

Criminal Law Policy in Efforts to Enforce Criminal Acts of Defamation in the Electronic Transactions Law

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Abstract. *The advancement of information technology that makes human life easier is also accompanied by the emergence of new crimes that utilize electronic media, one of which is the crime of defamation. The purpose of this study is to determine the law enforcement against the crime of defamation based on current positive law and to analyze the ideal criminal law policy against the crime of defamation in the ITE Law in the future. The research method used is a normative legal approach using a legal approach or review of regulations related to the ITE Law. The results of the study show that law enforcement against criminal acts of defamation based on positive law can currently be carried out by taking legal action against perpetrators of violations as stated in Article 27 Paragraph (3) of Law No. 11 of 2008 concerning ITE, but from several cases that have been presented, it is increasingly strengthened that the existence of this Article is a "rubber Article" which is caused by the weak intention or element of intention in the formulation, unclear bestanddeel delict from Article 27 paragraph (3) of the ITE Law, the element of defamation is vague, and it is unclear who is the target of the regulation. The ideal criminal law policy against criminal acts of defamation in the ITE Law in the future is to provide a Formulation of Criminal Acts in the Law on Electronic Information and Transactions which should use the Principles of "Lex Certa" and "Lex Stricta" (Clarity of Formulation and Purpose), the Lex Certa Teaching, namely that a statutory regulation should not be interpreted other than the intention of the substance of the statutory regulation.*

Keywords: *Criminal; Defamation; Information; Technology.*

1. Introduction

The development of information technology that occurs in almost every country is already a global characteristic that results in the disappearance of state boundaries (borderless). Countries that already have more adequate information network infrastructure have certainly enjoyed the results of the development of their information technology, developing countries in their development will feel the tendency of neocolonialism.¹

In the development of advanced computer technology, the presence of the internet network has provided great benefits for humans. Its use is not only in government, private and business worlds, but has reached all sectors of life including all household (personal) needs.² The role of information and communication technology in the era of globalization is very important to be placed in a very strategic position because it represents a world without borders, distance, space, and time. The influence of the use of globalization through information and communication technology has changed people's lifestyles, and is developing rapidly in a new order of life and driving changes in the social, cultural, economic, defense, safety, and law enforcement fields.³

In the era of globalization, discussions on freedom of expression are increasingly gaining ground and are widely open along with the rapid innovation and utilization of information and communication technology, especially the internet, which has a radical impact on the enjoyment of the right to freedom of expression with ease and does not limit the space for people to move without regard to differences in distance and time. Social media is here to answer all the challenges of society in exchanging information with all the convenience, namely quickly and saving time. People who were previously only able to express ideas, ideas and experiences experienced in a narrow scope now have the opportunity to pour out to the general public. Currently, modern society is no longer unfamiliar with the existence of social media. The existence of social media is getting higher after the emergence of media that are driving the success of using social media such as Facebook, Instagram, Twitter, blogs and so on.⁴

Freedom of expression has been mandated in the 1945 Constitution of the Republic of Indonesia, specifically Article 28F (2nd amendment, enacted in August 2000) which states that:

"Everyone has the right to communicate and obtain information to develop their personality and social environment, and has the right to seek, obtain, possess, store, process and convey information using all available channels."

¹See www.ristek.go.id, The Need for Comparative Studies in the Development of Information Technology in Indonesia. 2001 accessed on October 23, 2023 at 13.10

²Farris Nur Sanjaya. Application of Law Information and Electronic Transactions in Crime Investigation of Online Gambling. Journal of Legal Sovereignty. Vol 1 No 2 (2018) pp 537-542

³Vitriano Aditya Morradi and Munsharif Abdul Chalim. Criminal Law Enforcement Policies In Prevention Efforts Of Information Technology Crime. Jurnal Daulat Hukum Vol 2 No 2(2019). Pp 249-254

⁴Putu Eva and Ditayani Antari, "Legal Review of Restrictions on Freedom of Speech" International Journal of Law Reconstruction, Vol 4, no. 1 (2017): page 21.

The development of technology and information as an impact of globalization today has a very big influence on human life and civilization. This progress that has a big influence has also stimulated human minds to continue to innovate, the impact of which can be positive and negative. In line with the development of technology and information, it also has an impact on the birth of new forms of crime and the evolution of old forms of crime with new modes of operation.

