

## Systematic Construction of Articles of Criminal Defamation in Law Concerning Electronic Information and Transactions

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### Abstract

*Court decisions can be seen as the laboratory of logic after considering (legal reasoning) the legal facts that appear in court. The criminal defamation article has become a controversial law because of its elastic interpretation. The purpose of this article is to examine and analyze the systematic construction of the defamation article and its juridical consequences in article 27 paragraph (3) of Law No.19 of 2016 concerning Electronic Information and Transactions. The method used is normative juridical and the analytical orientation uses conceptual approach (Concept Approach) and the approach to legislation (Statue Approach). The conclusion of the research is the systematic construction of the criminal defamation article juridical formulated first: legal subjects (adresar), second : acts or criminal acts, third : criminal sanctions (Prison and Fines).The phrase "transmitted" is an extensive juridical formulation/formulation in accordance with the phrase "in public" as formulated in the Criminal Code. Disgraceful acts are formulated cumulatively (the word "and") include intentionally and without rights (1) distributing and/or (2) transmitting and/or (3) making accessible Electronic Information and/or Electronic Documents. The formulation of the action convicted is cumulative-alternative marked by the phrase "and/or". The juridical weakness of this law is that there is no determination of the offense as a "crime" or "violation". This fact can be interpreted as the skepticism of legislators in the criminal approach in the ITE Law. The juridical consequence of the application of this article is the provision of a complaint offense. It is recommended that the formulation of the complaint offense follow the principle of harmonization of the main criminal law system (KUHP).*

*Keywords: Systematic Construction; Criminal Article; Defamation; Electronic Information and Transactions*

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### 1. Introduction

Based on the Decisions of the Constitutional Court Number 50/PUU-VI/2008 and Number 2/PUU-VII/2009, criminal acts of insult and defamation in the field of Electronic Information and Electronic Transactions are not merely a general crime, but as a complaint offense. The affirmation of the complaint offense is intended to be in line with the principles of legal certainty and a sense of community justice.

The decision is a description of efforts to find justice in the implementation of the rule of law in the context of legal events and facts until it reaches the domain of justice<sup>1</sup>. The presentation of the Constitutional Court's decision is an example of the existence of law that does not exist in a vacuum, but always interacts with the legal ecosystem and its environment. As described by Vibeke Norgaard Martin and Matthew Frederick with a scheme of three circles that intersect each other to form a descriptor of justice. The first circle is identified as Facts, which intersects with the

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<sup>1</sup>Artidjo Alkostar, 2018, *Metode Penelitian Hukum Profetik*, UII Press, Yogyakarta, p.47

second circle Emotions and the third circle Laws. Facts interact with Emotions to produce Events or Events. Facts interact with Laws to produce Logic. While the circle of emotions interacts with the circle of law to form appropriateness. The domain of justice results from the sub descriptors of events or occurrences, appropriateness and logic.<sup>2</sup>

Law No. 19/2016 concerning Information and Electronic Transactions (hereinafter referred to as UU ITE) prior to the decisions of the Constitutional Court Number 50/PUU-VI/2008 and Number 2/PUU-VII/2009 is a controversial law, especially the article on defamation which is formulated in article 27 paragraph (3). The application of the law of the article leaves room for interpretation that is elastic, aka the "rubber article". The realm of legal application of the ITE Law has sparked a lot of debate around the issue of injustice. Investigation of criminal acts of defamation is carried out according to the provisions of the Criminal Procedure Code starting with the existence of complaints, investigations, investigations in the investigation investigators summon witnesses and suspects for examination, then the investigator records the minutes of examination and prepares the minutes of examination.<sup>3</sup> Obstacles during the law enforcement process are the obstacles faced by law enforcement officers today: how to capture cybercrime perpetrators is related to the provisions of applicable criminal law. Law enforcement officers are faced with difficulties in determining the qualifications of a crime given the difficulty of finding evidence<sup>4</sup>. Further research found that the impact of internet technology on the rule of law, the legal consequences of cyber crime on the application of criminal law in Indonesia are cyber crime or cyber crime is a term that refers to criminal activities with computers or computer networks that become tools, targets or places. occurrence of crime<sup>5</sup>. In particular, the obstacles in disclosing criminal acts of defamation through the internet, described the first obstacle is the search for perpetrators through social media used by defamation facilities. The two factors are inadequate facilities and infrastructure, the third is the difficulty of revealing evidence, the fourth is the amount of budget needed by the police in the process of proving a case using expert witnesses, and the fifth is the difference in the perspective of state law on the founders of social media.<sup>6</sup>

Referring to the PUU facility above, the author examines in more depth the systematic construction of criminal defamation articles and their juridical consequences. The purpose of this study is to examine and analyze the systematic construction of the defamation article and its juridical consequences in Article 27 Paragraph (3) of Law No. 19 of 2016 concerning Electronic Information and Transactions.

