

Implications of Constitutional Court Decision Number 78/PUU-XXI/2023 on Hoax Law Enforcement in Indonesia in Relation to Article 263 of Law Number 1 of 2023

Reyraya Respati Paramudhita
Universitas Padjadjaran, Bandung, Indonesia
reyparamudita@gmail.com

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Abstract:

Constitutional Court Decision Number 78/PUU-XXI/2023 declared Articles 14 and 15 of Law Number 1 of 1946 contrary to the 1945 Constitution and legally non-binding, creating a fundamental legal vacuum (*rechtsvacuum*) in hoax law enforcement in Indonesia. This normative juridical research, employing statutory and case approaches, analyzes the applicability of Article 263 of the National Criminal Code (Law No. 1 of 2023) as a replacement norm and the multidimensional implications of the Decision on law enforcement. Theoretical frameworks include the Rule of Law (*Rechtsstaat*) doctrine of Julius Stahl and A.V. Dicey, Gustav Radbruch's Legal Certainty Theory (*Rechtssicherheit, Gerechtigkeit, Zweckmäßigkeit*), Legal Interpretation Theory (grammatical, systematic, teleological, and constitutional methods), Lawrence M. Friedman's Legal System Theory, and Soerjono Soekanto's five law enforcement factors. The research finds that Article 263 substantially satisfies the *lex certa* standard required by the Court by explicitly requiring *mens rea* elements—*dolus* ("knowingly") and *culpa* ("reasonably suspected")—along with a tangible harm element of "social unrest," thereby overcoming the three unconstitutional characteristics of the invalidated norm: definitional vagueness, susceptibility to multiple interpretations, and the absence of explicit *mens rea*. The Decision carries implications across three dimensions: (1) legal substance—elimination of vague "rubber article" norms; (2) legal structure—a paradigm shift from total enforcement to selective full enforcement requiring proof of *mens rea*; and (3) legal culture—a demand for transformation from forward culture to verification culture. This research recommends drafting implementing regulations to operationally define "social unrest," synchronizing the Court's constitutional interpretation into technical law enforcement guidelines, and strengthening non-criminal mechanisms inspired by Germany's NetzDG as complementary approaches.

Keywords: constitutional court; hoax; *lex certa*; *mens rea*; national criminal code.

INTRODUCTION

The rapid expansion of information technology in the final decade has given rise to a heartbreaking civilizational paradox. On the one hand, it has rolled out the red carpet for the democratization of knowledge, but on the other, it has sown the destructive seeds of the massive and systematic dissemination of hoaxes. These deliberately produced and amplified lies are not just ripples in the digital ocean, but a flood that threatens the very foundations of the nation, undermines social order, rips apart political stability,

and paralyzes the lifeblood of the Indonesian economy. Empirical reality demonstrates the fragility of our domestic information security. The Ministry of Communication and Digital of the Republic of Indonesia identified 1,923 pieces of hoax content circulating throughout 2024. When woven into a monthly chronology, these figures represent a constant curve of anxiety: January recorded 143 items, February 131 items, March soared to 162 items, April remained at 143 items, May climbed to 164 items, June slightly declined to 153 items, July reached 170 items, August was at 162 items, September crept up to 173 items, October reached its peak of tension with 215 items, November plateaued at 166 items, and December closed with 141 items. The political realm occupied the highest caste in this hierarchy of falsehoods with 237 items, followed by government issues with 214 items, and the health sector perched at 163 items (Ministry of Communication and Digital, 2025). Long before that, if we draw a straight line from August 2018 to December 2023, there were no fewer than 12,547 false narratives circulating freely on various digital platforms in the country (Muhamad, 2024).

This phenomenon of information distortion is closely intertwined with various multidimensional crises that transcend the purely technical boundaries of communication. The contemporary healthcare world is witnessing a dark memory when hoaxes surrounding the handling of Covid-19 proliferated into a social pathology that gave rise to massive resistance to the national vaccination program. This chaotic situation was christened by the World Health Organization as an infodemic, a situation in which rising tides of misinformation and disinformation combine with pandemic panic, ultimately sabotaging and paralyzing the effectiveness of the public's medical response (WHO, 2020; Covid-19 Task Force, 2021). Meanwhile, on the political stage, the General Elections Supervisory Agency (Bawaslu) recorded a digital footprint of 62 pieces of content verified as genuine hoaxes and disinformation during the 2019 General Election (Badan Pengawas Pemilihan Umum, 2019). These manipulative traces were not merely political embellishments, but also catalyzed acute social polarization, eroding the foundations of social cohesion, and radically reducing public trust in democratic institutions (Herdiansah, 2019). The economic sector was also devastated by the circulation of fictitious information regarding the stability of certain corporations and products, a storm of falsehoods that successfully triggered investor panic selling, which harmed the capital market as a whole (Santoso & Kurniawan, 2024).

For decades, Indonesia's legal framework for prosecuting digital hoaxers has relied on an ancient pillar: Articles 14 and 15 of Law Number 1 of 1946 concerning Criminal Law Regulations. Through the framework of Article 14 paragraph (1), the law threatens imprisonment of up to ten years for any individual who intentionally disseminates false news that causes unrest among the people. Article 15 acts as a safety net to punish the spread of uncertain, exaggerated, or incomplete news that is thought to be able to ignite collective anxiety. However, if traced from the perspective of legal history, this normative instrument was actually born in the womb of the 1946 independence revolution. An era that demanded the availability of elastic, repressive, and pragmatic legal instruments to maintain the sovereignty of the state that was still young. Using articles left over from the pre-constitutional emergency period to judge the reality of today's digital world is an acute legal anachronism. Digitalization demands precise, strict constitutional standards and respect for human rights, something that was not contained in the womb of the 1946 law.