The development and advancement of technology in Indonesia is one of its manifestations, namely improving the quality and quantity of human resources. At the same time, technological progress has positive and negative impacts on the Indonesian nation.⁵The advancement of information technology that makes human life easier is also accompanied by the emergence of new crimes that utilize electronic media, be it mobile phones or computers or laptops. Various forms of modern crimes have a greater impact than conventional crimes. The development of increasingly modern forms of crime is caused by the unlimited space for crime that utilizes technology. Everyone can utilize information technology anywhere and anytime and is not limited by space and time. Current technological advances do have many uses, but do not rule out the possibility of crime in this aspect. This is because information and communication technology is currently a double-edged sword because in addition to contributing to improving human welfare, progress and civilization, it is also an effective means for unlawful acts.⁶

The criminalization policy against information technology crimes is part of the criminal policy using criminal law (penal) means, and therefore is part of the "criminal law policy" (penal policy), especially the formulation policy. Furthermore, according to Barda Nawawi Arief, the criminalization policy is not just a policy of determining/formulating what actions can be punished (including criminal sanctions), but also includes the issue of how the formulation/legislation policy is arranged in a harmonious and integrated criminal law system (legislative policy).⁷

The policy for combating cybercrime through technology was also expressed in the IIIC (International Information Industry Congress) which stated:

The IIIC recognizes that government action and international traditions to harmonize laws and coordinate legal procedures are key in the fight against cybercrime, but warns that these should not be relied upon as the only instruments. Cybercrime is enabled by technology and requires a healthy reliance on technology for its solution.

Based on the above understanding, efforts or policies to combat criminal acts in the field of information technology carried out using "penal" means (criminal

⁵Zaldy Kurniawan "Police Role In The Handling Of Hate Speech". Jurnal Daulat Hukum. Vol 1 no 1 (2018) pp 317-322

⁶Didik Endro Purwoleksono, Criminal Law: A Description of Thoughts, Airlangga University Press, Surabaya, 2019, page 55

⁷Barda Nawawi Arief, Selected Chapters on Criminal Law, PT.Citra Aditya Bakti, Bandung, 2003, p.1,259.

law) require a study of the material/substance (legal substance reform) of current information technology crimes.⁸

In the definition of "penal policy" put forward by Marc Ancel, penal policy is a science and art which ultimately has the practical aim of enabling positive legal regulations to be formulated better and to provide guidance not only to lawmakers, but also to courts that apply laws and also to organizers or implementers of court decisions.⁹

Currently, Indonesia has cyber law to regulate cyberspace and sanctions related to cybercrime both in Indonesia and outside Indonesia's jurisdiction, the consequences of which are felt in Indonesia. Cybercrime continues to develop along with the information technology revolution that reverses the old paradigm of conventional crime towards virtual crime by utilizing electronic instruments but the consequences can be felt in real terms. Cyber law was born because of activities carried out through computer system networks and communication systems both locally and globally (internet) by utilizing computer system-based information technology which is an electronic system that can be viewed virtually.

One of the negative impacts of technological advances is the ease of electronic dissemination of information that wants to publish or express various expressions and opinions about someone, but sometimes the information does not pay attention to the dignity and human dignity of each person from slander, insults or defamation that causes harm to others.

Prevention and eradication of crimes involving the dissemination of electronic information containing insulting and/or defamatory content is regulated in the ITE Law, namely in Article 27 paragraph (3), which reads:

"Any person who intentionally and without authority distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation."

In the explanation of Article 27 paragraph (3) in Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions, paragraph (3) states:

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

Then, regarding the criminal sanctions, this article is regulated separately, namely in Article 45 Paragraph (3) which states that:

"Any person who intentionally and without authority distributes and/or makes accessible Electronic Information and/or Electronic Documents containing insulting and/or defamatory content as referred to in Article 27 paragraph (3)

⁸Barda Nawawi Arief, Problems of Law Enforcement and Criminal Law Policy in Combating Crime, Kencana Prenada Media Group, Jakarta, 2007, p.1.240.

⁹Barda Nawawi Arief, Anthology of Criminal Law Policy, PT.Citra Aditya Bakti, Bandung, 2003, page 21

shall be punished with imprisonment for a maximum of 4 (four) years and/or a maximum fine of IDR 750,000,000.00 (seven hundred and fifty million rupiah)."

In the explanation of Article 45 paragraph (3) in Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions, paragraph (3) states:

"The provisions in this Article also include cyber bullying that contains elements of threats of violence or intimidation and results in physical, psychological violence and/or material loss."

The implementation of the regulation needs to be studied both in the perspective of material law and formal law and it is also necessary to pay attention to how the legislators construct prohibited acts. This is an important thing to pay attention to because if law enforcers are wrong in implementing the law, it will harm the sense of justice that arises in society.

