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How Far the Authorities are Going to go on Tackling Political Motive Hoax Spreading

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Abstract

This paper identifies hoax as a cyberspace social problem which can have a negative impact toward public order, both in cyberspace and real life. It also elaborates how a hoax is different from fake news for its characteristic. A hoax could cause horizontal conflict, especially in Indonesia when it is about the most recent common political commodities, which are race, ethnicity, religion, intergroup (SARA). Every government has interest on maintaining public order to keep the sustainability of society. Criminal law is designed to be the ultimate tool of social engineering through deterrence effect. The problem is how far the law enforcement is going to go to eradicate the hoax spreading, because the issues of freedom of speech/information. The research is conducted by using a conceptual approach in a normative legal study. Secondary data also provided in this paper to grasp the factual problems as the threat that needed to be encountered. The first part of the paper elaborates the freedom of speech/information, cyberspace, and social media. The second part is explanation of profile of hoax in Indonesia. The third part is elaboration of criminal statutes of hoax distribution using information communication technology. The last part is on how far the government and law enforcement synergize and how far they going to go in handling hoaxes and the sources to prevent and contain further damage. The findings are the blocking and taking down is not just about depraving internet user's rights, but balancing between the freedom and public order. In order to be justifiable and balanced, the government needs to consider objectively whether the content was a threat that disrupting public order (moreover, national security), while the law enforcement could confiscate the electronic system involved and it should have been through appropriate criminal procedure.

1. Introduction

Twenty-one years ago, Gilbert Held already warned about an internet hoax. ¹ He called it “a far more insidious threat than software virus”.² He explained that a web page could professionally have composed to appear similar to an electronic news page format used by a leading distributor of certain news and was posted on a website that allows individuals the ability to create their own web pages.³

Recently in Indonesia, hoaxes became a political commodity. Certain media even called the business as “farm”.⁴ Hoax had been spread to influence the people as the key factor of democracy and as a tool to destroy opposition’s reputation in order to affect their electability, even Indonesian Press Council contend that hoax is in the serious stage.⁵ Also, it can be used to subverts the government and build public opinion to not trust the government anymore. Further in this paper will be explained how it became a commodity since it could be sold and be bought. There are hoax service providers and users that actively engaged to spread what is to be the user’s agenda, especially politics. To address this issue, there were several socializations by the law enforcement and NGOs, for they share a common interest – to protect public order. Combating hoax has been a priority in Jokowi administration. Indonesia Police Chief in 2015 issued an internal regulation No: SE/06/X/2015 of hate speech case handling. This was an effort to uniformed police force’s attitude and guided points to handle hate speech cases for hoax that was popular and dominated with hate speeches.

The significant effect of the hoax could be seen firstly by looking at the number of smartphone users and the ascending in Indonesia. Leisti took data from eMarketer in 2014, Indonesia was at the 7th position out of top 25 countries ranked by smartphone users in 2013-2018. At that time, Indonesia

Table 1: Top 25 countries ranked by smartphone users, 2013–2018 (Millions).

		2013	2014	2015	2016	2017	2018
1	China ^a	436.1	519.7	574.2	624.7	672.1	704.1
2	USA ^b	143.9	165.3	184.2	198.5	211.5	220.0
3	India	76.0	123.3	167.9	204.1	243.8	279.2
4	Japan	40.5	50.8	57.4	61.2	63.9	65.5
5	Russia	35.8	49.0	58.2	65.1	71.9	76.4
6	Brazil	27.1	38.8	48.6	58.5	66.6	71.9
7	Indonesia	27.4	38.3	52.2	69.4	86.6	103.0
8	Germany	29.6	36.4	44.5	50.8	56.1	59.2
9	UK	33.2	36.4	39.4	42.4	44.9	46.4
10	South Korea	29.3	32.8	33.9	34.5	35.1	35.6

¹ Held, G. (1999). Are you prepared for an Internet hoax? *International Journal of Network Management*, 9(6), 345–345. [https://doi.org/10.1002/\(SICI\)1099-1190\(199911/12\)9:6<345::AID-NEM350>3.0.CO;2-0](https://doi.org/10.1002/(SICI)1099-1190(199911/12)9:6<345::AID-NEM350>3.0.CO;2-0)

² *Ibid.*

³ *Ibid.*

⁴ Tempo. (2017). Hoax epidemic: Fake news splatter in cyberspace. 4.

⁵ Juditha, C. (2018). Hoax Communication Interactivity in Social Media and Anticipation. *Jurnal Pekommas*, 3(1), 31-44. DOI: <http://dx.doi.org/10.30818/jpkm.2018.2030104>.

11	Mexico	22.9	28.7	34.2	39.4	44.7	49.9
12	France	21.0	26.7	32.9	37.8	41.5	43.7
13	Italy	19.5	24.1	28.6	32.2	33.7	37.0
14	Turkey	15.3	22.6	27.8	32.4	37.2	40.7
15	Spain	18.9	22.0	25.0	26.9	28.4	29.5
16	Philippines	14.8	20.0	24.8	29.7	34.8	39.4
17	Nigeria	15.9	19.5	23.1	26.8	30.5	34.0
18	Canada	15.2	17.8	20.0	21.7	23.0	23.9
19	Thailand	14.4	17.5	20.4	22.8	25.0	26.8
20	Vietnam	12.4	16.6	20.7	24.6	28.6	32.0
21	Egypt	12.6	15.5	18.2	21.0	23.6	25.8
22	Colombia	11.7	14.4	16.3	18.2	19.7	20.9
23	Australia	11.4	13.2	13.8	14.3	14.7	15.1
24	Poland	9.4	12.7	15.4	17.4	19.4	20.8
25	Argentina	8.8	10.8	12.6	14.1	15.6	17.0
	Worldwide	1311.2	1639.0	1914.6	2155.0	2380.2	2561.8

Source: eMarketer, Dec 2014⁶

Note: Individuals of any age who own at least one smartphone and use it/them at least once per month; ^aexcludes Hong Kong; ^bforecast from Aug 2014.

Internet World Stats processed data from Facebook, International Telecommunication Union, official country telecom reports, and other trustworthy research resources. The data showed Indonesia is at 4th place of countries with the highest number of internet users. Ascending three places since 2014.⁷

Table 2: Top ten countries ranked by smartphone users 2000-2019

No.	Country or Region	Population 2019 Est.	Population 2000 Est.	Internet Users 30 June 2019	Internet Users 31 Dec 2000	Internet Growth 2000-2019
1	China	1,420,062,022	1,283,198,970	854,000,000	22,500,000	3,695 %
2	India	1,368,737,513	1,053,050,912	560,000,000	5,000,000	11,100%
3	United States	329,093,110	281,982,778	292,892,868	95,354,000	207%
4	Indonesia	269,536,482	211,540,429	171,260,000	2,000,000	8,463%
5	Brazil	212,392,717	175,287,587	149,057,635	5,000,000	2,881%
6	Nigeria	200,962,417	122,352,009	123,486,615	200,000	61,643 %
7	Japan	126,854,745	127,533,934	118,626,672	47,080,000	152 %
8	Russia	143,895,551	146,396,514	116,353,942	3,100,000	3,653 %
9	Bangladesh	168,065,920	131,581,243	96,199,000	100,000	96,099 %

⁶ Leisti, S. (2017). Digital Era and Social Media Shaping the World. In P. Hallberg & J. Virkunen (Eds.), *Freedom of Speech and Information in Global Perspective* (p. 239). Palgrave Macmillan-Springer.

