

Criminal Liability of Spreading Fake News on Social Media: Indonesian Criminal Law Perspective

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ABSTRACT: The spread of fake news on social media raises many legal problems in Indonesia. These legal problems are mainly lie in the formulation of the law as well as in the law enforcement area. Legal problems arising from the spread of fake news must be resolved immediately, both at the level of legislative policy and law enforcement, because it has a very negative impact on a person. In addition, studies on the spread of fake news in Indonesian are still overlooked. Therefore, reviewing the regulation on criminal liability for those who spread fake news on social media in Indonesia is very important. Doctrinal legal research methodology was applied to investigate three main issues discussed in this article. First, the current study shows that the act of spreading fake news on social media cannot be charged with Article 28 of the Indonesia Law Number 19 of 2016 concerning amendments to Law Number 8 of 2011 concerning Information and Electronic Transactions. Second, several Indonesian court decisions were studied, and it is shown that judges in deciding cases of spreading fake news on social media applied Law Number I of 1946 concerning Criminal Law. The last, related to criminal law reform, the act of spreading fake news on social media should also be regulated within the Information and Electronic Transactions Laws.

KEYWORDS: Fake News, Criminal Liability, Criminal Law Policy



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I. INTRODUCTION

The spread of fake news or hoaxes is a form of fraud that can cause harm. Hoax in the Indonesian dictionary online is defined as false news or false information. The term hoax has existed since the early 1800s in England. The use of information and communication technology in committing a crime causes difficulties for law enforcement officers in dealing with. This is because the field of information and communication technology has characteristics that are very different from crimes in general or conventional crimes committed without the help of information and communication technology. The existence of advances in information and communication technology in people's lives with the various benefits contained in it have a negative effect, which makes it easier for criminals to carry out their actions and makes society insecure.

The problem that often occurs in Indonesia today with the advancement of information technology is the number of fake news or hoaxes circulating on social media. Of course, this fake news can have a huge impact because almost everyone can see and read the news every day. The State of Indonesia in handling crime cases in the field of information technology has made legal regulations as contained in Law Number 19 of 2016 concerning amendments to Law Number 8 of 2011 concerning Information and Electronic Transactions (hereinafter referred to as UU ITE). In the ITE Law, the rules governing fake news are contained in Article 28 Paragraph (1). However, the article requires the existence of electronic transactions.¹ This means that without the existence of a form of electronic transaction, the perpetrators of fake news crimes cannot be accounted using the provisions of the ITE Law. In other words, the responsibility of the perpetrators of spreading false news through social media must be related to the existence of electronic transactions.

As for what is meant by electronic transactions in Article 28 Paragraph (1) of the ITE Law is a legal act that uses computers, computer networks, and/or other electronic media so that the dissemination of false news by perpetrators carried out on social media that is closely related to the world of information and communication technology not as a conventional criminal act. Not only the provisions of Article 28 Paragraph 1 of the ITE Law which regulates relation to false news but also the provisions Article 28 Paragraph 2 of the ITE Law are not so specific in regulating false news on social media. The provisions of Article 28 Paragraph 2 emphasize the expression of hatred which in principle must contain elements of provocation, incitement or insult

¹ See Article 28 paragraph 1 of the ITE Law.

to one person. Incitement and provocation are of course based on lies but in this article, it is required that there must be someone intended to do so. If false news that does not refer to any person cannot be presumed by the provisions of Article 28 paragraph 2 of the ITE Law.

In conventional law, broadcasting or spreading false news is regulated in Law Number 1 of 1946 concerning criminal law regulations (hereinafter referred to as the Criminal Law). The provisions of Article 14 state "Whoever broadcasts false news or notifications and causes trouble among the people, is punished with a maximum imprisonment of ten years". The article does not require false reporting on social media or contained in electronic information. Thus, this provision cannot be used to ensnare perpetrators of spreading fake news on social media published in electronic information or electronic documents. Now information or news that is considered true is no longer easy to find. The Mastel Survey (2017) revealed that of 1,146 respondents, 44.3% of them received hoax news every day and 17.2% received it more than once a day.² Even conventional media that are relied on as trustworthy media are sometimes contaminated with the spread of hoaxes. Conventional media is also a channel for disseminating hoax information/news, each at 1.20% (radio), 5% (print media) and 8.70% (television).

Not only conventional media, hoaxes are now circulating in the community through online media. The results of research conducted by Mastel (2017) stated that the most widely used channels for spreading hoaxes were websites, at 34.90%, chat applications (WhatsApp, Line, Telegram) at 62.80%, and social media (Facebook, Twitter, Instagram, and Path) which are the most used applications, reaching 92.40%. Meanwhile,³ According to data presented by the Ministry of Communication and Information, there are as many as 800,000 sites in Indonesia that are indicated as spreading hoaxes and hate speech. There are cases in Indonesia related to the spread of fake news, and these cases have been decided by the Court. First, in Decision Number 203/Pid.Sus/2019.PN.JKT. Sel, a person named RT was declared proven guilty of a criminal act by the provisions of Article 14 of the Criminal Law because of broadcasting news (posting) on social media. She stated that she had been persecuted even though she had never been abused because it

² <https://affectivemachine.files.wordpress.com/2017/02/infografis-hasil-survey-mastel-tentang-wabah-hoax-nasional> accessed on 05 May 2021

³ *ibid.*

was a side effect of facial plastic surgery. The panel of judges presiding the RT case decided the case under the provisions of the Criminal Law Act.