There is a problem in Article 27 paragraph (3) of the ITE Law related to the issue of defamation on social media, where the article is often considered a "rubber article" one of which is that there is an interesting defamation case related to the mention of an imperfect name as a criminal act of defamation referring to the case of Yenike Venta Resti because it has caused pros and cons. This case began with an illicit relationship between Yenike Venta Resti and the husband of the victim Siti Anggraeni Hapsari, where after the victim witness Siti Anggraeni Hapsari found out about the illicit relationship, the victim witness Siti Anggraeni Hapsari reprimanded Yenike Venta Resti via a private message which was then responded to by Yenike Venta Resti by uploading a status on Blackberry and Facebook which defamed Siti Anggraeni Hapsari with an imperfect name according to Siti Anggraeni Hapsari's identity which gave rise to the final decision of the Supreme Court Number 2172 K/Pid.Sus/2015 on the decision Deed on Cassation Application Number 05/Akta/KS/I/ 2015/PN.Sby in conjunction with Number 2357/Pid.B/2012/PN.Sby

Case Prita Mulyasari as a housewife who was reported by Omni Batavia Hospital. The only one who is popular and has succeeded in attracting public attention is Prita, which gave birth to the Coin For Prita movement. Prita Mulyasari, who only sent an email criticizing the service of the hospital that we know as Omni International Hospital, until finally she was detained at the Tangerang Women's Prison because of the ITE Law. When we examine the case, there was no intention on the part of the victim to defame the hospital institution. What she did was only to fill in complaints, as in filling in the complaint box that is usually provided in every public service location. Article 27 paragraph (3) provides fear for anyone who wants to express and express their opinion, because of the potential for them to easily be caught in the law using this article.

This case then gave birth to the Tangerang District Court decision No.1269/PID.B/2009/-PN.TNG dated December 29, 2009, which in essence stated that Prita Mulyasari was not guilty of committing a crime as charged. Omni Hospital did not want to lose and continued to fight until the cassation and finally gave birth to the Supreme Court decision No. 822 K/PID.SUS/2010, which in essence accepted the cassation application of the hospital and stated that Prita Mulyasari had been legally proven to have violated Article 27 paragraph (3) in conjunction with Article 45 paragraph (1).

In the latest regulations regarding the explanation of Article 27 Paragraph (3) regarding defamation as regulated in the Joint Decree (SKB) concerning Guidelines for the Implementation of Certain Articles in Law No. 19 of 2016 concerning Amendments Law No. 11 of 2008 concerning Electronic Information and Transactions (UU ITE) also does not explain whether an imperfect name can be said to fulfill the elements of defamation. Only in letter f it is explained that the victim as the reporter must be an individual with a specific identity, and not an institution, corporation, profession or position.

This study aims to know and analyze law enforcement against criminal acts of defamation based on current positive law and know and analyze the ideal criminal law policy against criminal acts of defamation in the ITE Law in the future.

2. Research Methods

Method The research approach used in this writing is Normative Jurisprudence. This method emphasizes more on the concept that law can be viewed as a set of laws and regulations that are systematically arranged based on a pyramidal-hierarchical order, with the main source called the *grundnorm* as the umbrella of all laws and regulations.

The research in this writing is a qualitative research where the data in the research is not in the form of numbers, but verbal words. Suteki, citing the definition of qualitative research according to Syaodih Sukmadinata, is a research aimed at describing and analyzing phenomena, events, social activities, attitudes, beliefs, perceptions, thoughts of people individually or in groups.

Data used in the form of legal materials which are divided into primary legal materials, secondary legal materials and tertiary legal materials. Primary Legal Materials, including:

Namely legal materials that have binding legal force (statutory regulations), consisting of: The 1945 Constitution of the Republic of Indonesia; Criminal Code; Law No. 11 of 2008 concerning Electronic Information and Transactions; Law No. 19 of 2016 Amendment to Law No. 11 of 2008 concerning Electronic Information and Transactions; Law No. 1 of 2024 concerning the Second Amendment to Law No. 11 of 2008 concerning Electronic Information and Transactions. Secondary Legal Materials, including materials that are closely related to primary legal

materials and can help analyze and understand primary legal materials, consisting of scientific works by undergraduates and research results. Tertiary Legal Materials, including: Legal Dictionary; Popular Scientific Dictionary; Big Indonesian Dictionary.

Legal data/materials are collected through searches to related locations such as literature studies and document studies by searching for legal materials in libraries. Data analysis is carried out qualitatively through a review of deductive thinking logic.

3. Results and Discussion

3.1 Law Enforcement Against Criminal Acts of Defamation Based on Current Positive Law

With the existence of the ITE Law, every citizen has the right to obtain legal certainty when a citizen experiences actions that violate ethics in cyberspace regarding the ITE Law. The validity and interpretation of Article 27 paragraph (3) of the ITE Law cannot be separated from the basic legal norms in Article 310 and Article 311 of the Criminal Code. This is one of the considerations of the Constitutional Court in the decision of case No. 50/PUU-VI/2008 regarding the judicial review of Article 27 paragraph (3) of the ITE Law against the 1945 Constitution. The Constitutional Court concluded that a person's good name and honor should be protected by applicable law, so that Article 27 paragraph (3) of the ITE Law does not violate democratic values, human rights, and the principles of the rule of law. Article 27 paragraph (3) of the ITE Law is Constitutional

If we look closely at the contents of Article 27 paragraph (3) in conjunction with Article 45 paragraph (3) of the ITE Law, it seems simple when compared to the more detailed insult articles in the Criminal Code. Therefore, the interpretation of Article 27 paragraph (3) of the ITE Law must refer to the insult articles in the Criminal Code. For example, in the ITE Law there is no definition of defamation. By referring to Article 310 paragraph (1) of the Criminal Code, defamation is defined as an act of attacking someone's honor or good name by accusing them of something with the clear intention of making it publicly known.

