



THE GIRL, WHO CRIED WOLF, JAILED!

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Abstract

The development in the usage of information technology nowadays is not only for positive activities, but also for criminal activities. One of the crimes having massive impact is by using information and technology media to spread fake news, false information, insults, or defamation. This is proven to have caused problems and challenges in law enforcement, especially for law enforcers. The findings of this study conclude, that criminal law policies related to the regulations on spreading misinformation are still very limited and irrelevant to be applied to the act of spreading misinformation through information technology. The existence of limited rules, results in law enforcement practices that tend to be forced and expanded, thus resulting in criminal law enforcement which is discriminative in nature, not in accordance with the objectives of law enforcement to create legal certainty, justice, and benefits the society is seeking.

Keyword: criminal acts, information technology, and spreading fake information.

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1. INTRODUCTION

Without doubt, the dynamic development of information technologies have been bringing immense impacts on people's lives, both positive and negative. The positive impact of the development is providing conveniences in various life activities. Utilization of information technology have been increasing the effectiveness and efficiency of community member's activities and formed a new public space for people to communicate without being limited by space and time. The negative impact of the development of information technology, namely the birth of crimes in the field of information technology known as cybercrime, as results of the misuse of information technology by irresponsible people. Based on the categorization of cybercrime, crimes in the field of information technology can be in the form of conventional crimes committed using information technology facilities or conventional crimes that adapt to the development of information technology, which in some literature is known as *old wine in new bottles*¹ or *old crimes using new tools*,² or it can be in the form of new crimes that in accordance with the characteristics of information technology, such as: *hacking, cracking, and viruses, or new crimes using new tools*.³

Cybercrimes that fall into the category of conventional crimes using information technology or those that adapt to the development of information technology, such as: spreading false news, insults, or defamation.

¹ Sigid Suseno, *Yurisdiiksi Tindak Pidana Siber*, Bandung: Refika Aditama, 2012, p. 94. Majid Yar, *Cybercrime and Society*, London: SAGE Publication, 2006, p. 11.

² Sigid Suseno, *op.cit.*, p. 95. Ivonne Jewkes, (ed), *Dot.cons Crime, deviance and identity on the Internet*, Devon: William Publishing, 2003, p. 20-21.

³ *Ibid.*, Ivonne Jewkes, (ed), *Dot.cons Crime, Deviance and Identity on the Internet*, Devon: William Publishing, 2003, p. 20-21.

In this current information age, these criminal acts are generally no longer carried out orally, in written forms, or printing, but by sending through electronic/digital information through social media or other information technology media. In Indonesia, criminal acts of defamation and the spread of false news ranked 2nd or 3rd after online frauds for cybercrime cases in Indonesia.⁴ While the results of the Telematics Society surveys in 2018, revealed that 92.40% of the spread of false information was carried out through social media. The forms of information that are often disseminated are in the form of wiring as much as 62.10%, in the form of images as much as 37.50%, and in the form of video as much as 0.040%.⁵ Meanwhile, based on data from the Ministry of Communication and Information, from August 2018 to April 2019, there were 1,731 false information circulating through information technology facilities.

One of the interesting cases related to the spread of false information in Indonesia is the case of Ratna Sarumpaet. This case began with the distribution of a photo of Ratna Sarumpaet herself in a bruised and swollen condition with a caption as a result of being attacked by someone. Ratna is a senior actress who supported the lost presidential candidate and her attacked was politicized as her being beaten because of her political affiliation. Ratna used WhatsApp medium to send her photos to a colleague of the same political affiliation. The photos that were distributed went viral on social media and received various responses from several parties. This prompted the Indonesian National Police to undertake an investigation. Evidence was found that Ratna Sarumpaet's bruises and swellings were the result of plastic surgery and not battery. Ratna Sarumpaet's actions were then deemed as broadcasting or notifying false news by deliberately publishing an uproar which violates Article 14 paragraph (1) of Law Number 1 Year 1946 Concerning Regulation of Criminal Law (hereinafter "**Law 1 of 1946**"). In addition, she was also charged of violating Article 28 paragraph (2) and Article 45 paragraph (2) of Law Number 19 Year 2016 Concerning Amendments to Law Number 11 Year 2008 Concerning Electronics Information and Transactions (hereinafter "**EIT Law**"). The police took the case to the South Jakarta District Court, which rendered its judgement in Judgment Number 203/Pid.SUS/2019/PN.Jkt.Sel. Ratna Sarumpaet was convicted guilty of committing the crime of "deliberately broadcasted false information that caused an uproar among the people" as referred to in Article 14 of the archaic law from 1946. She was sentenced X years of jail, which she appealed to the High Court of Jakarta Province. The Appellate Court denied her appeal and sentenced her X years.

