

The Criminal Act of Dissemination of Fake News via Social Media in the Perspective of Individualization of Criminal



Basir Rohrohmana

Universitas Cenderawasih

ABSTRACT: This study focuses on 2 (two) main issues. First, how is the judge's decision considered based on the perspective of individualization of punishment? The second main issue is the factors that influence the judge's decision based on the perspective of individualization of punishment for the crime of spreading false news through social media.

The implementation of the perspective of individualization of punishment in the Decision of the Jayapura Class IA District Court Number 16/Pid.B/2020/PN Jap is implied in 6 (six) main points of the judge's consideration, namely (1) the indictment and criminal charges of the Public Prosecutor, (2) the defense of the Legal Counsel, (3) evidence in the form of witness statements, both charge witnesses and a de charge witnesses, expert statements, defendant statements, (4) evidence, (5) trial facts, (6) proof of elements of the crime of spreading false news through social media. In addition, 5 (five) factors influence the decision, namely (1) the condition of the perpetrator, (2) the motive of the perpetrator, (3) the impact of the crime committed, (4) the form of the perpetrator's mistake, (5) the purpose of the punishment. Thus, the judicial freedom of judges does not mean that judges abandon the perspective of individualization of punishment this perspective of individualization of punishment provides direction for judges in constructing decisions on criminal cases of spreading fake news through social media, which is fully supported by at least 2 (two) pieces of evidence and the judge's legal conviction (*juridische overtuigen*).

KEYWORDS: Criminal Acts, Individualization of Punishment, Fake News.

I. INTRODUCTION

Advances in information technology make it easier for everyone to interact, transact, and communicate through various social media.¹ Social media can be meaningful for personal and community life including how to work and relate to other people (parties). However, it can also be very dangerous, depending on the behavior of its users. In using social media, self-awareness and maturity are needed to use social media.

The consequences that arise from the use of social media such as smartphones by providing various applications and other media as a means of interacting, transacting, or communicating are the dissemination of fake news, namely news, reports, or information that does not correspond to the facts or real reality, and is misleading, and can even have an impact on anarchic actions, discriminatory actions, causing social conflict between community groups, disrupting or even destroying public order (social disorder), and acts of taking lives.

The dissemination of fake news through social media is qualified as a criminal act by criminal law, and of course one of the efforts to overcome it is through criminal justice. In the criminal justice adjudication stage, the case of the Criminal Act of Disseminating Fake News (TP-PBB) through social media is tried and finally, the judge makes a verdict. One thing that is certain in the trial leading to the verdict is the existence of the judge's considerations (the basis for consideration) which are influenced by various perspectives of the judge on the case he is facing, one of which is the perspective of individualization of punishment which focuses on the situational or individual legal circumstances (*individual juridische omstandigheden*) of the defendant.

The individual legal situation of the accused is an important perspective of the individualization of punishment in maintaining the balance between the objective elements of external actions (*daad-dagger strafrecht*) of a crime including the crime of

¹ Lihat Klaus Schwab, *Revolusi Industri Keempat*, judul asli The Fourth Industrial Revolution, Alih Bahasa Farah Diena & Andi Tarigan, PT Gramedia Pustaka Utama, Jakarta, 2019. h. 104, memberi catatan menarik dan patut diperhatikan, dinyatakan Schwab bahwa Kita hidup di dunia yang sangat terhubung (ter-hiperkoneksi) di mana informasi, ide, dan manusia berlalu-lalang lebih cepat dari sebelumnya. Kita juga hidup di dunia dengan ketidaksetaraan yang kian meningkat, sebuah fenomena yang akan diperburuk dengan perubahan besar-besaran dalam dunia kerja yang telah saya gambarkan sebelumnya. Melebarnya marginalisasi social, tantangan untuk menemukan sumber-sumber yang dapat diandalkan untuk memaknai dunia modern, dan kekecewaan terhadap elite dan struktur yang sudah mapan, sebagaimana yang dirasakan maupun yang benar-benar terjadi, telah memotivasi Gerakan-gerakan ekstrim dan mengizinkan mereka untuk merekrut sebuah perlawanan penuh kekerasan melawan system-sistem yang ada sekarang.