The application of sanctions in the Criminal Code classifies sanctions according to the level of the criminal act of insult committed, for example, verbal defamation (Article 310 paragraph (1)), is subject to a maximum prison sentence of 9 (nine) months or a fine of IDR 4,500, while written defamation (Article 310 paragraph (2)) is subject to a maximum prison sentence of 1 (one year) 4 (four) months or a fine of IDR 4,500. The basis for imposing sanctions is adjusted to the level of the prohibited act. In contrast to the criminal act of insult/defamation in Article 27 paragraph (3) of the ITE Law, every act classified as an act of insult/defamation is subject to a prison sentence of 4 (six) years and/or a fine of IDR 750,000,000 (seven hundred and fifty million rupiah).

In the provisions of the Criminal Code, punishment is based on the level of the crime for the criminal act of insult, even in some crimes, the choice of punishment is not cumulative, but rather an alternative between imprisonment or a fine. In contrast to Article 27 paragraph (3) of the ITE Law, for the crime of insult, the criminal sanctions are cumulative, between imprisonment and/or a fine. The Criminal Code explains who is the subject/victim of the insult, namely a person, in contrast to Article 27 paragraph (3), it is not explained who is the subject/victim of the insult itself, whether it is only a person or can be other than a person. This can clearly give rise to various interpretations.

In addition, the Criminal Code also provides justification for insults, namely if the act is committed in the public interest or because it is forced to defend oneself. In addition, the Criminal Code also provides the right to prove the accusation/slander (Article 312 of the Criminal Code), and can only be prosecuted if there is a complaint from the person who was the victim of the crime. However, this is not the case with Article 27 paragraph (3) of the ITE Law, which does not provide justification, does not provide the right to proof, and even the category of the crime is an ordinary crime that can be reported by anyone.

The formulation of the crime in Article 27 paragraph (3) in conjunction with Article 45 of the Electronic Information and Transactions Law is considered unclear so that it can criminalize people who want to convey expressions or criticism via the internet or social media. However, the Constitutional Court does not think so, in Decision Number 50/PUU-VI/2008 and Number 2/PUU-VII/2009 stating that the provisions of Article 27 paragraph (3) of the Electronic Information and Transactions Law are constitutional and do not conflict with citizens' freedom of expression. In its legal considerations, the panel of constitutional judges provided an explanation regarding the provisions of Article 27 paragraph (3) in conjunction with Article 45 of the Electronic Information and Transactions Law. Then the amendment to the 2016 Electronic Information and Transactions Law accommodated the points that were the legal considerations of the panel of constitutional judges.

Based on the above, it can be concluded that there is a problem of unclear legal subjects who are victims in the criminal act of insulting the ITE Law, so that some of the decisions of the panel of judges refer to the criminal act of insult in the Criminal Code by providing a note that the victim of the insult must be clear and concrete. In the proof of the elements, it is also seen that the panel of judges uses the interpretation of the criminal act of insulting the Criminal Code.

From the several cases above, we can see at least several issues regarding law enforcement regarding criminal acts of defamation based on current positive law contained in Article 27 paragraph (3) of the ITE Law, which further strengthens the existence of this Article as a "rubber Article" which can be withdrawn according to interests, namely:

1. Lack of guarantee of legal certainty.

Regarding the definition of "insult and defamation" in Article 27 paragraph (3) of the ITE Law, it is still unclear. The definition of "insult" and "defamation" must be explained in Article 27 paragraph (3) of the ITE Law. Without an explanation of "insult and defamation", there will be multiple interpretations when a violation of Article 27 paragraph (3) of the ITE Law occurs. In the Explanation of Article 27 paragraph (3) it is stated: "The provisions in this paragraph refer to the provisions on defamation and/or slander regulated in the Criminal Code (KUHP)." What needs to be noted is the inconsistent use of terms, in its norm in Article 27 paragraph (3) of the ITE Law uses the term 'insult and/or defamation' while to explain this proposition the term 'defamation and/or slander' is used. It can be understood that 'insult' is broader than 'defamation'. So the proposition of 'insult' in the norm of Article 27 paragraph (3) of the ITE Law should be able to be used to refer to every offense of insult regulated in the Criminal Code, but the legislators explain it by limiting it only to 'defamation and/or slander'. In the author's opinion, there is something counter-productive here. The norm in the article wants to have a broad scope, while the explanation of the article actually narrows it.

