

The Nature of the Crime of the Spread of *Hoaxes*

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ABSTRACT

This study aims, *First*, to analyze, analyze and discover nature *hoaxes*. *Second*, of the crime of analyzing, analyze and find the arrangements and basis for the criminal offence of *hoaxes*; *Third* To analyze, analyze and find the Construction of Accountability for the Crime of spread *Hoax*. The type of research used in this study is to combine normative legal research. The results of the research are, *first*, the nature of hoax is an act that is closely related to the act of creating news that is unclear and misleading, with content that is provocative and subjective. *Second*, the criminal act of spreading fake news (hoax) has a basis for imposing a crime, which is based on Article 28 paragraph (1) in conjunction with Article 45 A paragraph (1) of the ITE Law. *Third*, the development of Spread hoax (*hoax*) the need for the implementation of restorative justice as a policy choice of law enforcement officers. The crime of spreading fake news (*hoax*) mostly attacks the individual interests of the victim, so that this approach can be applied. However, not all hoax crimes can be committed by Restorative Justice.

KEYWORDS: Accountability; Spread; Fake New

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I. INTRODUCTION

Human life has so far taken place from traditional communication processes such as *face to face*, communication through groups and mass communication has now completely changed with the development of current communication technology, especially in this case the internet. *The US Supreme Court* defines the notion of the internet as an "*International network of interconnected computers*", it has provided many conveniences in everyday life for many people, not only for communication but also for the benefit of effective and efficient business transactions anytime and anywhere. ^[1]

The change in this process is caused by the large impact of globalization on human life. In this modern era of globalization, everyone has become very dependent on the internet, especially social media. Soerjono Soekanto explained that advances in technology will coincide with the emergence of various changes in the social sector. ^[2] These changes start fundamentally in everyday human life, for example, communication which is usually done meet and face to face, now this can only be done through social media. The development of global computer network technology or what is called the internet has created a new world called cyberspace. ^[3] Cyberspace as a form of communication network has formed its community called social media.

Social media is a container that is useful for making it easier for humans to interact socially. It is a new way to build communication relationships between individuals, to work together and discuss. Humans always need information from other humans, because naturally, human knowledge is limited. The content that is distributed by internet users to social networks can be a source of information for people in need, more importantly, that social media has the advantage of being able to be used anywhere and anytime.

The development of information technology as well as the development of society brings changes in people's lives so that the law needs to follow it. Therefore, it also regulates criminal law, especially regarding criminal acts which are then accompanied by the threat of criminal sanctions. Sanctions are imposed following the applicable criminal provisions according to the law concerned. Besides being intended to give suffering to the perpetrator of a criminal act and provide a deterrent effect on him, it can also be used as a warning to the public not to commit crimes or violations and to always be careful in their behaviour.

The development of information technology has a huge influence on human life. This development has caused world relations to become borderless which has also resulted in significant social changes in society. As a result of technological developments, it becomes a double-edged sword because in addition to having a positive impact on the welfare and progress of society and also having a negative impact, namely the emergence of various forms of crime.

The crimes that are caused are known as cyber crimes^[4]. Cybercrime has consequences for legal protection for its users. This becomes very important, considering that every human being must be protected following his dignity as a human being. Legal protection by the state is a form of state responsibility for the protection of its citizens by providing legal guarantees and concrete actions that protect the people from all forms of crime or other deviant actions that may be experienced by the community both in the real world or in the cyber world.

Since the issuance of Law Number 11 of 2008 concerning Electronic Information and Transactions (UU ITE) in Indonesia, which has been amended to Law Number 19 of 2016, there have been many criminal cases or cases reported using this law. Starting from cases of defamation to contents of fake news, containing hate speech content. It is not uncommon for perpetrators of acts of spreading fake news, containing hate speech content, to face the law and undergo legal processes until they are brought to trial.

