusi Sebagai Landasan Indonesia Baru Yang Demokratis, (Pokok-pokok Pikiran Tentang Perimbangan Kekuasaan Eksekutif dan Legislatif dalam Rangka Perubahan Undanh-undang Dasar 1945>>, Paper, Presented in a National Law Seminar VII, Badan Pembinaan Hukum Nasional, (Jakarta: Departemen Kehakiman RI, 1999), 146-147, accessed on 20 March 2002, https://www.pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf/

[22] Jurdi, *Teori Negara Hukum*, 14-15.

and thirsty for power, even acting arbitrarily and not caring about his people at all. Starting from there, Plato conveyed his moral message with gambling, demanded the ruler to do justice, uphold the values of wisdom and decency, and always pay attention to or care about the interests or fate of his people. Plato also stated about his basic idea that the interests of many people should be placed above personal and group interests.[23]

Friedrich Julius Stahl who came later after Plato gave elements of the rule of law based on the perception of his time. These elements include;[24]

1. Human Rights;
2. Adhering to the trias politica in the distribution of power aimed at ensuring human rights;
3. Government based on regulations;
4. Administrative justice in disputes.

On the other hand, the International Commission of Jurists Bangkok 1965 gave characteristics to the concept of the rule of law;[25]

1. Constitutional protection, which implies that the constitution must provide technical-procedural protection for the rights guaranteed in it;
2. An independent and impartial judiciary;
3. Free elections;
4. Freedom of expression;

[23] Jurdi, *Teori Negara Hukum*, 20.
[24] Jurdi, *Teori Negara Hukum*, 21.
[25] Majda El Muhtaj, *Hak Asasi Manusia dalam Konstitusi di Indonesia,* (Jakarta: Kencana, 2005), 24.

5. Freedom of association and position;
6. Citizenship education.

In addition, our constitution, the 1945 Constitution of the Republic of Indonesia, which acts as a *droit constituunelle* provides an explanation of the rule of law adopted by Indonesia. The 1945 Constitution Article 1 paragraph (3) states;[26]

1. The state is based on law, not based on mere power;
2. The state government is based on a constitution with limited non-absolute government powers;
3. Indonesia is a State of material law as proven in Article 33 and Article 34 concerning the economy and social welfare of the state being responsible;
4. The realization of Indonesia as a constitutional state is structured in a legal system (UUD 1945 – TAP MPR RI – UU – Perpu – Perpres – Kepres – and Perda).

According to Scheltema, *rechtsstaat* is a rule of law theory that applies in Continental European countries, namely a) legal certainty; b) equality; c) democracy; d) government that serves the public.[27] Equality or equality means equality of rights for everyone, giving everyone what is their share, so that legal justice in a state of law is understood as an equation, which gives birth to the principle that everyone is equal before the law and everyone gets what they want. be his right. The relationship between justice and equality is that equality is the most important element of justice because if there is unequal treatment it will

[26] Jurdi, *Teori Negara Hukum*, 22.
[27] Ismatullah dan Gatara, *Ilmu Negara Dalam Multi Perspektif,* 166.

cause injustice. The equation does not always have to be the same, but depends on the conditions and qualifications of each individual. This equation is called proportional equality, everyone belongs to the same category for a certain purpose and must be treated equally.[28] Justice and equality have a very close relationship, so if there is unequal treatment, then this is a serious injustice.

In addition, there are also principles that develop in the rule of law as follows.[29]

1. The Supremacy of Law; There is a normative and empirical acknowledgment of the principle of the rule of law, namely that all problems are resolved by law as the highest guideline.
2. Equality before the Law; There is an equal position of everyone in law and government, which is recognized normatively and implemented empirically.
3. Legality Principle (Due Process of Law); In every state of law, it is required to apply the principle of legality in all its forms (due process of law), namely that all government actions must be based on legal and written laws and regulations.
4. Limitation of Power; There is a limitation on state power and state organs by applying the principle of vertical division of power or horizontal separation of powers.

[28] Munir Fuady, *Dinamika Teori Hukum,* (Bogor: Ghalia Indonesia, 2010), 107.
[29] Jimly Asshiddiqie, <<Cita Negara Hukum Indonesia Kontemporer>>, Paper, presented in Undergraduate Graduation of Universitas Sriwijaya Palembang, *Simbur Cahaya*, No. 25(2004), accessed on 1 April 2022 https://dspace.uii.ac.id/bitstream/handle/123456789/1751/05.2%20bab%202.pdf?sequence=9&isAllowed=y/

5. Independent Executive Organs; In order to limit this power, nowadays there are also independent government institutional arrangements, such as the central bank, the army organization, the police organization and the prosecutor's office. In addition, there are also new institutions such as the Human Rights Commission, the General Election Commission, the Ombudsman, the Broadcasting Commission, and so on. These institutions, bodies or organizations were previously considered to be fully under executive power, but now they have developed to be independent so that it is no longer the absolute right of a chief executive to determine the appointment or dismissal of their leaders. The independence of these institutions or organs is considered important to ensure democracy, because their functions can be misused by the government to perpetuate power.
6. Free and Impartial Judiciary; The existence of an independent and impartial judiciary. This free and impartial justice absolutely must exist in every rule of law. In carrying out their judicial duties, judges should not be influenced by anyone, either because of their position (political) or money (economic) interests.
7. State Administrative Court; Although the state administrative court also concerns the principle of free and impartial justice, its specific mention as the main pillar of the rule of law still needs to be emphasized separately. In every state of law, there must be an opportunity for every citizen to challenge the decisions of state administrative officials and the execution of

the decisions of state administrative judges (administrative courts) by state administration officials.

8. Constitutional Court; In addition to the existence of a state administrative court which is expected to guarantee the upholding of justice for every citizen, the modern state of law also commonly adopts the idea of establishing a constitutional court in its state administration system.
9. Protection of Human Rights; There is constitutional protection of human rights with legal guarantees for demands for their enforcement through a fair process. The protection of human rights is widely disseminated in order to promote respect for and protection of human rights as an important feature of a democratic rule of law.
10. Democratic (Democratische Rechtsstaat); The principles of democracy or people's sovereignty are adhered to and practiced which guarantee public participation in the state decision-making process, so that every statutory regulation that is enacted and enforced reflects the feeling of justice that lives in the community.
11. Functioning as a Means of Realizing the Goals of the State (Welfare Rechtsstaat); Law is a means to achieve a common idealized goal.
12. Transparency and Social Control; There is transparency and open social control for every process of law-making and enforcement, so that the weaknesses and shortcomings contained in official institutional mechanisms can be complemented by direct community participation (direct participation) in order to ensure justice and truth.

B. Legislation

1. Legislation Function

The definition of the Legislation itself as stated in Article 1 point 2 of Law Number 15 of 2019 the second amendment to Law Number 12 of 2011 concerning the Establishment of Legislation that Legislation is a written regulation that contains legal norms that generally binding and established or determined by state institutions or authorized officials through the procedures stipulated in the Legislation.

Professor A. Hamid Attamimi stated that in the context of the formation of national law, laws and regulations have 3 (three) main functions, as follows.[30]

a) To fulfill legal needs in the life of society, nation and state which is constantly developing;
b) To bridge the customary law environment with other written laws;
c) To fulfill the need for unwritten legal certainty for the community.

On the other hand, Sugi Arto divides into two groups regarding the function of the legislation, as follows.[31]

a) Internal Functions; Internal function is the function of regulating legislation as a sub-system of law (statutory law) to the system of legal rules in general internally. Legislation carries out the function of law

[30] Aziz Syamsuddin, *Proses & Teknik Penyusunan Undang-Undang*, (Jakarta: Sinar Grafika, 2015), 19.
[31] Roy Marthen, *Ilmu Perundang-Undangan*, (Makassar: Karetakupa, 2017), 21, 23.

creation, the function of legal reform, the function of integrating legal pluralism, and the function of legal certainty.

b) External Functions; This function is the linkage of statutory regulations with the place where they apply. This external function can be referred to as a legal social function, which includes a change function, a stabilization function, and a convenience function.

There are also other opinions from well-known experts Robert Baldwin and Martin Cave about the function of legislation having the following functions.[32]

a) Prevent monopoly or unequal ownership of resources;'
b) Reducing the negative impact of an activity in the community or its environment;
c) Opening information to the public and encouraging equality between groups (encouraging institutional change, or affirmative action for marginalized groups);
d) Prevent scarce public resources from short-term exploitation;
e) Ensure equal distribution of opportunities and resources as well as social justice, expansion of access and redistribution of resources; and
f) Streamlining coordination and planning in the economic sector.

If we want to refer to Law Number 12 of 2011 it implicitly mentions the functions of the legislation as follows.[33]

[32] Marthen, *Ilmu Perundang-Undangan*, 24-25.
[33] Marthen, *Ilmu Perundang-Undangan*, 27.

a) Implement further regulations on the provisions contained in the 1945 Constitution of the Republic of Indonesia which expressly mentions it;
b) Further regulation in general of other basic rules in the articles of the 1945 Constitution of the Republic of Indonesia; and
c) Further regulation of the material of the State Constitution Republic of Indonesia in 1945.