Other cases occurred in the Brebes District Court, in the decision Number 42/Pid.Sus/2019/PN.Bbs. A person named JWT was found guilty of committing a criminal act by distributing electronic information in the form of digital images on WhatsApp social media which the truth of the image was not yet clear. By the panel of judges who examined the case, JWT was found guilty based on the provisions of Article 14 of the Law Number 1 of 1946 concerning Criminal Law. The third case is based on the decision of the Pekanbaru District Court with case number 147/Pid.Sus/2020/PN. Pbr a person named IDH who based on the decision was found guilty of committing the crime of broadcasting fake news that could cause trouble among the public following the provisions of Article 14 Paragraph 2 of the Criminal Law. The defendant's actions were by posting a hoax video where the mosque in Papua caught fire. The truth was that the mosque in Papua was not burned and was fine, so the panel of judges examining the case imposed a sentence on the defendant following the provisions of Article 14 Paragraph 2 of the Criminal law.

The three cases above, analyzed based on the decisions, still raise many questions because the three perpetrators carrying out their actions used electronic means or electronic systems. Therefore, special treatment is needed starting from the level of preliminary investigation to full investigation. Since the provisions of the Criminal Law have not regulated the electronic means or electronic system, an in-depth study is needed for the application of legal cases conducted through electronic means so that the principles of legality, legal certainty and justice in society can be created.

Conventional criminal law provisions regulate the spread of fake news but not by means of electronic information as regulated in Article 14 in the Law Number 1 of 1946 concerning Criminal Law. The provisions of these regulations are conventional rules in spreading fake news while it is still not clear whether they are carried out using social media or conventional media. It stated that the act charged is the act of spreading false news which is done conventionally. Considering the rapidly developing situation where new information technology exists in the current era and not in the era of the issuance of Law Number 1 of 1946 concerning Criminal Law, the ITE Law is more relevant to be used to ensnare criminals in cyberspace. However, there is a legal issue as to whether the spread of fake news can be criminally accounted for in the ITE Law.

The unregulated provisions for the spread of fake news on social media in the national legal rules, namely the ITE Law, make this legal issue

important to research, considering the very influential state of the technology at this time. The spread of fake news can make people worry and uneasy. In addition, the spread is very fast and can have a negative impact on the life of a person or society. It is very important to study the accountability arrangements for those who spread fake news on social media because there are many actors who spread fake news, making the Indonesian people restless. Meanwhile, the responsibility of the perpetrators of spreading false news on social media has not been regulated in the ITE Law. For the sake of creating order and peace in people's lives and for the sake of clarity and certainty about the act of spreading false news on social media, especially in the ITE Law, it is necessary to have a legal study on the act of spreading false news by means of information technology.

Based on the foregoing, a problem arises regarding the Criminal Responsibility for Spreading False News. It is certainly interesting to study the formulation of the problems including whether the act of spreading false news on social media can be charged with Article 28 of the ITE Law, what is the basis for the judge's consideration in deciding on cases of spreading false news (hoax) on social media based on Law No. 1 of 1946 concerning Criminal Law, and what is the ideal legal formulation policy in regulating the act of spreading fake news or hoaxes on social media.

The research in this discussion uses normative legal research, namely research on legal issues that are raised, discussed, and will be described in this research. There are 3 (three) approaches used to examine the formulation of the problem, namely the statutory approach, the conceptual approach, and a case approach. The statutory approach is used to conduct a study of the laws and regulations relating to the two formulations of the problem to be solved.⁴ The researcher uses the conceptual approach to examine some conceptual starts from the views of legal experts and doctrines that grow in legal science in order to build a legal argument in solving legal issues. By studying the views of legal experts and doctrines in legal science, researchers get ideas that will shape legal understanding, principles, and legal concepts in accordance with the problems in this research.⁵ The researcher uses a case approach to examine various cases that are related to the two legal issues. The case that the researcher will examine is a case that has permanent legal

⁴ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2016) at 33.

⁵ *Ibid.*

force, based on the three legal issues that the researcher has raised⁶ The decision to be analyzed by the researcher, namely South Jakarta District Court Decision Number 203/Pid.Sus/2019.PN.JKT. Sel, Brebes District Court Decision Number 42/Pid.Sus/2019/PN.Bbs, Pekanbaru District Court Decision with case number 147/Pid.Sus/2020/PN. Pbr.