In today's modern times, the internet and electronic media cannot be separated from the life of modern society to access information. Today's many electronic media are competing to provide fresh and new information and news for readers and viewers. Some of the electronic media that are currently widely accessed by the public are Youtube, Facebook, Blog, Twitter, Instagram, Whatsapp, Line, and so on.

Everyone has the right to communicate and obtain information to develop their personal and social environment, and the right to seek, obtain, possess, store, process and convey information using all available channels, thus the content of Article 28F of the Constitution of the Unitary State of the Republic Indonesia 1945 (UUD 1945) after the 2nd Amendment.^[5]

The description above can be understood that public access to news is part of Human Rights (HAM) which is recognized and protected by the state, so that its fulfilment is the responsibility of the state, and its management and utilization are guaranteed by law.

The government as the person in charge of the state, and to guarantee the implementation of the 1945 Constitution, issued Law No. 19 of 2016 concerning Amendments to Law no. 11 of 2008 concerning Electronic Information and Transactions, in which the basis of the considerations contains that to guarantee recognition and respect for the rights and freedoms of others and to fulfil fair demands following considerations of security and public order in a democratic society, it is necessary to amend the Law. Law Number 11 of 2008 concerning Electronic Information and Transactions to realize justice, public order and legal certainty; that based on the considerations as referred to in letter a, it is necessary to establish a Law concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions. These rules are divided into 2 (two) major parts, namely regulations regarding information and electronic transactions and regulations regarding prohibited acts.

In principle, Law Number 11 the Year 2008 concerning Electronic Information and Transactions which has been amended to Law Number 19 the Year 2016 is made only to create justice. Indonesia as a state of law must of course be a concern for every citizen of its society, this is because every action taken must pay attention to the norms of the rules that have been implemented in the Indonesian state because everything that indicates an act against the law must also be accountable. based on applicable law

II. RESEARCH METHODS

This research includes Normative Law Research or Doctrinal Law Research, namely legal research that uses secondary data sources or is literature research, in this type of legal research, the law is often conceptualized as what is written in statutory regulations (*law in books*) or The law is conceptualized as a rule or norm which is a benchmark for human behaviour that is deemed appropriate.^[6]

III. DISCUSSION

The Nature of Criminal Liability & Spread The Hoax

discourse on criminal liability cannot be separated from the discussion of criminal acts. A person can't be liable to be convicted if he has not committed a criminal act. Experts describe that in imposing a crime the elements of "criminal offence" and "criminal responsibility" must be fulfilled.

Criminal liability is based on the principle of error. The principle of error in the Dutch language reads *geen straf Zonder schuld*, which means that there is no crime without error. Thus, a person can only be convicted if there is something wrong with that person. According to Barda Nawawi Arief, the principle of guilt is a very fundamental principle in asking criminal responsibility for the maker who is guilty of committing a criminal act.^[7]

A person being responsible for a criminal act does not only mean legally punishing that person but also can fully believe that it is his proper place to hold accountable for the criminal act he has committed. Ruslan Saleh stated that: Ruslan "talking about criminal liability, cannot be separated from one or two aspects that must be seen with philosophical views. One of them is justice so that the discussion of criminal responsibility will

provide a clearer contour. Criminal liability as a matter of criminal law is interwoven with justice as a matter of philosophy.^[8]

Furthermore, in the discourse on criminal liability based on criminal law, there are similarities in its application between countries that adhere to the *common law system* and the *civil law system*. For example, the British penal code implies that in principle, everyone who commits a crime can be held accountable for his / her actions, unless there are reasons that negate the elimination of the responsibility concerned (*exemptions from liability*).^[9]

Accountability or what is known as the concept of liability in terms of legal philosophy, Roscoe Pound states that: I ... use the simple word "liability" for the situation whereby one may be exact legally and other is legally subject to the election." is an obligation to pay the retribution that the perpetrator will receive from someone who has been harmed. According to him, the accountability that is carried out does not only concern legal matters but also concerns the moral values or morals that exist in a society.^[10]