A new dawn for criminal law enforcement dawned when the Constitutional Court issued Decision Number 78/PUU-XXI/2023 on December 21, 2023. Through this monumental decision, the Court struck down the hammer of justice, declaring that Articles 14 and 15 of Law Number 1 of 1946 were diametrically opposed to the 1945 Constitution of the Republic of Indonesia and therefore lost their binding legal force. The Court uncovered three inherent flaws embedded in the two articles. First, there was a severe definitional vagueness in the element of public unrest, a phrase that was elastic and prone to misuse. Second, the articles were highly susceptible to multiple interpretations, particularly when testing the empirical limits of the elements of fake news and exaggerated news. Third, there was the absence of an explicit parameter of malicious intent (*mens rea*) as an absolute requirement for criminal liability in the circulation of information. This Constitutional Court decision instantly tore down the old legal framework, but at the same time triggered a worrying legal vacuum (*rechtsvacuum*). This uncertain situation has forced law enforcement and academics to shift their epistemological perspective to Article 263 of Law Number 1 of 2023 concerning the National Criminal Code as a substitute norm, touted as capable of filling this gap.

Although the discourse on hoaxes and law enforcement has garnered considerable attention, a review of previous academic literature reveals a wide, crucial research gap that needs to be addressed immediately. Several scholars have attempted to approach this maze of issues from various perspectives, but their analyses remain partial and fragmented. For example, Darmawan and Rizal (2024) examine the Constitutional Court's ruling using the perspective of *Siyasah Dusturiyah*, but their analysis stops at the aspect of Islamic statecraft, without addressing the projected substitute norm in the new National Criminal Code (Darmawan & Rizal, 2024). On the other hand, Deanova (2024) examines the internal inconsistencies embedded in the Constitutional Court's legal considerations, but she fails to examine the practical-legal implications of the decision on the existence of Article 263 of the National Criminal Code (Deanova, 2024). Similar weaknesses are apparent in Prasetyo's (2023) scientific documentation, which outlines the constitutionality standards of criminal norms in the digital era at a macro level, but ignores the specific contextualization of Article 263 as the new epicenter of law enforcement for fictitious information crimes (Prasetyo, 2023). Meanwhile, Wibowo (2025) attempts to assess the legal consequences of hoax dissemination through the corridor of the Electronic Information and Transactions Law, but his analysis loses comprehensive relevance because it fails to integrate the systemic implications following Constitutional Court Decision Number 78/PUU-XXI/2023 (Wibowo, 2025). The absence of a comprehensive study capable of simultaneously marrying the analysis of the constitutionality of Article 263 of the National Criminal Code, the sharpening of the parameters of malicious intent (*mens rea*) in digital dynamics, and the multidimensional implications of the decision clearly emphasizes the academic urgency of this research. This lack of synthesis is the starting point for the originality of this study.

Starting from this complex background and apparent research gap, this study seeks to address two crucial legal issues. *First*, what is the legal standing of Article 263 of Law Number 1 of 2023 concerning the National Criminal Code following the issuance of Constitutional Court Decision Number 78/PUU-XXI/2023? *Second*, what are the implications of this Constitutional Court decision for the future of law enforcement regarding hoax crimes in Indonesia in relation to Article 263 of Law Number 1 of 2023? Through these two guiding questions, this study is fully committed to dissecting the anatomy of Indonesian positive law, untangling the tangled norms, and offering a clear reconstruction of thought to achieve just legal certainty amidst the unabated digital information storm.

The constitutional architecture of law enforcement in Indonesia is fundamentally rooted in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which unequivocally declares that "*Indonesia is a state based on law.*" This constitutional affirmation is not merely a symbolic statement of political identity but constitutes the normative cornerstone upon which every exercise of governmental authority must rest. As a constitutional democracy, Indonesia rejects the doctrine of the *machtsstaat*, where political power stands above legal norms, and instead embraces the *rechtsstaat*, in which all state institutions, public officials, and citizens are equally subordinated to the supremacy of law. Consequently, every governmental action, including the formulation, interpretation, and enforcement of criminal legislation, must derive its legitimacy from constitutional norms and remain subject to constitutional scrutiny. Within this framework, the Constitution occupies the highest position in the hierarchy of legal norms and functions as the principal standard for assessing the validity of legislation and state policies. The constitutional commitment to the rule of law therefore transforms legality from a formal requirement into a substantive constitutional obligation aimed at ensuring justice, protecting individual liberties, and preventing arbitrary exercises of state power (Asshiddiqie, 2009).

The Indonesian conception of the rule of law has evolved through the synthesis of two major legal traditions that have profoundly shaped modern constitutional thought. From the continental European tradition, Indonesia inherited the doctrine of the *Rechtsstaat*, systematically developed by Julius Stahl during the nineteenth century. Stahl conceptualized the rule of law as a constitutional order characterized by four indispensable elements. *First*, the protection of fundamental rights (*Grundrechte*) ensures that state authority remains limited by legally guaranteed civil liberties. *Second*, the separation of powers (*Gewaltenteilung*) distributes governmental authority among different branches in order to prevent the concentration of power. *Third*, the principle of government based on law (*Gesetzmäßigkeit der Verwaltung*) requires every administrative action to possess a clear legal basis and to remain accountable to legal standards. *Fourth*, the existence of an independent administrative judiciary (*Verwaltungsgerichtsbarkeit*) provides citizens with an effective mechanism to challenge unlawful

governmental actions. Collectively, these four pillars establish a constitutional framework in which governmental authority is exercised within legally prescribed boundaries and remains continuously accountable before the law (Asshiddiqie, 2009).