⁷ Internet World Stats. (2019). Top 20 countries with the highest number of internet users. <https://www.internetworldstats.com/top20.htm>

10	Mexico	132,328,035	101,719,673	88,000,000	2,712,400	3,144 %
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Wall stated that cyberspace increasingly becomes a common aspect of human existence⁸, and looking at the numbers, it surely is. It would affect the number of behaviours that become defined as cybercrimes will not only increase, but the nature of their victimization will also broaden.⁹

In 2017, there were 132 million active internet users in Indonesia, which is 52 percent of total population.¹⁰ The number has risen in 2019 to 171,260,000 with the penetration of 63,53% of internet users to total population.¹¹ Furthermore, those data can be correlated with the digital literacy of its society. Survey conducted by Tempo from 694 samples discovered some 19 percent of them could not differentiate whether the information they got from social media is a hoax or factual, whereas 24,2 percent did not know how to differentiate, and 56,8 percent are able to make the differentiation.¹² The implication is, half of the internet users in Indonesia are media illiterate.

Walden stated that Indonesia is the third-largest democratic country in the world. It is populated with young and mobile-first with low levels of digital literacy. He also stated that Indonesia is highly susceptible to fake news and hoax distribution.¹³ He stated that Reza, Secretary of Alliance of Independent Journalists (AJI) Indonesia also confirmed the public literacy in Indonesia is very low, ranked 60 out of 61 countries from global study of literacy conducted by Central Connecticut State University in 2016.¹⁴

From a research held by Muhammadiyah University Jogjakarta, regarding Governor-Mayor Election last year, stated that in the future 34% of respondents still anxious about the practice of money politic, 28% hoax, 21% unethical competition.¹⁵ Indonesia has a lot of internet user which half of them are not media-literate and the majority get hoax from information which distributed to their smartphones. Besides, there is a public concern regarding hoax-spreading during the election. The Ministry of Communication and Information Technology of Indonesia revealed that there are nearly 800 thousand websites in Indonesia which are indicated as transmitter of hoax and hate-speech.¹⁶

⁸ Wall, D. S., (1998) Catching Cybercriminals: Policing the Internet, *International Review of Law, Computers & Technology*, 12(2), 201-218, DOI: 10.1080/13600869855397

⁹ *Ibid.*

¹⁰ Tempo, *Op.Cit.*

¹¹ Internet World Stats, *Op.Cit.*

¹² Tempo, *Op.Cit.*

¹³ Walden, M. (2018). Ahead of 2019 Election, Indonesia, Media Battle Fake News. Retrieved December 20, 2019, from <https://www.voanews.com/east-asia-pacific/ahead-2019-election-indonesia-media-battle-fake-news>

¹⁴ *Ibid.*

¹⁵ VOA Indonesia. (2018). Money politic, Hoax dan SARA threat for Region Head dan Presidential election. Retrieved July 20, 2018, from <https://www.voaindonesia.com/a/politik-uang-hoax-dan-sara-ancaman-pilkada-dan-pilpres/4268990.html>

¹⁶ CNN Indonesia. (2016). There are 800 thousand sites of hoax distributor in Indonesia. Retrieved July 20, 2018, from <https://www.cnnindonesia.com/teknologi/20161229170130-185-182956/ada-800-ribu-situs-penyebar-hoax-di-indonesia>

Previous research regarding hoax mostly conducted addressing the communication methods approach, such as by Juditha¹⁷, Abd. Majid¹⁸, Adiprasetyo et.al¹⁹. Those writings tend to elaborate the social phenomena using an approach in communication science. While the legal research basis addressing this particular matter was never conducted. As far as traced by author, there is only a publication regarding hoax by Lutfiyah, but the topic is in COVID-19 matter.²⁰ There was a research publication in 2016 in the United Kingdom focusing on website takedown from the procedural and empirical issue perspective.²¹ One thing for sure, this measure is considerable for attaining the higher interest than freedom in cyberspace. Unfortunately, there has not been such research conducted in Indonesia. But before such research is conducted, addressing the legal perspective of policy and criminal justice beforehand would be a good anticipation before other concrete actions are carried. In 1998, Wall had realized that it was of little surprise that the debate over the control of cyberspace has corresponded with the widespread realization of the increased potential for the commercial and political exploitation of the Internet.²² This paper intended to address the debate on how far the government and the law enforcement could go on imposing sanction and policy regarding political motive hoax spreading.

The first part of the paper elaborates on the freedom of speech/information, cyberspace, and social media. The second part is explanation of profile of hoax in Indonesia. The third part is elaboration of criminal statutes of hoax distribution using information communication technology. The last part is on how far the government and law enforcement synergize and how far they going to go in handling hoaxes and the sources to prevent and contain further damage. The elaborations in this paper are using conceptual approach in a normative legal study. Secondary data also provided above to give the context of empirical issues as the threat that needed to be encountered.

2. Result and discussion

2.1. Freedom of speech/information, cyberspace and social media

One of the most significant effects of Indonesia's political reform in 1998 is the recognition of freedom of speech. Before the political reform, the New Order (regime of Soeharto) shackled freedom of speech with various rules and terror.²³ Freedom of information is closely related with freedom of speech. Freedom of speech made the information, while the freedom of information is about how to gather the information,

¹⁷ Juditha, C., *Ibid.*

¹⁸ Majid, A. (2019). Fenomena Penyebaran Hoax Dan Literasi Bermedia Sosial Lembaga Mahasiswa Universitas Muslim Indonesia. *Jurnal Komodifikasi*, 8, 228-239.

¹⁹ Adiprasetyo, J., Gumilar, G, Hartoyo & Maharani, N. (2017). Hoax, Reproduksi Dan Persebaran: Suatu Penelusuran Literatur. *Jurnal Pengabdian Kepada Masyarakat*, 1(4). 271-278.

²⁰ Lutfiyah, K. (2020). Hoax and Fake News During Covid-19: Is the Law Effective in Overcoming It?. *The Indonesian Journal of International Clinical Legal Education*, 2(3). <https://doi.org/10.15294/ijicle.v2i3.38422>.

²¹ Hutchings, A., Clayton, R., Anderson, R. (2016). "Taking down websites to prevent crime," *2016 APWG Symposium on Electronic Crime Research (eCrime)*, Toronto, ON, 2016, pp. 1-10, doi: 10.1109/ECRIME.2016.7487947.

²² Wall, D.S., *Ibid.*

²³ Yoanita, D., Hadi, I. P., Setiawan, A., Aritonang, A. I., & Maureen, V. (2019). Spirit of writing and sharing as motives of kompasiana users. *Test Engineering and Management*, 81(11-12), p. 2051.

process, and publish, so that others can get or access or retrieve it. Activities such as conversations, all forms of printed materials, broadcasts, film, video, dramatic performances, recordings, and all electronic communications are speech in the conventional sense; sometimes physical activity or conduct that communicates a message also amounts to speech.²⁴ Yoanita stated that after reformation more and more user generated content (UGC) platforms arise.²⁵ Cyberspace amplifies freedom of speech and information. But even though the UGC is a sign of democracy, in practice it does not always have a positive impact. UGC also has the potential for negative impacts, especially when the content is inaccurate, provocative, and even lies (hoaxes). The problem society's face is a speech of incomplete information or manipulated information as hoax is under the same sun of human rights order.

Dworkin calls "constitutive" reasons for freedom of speech are respected for individual autonomy, responsibility, etc.²⁶ Sadurski gave four reasons to justify freedom of speech, which are search for truth, individual autonomy, democracy and self-government, and tolerance. The search for truths involving "marketplace of ideas" slogan, and is best known through the famous words by Holmes: "the best test of truth is the power of the thought to get itself accepted in the competition of the market".²⁷ What Holmes said would be applicable in liberal countries. There are conditions when the rule of the majority in some kind of democracy is not balanced with the protection of the minority. In this case, the marketplace of idea is not applicable. Looking at the Indonesian context, there are protections to exercise freedom of speech, but the restriction is also there, even there are several actions related to the exercise of freedom that is criminalized by virtue of maintaining public order.

