

Policy on Criminalization of Defamation Offenses Through Electronic Media

Kukuh Dwi Kurniawan^{1*}, Nu'man Aunuh², Yaris Adhial Fajrin³

^{1,2,3} Faculty of Law. University of Muhammadiyah Malang, Malang, Indonesia

*Corresponding author. Email: kukuhdwik@gmail.com

ABSTRACT

There is a significant increase in criminal acts of insult or defamation through social media, making many parties again doubt the existence of these offense arrangements in the Information and Electronic Transaction Law. Although since the Law was enacted in 2008 and revisions have been made including Article 27 paragraph (3) regarding elements of offenses against insults or defamation in 2016, this regulation does not make this regulation clearer. The regulation related to the regulation is returned to the existence of the law itself which is seen through the purpose of the existence of the law itself, whether or not it is in accordance with the initial purpose of establishing the law regarding offenses against insults and defamation in the ITE Law. This study uses descriptive analysis method by providing an overview of the legal construction of defamation or defamation offenses according to the ITE Law and providing an analysis of the policy on criminalizing the offense of insulting or defamation.

Keywords: *Criminalization, defamation, electronic media.*

1. INTRODUCTION

The development of this technology facilitates the exchange of information and communication to become borderless and causes changes in human behavior so that it gives rise to a new habit and culture that can be both positive and negative. As Soerjono Soekanto said that changes in society accompanied by an increase in crime have a tendency to change the interaction between community members which results in acts that violate laws or norms[1]. This means that not all people follow or obey the laws and norms, but there will always be behavior from community members who deviate from behavior in general and result in an assessment of dislike by the community.

Changes and technological developments that are not followed by knowledge of the development of public knowledge about legal changes make community members become victims and perpetrators of criminal offenses. Forms of criminal offenses that often occur in society are criminal acts in the form of insults or defamation through information media and electronic transactions.

The impact of technological developments that are not followed by an understanding of the wise use of social media makes a lot of insults or defamation occur in the community so that it requires serious attention from all parties, from the government, law enforcement, academics and community members.

2. METHOD

In this study, the construction of defamation acts whose elements are contained in Article 27 of the ITE Law, considering that this article is also called the rubber article or the formulation of its provisions has multiple interpretations so that it is very easy to use certain parties to report acts that are not actually included in the context of pollution, reputation or humiliation and law enforcement can easily criminalize someone with the article on defamation of the ITE Law. This research is aimed at finding the rule of law, legal principles, and legal doctrines in order to answer the legal issues being faced[2]. Reviewing the act of defamation with the doctrine of legal science and the purpose of punishment so that it is expected to find a policy of criminalizing defamation.

3. THE CASE OF DEFAULT IN INDONESIA

Cases regarding defamation in Indonesia have significantly increased after the ITE Law was passed in 2008. Starting from the case of Prita Mulyasari who complained about the services of the Omni International Hospital Tangerang on August 15 2008, this case has reached the stage of cassation that was sentenced to 6 months in prison with a probationary period of 1 year and finally in September 2012 was acquitted after the Supreme Court granted the application for judicial review (PK)[3]. Second, Muhammad Arsyad is a student activist at Hasanuddin University who was accused of insulting the central board of the Golkar Party in 2013 for writing

a status on BlackBerry Messenger with the phrase "No Fear Nurdin Halid Corruptor!", although in the end he was acquitted by the Makassar District Court on 28 May 2014, but Arsyad was imprisoned during the investigation[4]. Third, Fadli Rahim is a state civil servant in Gowa Regency, in 2015 he was sentenced to 8 months in prison by the Sungguminasa District Court for committing acts of humiliation and defamation of Ichsan Yasin Limpo as the Regent of Gowa[5]. Third, Baiq Nuril Makmun is an honorary teacher at SMAN 7 Mataram, West Nusa Tenggara who was sentenced to 6 months in prison through a Supreme Court cassation decision in September 2018 for recording a conversation with his school principal which contained immoral acts by the principal and verbally abusing Baiq Nuril, in July 2019 President Jokowi granted amnesty to Baiq Nuril[6]. Fourth, Juniar Nainggolan and Benny Edward Hasibuan were convicted for uploading a video of checking a number of private police cars at the Traffic Directorate of the North Sumatra Regional Police, using the e-samsat application, suspecting that some of the cars were not tax-compliant, so they were both charged with the ITE Law and handed down sentences to 8 months in prison by the Medan District Court on 12 April 2021[7].

The high intensity of cases can also be seen from the reports from the Sub-Division of the Sub-Division of Ditreskrimsusall Polda in Indonesia, from January 2015 to December 2020 with a total of 20,033 incoming reports[8].