Complementing the continental tradition, the Anglo-Saxon conception of the rule of law articulated by A.V. Dicey further enriches Indonesia's constitutional understanding of legality. Dicey formulated three essential principles that continue to influence constitutional democracies worldwide. The first is the supremacy of law, which rejects arbitrary governmental power by requiring every exercise of public authority to be authorized by law. The second is equality before the law, affirming that no individual, regardless of political position or social status, enjoys immunity from legal accountability. The third principle recognizes that constitutional rights are effectively protected not merely through constitutional declarations but through their realization and enforcement within ordinary legal processes (Dicey, 1959). Unlike continental legal systems that traditionally emphasize codified constitutional guarantees, Dicey's approach highlights the operational role of courts in safeguarding individual freedoms through judicial practice. Indonesia has gradually integrated these complementary traditions into a constitutional model that combines codified constitutional supremacy with judicial protection of fundamental rights.

Building upon these classical doctrines, Jimly Asshiddiqie developed a comprehensive formulation of the Indonesian rule of law by synthesizing both *Rechtsstaat* and *Rule of Law* traditions into thirteen constitutional principles. These principles include constitutional supremacy, legality, the protection of human rights, democracy, equality before the law, due process of law, judicial independence, proportionality, legal certainty, governmental accountability, constitutional review, separation of powers, and the existence of an independent Constitutional Court as the guardian of the Constitution (Asshiddiqie, 2012). This synthesis reflects Indonesia's unique constitutional identity in which the rule of law is understood not only as procedural legality but also as a normative commitment to constitutional justice. The Constitutional Court therefore assumes a central institutional role in maintaining constitutional coherence by ensuring that statutory provisions remain consistent with constitutional values and fundamental rights.

The normative hierarchy underlying this constitutional system can be more deeply understood through Hans Kelsen's *Stufentheorie* or hierarchical theory of legal norms. Kelsen argued that every legal norm derives its validity from a higher norm within a structured pyramid culminating in the *Grundnorm*, which functions as the ultimate source of legal legitimacy (Kelsen, 1967). In the Indonesian constitutional order, the 1945 Constitution occupies this supreme normative position, while statutes, government regulations, and subordinate legislation derive their validity from constitutional authorization. Consequently, when statutory provisions conflict with constitutional principles, the Constitutional Court possesses the authority to invalidate such provisions through judicial review. Judicial review therefore serves not merely as a procedural mechanism but as a constitutional instrument for preserving the internal coherence, consistency, and legitimacy of the legal system.

This theoretical perspective becomes particularly relevant in understanding Constitutional Court Decision Number 78/PUU-XXI/2023, which invalidated Articles 14 and 15 of Law Number 1 of 1946 concerning Criminal Law Regulations. The Court concluded that the contested provisions failed to satisfy constitutional standards of legal certainty because their formulations were excessively broad, vague, and susceptible to arbitrary interpretation. By annulling these provisions, the Constitutional Court restored the consistency of the constitutional hierarchy envisioned by Kelsen, ensuring that lower-level legislation remains aligned with constitutional guarantees of legality and fundamental rights. The decision therefore represents not simply an exercise of constitutional adjudication but an affirmation of the constitutional principle that legislation inconsistent with constitutional values cannot retain normative validity.

Within this constitutional framework, freedom of expression occupies a central position as one of the fundamental rights guaranteed by the Constitution. Nevertheless, Indonesian constitutional law does not recognize freedom of expression as an unlimited or absolute liberty. Article 28J of the 1945 Constitution explicitly provides that constitutional rights may be restricted by statute when such limitations are necessary to respect the rights of others, preserve morality, maintain religious values, ensure public order, or protect national security within a democratic society. Constitutional jurisprudence has consistently interpreted these limitations through three cumulative requirements. First, restrictions must possess a clear statutory basis established through democratic legislation. Second, they must satisfy the principle of proportionality by ensuring that restrictions do not exceed what is necessary to achieve legitimate constitutional objectives.

Third, they must pursue legitimate aims recognized within democratic constitutional governance. These cumulative requirements establish the constitutional framework for evaluating the legality of criminal provisions regulating misinformation and false information.

The enactment of Article 263 of the new National Criminal Code must therefore be interpreted within this broader constitutional framework. Unlike the previous provisions contained in Law Number 1 of 1946, Article 263 seeks to formulate criminal liability for disseminating false information in a manner that better reflects constitutional requirements of legality, clarity, and proportionality. Nevertheless, its constitutional legitimacy ultimately depends upon whether its formulation satisfies the principles of legal certainty, narrowly defines prohibited conduct, and avoids excessive interference with constitutionally protected freedom of expression. The Constitutional Court Decision Number 78/PUU-XXI/2023 consequently provides an important constitutional benchmark for evaluating whether future criminal regulations concerning misinformation remain compatible with Indonesia's constitutional commitment to the rule of law.

Among twentieth-century legal philosophers, Gustav Radbruch occupies a particularly influential position in explaining the relationship between legality, justice, and the moral legitimacy of law. Rejecting purely positivistic conceptions of legality, Radbruch argued that every legal system must simultaneously pursue three inseparable values: legal certainty (*Rechtssicherheit*), justice (*Gerechtigkeit*), and utility (*Zweckmäßigkeit*). These values should not be understood as competing alternatives but as complementary dimensions that collectively determine the legitimacy of legal norms. A legal system emphasizing certainty while neglecting justice risks legitimizing oppression through formal legality, whereas a legal system pursuing justice without legal certainty risks creating unpredictability and arbitrary decision-making. Accordingly, good law requires an appropriate balance among these three foundational values (Muslih, 2017).