Holmes also said that free speech does not give a person the right to yell "fire" in a crowded theatre. Similarly, most free speech advocates would not be heard to advise that a computer hacker should be free to publish missile launch codes that activate nuclear weapons systems, or that someone should be free to change speed limit signs on motorways. Yet all of these activities involve speech or expression of some sort.²⁸ This confirms that freedom has limitations.

There are restrictions on exercising freedom by the law. The law should provide a balance between public order and human rights. Freedom of speech is protected by Indonesia Constitution in Article 28E verse (2) and (3), repeated in 28I verse (1) emphasizing that the right cannot be diminished in all circumstances. The freedom of information is protected by Article 28F. Further freedom assurances are in Law 39/1999 of Human Rights. While the restrictions, stated in Article 28J Indonesia Constitution and Article 70 Law 39/1999, which is the laws and the freedom others. Should it limitless, it would not be freedom at all.

²⁴ Melkonian, H. (2012). *Freedom of Speech and Society: A social approach to freedom of expression*. New York: Cambria Press, p. xxvii.

²⁵ Yoanita, D., Hadi, I. P., Setiawan, A., Aritonang, A. I., & Maureen, V., *Op.Cit.*

²⁶ Dworkin, R. (1996). *Freedom's Law: The Moral Reading of the American Constitution*. Oxford: Oxford University Press.

²⁷ *Abrams v. United States*, 1919.

²⁸ *Ibid.*

The world of social media develops and opens new, faster ways of communicating and exploring the outside world. There are a wide variety of tools designed to harness the vast amount of data the internet, such as Facebook, Twitter, YouTube, LinkedIn, Instagram, and many more. The pivotal idea behind all social media is the instant, and effortless connection to the rest of the world in the forms of papers, news, protests, video clips and personal commentaries. Thoughts and ideas flow rapidly, instantly, in real time.

Social media was built on the ancient invention of writing. It takes information storing to a new level. It might have said that it is a virtual version of the physical world. Even more, the user can visit any country, corporation or institution and connect with anyone by the access to the internet. The users create their own content and tell their own truth to the rest of the collective.²⁹ While the concept is being contested by big data analytics practitioners because internet user's behavior can be manipulated by processing the user's interactions in cyberspace and hit them with information. Brittany Kaiser called it "weapon-grade communication tactics" in a hearing she attended as a witness held by Digital Culture Media and Sport Committee, UK. She describes it as "a powerful secret psyops weapon".³⁰ That cyberspace is a powerful place of propaganda that can manipulate targeted user's behavior, and even decisions conforming a certain agenda of politicians.

Jaishankar postulated an interesting Space Transition Theory. It argues that people behave differently when they move from one space to another".³¹ The theory mainly argues of causation of cybercrime. It explains about how internet user also has different behavior in cyberspace than a real one. Relating to the Space Transition Theory, cyberspace can amplify the behavior of freedom of speech expression.³² The behavior that amplifies the hoax that triggered hate happens. While the illiterate people who triggered can start protests even worse, riot.

Hoax is rather general than fake news (which is also popularly known to manipulate internet users through news platforms). Yet in cyberspace, a manipulation using false information can be conducted without a news platform. Everybody could setup a website so easily and put information there, including fake ones. A survey conducted by Mastel (Telematic Society of Indonesia) involving 1.116 respondents, 92,40% found that hoax distribution majority uses social medias, 62,80% from instant messaging, and then websites 34,90%. While television 8,70%, journalism 5%, email 3,10%, dan radio 1,20%. Obscurity of the news source made 83,2% respondents directly checked the validity of the information, while 15,9% directly deleted it and did not respond any further, 1% straight away share it.³³ Looking at the data provided by Liputan6, can be seen that there is false information spread or distributed outside the news platform. Non-news-fake

²⁹ Leisti, S., *Op.Cit.*

³⁰ Kaiser, B. (2019). *Targeted*. London: HarperCollins Publishers Ltd., p. 220.

³¹ Jaishankar, K. (2008a). Establishing a Theory of Cyber Crimes, 1(2), p. 7-9. <https://doi.org/10.5281/zenodo.18792>

³² Jaishankar, K. (2008b). Space Transition Theory of Cyber Crimes. *Crimes of the Internet*, (January 2008), p. 283-301.

³³ Liputan 6. (2018). Survey: Social media as the main source of hoax spreading. Retrieved from <https://m.liputan6.com/tekno/read/2854713/survei-media-sosial-jadi-sumber-utama-penyebaran-hoax>

information which is a hoax. For a certain type of hoax, that 1% is a threat toward the public order looking at the low level of digital literacy of Indonesia's internet users.

According to Leisti: "Social media is not the change, but it is a part of the change. It is a driver of social change and it changes the field of information media. In the political arena, it can help a loosely coordinated public to assemble and demand change together."³⁴ Some countries have blocked certain social medias in order to protect public well-being and political stability. Turkey's "Twitter-gate" is another good example of blocking social media activity, by the government, which can backfire. After Twitter was blocked, users realized they could still tweet via text, by changing their DNS (domain name server settings) or by using a VPN (a virtual private network). It shows how IT-literate, resourceful citizens could dodge censorship. Services that monitor Twitter usage reported that there is no tweet activity reduction in Turkey at the time. The government was not only failed to block social media channels, the effort even boosted the morale of the users to tweet more. There are ways for internet users to resist internet censorship if they have technological knowledge to do so. Snowden said that IT is a new system of communication, a new set of symbols that people must intuitively understand in the same way children learn to write in school. So, it is learnable.

Leisti also stated, when it comes to social media, a balance between freedom and responsibility is difficult to achieve, as the messages, whether truthful or not, insulting or hate speech, often come about randomly and unexpectedly.³⁵ Similar with Leisti, rights to freedom of expression are obviously not unrestricted, and the conventions allow for limitations in order to protect the rights or reputation of others and for the protection of national security, public order, public health, and morals. Furthermore, he stated, the Internet creates an environment in which these rights are difficult to balance.³⁶

Under Indonesia's illegal content related to electronic information distribution, creating and spreading fake news is illegal. Yet the interesting part is, holding social media accounts under false names is not, unless there is an impersonation of a "real" person. This is the implication of Article 51 jo. Article 35 Law 11/2008 amended with Law 19/2016, that criminal sanction can be imposed should violation of data manipulation resulting to other's misleading interpretation regarding the authenticity of the data.

In combating hoax, there was a resolution to take down websites and social media account that disseminate hoax by the government. Yet the question is the basis to do such action to be justified. This matter will be elaborated more in the section 2.4.

2.2. Profile of hoax in Indonesia

Hoaxes have always happened, but the internet makes some of them easier, and lets others be repackaged in ways that may bypass our existing controls (be they personal

³⁴ Leisti, S., *Op.Cit.*

³⁵ *Ibid.*

³⁶ Smith, R. G. (2011). Human Rights Infringement in the Digital Age. In K. Jaishankar (Ed.), *Cyber Criminology: Exploring Internet Crimes and Criminal Behavior* (pp. 393-409). Boca Raton London New York: CRC Press Taylor & Francis Group. <https://doi.org/10.1201/b10718>.

intuitions, company procedures or even laws).³⁷ Hoaxing is another type of deliberate fabrication or falsification in the mainstream or social media. Attempts to deceive audiences by masquerading as news, and may be picked up and mistakenly validated by traditional news outlets. Rubin et al quoted Brunvand who distinguishes a hoax from pranking or practical joking. He claimed hoax as “relatively complex and large-scale fabrications” which may include deceptions that go beyond the merely playful and “cause material loss or harm to the victim”.³⁸ To deceive more literate internet users, a good method of masquerade is needed. Yet, the less literate or illiterate ones will not be needed, because they would instantly believe the information and unfortunately and they will also share the information with others.