2. Morality of Law Theory

Lon F. Fuller explains that the legal system must emphasize what it takes to make the law work. Fuller's solution to making law work is that the legal system must represent internal morality and legality principles or procedural basic law. Morality of Law theory is a theory initiated by Lon F. Fuller that there are things that cause the failure of legislation. Such legal failure can be avoided if there is an emphasis on the contents of the legislation with 8 (eight) certain moral requirements which include;[34]

a) Laws should be general. There must be rules as a guide in making decisions so that the nature of the requirements for generality is needed. These rules serve as guidelines to the authorities so that authoritative decisions are not made on an ad hoc basis and on the basis of independent policies, but on the basis of general rules.
b) They should be promulgated, that citizens might know the standards to which they are being held. Any rules that serve as guidelines for the

[34] Ahmad Redi, *Hukum Pembentukan Peraturan Perundang-undangan*, (Jakarta: Sinar Grafika, 2018), 44-45.

authorities should not be kept secret but must be made public (publication). The requirement that the law must be promulgated (published) because people will not obey the law that is not known to the party to whom the law is applied (norm adressaat).

c) Retroactive rule-making and application should be minimized. Rules must be made to serve as guidelines for future activities so that the law is minimized retroactively.
d) Laws should be understandable. Laws must be made so that they can be understood by the people.
e) Free of contradiction. The rules must not conflict with each other either vertically or horizontally.
f) Laws should not require conduct beyond the abilities of those effected. The rules may not require behavior or actions beyond the ability of the parties affected by the law, meaning that the law may not order something that is impossible to do.
g) They should remain relatively constant through time.
h) The law cannot be changed at any time, so the law must be firm. They should be a congruence between the laws as announced and their actual administration.

In addition, Fuller also argues that the law (statutory regulations) will cause problems when the law deviates from these 8 (eight) requirements.

"The eight principals constitute a morality, Lon Fuller will say, because of two reasons. One being that law leads to social order which needs moral

values, and two being that is does so by respecting individuality and the right to self guidance, because as Lon Filler will state, rules guide behavior. One cannot be autonomous and follow the principles of legality, without there being some sort of inherent moral value. This is the connection between law and morality; morals and principles inherently and internally construct and hold together laws." (Kim Graham, 2006).[35]

At the moment Fulller put forward the famous eight principles of law, it was at that moment that morals emerged clearly as a paradigm. According to Fuller, the law cannot be accepted as law, unless it departs from a certain morality. The law must meet certain moral standards and it does not deserve to be called law if it shows the following failures.[36]

a) Failure to issue rules (to achieve rules). A legal system must contain rules, meaning that it cannot make decisions that are only ad hoc;
b) Failure to announce the regulation to the public (to publicize). The rules that have been made must be announced;
c) Failure to abuse retroactive legislation. This shows that there should be no retroactive rules, because such rules cannot be used as behavioral guidelines. Allowing the rule to apply retroactively undermines the integrity of the rule that is intended to apply in the future. Failure to make the rule understandable. Rules must be arranged in a formula that can be understood;

[35] Redi, *Hukum Pembentukan Peraturan Perundang-undangan*, 45.
[36] Zuhraini, Kajian Sistem Penyelenggaran Pemerintah Pekon Dalam Perspektif Hukum Sebagai Sistem Nilai (Berdasarkan Teori Lon Fuller), *Jurnal Asas*, No. 2(2017): 46.

d) Failure due to making contradictory rules. A system must not contain rules that conflict with each other.
e) Failure because it demands behavior outside the person being regulated (beyond the power of the affected). The rules must not contain demands that exceed what can be done;
f) Failure due to frequent changes. There should be no habit of changing the rules frequently so as to cause people to lose orientation;
g) Failure to harmonize the rules with the practice of their application. There must be a match between the regulations promulgated and their daily implementation.

C. Public Policy & Act Against The Law

1. Public Policy

In terms of policy terminology comes from the term policy (English) or *politiek* (Dutch). The terminology can be interpreted as general principles that function to direct the government (including law enforcement) in managing, regulating or resolving public affairs, community problems, or fields of drafting laws and regulations and allocating laws/regulations for a goals that lead to efforts to realize the welfare and prosperity of the community (citizens).[37]

The word policy in English is equated with the word policy and is distinguished from the word wisdom which means wisdom or wisdom. The term policy is always used interchangeably with other terms such as programs, goals,

[37] Lilik Mulyadi, *Bunga Rapai Hukum Pidana Perspektif Teoritis dan Praktik*, (Bandung: Alumni, 2008), 234.

decisions, provisions, laws, big plans, and proposals.[38] Budi Winarto cites the opinion of several experts regarding the definition of policy as follows.[39]

a) Carl Friedrich (1963) sees that policy is a direction of action proposed by a person, group or government in a certain environment, which provides obstacles or opportunities in order to achieve a goal or realize a certain goal or purpose.
b) Richard Rose (1969) argues that policy is a series of activities that are more or less related and their consequences for those concerned, not decisions that stand alone.
c) Robert Eyestone (1971) made a very broad definition, namely that public policy is the relationship of a government unit with its environment.
d) Thomas R. Dye (1975) said that policy is whatever the government chooses to do or not to do.
e) James E. Anderson (1979) argues, that policy is a direction of action that has a purpose, which is determined by a person or several actors to overcome a problem.

According to the KBBI, policy is defined as a series of concepts and principles that become the outline and basis of a plan in the implementation of a job, leadership, and way of acting (about government, organization, etc.); a statement of ideals, goals, principles and guidelines for management in the pursuit

[38] Solichin Abdul Wahab, *Analisis Kebijakan: Dari Formulasi ke Implementasi Kebijakan Negara*, (Jakarta: Bumi Aksara, 2008), 76.
[39] Miftah Thoha, *Perilaku Organisasi*, (Jakarta: Raja Grafindo Persada, 2002), 12-15.

of goals. Solichin Abdul Wahab provides several guidelines regarding the formulation of a policy:[40]

a) Policies must be distinguished from decisions.
b) Policies are not necessarily distinguishable from administration.
c) Policies cover behavior and expectations.
d) Policies include inaction or inaction.
e) Policies usually have an end result to be achieved.
f) Each policy has certain goals or objectives, both explicit and implicit.
g) Policy emerges from a process that takes place over time.
h) Policies cover inter-organizational and intra-organizational relationships.
i) Public policy, although not exclusive, concerns the key roles of government institutions.
j) The policy is formulated or defined subjectively

According to William Dunn,[41] policy formulation is the development and synthesis of problem solving alternatives. Budi Winarno[42], stated that each alternative competes to be chosen as a policy in order to solve the problem.

Tjokroamidjojo said that policy formulation is the same as policy formation, which is a series of actions for selecting various alternatives that are carried out

[40] Wahab, *Analisis Kebijakan: Dari Formulasi ke Implementasi Kebijakan Negara*, 98.
[41] William Dunn, *Pengantar Analisis Kebijakan Publik,* (Yogyakarta: Gadjah Mada University Press, 2007), 132.
[42] Budi Winarno, *Kebijakan Publik: Teori dan Proses*, (Yogyakarta: Med Press, 2007), 18.

continuously and never completed, in this case including decision making. Learn more about the state (public) policy-making process.[43]

The study of policy formulation pays very deep attention to the nature (formulation) of public problems. Public problems are a big foundation in formulating public policies so that their directions are correct, appropriate, and appropriate. The formulation of the problem, according to William Dunn, will greatly help policy analysts to find hidden assumptions, diagnose public problems, map possible goals, combine opposing/conflicting views, and design new policy opportunities. Policy formulation will be related to several things, namely how to solve a problem, especially public problems to get the attention of policy makers, how to formulate proposals to respond to certain problems that arise, how to choose one alternative to overcome public problems.[44]

According to Anderson, policy formulation involves efforts to answer the question of how various alternatives are agreed upon for the problems developed and who participates. Problem formulation can be viewed as a process consisting of four stages namely; problem search, problem definition, problem specification, problem recognition. The policy formulation process includes the following stages;[45]

a) Gather as much information as possible.

[43] Muhammad Irfan Islamy, *Prinsip-prinsip Perumusan Kebijakan Negara*, (Jakarta: PT Bumi Aksara, 2014), 24.
[44] William Dunn, *Pengantar Analisis Kebijakan Publik*, 134.
[45] Subarsono, *Analisis Kebijakan Publik*, (Yogyakarta: Pustaka Pelajar, 2011), 28.

b) Formulate various alternatives with various advantages and disadvantages.
c) Fostering unity of opinion and coalitions among various individuals.
d) Discuss, bargain, and compromise to produce an agreement.