The application of the Article 14 paragraph (1) of Law 1 of 1946 on cases that have characteristics of information technology, such as Ratna Sarumpaet's case, can actually cause legal problems, especially with regards to the crime and the interpretation of the elements of the crime. Obviously, at the time of the formulation of Law Number 1 of 1946, the computer technologies and social media did not exist yet. This can be seen in the formulation of Law 1 of 1946 which uses the nomenclature and formulation of elements using "spreading or broadcasting", "fake news" or "false information", and "uncertain news" or "exaggerated news" or "incomplete news". Meanwhile, the dissemination of false information is carried out by downloading, distributing, or transmitting electronic information through information technology, including through social media. For that matter, the elements of Article 14 paragraph (1) Law 1 of 1946 were irrelevant to be used as a tool for suppressing the dissemination of information carried out through information technology media as happened in the Ratna Sarumpaet's case. The defense had also aptly stated that the act of broadcasting were not done by her, albeit by her colleagues and the news media. A definition of the act of broadcasting is provided in Law Number 32 of 2002 Concerning Broadcasting (hereinafter "**Broadcasting Law**"), which defined broadcasting as an act of wide-spreading content using radio

⁴ Cybercrime Data Year 2015-2019, Directorate of Cybercrime, Head Quarters of the Indonesian National Police, 2020.

⁵ Nurudin, *Media Sosial, Agama baru Masyarakat Milenial*, Bandung: Intrans Publishing, 2018, p. 6. Other opinion explained that the massiveness of fake news spreading, in this digital era is what is referred to as the *post-truth* era. Post-truth era is illustrated as the period that tend to ignore facts. Post-truth is related to nihilism, narcissism, skepticism, and postmodernism, which in principle refusing the universal truth. Reality and truth is only a matter of perception or bound to personal perspective and interpretation. The basic concept in post-truth era, eventually became the foundation of fake news easily disseminated. See U. Ulya, "Post-Truth, Hoaks, dan Religiusitas di Media Sosial," *Fikrah* Vol. 6 (2018).

frequency, cables, or other media to be widely received. There are also debates that her deeds were simply an act of seeking attention, like the well-known fable of the Girl who Cried Wolf. The law enforcement of the example above, of course is not in line with the objectives of the law which should be able to realize justice, certainty, and benefit. In fact, that three objectives of the law are essential goals in the law enforcement.

2. METHODS

This research is legal research using juridical-normative and empirical approach or a multidisciplinary approach. This research use of juridical-normative and empirical approach at the same time, because this study is based on modern legal concepts according to the *sociological jurisprudence*. Furthermore, the concept of development law is also used which views law not only as a set of rules and principles that regulate human life in society, but also includes the institutions and the process needed to create the law in a living and dynamic society.

3. RESULTS AND DISCUSSION

The Policy of Formulating the Regulation of Spread of False Information in the Sphere of Indonesia Criminal Law

The formulation policy as part of penal policy is law enforcement policy *in abstracto* by the legislature. Other policies are application policies, judicial policies, executive policies, or administrative policies. Criminal law policy is a science that examine positive legal regulations, in this case criminal laws and regulations in order to be formulated for more details.⁶ Laws and regulations relating to the regulations of the spread of false information in Indonesian criminal law, among others:

1. Law Number 1 Year 1946 Concerning Regulation of Criminal Law

Law 1 of 1946 historically was intended to be temporary before the formation of the Indonesian Criminal Code or *Kitab Undang-Undang Hukum Pidana* (KUHP). According to Oemar Seno Adjie, Law 1 of 1946 was a preliminary regulation before the enactment of a new and national criminal code. Therefore, its nature is a transitory, which must lead to the new Criminal Code.⁷ The transitory, temporary, dan provisory nature of Law Number 1 of 1946 can be characterized by the provision of its Article V, which is temporary, so that provision in criminal law regulations that contradict the criteria specified in Article V⁸ of Law 1 of 1946 is also temporary in nature.⁹