2. Noregulations regarding the use of imperfect names

In Article 27 paragraph (3) of the ITE Law and its explanation, there is no specific explanation regarding the legal subject in the content of insults and/or defamation. This also includes the use of imperfect names in the content of insults and/or defamation. In the explanation of Article 27 Paragraph (3) of the Ministerial Decree concerning Guidelines for the Implementation of Certain Articles in the 2021 ITE Law, it is explained that the victim as the reporter must be an individual with a specific identity, and not an institution, corporation, profession or position. However, in practice, content of insults and/or defamation is often found on social media that does not clearly or specifically mention the legal subject of the insult and/or defamation. This can be exploited by the perpetrators to create content of insults and/or defamation by using pseudonyms or imperfect names and not being caught

3. The ambiguity of who is the target of the regulation

The norm of Article 27 paragraph (3) of the ITE Law shows the ambiguity of who is the target of the regulation, whether it is those who make the information accessible or those who create insulting and/or defamatory content (dader).

When associated with the theory of punishment, namely the Combined/modern Theory (Verenigings Theorien), law enforcement against criminal acts of defamation is based on current positive law introduced by Prins, Van Hammel, Van List with the following views:

- a. The most important objective of criminal law is to eradicate crime as a social phenomenon.
- b. Criminal law and criminal legislation must pay attention to the results of anthropological and sociological studies.

c. Criminal law is one of the most effective means that can be used by the government to eradicate crime. Criminal law is not the only means, therefore criminal law should not be used alone but must be used in combination with social efforts.

Van Hamel explains that criminal law is a special suffering imposed by an official who is authorized to impose a penalty on behalf of the state as the person responsible for the punishment for an offender, namely solely because the person has violated a law or regulation that must be enforced and applied by the state. From the above view, it shows that this theory requires that punishment not only provides physical but also psychological suffering and most importantly provides punishment and education. From the description above, it can be concluded that the purpose of punishment is to desire improvements in humans or those who commit crimes, especially in minor crimes.

Therefore, with the current criminal law policy based on positive law regarding defamation, it is an act of violating the rights of others which causes harm to others so that legal action can be taken against the perpetrator of the violation as stated in Article 27 Paragraph (3) of Law No. 11 of 2008 concerning ITE, and the provisions regarding the imposition of punishment are regulated in Article 45 Paragraph (3) of Law No. 19 of 2016 concerning ITE.

3.2 The Ideal Criminal Law Policy Against Criminal Defamation in the ITE Law in the Future

Soedarto said that the use of studying comparative law is for the renewal of national law, where in this case it is more intended as a renewal of criminal law policy in the future related to defamation of the ITE Law, so that a new and higher quality national criminal law is expected to be realized.

3.2. Comparative Analysis of Defamation in Positive Law and Islamic Law

Defamation is an act that can be punished because it has been regulated in positive law, both stated in the Criminal Code or Law No. 19 of 2016 concerning Law No. 11 of 2008 concerning Information and Electronic Transactions. In positive law, defamation is also known as a crime against honor.

Defamation can be seen from two sides, namely the Criminal Code and ITE. In the Criminal Code, Article 310 Paragraph (1) is as follows:

"Anyone who intentionally attacks the honor or good name of a person by accusing them of something, with the clear intention of making it known to the public, is threatened with defamation with a maximum prison sentence of (9) nine months or a maximum fine of IDR 4,500.00 (four thousand five hundred rupiah)"

The formulation of the crime of defamation in paragraph (1) consists of the following elements of the crime:

Objective elements:

1. His actions: Attacking
2. The object:
3. Honor of people
4. Good name of a person
5. How: by accusing certain actions.

Subjective elements:

- a. Error : intentional
- b. The intention is clear so that it is known to the public. A summary of the elements of the crime of defamation includes:
- c. The act of attacking.
- d. Object: honor or good name of a person

As for what is meant by intentionally in the formulation contained in the Criminal Code Article 310 Paragraph (1) above, including the subjective element aimed at the act. This means that the perpetrator is aware of his actions, the perpetrator is aware of his words which contain violations of the honor or good name of others. then the element of attacking the honor or good name of others, what is meant by the word "attack" here does not mean attacking but with the intention of violating by attacking the honor and/or good name. With the intention that is clearly known to the public, this crime in its application requires precision because it must be proven in "real intention to broadcast".