Types of Cyber Crimes	Complaints
Online Fraud	8,541
Provocative Content Spread	7,46
Pornography	1,308
Illegal Access	1,056
Gambling	168
Blackmail	244
Data / Identity Theft	386
Electronic System Hack	244
Illegal Interception	64
Site Appearance Change	92
System Crashes	139
Data Manipulation	331
Total	20,033

Source: patrolsiber.id

The tabel shows that the highest reports of online fraud are 8,541 reports, the spread of provocative content is 7,460 reports, pornography is 1,308 reports and illegal access is 1,056 reports[8]. The types of acts of insult and defamation by the Subbagbinops Ditreskrimsus are included in the category of spreading provocative content.

The same trend is found in statistical data made by patrol.id, there are high cases of cybercrime in Indonesia. Patrolsiber.id is a website developed by the Directorate of Cyber Crime (Dittipidsiber) which is a work unit under the Criminal Investigation Unit of the National Police and is tasked with enforcing the law against cybercrimes[9]. In general, Dittipidsiber handles two groups of crimes, namely computer crime and computer-related crime.

Computer crime is a cybercrime group that uses computers as the main tool with the forms of crime being hacking, illegal interception, web defacement, system interference, data manipulation[10].

Computer-related crimes are cybercrimes that use computers as tools, such as online pornography, online gamble, online defamation, online extortion, online fraud, hate speech, online threats, illegal access, data theft[11]. To support cybercrime evidence, Dittipidsiber is equipped with various capabilities and supporting facilities, one of which is a digital forensic laboratory. Dittipidsiber Digital Forensic Laboratory has achieved ISO 17025:2018 as a test and calibration laboratory in the field of computer forensics that meets quality standards in terms of managerial and technical examination of digital evidence. Therefore, Dittipidsiber also serves the examination of digital evidence from various work units, from the Headquarters to the Polsek level. In addition, Dittipidsiber also cooperates with various institutions, both at home and abroad, to facilitate coordination in the disclosure of transnational and organized cybercrimes.

Dittipidsiber through its website has received 27,717 cybercrime reports with potential losses reaching 5.05 trillion. The complaints were predominantly related to fraud, a number of frauds amounted to 12,611 complaints, while insults or defamation came in second place with 4,369 complaints or about 16% of the total public complaints[8].

In terms of the law enforcement process for public complaints about cybercrimes, it is quite low, from patrol.id data from 2015 to 2020 the highest percentage is only around 52% and the lowest is 23% in 2020. Most complaints occur in 2018-2019 because it coincided with the political year

4. OBJECTIVE OF CRIMINALIZATION OF DESTRUCTION OF DAMAGE

Defamation or insulting behavior is the most common case that makes this article dubbed a rubber article as Jimly Asshiddiqie equates the article related to insult or

defamation with subversive legislation[12]. The unclear distribution or transmission limits make this article create legal uncertainty and is easier to interpret as a limitation on freedom of expression and opinion in the mass media.

Returning to the purpose of the law itself, law as Law As A Tool Of Social Engineering as according to Roscoe Pound, according to his point of view sees law from the side of interests and values. In Pound's teachings, studying law is not just norms or regulations but is a process to bring about a new balance, thus making society change into a new, better condition with that new balance[13].

The existence of the law to give happiness to humans, the law was created for the benefit of humans, as the adage of Satijpto Rahardjo which conveys the law for humans, not humans for the law. The law is for humans and not the other way around and the law does not exist for itself, but for something wider, namely for human dignity, happiness, welfare, and human glory[14].

Defamation in English is often translated as defamation. In some countries, defamation is also known as calumny, vilification or slander[15]. These three terms are used for verbal defamation. Meanwhile, written defamation is often called libel. In Black's Law Dictionary, defamation is defined as the act of endangering the reputation of another by making a false statement to a third party. If the accusation of defamation involves a matter that is a public concern, then the plaintiff must prove his statement regarding the guilt of the defendant[16].

In common law countries, the term slander is used to designate a crime, lie and slander made orally. Meanwhile, crimes, lies and slanderous statements made with writing or pictures are called libel. Slander and libel allow for legal action, both civil and/or criminal with the aim of preventing various kinds of slander and unfounded criticism. In these common law countries, defamation itself is defined as the public disclosure of someone's personal facts that are still an open secret and spreading information that can offend people.

Whereas in civil law countries, defamation is more categorized as a crime that falls into the realm of criminal law rather than civil. The definition of defamation in civil law countries is not much different from that in common law countries, for example Article 111 of the Irish Criminal Code which states that defamation is an act directed at a certain person or party so that by a third party the person is considered to have contemptible behavior, and contrary to morality and honor, or the act can humiliate or humiliate him in public.

