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## **CRIMINAL DISINFORMATION IN RELATION TOTHE FREEDOM OF EXPRESSION IN INDONESIA: A CRITICAL STUDY**

### **Abstract**

*In a democratic society, the criminalisation of spreading disinformation is deemed a violation of freedom of expression. The development of information and communication technology, specifically the Internet, has changed people's perceptions of both disinformation and freedom of expression. This research critically analyses criminal law intervention against disinformation and freedom of expression in Indonesia. The research is document research using a comparative approach that analyses laws and regulations on disinformation in Indonesia, Germany, and Singapore. For Indonesian law, this research focuses on the provision of Articles 14 and 15 of Law No. 1/1946, which criminalises disinformation in the public sphere. This research shows that Indonesia needs a new approach regarding the criminal prohibition of spreading disinformation. It recommends that criminal law intervention is limited only to disinformation that is spread on a massive scale and causes significant harm.*

### **Keywords**

*criminalisation – disinformation – freedom of expression – harm principles – Indonesia*

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## INTRODUCTION

The spread of false and fake information through the Internet on a massive scale has increasingly become a serious concern globally. In Indonesia, this type of information is commonly referred to as 'hoax'. Its meaning is broadly in line with the English definition, but how it is understood by individuals varies, as it encompasses a broad array of both dis- and misinformation. According to the Merriam-Webster dictionary, a hoax is a piece of information that spreads in order to trick other people into believing something false.<sup>1</sup> The Indonesian Ministry of Information and Communications defines hoax as a term within the field of communications conveying information that is not true: it either contains harmful disinformation or not, including in the form of memes, parodies, or satire.<sup>2</sup>

The English definition of hoax is different from that of disinformation, which is a piece of false information that is deliberately and often covertly spread to influence the public or obscure the truth.<sup>3</sup> Wardle argues that disinformation is a type of information that tricks its audience and causes harm to other parties. The actor who creates the disinformation distributes it without providing a mechanism for verification. Thus, in journalism, for example, disinformation is not aligned with the journalist code of ethics because it is neither accurate nor accountable.<sup>4</sup> This is broadly what is meant by 'hoax' in the Indonesian context. Consequently, in this research, to ensure clarity, the term 'disinformation' will be used.

In Indonesia, spreading disinformation resulting in conflict is criminalised, through Articles 14 and 15 of Law No. 1/1946 concerning Criminal Law Regulations (Law No. 1/1946). This condition originated from

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<sup>1</sup> Merriam Webster Dictionary, *Hoax*, available at: <https://www.merriam-webster.com/dictionary/hoax> [last accessed 15.3.2021].

<sup>2</sup> Interview with Josua Sitompul, the Legal Coordinator and Partnership of the Ministry of Information and Communication of Republic of Indonesia, March 3, 2021.

<sup>3</sup> Merriam Webster Dictionary, *Disinformation*, available at: <https://www.merriam-webster.com/dictionary/disinformation> [last accessed 15.3.2021].

<sup>4</sup> C. Wardle, *First Draft's Essential Guide to Understanding Information Disorder*, 2019, P. 15, available at: [https://firstdraftnews.org/wp-content/uploads/2019/10/Information\\_Disorder\\_Digital\\_AW.pdf?x61605](https://firstdraftnews.org/wp-content/uploads/2019/10/Information_Disorder_Digital_AW.pdf?x61605) [last accessed 15.4.2021].

the colonial government of the Dutch East Indies and was perpetuated from article 171 of *Wetboek van Strafrecht voor Nederlandsch-Indie*, or the Dutch East Indies Penal Code. The Dutch government applied these provisions only to areas under its colonial rule.<sup>5</sup> After independence, Indonesia has upheld that regulation. Those provisions and several more recent provisions in Law No. 19/2016 on Electronic Information and Transactions (ITE Law) are often used to prevent and handle the distribution of false information circulating on the Internet.<sup>6</sup>

In response to the massive explosion of false and misleading content on the Internet, other nations have also developed specialised laws regulating the spread of disinformation. In the year 2018, Germany published *Netzwerkdurchsetzungsgesetz (NetzDG)*, which is a law that can hold intermediaries responsible for user-generated content.<sup>7</sup> Meanwhile, Indonesia's neighbour Singapore has published the Protection from Online Falsehoods and Manipulation Act (POFMA) of 2019, which contains a correction direction that utilises the government's authority to alert internet users, and internet intermediaries, to the (alleged) falseness of statements.<sup>8</sup> Neither bill prioritises criminal law enforcement to handle and prevent the distribution of disinformation.

This article aims to give an outlook on criminal law regulations concerning the spread of disinformation that fits Indonesian social conditions and questions the relevance of criminal law interventions against disinformation. This research uses a micro comparative approach to analyse disinformation laws and regulations relating to freedom of ex-

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<sup>5</sup> A.S. Hirsch, *Geschiedenis Van Het Wetboek Van Strafrecht Voor Nederlandsch-Indie*, J. H. De Bussy, 1918. The *Crimineel Wetboek voor het Koninkrijk Holland*, Dutch Penal Code prohibit the false alarm in article 142. The Dutch East Indies government adjusted this article with the situation in the colonial territory with concordantie principle and criminalised the spread of disinformation that creates chaos in article 171, the *Wetboek van Strafrecht voor Nederlandsch-Indie*. This prohibition regulates Suriname, a former Dutch colony, as stipulated in article 90 *Wetboek van Strafrecht voor Suriname*.

<sup>6</sup> R. Tapsell, "Indonesia's Policing of Hoax News Increasingly Politicised", *ISEAS Perspective*, 2019, Issue 75, p. 5–6.

<sup>7</sup> W. Schulz, "Regulating Intermediaries to Protect Privacy Online – the Case of the German NetzDG," *HIIG Discussion Paper Series*, 2018, Volume 1, Issue 1, p. 1-15.

<sup>8</sup> S. Chen, Ch. W. Chia, "Singapore's Latest Efforts at Regulating Online Hate Speech: A Perspective from International Law and International Practices," *SSRN Electronic Journal*, 2019, No. 6, p. 5.

pression in Germany and Singapore to provide learning material for Indonesia. The researchers chose these countries because they have national laws that specifically seek to prevent the spread of disinformation, primarily through the Internet.

## I. FREEDOM OF EXPRESSION, DISINFORMATION, AND CRIMINALISATION

The justification behind the freedom of expression is finding the truth and actively participating in democracy.<sup>9</sup> Mill considers that freedom of expression is a way to communicate a fact, and the more chances that are given to state an opinion, the greater the chance that the truth can be revealed.<sup>10</sup> Feinberg believes that a statement of information that is not true is allowed as long as it does not harm any other party.<sup>11</sup> In this line of thinking, the prohibition of opinions that consist of untruths can in fact create more harm because the discovery of the truth is prevented. John Milton communicates the same sentiment, stating that lies must be revealed and cannot be censored, because this would make individuals lose the ability to think and seek the truth.<sup>12</sup> Under the foundation of freedom of expression, a person may state something not true to the public as long as it does not burden other parties.

The assessment of an opinion can be conducted openly and freely within the marketplace of ideas, in which there is the plurality and accessibility of information.<sup>13</sup> Each person who comes to the 'market' by bringing individual opinions, triggers an exchange of views. Ideas compete with one another and are assessed by individuals, leading to the

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<sup>9</sup> L. Alexander, *Is There a Right of Freedom of Expression?* Cambridge University Press, 2010, p. 135.

<sup>10</sup> J. S. Mill, *On Liberty*, Forgotten Books, 2017, p. 3, 19-34.

<sup>11</sup> J. Feinberg, *Freedom and Fulfilment: Philosophical Essays*, Princeton University Press, 2021, p. 124-125.

<sup>12</sup> J. Milton, C.E. Vaughan, *Areopagitica and Other Prose Works*, Dover Publications, 2016, p. 29-3.