2. Act Against The Law

The government is a part of the state apparatus (organ of state) which has a broad or narrow meaning. In a broad sense, government is all affairs carried out by the state in carrying out the welfare of its people and the interests of the state itself. So it is not interpreted as a government that only carries out executive duties, but also includes other tasks including legislative and judicial.[46] It can also be said that government in the broad sense of its scope includes all state apparatus, which basically consists of the branches of executive, legislative and judicial powers or other state apparatuses which also act for and on behalf of the state.

Government in its narrow sense (which is called bestuur) only includes the organization of functions that carry out government (executive) tasks that can be carried out by the Cabinet and its apparatus from the Central to the Regional levels.[47] So, in a narrow sense, the government is the one that is included in the executive branch branch (law applying organ). In relation to the constitutional system, the executive branch of government has a different organizational structure and function from other branches of government (legislative, judicial, and others).

[46] Moh. Kunsardi, and Harmaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia*, (Jakarta: Sinar Bakti, 1983), 171.
[47] Amrah Muslimin, *Beberapa Asas dan Pengertian Pokok Tentang Administrasi dan Hukum Administrasi, Dasar dan Struktur Ketatanegaraan Indonesia*, (Yogyakarta: UII Press, 2001), 74.

The executive branch of government represents or contains two characters. First, as a state apparatus. Second, as a state administrative body. As a state apparatus, the executive branch of government acts for and on behalf of the state. Executive action as a tool of the state is an act of the state. As state administration, the executive branch of government has independent powers delegated by the state. This independent power allows the state administration to take independent actions both in the field of regulation (*regelen*) and in the administration of state administration (*besturen*).[48]

It is in this field of bestuur that the state administration or government agency or official has the authority to administer the state in a form called the act or act of government administration. This government agency or official in carrying out its functions must be based on the applicable laws and regulations. Usually this government agency or official in issuing policies (beleid) is based on the interpretation understood by him. The interpretation of a legal regulation is common in the field of written law. The nature of a legal regulation that has been fixed in a law that must not be implemented, is when people begin to look at the literal (explicit) norm, which is considered to have fulfilled the community's sense of justice. On the other hand, if the implementation of laws according to norms explicitly forces government agencies or officials to take unsatisfactory actions,

[48] Bagir Manan and Kuntara Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia*, (Yogyakarta: Liberty, 1982), 74.

then that is where people start looking for ways by carrying out interpretations to approach that sense of justice.[49]

Theoritically, Administrative Actions (Bestuurshandelingen) can be divided into two, namely Feitelijk Handelingen (commonly called material actions and also Rechtshandelingen (legal actions). These material actions are called "ordinary" because basically these actions have no legal impact administratively, therefore it can also be called factual action. While this legal action (Rechts handelingen) theoretically has legal implications administratively. Factual action is a real or physical action carried out by the State Administration. This action is not only limited to active actions but also passive actions What is meant by passive action in this case is staying silent about something.[50]

From the theoretical explanation, government agencies or officials must act in accordance with applicable legal norms. This is in line with Article 5 of Law no. 30 of 2014 concerning Government Administration which states that the administration of government must be based on the principle of legality. This means that the government must not act other than implementing the rule of law. In some cases, we can see government bodies or officials in public law deviating from the applicable laws and regulations (positive law). Often, for reasons of legal certainty, they have sacrificed other more important needs, namely the need for a sense of

[49] Agus Budi Susilo, Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara, *Jurnal Hukum and Peradilan,* No. 2(2013): 293.
[50] Muhammad Adiguna Bimasakti, *Onrechmatig Overheidsdaad* oleh Pemerintah Dari Sudut Pandang Undang-Undang Administrasi Pemerintahan, *Jurnal Hukum Peraturan,* No. 2(2018): 270.

justice, protection, comfort that is accepted by the community, both individually and in groups. The government's actions, sometimes for reasons of public interest and legal certainty, actually sacrifice the individual rights of the community, either individually, in groups, or as civil legal entities.

In civil law, the actions of government agencies or officials can be categorized as acts against the law as long as they fulfill the elements. First of all, we must understand the meaning of the act itself. Utrech said that the actions were the actions of the government. Meanwhile, Bachsan Mustafa gave his opinion that the act was an act of the state administration, and Sjachran Basah considered that the act was an act of the government.[51] *Onrechtmatige overheidsdaad* or unlawful acts by the authorities (government or government agencies or officials) as known in the history of law in Indonesia is sourced from Article 1365 B.W (KUHPerdata), which includes the field of civil law. This was based on the interpretation of Article 2 R.O and Article 101 of the Indonesian Constitution, because at that time the state administrative court had not yet been formed.[52]

In the civil law doctrine, the criteria for unlawful elements are obtained from Arrest Hoge Raad dated January 31, 1919 in the case between Lidenbaum Vs. Cohen (PMH case in printing competition). In the first instance in the Amsterdam District Court Lidenbaum (Plaintiff) won. However, at the appeal level, Lidenbaum lost on the grounds that there was no law (written regulation) that prohibits the

[51] Susilo, *Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara*, 297.
[52] Susilo, *Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara*, 294.

object of his lawsuit. Then at the cassation level Lidenbaum won on the grounds of judge Hoge Raad (Dutch Supreme Court) that breaking the law is not the same as going against the rules.[53]

Based on the consideration of Arrest HR on January 31, 1919, the criteria for determining an act that is contrary to the law in general are as follows.[54]

a) Contrary to the legal obligations of the perpetrator; or
b) Violating the subjective rights of others; or
c) Violating the rules of morality (goede zeden); or
d) Contrary to the principles of propriety, thoroughness and caution in the social life of the community.

Apart from that, elements of unlawful acts can also be seen in the laws and regulations that apply in our country. In Article 53 paragraph (2) of the Law on State Administrative Courts it has been explained that; the reasons that can be used in the lawsuit as referred to in paragraph (1) are; a) The State Administrative Decision being sued is contrary to the prevailing laws and regulations; and b) The State Administrative Decision being sued is contrary to the general principles of good governance.

D. Siyasah Dusturiyah

There is a popular opinion among Muslims which states that Islam is a comprehensive religion. The reason is because in it there is a political system and

[53] Susilo, *Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara*, 272.
[54] Ahmad Budi Cahyono, and Surini Ahlan Sjarif, Mengenal Peraturan Hukum Perdata, (Jakarta: CV Gitama Jaya, 2008), 122-123.

also arrangements regarding state administration, there are even economic systems, social systems, and so on. For example Hasan Al-Banna, Al-Maudidi, and Rashid Rida who believe that "Islam is a complete religion". In addition, the paradigm of thought that states this is in passing justified by the Qur'an, which is stated in the following 3 verses.[55]

> "Today (the period of Hajj wada, the last pilgrimage performed by the Prophet) I have perfected your faith for you, completed My favour upon you, and chosen Islam as your way. But whoever is compelled by extreme hunger—not intending to sin—then surely Allah is All-Forgiving, Most Merciful." (Q.S. Al-Maidah/5:3)
>
> "We have left nothing out of the Record." (Q.S. Al-An'am/6:38)
>
> "We have revealed to you the Book as an explanation of all things, a guide, a mercy, and good news for those who fully submit." (Q.S. An-Nahl/16:89)

The first verse means that Islam is a religion (din), which was revealed to the Prophets, starting from the Prophets Adam, Abraham, Moses, Jesus, and so on until the Prophet Muhammad SAW. as the last Prophet and Messenger, to be perfect in his teachings, and to be perfect in the revelation sent down by Allah to the Prophet Muhammad. Tafsir Al-Tabari gives takwil on the verse that Allah perfects the laws, obligations, all commands and prohibitions that are lawful and unlawful, as well as various acts of worship that are related to religious affairs for humans and

[55] Pulungan, *Fikih Siyasah*, 1-2.

revelations that were revealed to His Messenger.[56] Then, the second and third verses, what is meant by the Qur'an as an explanation for everything and in it does not escape "anything" are related to religious matters and the points of happiness in this world and the hereafter.[57] So, human happiness in the hereafter will stem from the quantity and quality of his work and deeds in the world, both deeds related to God and deeds related to fellow humans and their environment. How to realize these two goals is not explained in detail in the Qur'an, but only in the form of general statements and in the form of the basics. Likewise, the problem of muamalah (politics and society), the Qur'an does not specify the technical implementation, only in the form of the basis or principles.[58] The principles of the Qur'an in the Political and Administrative System:[59]

1) The principle of upholding legal and justice is contained in Q.S. An-Nisa/4:58, An-Nisa/4:135, Al-Maidah/5:8, and An-Nisa/4:105.
2) The principle of leadership, contained in Q.S. Ali Imran/3:118, An-Nisa/4:59, and Ash-Syu'ara/26:150-152).
3) The principle of deliberation, which is contained in Q.S. Ali Imran/3:159, and Ash-Shura/42:38.
4) The principle of equality, found in Q.S. An-Nisa/4:1, and Al-Hujurat/49:13.

[56] Pulungan, *Fikih Siyasah*, 3.
[57] Pulungan, *Fikih Siyasah*, 3.
[58] Pulungan, *Fikih Siyasah*, 4.
[59] Pulungan, *Fikih Siyasah*, 5-17.