Legal certainty constitutes the first and perhaps most fundamental requirement of criminal legislation. According to Radbruch, legal norms must be formulated clearly, precisely, and predictably so that individuals are capable of understanding which conduct is prohibited and the legal consequences associated with violations. Predictability enables citizens to regulate their behavior according to law and prevents arbitrary exercises of governmental authority. Within criminal law, this principle finds concrete expression through the legality principle, traditionally articulated through four complementary dimensions: *lex scripta*, requiring criminal offences to be established by written legislation; *lex certa*, requiring offences to be defined with sufficient clarity and precision; *lex stricta*, prohibiting extensive interpretation or analogy detrimental to defendants; and *lex praevia*, prohibiting retroactive criminal punishment. These dimensions collectively ensure that criminal law operates as an instrument of legal certainty rather than arbitrary coercion.

Radbruch's second value, justice, emphasizes proportionality and equal treatment under law. Justice requires that individuals who are similarly situated receive equal treatment while recognizing relevant differences that justify differential legal responses. Criminal sanctions must therefore correspond proportionately to both the seriousness of prohibited conduct and the legitimate interests protected by law. The third value, utility, concerns the practical effectiveness of law in achieving socially desirable objectives, including crime prevention, protection of public interests, and maintenance of social order. Effective criminal legislation must therefore not only satisfy formal legality but also contribute meaningfully to public welfare without imposing disproportionate restrictions upon constitutional rights.

These principles become particularly significant in evaluating Constitutional Court Decision Number 78/PUU-XXI/2023. The Court's principal constitutional concern centered upon the *lex certa* requirement, concluding that Articles 14 and 15 of Law Number 1 of 1946 employed vague terminology incapable of providing adequate legal certainty. Such indeterminacy created opportunities for inconsistent interpretation, selective prosecution, and arbitrary law enforcement, thereby undermining constitutional guarantees of legality. From Radbruch's perspective, legislation that systematically generates uncertainty and facilitates injustice loses its claim to normative legitimacy. His celebrated Radbruch Formula further suggests that when statutory law reaches an intolerable degree of injustice, it ceases to deserve recognition as genuine law. Although the Constitutional Court did not explicitly invoke this formula, its reasoning reflects Radbruch's conviction that constitutional legality cannot be separated from substantive justice and legal certainty.

While constitutional adjudication may transform legal norms, its practical significance ultimately depends upon how those norms operate within the broader legal system. Lawrence M. Friedman

conceptualizes the legal system as comprising three mutually reinforcing components: legal substance, legal structure, and legal culture (Friedman, 1975). Legal substance encompasses statutory provisions, judicial decisions, and normative rules governing behavior. Legal structure refers to the institutional arrangements responsible for implementing those rules, including courts, prosecutors, police authorities, and correctional institutions. Legal culture consists of the attitudes, beliefs, expectations, and patterns of legal consciousness that shape public responses toward law and legal institutions. These three dimensions continuously interact, making legal effectiveness dependent upon their collective alignment rather than the quality of legislation alone.

Constitutional Court Decision Number 78/PUU-XXI/2023 primarily transforms the legal substance by removing unconstitutional criminal provisions from Indonesia's legal framework. However, this normative change inevitably influences legal structures by requiring investigators, prosecutors, and judges to adapt enforcement practices to newly established constitutional standards. Simultaneously, the decision reshapes legal culture by redefining public perceptions concerning the constitutional limits of freedom of expression and governmental authority in regulating misinformation. Friedman's theory therefore demonstrates that constitutional reform generates systemic consequences extending beyond statutory amendment into institutional practice and societal legal consciousness.

Complementing Friedman's systemic analysis, Soerjono Soekanto identifies five interdependent factors determining the effectiveness of law enforcement in Indonesia. These include the quality of legal norms, the competence and integrity of law enforcement officials, the adequacy of institutional facilities and infrastructure, the level of public legal awareness, and the broader cultural values influencing legal behavior (Soekanto, 2010). None of these factors operates independently. Weak legislation cannot be compensated solely through professional law enforcement, just as effective statutes may fail when public legal consciousness remains low or institutional capacity is inadequate.

This multidimensional framework provides a particularly valuable analytical lens for evaluating the implementation of Constitutional Court Decision Number 78/PUU-XXI/2023. The effectiveness of the decision depends not merely upon the annulment of unconstitutional provisions but also upon whether law enforcement institutions internalize constitutional standards, whether legislative reform produces clearer criminal norms, whether adequate institutional resources support consistent enforcement, and whether society develops a constitutional understanding of responsible freedom of expression. By integrating legal, institutional, social, and cultural dimensions, Soekanto's theory enables a comprehensive evaluation of post-decision law enforcement that extends beyond purely doctrinal constitutional analysis and captures the complex realities shaping the implementation of constitutional justice in Indonesia.

METHOD

This study employs normative juridical research (doctrinal legal research), a methodology that examines law as a normative system consisting of constitutional provisions, statutes, judicial decisions, and legal doctrines to evaluate the consistency and coherence of legal norms (Hutchinson & Duncan, 2012). This approach is appropriate because the primary objective of the research is not to measure social behaviour empirically but to analyse the constitutional implications of the Constitutional Court Decision Number 78/PUU-XXI/2023 on the future enforcement of criminal provisions concerning the dissemination of false information in Indonesia (Smits, 2020).

The research adopts two complementary approaches. First, the statutory approach examines the hierarchy, formulation, and interaction of constitutional and statutory norms governing the criminalization of false information. Particular attention is devoted to the relationship between the 1945 Constitution, Law Number 1 of 1946 concerning Criminal Law Regulations, Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 1 of 2024, Law Number 1 of 2023 concerning the National Criminal Code, and Constitutional Court Decision Number 78/PUU-XXI/2023. This approach enables the identification of normative inconsistencies and constitutional standards governing restrictions on freedom of expression (Marzuki, 2021a).