In common manner, there are various motivations for hoaxing. Griffiths made a preliminary list of reasons for hoaxing are:³⁹

- (i) for amusement purposes,
- (ii) out of boredom,
- (iii) as an act of revenge,
- (iv) as a way to gain fame and/or notoriety in some way,
- (v) to gain attention, such as faking illness (Munchausen’s Syndrome),
- (vi) to demonstrate cleverness (or a perception of cleverness) to others around them, and
- (vii) to disrupt the status quo (including terrorist and non-terrorist activity), and for political causes (such as claiming to be a victim of a racist hate crime)

It is commonly known that website activities can earn income. The hoax creator and distributor motivation to spread hoax information is mainly due to revenue gained. The simplest money they got is from advertising, for instance, Google adSense gives USD 1 for 1000 user visits. Postmetro.info or Postmetro.co got approximate revenue IDR 30 million per month. While portalpiyungan.co got IDR 50-60 million per month just from the adSense.⁴⁰ It is for sure that the hoax creator and distributor are financially motivated. Apparently, for Indonesia’s condition, financial motivation is an addition for the list of reasons made by Griffiths.

The web admin or hoax creator and distributor intended to get a lot of visitors. To reach the objective, they tend to generate hoaxes based on controversial issues with controversial titles and click-bait. The hotter the issues, the more reposts/shares, and visits they got. For certain case, it commonly could triggered horizontal conflict in society. The most successful hoax, looking at the recent profile, highlighted and popular in controversial way, is related to ethnic, race, religion and inter-group. With the help of

³⁷ Anderson, R. (2008). *Security Engineering: A Guide to Building Dependable Distributed Systems* (2nd ed.). Indiana: Wiley. Retrieved from <http://www.citeulike.org/user/brothers/article/5106718>.

³⁸ Rubin, V. L., Chen, Y., & Conroy, N. J. (2015). Deception detection for news: Three types of fakes. In *Proceedings of the Association for Information Science and Technology* (Vol. 52, pp. 1–4). MO, USA. <https://doi.org/10.1002/pra2.2015.145052010083>

³⁹ Griffiths, M. D. (2017). The Psychology of Hoaxing: Why do individuals deliberately try to mislead others? Retrieved July 20, 2018, from <https://www.psychologytoday.com/us/blog/in-excess/201705/the-psychology-hoaxing>.

⁴⁰ Tempo, *Op.Cit.*

social media, the distribution of those kinds of information is expeditious. The problem is, from the profit they got, public order is at stake.

Technology development changed the man's information-related behavior from actively seek to passively stricken. The information strikes every day to be consumed, with nearly half of Indonesia's internet user population could not – or do not know how to differentiate whether the information is truthful or hoax, hoax could be a commodity that threatens public order.

In generating hoax - for security, privacy, and passive income, the hoax creator and distributor also uses bot (program) and anonymous account. This is one of the law enforcement obstacles to deal with. In one case in 2014, the police caught the hoax creator and distributor because he extorted the victim, and the victim reported to the police with extortion accusatory. Then, the police found that he was one of the hoax spreader twitter account admin. If there was no report on extortion, the hoax spreader identity would remain under the surface.

To protect and preserve public order, indeed we would expect the protection by the government by restricting publication of lies that could affect the public order. The literate users may test the veracity and truthfulness of the publication by doing information checking through websites, but the illiterate ones could not. By measuring the numbers of illiterate, the publication of lies could set significant impact toward public order, especially in certain type such as hate speech as political vehicle.

Hoax number escalated sharply in the times of election. Ashar stated that NGO 'Hidupkan Kembali Hoax' recorded there are more than 1.900 reports of fake news within three months ahead of Jakarta Governor election. From that reports, more than 1.000 reports confirmed as hoax. There are more than 40.000 websites that claimed as news site, but a lot of them are unregistered as press.⁴¹ Most of the hoax are related to politic, especially Jakarta Governor election, and religion issues played significant role.

A research publication in 2018 found that from the samples of 15 hoaxes with the approximate timeline to political contest, and clarified by independent NGO, all of them related to the attack toward political contestant.⁴² Further, Utami stated, in terms of form, hoax content circulating on social media before the 2017 Jakarta governor election demonstrated a specific pattern of how users deliver hoax information. When spreading hoax content, users tend to:

1. Post an edited image with personal comment.
2. Share a link to a blog (fake news) with personal comment.
3. Post a deceptive statement and an unrelated or misinterpreted photo.
4. Post a defaming narrative with claims by a perceivably influential figure supported by an edited image.

⁴¹ Jawa Pos. (2017). 1.900 hoax issues arise ahead of DKI Jakarta governor election. Retrieved July 24, 2018, from <https://www.jawapos.com/nasional/pemilihan/18/04/2017/1900-isu-hoax-muncul-jelang-pencoblosan-pilkada-dki-jakarta>

⁴² Utami, P. (2018). Hoax in Modern Politics: The Meaning of Hoax in Indonesian Politics and Democracy. *Jurnal Ilmu Sosial Dan Ilmu Politik*, 22(2), 85-97, DOI: <https://doi.org/10.22146/jsp.34614>.

5. Post a deceptive statement with support of screen captures of chats or Facebook status about similar claim.

The content profile of the hoaxes distributed has always been attacked toward personal or the supporters of the political candidate. Based on observations, posts attract attention if, among other things, they relate to well-known public figures, sensitive issues (i.e. primordial/ethnic, religion, race, group segregation – SARA issues), and human interests, including announcements considered important by the public. For the sensitive issues, Salam used the term for this type of hoax as an anti-diversity hoax.⁴³ They cause a horizontal conflict, and potential threat toward public order, as for Indonesia is a country with diversity as its identity.

Data released in a report from Mafindo, shows that political hoax or fake news and disinformation rise up by 61% between December 2018 and January 2019. The 109 problematic items identified this January, 58 were political in nature. While the latest Mafindo data from February further indicating an increasing escalation. In December there were 88 items of fake news, of which 36 were political in nature. The targets of hoaxes are not only political candidates but also electoral institutions.⁴⁴ The most common topics for hoaxes are usually related to politics, health, government, individual slander, crime, religious issues, trade, education, and international fraud.⁴⁵

In April 2019, there were 486 hoaxes identified by the Ministry of Communication and Informatics. From the data, 209 hoaxes are categorized as political information. The increasing of hoax was starting in August 2018. In August the contents categorized as hoax were 25 contents, yet in September there were 27. Calculating from August 2018 until April 2019, there were 1.731 contents.⁴⁶ The data elaborated more in this table:

Table: Hoax data of August 2018-April 2019

No.	Content category	Numbers of hoaxes
1	Political	620 contents
2	Governmental	210 contents
3	Health issues	200 contents
4	Defamation	159 contents
5	Other criminal conduct	113 contents
6	Other issues	429 contents
	TOTAL	1.731 contents

Source: Indonesia Ministry of Communication and Information Technology

⁴³ Salam, A. (2018). The Hoax Phenomenon in Indonesian Society: Observing Anti-Diversity Memes since 2014. *Humaniora*, 30(3) 315-324, <https://doi.org/10.22146/jh.38891>, p. 315.

⁴⁴ Lamb, K. (2019). Fake news spikes in Indonesia ahead of elections. Retrieved February 28, 2020, from <https://www.theguardian.com/world/2019/mar/20/fake-news-spikes-in-indonesia-ahead-of-elections>

⁴⁵ Yoanita, D., Hadi, I. P., Setiawan, A., Aritonang, A. I., & Maureen, V., *Op.Cit.*, p. 2051.