The Criminal Act of Dissemination of Fake News via Social Media in the Perspective of Individualization of Criminal

spreading fake news through social media, with the subjective elements (attitude or inner mood) of the accused. However, this individualized perspective of punishment is sometimes ignored and not even clearly stated in the construction of the judge's decision, even though in the negative *wettelijk stelsel* system of proof, the judge's legal conviction (*juridische overtuigen*) is an urgent point in determining the guilt of the accused including the accused in the TP-PBB through social media.

II. STUDY APPROACH

There are 3 (three) legal approaches used in this study, namely (1) the statutory regulatory approach, (2) the conceptual approach, and (3) the case approach. The statutory regulatory approach is used to study the statutory regulations related to the criminal act of spreading fake news through social media. Meanwhile, the conceptual approach is used to study the concept of the TPP-PBB, the Individualization of Criminalization Perspective, the concept of consideration, and the judge's decision. Meanwhile, the case approach studies the Judge's Decision on the TPP-PBB through social media.

III. LEGAL INSTRUMENTS OF TPBB SOCIAL MEDIA

TP-PBB social media is regulated in the legal instrument of the Criminal Code (KUHP, or outside the Criminal Code). In the provisions of Article 390 of the Criminal Code (KUHP), it is stated that anyone who intends to benefit themselves or others unlawfully, by broadcasting false news that causes the price of goods, funds, or securities to fall or rise, is threatened with a maximum imprisonment of two years and eight months. The target of the regulation (addressat norm) of this provision is legal protection for the price of goods, funds, or securities from the dissemination of false news (fake news). Therefore, the provisions of Article 155 (1) of the Criminal Code state that anyone who broadcasts, displays, or posts writing or paintings in public that contain statements of hostility, hatred, or insults towards the Indonesian Government, with the intention that the contents are known or more widely known by the public, is subject to a maximum prison sentence of four years and six months or a maximum fine of four thousand five hundred rupiahs. The target of the regulation (addressat norm) of this provision is to protect the legal interests of the government from acts of disseminating false news (hoaxes) that contain statements of hostility, hatred, or insults towards the Indonesian Government.

The provisions of Article 156 of the Criminal Code state that anyone who publicly expresses feelings of hostility, hatred or insult to one or several groups of the Indonesian people, shall be subject to a maximum imprisonment of four years or a maximum fine of four thousand five hundred rupiah. The target of the regulation (address at norm) of this provision is legal protection for the community against acts of openly expressing feelings of hostility, hatred, or insult to one or several groups of Indonesian people. Meanwhile, the provisions of Article 160 of the Criminal Code, state that anyone who publicly verbally or in writing incites to commit a criminal act, commits violence against a public authority, or does not comply with either the provisions of the law or the orders of office given based on the provisions of the law, shall be subject to a maximum imprisonment of six years or a maximum fine of four thousand five hundred rupiahs. The target of the regulation (address at norm) of this provision is legal protection for the public authority and obedience to the law or orders of office given based on the provisions of the law.

The provisions of Article 390 of the Criminal Code, Article 155 paragraph (1) of the Criminal Code, Article 156, and Article 160 of the Criminal Code are known to be articles on spreading hatred (Hatzaai Articelen), however, the provisions in these four articles do not directly mention the medium of the crime in the form of social media, they only mention oral or written language. Legal instruments outside the Criminal Code regarding TPP-PBB social media are regulated in Law Number 19 of 2016 concerning Electronic Information and Transactions (UUITE). This UUITE is an amendment to Law Number 11 of 2008. The provisions of Article 28 paragraph (1) of the UUITE state that Every Person intentionally and without the right to spread false and misleading news that results in consumer losses in Electronic Transactions. The target of the regulation of this article is clearly to provide legal protection for consumers from losses resulting from the act of spreading false and misleading news. Thus, spreading false news alone is not enough to fulfill the elements of this article but also confuses consumers. The media used by the offense is Electronic Transactions. The threat of criminal penalties for criminal acts in Article 28 paragraph (1) is contained in Article 45A paragraph (1) of the UUITE with a maximum prison sentence of 6 (six) years and/or a maximum fine of IDR 1,000,000,000.00 (one billion rupiah).