Second, the research employs a case approach, analysing judicial reasoning contained in Constitutional Court Decision Number 78/PUU-XXI/2023 together with selected criminal cases involving the dissemination of false information that were previously prosecuted under Articles 14 and 15 of Law Number 1 of 1946. The case analysis seeks to identify the constitutional deficiencies identified by the Court and to evaluate how similar

conduct may subsequently be addressed under Article 263 of the National Criminal Code. Judicial decisions are examined not merely as dispute resolutions but as authoritative constitutional interpretations that shape future law enforcement policy and legislative development (IRAC Committee, 2024).

The research relies exclusively on secondary data, consisting of three categories of legal materials. Primary legal materials comprise constitutional provisions, statutes, Constitutional Court decisions, and other binding legal instruments directly relevant to the regulation of false information. Secondary legal materials include scholarly books, peer-reviewed journal articles, dissertations, commentaries, and legal doctrines discussing constitutional law, criminal law, freedom of expression, judicial review, and comparative approaches to misinformation regulation. Tertiary legal materials, including legal dictionaries, legal encyclopaedias, and the *Great Dictionary of the Indonesian Language (Kamus Besar Bahasa Indonesia)*, are employed to clarify legal terminology and ensure conceptual consistency throughout the analysis (Marzuki, 2021b).

The analytical framework integrates four complementary legal theories that function as interpretive instruments rather than research methods. The constitutional validity of criminal law enforcement is evaluated through the Rule of Law doctrine developed by Julius Stahl and A.V. Dicey and subsequently contextualised within the Indonesian constitutional system by Jimly Asshiddiqie. The constitutional quality of criminal legislation is further assessed using Gustav Radbruch's theory of legal certainty, particularly the principles of *lex certa*, proportionality, justice, and legal utility. Constitutional interpretation is conducted through grammatical, systematic, teleological, and constitutional methods of legal interpretation to ensure that statutory provisions are interpreted consistently with constitutional values. Finally, Lawrence M. Friedman's Legal System Theory, complemented by Soerjono Soekanto's Five Factors of Law Enforcement, provides the analytical framework for evaluating the institutional and practical implications of the Constitutional Court's decision for future hoax law enforcement in Indonesia.

Data are analysed using a qualitative normative analytical method, involving the systematic interpretation, comparison, and harmonisation of legal norms through constitutional reasoning and legal doctrine (Smits, 2012). The analysis proceeds in three stages. First, the constitutional reasoning of the Constitutional Court is examined to identify the legal principles underlying the invalidation of Articles 14 and 15 of Law Number 1 of 1946. Second, the compatibility of Article 263 of the National Criminal Code with constitutional standards of legality, legal certainty, proportionality, and freedom of expression is critically evaluated. Third, a comparative law analysis is undertaken by examining Germany's Network Enforcement Act (NetzDG) 2017 and Singapore's Protection from Online Falsehoods and Manipulation Act (POFMA) 2019. The comparative analysis does not seek to transplant foreign legal rules directly into the Indonesian legal system but rather to identify normative principles, institutional mechanisms, and regulatory practices that may provide useful guidance for developing a constitutionally compatible framework for combating online misinformation in Indonesia (Zweigert, 1998).

RESULTS AND DISCUSSION

Ratio Decidendi and Legal Consequences of Constitutional Court Decision Number 78/PUU-XXI/2023

Constitutional Court Case Number 78/PUU-XXI/2023 concerned a petition for constitutional review of Articles 14 and 15 of Law Number 1 of 1946 concerning Criminal Law Regulations. The petition was submitted by a coalition consisting of journalists, academics, civil society activists, and digital rights advocates who argued that the contested provisions no longer complied with the constitutional guarantees established under the 1945 Constitution. The applicants principally contended that the provisions violated the constitutional protection of freedom of expression under Articles 28E paragraph (3) and 28F, undermined the guarantee of legal certainty embodied in Article 28D paragraph (1), failed to satisfy the constitutional requirements governing restrictions on fundamental rights under Article 28J paragraph (2), produced a chilling effect upon democratic participation, and were incompatible with modern constitutional standards governing criminal regulation in democratic societies (Constitutional Court of the Republic of Indonesia, 2023).

The Constitutional Court accepted these constitutional arguments in substantial part and developed a constitutional interpretation that significantly reshaped the legal framework governing the criminalization of false information. The Court emphasized that criminal legislation restricting constitutional rights must satisfy the principle of legality, particularly the requirement of *lex certa*, which demands that criminal offenses be formulated with sufficient clarity, precision, and predictability. According to the Court, the phrase *keonaran di kalangan rakyat*

("public unrest among the people") lacks objective legal parameters because its ordinary linguistic meaning encompasses a wide range of social disturbances, controversy, or public disorder without establishing measurable legal criteria. Such vagueness creates uncertainty about the scope of prohibited conduct and, consequently, opens the door to arbitrary interpretation and selective law enforcement. The Court therefore concluded that the provision failed to provide citizens with adequate notice concerning conduct capable of attracting criminal liability, thereby violating the constitutional guarantee of legal certainty under Article 28D paragraph (1) of the Constitution (Radbruch, 2006).

The Court further held that the statutory expressions "false news" and "exaggerated reports" similarly failed to satisfy constitutional standards of certainty because neither concept was accompanied by sufficiently precise statutory definitions. In the absence of objective legal criteria, law enforcement authorities retained broad discretion to determine whether particular expressions constituted criminal conduct. Such elasticity is fundamentally inconsistent with the legality principle because criminal liability cannot depend upon subjective assessments or fluctuating administrative interpretations. Constitutional democracies require criminal provisions to be formulated narrowly and precisely in order to prevent the criminal law from functioning as an instrument capable of suppressing legitimate public criticism or political dissent (Kelsen, 1967).