The provision in Law 1 of 1946 which regulates actions related to the dissemination of false information are Articles 14 and 15. The birth of these articles was based on the sociological condition of the native Indonesian people at that time who were credulous, ready to believe and act based on any news, even though the news was frivolous, lacking of common sense, and absent of credentials. It was believed that such lies can easily trigger riots and uproars, creating problems for the newly born State of Indonesia. Therefore, spreading fake news is punishable according to the provision of the said articles.¹⁰ Moeljatno also explained that the background of having such articles is because people were uneducated, easily influenced, and will believe in anything, including news that is not true. Broadcasted news, no matter how improbable, can stir anxiety that may lead to unwanted things.¹¹ Thus, it can be interpreted that Article 14 and 15 of Law Number 1 of 1946, are intended to prevent

⁶ Penal policy according to Marc Ansel in Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*, 6th Edition, Jakarta: PT Fajar Interpratama Mandiri, 2017, p. 28.

⁷ Oemar Seno Adjie, *Hukum (Acara) Pidana dalam Prospekti*, Jakarta: Erlangga, 1984, p. 154.

⁸ Article V Law 1 of 1946 function as regulator and *totssteen* against the old Criminal Code with the criteria, crimes that are: a. in whole or in part cannot be enacted now; b. not in accordance with Indonesia as an independent state; c. has no significant meaning.

⁹ Oemar Seno Ajie, *Loc.Cit.*

¹⁰ Tristam Pascal Moeliono, *Translation of Several Parts of Preparatory Works of Wetboek van Strafrecht and Wetboek van Strafrecht voor Nederlansch Indie (Dutch Criminal Code and Indonesian Criminal Code)*, Jakarta: Institute for Criminal Justice Reform (ICJR), 2021, p. 610.

¹¹ Moeljatno, *Kejahatan-Kejahatan terhadap Ketertiban Umum (Open Bare Orde)*, Jakarta: Bina Aksara, 1984. p. 132.

the public from being provoked by false news or news that may cause uproars, social unrests, or even riots that will disrupt security, social, economic, and political stability.

The provision of Article 14 and Article 15 of Law 1 of 1946 read as follows:

Article 14

- (1) Any person, spreading fake information or news, intentionally causing public unrest, shall be sentenced with imprisonment of a maximum of ten years.
- (2) Any person who publishes news or rendering information which may cause public unrest, while it can reasonably be suspected that such news or information is fake, shall be sentenced with imprisonment of a maximum of three years.

Article 15

Any person who publishes news that is uncertain, or exaggerated, or incomplete, while he or she understands, or at least reasonably suspected, that such news may cause, or already have caused public unrest, shall be sentenced with imprisonment of a maximum of two years.

Article 14 and Article 15 Law 1 of 1946 formulated the *norm adressat* by using the nomenclature “any person”. The phrase “any person” shows the limitative nature of the perpetrator who can be held criminally accountable. The two articles can only cover individual perpetrators who spread false news. While group of people or corporations are not included in those who can be held criminally accountable. Even though in the current era, perpetrators or disseminators of false information do not rule out the possibility that the crime is conducted by a group of people or corporations. Therefore, in terms of legal subjects, the provision in Article 14 and Article 15 are limitative.

Other aspect that limits Article 14 and Article 15 of Law 1 of 1946 is that it did not accommodate the latest nomenclature that occurred in the digital era of information and communication technology. Especially related to the problem of spreading false information through information technology, namely “electronic information”. The terms or phrases contain in Article 14, namely “fake news” or “fake information” and in Article 15, namely “news that is uncertain” or “news that was exaggerated” or “incomplete news”, has a different meaning from the phrase “fake news” or “fake information”. Etymologically, the term “news” is defined as “story or information”,¹² whereas “information” defined as data that has been processed and cultivated.¹³

Based on the description above, the provision of Article 14 and Article 15 of Law Number 1 of 1946 actually contain limited formulation, thus it is not in accordance with *lex certa* principle. *Lex certa principle* emphasizes that the criminal law rules must be clear without being vagueness (*nullum crimen sine lege stricta*), so that there is no ambiguity in formulation regarding the prohibited acts and criminal sanctions. Unclear or overly complex formulations will only create legal uncertainty and hinder the success of prosecution, which should be providing justice and legal benefits. Therefore, the provision in Article 14 and Article 15 Law Number 1 of 1946 only cover perpetrators who broadcasted false news or notifications, it should not be analogous to being applied in executing the acts of spreading false information.