Legal material is the most important part of legal research. Without legal material, it is impossible to find answers to the legal issues raised, to solve the issues that will be faced, researchers must use legal materials as a source of legal research.⁷ As for the source of legal materials to be used, study and analyze legal issues in research using primary, secondary, and non-legal legal materials.⁸ Primary legal materials are laws, minutes, or official records in the mechanism of making laws and judges' decisions. The first secondary legal material, namely books related to the basics of legal science and the views of legal experts. In addition to books, they can be in the form of writing either in the form of books or in the form of journals.⁹ Non-legal materials are all forms that are able to provide explanations and instructions for primary legal materials and secondary legal materials such as encyclopedias, legal dictionaries, and others. This study uses an Indonesian dictionary, encyclopedia, legal dictionary, and so on to support it.

II. ACT OF SPREADING FAKE NEWS ON SOCIAL MEDIA UNDER ARTICLE 28 OF THE INFORMATION AND ELECTRONIC TRANSACTIONS LAW

The ITE Law is one of the special crimes because the ITE Law has its own set of criminal acts and criminal provisions in the field of information and electronic transactions which is different from the Criminal Code because it is carried out regarding the legal process, the criminal procedure still refers to the Criminal Procedure Code.¹⁰ The ITE Law is a product of much-needed legislation and has become a pioneer in laying the basis for regulation in the field of utilization of Information Technology and Electronic Transactions. The preparation of the ITE Law consists of 2 (two) academic texts. The first text is the Information Technology Utilization Bill

⁶ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif* (Jakarta: PT. Kharisma Putra Utama, 2016) at 165.

⁷ Dyah Ochterina Susanti & A'an Efendi, *Penelitian Hukum* (Jakarta: Sinar Grafika, 2014) at 48.

⁸ Peter Mahmud Marzuki. *Op. Cit.* at 183

⁹ *Ibid.*

¹⁰ Didik Endro Purwoleksono, *Hukum Pidana: Untaian Pemikiran*, (Surabaya: Airlangga University Press, 2019), at 5.

(RUU PTI) which was prepared by Padjadjaran University appointed by the Ministry of Communication and Information in collaboration with experts from the Bandung Institute of Technology.

The second academic paper is the Electronic Information and Electronic Transaction Bill which was prepared by the University of Indonesia appointed by the Ministry of Industry and Trade. Then the two academic manuscripts were merged and re-adjusted by a team led by Ahmad M Ramli on behalf of the government of Susilo Bambang Yudhoyono which was named the Law on Information and Electronic Transactions as ratified by the DPR. The ITE Law was promulgated for the first time on April 21, 2008, while the amendment was promulgated on November 25, 2016. The government's commitment to produce a special product in the field of information and electronic transactions can be said to be an answer to concerns that arise in the practice of law enforcement in the field of telematics.

Fake news or hoaxes are defined as news or statement that has invalid information or fake news that has no inevitability that is deliberately disseminated to make things exciting and cause fear.¹¹ However, there are also hoaxes that are deliberately created to make the misguided way of thinking about something because of deceived by hoax news or opinions. If previously this hoax was widely disseminated via SMS or email, then hoaxes are now circulating more in social media such as Instagram, Facebook, Twitter, Path, WhatsApp, and certain blogs.

Law Number 1 of 1946 concerning Criminal Law Regulations contains three articles relating to the spread of false news (hoax), namely:

1. Article 14 paragraph (1) of Law Number 1 Year 1946 states that the act of broadcasting false news or notifications that can cause trouble in the community is punishable by a maximum of ten years in prison.
2. Article 14 paragraph (2) of Law Number 1 of 1946 essentially states that an act committed by broadcasting a news or issuing a notification that can cause trouble which is reasonable to suspect that the news is a lie, is punishable by a maximum of three years in prison.

¹¹ Adami Chazawi & ArdiFerdian, *Tindak pidana pemalsuan*, (Jakarta: PT Rajagrafindo Persada, 2016), at 236.

3. Article 15 of Law Number 1 of 1946 essentially states that an act of broadcasting uncertain news or excessive or incomplete news in which the news is reasonably suspected of causing trouble in the community is punishable by a maximum of two years in prison.

Based on the results of the We Are Social Hootsuite research released in January 2019, social media users in Indonesia reached 150 million, or 56% of the total population. The number is up 20% from the previous survey. Meanwhile, mobile social media users (gadgets) reached 130 million, or about 48% of the population.¹² It indicates that the Indonesian people in all their activities cannot be separated from the assistance of technology. It is not surprising that there are so many cybercrimes in Indonesia.

Hoax on social media, Alexander Boese argues that the first recorded hoax published was a fake almanac or calendar created by Isaac Bickerstaff alias Jonathan Swift in 1709.¹³ At that time, he predicted the death of astrologer John Partridge. In order to convince the public, he even made a fake obituary about Partridge on the predicted day of his death. Swift fabricated the information to embarrass Partridge in the public eye. Partridge also stopped making astrological almanacs until 6 years after the hoax circulated.

The word hoax only started to be used around 1808. The word is believed derived from hocus which means to deceive. The word hocus is an abbreviation of hocus-pocus, a kind of spell that is often used in magic shows when there will be a punch line in their performance on stage. Until now, the existence of Hoax continues to increase from fake news such as giant entities Loch Ness, the wall of China seen from space, to thousands of hoaxes scattered in the 2016 United States presidential election as critical as the practical politics of a superpower.