⁴⁶ Maharani, T. (2019). Ministry of communication and informatic identified 486 Hoaxes in April 2019, 209 are political. Retrieved from <https://news.detik.com/berita/d-4532182/kominfo-identifikasi-486-hoax-sepanjang-april-2019-209-terkait-politik>

According to the Mafindo report, throughout 2018 the Jokowi was the biggest target of fake news, accounting for 28.98%, while 20.85% was directed at the opposition, Prabowo Subianto.⁴⁷

One of the highlighted cases was Ratna Sarumpaet's. The case started when she who was one of the spokespersons of Prabowo - Sandiaga campaign team decided to have cosmetic surgery on Sept 21, without any consent of her family. The next day, a picture of her with swollen face went viral on social media. To her family, she claimed it was a result of an assault that happened in Bandung, West Java. She kept her secret for a week. On Oct 2, Fadli tweeted about the assault and it caught public attention. Later that night, Ratna met Prabowo and his national campaign team to clarify about the incident and she did not tell the truth yet. Prabowo then stood for her, said that he has met national police chief to discuss the case. According to Nanik S. Deyang, the incident had taken place on Sept 21, near Husein Sastranegara International Airport. However, on Oct 3, police found out that Ratna had not been in Bandung that day. Police found that she was at Jakarta hospital receiving treatment of cosmetic surgery. Afterward, she admitted having lied. She said pictures of her swollen eyes that went viral were the result of liposuction and apologized to Prabowo and public for her deception. Jakarta Police arrested Ratna when she was about to take a flight to Chile at Soekarno Hatta International Airport, Tangerang, Banten, to attend international playwrights conference on Oct 4.⁴⁸

Hoax related to identity politics, including religion and ethnicity, has proven difficult to entirely debunk. A new poll by Saiful Mujani Research Center (SMRC) showed that 6% of the population still believe Jokowi is a member of the Indonesian Communist Party.⁴⁹

2.3. Criminal law, public order and hoax-spreading

The law serves many purposes and functions in society. Four principal purposes and functions are establishing standards, maintaining order, resolving disputes, and protecting liberties and rights.⁵⁰ One of the law consequences is to create public order, one of the ways is by criminalizing certain action(s). Decision stated that public order is a measure of peace and observance of basic value patterns of a culture upon which the fruitful pursuit of legitimate interests in the given society depends.⁵¹ Akimzhanov et al. in one of his writing stated about the role of the state related to punishment, even though his writing is not particular in hoax and ICT regime, but what he stated can be considered as applicable to this matter. They stated that the task of the state consists in that, on the one hand, to provide inevitability of punishment for the committed crime, and on the other hand to make this punishment the most fair and effective, maximum

⁴⁷ Lamb, K., *Op.Cit.*

⁴⁸ Sulistya, R., Almas, P., & Dwinanda, R. (2018). No new suspect in Ratna Sarumpaet hoax case. Retrieved November 20, 2019, from <https://m.republika.co.id/berita/en/national-politics/18/11/09/phx436414-no-new-suspect-in-ratna-sarumpaet-hoax-case>

⁴⁹ Lamb, K., *Op.Cit.*

⁵⁰ Harris, B., & Brickley, S. (2018). Purposes and Functions of Law. Retrieved from <http://www.businesslawbasics.com/chapter-3-purposes-and-functions-law-1>

⁵¹ Dession, G. H. (1947). Sanctions, Law and Public Order. *Vanderbilt Law Review*, Yale Law S.

having reduced the social consequences both for the convict, and for the state, in general.⁵²

Establishing a safeguard of freedom of speech is a requirement for rule of law, and that free speech itself is a fundamental precondition for the development of a democratic rule of law.⁵³ In establishing public order related to freedom of speech and information, media literacy is as important as well as the law. Literacy can be a filter for the internet user to filter what kind of information can be consumed.

Kevin Mitnick claims that human beings are the biggest threat to security. Human emotions such as personal gain, willingness to help others, trust, fear of getting reproved, and conformity are the primary reasons social engineering techniques (which include hoaxes) can be so successful.⁵⁴ Griffiths quoting Jones, hoaxes prey upon several human traits including goodwill, naivety, greed, fear and anxiety, and a deference to authority.⁵⁵

Criminal law labels certain kinds of behavior as being unlawful and sets out the rules for deciding when a crime has been committed.⁵⁶ According to Brenner, since the mid-1990s, law enforcement officers divide cybercrime into three categories: crimes in which a computer is the target of the offence, crimes in which a computer is used as a tool in committing the offence, and crimes in which a computer plays an incidental role in the commission of the offence.⁵⁷ Computer is now and still going to develop, computer is not pictured as in the mid-1990s, which has big size and consume spaces. It is now very small and affordable, and even converge with cellular feature, commonly addresses as smartphones. That is one of the factors why Indonesia as third world country has many internet users, for smartphones are affordable. As aforementioned, social media is the main tool to distribute hoax, smartphones are affordable, and half of Indonesia's internet users are illiterate, hoaxes could fly anytime soon to smartphone users.

Not all of the hoax-spreading acts are criminalized and punishable. Because there are hoaxes that are not have certain impact toward the public order, even some are. Several hoaxes that have impact in certain ways summarized by Republika. For example, job vacancy hoax in energy corporations which potentially happened near contract signing or extension between the corporation and the government. Or the other type of hoax

⁵² Akimzhanov, T., Alayeva, G., Bishmanov, K., Lyutsik, V., & Ryzhkova, I. (2017). About the Implementation of International Standards And Limits Of Reception Of Foreign Experience To The Sphere Of Execution Of The Punishment In The Republic Of Kazakhstan. *Astra Salvensis*, V(Supplement No. 1), 25–35.

⁵³ Leisti, S., *Op.Cit.*

⁵⁴ Mitnick, K. D., & Simon, W. L. (2003). *The Art of Deception: Controlling the Human Element in Security*. *BMJ: British Medical Journal*. Indiana: Wiley. <https://doi.org/0471237124>

⁵⁵ Griffiths, M. D., *Op.Cit.*

⁵⁶ Cross, N. (2010). *Criminal law & criminal justice: An introduction*. *Criminal Law and Criminal Justice: An Introduction*. SAGE. <https://doi.org/10.4135/9781446288283>

⁵⁷ Brenner, S. W. (2010). *Cybercrime: criminal threats from cyberspace*. *Choice Reviews Online* (Vol. 48). <https://doi.org/10.5860/choice.48-0685>

could also happen when the government policy was disharmony with the corporation policy.⁵⁸

Quoting Pontoh, Rubin stated that hoax induces negative effect. The content usually instigation and libel. Again, he stated that hoax aims society's emotion, builds negative opinion that could harm nation's integration. Hoax can be tool to provoke and create negative agitation, ignited hate, and instigation to people (to create public disorder) through negative propaganda to inflict influence on society's behavior to respond according to the perpetrator's agenda.⁵⁹

The lawmaker criminalized the distribution of hoaxes that affect the public order. Reviewing the law - although hoax substantially contains lies, fake information, twisted facts, and some things similar to them - expressing, distributing and spreading, not all of them are criminal law violations. What is forbidden by law is if the hoax impact causes public disorder in certain ways.

Criminal law that is directly related to hoax can be found in Article 14 and 15 Law 1/1946; Article 390 Indonesia Criminal Code; and Article 28 (1) Law 11/2008 amended with Law 19/2016. While the rest articles discussed below besides the ones mentioned are potentially related to hoax or the effect the hoax caused.

Article 14 Law 1/1946 stated:

- (1) Any person disseminates false news or notification, knowingly to create public riot, shall be sentenced to imprisonment not exceeding ten years.
- (2) Any person disseminates false news or notification, that could create public riot, while deservedly suppose that the news or information is false, shall be sentenced to imprisonment not exceeding three years.

Verse (1) categorized as *materiele delict*, which means that criminal statute can be imposed, should public riot as impact of the action had happened. The dissemination of false news itself is unnecessarily punishable, until the impact comes in. While verse (2) formulation is arguably considered as *formele delict*. The impact is not firmly formulated, it is only stating about potential impact of the action. The potential impact itself is sufficient for the article to be applied, if false news disseminated. This norm needed a quantitative indicator of what it is meant of the potential impact of public riot, to prevent obscurity of the norm itself.