Another important aspect of the Court's reasoning concerns the constitutional relationship between criminal liability and culpability. The Court reaffirmed that criminal responsibility cannot be established solely because inaccurate information has been disseminated. Rather, criminal punishment requires the existence of a demonstrable element of fault (*mens rea*) together with legally recognizable harm resulting from the prohibited conduct. The mere possibility that information might create public unrest cannot, by itself, justify criminal punishment. This interpretation reflects the constitutional principle of proportionality, according to which restrictions upon freedom of expression must be necessary, appropriate, and proportionate to the legitimate objective pursued. Criminal sanctions therefore represent an *ultima ratio* that should only be imposed where less restrictive legal measures are insufficient to protect constitutionally recognized public interests (Alexy, 2002).

The Constitutional Court also evaluated the proportionality of the criminal sanctions prescribed under Article 14 paragraph (1) of Law Number 1 of 1946. The possibility of imprisonment for up to ten years was considered disproportionate to the uncertain formulation of the prohibited conduct because severe criminal sanctions combined with vague legal norms inevitably generate excessive deterrent effects upon constitutionally protected expression. From a constitutional perspective, the combination of broad statutory language and severe criminal penalties risks encouraging self-censorship among journalists, academics, activists, and ordinary citizens, thereby undermining democratic deliberation and the free exchange of ideas that constitute essential elements of a constitutional democracy (Barendt, 2005).

Empirical developments further reinforce the constitutional concerns identified by the Court. According to the Press Legal Aid Institute (LBH Pers), between 2016 and 2023 dozens of journalists, bloggers, activists, and media workers were subjected to criminal complaints or legal proceedings under Articles 14 and 15 of Law Number 1 of 1946, although many of these cases were ultimately discontinued or failed to result in criminal convictions. While these data do not in themselves establish unconstitutional enforcement, they illustrate how broadly formulated criminal provisions may contribute to a chilling effect, whereby individuals refrain from exercising constitutionally protected freedom of expression because of uncertainty regarding the limits of criminal liability (Pers, 2023).

The operative part (*amar putusan*) of Constitutional Court Decision Number 78/PUU-XXI/2023 declared that the petition was granted in part, that Articles 14 and 15 of Law Number 1 of 1946 are contrary to the 1945 Constitution, and that both provisions consequently no longer possess binding legal force following the pronouncement of the judgment on 21 December 2023 (Constitutional Court of the Republic of Indonesia, 2023). From the perspective of constitutional law, the decision immediately removes the invalidated provisions from Indonesia's normative legal hierarchy and prevents their future application by courts and law enforcement authorities. Consequently, criminal prosecutions initiated solely on the basis of Articles 14 and 15 after the judgment can no longer rely upon those provisions as a valid legal basis. More broadly, the decision establishes an important constitutional precedent requiring future criminal legislation regulating misinformation or false information to comply with the principles of legality, legal certainty, proportionality, and constitutional protection of freedom of expression, thereby strengthening Indonesia's commitment to the rule of law and constitutional democracy (Asshiddiqie, 2020).

Table 1. Comparison of Hoax Dissemination Norms: Article 14 of Law 1/1946 vs. Article 263 of the National Criminal Code

Aspect	Art. 14 Law 1/1946 (Invalidated)	Art. 263 National Criminal Code
Mens Rea Element	Not explicit; susceptible to multiple interpretations	Explicit: "knowingly" (dolus) & "reasonably suspected" (culpa)
Causation/Harm Element	"Public unrest" (keonaran)—undefined, highly subjective	"Social unrest" (kerusuhan)—more measurable; implementing regulation required
Gradation of Liability	None; singular undifferentiated penalty	Dolus 6 years (para. 1) vs. culpa 4 years (para. 2)
Proportionality of Sanction	Up to 10 years; disproportionate	Max. 6 years or fine; more proportionate
Conformity with Constitutional Court Decision	Contrary; invalidated	Aligned with constitutional standards

Source: Author's analysis based on Law No. 1 of 1946, Law No. 1 of 2023, and Constitutional Court Decision 78/PUU-XXI/2023.

Constitutionality of Article 263 of the National Criminal Code as a Replacement Norm

Article 263 of the National Criminal Code, contained in Chapter XIV on Offenses against Public Order, establishes two graduated levels of criminal liability. Paragraph (1): any person who broadcasts or disseminates news or information while knowingly aware that such news or information is false, and which causes social unrest, shall be punished with imprisonment of up to six (6) years or a Category V fine (IDR 500 million). Paragraph (2): any person who broadcasts or disseminates news or information while there is reasonable suspicion that such news or information is false, and which causes social unrest, shall be punished with imprisonment of up to four (4) years or a Category IV fine (IDR 200 million).

Applying Radbruch's Legal Certainty Theory as the primary criterion and constitutional interpretation as the analytical method, the elements of Article 263 of the National Criminal Code integratively satisfy Radbruch's three values. First, *Rechtssicherheit*: the phrase "knowingly" (*diketahui*) creates an element of *dolus directus* (direct intent), requiring actual knowledge on the part of the offender that the content being disseminated is false, while the phrase "reasonably suspected" (*patut diduga*) creates an element of *culpa* (negligence) in the form of a reasonable verification duty prior to dissemination. Second, *Gerechtigkeit*: the gradation of liability between *dolus* (6 years) and *culpa* (4 years) reflects a proportional justice superior to the invalidated norm. Third, *Zweckmäßigkeit*: restricting criminalization to conduct that actually causes unrest enables targeted enforcement without sacrificing constitutionally protected freedom of expression.

Grammatical analysis of the *mens rea* element reveals significant progress. The word "knowingly" (*diketahui*) in paragraph (1) requires proof that the suspect was aware of the content's falsity at the time of dissemination—demonstrated through digital communications records, expert testimony from digital forensics specialists, or metadata evidence—rather than merely proving the factual inaccuracy of the content. The phrase "reasonably suspected" (*patut diduga*) in paragraph (2) applies an objective standard: would a person in the same position and circumstances as the offender, with the available information, have suspected the information to be false before disseminating it?