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<sup>2</sup> *Ibid*, p.47

<sup>3</sup> Morradi, Vitriano Aditya, 2017, *Proses Penyidikan Tindak Pidana Pencemaran Nama Baik (Studi Kasus di Polres Rembang)*, Tesis, Fakultas Hukum UNISSULA

<sup>4</sup> Simbolon, Timbul Mangaratua, 2018, *Kebijakan Hukum Pidana Terhadap Tindak Pidana Penghinaan atau Pencemaran Nama Baik Melalui Internet di Indonesia Sebagai Cybercrime*, Tesis, Fakultas Hukum UNISSULA

<sup>5</sup> Wahyudi, Muhammad, 2017, *Permasalahan Cyber Crime dalam Sudut Pandang Hukum Pidana Beserta Akibat Hukumnya*, Tesis, Fakultas Hukum UNISSULA

<sup>6</sup> Satria Ardi Yana, Bambang Tri Bawono, "Effectiveness of Implementing ITE Laws and Investigations of Damnation through Social Media", *Law Development Journal*, Volume 2 Issue 3, September 2020

This paper is limited to the article on defamation of the ITE Law. As input for the systematic construction of criminal articles (penal policy) that is formulated in the ITE Law, then its operational analysis is carried out so as to produce criminal sanctions for criminal acts or acts that are not in accordance with the values of justice and legal certainty in the ITE Law. The author only tries to be as rational as possible in reviewing the criminal article, so that the benefits of this research can be taken in the form of insight into the criminal article in the ITE Law in providing the benefits of legal certainty and public justice.

## 2. Research methods

The study method in formulating solutions uses normative juridical in a broad and narrow sense. Method usenormative juridical, lead researchers to find the truth by using inductive methods and criteria for measuring a fact in accordance with an appropriate legal study.<sup>7</sup> The research method of normative juridical literature was chosen by researchers, by examining books, literatures and laws and regulations related to the problem.<sup>8</sup> When discussing the juridical formulation in the PUU provisions related to defamation, the approach used is normative juridical in a narrow sense. This research uses a qualitative approach, which is an approach that emphasizes inductive analysis, descriptive analysis, and the study of people's perceptions or opinions.<sup>9</sup> Inductive thinking method through a series of stages<sup>10</sup>: discovery of legal problems, classification, analysis and conclusions (discovery of rules). Meanwhile, the analysis orientation uses a conceptual approach (Concept Approach) and a statutory approach (Statue Approach).

## 3. Research Results and Discussion

The definition of the term defamation or insult is not clearly stated, only implied in the articles as contained in the ITE Law of 2008 Article 28 paragraphs 1 and 2 which reads:

*"(1) Everyone intentionally and without rights spreads false and misleading news that can result in consumer losses in electronic transactions".*

*"(2) Everyone intentionally and without rights disseminates information aimed at causing feelings of hatred or hostility towards certain individuals and/or groups of people based on ethnicity, religion, race, and inter-group (SARA)."*

So defamation can be interpreted as an act that is carried out intentionally to spread false news or information that can cause hatred and damage the good image of a person or certain community group.

The oldest history of legal theory is the ethical theory (Etish Theorie) which explains that the law only aims to achieve justice. Subsequent developments

<sup>7</sup> Koko Arianto Wardani dan Sri Endah Wahyuningsih, "Kebijakan Formulasi Hukum Pidana Mati Terhadap Pelaku Tindak Pidana Korupsi Di Indonesia", *Jurnal Hukum Khaira Ummah*, Vol. 12. No. 4 Desember 2017, p. 953.