<sup>13</sup> C. Lombardi, The Illusion of a "Marketplace of Ideas and the Right to Truth," *American Affairs Journal*, 2019, Volume III, Issue 1, p. 1-3. Oliver Wendell Holmes Jr introduces the concept of marketplace of idea within the court decision of *Abrams v. United State*.

emergence of further ideas. After all, individuals are humans who have the rationality to choose and receive the best opinions. The aim of the marketplace of ideas is to shape public opinion and, in turn, public policy. This is a key part of a citizen's participation in a democracy.

The Internet is seen as a digital marketplace of ideas, including false and inaccurate information. The Internet is part of the public space which formulates public opinion.<sup>14</sup> However, the algorithms of various Internet intermediaries – social media platforms such as Facebook and YouTube as well as search engines such as Google – hinder users' access to information and thus to the truth. Internet intermediaries use algorithms to personalise information in line with the specific interests of Internet users. Subsequently, Internet users cannot receive the complete and balanced information needed for the thought process in order to make decisions.

Some actors use the Internet to spread disinformation and create negative consequences and conflict. This has implications for Internet users' rights to privacy, because intermediaries offer data-driven services, which certain actors can use to spread disinformation.<sup>15</sup> These actors determine the targeted audience by collecting and analysing users' data then advertising the disinformation specific to the target audience. Moreover, the actors purposely utilise the Internet to spread disinformation because the Internet can provide a repetitive impact, affective arousal, and cognitive bias. The negative effect: Internet users believe and trust that disinformation.<sup>16</sup> What has happened is the opposite of the ideal situation of the marketplace of ideas, and instead echo chambers and filter bubbles are rampant.<sup>17</sup> This harms Internet users, making them become less critical of the information circulated on the Internet.

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<sup>14</sup> T. Rasmussen, "Internet and the Political Public Sphere," *Sociology Compass*, 2014, Vol. 8, Issue 12, p. 1322. Rasmussen refers to Benkler's arguments that Internet represents a significant change towards a more democratic and responsive public sphere.

<sup>15</sup> J. Hoboken, R. Fathaigh, "Regulating Disinformation in Europe: Implications for Speech and Privacy", *UC Irvine Journal of International, Transnational, and Comparative Law*, 2021, Vol. 6, p. 14.

<sup>16</sup> A. Gelfert, "Fake news: A definition," *Informal Logic*, 2018, Vol. 38, Issue 1, p. 93-113.

<sup>17</sup> N. Stremmlau, I. Gagliardone, M. Price, *World Trends in Freedom of Expression and Media Development Global Report 2017/2018*, United Nations Educational, Scientific and Cultural Organization, 2018, p. 83-85.

Disinformation is often associated with violence. Actors can use disinformation to incite Internet users to violate the law. For example, in Indonesia, disinformation alleging that fraud took place during the 2019 presidential election was widely circulated online prior to the announcement of results, leading to violent riots on 21 May 2019.<sup>18</sup> Another equally severe type of violation is disinformation that leads to a digital violation, which is the use of electronic devices to harm another person or group of people.<sup>19</sup> Digital violations are considered to be psychologically harmful.

The circulation of disinformation on the Internet has serious consequences that threaten democracy and national security. Before and during elections, the scale of disinformation on the Internet increasingly polarises and creates tensions between citizens. In European Union countries, disinformation has harmed the quality of political discussions with family and friends,<sup>20</sup> while in Indonesia, it has caused young people to withdraw from political debate, leading to electoral apathy and thus reducing the quality of democracy.<sup>21</sup> Moreover, foreign actors have evolved to undermine public trust and democracy by fabricating and circulating disinformation on the Internet, such as indications of foreign actors' interference in the 2017 German election.<sup>22</sup> Changing the perceptions and behaviours of citizens through disinformation has become a new strategy to interfere in the security of foreign nations because it causes dislike and distrust towards the legitimate authorities, opening up an opportunity to change the state's policies, values, or sys-

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<sup>18</sup> Q. Temby, "Disinformation, Violence, and Anti-Chinese Sentiment in Indonesia's 2019 Elections", *ISEAS Perspective*, 2019, Issue 67, p. 2-3.

<sup>19</sup> C. Colomina, H. S. Margalef, R. Youngs, Policy Department for External Relations Directorate General for External Policies of the Union, *The impact of disinformation on democratic processes and human rights in the world*, p. 13-14. available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO\\_STU\(2021\)653635\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653635/EXPO_STU(2021)653635_EN.pdf) [last accessed 15.7.2021].

<sup>20</sup> *Ibid.*

<sup>21</sup> T. Paterson, "Indonesian Cyberspace Expansion: A Double-Edged Sword", *Journal of Cyber Policy*, 2019, Vol. 4, Issue 2, p. 221-224.

<sup>22</sup> A. Henschke, M. Sussex, C. O'Connor "Countering Foreign Interference: Election Integrity Lessons for Liberal Democracies", *Journal of Cyber Policy*, 2020, Vol. 5, Issue 2, p. 180-181.

tems.<sup>23</sup> This illustrates how disinformation threatens, not only the democratic process, but also national security.

Freedom of expression is a key part of civil and political rights. Within the fulfilment of these rights, the state should minimise its active role in limiting freedom of expression. Article 19 (3) of the International Covenant on Civil and Political Rights states that limitation of the freedom of expression can only be conducted through limited national laws and should apply only to expressions which bring down the reputation of others, disturb public order, national security, health, and public morals. Furthermore, the International Convention on Freedom of Information from 1949 banned the use of propaganda that disrupts the peace.<sup>24</sup>

However, sometimes freedom of expression is limited by laws and regulations that result in criminalisation. Criminalisation is a form of legislative policy that seeks to position harmful actions as an offence intended to control or influence other people's actions. Criminalisation is a political mechanism that is used to declare dangerous activity as an offence, and the legitimate interest is protected when it conforms to political morality.<sup>25</sup> Therefore, criminalisation can be influenced by a nation's political perspective.

Criminalisation has limitations where harm principles provide barriers. In this instance, the state can the legitimately intervene in the freedom of citizens because their actions cause harm either to personal, public, or national interests. Simester and von Hirsch argue that wrongdoing and activities that are morally false form the beginning of criminalisation. However, these concepts are not enough to rationalise criminalisation because the harm principle requires loss on the part of another party. In this instance, such principles coincide with mental degradation or the physical degradation of property ownership due to another person's wrongdoing. The harm that is not limited directly to the actions of others, but leads to injury to other people, and is perpetu-

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<sup>23</sup> J. Sarts, "Disinformation as a Threat to National Security", in S. Jayakumar, B. Ang, A. Nur Diyanah (eds.), *Disinformation and Fake News*, Singapore: Palgrave Macmillan, 2021, p. 24.

<sup>24</sup> T. McGonagle, "Fake news": False fears or real concerns?" *Netherlands Quarterly of Human Rights*, 2017, Vol. 35, Issue 4, p. 203–207.

<sup>25</sup> A. Ashworth, J. Horder, *Principles of Criminal Law*, Oxford University Press, 2013, p. 67.

ated indirectly through the actions of someone, is part of the risk that can cause harm to others.<sup>26</sup> The harm principle is used to limit the criminalisation of freedom of expression and disinformation.

## II. DISINFORMATION AS JUSTIFICATION FOR LIMITING FREEDOM OF EXPRESSION IN INDONESIA, AND ITS CHALLENGES

Indonesian law has outlawed the spread of disinformation that disrupts public order through articles 14 and 15 of Law No. 1/1946. These regulations are part of the *haatzaai artikelen* provision in the Indonesian Penal Code, defined as hate speech towards the government and groups within society. This regulation was seen as a way for the Dutch colonial government to carry out its function to retain social order in the Dutch East Indies. The colonial government criminalised those actions because they believed society was easily influenced and believed false information, leading to the endangerment of public order.<sup>27</sup> Repression of freedom of expression protects the public from any distribution of false information and is a tool to create political stability. Therefore, the regulation can be widely interpreted as a way for the colonial government to consolidate its power over the Dutch East Indies.