The harm element of "social unrest" (*kerusuhan dalam masyarakat*) in Article 263 of the National Criminal Code carries a more concrete connotation than "public unrest" (*keonaran*) in the invalidated norm. The word *kerusuhan* (riot/social disturbance) refers to actual physical disorder in the community, not merely public controversy or disagreement of opinion. Nevertheless, a critical caveat remains: the term *kerusuhan* has not yet been given an operational definition in the official explanatory notes to the statute, so implementing regulations are still needed to ensure consistent application and prevent the recurrence of the subjective interpretation that rendered the former norm unconstitutional.

Based on the foregoing analysis, hoax law enforcement following the Constitutional Court Decision must satisfy three cumulative constitutional parameters: (1) factually provable mens rea—whether *dolus* or *culpa*; (2) proof that the disseminated content was known or reasonably suspected to be false by the offender at the time of dissemination; and (3) actual harm in the form of concrete and measurable social unrest, not merely abstract potential or remote possibility.

Comparative Review: Germany (NetzDG) and Singapore (POFMA)

To situate Indonesia's legal framework within the global context, a comparative analysis is conducted of two of the world's most influential hoax regulation models: Germany's Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*, NetzDG) and Singapore's Protection from Online Falsehoods and Manipulation Act (POFMA).

Germany's NetzDG (2017, updated 2021) adopts a shared responsibility model that obliges digital platforms with more than two million registered users to remove content that is "manifestly unlawful" within 24 hours of notification, or content where unlawfulness is not manifest within 7 days, with administrative fines of up to €50 million for non-compliance (He, 2020). This model treats criminal law as a last resort (*ultimum remedium*) and prioritizes non-criminal mechanisms, positioning platform operators as key actors in content moderation. From the perspective of law enforcement objectives theory, Germany's approach primarily emphasizes the preventive goal: preventing harmful content from remaining in circulation without mass criminalization of individuals (Santos et al., 2025).

Singapore's POFMA (2019) employs a correction order approach that grants government ministers broad authority to issue Correction Directions, Takedown Directions, or Stop Communication Directions. From the time of its enactment through the end of 2023, more than 80 Correction Directions and Takedown Directions had been issued against various parties, including opposition parties and foreign media (Teo, 2021). However, this approach has been sharply criticized by international press freedom organizations for its potential to be used to silence legitimate political criticism.

Table 2. Comparison of Hoax Law Enforcement Approaches: Germany, Singapore, and Indonesia

Aspect	Germany (NetzDG)	Singapore (POFMA)	Indonesia (Art. 263 National Criminal Code)
Primary Focus	Digital platforms	Government (top-down)	Individual offenders with strict mens rea requirements
Dominant Objective	Preventive	Repressive	Integrative: preventive, repressive, rehabilitative
Primary Mechanism	24-hour takedown obligation	Correction & Takedown Directions	Criminal prosecution with mens rea evidence
Sanction	Corporate fines up to €50 million	Individual fines up to SGD 1 million, imprisonment	Imprisonment max. 6 years or Category V fine
Free Expression Protection	Judicial appeal mechanisms available	Limited; criticized by international human rights bodies	Guaranteed through mens rea requirement (Constitutional Court Decision)

Source: Author's analysis based on He (2020), Teo (2021), Santos et al. (2025), and Constitutional Court Decision 78/PUU-XXI/2023.

The comparative analysis demonstrates that the most effective hoax law enforcement systems integrate three objectives—preventive, repressive, and rehabilitative—while treating criminal enforcement as *ultimum remedium* rather than *prima ratio*. Post-Decision, Indonesia occupies a unique position: unlike more repressive Singapore, Indonesia's constitutional framework after the Decision actually strengthens freedom

of expression protections while preserving the ability to enforce against hoaxes that genuinely undermine public order. Adopting a NetzDG-inspired shared responsibility model, complemented by Rapid Correction mechanisms and community-based digital literacy programs, would provide Indonesia with a more balanced and proportionate approach.

Multidimensional Implications of Constitutional Court Decision 78/PUU-XXI/2023

Employing Friedman's three-component framework integrated with Soekanto's five factors, the implications of the Constitutional Court Decision can be analyzed across multiple dimensions.

1. Dimension 1: Legal Substance (Radbruch's Legal Certainty Theory).

The Constitutional Court Decision fundamentally transforms the normative landscape by eliminating two "rubber articles" that for seven decades had the potential to serve as instruments of excessive criminalization. On the substance dimension, the Decision affirms three cumulative constitutional parameters that must be satisfied in every prosecution under Article 263 of the National Criminal Code. The value of *Rechtssicherheit* (certainty) is strengthened by removing ambiguous norms and directing enforcement authorities toward a norm that explicitly contains a *mens rea* element. The value of *Gerechtigkeit* (justice) is achieved through proportionate gradation of liability between *dolus* and *culpa*. The value of *Zweckmäßigkeit* (utility) is realized through restricting criminalization to targeted enforcement that does not sacrifice freedom of expression. At the structural-normative level, the Constitutional Court Decision also affects pending cases. Hoax dissemination conducted before the Decision cannot automatically be prosecuted under Article 263 of the National Criminal Code, as doing so would violate the principle of *nullum crimen sine lege praevia* (the *lex praevia* dimension). Convicts under Articles 14 and 15 of Law No. 1 of 1946, whose cases have become final and binding, may file for judicial review under Article 263 of the Code of Criminal Procedure (KUHAP) on the grounds of newly discovered evidence (*novum*) in the form of the Constitutional Court Decision.