While the word good name is intended as the honor given by the general public to someone either because of his actions or his position. So the good name is intended for certain people only, for example; president, vice president, governor, kyai, pendera and others, as for the crime of accusing someone of doing something, the word "certain act" means that the alleged act is stated clearly, both the time and place. If the time and place are not clear then it is included in ordinary (light) insults, for example: you are a liar, you are a thief and a cheat, you are an extortionist

The provisions regarding defamation committed on social media are contained in Article 27 paragraph (3) in conjunction with Article 45 paragraph (3) of the Electronic Information and Transactions Law, which contains provisions which state:

"Any person who intentionally and without the right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation as referred to in Article 27 paragraph (3) shall be punished with a maximum imprisonment of four years and/or a maximum fine of IDR 750,000,000 (seven hundred and fifty million rupiah)"

The elements contained in this article are:

- a. Each person.
- b. Intentionally and without right.
- c. Distribute and/or transmit and/or make accessible.
- d. Electronic information that contains insulting and/or defamatory content

Article 27 paragraph (3) in conjunction with Article 45 paragraph (3) of the ITE Law seems simple when compared to the more detailed defamation articles in the Criminal Code. The words "publicly known" and "broadcast" in Article 310 paragraph (1) and the Criminal Code include the expression "cyberspace". Including cyberspace in the meaning of "publicly known", "in public", and "broadcast" as in the Criminal Code, is literally inadequate, so a special formulation is needed which is extensive, namely the words "distribute" and/or "transmit" and/or "make accessible" defamatory content.

As for those who can be ensnared by the ITE Law on users of various media in information systems and electronic devices, which are not limited to media that can possibly be accessed by the public or "in public" but through other more personal media. Almost all of these media can be ensnared by the ITE Law, including; news in online media, online discussion forums, Facebook, Instagram, Twitter, Blogs, electronic mail (Email), short messages/SMS and so on. So that all opinions or opinions, expressions that are carried out either intentionally or not, intended to insult and defame or not, either privately or publicly, will easily become the target of accusations of detention and imprisonment.

Meanwhile, Islamic law strictly prohibits demeaning each other, criticizing, insulting, slandering and so on in (Surat al-Hujurat (49): 11) Allah says:

Allah's blessings God bless you Facebook *وَ أَنْفُسَكُمْ وَلَا تَنَابَرُوا بِالْأَلْقَابِ بِئْسَ* God willing, God willing, God willing, God willing, God willing God bless you
Meaning: "O you who believe, do not let a group of men look down on another group, perhaps the person being laughed at is better than them. And don't let a group of women look down on another group, maybe the one who gets humiliated is better. And don't like to criticize yourself and don't call yourself names that contain insults. The worst calling is (calling) that is bad after faith and whoever does not repent, then they are the wrongdoers."

In Islamic law, the crime of defamation is considered haram because it belittles or lowers a person's dignity, or belittles a person's faults and shortcomings with the aim of making them laugh. This can happen by telling about other people with words, actions, gestures or in other ways that can convey the same intent and purpose. The aim is to humiliate other people, make them laugh, insult them and reduce their position in the eyes of the public and this is haram.

In Islamic law and positive law have the same goal in issuing laws related to defamation, which aims to create a harmonious life between fellow human beings, maintain each other's honor by not spreading false news, slandering, insulting and degrading each other. Islamic law punishes perpetrators of criminal acts of defamation with Jarimah ta'zir which is related to crimes against honor and moral damage by punishing perpetrators of criminal acts of defamation with imprisonment. Likewise in positive law because basically Indonesia adheres to a prison system. The length of the prison sentence is left to the authorized judge, depending on how severe the effects are caused by the act.

3.3. Imperfect Name Calling as a Criminal Act of Defamation

Referring to Decision Number 2172 K/Pid.Sus/2015 which rejected the public prosecutor's cassation request and the defendant's cassation on the grounds that even though the defendant did not mention the full name of the object whose good name was defamed, it is certain that the words were directed at the victim witness.

The defendant here tried to avoid the charges because he did not mention the victim's name in full. If examined, there is a phrase "has a content" in Article 27 paragraph (3) of the ITE Law which means that the mention of the name is not perfect as seen from the existence of evil intentions, and law enforcement only needs to prove that the perpetrator committed an act according to the elements of the article. Through this decision, Facebook users must be fully aware that law enforcement can analyze the content of sentences in Facebook posts. The content of sentences can also be asked for the opinion of language experts and criminal experts to find hidden intentions.

The government officially signed a Joint Decree (SKB) of three institutions regarding guidelines for implementing certain articles of the Law on Information and Electronic Transactions (UU ITE), the Joint Decree was signed by the leaders of the three institutions, namely the Minister of Communication and Information, the Chief of Police, and the Attorney General. The signing of this Joint Decree serves as a guideline in efforts to enforce the Law on Information and Electronic Transactions which prioritizes the implementation of restorative justice.