Article 15 Law 1/1946 stated:

“Any person disseminates dicey information or exaggerating information or incomplete one, while understand at least deservedly suppose that the information will or had created public riot, shall be sentenced to imprisonment not exceeding two years.”

⁵⁸ Susilawati, D., & Putri, W. D. (2017). The impact of hoax news. Retrieved August 9, 2018, from <https://www.republika.co.id/berita/trendtek/internet/17/04/11/oo7uxj359-begini-dampak-berita-hoax>.

⁵⁹ Rubin, V. L., Chen, Y., & Conroy, N. J., *Op.Cit.*

This article criminalized the action of disseminating incomplete or exaggerating information that could cause a public riot. It is obviously related to the doctrine of culpability, in which the perpetrator deservedly suppose that the public riot could happen as the consequence of the action.

On the impact in harming public order, Indonesia has a chapter of Crime Against Public Order in Indonesia Criminal Code introduced in Section V. Article 156 Indonesia Criminal Code stated:

“The person who publicly express the feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years or a maximum fine of three hundred Rupiahs.”

This article is not literally about the hoax, but in Indonesia, some hoaxes created are very related to this matter – racial-hate, religion-hate, group-hate, especially ahead of the political contest period. The article does not require any impact of the expression. The expression itself is criminalized and can be penalized.

Article 156a Indonesia Criminal Code ruled:

“By a maximum imprisonment of five years shall be punished any person who deliberately in public express feelings or commits an act,

- a. which principally have the character of being at enmity with, abusing or staining a religion, adhered to in Indonesia;
- b. with the intention to prevent a person to adhere to any religion based on the belief of the almighty God.”

Both articles categorized as *formele delict*. They do not require any result of the action for the articles to be applied. Both of them criminalized idea-expression in public, Article 156 is of hostility, hatred or contempt to particular group in Indonesia, while Article 156a is of abusing or staining every religion lawfully acknowledged in Indonesia or making someone else be atheist.

The other, Article 160 Indonesia Criminal Code ruled:

“Any person who orally or in writing incites in public to commit a punishable act, a violent action against the public authority or any other disobedience, either to a statutory provision or to an official order issued under a statutory provision, shall be punished by a maximum imprisonment of six years or a maximum fine of three hundred Rupiahs.”

This article has the potential to be a tool of government power abuse. The term ‘any other disobedience’ created room for interpretations.

Some other acts criminalized in law contain criminal sanctions outside the code. Several articles that related to profile of hoaxes in Indonesia ruled in Law 11/2008 amended with Law 19/2016 of Electronic Information and Transaction. Regarding action of offense

toward person reputation ruled in Article 45 (3) jo. 27 (3) Article Law 11/2008 amended with Law 19/2016:

“Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation as mentioned in Article 27 (3) punishable shall be sentenced to imprisonment not exceeding 4 (four) years and/or fine not exceeding Rp750.000.000,00 (seven hundred and fifty million rupiahs).”

Law 19/2016 give limitation to the extent of ‘distributes’ and ‘transmits’, which in previous Law 11/2008, the law maker did not firmly do so. It is very likely because of the thought the terms could understood in common sense. While common sense understanding in certain ways causing multi-interpretation. That is why limiting the extent of the terms is a good step.

These statutes are not specifically prohibiting and punish hoax. Yet, these statutes prohibiting and punish actions that have the controversial and provocative nature of certain information distributed along the hoax.

Article 390 Indonesian Criminal Code is also use ‘false news’ proposition. Stated:

“Any person knowingly to gain self or others(s) profit, against rights, disseminates false news to escalate or deescalate needs price, funds, marketable securities, shall be sentenced to imprisonment not exceeding two years and eight months.”

Soesilo clearly explained that what is forbid in Article 390 Indonesian Criminal Code is ‘disseminating false news’. Yet the action itself is not necessarily punishable. The one that has the objective to escalate or deescalate prices or marketable securities is. And it should also with the intention to gain personal profit, whether self or other(s).⁶⁰ So, clearly the hoaxing is punishable when the impact had already happened.

Article 28 (1) Law 11/2008 is clearly using term that related closely to hoax, stated:

“Any Person who knowingly and without authority disseminates false and misleading information resulting in consumer loss in Electronic Transactions.”

Article 28 (1) using a slightly different term, it uses ‘disseminates’ instead of ‘distributes’ or ‘transmits’. But when we look at the term within the context of the article, in nature they have a similar meaning. This norm uses the phrase of ‘false and misleading information’, which mentioned Rubin as hoax. This norm applied to a certain type of the case like Erick J. Adriansjah who forwarded e-mail from his colleague that contains information of banks liquidity problem: “market news stated that several Indo bank is having a liquidity problem and fail to complete an interbank transaction. These Indo bank include: Bank Panin (PNBNIJ); Bank Bukopin (BBKPIJ); Bank Arta Graha (INPCIJ); Bank CIC (BCICJ) dan Bank Victoria (BVICIJ). We will keep you update.” (Detik Finance,

⁶⁰ Soesilo, R. (1996). *Kitab Undang-undang Hukum Pidana (KUHP) serta Komentar-komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia, p. 269.

2008). This rumour was very disturbing, and potentially caused widespread economic problems in Indonesia.

In law enforcement practice, this norm is extensively applied to deter online fraud, but only within the scope of buyer-seller. The extent of this norm could not deter online fraud beyond that scope.

Regarding to racism and religionism related hoax, Article 28 verse (2) Law 11/2008 stated:

“Any Person who knowingly and without authority disseminates information aimed at inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and intergroups (SARA).”

The operative term of the action criminalized in this verse is similar with verse (1), which disseminates. The era of ICT amplifies the freedom of speech and information. Ahead of political contestation, sharing information contain speech or expression inflicting hatred or dissension to individual(s) or certain groups based on ethnic groups, religions, races, and intergroups.

From the elaborations above, can be concluded that criminal statutes for hoax and what is related to in Indonesia can be categorized into:

- 1) Hoax with the impact of public disorder
- 2) Hoax with the impact of economy or consumer damage
- 3) Information processing of provocative and offensive toward ethnic, racism, culture

2.4. Measures by the authorities on preventing and deterring hoax

Should there is a hoax distribution case come and needed to be handled, whereas there are basically two authorities in Indonesia's cyberspace, namely the government and the law enforcement. Thus, there are two measures can be conducted in handling hoax-spreading, the administrative measure by the government, or criminal justice procedure one by the law enforcement. The idea to block or takedown website or social media that caused horizontal conflict might be an instant problem-solver, but a matter of justifiability is in question. Because the debate of blocking or taking down website or social media account emerged as it is arguably incapacitating the user to exercise their freedom of speech and of information.

For administrative measure perspective, the government regulated cyberspace for the purpose of controlling. In cyberspace, administrative regulation also exists with their administrative sanction, should violations have occurred. The administrative measure is not only toward the content but also toward the corporate that provides service of contents distribution such as social media provider. Administrative sanctions can be imposed toward the corporate if they would not comply with the regulations. In 2014, Minister of Communication and Informatics issued a regulation regarding Negative

Content Internet Site Handling, by the number 19/2014.⁶¹ There are two mechanisms regulated in the regulation, which are blockage and normalization. The blockage is the measure of making a website that has negative content would inaccessible, while the normalization is a process of excluding a website that had been blocked out of the blockage list. It is clear in the regulation that the government's intention was to protect the public interest from negative internet content.

One of the administrative measures toward the content could be removed from every search index. Removing the content from search engine indexes is not considered incapacitation. The freedom of speech is still can be exercised, but the tool of acceleration is no longer provided. It is not a problem because the tool of acceleration is not a right that supposedly given to everyone equally. But the challenge is the government depends on the parties involved in search engine indexation which could possible beyond Indonesia's jurisdiction, thus goodwill of the parties is also essential.