<sup>8</sup> Putra, Bangkit Permana, 2018, *Tinjauan Yuridis Normatif Putusan Majelis Hakim Terhadap Kasus Tindak Pidana Pencurian* (Studi Kasus Putusan Nomor: 840/Pid.B/2017/PN.Smg), Skripsi, Fakultas Hukum UNISSULA

<sup>9</sup> Moleong, L.J., 2004, *Metodologi Penelitian*, Remaja Rosda Karya, Bandung, p. 3

<sup>10</sup> Artidjo Alkostar, 2018, *Metode Penelitian Hukum Profetik*, FH UII Press, Yogyakarta, p.38

emphasize that the law is explained in terms of its usefulness. The theory of legal expediency was pioneered by Jeremy Bentham who argued that the value of good and bad law is measured by the good and bad results of its application (utility). Bellefroid in his book "Inleiding tot de rechtswetenschap in the Netherlands", states that the content of the law must be determined by two principles, namely justice and benefit. So that the law is tasked with ensuring legal certainty (rechtszekerheid) in human interaction. In this task, two other tasks are concluded, namely to ensure justice and the law remains useful.<sup>11</sup> The literature estimates in this article can be compiled as follows: first, the juridical construction of the defamation article in the ITE Law is measured in three legal theoretical perspectives which stipulate that the norms in the article should be fair, contain legal certainty and benefit the community. Second, the juridical consequences of the article which are characterized by the previous 3 things (fairness, legal certainty and benefits) can be assessed based on their application (applicative stage) when the law enforcement stage is operationalized.

The juridical formulation of Article 27 of the ITE Law is formulated as follows:  
*"(1) Any person intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that have contents that violate decency.*

*(2) Any person intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing gambling content.*

*(3) Any Person who knowingly and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation.*

*(4) Any person intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain extortion and/or threats."*

After making limited changes to the old ITE Law (Law No. 11/2008) with the new ITE Law (Law No. 19/2016), the explanation of article 27 in the law is formulated as follows:

"Verse (1)

*What is meant by "distributing" is sending and/or disseminating Electronic Information and/or Electronic Documents to many People or various parties through Electronic Systems.*

*What is meant by "transmitting" is sending Electronic Information and/or Electronic Documents addressed to one other party through the Electronic System.*

*What is meant by "make accessible" are all actions other than distributing and transmitting through Electronic Systems that cause Electronic Information and/or Electronic Documents to be known to other parties or the public.*

*Paragraph (2)*

*Quite clear.*

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<sup>11</sup> Ridwan Syahrani, 1999, *Rangkuman Intisari Ilmu Hukum*, PT Citra Aditya Bakti, Bandung, p.22

*Paragraph (3)*

*The provisions in this paragraph refer to the provisions for defamation and/or slander as regulated in the Criminal Code (KUHP).*

*Paragraph (4)*

*The provisions in this paragraph refer to the provisions of extortion and/or threats regulated in the Criminal Code (KUHP).*

The systematic discussion used by the author in reviewing the systematic construction of Article 27 paragraph (3) of the ITE Law is summarized below.

*Systematic Construction Article 27 Paragraph (3) of the ITE Law*

The definition of systematic construction of criminal articles that the author means is a criminal provision that contains a formulation that states criminal penalties for violations of provisions containing prohibition norms or orders<sup>12</sup>. Construction is the arrangement and relationship of words in a sentence or group of words<sup>13</sup>, while systematic means regular according to the system; use the system; in a well-arranged way<sup>14</sup>. Thus, the essence of a criminal article that is systematically constructed contains a juridical formulation: the criminal act (criminal act) and criminal sanctions for the act. In addition, between articles in the PUU which contain criminal provisions, there is a systematic relationship between articles, which are often referred to as the main article and its derivative articles. In this subchapter, the author examines the substantive criminal system contained in the criminal article on defamation of the ITE Law. The substantive criminal system is essentially a criminal provision in the legislation under study which is part of the overall criminal system or criminal law system currently in force in the Criminal Code.<sup>15</sup>

Based on the definition or limitation above, the systematic construction of Article 27 paragraph (3) of the ITE Law can be explained as follows:

Article 27 paragraph (3) with the following juridical formulation: *"Every person intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that have insulting and/or defamatory contents"*

The juridical formulation of Article 45 of the ITE Law is as follows:

*"Article 45"*

*(1) Any person who knowingly and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing content that violates decency as referred to in Article 27 paragraph (1) shall be punished with imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).*

*(2) Any person who knowingly and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing gambling content as referred to in Article 27 paragraph (2) shall be punished with*

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<sup>12</sup> Barda Nawawi Arief, 2012, *Kebijakan Formulasi Ketentuan Pidana Dalam Peraturan Perundang-Undangan*, Pustaka Magister, Semarang, p.12

<sup>13</sup> Pusat Bahasa Departemen Pendidikan Nasional, 2008, *Kamus Besar Bahasa Indonesia*, p.822

<sup>14</sup> *Ibid*, p.1495

<sup>15</sup> Barda Nawawi Arief, *Op.Cit*, p.3

*imprisonment for a maximum of 6 (six) years. six) years and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).*