Meanwhile, Chairul Huda stated that "accountability is the responsibility of a person for the criminal act he has committed."^[11] Strictly speaking, what the person is responsible for is the criminal act he has committed. Thus, there will be a criminal liability because there has been a criminal act committed by someone. Talking about the issue of criminal responsibility cannot be separated from criminal acts. A person can't be liable to be convicted if he has not committed a criminal act. Criminal liability is essentially a mechanism established by the criminal law to react to violations of an agreement to refuse a certain act. Community rejection of an act is manifested in the form of prohibition (and the threat of punishment) for the act. This is a reflection that society through the state has criticized this act. Whoever or everyone who does this will also be criticized. If the maker is criticized for committing the criminal act, he can do something else.

Criminal liability is to impose reproach on the maker for his actions that violate the prohibition or create a prohibited situation. Criminal liability, therefore, concerns the transfer of the reproach that is in the criminal act to the creator. To account for a person in criminal law is "to carry on a reproach which objectively has a criminal act subjectively against the maker."^[12]

Andi Zainal Abidin stated that both *civil law* and *common law countries* generally negatively formulate criminal liability. This means, in Indonesian criminal law, like other *civil law systems*, the law defines conditions that can cause the maker to be held accountable.^[13] As such, what is regulated are the circumstances that can result in the maker not being convicted (*strafuitsluitingsgronden*), which for the most part is the excuse of erasing. Whereas in the practice of justice in common law countries, various general reasons (*general defence*) or *general excusing of liability are accepted. offender*.^[14]

The concept of criminal liability is the conditions needed to impose a crime on a criminal. Meanwhile, based on non-dualistic ideas (*daad en dader strafrecht*), the due process of determining criminal responsibility is not only carried out by taking into account the interests of the community, but also the interests of the maker itself. According to Galligan, "if this requirement is ignored and there is no visible criminal situation that shows the perpetrator can be censured, then the law and its institutions have failed to fulfil their function."^[15]

Speaking of criminal liability, there are two views. , that is a monistic view, among others, was put forward by Simon who formulated *strafbaar feit als eene strafbaar gestelde onrechtmatige, met schuld in verband staande handeling van een toerekeningsvatbaar person* " (an act which is punishable by law, contrary to the law, is committed by someone who is guilty and the person it is considered responsible for his actions).^[16] According to monism, the *strafbaar feit* elements include both the action element, which is commonly called the objective element and the making element which is commonly called the subjective element. Therefore, mixing the elements of the act with the elements of its maker, it can be concluded that the *strafbaar feit* is the same as the conditions for imposing punishment, so that it is as if it is assumed that if there is *strafbare feiten*, then surely the perpetrator can be convicted.

Meanwhile, according to a dualistic view, as put forward by Herman Kontorowicz in 1933 in his book entitled *Tut und Schuld* where he opposed the correctness of the stance regarding error (*schuld*) which was then in power, which he called *objective schuld*, because of the error there was seen as a characteristic of behavior (*merkmal der Handlung*). For the existence of *straf voraussetzungen* (conditions for the imposition of a criminal offense against the maker), it is necessary to first prove the existence of *strafbare handlung* (a criminal act), then after that, it is proven *Schuld* or the subjective error of the maker.^[17]

In connection with Herman Kontorowicz's view, Moeljatno further said: "Therefore, the conditions for the existence of a crime (*strafvoraussetzungen*) which are generally thoughtless and systematic, are followed by instincts that view it as *handlung qualities* like a *merkmalshaufe* (pile of conditions), should now be systematized according to the essence of the respective conditions, taking into account the two aspects which are one another, are parallel forms. In terms of *handlung* , the objective aspects may also be raised "*Tat*" and "*tatbestand matzigkeit*" which match the wet formulation) and there is no justification (*Fehlen von rechtfertigungsgründen*). In terms of *handle*, which can be called the subjective aspect, on the other hand, there is "*Schuld*" (error) and there is no excuse for forgiveness (*Fehlen von personalechen*