The disinformation articles in the Indonesian Penal Code consist of three elements: the publication of disinformation to the general public, culpability, and harm. Article 14 (1) relates to the punishments for an actor who intentionally spreads disinformation that causes chaos. Article 14 (2) prohibits the negligent spreading of disinformation that could potentially cause chaos, while Article 15 punishes people who are negligent in spreading incomplete and exaggerated information that could potentially cause chaos. The legal explanations of these articles state that the individual cannot be criminalised if the information is accurate. Indonesia is currently revising its Penal Code, and in the 2019 draft

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<sup>26</sup> A. P. Simester, A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalization*, Hart Publishing, 2011, p. 19–37.

<sup>27</sup> Hirsch, *supra* note 5.



version, the legislators still regulate disinformation offences with similar formulations.

The implementation of these regulations is challenging. In a 2019 court decision (No. 255/Pid.Sus/2019/PN.Bpp), the panel of judges argued that a woman had been negligent in spreading disinformation because she forwarded fake information alleging election fraud to family members and friends through her Facebook account and a WhatsApp group without conducting a fact check.<sup>28</sup> The legal discussions in the defendant's trial related to the proportionality principle between culpability, incorrect information, and harm. The judges considered the false information to be the critical element behind their decision to punish the defendant and did not consider that she had originally received the message from an unknown Facebook account. The defendant thus did not know it was fake information, nor did the defendant realise the potential consequences of her action. Nevertheless, the judges found the defendant guilty of violating Article 14(2) and sentenced her to one-year's imprisonment.

The next challenge is interpreting what is meant by 'chaos' caused by disinformation. In court decisions No. 203/Pid.SUS/2019/PN.Jkt.Sel and No. 225/Pid.Sus/2021/PN Jkt.Tim, the panel of judges interpreted chaos as anxiety and discomfort in society, associated with demonstrations and trending topics on the Internet.<sup>29</sup> Disinformation regarding the persecution of a supporter of a particular presidential candidate and a false Covid-19 test result of a related Islamic group leader attracted significant public attention because political figures themselves shared this information. However, the disinformation cannot be considered to have caused chaos because there was no public reaction that disturbed public order.

With the development of information and communication technology, disinformation can easily spread through electronic devices, creating challenges regarding the definition of what is private communication and what is communication in the public sphere. In 2021, the

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<sup>28</sup> *General Prosecution v. Lisa Tri Ekawati*, No. 255/Pid.Sus/2019/PN.Bpp, 21 October 2019, Balikpapan, Indonesia, p. 22–32.

<sup>29</sup> *General Prosecution v. Ratna Sarumpaet*, No. 203/Pid.SUS/2019/PN.Jkt.Sel, 28 June 2019, South Jakarta, Indonesia, P. 118–147; *General Prosecution vs Moh. Rizieq Bin Hussein Syihab alias Habib*, No. 225/Pid.Sus/2021/PN.Jkt.Tim, East Jakarta, Indonesia, p. 131–135.

Indonesian Ministry of Information and Communication, the Indonesian Attorney General, and the Chief of the National Police jointly issued a guideline for law enforcement on implementing the 2016 Electronic Information and Transaction Law. The guideline determines that communication conducted on social media accounts and group chat applications that are freely accessible by the public is a form of communication in the public sphere. The reasoning was that even though communication on social media accounts and chat groups is limited to certain individuals ('friends' and group members), individuals can still forward the message to other parties outside of that circle. However, there is online and face-to-face communications differ. For example, online, people are more confident in delivering their thoughts, but tend to be careless with other users' feelings.<sup>30</sup> The guideline on enforcing the Electronic Information and Transaction Law does not take this into account.

The Electronic Information and Transaction Law does not directly regulate the spread of disinformation itself. Sigid Suseno, who drafted the law, states that the law does not restrict the distribution of false and fake information, since disinformation has a wide net of understanding. Hence, the Law regulates various types of false and fake information, such as the criminal acts of defamation, hate speech, and misleading advertising.<sup>31</sup>

Researchers disagree with this argument. For example, disinformation is distinguished from misleading advertising. Disinformation fabricates and distributes false and manipulative information relating to public concerns and has the aim of causing social chaos. Misleading advertising causes a consumer to take decisions that are financially prejudicial to him when purchasing goods or services.<sup>32</sup> Misleading advertising is thus commercial in nature; it does not aim to cause chaos.

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<sup>30</sup> L. Merlyna, "Freedom to Hate: Social Media, Algorithmic Enclaves, and the Rise of Tribal Nationalism in Indonesia," *Critical Asian Studies*, 2017, Vol. 49, Issue 3, p. 421.

<sup>31</sup> Interview with Sigid Suseno as drafter the Law of Information and Electronic Transaction year 2008 and year 2016 dated 6 May 2021.

<sup>32</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, O.J. L 250, 19/09/1984, p. 0017-0020.

Additionally, disinformation, defamation and hate speech have different characteristics. Defamation is defined as false statements of a factual nature that insult and cause damage to an individual's reputation.<sup>33</sup> Hate speech is defined as hateful expression that targets and threatens a specific group based on their identity, such as ethnic, racial, and religious. The actors create the impression that a targeted group is a useless group or a threat to the community.<sup>34</sup> However, they also share a key similarity: they can often be considered forms of false information that can harm others. The persons targeted by defamation and hate speech are clear; on the other hand, disinformation defines its targets. The purpose of hate speech varies: it could aim to insult a particular group; create chaos that targets a particular group, cause the dismissal of a group from participating in public opinion and policymaking, and discriminate against a group.

In some cases, hate speech may not contain false information. It is clear that the international community has decided that defamation and hate speech are unprotected speech, but disinformation is in a grey area. Sometimes, it is difficult to draw a fine line between those offences, and in some cases, the offences overlap, as when insulting a public or political figure representing a specific group based on his/her race, ethnicity, religion, and social identities. Thus it can be unclear whether this is defamation, disinformation, or hate speech. Indonesian law does not have a specific offence concerning defamation of political figures, and the Constitutional Court has decriminalised defamation of the president and vice president.<sup>35</sup> However, the Penal Code is currently being revised, and in the 2019 draft, defamation of the president and vice president would be re-criminalised.

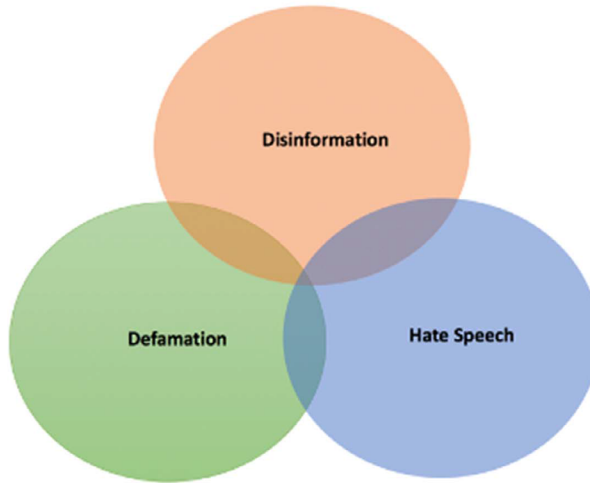
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<sup>33</sup> C. Phiri, "Criminal Defamation Put to the Test: A Law and Economics Perspective," *University of Baltimore Journal of Media Law & Ethics*, 2021, Vol. 9, no. 1, p. 49.

<sup>34</sup> S. Udupa, I. Gagliardone, A. Deem, L. Csuka, *Hate Speech, Information Disorder, and Conflict*, February 2020 available at [https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new\\_publication\\_3/the-field-of-disinformation-democratic-processes-and-conflict-prevention-a-scan-of-the-literature.pdf](https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/the-field-of-disinformation-democratic-processes-and-conflict-prevention-a-scan-of-the-literature.pdf) [last accessed 15.8.2021].

<sup>35</sup> *Indonesia v. Agus Slamet, Komar Raenudin*, No. 32/PUU-XIII/2015, 20 December 2015, Jakarta, Indonesia, p. 33–35.