*(3) Any person who intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing insults and/or defamation as referred to in Article 27 paragraph (3) shall be punished with imprisonment for a maximum of 4 (four) years and/or a fine of a maximum of Rp.750,000,000.00 (seven hundred and fifty million rupiah).*

*(4) Any person who intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing extortion and/or threats as referred to in Article 27 paragraph (4) shall be subject to imprisonment a maximum of 6 (six) years and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).*

*(5) The provisions as referred to in paragraph (3) constitute a complaint offense.”*

Meanwhile, in the explanation of Article 45 of Law No. 19/2016 concerning Information and Electronic Transactions (UU ITE) it is stated that the explanation of Article 45 is quite clear.

The pattern of punishment is a guideline for making or compiling or formulating a crime<sup>16</sup>the article above explains that:

- Legal subject : Everyone.
- The criminal act: intentionally and without rights distributing and/or transmitting and/or making accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation.
- Criminal sanction : Sentenced to a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 750,000,000.00 (seven hundred and fifty million rupiah).

It seems that the systematic construction of Article 27 paragraph (3) of the ITE Law has a pattern of formulating criminal sanctions in the form of imprisonment and/or fines (alternative cumulative), which previously formulated the address, namely Everyone. Meanwhile, the formulation of the act of being convicted indicates an act in the form of intentionally and without rights distributing and/or transmitting and/or making accessible Electronic Information and/or Electronic Documents containing insults and/or defamation. This criminal act shows the formulation of a disgraceful act that is cumulatively formulated (the word "and") includes intentionally and without rights (1) distributing and/or (2) transmitting and/or (3) making accessible Electronic Information and/or Documents Electronic.

Thus, the pattern of punishment in Article 27 paragraph (3) of the ITE Law has a construction of systematic criminal sanctions with juridical formulations as follows: first: legal subjects (adresat), second: acts or criminal acts, third: criminal sanctions.

### **Juridical Consequences of Article 27 paragraph (3) of the ITE Law Seen from the Harmonization Principle of the Main Criminal Law System (KUHP)**

Criminal requirements generally include requirements relating to the act and the person. Meanwhile, in these prerequisites, there are two pairs of principles, namely the principle of legality concerning the aspect of action and the principle of

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<sup>16</sup>Ibid, p.20

culpability (principle of error) concerning the aspect of people. The principle of legality requires that there be definite provisions beforehand, both regarding prohibited acts that can be punished and regarding the crime itself. Meanwhile, the principle of guilt requires that only people who are truly guilty can be subject to punishment<sup>17</sup>.

Referring to this concept, it can be explained about the juridical consequences of criminal articles in the implementation of law enforcement including:

Explanation of the phrase "The provisions in this paragraph refer to the provisions for defamation and/or slander as regulated in the Criminal Code (KUHP)"

Referring to the Criminal Code for defamation (insult) is regulated in Chapter XVI book II, articles 310 to 321. Article 310 with a juridical formulation:

*"(1) Whoever deliberately attacks someone's honor or reputation by accusing someone of something, the intention of which is clear so that it is known to the public, is threatened for libel with a maximum imprisonment of nine months or a maximum fine of four thousand five hundred rupiahs.*

*(2) If this is done by means of writing or an image which is broadcast, displayed or pasted in public, the threat of written libel is punishable by a maximum imprisonment of one year and four months or a maximum fine of four thousand five hundred rupiahs.*

*(3) It does not constitute libel or written defamation, if the act is clearly carried out in the public interest or because it is forced to defend oneself."*

Those who commit defamation and cannot prove the truth of what they say can be subject to Article 311 of the Criminal Code with the formulation:

*"If the person who commits the crime of defamation or written defamation is allowed to prove what is alleged is true, does not prove it, and the accusation is made contrary to what is known, then he is threatened with slander with a maximum imprisonment of four years."*

Article 312 of the Criminal Code contains permission from the judge to prove the truth in defamation if the act is carried out in the public interest, or because he is forced to defend himself. Article 313 of the Criminal Code, the evidence referred to in article 312 is not allowed if the thing alleged can only be prosecuted on a complaint and the complaint is not brought forward. Article 314 of the Criminal Code discusses defamatory acts which read:

*"(1) If the person who was insulted, with the judge's decision being final, is found guilty of the thing alleged, then punishment for slander is impossible.*