Furthermore, there are provisions in Article 28 paragraph (2) of the ITE Law which states that any person who intentionally and without the right to disseminate information intended to cause hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, race, and inter-group (SARA). The target of the regulation (addressat norm) of this article is legal protection against acts of disseminating information intended to cause hatred or hostility towards individuals and/or certain community groups based on SARA. The criminal threat for criminal acts in Article 28 paragraph (2) is contained in Article 45A paragraph (2) of the ITE Law, which is punishable by imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

There are also regulations regarding TP-PBB, namely in Law Number 1 of 1946 concerning Criminal Law Regulations, Article 14 paragraphs (1) and (2), and Article 15. Provisions of Article 14 (1) Whoever, by broadcasting false news or notices, intentionally causes unrest among the people, shall be punished with a maximum prison sentence of ten years. (2) Whoever

The Criminal Act of Dissemination of Fake News via Social Media in the Perspective of Individualization of Criminal

broadcasts news or issues a notice, which can cause unrest among the people, while he should have suspected that the news or notice is false, shall be punished with a maximum prison sentence of three years. Provisions of Article 15 of Law Number 1 of 1946 state that Whoever broadcasts uncertain news or excessive or incomplete news, while he understands or should have suspected at least that such news will or can easily cause unrest among the people, shall be punished with a maximum prison sentence of two years.

IV. THEORETICAL CONCEPTUAL BASIS

A. Hate Speech

Hate Speech is an act of communication carried out by an individual or group, either in the form of incitement, provocation, or discriminatory actions that occur in community life. Forms of Hate Speech can be in the form of Criminal Acts regulated in the Criminal Code and outside the Criminal Code, including (a) Insults, (b) Defamation, (c) Defamation, (d) Unpleasant acts, (e) Provoking, (f) Inciting, (g) Spreading fake news. In simple terms, hate speech can be interpreted as an act of conveying words (thoughts) in public, either verbally or in writing, to cause hatred towards a particular group based on differences in race, religion, ethnicity, even sexual orientation, and other differences in identity. So in this case it is clear that what is prohibited by law is the content of statements that can cause hatred/hostility and not freedom of speech.²

B. Social-Media

Social media is an online media that supports social interaction. Social media uses web-based technology that transforms communication into interactive dialogue. Some popular social media sites today include WhatsApp, BBM, Facebook, YouTube, Twitter, Wikipedia, and Blog. Another definition of social media is also explained by Antony Mayfield according to him social media is a media where users can easily participate in, share, and create messages, including blogs, social networks wiki/online encyclopedias, virtual forums, and virtual worlds. According to Puntoadi, social media begins with three activities: sharing, collaborating, and connecting.^{3,4}

The positive impacts of social media include (1) Strengthening friendships. In terms of friendship, the use of social media is very suitable for interacting with people who live far away. (2) Providing space for positive messages. (3) Familiarizing friendships. (4) Providing accurate and precise information. (5) Increasing insight and knowledge. The functions of social media include the following:

- (a) Social media is a media designed to expand human social interaction using the internet and web technology.
- (b) Social media has succeeded in transforming the practice of one-way communication of broadcast media from one media institution to many audiences (one to many) into the practice of dialogical communication between many audiences (many to many).
- (c) Social media supports the democratization of knowledge and information. Transforming humans from users of message content to creators of the messages themselves.
- (d) Social media can also be used as a source of income because by using social media you can display various kinds of advertisements, receive sponsorship from other parties, sell your products, create creative content, and so on.⁵

C. Individualization of Punishment Perspective

The Individualization of Punishment Perspective was born from the thinking of the Modern school which was a reaction to the classical school. The Individualization of Punishment Perspective is a logical consequence of the thinking of the positive legal school which holds that humans are dependent creatures. If a crime is committed, then what is imposed must be by the conditions of the perpetrator and his environment.⁶ Barda Nawawi Arief thinks that the perspective of individualization of punishment is built on the idea of balance in punishment (*daad dader strafrecht*), which includes the following 4 (four) things: (1) mono-dualistic balance between public or community interests and individual or personal interests, (2) balance between objective elements of external actions and subjective elements (inner attitudes) giving rise to the principle of *daad-dader strafrecht*, (3) balance between formal and material criteria, (4) balance between legal certainty with flexibility or elasticity and justice.⁷