Strafoussshlieszungsgrunden). As only the first aspect is possible *tatbestand smaszig, schuld*. Meanwhile, if these aspects are seen as a unity, not only side by side (*parallel verhältnis*), even one is a condition for the other (*Bedingungsverhältnis*). The aspect that becomes the requirement is That, namely *strafbare Handlung* in the meaning of *Strafgesetzbuch* which is *das kriminelle Unrecht*. Whereas what is implied is *schuld*, because *schuld* only existed after *unrecht unlawful* or the nature of action, and there could be no *schuld* without the existence of an *unrecht*.^[18]

Moeljatno's view can be seen as a technique for judges to impose crimes, that is, it can make it easier for judges to provide appropriate qualifications to makers who will not be convicted. If one of the criminal acts is not proven, then the verdict is acquittal (*vrijspraak*), whereas if all elements of the act are proven, the perpetrator is not immediately punished. If the maker who commits the act is found incapable of being responsible or is found not guilty or negligent, or there is an excuse for forgiveness, then he is free from all legal charges (*ontslag van alle recover volging*).

Based on the description above, that the issue of criminal liability is closely related to the element of error, "discussing the element of error in criminal law means the heart", said Idema^[19] In line with that, according to Sauer there are three basic definitions in criminal law, namely: a). Nature against the law (*unrecht*). b). Error (*schuld*), and c). Criminal (*strafe*).^[20]

According to Ruslan Saleh, the definition of a criminal act does not include liability. A criminal act only refers to the prohibition of an act. Whether the person who has committed the act is then also convicted depends on whether he or she has indeed committed the act to have a fault or not. If the person who commits the criminal act really has a mistake, then of course he will be convicted.^[21]

In connection with this, Sudarto said, "It is not enough to convict someone if that person has committed an act that is against the law or is against the law. Even though the maker fulfils the element of the offence in the law and is not justified, this does not yet fulfil the requirements to impose a sentence. For conviction, there is still a requirement that the person who committed the act had an error or was guilty. In other words, that person must be held accountable for his actions or if seen from the point of view of his actions, he must be held accountable to that person."^[22] This is where what is called the principle of "no punishment without error" (*Keine strafe Ohne Schuld*).^[23]

Based on the dualistic view that will also form the basis of the forthcoming draft of the Criminal Code, *criminal acts* and *criminal liability* are separated. A person is convicted not only because of his evil deed (*actus reus*) but also because he is deserving of reproach because of his wrong thoughts (*men's rea*). Thus, criminal liability relates to a condition that is a condition of the existence of punishment and the legal consequences of this.

According to Barda Nawawi Arief, about the issue of criminal liability, the existence of criminal responsibility must be clear first who can be accounted for, and this must first ascertain who is declared as the maker of a certain crime. This problem concerns the subject of criminal acts which have generally been formulated by legislators for the crime concerned. However, in reality, determining who the maker is is neither easy nor difficult. Furthermore, he stated that after the author was determined, what was next about criminal responsibility? This problem of criminal responsibility is another aspect of the subject of a criminal act that can be distinguished from the problem of the maker (who commits the crime). This means that the definition of the subject of a criminal act can include two things, namely who commits the crime (the maker) and who can be held accountable. In general, the one who can be accounted for in criminal law is the maker, but this is not always the case. This problem also depends on the method or system adopted by the legislators.^[24]

Strictly speaking, about criminal liability for spreading fake news (*hoaxes*), it is people's responsibility for the criminal act of spreading fake news (*hoax*) that they do. Thus, there will be criminal responsibility for the spread of fake news (*hoax*) because there has been a criminal act committed by someone. Where the community has agreed to reject an act of spreading fake news (*hoax*) which is manifested in the form of a prohibition on the act. As a consequence of the community's refusal, the person who did the act would be criticized, because in that incident the maker could do something else. Criminal responsibility for the spread of fake news (*hoax*) is essentially a mechanism established by the criminal law to react to violations of the agreement to reject an act of spreading fake news (*hoax*).