5) The principle of human rights, there are several rights included in this principle;
    a) Right to life (Q.S. Al-Isra/17:33)
    b) Private property rights and earning a living (Q.S. Al-Baqarah/2:188, An-Nisa/74:29, An-Nisa/4:32, Al-Jum'ah/62:10)
    c) The right to respect and personal life (Q.S. An-Nur/24:27, Al-Hujurat/49:11-12)
    d) Right of opinion and association (Q.S. Ali Imran/3:104, Al-Ashr/103:1-3)
    e) The right to freedom of religion, tolerance of religion and the relationship between religious adherents (Q.S. Al-Baqarah/2:256, Mumtahanah/60:8)
    f) Equality before the law and self-defense (Q.S. Ash-Shura/42:41, An-Nisa/4:58)
    g) Right to freedom from persecution (Q.S. Al-A'raf/7:33)
    h) The right to freedom from fear (Q.S. Al-Maidah/5:32)
6) The principle of doing good and evil deeds is found in Q.S. Ali-Imran/3:110.
7) The principle in determining the officials or implementers of an affair, which is contained in Q.S. Al-Qashash/28:26.

Siyasa dusturiyah is one of the scopes in the study of *fiqh siyasah* which discusses matters of state legislation. In this scope, it discusses the concepts of the constitution, legislation, democratic institutions, and *shura* which are important

pillars in the legislation. Not only that, this scope also discusses the concept of the rule of law in siyasa and government administration by the bureaucracy or the executive.[60]

The word *dusturiyah* comes from the Persian language which has the root word dusturi and originally meant one person who has authority, both in the political and religious fields. In later developments, this word was used to denote members of the Zoroastrian priesthood (religious leaders). After experiencing absorption into Arabic, the word dustur developed its meaning into a basic principle/development. According to the term, *dustur* means a collection of rules that regulate the basis and cooperative relations between members of the community in a country, both unwritten (conventions) and written (constitutions).[61]

In the concept of *siyasah dusturiyah*, the purpose of making laws and regulations is to realize the benefit of humans and to meet human needs. In addition, the discussion in the field of *fiqh siyasa* also concerns the relationship between the leader on the one hand and the people on the other and the institutions that exist in the community. Therefore, in fiqh siyasa dusturiyah it is usually limited to discussing the regulations and legislation required by state matters in terms of conformity with religious principles and is the realization of human benefit and meeting their needs.[62] If we try to understand the use of the term *fiqh dusturi*, it is intended as the name of a science that discusses government issues in a broad sense,

[60] Muhammad Iqbal, *Fiqh Siyasah Konstektualisasi Doktrin Politik Islam*, (Jakarta: Prenada Media Group, 2014), h. 177.
[61] Iqbal, *Fiqh Siyasah Konstektualisasi Doktrin Politik Islam*, 177-178.
[62]H. A. Djazuli, *Fiqh Siyasah Implementasi Kemaslahatan Umat dalam Rambu-rambu Syariah*, (Jakarta: Kencana, 2003), h. 47

because in that dustur there is a set of principles for regulating power in the government of a country, as dustur in a country. Of course, laws and other lower regulations must not conflict with the dustur.[63] The explanation simply explains if in the process of forming a statutory regulation, the lower regulations may not contradict the basic regulations or in this case in our country it is called the constitution. The constitution contains many explanations of how the principles of a state will work. For this reason, this constitution is a basic rule which will be further elaborated in the legislation below.

The issue of *fiqh siyasa dusturiyah* generally cannot be separated from two main things: first, kulliy arguments, both verses of the Qur'an and hadith, *maqosidu sharia*, and the spirit of Islamic teachings in regulating society, which will not change no matter what changes public. Because these *kulliy* arguments become dynamic elements in changing society. Second, the rules that may change due to changes in situation and conditions, including the results of *ijtihad* scholars, although not entirely.[64]

In *siyasa dusturiyah*, the concept of reciprocal relations between the government and the people is also known. Muhammad Rasyid Rida concluded that the head of state has duties in four areas; a) develop Islamic da'wah and uphold the truth; b) upholding justice; c) protect religion from intruders and reject heresy; d) deliberation in establishing laws that are not explicitly regulated by the texts. Orientalist Bernard Lewis said that the duties and obligations of the head of state

[63] Djazuli, *Fiqh Siyasah Implementasi Kemaslahatan Umat dalam Rambu-rambu Syariah*, 53.
[64] Djazuli, *Fiqh Siyasah Implementasi Kemaslahatan Umat dalam Rambu-rambu Syariah*, 48.

only cover those related to the benefit of the people, namely defending the interests of the people and protecting society from enemies as well as providing opportunities for them to have a good life to achieve happiness in the hereafter. These two opinions can be developed on respect and maintenance of the human rights of its people.[65]

Siyasa dusturiyah is not a single science that has no branches in it. However, the discipline also has 3 (three) branches in it regarding state administration as follows.[66]

1. *The field of siyasa tasyri'iyah,* including the issue of *ahl al-hall wa al 'aqd,* representatives of people's problems. This field also discusses the relationship between Muslims and non-Muslims within a country, as well as the Constitution, laws, implementing regulations, regional regulations and so on.
2. *The field of siyasah tanfidhiyah,* including the issue of priesthood, the issue of *bai'ah, wuzarah, waliy al-ahdi,* and others.
3. *The field of siyasa qadha'iyah,* including judicial matters.
4. *The field of siyasa idariyah,* including administrative and staffing matters.

If we look at the constitutional context this time, legislation is very important to regulate the life of the nation and state. The purpose of the state has

[65] Djazuli, *Fiqh Siyasah Implementasi Kemaslahatan Umat dalam Rambu-rambu Syariah*, 243-244.
[66] Djazuli, *Fiqh Siyasah Implementasi Kemaslahatan Umat dalam Rambu-rambu Syariah*, 47.

even been clearly stated, namely to prosper its people. This is also in line with the objectives of the legislation in the *siyasah dusturiyah*. So that the government can formulate legislation through its legislative power (*al-sulthan al-tasyr'iyah*). In addition, in the formulation of laws, the legislature has the authority to interpret or make analogies or inferences with the texts of the Qur'an and Hadith. The purpose of the interpretation itself is part of the state's efforts to understand and seek the true intent of the lawsuits contained in the main legal sources. While the analogy is to use the Qiyas method, a law that has texts on problems that develop based on the equation of legal causes. While inference is a method of making legislation by analyzing or seeking a detailed understanding of the principles of sharia and the will of *syar'i* (God). If there is a new problem that previously did not have texts, then it is included in the authority of the legislative body which will solve the problem in the form of a policy, provided that it does not violate the principles of Islamic teachings. If there are no texts at all, then the legislative power area is wider and larger, as long as it does not deviate from the principles of Islamic teachings.

To analyze a statutory regulation in the order of Abdul Wahhab Khallaf, he can use his thinking which states that the principle used as a system of legislation is the guarantee of individual rights and the principle of equality between them. This means that in determining whether or not a substance is a law, these two principles must be met first. An article in the law must be able to provide protection for human rights. In addition, the contents of the law should not only side with one party, but ignore the other party because it prioritizes the principle

of equality before the law.

In the development of siyasa dusturiyah, one of the ideas that can be used to analyze the substance of the legislation is the thought of Abdul Wahhab Khallaf. He is a professor at Al Azhar University in Cairo. Abdul Wahhab Khallaf said that in the statutory system there must be two things contained, the principle of guaranteeing individual rights and the principle of equality.

The principle of guaranteeing individual rights and also the principle of equality is further elaborated by Abdul Wahhab Khallaf as follows.[67]

a) Individual Right Guarantee

All individual rights and their kinds have two common elements; a) individual freedom; and b) equality between individuals in rights from society and from politics. The purpose of individual freedom is to provide the possibility that everyone can distribute their personal affairs in a safe situation or do not feel pressured or feel threatened when doing so, of course with conditions; when someone wants to convey about matters concerning his honor, property, residence, or rights do not disturb other people. From this freedom, several main things are formed;

1) The Right to Feel Free

In Islamic law, there are provisions that protect a person from all forms of hostility. This is because Islam has determined

[67] Ibid., h. 33-46

restrictions on prohibitions and orders, including those who violate, Islam has determined that the sanctions for violations are left to the leader (*ta'zir*). The scholars agree that sanctions must be based on reasoning (*ra'yu*) and analogy (*qiyas*), and must be based on the provisions of the text, as Allah says, "Fight against them ˹if they persecute you˺ until there is no more persecution, and ˹your˺ devotion will be to Allah ˹alone˺. If they stop ˹persecuting you˺, let there be no hostility except against the aggressors." (Al-Baqarah, 193).

"So, if anyone attacks you, retaliate in the same manner." (Al-Baqarah, 194).