While, on criminal justice perspective, Akimzhanov argued there are two most widespread tendencies of criminal justice development:⁶²

- the first - reflects the concept of control of crime (policy of legality and an order) which has an ultimate goal by rigid means to control the crime in case of need, sacrificing the rights and freedoms of participants of criminal procedures in the limits, fixed by the national legislation;
- the second - corresponds to the concept of so-called formal process of law according to which priority values are the rights and personal freedoms which are not subject to restriction even for fight against crime.

Using the measure to directly take down website or social media account reflect the first tendency. Yet still, the control of crime concept should be conducted according to criminal procedure. The question to this tendency is how far the sacrifice of the rights and freedoms go in order to achieve the crime control. Also, the other issue that needs to be paid attention to is the jurisdiction problem if the electronic system that be taken down involves multi-jurisdictions.

It is known that freedom of information (also, of speech) is considered as derogable rights.⁶³ There are several statutes implied to concur the argument. In Article 19 paragraph 3 ICCPR, which has the same substance with Article 23 paragraph (2) and Article 44 Republic of Indonesia Law 39/1999 concerning Human Rights. The similarities of those statutes are: both of them carry responsibilities in the exercise, and the exercise is restricted by the law with the reasons prescribed. Yet still, the derogation has to be done justifiably. The website or social media take down cannot be done arbitrarily. When it comes down to a criminal proceeding, it must be conducted according to criminal procedure. The action done beyond the criminal procedure is arbitrary action. Should hoax distribution allegation occurred, the investigator can perform a confiscation of the electronic system of website and/or social media account.

⁶¹ Read *Peraturan Menteri Komunikasi Dan Informatika Republik Indonesia Nomor 19 Tahun 2014 Tentang Penanganan Situs Internet Bermuatan Negatif* (BNRI 2014 No. 1003)

⁶² Akimzhanov, T., Alayeva, G., Bishmanov, K., Lyutsik, V., & Ryzhkova, I., *Op.Cit.*, p. 28.

⁶³ Derogable rights means that they are can be set aside or removed or suspended temporarily in order to achieve higher interest.

The legal basis of this conduct is justifiable by Article 38 Republic of Indonesia Law 8/1981 concerning criminal justice procedure. The statute limitations for this matter are:⁶⁴

- Should be by permission of the chairman of district court; should be an urgency, it can be proposed later
- Should be a thing that used directly or as a preparation to execute or directly related to criminal offence.

Legal issue for this norm is what is to be considered as “thing” and whether electronic system as a website or social media can be considered as such. The lawmaker had encountered the issue of electronic information, document, and system recognition as evidence with the enactment of Law 11/2008 and the amendment. The recognition was accommodated in Article 5 Law 11/2008 with the elucidation in Law 19/2016. Yet those laws as the *lex specialis*, have not specifically regulate what is beyond the recognition, in this matter is confiscation⁶⁵ of electronic evidence. Confiscation of website or social media that spread hoax could be a key to sustain the public order. Because if the illicit content must stay online and wait until the perpetrator proven guilty will be a cost. The principle of innocent until proven guilty applied accordingly to the perpetrator, while the criminal conduct being seized to prevent further damage.

In Indonesia criminal justice system, there are statutes limitations of what is can be presented as evidence in criminal case. The general rules are in Law 8/1981 or known as KUHAP. Not everything that has evidentiary nature can be presented as evidence. It has to fulfil evidence requirement as in Article 184 KUHAP. For electronic evidence, the recognition is under Article 5 Law 11/2008 with the elucidation that it is broadening the statute limitation in Article 184 KUHAP, with later elaboration in Article 44 Law 11/2008 and the amendment. Is possible for the *lex specialis* to rule the criminal justice process for the existence of Article 284 (2) KUHAP. But unfortunately, there is not yet any regulation of electronic system/ document/ information confiscation in a criminal matter. The effort right now is drafting the amendment of Law 8/1981, inserting the due process of collecting, evaluating, and processing electronic evidence.⁶⁶ The draft suggests that the inclusion of electronic information/document/account as evidence that can be confiscated is needed.⁶⁷ The draft implicates that the confiscation can be done by identical-cloning the electronic device or the crime scene, with the option of returning the electronic device or system that already cloned.⁶⁸ The reason for unreturning the evidence is if it is still needed for the investigation, and not explicitly of negative impact reason. It is understandable because not all electronic information has recurring negative impacts. But learning from the hoax cases, the reason for damage prevention should be inserted.

Law 11/2008 amended with Law 19/2016 is strategic in formulating the objective element of crimes. Most of them used the concept of ‘unlawful’ or ‘without rights’,

⁶⁴ Read Article 38 and Article 39 Law 8/1981

⁶⁵ The concept of confiscation in criminal justice system can be found in Article 1(15) Law 8/1981

⁶⁶ Kemitraan & Lembaga Kajian dan Advokasi Untuk Independensi Peradilan. (2019). “Naskah Akademik Kerangka Hukum Perolehan, Pemeriksaan, dan Pengelolaan Bukti Elektronik”.

⁶⁷ It is in Article 1(16) of the draft, with all the process in Article 131-Article 131f of the draft.

⁶⁸ Read Article 131b of the draft.

raising the possibility of lawful action ones. For instance, the formulation of illegal access and an illegal interception. The added elements of 'unlawful' or 'without rights' imply that there are actions conducted legally, lawful, or rightfully. Access, interception, and destruction of website or social media account could be included. But it is still needed good ruling in order to eliminate arbitrary actions to do so.

3. Conclusion

Based on the recent profile, highlighted and popular in a controversial way, the most successful hoax to be distributed and creating negative social impact in Indonesia is related to ethnicity, race, religion and inter-group. That is of course very potential and could cause horizontal conflict to disrupt public order.

In protecting and maintaining public order, Indonesia is one of the countries that are serious in ruling freedom of speech and information by limiting certain action by criminalization. But not all hoax generating and/or spreading are punishable. Several articles regulates disseminating false, incomplete, or exaggerating information and in what situation the action is punishable. While the other ones are not directly of hoax, yet in certain conditions the article could be applied respectfully.

Blocking or taking down website or social media account is considerably an option and could be exercised by government and law enforcement. The government could use the policies in putting forward public order (moreover, national security) by administrative sanctioning the corporations or parties that run the system involved in hoax spreading. While the law enforcement could confiscate the electronic system involved where it should have been through the appropriate criminal procedure. It is an effort to prevent any arbitrary action that could occur in the take down process. Yet it is possible to detain and confiscate electronic system that under investigation of computer-enabled crime case.

Punishment for the hoax spreader or generator or farmer would not be effective without appropriate education of media literacy, and appreciation and internalization of diversity. So, education to the society as a non-judicial effort should also be conducted as a complementary one. Recommendations for further research are conceptual research on "public riot" and on multi-jurisdictions issue in taking down the electronic system if the content-related cybercrime occurred, is needed.

List of References

Books

- Anderson, R. (2008). *Security Engineering: A Guide to Building Dependable Distributed Systems* (2nd ed.). Indiana: Wiley. Retrieved from <http://www.citeulike.org/user/brothers/article/5106718>
- Cross, N. (2010). *Criminal law & criminal justice: An introduction. Criminal Law and Criminal Justice: An Introduction*. SAGE. <https://doi.org/10.4135/9781446288283>
- Dworkin, R. (1996). *Freedom's Law: The Moral Reading of the American Constitution*. Oxford: Oxford University Press.