Image 1. Overlapping Between Disinformation, Defamation and Hate Speech



Source: Researchers.

The challenge in implementing these laws is that law enforcement officers cannot identify the differences between criminal offences relating to disinformation and other criminal offences in the Electronic Information and Transaction Law. In court decision No. 129/Pid.Sus/2020/PN.Kbm, the panel of judges declared that the accused had committed defamation by sharing disinformation about a COVID-19 death and criticising the government's poor management of the pandemic in the Kebumen District.<sup>36</sup> Meanwhile in court decision No. 121/Pid.Sus/2020/PN.Plk, the panel of judges found that the accused had committed hate speech after they had made a statement about the rise of the Indonesian Communist Party and fraud in the presidential election.<sup>37</sup> The year prior, in court decision No. 605/Pid.Sus/2019/PN.Ptk, the panel of judges argued that the accused had committed criminal fraud by sharing disinformation that accused President Joko Widodo's family of being

<sup>36</sup> *General Prosecution v. Sujud Sugiarto Bin Muhamad Kumroni*, 129/Pid.Sus/2020/PN.Kbm, 4 October 2020, Kebumen, Indoensia, p. 57-70.

<sup>37</sup> *General Prosecution v. Mulia Ningsih binti Abdurahman*, No. 121/Pid.Sus/2020/PN.Plk, 18 May 2020, Palangkaraya, Indoensia, p. 30-59.

members of the Indonesian Communist Party.<sup>38</sup> The Electronic Information and Transaction Law was used in these cases because the accused all utilised electronic devices to publish statements without considering the content of said statements. However, as we can see, the actual criminal acts each individual was charged with differed.

The derivative regulation of Electronic Information and Transaction Law does not mention disinformation or hoaxes. This regulation – Communication and Information Ministerial Regulation No. 5/2020 concerning Private Electronic System Operators – only regulates complaint mechanisms to handle prohibited content, including removing and blocking access to the system hosting the content. Prohibited content is described as content that is illegal or harmful to the public, but the regulation does not further explain the differences.

### III. DISINFORMATION AND FREEDOM OF EXPRESSION IN GERMANY AND SINGAPORE

Germany's approach to tackling disinformation relates to freedom of expression and the country's broader governance system. The German Constitution guarantees freedom of speech and opinion in every form, as well as the right to receive information. This right is fundamental to the democratic process and constitutes a right of democratic society.<sup>39</sup> In Germany, like other European Union nations, political speech has higher protection than commercial speech.<sup>40</sup> Freedom of political expression is a necessary component in fulfilling democratic norms: citizens have the right to control their government based on public opinion and equality of every citizen. The range of protection for expression in Germany is broad, and includes arts, sciences, research, and teaching, which are crucial to shaping citizens' preferences and values to create

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<sup>38</sup> *General Prosecution v. Surnawati binti Suratman*, No. 605/Pid.Sus/2019/PN.Ptk, 26 August 2019, Pontianak, Indonesia, p. 12–17.

<sup>39</sup> O. Jouanjan, "The Freedom of Expression in the Federal Republic of Germany," *Indiana Law Journal*, 2009 Vol.84, Issue 3, p. 871–874.

<sup>40</sup> I. Katsirea, "Fake news": Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty," *Journal of Media Law*, 2018, Vol. 10, Issue 2, p. 172–173.

the public will.<sup>41</sup> State intervention on freedom of expression is only implemented through national laws if required in order to maintain democracy; that is, to prevent harm to others and to society.

Unlike Indonesia, Germany does not have a specific offence that criminalises the distribution of disinformation that disturbs public order.<sup>42</sup> However, several crimes in *Strafgesetzbuch*, the German Penal Code, can be associated with disinformation on specific matters. For example, with the voter deception offence, deception can be conducted through disinformation that manipulates the voters to vote against their will. Meanwhile for the offence of disruptive propaganda against the Federal Armed Forces, disinformation can occur by making or spreading false or grossly distorted statements that obstruct the Federal Armed Forces from conducting their duties. Other articles associated with disinformation include malicious gossip that negatively affects public opinion about an individual, and malicious gossip concerning persons in political life. These articles relate to the insulting of public and political figures that influences public opinion about the person and their general activities. Both articles are considered as special provisions on insults and defamation.

Hate speech is often associated with disinformation. In *Strafgesetzbuch*, hate speech falls under the incitement of the masses, which prohibits inciting hatred against sections of the population or insulting the human dignity of sections of the community so as to cause a disturbance to the public peace.<sup>43</sup> An additional feature of the hate speech offence relates to Holocaust denial. It prohibits public comments that disturb the public peace by violating the dignity of holocaust victims or by approving of, glorifying, or justifying National Socialist tyranny and arbitrary rule. In Germany, the Holocaust and National Socialism are sensitive issues; the provision does not limit people from making statements about this issue as long as such information does not incite others to disrupt the public peace.<sup>44</sup>

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<sup>41</sup> A. Stone, F. Schauer (eds), *The Oxford Handbook of Freedom of Speech*, Oxford University Press, 2021, p. 83, 100.

<sup>42</sup> § 108, 109d, 186, 188 Strafgesetzbuch (StGB).

<sup>43</sup> § 130 Strafgesetzbuch (StGB).

<sup>44</sup> E. Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law*, Asser Press: 2018, p. 126.

In terms of tackling disinformation, Germany takes a different approach from Indonesia. Germany utilises non-penal methods such as content moderation, media regulation, competition, and privacy.<sup>45</sup> NetzDG focuses on regulating internet intermediaries to moderate the distribution of unlawful content, such as content that disrupts the interests and safety of the public on the Internet. This definition of unlawful content aligns with several articles regarding content in *Strafgesetzbuch*, including malicious gossip and the incitement of the masses. Several other legislations do not directly design to tackling disinformation, but may provide assistance, such as *Medienstaatsvertrag* or Interstate Media Treaty, *GWB-Digitalisierungsgesetz* or Competition Act, and *Bundesdatenschutzgesetz* or Data Protection Act.

In Germany, internet intermediaries that act as media content providers must uphold transparency and non-discrimination principles regarding information to ensure the diversity of opinion. This includes prioritising journalistic content and disclosing information about the implementation of their internal content promotion algorithms.<sup>46</sup> The data collected by internet intermediaries determines whether their actions result in market dominance, affecting the relevant sector's business models and competition. Therefore, the Competition Act relies on the Data Protection Act to protect the data collected and utilised by internet intermediaries to run their data-driven services.<sup>47</sup> Altogether, these approaches will minimise the circulation of disinformation through the Internet.

Singapore provides an interesting and contrasting situation to that in Germany. The development and implementation of POFMA forms part of the Singaporean government's interest in mitigating and preventing the spread of disinformation that disrupts the public. Prior to POFMA's ratification in 2019, Singapore already had several pieces of

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<sup>45</sup> J. Jaurisch, *Regulatory Reactions to Disinformation: How Germany and the EU Are Trying to Tackle Opinion Manipulation on Digital Platforms*, October 2019, p. 14, available at <https://www.stiftung-nv.de/en/publication/regulatory-reactions-disinformation> [last accessed 15.8.2021].

<sup>46</sup> J. Jaurisch, T. Lenior, *Disinformation: The German Approach and What to Learn From It*, 28 February 2020, available at <https://www.institutmontaigne.org/en/blog/disinformation-german-approach-and-what-learn-it> [last accessed 15.8.2021].

<sup>47</sup> Jaurisch, *supra* note 45.

legislation that dealt with false information, such as the Telecommunications Act and the Internal Security Act. However, these pieces of legislation do not have a mechanism for removing falsehoods from Internet intermediaries.<sup>48</sup> This led to POFMA, which utilises both penal and non-penal approaches. POFMA criminalises several previously-uncriminalised actions: first, persons or a corporation that intentionally fabricates disinformation; second, the utilisation of bots to distribute and accelerate the spread of disinformation; and third, persons who intentionally make financial gain or other material gain through the provision of services to disseminate disinformation. Crucially, POFMA does not criminalise people who accidentally communicate disinformation.