Therefore, a sanction or punishment is imposed on the wrongdoer, and the punishment must be commensurate with the offense committed, no more. This shows that even in Islam there are guarantees for individual freedom and security stability.

2) Right to Reside

This freedom is also guaranteed in Islam. In the Qur'an there is no rule that states it is permissible to expel people, except as a punishment for those who fight against the religion of Allah and His Messenger, and do mischief on earth. Allah SWT said, "Indeed, the penalty for those who wage war against Allah and His Messenger and spread mischief in the land is death,

crucifixion, cutting off their hands and feet on opposite sides, or exile from the land. This ˹penalty˺ is a disgrace for them in this world, and they will suffer a tremendous punishment in the Hereafter." (Al-Maidah, 33).

3) Right to Wealth

Islam has recognized the freedom of ownership and guarantees with several laws, such as, "Indeed everything that is prescribed by Allah SWT in distributing something and using it, both in buying and selling, *ijarah, qirad,* and others." Islam makes the basis for the freedom of people who own these goods willingly and choose.

4) Right to Religion

In freedom of belief, Islam also guarantees this, even forbids anyone from destroying his creed freely even if it is based on reason and the right theory. Because Islam makes the basis of theology and the basis of faith as a discussion and study, there is no element of coercion and taqlid. In the Qur'an it can also be found that it is not permissible to force a person to choose his belief, as Allah says below,

"Let there be no compulsion in religion, for the truth stands out clearly from falsehood. So whoever renounces false gods and believes in Allah has certainly grasped the firmest, unfailing hand-hold. And Allah is All-Hearing, All-Knowing." (Al-

Baqarah, 256).

5) Right to Think

Basically, the attitude of Islam to a problem, whether it involves religion or not, is all based on a logical theme. If it concerns something that is not in the realm other than religion, then everyone may express his opinion according to his own thoughts and explain his needs easily. However, if the problem that comes up is related to religious matters, then every individual may ijtihad and argue with his *ijtihad* as long as there is no text, and also that *ra'yu* is within the limits of the basics of religion and the correct text.

6) Right to Study

Islam emphasizes that seeking legal knowledge is obligatory for every Muslim and Muslim woman, because people with knowledge are not the same as people without knowledge. Islam does not limit certain sciences to be demanded, as long as they are those that deliver the benefit of the world and religion.

b) The Principle of Equality

Equality is one of the most essential symbols of Islam. The texts of the Qur'an and Islamic law have determined the perfection of the characteristics of these principles. This is because Islam does not differentiate between each other in obeying the laws and regulations.

Muslim leaders and rulers and each individual has the same position. Prophet Muhammad SAW said, "There is no advantage for the Arabs over foreigners except *taqwa*." This principle is also strengthened by the word of Allah,

> "The believers are but one brotherhood, so make peace between your brothers. And be mindful of Allah so you may be shown mercy." (Al-Hujurat, 10).

The scope of the dusturiyah siyasa itself covers a very broad field of life in human life. In general, this discipline will discuss the following matters.[68]

a) Issues and scope of discussion;
b) The issue of Imamate, its rights and obligations;
c) The question of the people, their status and rights;
d) The issue of bai'at;
e) The issue of waliyul ahdi;
f) Representative issues;
g) The problem of ahlul halli wal aqdi;
h) The question of wizarah and its comparison;

This shows that the dusturiyah siyasa does regulate many things about how a country works. This means that even in Islam, the state also has its rules

[68] Khallaf, *Politik Hukum Islam,* 47.

and does not run the government arbitrarily, because in it there are human lives that need to be protected and to achieve the welfare of the people together.

In addition, there are also those who argue that studies in the field of *siyasa dusturiyah* are divided into four types;[69]

a) Constitution

In the constitution, the sources and methods of legislation in a country are discussed, both in the form of material sources, historical sources, statutory sources and interpretations. The source material is the subject matter of the constitution. The core source of this constitution is the regulation between the government and the people.

b) Legislation

Legislation or legislative power, also called *al-sultah al-tasyri'iyyah;* the meaning is the power of the Islamic government in forming and enacting the law. This power is one of the authorities or powers of the Islamic government in regulating state problems. Besides that, there are other powers such as *al-sulthah al-tanfidziyyah* (executive power) and *al-sulthah al-qadhaiyyah* (judicial power).

The elements of legislation in *fiqh siyasah* can be formulated as follows; a). The government as the holder of the power to

[69] Fatmawati, Fiqh Siyasah, (Makassar: UIN Alauddin Makassar, 2015), 64.

determine the law to be enforced in an Islamic society; b). The Islamic community will carry it out; c). Contents of regulations or laws that are in accordance with the basic values of Islamic law.

c) Ummah

In the Islamic concept, the *ummah* is defined in four ways; a) Nation, people, people who are united on the basis of faith/word of God; b) Adherents of a religion or followers of the Prophet; c) A large audience; and d) General, all mankind.

Western Orientalists consider the word *ummah* to have no equivalent words, neither nation-state is more similar to community (community). However, Abdul Rasyid Meton, a professor from Malaysia, still thinks that the community and the *ummah* are not the same. Community is a communal group of people who have similarities in kinship, ethnicity, culture, region and nation, while the *ummah* applies universally based on religious equality, so that it penetrates race, ethnicity, language and geographical boundaries. *Ummah* is actualized through ideological similarities that are based on the Oneness of Allah which is directed at achieving happiness in the world and the hereafter.

d) Shura and Democracy

The word shura comes from the root word *syawara-*

musyawaratan, which means removing honey from the beehive. Then in Indonesian terms it is called deliberation. This means that everything that is taken/issued from others (in the negotiating forum) for the sake of obtaining good. The format of the deliberation and its technical objects are left to the Muslims to manipulate it based on their interests and needs. As for the ethics of deliberation when guided by the QS. Ali-'Imran [3]:159 can be concluded; a) being gentle; b) easy to forgive if there are differences in arguments that are equally strong; and c) trust in Allah. The final results of the deliberation are then applied in the form of actions, which are carried out optimally, while the results are left to the power of Allah. The way of deliberation is not determined in detail by Allah. It is completely left to man. Meanwhile, in making decisions, it does not mean that the majority vote must be followed. Sometimes decisions are made based on a minority vote, if it turns out that the minority opinion is more logical and better than the majority vote.

Democracy comes from the Greek where *demos* means people, and *kratein* means government. Then it is interpreted that the highest power is held by the people. Abraham Lincoln further defined democracy as a form of power that comes from the people, by the people and for the people. This feature requires

the participation of the people to decide problems and control the government in power. According to Sadek J. Sulaiman democracy has the principle of equality between all human beings, there is no discrimination based on race, ethnicity, gender, religion or social status.

CHAPTER III

DISCUSSION OF RESEARCH FINDINGS

A. Juridical Analysis of Article 40 Paragraph (2) of Information and Electronic Transactions Act in Cases of Internet Blocking by the Government During Demonstrations in Papua

1. Chronology

Actions (handeling) carried out by the government or authorities as state administrators can certainly meet the interests of citizens. In this case, of course, there are things that can intersect between the public interest and the private interest of the community as legal subjects in civil law and public law. There are times when actions taken (or not taken) by the government can cause harm to the community, whether they are done intentionally or not.[70]

One example of a case where the government's actions are detrimental to the community is the internet blocking action carried out by the government during demonstrations in Papua in 2019. In terminology, internet blocking comes from two words, namely blocking and internet. According to the KBBI, blocking has a word origin which means to freeze something. On the other hand, according to the KBBI, the internet is an electronic communication network that connects organized computer networks around the world via telephone or satellite. So, internet blocking can be concluded as the act of freezing the internet network as a means of information and communication. Internet blocking means stopping or freezing the

[70] Bimasakti, *Onrechmatig Overheidsdaad oleh Pemerintah Dari Sudut Pandang Undang-Undang Administrasi Pemerintahan*, 266.

internet network so as to make everything that requires an internet network inaccessible.

The chronology of the act of blocking the internet in Papua begins with the outbreak of demonstrations in several areas in Papua and West Papua in August 2019. The demonstrations allegedly occurred due to alleged acts of racism between Papuan students in Surabaya.[71] The act of racism that has already spread through social media has finally triggered demonstrations in several areas in Papua and West Papua. Unfortunately, the action was marred by riots, road blockades, and arson which resulted in the local parliament building, correctional institutions, a number of places of business, public facilities and vehicles being damaged in the vicinity of the incident location. According to data released by CNN Indonesia in June 2020, the government through the Ministry of Communication and Information of the Republic of Indonesia (Kemkominfo) took a throttling policy on August 19, 2019, which was announced through Press Release No. 154/HM/KOMINFO/08/2019 concerning Internet Service Slowdown in Papua and West Papua. The internet slowdown was followed by restrictions on internet access (blocking) in the Papua region two days later or on August 21 by only going through Siaran Pers Nomor 155/HM/KOMINFO/08/2019 concerning Blocking Internet Services in Papua and West Papua. The press release stated that in order to speed up the process of restoring the security and order situation in Papua and its surroundings, after coordinating with law enforcement officials and related agencies, the Indonesian Ministry of Communication and Information has decided to temporarily block

[71] Dewanti, *Pembatasan Internet Dalam Mengatasi Konflik di Papua*, 25.