5. DEFAULT REGULATION IN INDONESIA

In Indonesia, the term defamation offense is not a juridical term (legal term) because it is not explicitly

mentioned in the Criminal Code, but is a term that has developed in the academic world (academic term) and society (social term). Some offenses that can be categorized as defamation offenses are: (1). Accusing something orally (Article 310 Paragraph 1 of the Criminal Code); (2). Accusing something by writing or broadcasting images (Article 310 Paragraph 2 of the Criminal Code); (3). Defamation (Article 311 of the Criminal Code and Article 36 Paragraph 5 of Law No. 32 of 2002 concerning Broadcasting); (4). Minor insults (Article 315 of the Criminal Code); (5). Complaints of slander (Article 317 of the Criminal Code); and (6). Distribute and/or transmit and/or make accessible electronic information and/or electronic documents containing insults and/or defamation (Article 27 Paragraph 3 of the ITE Law).

Regulations regarding defamation offenses can be found in the Criminal Code as well as in laws outside the Criminal Code, namely Law no. 32 of 2002 concerning Broadcasting (Broadcasting Law) and Law no. 11 of 2008 concerning Information and Electronic Transactions (UU ITE). In the Criminal Code, defamation is regulated through Article 310-320 of the Second Book (Crime) Chapter XVI concerning Humiliation. In addition to these articles, there are several other articles that are also regulated in the Criminal Code related to this defamation, namely articles that are included in the haatzaai articlesen (spreading feelings of hostility and hatred in society against the legitimate government). The rules for haatzaai articles are contained in articles 134, 136 bis, and 137 paragraph (1) regarding offenses against the president and/or vice president. In addition to a more severe criminal threat, the offense of defamation against the president and/or vice president is also different from ordinary defamation because it is not a complaint offense.

Whereas in the ITE Law, the offense of defamation is regulated in Article 27 Paragraph (3), namely: "Everyone intentionally and without rights distributes and/or transmits and/or makes electronic information and/or electronic documents accessible with insulting content, and/or defamation". Due to many controversies regarding the formulation and implementation of this article, there was a change in meaning through the explanation "The provisions in this paragraph refer to the provisions for defamation and/or slander as regulated in the Criminal Code (KUHP)" as amended by Law no. 20 of 2016.

In 2021 the controversy over this article resurfaced and many legal experts recommended that the ITE Law be amended as President Jokowi also conveyed the same thing in his State of the Union address[17]. However, it is an anti-climax, that in the end the government did not make changes to the ITE Law, instead issuing a Joint Guideline for the Minister of Communication and Information of the Republic of Indonesia, the National Police Chief, and the Attorney General by signing a Joint Decree (SKB) in the form of Guidelines for Criteria for

the Implementation of the Electronic Information and Transaction Law (ITE).

Specifically in Article 27 paragraph (3), restrictions on the interpretation of actions that can be threatened using defamation/insult using this provision are:

1. In an act that is done intentionally with the intention of distributing/transmitting/making accessible information the content of which attacks someone's honor by accusing something so that it is known to the public.
2. It is not a criminal offense if the content is in the form of insults which are categorized as insults, ridicule, and/or inappropriate words, also if the content is in the form of judgments, opinions, evaluation results or a fact.
3. It is a complaint offense so it must be the victim himself who reports, and not an institution, corporation, profession or position.
4. It is not an offense of insult and/or defamation if the content is distributed through closed or limited group conversations.
5. If journalists personally upload their personal writings on social media or the internet, then the ITE Law will still apply, unless it is carried out by the Press institution, then Law Number 40 of 1999 concerning the Press will apply.

The hope of making these guidelines is to prevent the existence of multiple interpretations from law enforcers so that they can reduce the essence of justice itself.

6. POLICIES FOR THE CRIMINALIZATION OF DEFAMATION

Various results of the UN meeting on "The Prevention of Crime and the Treatment of Offenders" often call for a policy on criminalization to take a philosophical/cultural approach, a moral-religious approach, and a humanist approach that is integrated with a rational, policy-oriented approach. Several statements in the congress essentially stated: (1). There is a need for harmonization or synchronization or consistency between development or renewal of national laws and socio-philosophical and socio-cultural values or aspirations; (2). A legal system that is not rooted in cultural values and even has "discrepancy" with people's aspirations is a contributing factor to the occurrence of crime (a contributing factor to the increase of crime); (4). Development policies that ignore moral and cultural values can be a criminogenic factor; (5). The lack of consistency between the law and reality is a criminogenic factor; and (6). The further the law moves away from the feelings and values that live in society, the greater the distrust of the effectiveness of the legal system.