With regard to disinformation, criminal prosecution is not the primary choice in Singapore; the government prefers to enforce directive mechanisms such as takedown and correction notices. Through POFMA, the government of Singapore can give instructions to those who spread disinformation to correct and stop communications; the situations in which this can be done are based on conditions determined by the government itself. Interestingly, in the *Democratic Party v. Attorney-General* and the *Online Citizen v. Attorney-General*, the Court of Singapore has argued that the failure to carry out such directions does not automatically criminalise the perpetrators.<sup>49</sup> On the other hand, POFMA requires internet intermediaries to carry out and transparently handle the spread of disinformation.

Defamation and hate speech are often associated with falsehoods about a person or group of people. However, POFMA distinguishes false and manipulative information from hate speech and defamation, and thus does not regulate the latter offences, which are already covered by the Singapore Penal Code. The Penal Code prohibits acts by a person who intentionally or knowingly harms another private individual.<sup>50</sup> Additionally, owing to Singapore's condition as a multi-cultur-

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<sup>48</sup> D. Tan, J.S. Teng, "Fake News, Free Speech and Finding Constitutional Congruence", *Singapore Academy of Law Journal*, 2020, Vol. 32, Issue 1, p. 225-227.

<sup>49</sup> *Democratic Party v. Attorney-General*, [2020] SGHC 25, 15 February 2020, Singapore, Para 9-18; and the *Online Citizen v. Attorney-General*, [2020] SGHC 36, 19 February 2020, Singapore, paras 4-11.

<sup>50</sup> Penal Code (Cap. XXI, 2007 Rev. Ed) s. 499.



al society that has had significant racial riots in the past,<sup>51</sup> hate speech offences are regulated not just in the Penal Code, but also by the Maintenance of Religious Harmony Act and the Sedition Act.<sup>52</sup> These regulations prohibit a person intentionally or knowingly promoting enmity or hatred between different racial and/or religious groups.

Both Singapore and Indonesia criminalise disinformation that disturbs public order. However, the two countries differ in which situations disinformation can actually be prosecuted. POFMA criminalises actions on the basis of intent, and does not require there to be any proof of harm caused as the consequences of the prohibited activities. This conflicts with the principle of criminalisation, as it is inappropriate to criminalise speech without corresponding harm criteria. The Singaporean government has already applied this law to suppress citizens' rights to exercise their freedom of expression. In April 2021, the Singaporean government ordered a correction notice towards Kirsten Han, a Singaporean freelance journalist. The government issued the correction order because she posted a link on her Facebook account to an article from a Malaysia human rights group lawyer that alleged that a Singaporean prison officer was directed to break the necks of death row inmates during executions.<sup>53</sup> POFMA can thus be interpreted as a tool in a government's broader approach to consolidating authority.

POFMA and other Singaporean regulations reflect the government's attitudes regarding freedom of expression and state governance. The Constitution of Singapore guarantees citizens' freedom of expression, but at the same time, it gives legitimacy to legislation that limits the extent of these freedoms, using argumentation to protect public interests based on conditions that are necessary or expedient. In Singapore, the public interest is prioritised over personal interest because it carries a majority interest in society – POFMA even describes public interest as the need to prevent decreases in public confidence in the government to

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<sup>51</sup> J. L.-C. Neo, "Seditious in Singapore! Free Speech and The Offence of Promoting Ill-Will and Hostility Between Different Racial Groups," *Singapore Journal of Legal Studies*, 2011, December Issue, p. 354–361.

<sup>52</sup> Tan, Teng, *supra* note 48.

<sup>53</sup> K. Tan, How Singapore's "Fake News" Law Get Exported, 8 April 2021, available at <https://www.theballot.world/articles/singaporefakenews> [last accessed 1.10. 2021].

perform and exercise their duty and power.<sup>54</sup> This reflects Singapore's status as an authoritarian state that consistently shows reluctance to embrace civil and political rights.<sup>55</sup> Thus in Singapore's case, freedom of expression does not result in public participation in policy decision making; this process is concentrated within the states' executive agencies and their elite bureaucrats.<sup>56</sup>

#### IV. ARECOMMENDATION REGARDING CRIMINALISATION OF DISINFORMATION IN INDONESIA

What can Indonesia learn from how disinformation is handled in Singapore and Germany? To determine whether the criminal law intervention in the case of disinformation fits with freedom of expression in Indonesia, we should consider the historical and state governance backgrounds.

Indonesia has historical similarities with Singapore. Both countries are former colonies familiar with criminal offences that suppress the freedom of expression to serve colonial government interests, and those offences still apply in the twenty-first century. Indonesia has the *haat-zaai artikelen*, while Singapore has the Sedition Act and Internal Security Act, strictly regulating political speech. Since the fall of the authoritarian Suharto government in 1998, Indonesian governance of civil and political rights has shifted. Indonesia has become a democratic state, follows the liberal democratic norms, and has a pluralist political system.<sup>57</sup> Subsequently, Indonesia has decriminalised several criminal offences that hinder democratic development, such as defamation of the president and vice president.

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<sup>54</sup> Protection from Online Falsehoods and Manipulation Act (Cap 1, 2019) s. 4.

<sup>55</sup> M. Davies, "An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia," *Journal of Current Southeast Asian Affairs*, 2014, Vol. 33, Issue 3, p. 112.

<sup>56</sup> H. Han, "Singapore, a Garden City: Authoritarian Environmentalism in a Developmental State," *Journal of Environment and Development*, 2017, Vol. 26, Issue 1, p. 17-18.

<sup>57</sup> Davies, *supra* note 55.

However, Indonesia's democracy differs from that of Germany, where citizens' rights are inviolable unless the state has statutory authority.<sup>58</sup> Nevertheless, as a former colonial and authoritarian state, Indonesia's legislation still contains several restrictions that mention peace and public order. In contemporary pluralist Indonesia, with different groups with different interests, the limitation of freedom of expression is implemented in order to accommodate the interests of all. Therefore, Indonesia is constantly compromising to maintain harmony and balance between individual interests and the interest of various parties in the community.<sup>59</sup>

In this section, the researchers discuss the approach for criminalising disinformation while maintaining freedom of expression in ways that are compatible with the Indonesian context. First, the researchers determine 'public interest' in relation to disinformation criminal offences. Then, the researchers criticise criminalising disinformation using harm principles with the hope of giving a better formulation for criminal offences.

## 1. DETERMINING THE PUBLIC INTEREST

To determine the public interest, we must understand the impact of disinformation in Indonesia. Existing research points towards the dangers of the spread of disinformation within Indonesian society in the twenty-first century. The Indonesian Institute of Sciences has shown that the rate at which Indonesian people believe disinformation is very high. Three types of disinformation are particularly trusted: disinformation on the rise of the communist party in Indonesia; allegations around the existence of millions of foreign workers from China in Indonesia; and accusations relating to government attempts to criminalise Indonesian Muslim leaders. In the graphic below, the Indonesian Institute of Sciences split the respondents in to two groups: the group who had accessed

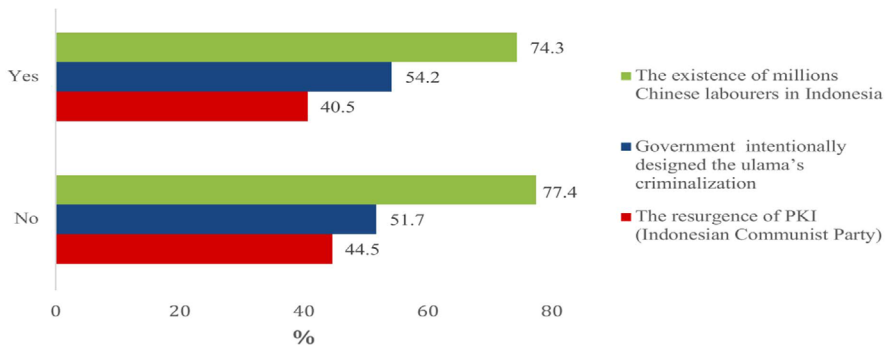
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<sup>58</sup> R. Campbell, "How Critical Are Germans Of Democracy? The Pattern and Origins of Constitutional Support in Germany", *Journal of Contemporary Central and Eastern European* (2020), Vol. 28, Issue 2-3, p. 7.