Alf Ross said that "criminal responsibility does not only mean 'rightfully sentenced' but also 'rightfully accused'.^[25] Firstly, criminal responsibility is a condition that exists in the maker when he commits a criminal act. Then criminal liability also means connecting the conditions of the maker to the actions and sanctions that should be imposed. Thus, the assessment is carried out in two directions. First, criminal responsibility is placed in the context of being factual requirements (*conditioning facts*) of conviction,^[26] therefore it carries a preventive aspect. Second, criminal liability is the *legal consequence*^[27] of the existence of these factual requirements, so that it is part of the aspect of *is this connection between conditioning facts and conditioned legal consequences which is expressed in the responsibility* statement.^[28] Based on the concept of criminal

liability above, it can be said that "criminal liability is related to a condition which is a condition of conviction and legal consequences for its existence."^[29]

Judging from the opinions of the experts above, criminal liability differs from a criminal act. A criminal act only refers to prohibited and punishable an act is punishable. Whether the person who commits the act is then sentenced to punishment, depending on the act, it contains an error. This is because the principle of criminal liability is "not to be convicted if there is no mistake (*Geen straf Zonder Schuld; Actus non facit reum nisi men's sis rea*), which means that the assessment of criminal responsibility is aimed at the inner attitude of the perpetrator, not an assessment of his actions. The exception to the principle of actus reus and men's rea is only offences that are strict liability in nature.

Thus, criminal liability in practice in the field experiences complex problems. Where in the criminal justice system, judges are required not only to be creative, but also capable of realizing justice. So judges are required to be more creative in using the existing juridical tools to achieve justice. Where there is a possibility that if a criminal judge merely applies the law, it will be difficult to achieve justice. The saying that judges are mouthpieces of law has been abandoned. The role of the judge is not only to apply the law but also to explore and interpret it. This does not only occur in the *common law system community*, but the same tendency also appears in people who use *civil law systems*, considering that today the two legal families are moving towards one another.

Starting from the formulation of "responsibility" or liability from a philosophical point of view, liability is defined as an obligation to pay the retribution that the perpetrator will receive from someone who has been "harmed". In line with the increasingly effective protection of the law on the public interest in peace and order, and the belief that "retaliation" is a means of deterrence, the payment of "compensation" has shifted from its position, initially as a "privilege" then becoming an "obligation. ". The measure of "compensation" is no longer based on the value of retaliation that must be "purchased", but from the point of view of the loss or suffering caused by the actions of the perpetrator concerned.

IV. CONCLUSION

The essence of criminal responsibility for spreading fake news (hoax) is an act that is closely related to the act of creating news that is unclear and misleading, with content that is provocative and subjective. Based on this, this act is considered a criminal act. This can be justified because the act is a criminal act that also creates a criminal event. Apart from the aspect of the act of spreading, there are also consequences so that based on these consequences this act is constructively prohibited and the perpetrator may be subject to criminal sanctions.

V. SUGGESTIONS

1. The government needs to supervise any content published in electronic media, if there is any distorted information, it must be immediately acted upon. Efforts to prevent the filtering of fake news are steps that must be taken by the government in preventing the spread of fake news so as not to cause harm to the community.
2. The government needs to reformulate more specific rules for handling *hoaxes* so that there are no multiple interpretations in law enforcement.