2. Law Number 32 Year 2002 Concerning Broadcasting

The formation of this law was intended to be industry specific for the mass media broadcasters and journalistic. The majority provision of the Broadcasting Law regulates various broadcasting and journalistic scopes, including with regard to the spread of fake news under the context of journalism. With regard to the regulation of the spread of false information, contain in Article 36 paragraph (5) letter a of the Broadcasting Law. In this article, members of the press are prohibited from broadcasting contents that are slanderous, inciting, misleading, and/or containing false materials.

¹² Tim Penyusun, *Kamus Besar Bahasa Indonesia*, Edisi Kelima, Jakarta: Badan Pengembangan dan Pembinaan Bahasa Kementerian Pendidikan dan Kebudayaan Republik Indonesia, 2016.

¹³*Ibid.* p. 331.

The provision in the Broadcasting Law is limited to conventional mass broadcasts, especially for radio and television. This can be seen in the definition of broadcasting written in Article 1 paragraph 2 Law Number 32 of 2002, broadcasting means activity of broadcasting through a transmitter and/or transmission facilities on land, in the sea, or in space by using radio frequency through air, cable, and/or other media to be received simultaneously and synchronously by the public with a broadcast receiver. Thus, broadcasting carried out through information technology media such as *Youtube*, *Instagram Live*, and the rest are not reachable by the rule. Implicitly, Constitutional Court of the Republic of Indonesia Judgment Number 39/PUU-XVIII/2020, also emphasized that the Broadcasting Law does not apply to internet-based media activity.

3. Law Number 19 Year 2016 Concerning Amendments to Law Number 11 Year 2008 Concerning Electronics Information and Transactions

The EIT Law governs the spread of false information, as provided in its Article 27 paragraph (3) and Article 28. Reviewing from the EIT Law formation, one of the background of the formation of the EIT Law was motivated by the massive development of information technology, which has an impact on the civil aspects. To be more specific, it was enacted to govern *e-commerce* transactions in Indonesia. The borderless nature of *e-commerce* transactions has given rise to various problems that surround it.¹⁴ According to Sigid Suseno, the EIT Law is Indonesia's first cyber law and its establishment aims to provide legal certainty for people who conduct electronics transactions, encourage economics growth, prevent crimes based on information and communication technology, and protect users who use information and communication technology.¹⁵

The provision of Article 27 paragraph (3) of the EIT Law, in fact only criminalizes the act of distributing, transmitting, or making accessible electronic information or electronic document. Albeit the act of making and/or producing the contents of insults, slanderous materials, and/or defamation is not regulated, nor defined as a crime.¹⁶ Likewise, with the formulation in Article 28 paragraph (1) of the EIT Law, actions that are punishable are only the acts of spreading false and misleading news. While the act of making and producing false and misleading news and information are not defined as a crime. This was also emphasized by Eddy Hiariej that the existence of Article 27 and Article 28 are ambiguous and can be multi-interpreted that do not meet the criteria of *lex certa* principle. This gives room for law enforcers to make different interpretations.¹⁷ The existence of this article is contrary to the value of the rule of law which requires clear rules (*the rule must be made according to a set of clear and well-understood rules*). In addition, it is not in line with legal certainty which contains the principles of legality and predictability.

Law Enforcement for Spreading False Information in Indonesia

Law enforcement against the spread of false information in this study analyzes from the perspective of applicative policy, namely the policy implementing criminal law but law enforcement officers from the police to the courts and the factors that influence law enforcement practically. Therefore, in this sub chapter, several related cases have been decided by the court. Central Jakarta District Court Panel of Judges Judgement Number 1249/Pid.Sus/2020/PN.Jkt.Pst, the meaning about phrase "broadcast news or issues notification" is when the information that is disseminated can be seen by people at large, both with and/or without broadcasting equipment. Then related to the element "can cause problem among people", defined as actions that cause chaos, disorder, or commotion. The judge also interpreted the word "can", which is a formal offense or *delik formill* so that the condition for causing trouble among the people is not necessary.

Different things can be seen in the Surabaya District Court Judgement Number 3151/Pid.Sus/2019/PN.Sby which does not specify the legal consideration for the elements in Article

¹⁴ Tim Penyusun, *Naskah Akademik Rancangan Undang-Undang tentang Informasi dan Transaksi Elektronik*, Jakarta: Departemen Komunikasi dan Informatika, 2006, p. 3-4.

¹⁵ Sigid Suseno, *Yurisdiiksi...Op.Cit.*, p. 126.