In Indonesia, no one knows what hoax news first appeared. However, this hoax phenomenon has started to get crowded since the Jakarta gubernatorial election (Pilgub) in 2012. Hoax news at this time usually reports a lot about the ugliness of each cagub, or Black Campaign. It also continues, even more so in the 2014 presidential election. Hoax or false information has become a phenomenon in Indonesia that is deliberately disguised to look true. It is inseparable from the characteristics of the Indonesian people who use social media a lot when they receive news and information quickly through social media devices.

¹² Yudo Triartanto, *Kredibilitas Teks Hoax di Media Siber*. Jurnal Komunikasi. Journal Volume VI Number 2, BSI Communication Academy, Jakarta, 2015, at 34.

¹³ *Ibid.* at 35.

The national law does regulate Hoaxes in the provisions of Article 28 of the ITE Law. The Article in paragraph 1 regulates related to false and misleading news that results in a consumer loss, meaning that the provisions of Article 28 paragraph 1 of the ITE Law are required to have a loss of economic value arising from an electronic transaction between producers and consumers. In this case, it is the consumer who becomes the victim of a crime because of the misleading fake news that causes harm to the consumer. While the provisions of Paragraph 2 in Article 28 of the ITE Law regulate about hate speech, the main condition of which is the presence of hatred and hostility between certain individuals and/or groups that contain elements of ethnicity, religion, race, and culture. This means that if an act contains elements of hatred or hostility towards individuals or groups of people, then it can be carried out with criminal liability.

In contrast to the actions of fake news or hoaxes that are carried out related to chain messages, urban legends, getting gifts, and other actions that do not have an element of hate speech. This kind of hoax acts has not yet been regulated in the national legal rules. Based on the provisions in Article 28 Paragraph 1, it must contain electronic transactions while Article 28 Paragraph 2 implies hate speech. Article 28 paragraph (2) of the ITE Law states that: "Every person intentionally and without rights disseminates information aimed at causing hatred or hostility to certain individuals and/or community groups based on ethnicity, religion, race and intergroup (SARA).

As for the criminal threat, it is regulated in Article 45A paragraph (2) of the ITE Law, said "Every person who intentionally and without rights disseminates information aimed at causing hatred or hostility to certain individuals and/or community groups based on ethnicity, religion, race, and between groups (SARA) as referred to in Article 28 paragraph (2) shall be sentenced to a maximum imprisonment of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah)".

There are several cases of hoax crimes or fake news that have been decided by the court. First, in Decision Number 203/Pid.Sus/2019.PN.JKT. Sel, a person named Ratna Sarumpaet was found guilty of a crime in accordance with the provisions of Article 14 of the Criminal Law Act, by broadcasting news (posting) on social media that she has been persecuted even though it was not any act of abused. What happened was actually a side effect of facial plastic surgery. The panel of judges who tried the RT case decided the case under the provisions of the Criminal Law Act.

The provisions of Article 14 of the Criminal Law basically regulate relating to "anyone by broadcasting false news or notifications, deliberately

publishes trouble among the people". In the provisions of Article 14 of the Criminal Law, there are several elements, namely an act of "broadcasting" and the existence of "trouble". Conventional criminal law provisions regulate the spread of false news as regulated in Article 14 in the Rule of Law Number 1 of 1946 concerning Criminal Law. The provisions of these regulations are conventional rules, and in spreading fake news in these regulations, it is still not clear whether they are carried out using social media or conventional media. If examined carefully, the establishment of the Criminal Law Act was formed before the development of information and communication technology, so that the form of broadcasting in the Criminal Law Act was only limited to broadcasting through conventional media such as radio, newspapers, and so on that developed at that time.

Basically, Decision Number 203/Pid.Sus/2019/PN.JKT. that decides on criminal cases under the provisions of Article 14 of the Criminal Law is still not in accordance with the elements in the criminal provisions since it is about broadcasting actions carried out on social media. At this time, a new rule that is relevant to criminal acts committed using social media in social media tools is needed. The existence of a clear formulation of legal provisions against the act of broadcasting fake news or hoaxes will provide legal certainty to the community so that it will not form the principle of legality.

III. BASIS FOR CONSIDERATION OF JUDGES IN DECIDING CASE OF SPREADING FAKE NEWS IN SOCIAL MEDIA BASED ON LAW NUMBER I YEAR 1946 CONCERNING CRIMINAL LAW

Basically, the judge's consideration in a criminal decision must pay more attention to the aspect of justice, in relation to the spread of false news or hoaxes. Law Number 1 of 1946 concerning Criminal Law Article 14 paragraph 1 affirms: "Whoever, intentionally broadcasts false news or notifications with deliberately causing trouble among the people, is punished with a maximum imprisonment of ten years. Paragraph 2 says "Whoever issues a notification that can cause trouble among the people, while he should think that the news or notification is a lie, is punished with a maximum imprisonment of three years. The distinguishing value of the two provisions above is lying on how the fake news cause trouble on purpose, as an intention or certainty.