Telecommunication Data services, starting Wednesday (21/8) until the situation is over. The land of Papua is back to being conducive and normal.

In a statement from the Ministry of Communication and Information on its website, it stated that the temporary blocking of internet access in Papua was aimed at preventing the widespread spread of hoaxes that could trigger actions. But unfortunately in the press release, the blocking was not accompanied by a time limit, so it did not provide clarity to the people of Papua and West Papua until when their internet network would be suspended. Then on August 23, 2019, the Ministry of Communication and Information through Siaran Pers Nomor 159/HM/KOMINFO/08/2019 concerning Blocking of Data Services in Papua and West Papua said that the blocking of data or internet services will continue until the situation and condition of the Land of Papua is completely normal. Through the press release, it was also stated that the internet blocking action was still ongoing based on the evaluation carried out by the Ministry of Communication and Informatics with law enforcement officials and related agencies on Friday, August 23, 2019 at 16:00.

The Ministry of Communications and Information Technology provides its response regarding the legal basis for blocking internet in Papua, which is intended to protect the public interest. The government is of the opinion that if the blocking is carried out by referring to Article 40 paragraph (2) of Information and Electronic Transactions Act (UU ITE). Article 40 paragraph (2) of Information and Electronic Transactions Act mandates that the government protects the public interest from all kinds of disturbances as a result of misuse of Electronic

Information and Electronic Transactions that disrupt public order, in accordance with the provisions of the Laws and Regulations.

Internet blocking in the Papua region causes people in Papua to be unable to communicate and obtain information through cyberspace. A news report released on August 31, 2019 by one of the mass media, namely the BBC, explained that internet data services in Papua were cut off.[72] The BBC also covered the statements of several people working in Papua at the time of the demonstration, one of which was Syaifullah who said that if he left his office, it would be the same as losing communication with the outside world because he could only connect to the outside world using the office wifi. it data service is blocked. Another statement was also given by Rio who admitted that it was difficult to communicate, because the telephone service was cut off when he left his office. On the other hand, a journalist named Lucky Ireeuw from the Cendrawasih Post also said that he could not upload the news he had received in the field because of the blocking of access to internet data services. In the same news headline, the Minister of Communication and Information, Rudiantara, stated that his party only limited data services, not voice services. The Coordinating Minister for Political, Legal and Security Affairs, Wiranto, also voiced that the policy of blocking internet access was not arbitrary, but to protect the country, so it is okay to sacrifice 2-3 days not to see pictures.

[72] "Papua: Akses Internet Diblokir Dewan Pers Sebut 'Lebih Berbahaya Dari Hoaks'', *BBC*, 31 August 2019, accessed on 2 June 2022, https://www.bbc.com/indonesia/indonesia-49525012/

The internet restrictions also prevent the public from accessing internet-based public services. As reported by National Tempo on August 26, 2019[73], the Director of SAFEnet, Damar Junianto, stated that the public cannot access BPJS services because they need data services. Damar also stated that online MSMEs could not carry out their usual activities because of network constraints. In addition, a news report was released by Kompas on August 26, 2019 which stated that the blocking of the Telkom Group data network in Papua Province had an impact on various economic sectors, one of which was the failure of the auction of a project worth 700 billion due to the blocking of data services.[74] In fact, in a journal written by Noviyanti, et al, Restrictions on Internet Access by the Government during Protests and Riots in Papua and West Papua Viewed from a Human Rights Perspective, explains that top10vpn.com has conducted research to find out how long the internet blocking was carried out in Indonesia. Indonesia caused a total loss of 187.7 million US dollars, which if converted into rupiah amounted to Rp. 2.5 trillion. In this research report, it was also found that Indonesia had blocked the internet for 338 hours, which was only valid in Papua and West Papua.[75]

The case of blocking internet access by the Ministry of Communication and Information in Papua in 2019 has been submitted to the State Administrative High

[73] Juli Hantoro, "Pemblokiran Internet di Papua, SAFEnet: Layanan Publik Terhambat", *Nasional Tempo,* 26 August 2019, accessed on 2 June 2022, https://nasional.tempo.co/read/1240364/pemblokiran-internet-di-papua-safenet-layanan-publik-terhambat/

[74] "Layanan Data di Papua Diblokir, Proyek 700 Miliar Gagal Dilelang, *Kompas,* 26 August 2019, accessed on 3 June 2022, https://regional.kompas.com/read/2019/08/26/14384131/layanan-data-di-papua-diblokir-proyek-rp-700-miliar-gagal-dilelang/

[75] Noviyanti, Noval, dan Jamaludin, Pembatasan Akses Internet oleh Pemerintah saat Terjadi Unjuk Rasa dan Kerusuhan di Papua dan Papua Barat ditinjau dalam Perspektif Hak Asasi Manusia, 43.

Court. Through the Putusan Nomor 230/G/TF/2019/PTUN-JKT which was read out on June 3, 2020, the Jakarta State Administrative Court (PTUN) granted a lawsuit by a number of civil society organizations against the government's actions to slow down and cut off internet access in Papua which was carried out in August last 2019. In its decision, the Assembly concluded that restricting internet access in Papua is an act against the law.

Among the people, the policies taken by the government also trigger pros and cons. Several officials and figures have voiced their voice in responding to this policy. The Indonesian Police (Suara.com, September 4, 2019) considers that internet restrictions need to be carried out so as not to aggravate the situation. According to the then Vice President of the Republic of Indonesia, Jusuf Kalla, internet blocking was needed to reduce the influence of hoaxes on social media. Meanwhile, according to the Ombudsman, the internet restriction policy has harmed the public because it interferes with the public service process (ombudsman.go.id, September 1, 2019). Even according to the Deputy Speaker of the DPR, Fahri Hamzah, blocking the internet actually violates human rights, because it robs people of their freedom to communicate (Republika, 28 August 2019). In addition, on 3 September 2019, the Director of SAFEnet, Damar Juniarto at an event held by the Indonesian Legal Aid Foundation (YLBHI) commented on the government's actions to block internet access in the Papua area.[76]

[76] Elvita WW, "Pembatasan Akses Internet: Kebijakan, Batasan, dan Dampaknya", YLBHI, 3 September 2019, accessed on 3 June 2022, https://ylbhi.or.id/informasi/kegiatan/pembatasan-akses-internet-kebijakan-batasan-dan-dampaknya/

2. Juridical Analysis of Article 40 Paragraph (2) of Information and Electronic Transactions on Papua's Internet Blocking by The Government

In general, the purpose of the formation of legislation is to regulate and organize life in a country so that the people governed by the law obtain certainty, benefit and justice in the life of the state and society. In the study of *siyasa dusturiyah*, it is explained that the statutory system must contain the principle of guaranteeing individual rights and the principle of equality. Therefore, one of the main pillars in the governance of a legal state is the formation of good, harmonious, and easy-to-implement laws and regulations in society.[77] Referring to this goal, the legislation must indeed be established in accordance with the needs of the community and keep up with the times. Legislation in a state of law is also very much needed to be a provision in how the government runs its government.

Article 6 of Law Number 12 of 2011 concerning the Establishment of Legislations states that the content of laws and regulations must reflect the principles; a) shelter; b) humanity; c) nationality; d) kinship; e) archipelago; f) Bhinneka Tunggal Ika; g) justice; h) equality of position in law and government; i) order and legal certainty; and/or j) balance and harmony.

Indonesia is a country with a concept where everything that regulates the life of the nation and state must become a written law before it is implemented. Legislation as written law is expected to provide legal certainty in its

[77] Jalaludin, Hakikat dan Fungsi Peraturan Perundang-Undangan Sebagai Batu Uji Kritis Terhadap Gagasan Pembentukan Perda Yang Baik, *Jurnal Aktualita*, No.3(2011), 2.

implementation. The role of legislation is increasingly important as a demand for the principle of legality as one of the characteristics of the rule of law.

Regarding internet blocking in Papua in 2019, the government through the Ministry of Communication and Informatics stated that the legal standing for their actions was Article 40 paragraph (2) of Law Number 19 of 2016 concerning Information and Electronic Transactions.[78] At the same time, the government also explained that the purpose of the blocking was to protect the public interest and defuse the situation in Papua due to large-scale demonstrations due to the spread of hoax news on the internet. Article 40 paragraph (2) of the Informations and Electronic Transactions Act mandates that the government protect the public interest from all kinds of disturbances as a result of the misuse of Electronic Information and Electronic Transactions that disrupt public order, in accordance with the provisions of laws and regulations.

Reviewing the subtance of the article, it shows that the government has a responsibility to protect the public interest in this case related to the misuse of electronic information and electronic transactions. So that if there is a threat that will disrupt public order in the form of digital content, the government must take action to protect the interests of the community together, but with the provisions of laws and regulations.