¹⁶ Sigid Suseno, *Yurisdiiksi...Op.Cit.*, p. 127 and 133.

¹⁷ Statement made in discussion "Review EIT Law with regards to Insult and Slander according to the Criminal Code", Bali, 21 March 2021.

14 and/or Article 15 Law Number. 1 of 1946. The panel of judges only affirmed the element of “deliberately causing trouble among the people”, considered to have been proven because the element in Article 14 paragraph (1) Law Number 1 of 1946 is a formal offense or *delik formil* that focuses on the method or the perpetrators efforts in realizing his will so that it does not require a goal to be achieved. Even though under the judge’s consideration, Article 14 and Article 15 Law Number. 1 of 1946 considered as a *delik formil*, the *mens rea* is not taken into judge consideration. *mens rea* should still be required by seeing that the information disseminated has an element of *intent to harm* or *vice versa*. *Intent to harm* element become important, considering if based on the typology of fake news, it has different dimension. Wardle dan Derakhsan explained that *fake news* which is included as an *intent to harm* category, is for *dis-information* category which include *false content*, *imposter content*, *manipulated content*, and *fabricated content*. Then the second type of information that falls into the *intent to harm* category, is *mal-information* that includes *some leak*, *some harassment*, and *some hate speech*.¹⁸

The aspect of *intent to harm* is importance to consider. This is because fake news, not all acts of spreading false information must be categorized as a form of crime. According to Vojak’s view, in *fake news* there are dimensions that can be *accidental* an *intentional*. Coincidental fake news or information (*accidental*), namely information or viral news on social medias that occurs when the news maker has no intention of making fake news, so that it becomes viral, but it turns out that the contents provoke *netizen* to share the news through network. While fake news that is intentionally spread (*intentional*), is a type of fake news that is deliberately made by the parties in order to seek profit from the incident.¹⁹

While related to court decision on cases deemed to have violated Article 27 paragraph (3) UU ITE, there is also no uniformity in understanding the construction of Article 27 paragraph (3) UU ITE among judges. First judgement, can be seen in Medan District Court Judgement Number 1183/Pid.Sus/2019/PN.Mdn, who hear cases of acts that attack someone’s honor and reputation. The act of attacking is closely related to the provision in Article 310 Kitab Undang-Undang Hukum Pidana (KUHP) which qualify as a complaint’s offense or *delik aduan*. In this case, the complainant is a direct victim so that the judges are declared to have fulfilled the elements as referred to Article 23 paragraph (3) UU ITE *jo*. Article 310 KUHP. However, in the second case, a different practice can be seen in Rangkas Bitung District Court Judgement Number 160/Pid.Sus/2020/PN Rkb. Even though it has similarities as a case of defamation or insults, the victim is no reporting it directly. Even though the judge firmly stated that the perpetrator’s actions were a violation of Article 27 paragraph (3) UU ITE which is closely related to the provision in Article 310 KUHP where the qualification is a complaint offense so that a direct complaint from the victim is required.

The construction of the wrong application of the law is also seen in the lawsuits of the case that was heard at the Makassar District Court Judgement Number 626/Pid.Sus/2018/PN Mks. In the case of online dissemination of information and advertisement for sexual services, *online*, the prosecutor indicts the perpetrator with Article 28 paragraph (1) UU ITE. This indictment, is not appropriate considering that Article 28 paragraph (1) UU ITE is an offense or *delik* against the act of spreading false news in the context of electronic transaction in the form of engagements between business actors/sellers and consumers or buyers. Therefore, it is not appropriate to use it for the act of offering online prostitution because prostitution is a crime and not a business activity. The act of spreading false information in the form of advertisement for online sexual services, should be categorized as an act that violates Article 378 KUHP related to fraud or in the event that pornographic content is distributed in offering online prostitution, it can violate Article 45 paragraph (1) *jo*. Article 27 paragraph (1) UU ITE or Law Number 44 Year 2008 Concerning Pornography.

The wrongful Article provision application, was also seen in the case heard at the Pontianak District Court Judgement Number 605/Pid.Sus/2019/PN Ptk related to cases of defamation or insults to the president. In indictment, the Prosecutor used Article 45A paragraph (1) *jo*. Article 28 paragraph (1)

¹⁸ Claire Wardle dan Hossein Derakhsan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, Strasbourg Cedex: the Council of Europe 2017, p. 31.