<sup>59</sup> P.M. Faiz, "The Protection of Civil and Political Rights by The Constitutional Court of Indonesia", *Journal of Indonesian Law Review* (2016), Vol. 6, No. 2, p. 167.

the Internet the preceding week (‘yes’), and who had not (‘no’). The result shows that the percentage of those who believed those three types of disinformation was almost identical. This shows that disinformation relating to ethnicity, race, and religion is highly trusted.<sup>60</sup> Some actors use these issues in a purposely inappropriate way to create dislike toward the government and certain social groups, leading to tension between members of society.

Graphic 1. Respondents Belief as Regards Disinformation



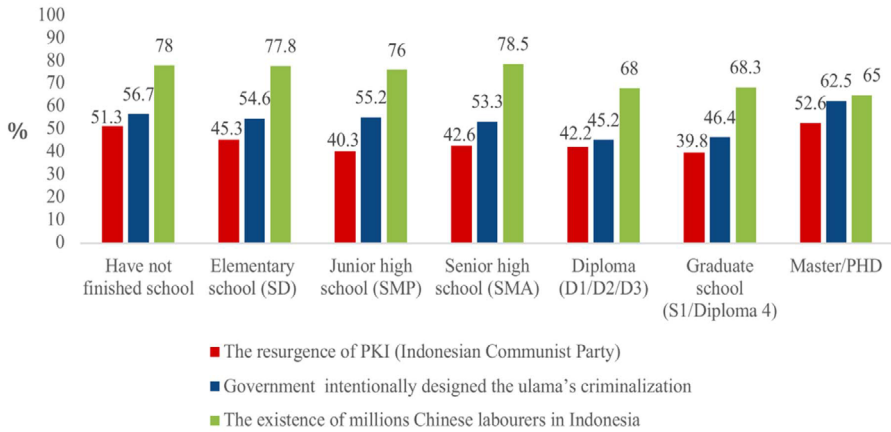
Source: Nadzir, Seftiani, Permana, *Supra* note 60.

The following graphic shows the beliefs of respondents regarding the same three types of disinformation based on their educational background. Higher education does not necessarily make respondents more capable of spotting disinformation. The differences between every level of education background are minor.<sup>61</sup> This research shows that disinformation, spread primarily through the Internet, has severely negatively impacted critical thinking in Indonesian society.

<sup>60</sup> I. Nadzir, S. Seftiani, Y.S. Permana, “Hoax and Misinformation in Indonesia: Insights from a Nationwide Survey,” *ISEAS Perspective*, 2019, Vol. 9, Issue 2, p. 10.

<sup>61</sup> *Ibid.*, p. 8.

Graphic 2. Respondents Belief as Regards Disinformation Based on Education Background



Source: Nadzir, Seftiani, Permana, *Supra* note 60.

Research from the Centre for Innovation Policy and Governance found that several new actors have begun spreading false information on the Internet. One type of actor, referred to as a 'buzzer', is a person who can spark and extend internet discussions with ulterior motives. These buzzers utilise disinformation to build debate on the Internet. Some buzzers work alone, but others spread disinformation under the authority of a third party that has coordinated the buzzer to share false and manipulated information, including for payment.<sup>62</sup> Meanwhile research from Bradshaw and Howard shows that bots and fake accounts are often utilised to broaden the reach and advance the discussion of disinformation among internet users. In several disinformation cases in Indonesia, contents were entirely fabricated in order to maximise their distribution.<sup>63</sup> Both studies show that the fabrication and dissemination

<sup>62</sup> R. Camil, N.H. Attamimi, K. Esti, "Dibali kFenomena Buzzer: Memahami Lanskap Industri dan Pengaruh Buzzer di Indonesia", p. 10-17, available at: <https://cipg.or.id/en/publication/buzzer-2/> [last accessed 15.3.2021].

<sup>63</sup> S. Bradshaw, P. N. Howard, *The Global Disinformation Order 2019 Global Inventory of Organized Social Media Manipulation*, p. 10-19, available at: <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf> [last accessed 15.3.2021].

of disinformation using these schemes and patterns increases before and during general elections in Indonesia.

In 2017, the Indonesian National Police caught two online syndicates – known as Saracen and the Muslim Cyber Army – who fabricated and distributed disinformation and hate speech online. Both syndicates utilised bots, fake accounts, and the hacking of social media accounts to manipulate public debate regarding candidates’ ethnicities and religions, playing an essential role during the 2016 and 2017 Indonesian elections.<sup>64</sup> On top of this, there was some indication that the ‘syndicates’ were part of foreign interference.<sup>65</sup>

Therefore, the argument about the purpose of criminalising disinformation must be shifted. Criminalisation should protect the public interest, not the government interest that helps governments perform and exercise their duty and power. Criminalisation should not suppress the right to speech and should not direct public opinion towards the government. Instead, the state should use provisions on disinformation to protect the public interest from actors that use the Internet as a medium to fabricate and distribute disinformation to manipulate and incite members of society to conduct unlawful action that disrupts public order.

## 2. SHIFTING PERSPECTIVES ON WRONGDOING

Religious moral standards often form the basis for criminalising an action. That said, lying itself cannot be sufficient justification for punishment. If the act of telling a lie is criminalised, this could be constituted as violating freedom of expression, because it can be difficult to determine exactly what constitutes the truth. Within a pluralistic society, every group has its version of the truth, and the truth cannot be valued by just one portion of the community.<sup>66</sup> Then, if lying itself is criminalised,

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<sup>64</sup> H. Pearl, *Indonesia Battles Fake News as Elections Loom*, 15 March 2018, available at <https://www.thejakartapost.com/news/2018/03/15/indonesia-battles-fake-news-as-elections-loom.html> [last accessed 15.3.2021].

<sup>65</sup> A. N. Salma, “Defining Digital Literacy in the Age of Computational Propaganda and Hate Spin Politics”, *KnE Social Sciences & Humanities*, 2019, p. 330–332.

<sup>66</sup> *R. v. Zundel*, [1992] 2 SCR 731 No. 21811, Judgment of 27 August 1992, para 6-11.

this has negative consequences because the authorities can easily abuse their power to punish people who have criticised the government.

The imperative prioritising the criminalisation of untruthful information is no longer relevant in the twenty-first century. The European Court of Human Rights has shown the difficulty of determining the objective and absolute truth, especially dealing with historical issues.<sup>67</sup> Both specific facts and international consensus are required to establish the entire picture of a historical event. In *Perinçek v. Switzerland*, the case of Armenian genocide denial, the European Court of Human Rights argued this kind of speech is not protected under freedom of expression because there is no consensus on the time and space of the genocide. The court also considered that the Armenian genocide does not have widespread political recognition within the international community. This is different from the Holocaust, which has political distinction, and established historical facts, leading to Holocaust denial is not protected under freedom of expression.<sup>68</sup> The truth becomes relative because it depends on the angle and technique used to review an event.

Furthermore, it is essential to distinguish truth from opinion. The German Federal Constitutional Court gave an argument in a Holocaust denial case that distinguished the declaration of fact from an opinion. Although the court decision does not relate to disinformation, this case can be used for reference. An opinion is a subjective perspective of the person who expresses it, and it contains the judgment of facts, ideas, personal behaviour and situation.<sup>69</sup> A declaration of fact is an objective relation between a statement and reality – even though the fact is actual, it does not automatically protect, because only a declaration of fact that serves the purpose of developing personal opinion is protected under freedom of expression.<sup>70</sup> The court argues that Holocaust denial is a declaration of fact. However, it can qualify as an opinion only insofar that the word of fact applies as a source to develop a personal opinion.

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<sup>67</sup> *Perinçek v. Switzerland*, Application No. 27510/08, Judgment of 15 October 2015, para 115.