² Hatarto Pakpahan, *Tindak Pidana Hate Speech Ditinjau dari Hukum Pidana dan Konstitusi*, Jurnal Cakrawala Hukum, Fakultas Hukum Universitas Merdeka Malang, 2018. h. 168

³ Fahlepi Roma Doni, *Perilaku Penggunaan Media Sosial Pada Kalangan Remaja*, Indonesian Journal On Software Engineering, Volume 3 No 2 (2017), h. 4

⁴ Zidti Imaroh, Achmad Irwan Hamzani, Fajar Dian Aryani, *Pertanggungjawaban Pidana Penyebar Berita Hoax di Media Sosial*, PT Nasya Expanding Management, Pekalongan, 2023. h. 39

⁵ Arum Wahyuni Purbohastuti, *Efektivitas Media Sosial Sebagai Media Promosi*, Jurnal Tirtayasa Ekonomika, Vol. 12, No. 2, Oktober 2017, h. 215.

⁶ Widodo, *Hukum Pidana Di Bidang Teknologi Informasi, Cybercrime Law Telaah Teoritik dan Bedah Kasus*, Aswaja Pressindo, Yogyakarta, 2011, h. 168.

⁷ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, Perkembangan Penyusunan Konsep KUHP Baru*, Kencana, Jakarta, 2014, h. 97

The Criminal Act of Dissemination of Fake News via Social Media in the Perspective of Individualization of Criminal

In the context of Criminal Individualization, the approach that is encouraged is the humanistic approach. The humanistic approach that contains the Idea of Criminal Individualization contains 3 (three) characteristics, namely:

- Accountability (criminal punishment is personal/individual (personal principle);
- Punishment is only given to the guilty person (culpability principle: no punishment without fault)
- Punishment must be adjusted to the characteristics and conditions of the perpetrator: this means that there must be flexibility for judges in choosing criminal sanctions (types and severity of sanctions) and there must be the possibility of modifying the punishment (change/adjustment) in its implementation. Therefore, it contains the principle of flexibility and the principle of modifying the punishment.⁸

The Individualization of Sentencing Perspective by Sheldon Glueck (in Barda Nawawi Arief) once proposed the principle of a two-phase process (the idea of separating the criminal justice process) in criminal cases, namely (1) the technical legal proof phase (the guilt finding phase), (2) the criminal/action imposition phase or the punishment/development phase (the sentence-imposing/the treatment phase).⁹

V. INDIVIDUALIZATION PERSPECTIVE OF CRIMINALIZATION IN SOCIAL MEDIA TP-PBB CASE DECISIONS

A. Judge's Decision Consideration

Consideration of the Judge's Decision from an Individualized Perspective The punishment for spreading fake news through social media is reviewed in the Jayapura Class IA District Court Decision Number 16/Pid.B/2020/PN.Jap. In this decision, the judge has considered 6 (six) main points, namely (1) the indictment and criminal charges of the Public Prosecutor, (2) the defense of the Legal Counsel, (3) evidence in the form of witness statements, both a charge witnesses and a de charge witnesses, expert statements, defendant statements, (4) evidence, (5) trial facts, (6) proof of the elements of TP-PBB through social media.

1. Consideration of the Acts Accused.

The defendant is Riki Karel Yakarmilena, charged with intentionally and without the right to spread information intended to cause hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, race, and inter-group (SARA). The defendant's actions are as regulated and subject to criminal penalties under Article 45 paragraph (2) in conjunction with Article 28 paragraph (2) of Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE). The Judge's Decision Consideration is seen in confirming the identity and actions of the defendant.

2. Legal Counsel's Defense Consideration

The Defendant's Legal Counsel's Defense essentially stated that the Defendant must be declared not legally and convincingly proven to have committed the act as referred to in the indictment of the Public Prosecutor so that the Defendant must be acquitted of all charges by the Public Prosecutor. The Perspective of Criminal Individualization in the Legal Counsel's Defense is seen as overly prioritizing the Individualization of Criminalization without encouraging the objectivity of other relevant and reliable aspects.