Digital content that is considered to threaten public order is also explained in General Elucidation Number 1 Paragraph 9 of the Informations and Electronic

[78] Dewanti, Pembatasan Internet Dalam Mengatasi Konflik di Papua, 27.

Transactions Act, *the virtuality characteristics of cyberspace allow illegal content such as Information and/or Electronic Documents that have content that violates decency, gambling, insults or defamation. extortion and/or threats, spreading false and misleading news so as to result in consumer losses in Electronic Transactions, as well as acts of spreading hatred or hostility based on ethnicity, religion, race, and class, and sending threats of violence or intimidation aimed at personally may accessed, distributed, transmitted, copied, stored for re-dissemination from anywhere and anytime. In order to protect the public interest from all kinds of disturbances as a result of the misuse of Electronic Information and Electronic Transactions, it is necessary to affirm the role of the Government in preventing the dissemination of illegal content by taking action to cut off access to Electronic Information and/or Electronic Documents that have content that violates the law so that they cannot be accessed. from the jurisdiction of Indonesia and required authority for investigators to request information contained in the Electronic System Operator for the purposes of law enforcement of criminal acts in the field of Information Technology and Electronic Transactions.*

The internet blocking case in Papua basically has the aim of preventing the circulation of hoax information that can disrupt national security stability, so that internet blocking is considered by the government as a way so that the Papuan people cannot access the hoax news.[79] If it is observed from the government's goal of blocking the internet, this is indeed done to protect the public interest, although

[79] Yusuf Syibly Ramadhan and Adis Imam Munandar, Analisis Kebijakan Pembatasan Akses Internet Di Wilayah Papua Tahun 2019 Dalam Perspektif Keamanan Nasional, *Jurnal Kebijakan dan Manjemen Publik*, No. 1(2021), 50.

this public interest is limited to the protected areas of Papua and West Papua. The facts on the ground at the time the demonstration took place in Papua show how chaotic the situation in the cities there was to the destruction of several public facilities.

Article 40 paragraph (2) of the Informations and Electronic Transactions Act mandates that the government protects the public interest through the provisions of laws and regulations. However, regarding internet blocking itself, in reality it still does not have its own legal standing in our country. The content of Article 40 paragraph (2) is not sufficient if it is not accompanied by the provisions of the laws and regulations governing the procedures for blocking the internet. As a state of law as stated in Article 1 paragraph (3), all government actions must adhere to the principle of legality or government based on law. In addition, the legal basis used to act must also be in accordance with what the government wants to do. Article 40 paragraph (2) is also interrelated with the following articles, namely Article 40 paragraph (2a) and Article 40 paragraph (2b).

In Article 40 paragraph (2a) and paragraph (2b) it is stated that the government is obliged to prevent the dissemination and use of Electronic Information and/or Electronic Documents that have prohibited contents in accordance with the provisions of laws and regulations. Meanwhile, Article 40 paragraph (2b) states that in carrying out the prevention as referred to in paragraph (2a), the Government is authorized to terminate access and/or order Electronic System Operators to terminate access to Electronic Information and/or Electronic Documents containing breaking the law. In line with this, in the Decision of the

Constitutional Court, Putusan Nomor 81/PUU-XVIII/2020 concerning Article 40 paragraph (2b) it is stated that the article is in accordance with Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

The two articles require the government to take precautions against content that violates the provisions of laws and regulations that are spread in cyberspace. The government also has the authority to terminate access or order people who operate the electronic system to terminate access to negatively charged content that is considered to violate legal norms. So, in simple terms it can be said that the government may only block or cut off access to digital content that is harmful to the public, not cut off data services or block internet networks if the aim is to prevent the spread of hoax news based on Article 40 Paragraph (2) of the Informations and Electronic Transactions Act.

The statement about blocking the internet at that time was not in accordance with the procedure if the riots in Papua were to be categorized as an emergency. Internet blocking by the government does not meet the main requirements in Article 2 paragraph (2) of Law Number 23 of 1959/Government Regulation in Lieu of Law Number 23 of 1959 concerning Determination of Dangerous Conditions, namely the announcement of a statement or elimination of a state of danger by the President. In fact, the act of slowing down or throttling to blocking data services is only broadcast through the Ministry of Communication and Information Technology (KOMINFO) Press Release.

Blocking the internet is an act that can take away the rights of individuals, as well as groups, which in this case are the people of Papua. Internet blocking in the Papua region causes people in Papua to be unable to communicate and obtain information through cyberspace. The internet restrictions also make internet-based public services in Papua and West Papua experiencing problems in their services.[80] This shows that there is injustice in the enforcement of the right to information and communication. The steps taken by the government should focus on blocking internet content only, so that it will not affect other fields that require the use of data services. If we look at Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia, Article 73 of Law Number 39 of 1999 concerning Human Rights, and Article 19 paragraph (3) of the International Covenant on Civil and Political Rights, Human rights are needed proportionally in a democratic state.

Government Regulation Number 71 of 2019 (PP Number 71 of 2019) concerning the Implementation of Electronic Systems and Transactions, we can find the contents of the same article as Article 40 paragraph (2) of the Informations and Electronic Transactions Act, which is contained in Article 90 letter b of Government Regulation Number 71 of 2019 which mandates that the government protect the public interest from all things. types of disturbances as a result of misuse of Electronic Information and Electronic Transactions that disrupt public order, in accordance with the provisions of the Legislation. Then, Article 94 of the Government Regulation also explains the role of the government to protect the

[80] Noviyanti, Noval, dan Jamaludin, Pembatasan Akses Internet oleh Pemerintah saat Terjadi Unjuk Rasa dan Kerusuhan di Papua dan Papua Barat ditinjau dalam Perspektif Hak Asasi Manusia, 43.

public interest in relation to Article 90 letter b, namely; a) the establishment of a national cyber security strategy that is part of the national security strategy, including the development of a cybersecurity culture; b) setting information security standards; c) arrangements for the protection of vital information infrastructure; d) regulation of risk management of Electronic System operation; e) regulation of human resources in the implementation of Electronic System protection; f) fostering and supervising the protection of vital information infrastructure; g) fostering and supervising risk management for Electronic System operations; h) guidance and supervision of human resources in the implementation of Electronic System protection; i) implementation of Electronic Information security; j) organizing information security incident handling; k) implementation of emergency response management; and l) other functions necessary to protect the public interest from any kind of interference.

In fact, internet blocking is related to human rights restrictions. Thus, the limitation of the right to information and the right to communicate requires a regulation regulated in the law. Several laws and regulations in Indonesia explain the conditions for the existence of restrictions on human rights themselves, as follows.

a) If we refer to Article 28J of the 1945 Constitution of the Republic of Indonesia, there are 3 conditions for limiting human rights, namely; a) Stipulated by law; b) Aims to ensure the recognition and respect for the rights and freedoms of others; c) Fulfilling just demands in accordance with

considerations of morals, religious values, security, and public order in a democratic society.

b) In addition to being regulated in the constitution, the requirements for limiting human rights are also regulated in other laws and regulations, such as in Article 21 and Article 22 paragraph 2 of the ICCPR which emphasizes that the conditions for limiting human rights are; a) Determined by law; b) Necessary in a democratic society; c) In the interest of national security, security and public order; d) Maintain public health and morals or protect the rights and freedoms of others.

c) Beside from the constitution and the ICCPR, in Article 70 of Law no. 39 of 1999 concerning Human Rights also allows for restrictions on human rights, as long as they fulfill 3 principles in human rights instruments; a) It is carried out by law; b) Solely to guarantee the recognition and respect for human rights and the freedom of others; and c) Respect for decency, public order and the interests of the nation.

Apart from that, restrictions and reductions in rights are also regulated in the Siracusa Principles. The Siracusa principle states that limiting rights should not injure the basis of rights. Any restrictive arrangements need to be written with the aim of protecting rights and must be strictly enforced. The conditions for the limitation and reduction of rights are as follows.[81]

[81] The Siracusa Principles, 7-9.

a) Prescribed by Law; no limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied. Laws limitations shall not be arbitrary or unreasonable, and legal rules shall be clear and accessible to everyone.
b) In a democratic society; the burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.
c) Public order; respect for human rights is part of public order and public order shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
d) Public health; in this case public health may be invoked as a ground for limiting certain rights in order to allow a state to take the population or individual members of the population.
e) Public morals; a state shall demonstrate that the limations in question is essential to the maintenance of respect for fundamental values of the community.
f) National security; this should be taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force, but national security cannot be used as a reason for invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

g) Public Safety; the need to protect public safety can justify limitations provided by law.

h) Rights and freedoms of others or the rights or reputations of others; the scope of the rights and freedoms of others that may act as a limitation upon rights in the Convenant extends beyond the rights and freedoms recognized in the Convenant.