The presence of social media has many positive impacts, such as making it easy for everyone from various parts of the world to interact in communication and exchange information very quickly. Apart from having a positive impact, of course, social media also has a negative side. Various acts against the law can be carried out using information technology, one of which is the spread of fake news (hoax) through social media. There are cases in Indonesia related to the spread of fake news, and these cases have been decided by the Court. Those courts are the South Jakarta District Court, Brebes District Court, and Pekanbaru District Court.

The case at the South Jakarta District Court, in decision number: 203/pid.sus/2019/pn.jkt.sel. is about Ratna Sarumpaet who was found guilty of committing a crime by broadcasting news or providing false information by deliberately publishing trouble among the people as regulated and threatened with crime. Article 14 paragraph (1) of Law Number 1 of 1946 concerning Criminal Law. The chronology of the alleged spread of fake news (hoax) started when there was a photo of a woman whose face was full of bruises circulated on social media. The photo is reported to be that of human rights (HAM) activist Ratna Sarumpaet who is also a national campaigner at the National Winning Body for the Prabowo Subianto-Sandiaga Uno pair.

The judge examining the verdict Number: 203/Pid.sus/2019/Pn.Jkt.Sel considered that the defendant's actions were wrong. In accordance with an act as stipulated in Article 14 of Law Number 1 of 1946 concerning Criminal Law, the defendant may be sentenced to a criminal sentence as stipulated in Article 14. The analysis of the panel of judges examining RT only focuses on fake news and the consequences of confusion in the community. However, when viewed from the actions of Ratna Sarumpaet who spread false news, there is actually another element that is the existence of an act carried out through social media. If it is observed that the provisions of Article 14 of the Criminal Law do not recognize the existence of social media instruments, this will certainly nourish a conflict with the principles of criminal law, such as the principle of legality.

The judge in giving his consideration did not pay attention to the tools used by the RT in carrying out the act of spreading fake news, so the judge only focused on the act of Ratna Sarumpaet who spread false news or hoaxes that resulted in chaos in the community. Even though it is very clear that the actions carried out by the RT do not only cause trouble in the regional scope, the existence of social media can have a national impact, so it is clear that

the actions of the RT must actually pay attention to the tools used in committing a crime.

The second case is based on decision Number 42/Pid.Sus/2019/PN.Bbs. that a person named Jarwoto based on the decision was found guilty of committing a criminal act as stipulated in Article 14 of the Criminal Law Act. The defendant's actions were of distributing electronic information in the form of digital images on WhatsApp social media but the truth of the image was not yet clear. The panel of judges who examined the case considered the element of "having broadcast uncertain news or news that was excessive or incomplete" on the pretext that the defendant had sent a WhatsApp Group an image that was not true so that the defendant could be categorized as having broadcast the fake news. However, the panel of judges examining the case still did not consider the Defendant's actions using social media facilities, which are certainly very different from conventional means.

Of course, what the defendant did was a criminal act in the field of cybercrime, but the ITE Law regulations have not yet accommodated accountability for the perpetrators of spreading false news or hoaxes. While in the provisions of Article 14 and Article 15 of the Criminal Law if viewed from the case, it cannot be applied to the defendant because the provisions of the Criminal Law still do not regulate the existence of an electronic system and the regulation of electronic systems only exists in the ITE Law. The provisions of Article 28 paragraph 1 and Paragraph 2 of the ITE Law regulate about spreading of false news, but the contents of the provisions of the article are conditions for electronic transactions and hate speech. Therefore, it cannot be applied to perpetrators who do not carry out their actions with electronic transactions and the nature of hate speech.

The other case is based on the decision of the Pekanbaru District Court with case number 147/Pid.Sus/2020/PN. Pbr that a person named IDH who based on the decision was found guilty of committing the crime of broadcasting fake news that could cause trouble among the public in accordance with the provisions of Article 14 Paragraph 2 of the Criminal Law. The defendant's actions of posting a hoax video of a mosque in Papua while the Papua area is still in a non-conducive condition caused by demonstrations. The defendant's actions of distributing or posting videos on YouTube social media were a series of electronic systems regulated in the ITE Law. The defendant was indicted based on evidence from social media accounts, namely YouTube which is electronic information or electronic documents known in the ITE Law. While the Criminal Law does not recognize the existence of an electronic system, the criminal liability for

those who spread false news using the YouTube account should be regulated in the ITE Law yet it is not regulated in the ITE Law. Consequently, the panel of judges examining the case seems to impose the legal provisions of Article 14 of the Criminal Law.

The panel of judges examining the case considered the defendant's actions in accordance with the provisions of Article 14 of the Criminal Law. If examined carefully, the actions of the defendant have an element of spreading information through social media, YouTube. It means that the provisions of Article 14 of the Criminal Law which are applied to the defendant in this case are not appropriate since they do not really review the actions carried out by the defendant using YouTube social media.

Andreas Kaplan and Michael Haenlein define social media as a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0 and enable the creation and exchange of user-generated content. Web 2.0 became the basic platform of social media.¹⁴ Social media exists in many different forms, including social networks, internet forums, weblogs, social blogs, microblogging, wikis, podcasts, images, videos, ratings, and social bookmarking.