¹⁹ Brittany Vojak, “Fake News: The Commoditization of Internet Speech,” *California Western International Law Journal*, Vol. 48: No. 1, Article 5. p. 130 and 134.

UU ITE. That indictment, is highlighted by the judge at the court who stated that the suspect had violated Article 28 paragraph (1) UU ITE. The application of Article 45A paragraph (1) jo. Article 28 paragraph (1) UU ITE and Article 44 paragraph (1) Law Number 1 of 1946, actually is incorrect considering the offense in Article 28 paragraph (1) of UU ITE is not an offense against the act of spreading false news in the context of electronic transactions. In addition, the provision of the UU ITE does not regulate insults or defamation of the head of state (president). The regulatory provision relating to insults or defamation of the head of state are contained in Article 134, 136, and 137 KUHP whose qualify as complaints offenses or *delik aduan*. On the other hand, the Articles has been deemed unconstitutional by the Constitutional Court Decision Number 013-022/PUU-IV/2006 and Decision Number 6/PUU-V/2007. This decision affirms that the provision of Articles 134, 136, and 137 KUHP negate the principle of equality before the law, reduce the freedom to express thoughts and opinions, freedom of information, and the principle of legal certainty.

Law enforcement such in the court decision above, has led to discrimination in the law enforcement that leads to injustice, legal uncertainty, and also the non-use of law for the community. The root of the problem is caused by various factors, including: the substance of the law and law enforcement officers.²⁰ In terms of substance, as explained above the provision of Article 14 and Article 15 of Law Number 1 of 1946 and Article 27 and Article 28 of UU ITE have weaknesses. However, according to the Directorate of Cyber Crimes, Indonesia National Police Criminal Investigation Agency and judges under Supreme Court of the Republic of Indonesia, in view of the legal substance related to the spread of false information (*fake news*) contained in Article 14 and Article 15 of Law Number 1 of 1946 and Article 27 and Article 28 of UU ITE have been quite accommodating in law enforcement from the spread of false information.²¹

The factors of law enforcement understanding of the substance of the law, become the most influential part in law enforcement of spreading false information. Indonesian Police Headquarter consider that it is not necessary for all perpetrators of spreading fake news or false information (especially through social media) to be legally punished, only those who cause viral for example have more than 100 thousand viewer or included in trending topics are considered viral. In more detail, it can be seen in the following table regarding the investigation carried out by the National Police on cases of spreading false information.²² The following are the criteria that are used as a guideline by the Indonesian Police in law enforcement of spreading false information.

Table 1. Criminal Actions Criteria of False Information Dissemination According to the Investigators of Indonesian National Police²³

No	Jenis Akun	Tindakan Hukum	
		Viral	Not Viral
1	Real Account	Criminal Investigation	Restorative Justice (Clarification or Apology/ Klarifikasi maupun permintaan maaf)
2	Anonymous Account	Criminal Investigation/ Take Down	Take Down

The viral parameter for taking legal action by the Indonesian Police is not in line with the intent of the disturbance which is the result of the act of spreading false information, In the explanation of Article XIV and XV of Law Number 1 of 1946 provides an explanation on what is meant by disturbance is

²⁰ Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, Jakarta: PT Raja Grafindo Persada, 2002, p. 5.

²¹ Wawancara dengan Kompol. Ricky Boy Sialagan, S.I.K, M.I.K, penyidik pada Direktorat Tindak Pidana Siber Bareskrim Polri.

²² Wawancara dengan Kompol. Ricky Boy Sialagan, S.I.K, M.I.K, penyidik pada Direktorat Tindak Pidana Siber Bareskrim Polri.

²³ *Ibid.*,

not only anxiety and shaking hearts of a large number of people, but more than that in the form of chaos. According to Andi Hamzah, Article 14 paragraph (1) of Law Number 1 of 1946 is a material offense in which to criminalize a person there must be a disturbance among the people, namely something is said to have entered the category of disturbance when the police have intervened to break up the disturbance.²⁴ Thus the viral criteria cannot be used as an embodiment of the proven elements of trouble.