3. Consideration of Evidence

The evidence applied in this case is witness testimony, both a charge witness and a de-charge witness, expert testimony, and the defendant's testimony. Optimizing the use of evidence that will become trial facts that the judge must consider in making a decision. However, in the use of evidence, especially in the form of witness testimony, expert testimony, and defendant's testimony, sometimes there is a mixture that is difficult to separate between opinions, thoughts, and individual perspectives with the facts of the incident that should meet the quality of being heard, seen and experienced by oneself (witness quality), experiencing the crime directly (defendant quality) and the expectations that are owned and needed to clarify the crime (expert quality). The quality of witnesses, defendant quality, and expert quality tend to be individually oriented, therefore the judge should be selective in constructing factual considerations and legal considerations of the TP-PBB case.

4. Consideration of Evidence

This evidence remains a legal consideration for the judge but is not directly related to the perspective of individualization of punishment. The provisions of Article 181 (1) of the Criminal Procedure Code state that the presiding judge shows the defendant all evidence and asks him whether he knows the object by paying attention to the provisions as referred to in Article 45 of this law. (2) If necessary, the presiding judge also shows the object to the witness.

5. Trial Facts Consideration

Trial facts are witness testimony facts, expert testimony facts, letter facts, clue facts, and defendant testimony facts. These trial facts are *conditio sine qua non*, intertwined between one fact and another. The Individualization of Criminal Procedure Perspective in this consideration plays an important role, especially in helping judges obtain clues to actions, events, or

⁸ *Ibid.* h. 39

⁹ *Ibid.* h. 40

The Criminal Act of Dissemination of Fake News via Social Media in the Perspective of Individualization of Criminal

circumstances that are mutually consistent so that the judge believes that TP-PBB has occurred through social media and the defendant is the perpetrator (Article 188 paragraph (1), paragraph (2) and paragraph (3) of the Criminal Procedure Code).

6. Proof of TP-PBB Elements Through Social Media

Consideration of the evidence of the elements of TP-PBB through social media falls into the realm of legal considerations (*juridische overwegingen*). The constitutive elements of TP-PBB include (1) the element of Every Person; (2) the element intentionally and without rights, (3) the element of spreading information, (4) the element intended to cause hatred or hostility towards individuals and/or certain community groups based on ethnicity, religion, race, and inter-group (Sara). The first and second elements tend to be individual-subjective, thus the perspective of individualization of criminalization is more dominant. Meanwhile, the third and fourth elements are objective because they are related to the defendant's actions.

B. The Factors that Influencing the Perspective of Individualization of Criminalization on Decisions in TP-PBB Cases Through Social Media

The Individualization Perspective of Criminalization of the TP-PBB Social Media Decision on the Decision of the Jayapura Class Ia District Court Number 16/Pid.B/2020/PN Jap is influenced by 5 (five) factors, namely (1) the condition of the perpetrator, (2) the motive of the perpetrator, (3) the impact of the crime committed, (4) the form of the perpetrator's mistake, (5) the purpose of the punishment.

The perpetrator's condition factor, namely unemployment, and high school education, is a sensitive-potential condition of the perpetrator that drives him to commit TP-PBB through social media. The perpetrator's motive factor is the motivation of a potential-latent construction formed by the perpetrator's (defendant's) empirical experience of the conditions experienced in his daily life or formed through the media. The potential-latent construction which is the defendant's psychological impulse should be the judge's consideration in passing a verdict on the defendant. The impact factor of TP-PBB forms the judge's opinion on the defendant's actions because it contains (1) Fake News, (2) Clickbait, (3) Confirmation Bias, (4) Misinformation, (5) Satire, (6) Post-truth, and (7) Propaganda. The seven psychological impulse contents give rise to the defendant's malicious deception. With this malicious deception, the judge should consider it in passing a verdict on the defendant. In addition, malicious deception also contains acts without rights. The concept of law without rights can be interpreted as being against the law, namely (1) without any rights of one's own (*zonder eigen recht*), (2) contrary to the law in general (*in strijd met het recht in het algemeen*), (3) contrary to a person's personal rights (*in strijd met een anders subjective recht*), (4) contrary to objective law (*tegen het objectieve recht*). The four components of the concept of acts without rights are locked into the act of spreading news that is not in accordance with the facts or actual circumstances.