<sup>68</sup> M. Wojcik, "Navigating the Hierarchy of Memories: the ECtHR Judgment in *Perinçek v. Switzerland*," *Journal of the King's Student Law Review*, 2020, Vol. XI, Issue 1, p. 100–113.

<sup>69</sup> Jouanjan, *supra* note 39, p. 870–873.

<sup>70</sup> Fronza, *supra* note 47, p. 136–137.

When Holocaust denial is used to insult Holocaust victims, it is criminalised.<sup>71</sup> It is complex to prescribe the truth about an event because society's sensitivity to an issue must be considered. Therefore, it is hard to criminalise false and fake information even though it causes harm.

The truth of the information is not considered as the critical element to determine whether a person is guilty. Other factors, namely harm and culpability, are adequate to consider the statement. The proof of the truth of the asserted or disseminated fact does not preclude punishment if the convict intentionally fabricates and publishes a statement that incites other people to disturb the public peace.

Hence, this research understands that behaviour can be considered as wrongdoing when a person intentionally manipulates others using disinformation. The actors want their targets to believe and trust the disinformation and then treat it as truth. It must be noted that disinformation is not always entirely false, and that some disinformation contains elements of the truth.<sup>72</sup> If criminalisation is based on the fact that there is a statement that is incorrect, false, or fake, then a person who communicates this type of semi-true information cannot be punished.

A consequence of this argument is that malinformation may be criminalised. Malinformation is a piece of truthful information that is shared to cause harm.<sup>73</sup> Perpetrators can be prosecuted if the malinformation is shared with negative intentions by a person who does not have the authority to publish that information. This argument is based on Feinberg's point of view that even in a free society, people cannot freely speak just based on truth because their statements can still offend other people or the broader public.<sup>74</sup> The proportionality between the harm and the benefit from the statements towards society must be measured.

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<sup>71</sup> *Judgment of the Munich Superior Land Court v. the Publisher G and Mr. G*, BVerfGE 82, 272 1 BvR 1165/89, 26 June 1990, Karlsruhe, Germany, paras 30, 40–42.

<sup>72</sup> Wardle, *supra* note 4.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*



### 3. LIMITED TO INTENTIONAL ACTION

Criminal law intervention requires the culpability of a person who conducts or creates an unlawful action.<sup>75</sup> Publishing disinformation can be seen as a public communication activity. Thus, determining a perpetrator's guilt can be done based on public communication. It means that we must consider who the speaker is that can formulate and spread a message, what the message is, who is the audience, what medium is used to publish and distribute the news, and what is the effect of the message on the audience.<sup>76</sup>

The researchers illustrate a better understanding of the culpability aspect of this criminal offence, as follows. Our perpetrator is a community leader who has the intellectual capacity to spread disinformation about an attack on a house of worship belonging to a certain religious group in his official and publicly accessible social media account. This leader should be treated differently from an ordinary citizen distributing false or manipulated information during a moment of high societal tension, because the impact on the community is likely to be different. In this example, the culpability of the speaker can be judged from two aspects. First, the speaker knows his capacity to influence the audience. Second, the speaker knows when to publish the information. If the speaker did not have bad intentions, he would not post the disinformation when there are already high levels of tension in the community.

The message's impact can help us analyse the presentation of the message and the medium the speaker used to publish and distribute the disinformation.<sup>77</sup> To disturb society, the speaker needs certain skills and knowledge to create manipulative disinformation and distribute it on a massive scale. The more exciting and manipulative the disinform-

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<sup>75</sup> R. A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros, "The Boundaries of the Criminal Law," in R. A. Duff, S. Green, L. Farmer (eds.), *The Boundaries of the Criminal Law*, Oxford University Press, 2011, p. 76; and M.S. Moore, "Intention as a Marker of Moral Culpability and Legal Punish Ability", in R. A. Duff, S. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press, 2011, p. 180-185.

<sup>76</sup> Z. Sapienza, N. Iyer, A.S. Veenstra, "Reading Lasswell's Model of Communication Backward: Three Scholarly Misconceptions," *Mass Communication and Society*, 2015, Vol. 18, Issue 5, p. 611.

<sup>77</sup> *Ibid.*, p. 609-610.

mation, the more serious the intention to manipulate the audience. Furthermore, the choice of the Internet as a medium to spread disinformation is not only because the Internet is the most popular media at the moment, but because social media permits a relationship with the targeted audience. For example, actors in Indonesia tend to choose Facebook, YouTube, WhatsApp, and Instagram because those platforms have significant numbers of users in Indonesia.<sup>78</sup> To expand, accelerate the distribution, and develop a conversation about pieces of disinformation, actors often mention accounts that belong to official institutions or public figures, use bots and hashtags, create and use fake accounts, and even advertise content. The more widely and frequently the disinformation content reaches the desired audience, the more significant the impact, meaning that the actor had a serious intention to manipulate the audience. Their culpability can be judged through these elements. The wider, faster, and more massive the spread of disinformation, the greater the seriousness of the action.

In terms of culpability, there are several motivations behind the speaker's publishing and spreading of false, fake, and manipulative information—the purpose is not solely to disrupt public order. Several actors and buzzers have spread disinformation under the guise of economic motivations.<sup>79</sup> Such motivations are not included as *mens rea*, but are a driving force behind some criminal actions. The motivation becomes an assessment of whether such actions can be criticised morally or not.<sup>80</sup> Parties and buzzers must have sufficient awareness of the impact of disinformation on society. After all, when the said disinformation is distributed in a situation that is not conducive and can disrupt public order, despite the original motivation, this must be seen as a severe fault which will create harm for the public.

There are limits to the criminal law intervention, based on intentional actions. An actor who does not know that the information is false, and negligently shares that information, cannot be criminalised, especially if his action causes only minor harm to others. This kind of

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<sup>78</sup> S. Kemp, *Digital 2021: Indonesia*, p. 47, available at: <https://datareportal.com/reports/digital-2021-indonesia> [last accessed 15.3.2021].

<sup>79</sup> Camil, Attamimi, Esti, *supra* note 62 and Bradshaw, Howard, *supra* note 63.

<sup>80</sup> V. Tadros, "Wrongdoing and Motivation", in R.A. Duff, R. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press, 2011, p. 206–210.

conduct qualifies as misinformation. Criminal law intervention is not permitted in cases of minor damage because this will conflict with the principle of *de minimis non curat lex*.<sup>81</sup> In this case, a non-penal mechanism can be used to moderate misinformation. The exception for prosecution of misinformation is if the impact creates severe harm and the perpetrator had bad intentions.

#### 4. LIMITED TO SERIOUS HARM

Disinformation is an indirect incitement.<sup>82</sup> The speaker uses disinformation to manipulate and influence others to believe and trust the information, then the audience voluntarily, but unlawfully, disturbs public order. The danger of this action is indirect harm if the audience harms others. Simester and Hirsch use the term 'remote harm' to describe this kind of harm,<sup>83</sup> while Westen describes this indirect harm as 'risk' or 'potential harm'.<sup>84</sup>

Disinformation spread through the Internet has a severe consequence for democracy, public order, and national security, but it is not easy to determine what constitutes the serious harm of disinformation. Serious harm should be a present and dangerous form of harm, and should not only disturb the peace and order of Internet users. In remote harm, Simester and Hirsch introduced the standard harm analysis, which is a principle that limits the criminalisation of remote harm. The standard harm analysis consists of three considerations: (1) the gravity of the remote harm; (2) the social value of the conduct, and the degree of intrusion upon actors' choices that criminalisation would involve; and (3) the certain side-constraints that would preclude criminalisation.<sup>85</sup>

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<sup>81</sup> N. Peršak, *Criminalizing Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts*, Springer, 2010, p. 73.

<sup>82</sup> J. Jaconelli, "Incitement: A study in language crime," *Criminal Law and Philosophy*, 2018, Vol. 12, Issue 2, p. 246–248. See also Oemar Seno Adji, *Perkembangandelik pers di Indonesia*, Erlangga, 1990, p. 54–55.