As internet and mobile phone technology advances, social media also grows rapidly. Now to access Instagram, for example, it can be done anywhere and anytime using a mobile phone. How quickly people can access social media has resulted in a major phenomenon in the flow of information not only in developed countries but also in Indonesia. Because of its speed, social media has also begun to appear to replace the role of conventional mass media in spreading news.

Social media has a very big impact on people's lives, one of which is with social media, we can easily interact with anyone including our favorite artists who also use well-known social media such as Facebook and Twitter. Social media allows us to have many connections and wide networks. Of course, this has a positive impact on people who want to make friends or life partners from faraway places or foreign countries. This means that social media has enormous benefits for human life. However, it will be the opposite if social media by humans is used as a medium of crime such as spreading false news.

Indonesia does regulate human actions and behavior on social media, this is further regulated in the ITE Law. However, the act of spreading false

¹⁴ I Gusti Ngurah Aditya Lesmana, Tesis: Analisis Pengaruh Media Sosial Twitter Terhadap Pembentukan Brand Attachment (Study: PT. XL AXIATA), (Master of Management Program, Faculty of Economics, University of Indonesia), at 10-11.

news which is closely related to not causing economic losses and there is hate speech is still not regulated by legal norms in Indonesia. Law Number 1 of 1946 concerning Criminal Law does regulate the form of the act of spreading false news as stipulated in Article 14. However, this article cannot provide a form of legal certainty because there is an element of ambiguity in the provisions of the article relating to broadcasting news or fake news.

Broadcasting is the entire process of delivering broadcasts starting from the preparation of production materials, production, preparation of broadcast discussions, and then broadcasting to the reception by listeners/viewers in one place.¹⁵ This means that broadcasting is a series of processes to be heard somewhere, while hoaxes or fake news sometimes do not have a process of broadcasting but spontaneously. According to researchers, the spread of fake news can be categorized as an act of transmitting and/or distributing electronic information, so the provisions of Article 14 of Law Number 1 of 1946 concerning Criminal Law are very irrelevant to ensnaring perpetrators of criminal acts of spreading false news.

The word broadcast in Article 14 does not have a definite form, because if it is only the element of broadcasting it is very vague. Considering Law Number 1 of 1946 concerning Criminal Law was formed and made before the state of Indonesia recognized the existence of an electronic system. It can be said that the form of broadcasting in the provisions of Law Number 1 of 1946 concerning Criminal Law is broadcasting conventionally and therefore the act in question cannot be applied to the perpetrators of the crime of spreading false news on social media.

Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. It is clear in the sense that it does not cause doubt (multi-interpretation) and is logical. It is clear in the sense that it becomes a norm system with other norms so that it does not clash or cause norm conflicts. Legal certainty refers to the application of a clear, permanent, consistent, and consequent law whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands but factually characterize the law. An uncertain and unjust law is not just a bad law.

Legal certainty is a form of effort to realize the law in reality. According to the term legal certainty is a condition that is certain, not vague, clear, stipulation and is a stipulation. The law in essence must be fair and certain so as not to cause multiple interpretations, the exact meaning is a

¹⁵ Masduki, *Menjadi Broadcaster Profesional* (Yogyakarta LkiS Yogyakarta, 2004), at 16.

guide to behavior, while the meaning of fair behavior must prioritize an order that has reasonable value. Only because it has a just nature and is implemented with certainty the law is able to carry out its functions. Legal certainty is a question that can be answered normatively and cannot be answered sociologically.¹⁶ This means that a rule of law must contain a fair and definite rule of law so that in the process of enforcing it there will be no doubt, that a situation can be said to be in accordance with the principle of legal certainty and must be regulated in advance in a legal norm that is clear, definite and not obscure. Then, in its enforcement it will be clear, certain, and not obscure.

According to Hans Kelsen, law is a norm contained in the law. Laws that contain rules that have a general nature can be used as a basis for individuals to behave in society, both in social relations and among individuals. These rules become a benchmark for the community to take action against each individual. The implementation of these rules provides legal certainty to the community.¹⁷ The act of spreading false news that is appropriate and provides legal certainty has not yet been regulated. Currently, the norms related to spreading false news have indeed been regulated in the provisions of Law Number 1 of 1946 concerning Criminal Law. However, the formulation of these norms still creates confusion regarding the phrase spreading. Since it can be interpreted as a form of spreading through conventional media, social media which actually uses electronic information is still not known in the provisions of Law Number 1 of 1946 concerning Criminal Law.

In principle, by applying the existence of a principle of legal certainty, law enforcement can be implemented. Law enforcement can be interpreted as a process, which in principle is a non-strict decision-making that can be regulated by the rule of law. However, it has elements that can provide an assessment of a person's personality. Conceptually, law enforcement has a core to harmonize the relationship of values in good rules and to create the maintenance of comfort and peace in social life in society. This conception has a philosophical basis that requires further explanation so that later it will not appear more real.¹⁸ This means that the existence of law enforcement in people's lives will certainly provide a form of legal certainty in people's lives.