When analyzed with the theory of restorative justice, which is a concept of thought that responds to the development of the justice system by emphasizing the need for community involvement and victims who feel marginalized by the mechanisms that work in the current criminal justice system. Restorative justice is a process that aims to provide rights to victims of crime. To achieve this goal, a meeting is held between the victim and the perpetrator. Thus, the resolution of the problem of the Law on Information and Electronic Transactions can be carried out without having to go through the judicial mechanism. Efforts are made to strengthen the position of criminal justice provisions as the ultimatum remedium or last resort in resolving legal problems. The concept of restorative justice is actually related to the idea that in resolving a problem in criminal law, it should not only be based on resolution through formal criminal law procedures. In this context, criminal law must actually facilitate certain procedures that facilitate perpetrators and victims to resolve criminal law problems amicably. In Tony F. Marshall's view, restorative justice is a criminal justice process that emphasizes joint resolution by the parties involved (law enforcers, perpetrators, and victims) to restore victims, treat perpetrators proportionally, and is forward-looking to prevent future criminal acts.

Restorative justice viewed from an Indonesian perspective actually has relevance to the legal ideals of Pancasila. There are three relevances between restorative justice and the legal ideals of Pancasila, namely: first, restorative justice emphasizes the resolution of a criminal case by optimizing the balance of interests between values that develop in society, victim recovery, and treating the perpetrator proportionally. This is actually in line with the values of humanity in Pancasila, especially the second principle which emphasizes that humanity must be an important value and orientation in national and state life. In this case, restorative justice actually has an effort to implement the second principle of Pancasila, especially the value of humanity. Second, restorative justice emphasizes the implementation of the resolution of criminal acts that refer to societal values. In this case, restorative justice implements the people's values in the fourth principle. The fourth principle of Pancasila actually contains several important substances including: people's values, wisdom, and deliberation. The three substances in the fourth principle are actually things that are implemented through restorative justice practices. Third, restorative justice places victims and perpetrators as "family" who try to solve problems together.

Defamation is first regulated in Article 310 of the Criminal Code which aims to protect the dignity of every person, especially regarding the self-esteem, honor (eer) and good name (goeden naam) of a person. In proving an act as defamation, it is seen from the measure of the honor and good name of the person being truly attacked or defamed.

The ideal regulation of criminal defamation also in its special rules must firmly determine whether an act of defamation is a crime or a violation. This is important to regulate because it is related to the Criminal Procedure Law in the future, whether it meets the criteria of error with an act that is intentional or negligent of the perpetrator, both in criminal acts and in violations.

As stated by Sudarto, namely: In a criminal act in the form of a crime, there must be intent or negligence. In the law, the elements are stated explicitly or can be concluded from the verb in the formulation of the criminal act. In the formulation of a criminal act in the form of a violation, there is basically no mention of intent or negligence, meaning that it is not stated whether the act was done intentionally or negligently. This is important for Criminal Procedure Law, because if it is not stated in the formulation of the law, then it does not need to be stated in the indictment and also does not need to be proven.

In addition, the ideal regulation to provide the formulation of criminal acts in the Law on Electronic Information and Transactions should use the principles of "Lex Certa" and "lex stricta" (Clarity of Formulation and Purpose), the teaching of lex certa, namely a regulation should not be interpreted other than the intention of the substance of the regulation. The problem is that the formulation of criminal acts in the field of information and communication technology in this amended Law is not carried out by considering the principle of lex certa (the formulation of criminal acts is clear and clear) and the principle of lex stricta (the method of

formulating criminal acts must be strict and limited in scope) as an implementation of the principle of legality. In the formulation of criminal acts, it also does not pay attention to the differences in the formulation of formal and material crimes, even though the General Rules in Book I of the Criminal Code still distinguish Crimes from Violations, while criminal acts in the Law on Electronic Information and Transactions only regulate the qualification of criminal acts in this Law as Crimes.

3.4. Analysis of Defamation in the New Criminal Code

In Law No. 1 of 2023 concerning the Criminal Code, defamation is regulated in Article 433 paragraph (1) and Article 433 paragraph (2).

Based on the formulation of Article 433 paragraph (1) of Law No. 1/2023 concerning the Criminal Code regarding insults, namely:

"Any person who verbally attacks the honor or good name of another person by accusing them of something, with the intention of making it publicly known, shall be punished for defamation, with a maximum imprisonment of 9 (nine) months or a maximum fine of category II."

Based on this, there are several analyses in defamation actions, namely:

1. Deliberately

Intention is a subjective element that is intended for an action or in other words the perpetrator knows about his actions and is aware when saying a sentence that violates the honor or good name of another party. It is a different story if the perpetrator says a sentence when he is drunk or when he is dreaming because in that context the perpetrator who utters a sentence is still in a state of unconsciousness.

2. Attacking another person's honor or good name

Attacking in this case is a violation, while good name in this context is interpreted as the honor that a person has, either as a result of his behavior or the social position he holds.

3. Accuse of committing a certain act

Certain acts are defined as acts that are accused of having clarity both in time and place. If there is no clarity in the context, it can be categorized as a minor insult.

4. With the real intention of making it known to the public

In this element, its implementation requires precision to be able to prove the meaning of the intention not to broadcast. In the context of proof, it is mandatory to have a cautious attitude because if the intended action is gossip and is not heard by others, there will be difficulties in the proof process.