*(2) If he is acquitted by the judge's decision which becomes permanent, he is acquitted of the thing accused, then the decision is considered as perfect evidence that the thing alleged is not true.*

*(3) If the person who was insulted has started a criminal prosecution because of the thing he is accused of, then the prosecution for slander is stopped until a final decision is made regarding the thing accused."*

Article 315 of the Criminal Code regulates minor insults which reads as follows: *"Every deliberate insult that is not in the nature of broadcasting or written defamation committed against a person, either in public orally or in writing, or in front of the person himself by word of mouth or deed, or by a letter sent or received to him,*

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<sup>17</sup>Ibid, p.127

*is threatened because light contempt with a maximum imprisonment of four months and two weeks or a maximum fine of four thousand five hundred rupiahs.*

Article 317 of the Criminal Code contains a false complaint which reads:

*"(1) Whoever deliberately submits a false complaint or notification to the authorities, either in writing or in writing, about a person so that his honor or reputation is attacked, is threatened with a slanderous complaint, with a maximum imprisonment of four years,*

*(2) The revocation of rights under article 35 No, 1 - 3 may be imposed."*

While article 318 contains false prejudice, it reads:

*"(1) Whoever by any act intentionally creates a false suspicion against someone that he has committed a criminal act, is threatened with causing a false suspicion, with a maximum imprisonment of four years.*

*(2) Revocation of rights based on article 35 no. 1 - 3 can be dropped."*

Meanwhile, defamation of people who have died is formulated in Article 320 of the Criminal Code as follows:

*(1) Any person who is dead against someone who is already dead commits an act which if that person were still alive would constitute libel or written libel, shall be punished by a maximum imprisonment of four months and two weeks or a maximum fine of four thousand five hundred rupiahs.*

*(2) This crime is not prosecuted if there is no complaint from one of the blood relatives or by marriage in a straight line or deviates to the second degree from the deceased, or on the complaint of the husband (wife).*

*(3) If because of the matriarchal institution, your father's power is exercised by someone other than your father, then a crime can also be prosecuted on the complaint of that person."*

The juridical formulation of article 45 paragraph (5): "The provisions as referred to in paragraph (3) constitute a complaint offense."

The principle of harmonization of the unity of the substantive criminal law system explains that the qualifications of offenses formulated in the Special Law (including the ITE Law) outside the Criminal Code must be oriented towards juridical qualifications in the parent system (KUHP). Whereas in the Criminal Code offense qualification system it is clearly formulated that without the law mentioning or declaring an offense as a complaint offense, it can be said that the offense is a complaint offense if in the formulation of the offense or in the chapter governing the offense there is a provision/clause, that the offense The person concerned cannot be prosecuted if there is no complaint from the person/subject mentioned in the clause<sup>18</sup>.

The ITE Law is categorized as a law that does not mention the qualification of the offense (Juridical Qualification), there is only a designation as a complaint offense.<sup>19</sup> This means that there is no determination of the offense as a "crime" or "violation". This fact can be interpreted as the skepticism of legislators in the criminal approach in the ITE Law.

<sup>18</sup> Barda Nawawi Arief, 2012, *Kebijakan Formulasi Ketentuan Pidana Dalam Peraturan Perundang-Undangan*, Semarang :Pustaka Magister, p. 45

<sup>19</sup> Barda Nawawi Arief, Op.Cit, p. 39

#### 4. Closing

Answering the problem questions in this article, the author can conclude as follows: Systematic construction in article 27 paragraph 3 of the ITE Law is juridically formulated: *first*: legal subjects (adresat), second : acts or criminal acts, third : criminal sanctions (Prison and Fines). This article regulates the criminal act of defamation contains insults/defamation and is intentionally transmitted both in written and oral form through cyber (virtual) media. The phrase “transmitted” is an extensive juridical formulation/formulation in accordance with the phrase “in public” as formulated in the Criminal Code. The juridical consequence of the application of the article is the provision of a complaint offense. The principle of harmonization of the master system of criminal law stipulates that the provisions for complaint offenses state that:in the formulation of the offense or in the chapter that regulates the offense there is a provision/clause, that the offense in question cannot be prosecuted if there is no complaint from the person/subject mentioned in the clause. In this context, the ITE Law seems weak to follow this harmonization principle.

One of the juridical weaknesses of the ITE Law is that there is no harmonization with the main criminal law system (KUHP). This fact limits law enforcement officers from applying/implementing multi-interpretation articles. For this reason, it is recommended that the articles governing defamation and/or insults be separated because they are not in accordance with the qualifications of the offenses in the Criminal Code.

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