REFERENCE

- [1] Abdul Wahid and Mohammad Labib, *Mayantara Crimes: Cyber Crime*, Bandung: Refika Aditama, 2005, p. 24.
- [2] Soerjono Soekanto, *Principles of Sociology of Law*, Jakarta: Rajawali Press, 1980. h. 87-88.
- [3] Agus Raharjo *Cybercrime: Understanding and Efforts to Prevent Technology Crime*, Bandung: Citra Aditya Bakti, 2002. h. 91
- [4] In the Ninth Edition of the Big Indonesian Dictionary, 2015, the Definition of Cyber, namely; 1. Computer and Information Systems; 2. Cyberworld; 3. Connected to the Internet., P. 1301
- [5]. The 1945 Constitution, Directorate General and Registrar's Office of the Constitutional Court of the Republic of Indonesia, Jakarta, 2011, p. 48.
- [6]. Said Sampara & La ode Husen, "Legal Research Methods" Cet II. Kretakupa Print, Makassar 2017
- [7] Barda Nawawi Arief, *Interest of Criminal Law Policy*, (Citra Aditya Bakti, Bandung, 2002), p. 85.
- [8] Roeslan Saleh, *Thoughts on Criminal Liability*, (Jakarta: Ghalia Indonesia, 1982),
- [9] Romli Atmasasmita, *Comparison of Contemporary Criminal Law*, (Jakarta: fikahati aneska, 2009), p. 93
- [10] Romli Atmasasmita, 2000, *Comparative Criminal Law*, Mandar Maju, Bandung, p. 65
- [11] Chairul Huda, *From No Penalty Without Error Towards No Criminal Accountability Without Error*, 4th Printing, (Jakarta: Kencana Prenada Media Group, 2011), p. 70

- [12] Roeslan Saleh, *Criminal Actions and Criminal Accountability ; Two Basic Definitions in Criminal Law*, (Jakarta: New Aksara, 1983), p. 13
- [13] Andi Zainal Abidin, *Criminal Law I*, (Jakarta: Sinar Grafika, 1983), p. 260
- [14] Chairul Huda, *From No Penalty Without Error Towards No Criminal Accountability Without Error*, p. 61
- [15] DJ Galligan, *Due Process and Fair Procedures; Study of Administrative Procedures*, (Oxford: Clarendon Press, 1996), p. 5
- [16] Muladi and Dwidja Priyatno, *Corporate Criminal Liability*, (Jakarta: Kencana Prenada Media Group, 2010), p. 61
- [17] Moeljatno, *Criminal Actions and Accountability in Criminal Law*, speech was given at the Commemoration Ceremony of the 6th Anniversary of Gadjah Mada University, December 19, 1955, (Jakarta: Bina Aksara, 1985), p. 22-23
- [18] Moeljatno, *Criminal Actions and Accountability in Criminal Law*, p. 23-24
- [19] Sudarto, *A Dilemma in Indonesia's Criminal System Reform*, (Semarang: FH-UNDIP, 1979), p. 86
- [20] Sudarto, *Law and Community Development*, (Bandung: Sinar Baru, 1983), p. 6
- [21] Roeslan Saleh, *Criminal Actions and Criminal Accountability; Two Basic Definitions in Criminal Law*, p. 75
- [22] Muladi and Dwidja Priyatno, *Corporate Criminal Liability*, p. 69
- [23] In English criminal law, this principle is known in Latin which reads 'actus non facit reum, nisi mens sit rea' (an act does not make a person guilty unless the mind is guilty), See Moeljatno, *Principles Criminal Law*, (1980), p. 3
- [24] Barda Nawawi Arief, *Masalah Pemidanaan Sehubungan Perkembangan Delik-Delik Khusus Dalam Masyarakat*, Kertas Kerja, pada Seminar Perkembangan Delik-delik Khusus dalam Masyarakat yang mengalami Modernisasi BPHN-FH UNAIR Surabaya, Tanggal 25-27 Februari 1980 (Bandung : Bina Cipta, 1982), h. 105-107.
- [25] Alf Ross, *on Guilt, Responsibility and Punishment*, (London: Stevens & Sons, 1975), h. 17
- [29] Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, h. 66

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