CONCLUSIONS AND SUGGESTIONS

1. Conclusion

- a. The decision of Jayapura Class Ia District Court Number 16/Pid.B/ 2020/PN Jap. In this decision, the judge considered 6 (six) main points, namely (1) the indictment and criminal charges of the Public Prosecutor, (2) the defense of the Legal Counsel, (3) evidence in the form of witness statements, both a charge witnesses and a de charge witnesses, expert statements, defendant statements, (4) evidence, (5) trial facts, (6) proof of the elements of TP-PBB through social media. These six considerations of the judge also indicate a description of the assessment of the perspective of individualization of criminalization in the construction of the judge's decision on TP-PBB through social media.
- b. The Individualization Perspective of the Criminalization of the TP-PBB Decision via social media has 5 (five) factors that influence the Decision of the Jayapura Class Ia District Court Number 16/Pid.B/2020/PN Jap, namely (1) the condition of the perpetrator, (2) the motive of the perpetrator, (3) the impact of the crime committed, (4) the form of the perpetrator's error, (5) the purpose of the punishment. These five factors each have an influence that does not negate each other on the Individualization Perspective of the Criminalization of the TP-PBB Decision via social media.

2. Suggestions

- a. In constructing a verdict, the judge has judicial freedom to carry out his duties and functions adhering to the principle of the impartial court, but in this case, it cannot be separated from the judge's perspective on the case he is facing. With this view, it is suggested that the judge should progressively realistically consider the perspective of individualization of punishment in the entire trial process of the TP-PBB case via social media.
- b. The judge makes a criminal verdict in a criminal case including TP-PBB via social media because the defendant is found guilty legally and convincingly supported by at least 2 (two) pieces of evidence and added to the judge's conviction. This principle of proof is known as the negative *wettelijk stelsel*. Concerning the judge's decision by asking about his conviction, it is suggested that the judge should state his legal conviction (*juridische overtuigen*) by orienting himself toward the perspective of individualization of punishment.

REFERENCES

- 1) Arum Wahyuni Purbohastuti, *Efektivitas Media Sosial Sebagai Media Promosi*, Jurnal Tirtayasa Ekonomika, Vol. 12, No. 2, Oktober 2017. DOI: <http://dx.doi.org/10.35448/jte.v12i2.4456>
- 2) Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, Perkembangan Penyusunan Konsep KUHP Baru*, Kencana, Jakarta, 2014.
- 3) Hatarto Pakpahan, *Tindak Pidana Hate Speech Ditinjau dari Hukum Pidana dan Konstitusi*, Jurnal Cakrawala Hukum, Fakultas Hukum Universitas Merdeka Malang, 2018.
- 4) Fahlepi Roma Doni, *Perilaku Penggunaan Media Sosial Pada Kalangan Remaja*, Indonesian Journal On Software Engineering, Volume 3 No 2 (2017). DOI: <https://doi.org/10.31294/ijse.v3i2.2816>
- 5) Klaus Schwab, *Revolusi Industri Keempat*, judul asli The Fourth Industrial Revolution, Alih Bahasa Farah Diena & Andi Tarigan, PT Gramedia Pustaka Utama, Jakarta, 2019.
- 6) Widodo, *Hukum Pidana Di Bidang Teknologi Informasi, Cybercrime Law Telaah Teoritik dan Bedah Kasus*, Aswaja Pressindo, Yogyakarta, 2011.
- 7) Zidti Imaroh, Achmad Irwan Hamzani, Fajar Dian Aryani, *Pertanggungjawaban Pidana Penyebar Berita Hoax di Media Sosial*, PT Nasya Expanding Management, Pekalongan, 2023.



There is an Open Access article, distributed under the term of the Creative Commons Attribution – Non Commercial 4.0 International (CC BY-NC 4.0) (<https://creativecommons.org/licenses/by-nc/4.0/>), which permits remixing, adapting and building upon the work for non-commercial use, provided the original work is properly cited.