Looking at the conditions and limitations or reductions in human rights themselves, the initial condition is that the limitation or reduction of these human rights must be regulated in law, besides that these restrictions must be needed in a democratic country and must protect the freedom of the rights of others. However, the internet blocking action carried out by the government only announced through a press release by the Ministry of Communication and Information has been procedurally flawed and also does not take into account the basic rights of other people who need data services in their daily activities.

Article 40 paragraph (2) of the Informations and Electronic Transactions Act still does not have an explanatory regulation for the procedures for how a threat that disrupts public order through information and electronic transactions can be carried out. Also, in Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions, does not at all discuss the blocking of internet networks.

Article 40 paragraph (2) of the Informations and Electronic Transactions Act when viewed from its substance can be used as a legal standing for internet

blocking actions, as long as the legalization and procedures for internet blocking actions have also been regulated in laws and regulations. However, in reality, if we examine further and follow the article that follows, the article is an article that is intended only for digital content that disturbs public order, there is not a single statutory regulation that regulates internet blocking. This is with the exception of Law Number 23 of 1959 concerning the Determination of Dangerous Conditions where in Putusan Nomor 230/G/TF/2019/PTUN-JKT, the panel of judges stated that the act of blocking the internet by cutting off data services can be justified if it is in accordance with the procedure, namely the existence of announcement of a statement or deletion by the President if Papua and West Papua are in a state of emergency that could threaten national security or public order.

The government's action to block the internet network is theoretically a failure of the legislation set by the government. Lon F. Fuller explained that one of the inadequacies of legislation to be called law is if the legal product fails to harmonize the rules with the practice of its application, therefore there must be a match between the regulations promulgated and their daily implementation. Article 40 paragraph (2) of the Informations and Electronic Transactions Act if it is associated with blocking internet networks shows a legal discrepancy with reality. However, Article 40 paragraph (2) of the Informations and Electronic Transactions Act if it stands alone is in accordance with the principles of establishing legislation and does not conflict with the constitution.

2. Internet Blocking by the Government During Demonstration in Papua in the Perspective of Siyasah Duturiyah

The administration of government has regulated its provisions in Law Number 34 of 2014 concerning Government Administration. The law regulates the implementation of government duties, provides protection to citizens and guarantees the basic rights of the community. In fact, having a state by adhering to religious principles is something that is guaranteed by the constitution in Article 29 paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that the State is based on the One Godhead and the State guarantees the independence of every citizen to embrace his religion. each and worship according to his religion and belief.

Article 29 of the 1945 Constitution of the Republic of Indonesia provides freedom or guarantees for every citizen to worship and adhere to their respective beliefs, including for citizens who have positions or authorities to run the government. For officials who are Muslim, then in running the government itself, they must not violate the Sharia or general principles of the Islamic religion.

In the political and constitutional system in Islamic law, there are several principles in running the government, one of which is the principle of upholding law and justice as in Q.S An-Nisa verse 58, 105, 153, and Al-Maidah verse 8, as well as establishing the principle of human rights.[82] This is in line with the mandate of Article 1 paragraph (3) of the State constitution that the State of Indonesia is a

[82] Pulungan, *Fikih Siyasah*, 5.

state of law. All state life must be carried out in accordance with the laws and regulations. It has even been stated in Article 5 of Law Number 30 of 2014 concerning Government Administration which states that the administration of government must be based on the principle of impartiality. That principle requires Government in determining and/or take decisions and/or actions with consider the interests of the parties as a whole and non-discriminatory. The government's action is also an act of exceeding the authority as stated in Article 18 paragraph 2 letter b of Law Number 30 of 2014 because the action is contrary to the authority given in the provisions of the legislation.

In Islamic leadership, there are 5 (five) characteristics of the Prophet Muhammad which are used as guidelines in running the government by later leaders, one of which is trust or *amanah*.[83] A leader must be honest and trustworthy, and be able to take responsibility for carrying out what he is told to do. This shows that a leader must not do anything beyond what has been ordered to him, and must fulfill or obey all things that have become his responsibility. In the concept of good governance itself, trust can be paralleled with the principle of accountability. The principle of accountability itself according to Law Number 28 of 1999 concerning the Implementation of a Clean and Free State from Corruption, Collusion, and Nepotism are as follows. The principle that determines that every activity and the final result of the activities of a State Organizer must be accountable to the community or the people as the holder of the highest sovereignty of the state in accordance with the provisions of the applicable laws and regulations.

[83] Muhammadong, *Good Governance dalam Perspektif Hukum Islam*, 67.

The act of blocking the internet is a policy taken by the government to overcome a problem. Policy itself is something that is taken or not taken by the government. A policy made by the government must of course be formulated in a correct, precise, and appropriate direction.[84] However, this policy is one of the government's actions that are not in accordance with the principles of the rule of law, so that the policy is not correct and not in accordance with applicable legal norms. The blocking was indeed based on a clear legal basis, but the government acted differently from what was ordered in the article. In Article 40 paragraph (2) of the Information and Electronic Transactions, after being analyzed, it contains the authority given to the government to maintain public order and Article 40 paragraph (2a) and (2b) as a derivative article explains that the government is only authorized to terminate access to illegal content, not to cut off data services or block internet. As a result, the termination of the data service has robbed all people of Papua of their right to information and communication.

The termination of data services as part of the internet blocking by the government can actually be justified when the government relies on Law Number 23 of 1959/Prp Number 23 of 1959 concerning the Determination of Dangerous Conditions. However, the government did not comply with the procedure for determining the state of danger in which the state of danger had to be announced by the President of the Republic of Indonesia a statement or abolition of the state of danger. In the case of internet blocking in Papua, the government only disseminated the information through the KOMINFO Press Release.

[84] William Dunn, *Pengantar Analisis Kebijakan Publik*, 134.

Internet blocking by the government can be regarded as the government's failure to enforce the law where it is prescribed by Islam as a principle in the political and constitutional system. As a result of this action, the right to information and communication of the Papuan people must be taken away without going through a clear procedure. The government should be able to carry out its responsibilities in accordance with what is ordered or mandated in carrying out its duties. However, in this case the government has acted beyond what has been ordered.

This act of blocking the internet by the government has also injured the human rights of citizens who need data services in their daily activities. For example, journalists find it very difficult to upload their news on their internet pages, and they also have difficulty communicating due to data service interruptions. Several public services used by the community have also stalled, for example access to BPJS. From the business world too, for example, the UMKM which need data services to sell are also disadvantaged by the government's action. Whereas in the Islamic political and constitutional system there is a principle of human rights which means that the State must be able to protect the basic rights of its citizens, including the right to information and communication.

So, based on the description above, the government's actions are actually in accordance with what is mandated by Islamic law, where the leader must be able to maintain the benefit of the people. The act of blocking the internet which aims to normalize the violent atmosphere in Papua is a noble goal. However, in achieving a goal, the government must not be arbitrary and must follow the procedures that

have been regulated. The internet blocking action by the government has harmed the community in several fields, even hampering the daily life of the Papuan people. Therefore, the act of blocking the internet is a violation of the law or *onrechtmatige overheidsdaad* because the government has acted differently than implementing legal regulations.

CHAPTER IV

CLOSING

A. Closing

Based on the previous descriptions, 2 (two) conclusions can be drawn as follows.

1. Article 40 paragraph (2) of the Information and Electronic Transactions Act provides a mandate for the government to protect the public interest which causes disturbances related to the misuse of electronic information and electronic transactions. The article is still not sufficient to serve as a guide in blocking the internet which, if implemented, will reduce the constitutional rights of citizens protected by the constitution. In carrying out restrictions on human rights, the procedures and procedures for these restrictions must be regulated in advance by laws and regulations and are required in a democratic state atmosphere. In Article 40 paragraph (2a) and paragraph (2b) as a derivative of Article 40 of the Information and Electronic Transactions Act, it also does not explain at all how the procedure for blocking the internet network should be implemented. The two derivative articles contain the blocking of internet content that violates the law by cutting off access to the content, not cutting off access to the internet network or data services.
2. The internet blocking carried out by the government in Papua during demonstrations violated the principles in the political and constitutional system in Islam, namely the principle of guaranteeing human rights. The

government has also failed to enforce the law, which is what Islamic law requires, because it has acted differently from what was ordered in Article 40 paragraph (2) of the Information and Electronic Transactions Act. In Islam, one of the conditions for being a state is the level of trustworthy government officials, meaning that they are honest, trustworthy, and responsible in carrying out their duties. However, the act of blocking the internet is an act that is procedurally flawed, thus making the government commit acts against the law.

B. Suggestions

1. For future improvements to Law Number 19 of 2016 concerning Electronic Information and Transactions, precisely in Article 40 paragraph (2), the authors suggest that the regulator provides requirements for restrictions on human rights related to electronic information and transactions in that article and provides clarity regarding indicators of content that are considered harmful to public order so that human rights restrictions are needed.
2. The way government behaving must remain guided by the general principles of good governance and continue to enforce the law in accordance with the substance of the legal product. It is hoped that in the future the Government in making policies must be able to put forward the principle of proportionality so that basic rights are not injured..

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