¹⁶ Dominikus Rato, *Filsafat Hukum Mencari: Memahami dan Memahami Hukum*, (Yogyakarta Laksbang Pressindo, 2010), at 59.

¹⁷ Peter Mahmud Marzuki, *Op. Cit.* at 58.

¹⁸ Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakkan Hukum* (Jakarta: Raja Grafindo, 1983) at 7.

In addition, law enforcement will provide a form of implementing norms in reality so that the principle of legal certainty can be created.

Humans themselves in their lives will certainly have their own views about good deeds and bad ones, this view will always be manifested in a partner, for example, a partner in the value of peace, a pair of values of public interest with the value of personal interest. In fact, in law enforcement, the couple must complement and harmonize each other. The value pair must be described first because in principle the value is abstract. Concrete elaboration will occur in the form of legal rules, which contain orders and prohibitions. These rules will become a benchmark or guide for appropriate and inappropriate behavior or attitudes in people's lives.¹⁹ In principle, good norms are norms that can be implemented in people's lives. In addition, at the level of implementing norms, it does not conflict with existing legal theories.

IV. REGULATING THE ACT OF SPREADING FAKE NEWS ON SOCIAL MEDIA: A PERSPECTIVE OF INDONESIAN CRIMINAL LAW POLICY

An act seen as a criminal act must be regulated in advance in the provisions of a statutory regulation, this is consistent with the principle of legality of criminal law. The crime is not solely to retaliate against the perpetrator of a crime, yet it is in line with the theory of the purpose of criminal law. The term punishment, known in Dutch as *Straf*, is a general term for all forms of civil, administrative, disciplinary, and criminal sanctions. Criminal law is defined in a narrow way, namely criminal law. The purpose of the crime is not only achieved by sentencing but as a strong repressive effort as a security measure. Crime is seen as suffering that is applied to the maker for committing an offense.²⁰ This means that crime can be used as a means of suffering for perpetrators of criminal acts.

Suffering is not an end but a near end. The difference between action and crime is that action can be in the form of suffering but is not a goal. The purpose of the crime and the act are one, which is to correct the perpetrator. In the opinion of Immanuel Kant, punishment is a categorical imperative, which means that a person is required to be punished for committing a crime.

¹⁹ Ibid. at 6.

²⁰ Andi Hamzah, *Asas-asas Hukum Pidana* (Jakarta Rineka Cipta, 2008), at 27.

This is an absolute demand put forward by Kant as stated in his book *Philosophy of Law* as follows, "...criminals are never carried out solely as a means to promote other ends/goods. Both for the perpetrator himself and for society, but in all cases, it must be imposed only because the person in question has committed a crime."²¹ This means that criminal acts with the goal of making improvements to criminals so that they become good people in the life of society.

In the purpose of criminal law, there are several theories namely absolute theory, relative theory, and combined theory. Absolute theory can also be called the theory of retaliation. The view contained in this theory is that the conditions and justifications for the imposition of a crime include the crime itself, apart from the practical function expected of the sentencing. In this teaching, punishment regardless of its impact in the future, because a crime has been committed, it must be punished. An absolute teaching is that there is an absolute belief in the crime itself, even though the imposition of a criminal is actually useless or even has a worse impact on the perpetrator of the crime. The purpose and intention of this absolute theory, apart from being retaliation, according to Stammler's view are also to show the public that the law has been enforced. The purpose of punishment in this absolute teaching is indeed clear as revenge because in this teaching it is not explained why it must be considered fair to negate the sense of disturbing society by inflicting suffering on someone who commits a crime.

The relative theory or theory of purpose has the basis that crime is a tool to enforce order (law) in a society. Penalization is a tool to prevent the emergence of a crime with the aim that public order can be maintained. In this theory, the imposition of a crime depends on the expected effect of the punishment itself, so that a person does not repeat his actions again. According to the researcher, the goal to be achieved is to formulate a criminal formulation against the spread of false news through social media, if this is further regulated in a written rule, it will be in line with the relative objectives of criminal law.

In addition, the regulation of the criminal act of spreading false news through social media will provide a solution if there is chaos in society without written regulations. The theory of anomie is a term introduced by Emile Durkheim, to describe chaos in certain circumstances without regulation. This definition comes from the Greek "without" and "nomos": "law" or "regulation". This was also stated by Robert K. Merton, which aims

²¹ Abintoro Prakoso, *Hukum Penitensier* (Yogyakarta: Aswaja Pressindo, 2019), at 31.

to describe the state of deregulation in society. This situation is a state of disobedience to the norms found in people's lives and everyone does not know the desired expectations. This situation without norms causes deviant behavior in society.²² If there is an absence of norms in the life of society, it will certainly cause chaos in not only to society but also to the criminal law system in society. It also happens if the norms that govern it are not appropriate.

The theory put forward by Durkheim states that traditional standards and norms become useless in modern society. If there is no replacement, it causes the collapse of the norms that govern each person's behavior. As has been explained, conditions like this where there are no rules governed are called anomie. When there are no norms that regulate people's lives, what happens next is tension in society. According to Emile Durkheim, this anomie theory has three views²³:

1. Humans are social creatures;
2. Humans are considered as social beings;
3. In society, humans tend to live and always depend on the community as a group.