2. Dimension 2: Legal Structure (Legal Interpretation Theory & Law Enforcement Objectives Theory).

The Constitutional Court Decision mandates a paradigm shift in law enforcement from total enforcement toward selective full enforcement—measured, evidence-based, and grounded in the proof of *mens rea* and the principle of proportionality. For the national police: investigation must focus on proving that the suspect was aware of the content's falsity at the time of dissemination, through digital communications records, digital forensics expert testimony, or metadata evidence—not merely proving the factual inaccuracy of the content. For prosecutors: indictments must specifically articulate evidence of *mens rea* and the causal link between content dissemination and the unrest caused; criminal prosecution must serve as *ultimum remedium*, not *prima ratio*. For the courts: judges are required to actively apply constitutional interpretation aligned with the spirit of the Constitutional Court Decision, providing active protection for the right to freedom of expression under Articles 28E(2) and 28F of the 1945 Constitution.

Within the framework of Barda Nawawi Arief's three stages of criminal law policy—formulation, application, and execution—the Constitutional Court Decision has a direct impact on the application stage through normatively binding guidance for law enforcement authorities. This situation also demands an update at the formulation stage through the drafting of operational implementing regulations for Article 263, which will in turn enhance the effectiveness of the execution stage.

3. Dimension 3: Legal Culture (Soerjono Soekanto's Five Factors).

Analyzed through Soekanto's five factors: Factor one (the law itself)—the Constitutional Court Decision has cleansed the normative system, but implementing regulations operationally defining "social unrest" are still required. Factor two (law enforcers)—specialized training for investigators, prosecutors, and judges on *mens rea* standards and constitutional interpretation in digital hoax cases is immediately necessary; personnel who fail to understand these standards risk replicating the excessive criminalization problems of the past. Factor three (facilities and infrastructure)—effective enforcement requires sophisticated digital forensics capabilities, access to digital content metadata, and cooperation with technology platforms to prove the *mens rea* element. Factor four (the community)—enforcement effectiveness depends on the level of digital literacy among Indonesia's population; human rights-based digital literacy programs integrated into formal educational curricula represent a vital long-term investment. Factor five (culture)—Indonesia needs to

transition from a forward culture (sharing without verification) to a verification culture (verifying before sharing), most effectively supported by a shared responsibility mechanism among government, digital platforms, and civil society.

CONCLUSION

This research yields two principal conclusions. First, Article 263 of the National Criminal Code functions as a constitutionally valid replacement norm for hoax law enforcement following Constitutional Court Decision 78/PUU-XXI/2023. The norm substantially satisfies the *lex certa* standard required by the Court by explicitly mandating *mens rea*—*dolus* ("knowingly") and *culpa* ("reasonably suspected")—together with the actual harm element of "social unrest," thereby overcoming the three unconstitutional characteristics of the invalidated norm: definitional vagueness, susceptibility to multiple interpretations, and the absence of *mens rea* requirements. The gradation of liability between *dolus* (6 years) and *culpa* (4 years) reflects the fulfillment of the value of *Gerechtigkeit* in Radbruch's framework.

This constitutional validity is accompanied by an important qualification: the term "social unrest" requires an operational definition in implementing regulations, and every prosecution must satisfy three cumulative constitutional parameters: (1) factually provable *mens rea*; (2) content that the offender knew or reasonably suspected to be false at the time of dissemination; and (3) concrete and measurable actual harm, not merely abstract potential.

Second, Constitutional Court Decision 78/PUU-XXI/2023 carries multidimensional implications. On legal substance—elimination of vague norms and affirmation of Radbruch's three values integratively, with the 1945 Constitution as the *Grundnorm* guiding normative system coherence. On legal structure—a paradigm shift from total enforcement to selective full enforcement requiring proof of *mens rea* and application of proportionality principles by all law enforcement authorities. On legal culture—a dual transformation demanded of enforcement authorities (abandoning the mentality of excessive criminalization) and society (building a verification culture). Overall, the Constitutional Court Decision establishes a constitutional framework for hoax law enforcement that places the balance of legal certainty, justice, and utility—as required by Radbruch—as the highest objective of the legal system within the Pancasila state based on law.

Comparatively, Indonesia's hoax law enforcement model following the Constitutional Court Decision falls between Germany's prevention-oriented shared responsibility model and Singapore's more repressive approach. Indonesia's constitutional framework—by requiring proof of *mens rea*—provides stronger protection for freedom of expression than both of those models, while needing more systematic development of non-criminal mechanisms to achieve comparable effectiveness.

Based on the research findings, three principal recommendations are advanced. *First*, for the Legislature (House of Representatives and Government): immediately draft implementing regulations that operationally define "social unrest" in the official explanatory notes to Article 263 of the National Criminal Code, establish *mens rea* evidentiary parameters that can be applied consistently, and consider adopting a NetzDG-inspired shared responsibility model for effective non-criminal mechanisms. The legislature must also ensure that future development of the hoax legal framework consistently meets the proportionality standards of Article 28J(2) of the 1945 Constitution.

Second, for Law Enforcement Authorities: the Supreme Court should issue a Supreme Court Regulation (PERMA) and the Attorney General should issue a Circular Letter integrating *mens rea* parameters and actual harm evidentiary standards into hoax case handling procedures. The national police should promptly develop technical investigation guidelines that explicitly reflect the selective *mens rea*-based law enforcement paradigm. Constitutional interpretation training programs for all law enforcement personnel represent a short-term priority that cannot be deferred.

Third, for the Ministry of Communication and Digital Affairs: develop more systematic and transparent notice-and-takedown mechanisms for hoax content on digital platforms, complemented by Rapid Correction mechanisms and strengthened community-based digital literacy programs oriented toward building a verification-before-sharing culture. Cooperation with international technology platforms to develop protocols for accessing digital content metadata should be strengthened as the evidentiary foundation for evidence-based law enforcement in the digital age.

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