Article 433 paragraph (2) of the Criminal Code concerning written defamation states that:

"If the act as referred to in paragraph (1) is carried out in writing or images that are broadcast, shown or posted in a public place, the perpetrator shall be

punished for written defamation, with a maximum prison sentence of 1 (one) year and 6 (six) months or a maximum penalty of category III."

If the elements of insult or defamation are only spoken (verbal insult), then the act is included in Article 433 paragraph (1) of the Criminal Code, however, if these elements are carried out by means of a letter or image that is broadcast, shown or posted (insulting by means of a letter) then the perpetrator can be charged or given a penalty under Article 433 paragraph (2).

3.5. Implementation of Article 27 A in the latest ITE Law

Article 27A of Law No. 1 of 2024 concerning the Second Amendment to Law No. 11 of 2008 concerning Electronic Information and Transactions reads:

"Any person who intentionally attacks the honor or good name of another person by accusing them of something, with the intention that this matter becomes public knowledge in the form of Electronic Information and/or Electronic Documents carried out through an Electronic System"

Furthermore, the explanation of the article is; what is meant by "attacking the honor or good name" is an act that demeans or damages the good name or self-esteem of another person so as to harm that person, including insulting and/or slandering.

The crime in Article 27A of Law 1/2024 is a complaint crime that can only be prosecuted based on a complaint from the victim or person affected by the crime and not by a legal entity. In addition, the act in Article 27A of Law 1/2024 cannot be punished if it is done in the public interest or if it is done because of self-defense.

The provisions of Article 27A of Law 1/2024 contain the element of "attacking a person's honor or good name" which refers to Article 310 of the old Criminal Code which was still in effect at the time of this writing and Article 433 of Law 1/2023 concerning the new Criminal Code which will be in effect for 3 years from the date of enactment, namely 2026.

According to R. Soesilo regarding Article 310 of the Criminal Code, regarding the definition of "insulting" is attacking someone's honor and good name. Then, the person being attacked usually feels ashamed. While the "honor" that is attacked here only concerns the honor of a good name, not "honor" in the sexual field or honor that can be tarnished because of being offended by his genitals in the environment of sexual lust. Meanwhile, according to Oemar Seno Adji, the act of defamation is an act with the intention of attacking someone's honor or good name which is known as the term *aanranding of goede naam*.

Then, in the Explanation of Article 433 paragraph (1) of Law 1/2023, the nature of the act of defamation is if the act of insult is carried out by accusing, either verbally, in writing, or with pictures, which attacks the honor and good name of a person, thereby harming that person. The alleged act does not need to be a criminal act. The criminal act according to the provisions in this article has an

object of an individual. However, defamation of a government institution or a group of people is not included in the provisions of this article.

However, it should be noted that the existence of Article 310 of the Criminal Code and Article 433 of Law 1/2023 applies the principle of *lex specialis derogat legi generali*, which means that special law can override general law. In criminal law cases, there are general crimes regulated in the Criminal Code, and special crimes whose legal regulations are outside the Criminal Code.

4. Conclusion

Law enforcement against criminal acts of defamation based on current positive law is an act of violating the rights of others which causes harm to others so that legal action can be taken against the perpetrator of the violation as stated in Article 27 Paragraph (3) of Law No. 11 of 2008 concerning ITE, and the provisions regarding the imposition of penalties are regulated in Article 45 Paragraph (3) of Law No. 19 of 2016 concerning ITE, however, from several cases that have been presented above, at least several issues can be seen regarding law enforcement against criminal acts of defamation based on current positive law contained in Article 27 paragraph (3) of the ITE Law, which further strengthens that the existence of this Article is a "rubber Article" that can be withdrawn according to interests, namely; less guarantee of legal certainty, no regulation regarding the use of imperfect names and the ambiguity of who is the target of the regulation. The ideal criminal law policy against criminal acts of defamation in the ITE Law in the future is to provide the Formulation of Criminal Acts in the Law on Electronic Information and Transactions which should use the Principles of "Lex Certa" and "Lex Stricta" (Clarity of Formulation and Purpose), the Lex Certa Teaching, namely a regulation should not be interpreted other than the intention of the substance of the regulation. The problem is that the formulation of criminal acts in the field of information and communication technology in the ITE Law is not carried out by considering the principle of *lex certa* (the formulation of criminal acts is clear and clear) and the principle of *lex stricta* (the method of formulating criminal acts must be strict and limited in scope) as an implementation of the principle of legality. In the formulation of criminal acts, it also does not pay attention to the differences in the formulation of formal and material crimes, even though the General Rules in Book I of the Criminal Code still distinguish Crimes from Violations, while criminal acts in the Law on Electronic Information and Transactions only regulate the qualification of criminal acts in this Law as Crimes.

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