Nominee theory describes a situation in people's lives that does not have rules so that the absence of a norm that regulates a criminal act will cause chaos in people's lives. The chaos will have an impact on the order of people's lives so there is a need for a norm that regulates the behavior of people's lives. The existence of a rule that regulates the behavior of the community and is formulated in a national law rule, then it will be according to the principle of legality of criminal law.

The principle of legality is regulated in Article 1 Paragraph (1) of the Criminal Code, according to its formulation in Dutch saying: "Geen feit I strafbaar and uit kracht van een daaran voorafgegane wettelijke strafbepaling". Zainal Abidin Farid translates it as: "No event can be punished other than the strength of the provisions of the criminal law that preceded it."²⁴ But in his book "Hukum Pidana Indonesia" written together with Andi Hamzah, the formulation of Article 1 Paragraph (1) is translated as: "no act (feit) that can be punished other than based on the provisions of

²² J Sahalessy. Loc. Cit.

²³ Lilik Mulyadi, Bunga Rampai Hukum Pidana Perspektif Teoritis dan Praktik, (Bandung: Alumni, 2008) at 325.

²⁴ H. A. Zainal Abidin Farid, Hukum Pidana 1 (Jakarta: Sinar Grafika, 2007), at 130.

criminal law that preceded it"²⁵. The word "feit" is translated as "action" in contrast to the earlier translation which defined "feit" as "event". It is explained in the book that the difference in translation is because the term "feit" is often also interpreted as "event". The notion of "feit" includes both actions that violate something prohibited by criminal law or neglecting something that is required.²⁶ Roeslan Saleh, stated that "no act can be punished except on the strength of criminal rules in the legislation before the act is committed".²⁷ P.A.F. Lamintang gives the meaning of Article 1 Paragraph (1) as: "No act can be punished, except based on criminal provisions according to existing law before the act itself"²⁸. The principle of legality states that if a criminal act must be regulated in national law and if it is not regulated then the act cannot be declared a criminal act.

The act of spreading false news through social media has not yet been regulated, because the national legal rules that regulate the act of spreading false news are closely related to the existence of elements of electronic transactions and hate speech. The act of spreading false news in question was carried out in a conventional way and did not use online social media facilities so the provisions of these rules cannot be applied to perpetrators of criminal acts of spreading false news on social media. The unregulated act of spreading false news through social media creates a vacuum in the rule of law and this will result in chaos in people's lives as explained by the anomie theory. Based on the researcher's explanation above, the ideal legal formulation policy in regulating the act of spreading false news or hoaxes on social media can be done by formulating an act of spreading false news in the ITE Law. The proposing formulation says that it will be punished if someone who intentionally transmits and/or distributes news that is not known to be true or fake news by using electronic information facilities or electronic documents. With such regulation, the perpetrators of spreading false news or hoaxes on social media can be criminally accounted so that criminal law enforcement can be carried out.

²⁵ H. A. Zainal Abidin Farid dan Andi Hamzah, *Hukum Pidana Indonesia*, Jakarta. PT. Yarsif Watampone, 2010), at 53.

²⁶ Ibid.

²⁷ Roeslan Saleh, *Perbuatan Pidana dan Pertanggung Jawaban Pidana* (Jakarta: Aksara Baru, 1983), at 40.

²⁸ P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (Bandung: Citra Aditya Bakti, 1997), at 123.

V. CONCLUSION

The act of spreading fake news on social media in Article 28 of the ITE Law cannot be applied, because the provisions of the article contain elements of electronic transactions and elements of hate speech. In addition, based on the principle of legal certainty, a rule of law must be certain, clear, and not cause ambiguity so that its application can be implemented, with uncertainty an act of spreading false news on social media is certainly contrary to the principle of legal certainty. In addition, if it is forced to apply the provisions of Article 28 of the ITE Law, it will be contrary to the principle of legality of criminal law.

The judge's basic considerations in deciding cases of spreading hoaxes on social media based on Law No. 1 of 1946 concerning Criminal Law was based on the actions of the perpetrators by broadcasting fake news to the public which resulted in chaos in people's lives. If there is no disturbance, then the provisions of Law No. 1 of 1946 concerning Criminal Law cannot be applied. In addition, the provisions of Law No. 1 of 1946 concerning Criminal Law relating to broadcasting fake news have ambiguity in their meaning and when viewed from Law No. 1 of 1946 concerning Criminal Law existed before the regulation of electronic information, so the rules can be categorized as conventional rules. This obscurity and ambiguity will certainly conflict with the principle of legal certainty. Because of its ambiguity, it will also conflict with the principle of legality.

The ideal legal formulation policy in regulating the act of spreading false news or hoaxes on social media must be formulated in the provisions of the ITE Law. It recognizes the existence of electronic information and electronic documents so that it will not conflict with the principle of legal certainty and the legality principle of criminal law. In addition, with further regulation in the ITE Law, it will not conflict with the anomie theory because the rules already exist and will not cause chaos in people's lives.

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