<sup>83</sup> Simester, Hirsch, *supra* note 26, p. 55.

<sup>84</sup> P. Westen, "The Ontological Problem of „Risk“ and „Endangerment“ in Criminal Law", in Duff, Green, *supra* note 80, p. 307–310.

<sup>85</sup> Simester, Hirsch, *supra* note 26, p. 55.

Next, this research will analyse the remote harm of disinformation to determine what type of action must be criminalised.

The first consideration is the gravity of the remote harm. The greater the gravity, the more potent reason for criminalisation.<sup>86</sup> These criteria will be realistic with a specific target audience and situation, relating to when and where the disinformation is published. When the disinformation is published during a time of high societal tension, the probability of creating harm is more significant, likewise, if disinformation is published in a fanatic and intolerant society. A combination of both situations might create more substantial harm. Therefore, this becomes a solid argument for criminalising disinformation.

Articles 14 and 15 of Law No.1/1946 emphasise the occurrence of chaos in society. Should criminalisation be conducted only when chaos happens? Ashworth and Horder argue that criminal law also functions as prevention of harm. Therefore, in the form of inchoate crime, it includes incitement, allowing pre-emptive action.<sup>87</sup> It means that criminalisation could take place before more significant harm happens. A real potential risk of damage could cause the authorities to consider criminalising unlawful activity. In this case, if disinformation is published and distributed in a polarised society or where tension between different social groups is high, it can be considered potential harm.

The second consideration is the relationship between the social values of the conduct and the degree of intrusion upon the actors' choices that would occur if the conduct was criminalised. The more meaningful the behaviour is, or the more the prohibition would limit liberty, the stronger the countervailing case.<sup>88</sup> This research underlines that the message of the disinformation must be in contradiction with social values. However, this does not mean that the audience which receives the content will automatically conduct unlawful actions, as the audience is composed of individuals with autonomy to perform their own free actions.<sup>89</sup> Should the speaker be criminalised because of the audience's voluntary action? In this case, we must consider how the disinformation itself suppresses the autonomy or ability of the audience to think and freely choose their

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<sup>86</sup> *Ibid.*

<sup>87</sup> Ashworth, Horder, *supra* note 25, p. 145–146.

<sup>88</sup> Simester, Hirsch, *supra* note 26, p. 55.

<sup>89</sup> Ashworth, Horder, *supra* note 25, p. 51.

actions. As with the previous criteria, the criteria must be realistic with a specific target audience. In this case, the audience's emotions and beliefs about certain aspects are the essential factors. In an intolerant audience, intervention in audience choices is more accessible.

The last consideration is related to another barrier to criminalising an action. Simester and Hirsch state that freedom of expression can be a barrier to criminalisation. To analyse this, the researchers refer to the Supreme Court of Canada argument in the *R. v. Zundel* case, in which the judges applied the proportionality principle to decide whether the publication of false information offence in Article 181 of the Canada Penal Code violates freedom of expression.<sup>90</sup> However, as discussed before, Indonesia's historical, sociological, and state governance backgrounds have shaped the perception of freedom of expression and the criminalisation of false, fake, and manipulative information. Indonesia protects political speech, but this protection is not absolute and is laxer than in other democratic countries such as Germany or Canada.

The criminalisation of disinformation should be considered within the Indonesian context. There are three steps of criteria. First, criminalisation should be rational as between the approach and the objective. The goal is to promote personal interest (the citizen's right to receive information that serves the developing individual thinking and public opinion), and public interest (preventing false, fake, inaccurate information that disturbs public order). Indonesia has applied self-regulation and content moderation approaches that can prevent broad and massive disinformation circulation, through Communication and Information Ministerial Regulation No. 5/2020. However, there is little progress in the Internet intermediary response because the policy does not aim to change and improve the digital industry response that deals with issues like the European Union.<sup>91</sup> Syndicates like Saracen and the Muslim Cyber Army have utilised disinformation to manipulate the internet audiences and threaten public order.<sup>92</sup> Therefore, criminalisation is the rational approach to support the non-penal process and to meet the objective.

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<sup>90</sup> *R. v. Zundel*, *supra* note 66.

<sup>91</sup> A. Carson, L. Fallon, *Fighting Fake News A Study of Online Misinformation Regulation in the Asia Pacific*, January 2021, p. 13, 36. available at [https://www.latrobe.edu.au/\\_\\_\\_data/assets/pdf\\_file/0006/1204548/carson-fakenews.pdf](https://www.latrobe.edu.au/___data/assets/pdf_file/0006/1204548/carson-fakenews.pdf) [last accessed 15.8.2021].

<sup>92</sup> Paterson, *supra* note 21.

Second, the provision should be applied with minimum violations of freedom of expression. There must be a clear criminal offence,<sup>93</sup> not simply the sharing of disinformation. The prohibited action is when the actor intentionally uses disinformation that manipulates others into creating chaos. Therefore, harm becomes the essential element required to punish the perpetrator, but it requires clear and present remote damage. The provision does not suppress people so that they cannot publish their statements, but it does hold them responsible for inciting people to violate the law.

Third, there should be proportionality between effect and objective.<sup>94</sup> Will this provision reduce the quality of public opinion because people will be afraid to publish their opinion, or will the public be protected from actors who disturb the healthy development of public opinion? Proportionality might be achieved when the legislation safeguards a legitimate interest, such as criticism of and opinions on society, politics, history, science, and art. Article 14 and 15 of Law No. 1/1946 state that the only legitimate interest with regards to publishing the truth is society. This perspective should shift. An opinion should be protected, not because it is true, but because it is essential in developing individual thinking, public opinion, and democracy. A highlight is that the legitimate interest should serve as a balance between personal and public interest.

Last, there is a debate whether the disinformation offences are in fact required at all, because other offences such as defamation and hate speech can be applied. In *R. v. Zundel*, the judges referred to Article 181 of the Canada Penal Code for defamation; the article does not punish hate speech.<sup>95</sup> As discussed earlier, defamation and hate speech offences have different characteristics. The misuse of defamation and hate speech offences to punish disinformation action will harm the perpetrator. The perpetrator should not be punished if his/her opinions consist of inappropriate or unpleasant words about a person or a specific group. It requires it to be established beyond reasonable doubt that the perpetrator intentionally created and published manipulative information, leading to serious harm.

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<sup>93</sup> *R. v. Zundel*, *supra* note 66.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

## CONCLUSIONS

As a democratic country, Indonesia needs to develop a new approach to the criminalisation of the spreading of disinformation. Criminal law intervention regarding disinformation should not target the common or ordinary citizen that delivers their opinion with inaccurate facts. Hence, the legal interest in criminalising the spread of disinformation is not to suppress the citizen's freedom of expression, but to prevent actors who can utilise information technology and communication to fabricate, distribute, and accelerate fake and manipulated information on a massive scale and cause harm to society. Criminalisation should aim to prevent the disruption of social order as a result of disinformation.

Indonesia's historical, sociological, and governance system backgrounds have shaped legislation to limit the freedom of expression, including criminal law intervention on disinformation that disturbs public order. However, criminalisation should be formulated with care. It is only when disinformation is intentionally spread, creating serious and present dangers to society, that it should be declared a criminal offence. Other than that, the mitigation of non-penal approaches can be useful. A lesson learned from Germany and Singapore shows that disinformation on the Internet cannot be handled only by the criminal law. Laws in the information and communication technology fields must mitigate the circulation of disinformation through the Internet. Further research in non-penal policy is required to find a better solution to this issue.

The provision in Articles 14 and 15 of Law No. 1/1946 are not relevant to Indonesia's current situation. Therefore, Indonesia has a lot of homework to do in order to produce the ideal policy for dealing with this disinformation in the Internet age. Legislators need to shift their perspective and reformulate criminal offences in the existing legislation. This is especially important/vital because fake and manipulation information circulating online is very different from disinformation shared face to face or orally. We also highlight that criminal law intervention against disinformation should support and be integrated with non-penal policy.