- Hudson, B. A. (1993). *Penal Policy and Social Justice*. Macmillan – UK.
- Leisti, S. (2017). *Digital Era and Social Media Shaping the World*. In P. Hallberg & J. Virkunen (Eds.), *Freedom of Speech and Information in Global Perspective* (p. 239). New York: Palgrave Macmillan-Springer.
- Melkonian, H. (2012). *Freedom of Speech and Society: A social approach to freedom of expression*. New York: Cambria Press.
- Smith, R. G. (2011). Human Rights Infringement in the Digital Age. In K. Jaishankar (Ed.), *Cyber Criminology: Exploring Internet Crimes and Criminal Behavior* (pp. 393–409). Boca Raton London New York: CRC Press Taylor & Francis Group. <https://doi.org/10.1201/b10718>
- Soesilo, R. (1996). *Kitab Undang-undang Hukum Pidana (KUHP) serta Komentar-komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia
- Kaiser, B. (2019). *Targeted*. London: Harper Collins Publishers Ltd.
- Kemitraan & Lembaga Kajian dan Advokasi Untuk Independensi Peradilan. (2019). *Naskah Akademik Kerangka Hukum Perolehan, Pemeriksaan, dan Pengelolaan Bukti Elektronik*. Tanpa Penerbit.

Journals

- Adiprasetyo, J., Gumilar, G., Hartoyo & Maharani, N. (2017). Hoax, Reproduksi Dan Persebaran: Suatu Penelusuran Literatur. *Jurnal Pengabdian Kepada Masyarakat*, 1(4). 271-278.
- Akimzhanov, T., Alayeva, G., Bishmanov, K., Lyutsik, V., & Ryzhkova, I. (2017). About the Implementation of International Standards And Limits Of Reception Of Foreign Experience To The Sphere Of Execution Of The Punishment In The Republic Of Kazakhstan. *Astra Salvensis*, V(Supplement No. 1), 25–35.
- Bayles, M. (1974). Criminal Paternalism. In *The Limits of Law: Nomos XV* (p. 175).
- Brenner, S. W. (2010). *Cybercrime: criminal threats from cyberspace*. *Choice Reviews Online* (Vol. 48). <https://doi.org/10.5860/choice.48-0685>
- Dession, G. H. (1947). Sanctions, Law and Public Order. *Vanderbilt Law Review*, Yale Law S.
- Held, G. (1999). Are You Prepared for an Internet Hoax? *International Journal of Network Management*, 9.
- Jaishankar, K. (2008a). Establishing a Theory of Cyber Crimes, 1(2), 7–9. <https://doi.org/10.5281/zenodo.18792>
- Jaishankar, K. (2008b). Space transition theory of cyber crimes. *Crimes of the Internet*, (January 2008), 283–301.
- Juditha, C. (2018). Hoax Communication Interactivity in Social Media and Anticipation. *Jurnal Pekommas*, 3(1), 31–44.
- Lutfiyah, K. (2020). Hoax and Fake News During Covid-19: Is the Law Effective in

- Overcoming It?. *The Indonesian Journal of International Clinical Legal Education*, 2(3).
<https://doi.org/10.15294/ijicle.v2i3.38422>
- Majid, A. (2019). Fenomena Penyebaran Hoax Dan Literasi Bermedia Sosial Lembaga Mahasiswa Universitas Muslim Indonesia. *Jurnal Komodifikasi*. 8(N/A), 228-239.
- Mitnick, K. D., & Simon, W. L. (2003). *The Art of Deception: Controlling the Human Element in Security*. BMJ: British Medical Journal. Indiana: Wiley.
<https://doi.org/0471237124>
- Rubin, V. L., Chen, Y., & Conroy, N. J. (2015). Deception detection for news: Three types of fakes. In *Proceedings of the Association for Information Science and Technology* (Vol. 52, pp. 1-4). MO, USA. <https://doi.org/10.1002/pr2.2015.145052010083>
- Salam, A. (2018). The Hoax Phenomenon in Indonesian Society: Observing Anti-Diversity Memes since 2014. *Humaniora*, 30(3)
- Utami, P. (2018). Hoax in Modern Politics: The Meaning of Hoax in Indonesian Politics and Democracy. *Jurnal Ilmu Sosial Dan Ilmu Politik*, 22(2), 85-97.
<https://doi.org/10.22146/jsp.34614>
- Wall, D. S., (1998) Catching Cybercriminals: Policing the Internet, *International Review of Law, Computers & Technology*, 12(2), 201-218, DOI: 10.1080/13600869855397
- Yoanita, D., Hadi, I. P., Setiawan, A., Aritonang, A. I., & Maureen, V. (2019). Spirit of writing and sharing as motives of kompasiana users. *Test Engineering and Management*, 81(11-12), 2050-2062.

Websites

- CNN Indonesia. (2016). There are 800 thousand sites of hoax distributor in Indonesia. Retrieved July 20, 2018, from <https://www.cnnindonesia.com/teknologi/20161229170130-185-182956/ada-800-ribu-situs-penyebar-hoax-di-indonesia>
- Detik Finance. (2008). Kisah si Penyebar Rumor Perbankan. Retrieved August 13, 2018, from <https://finance.detik.com/bursa-dan-valas/d-1037940/kisah-si-penyebar-rumor-perbankan>
- Griffiths, M. D. (2017). The Psychology of Hoaxing: Why do individuals deliberately try to mislead others? Retrieved July 20, 2018, from <https://www.psychologytoday.com/us/blog/in-excess/201705/the-psychology-hoaxing>
- Harris, B., & Brickley, S. (2018). Purposes and Functions of Law. Retrieved from <http://www.businesslawbasics.com/chapter-3-purposes-and-functions-law-1>
- Internet World Stats. (2019). Top 20 countries with the highest number of internet users. Retrieved from <https://www.internetworldstats.com/top20.htm>
- Jawa Pos. (2017). 1.900 hoax issues arise ahead of DKI Jakarta governor election. Retrieved July 24, 2018, from <https://www.jawapos.com/nasional/pemilihan/18/04/2017/1900-isu-hoax-muncul-jelang-pencoblosan-pilkada-dki-jakarta>
- Lamb, K. (2019). Fake news spikes in Indonesia ahead of elections. Retrieved February

28, 2020, from <https://www.theguardian.com/world/2019/mar/20/fake-news-spikes-in-indonesia-ahead-of-elections>

Liputan 6. (2018). Survey: Social media as the main source of hoax spreading. Retrieved from <https://m.liputan6.com/tekno/read/2854713/survei-media-sosial-jadi-sumber-utama-penyebaran-hoax>

Maharani, T. (2019). Ministry of communication and informatic identified 486 Hoaxes in April 2019, 209 are political. Retrieved from <https://news.detik.com/berita/d-4532182/kominfo-identifikasi-486-hoax-sepanjang-april-2019-209-terkait-politik>

Sulistya, R., Almas, P., & Dwinanda, R. (2018). No new suspect in Ratna Sarumpaet hoax case. Retrieved November 20, 2019, from <https://m.republika.co.id/berita/en/national-politics/18/11/09/phx436414-no-new-suspect-in-ratna-sarumpaet-hoax-case>

Susilawati, D., & Putri, W. D. (2017). The impact of hoax news. Retrieved August 9, 2018, from <https://www.republika.co.id/berita/trendtek/internet/17/04/11/oo7uxj359-begini-dampak-berita-hoax>

VOA Indonesia. (2018). Money politic, Hoax dan SARA threat for Region Head dan Presidential election. Retrieved July 20, 2018, from <https://www.voaindonesia.com/a/politik-uang-hoax-dan-sara-ancaman-pilkada-dan-pilpres/4268990.html>

Walden, M. (2018). Ahead of 2019 Election, Indonesia, Media Battle Fake News. Retrieved December 20, 2019, from <https://www.voanews.com/east-asia-pacific/ahead-2019-election-indonesia-media-battle-fake-news>

Others

Abrams v. United States. 250 U.S. 616 (1919).

Tempo. (2017). Hoax epidemic: Fake news splatter in cyberspace, 4.