Legal actions that are only based on the virality of information, without examining the intention of the perpetrator, is contrary to the essence of criminal law. In theory of criminal law, the intention of perpetrator (*mens rea/guilty mind*) is the *mental element of crime* to assess the presence or absence of a criminal act. The next important thing in crime is the act that cause harm or harms to the people. This is as explained by Bambang Poernomo that a criminal act is an act committed but a person by committing a crime or criminal offense that harms the interest of others or harms the public interest.²⁵

Even in the theory of retaliation (*teori pembalasan*), it is said that in order to give punishment through law to a criminal, it is absolutely necessary to have harmed another person.²⁶ Adverse impacts are an important element in criminal acts in order to impose sanctions on the perpetrators. Therefore, without any adverse impact, it is certainly not appropriate for the act to be given criminal sanctions. According to Rimmelink, it is intended as an appropriate tool because it encourages the state to act fairly and avoid injustice.²⁷

In other words, if the action taken by someone does not meet the criminal element but is subject to a suffering punishment, it is an act of state injustice in enforcing criminal law.

On the other hand, in the fake news concept, it is also emphasized that false information that contains pure *intent to harm* is *dis-information* in the form of harassment and *hate speech*. This means that even if the information being disseminated is false, if it does not contain *harassment* and *hate speech* the perpetrator should not be given criminal sanctions. Thus, ideally there is no need for legal proceeding against perpetrators who spread fake news that only falls into the category of *mis-information*.

The various factors above, ultimately make law enforcement for the spread of false information impossible to achieve in a proportional and balanced manner between legal certainty (*rechtssicherheit*), benefits (*zweckmassigkeit*), and justice (*gerechtigkeit*). Sudikno Mertokusuma emphasized that in law enforcement these three elements must receive proportional attention in a balanced manner. Legal certainty is a judicial protection against arbitrary actions, which means that a person will be able to obtain something that is expected under certain circumstances. The community expects legal certainty because with legal certainty the community will be more orderly. The community also expect benefits from law enforcement. Law is for humans, so law enforcement must provide benefits or uses for humans. Finally, law enforcement must be fair.²⁸

4. CONCLUSION

The criminal law policy regulating the spread of false information in Indonesia criminal law is limited, which is related to nomenclature “spreading”, “fake news or false information”, “uncertain news, exaggerated or incomplete news” as stipulate in Article 14 and Article 15 Law Number 1 of 1946 and Article 45A paragraph (1) jo. Article 28 paragraph (1) Law Number 11 of 2008 Concerning Information and Electronic Transaction as Amendments to Law Number 11 of 2008 Concerning Electronics Information and Transactions; broadcast contents that are slanderous, inciting, misleading, and/or lying as formulated in Article 36 paragraph (5) jo. Article 57 letter d Law Number. 32 of 2002 Concerning Broadcasting. The regulation of criminal acts in Law Number. 1 of 1946 and Law Number. 32 of 2002 Concerning Broadcasting actually is no longer relevant to be applied to acts of spreading

²⁴ Paparan Prof. Andi Hamzah, dalam acara Indonesia Lawyers Club (ILC) pada Selasa, 9 Oktober 2018.

²⁵ Bambang Poernomo, *Asas-Asas Hukum Pidana*, Jakarta: Ghalia Indonesia, 1992, p. 23.

²⁶ *Ibid.*, p. 27.

²⁷ Jan Rimmelink, *Hukum Pidana Komentar atas Pasal-pasal Terpenting dari KUHP Belanda dan Pidananya dalam KUHP Indonesia*, Jakarta: PT. Gramedia Pustaka Utama, 2003, p. 604.

²⁸ Sudikno Mertokusumo, *Mengenai Hukum Suatu Pengantar*, Liberty: Yogyakarta, 2008, p. 160-161.

false information through information technology because at the time of its formulation, it was intended for oral, written, or printed actions, and the broadcast is not for acts through information technology facilities.

The practice of law enforcement against the spread of false information in Indonesia using the criminal law provision in Law Number 1 of 1946 and Law Number 11 of 2008 jo. Law Number 19 of 2016, tend to be forced, then giving rise to criminal law enforcement that are discriminatory and not in accordance with the objectives of law enforcement in order to create legal certainty, justice, and benefit for the community. Factors that influence the coercion of law enforcement and the expansion of the meaning of existing rules, due to the substance or formulation of a criminal law which has multiple interpretations (*legal substance*), thus causing arbitrariness in its application. In addition, the formulation of article which has multiple interpretation is not in line with the *lex stricta* principle in criminal law. Then from the aspect of law enforcement (*legal structure*), turns out that they do not fully understand the elements in the ruled for the dissemination of false information, especially those who carried out through the latest information technology. This minimal understanding, results in a misunderstanding in seeing the formulation of the article.

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