From the statement in the congress above, there are several conditions that must be considered in conducting criminalization, one of which is not ignoring moral and

cultural values. Criminalization that ignores moral and cultural values will actually become a criminogenic factor. In addition, the criminalization policy must also be implemented effectively. In general, to assess whether an act that has been criminalized is really worthy of being criminalized or not, and whether it can be implemented effectively or not, it can be seen through two things, namely the basis for justification and the formulation of the criminalization policy.

In the International Covenant on Civil and Political Rights (ICCPR), honor and reputation are also human rights that must be protected. Article 17 of the ICCPR states: (1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honor and reputation; (2). Everyone has the right to the protection of the law against such interference or attacks.

Often the criminalization of defamation offenses is considered to be able to limit freedom of opinion and expression which are also human rights. In this case, the ICCPR can be used as a guideline for its regulation. The ICCPR categorizes freedom of opinion and expression as a derogable right because in article 4 (2) of the ICCPR, non-derogable rights are only in the form of: (1) the right to life; (2) The right not to be tortured or subjected to cruel, inhuman treatment or punishment; (3) The right to be free from slavery; (4) The right not to be imprisoned solely on the basis of inability to fulfill contractual/agreement obligations; (5) The right not to be prosecuted on a retroactive basis; (6) The right to be recognized as a legal subject wherever a person is; and (7) The right to freedom of thought, conscience and religion.

The ICCPR also determines matters that may limit freedom of expression. Article 19 of the ICCPR states: (1). Everyone shall have the right to hold opinions without interference; (2). Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice; (3). The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a). For respect of the rights or reputations of others; b). For the protection of national security or of public order (public order), or of public health or morals.

Criminal law is an official rebuke of society which is formulated in the law, so that behavior that is prohibited in criminal law is a representation of a violation of the values that live in society. It can also be said that the acts regulated in criminal law are acts that are detrimental to society or are anti-social. However, not all actions that harm the community are regulated in criminal law because there are several factors, for example due to the

difficulty of formulating it correctly or in practice it cannot be implemented[18].

Actions that are anti-social are still very abstract, so clear boundaries need to be made. Regarding the criteria for which actions are anti-social, there are several theories that can be used as guidelines. These theories can also be used as the basis for justification for criminalization, including moral theory and individualistic liberal theory. These two theories are most likely to be used as the basis for justifying the criminalization of defamation offenses because they are related to morality and individual losses.

According to moral theory, between criminal law and the moral dimension are two very close things. The criminalization of an act can be based on the moral values that live in society. Immoral acts can be legalized into law into a criminal act. If an immoral act is not criminalized, there will be tension between morals and criminal law[19]. This theory can be a justification for criminalizing defamation offenses in Indonesia in accordance with the culture of the Indonesian people who still uphold eastern culture. In a country that still upholds eastern culture, actions that contain defamation such as insulting, slandering or the like are very contrary to good manners, so these actions are anti-social and must be criminalized.

Apart from being against manners, insults or slander are also prohibited by all religions adopted by the Indonesian people. The formulation of criminal law should be carried out through a value-oriented approach, both human values, cultural values and religious moral values. This humanist, cultural, and religious approach is integrated into a policy-oriented rational approach[20]. In western countries only, articles on defamation are applied to the majority of countries because they can have an impact on character assassination. Based on the research report released in The Article 19 of the Global Campaign of Free Expression, of the 168 countries surveyed, 158 have criminal laws related to defamation and 10 countries only include defamation offenses in civil law. From January 2005 to September 2007, there were approximately 146 people in the world who were imprisoned for defamation with details: in Africa there were 41 people, America 8 people, Asia and Oceania 35 people, Europe and Central Asia 22 people, and the Middle East and North Africa 40 people[21].

7. RESULT

Apart from moral theory, individualistic liberalism can also be used as the basis for justifying criminalization of defamation offenses. The individualistic liberal theory that is based on harm to society provides signs for limiting the freedom of citizens[22]. According to this theory, the power of the state cannot limit the freedom of citizens unless their actions are detrimental to others, so that the state has the right to criminalize these actions. The loss in question is of course not only material losses, but also immaterial losses. The impact on actions that

contain defamation is more in the form of immaterial losses, namely the fall of one's honor, good name, dignity and worth. Such losses have an impact on social relations because these actions can result in the emergence of negative stigma for someone in society. A person who is a victim of this defamation may be shunned or ostracized in society.

Although the impact is more on immaterial losses, but indirectly defamation can also have an impact on material losses to people who have certain positions, such as businessmen, doctors or others that cause people's trust to decrease. For a doctor or businessman, the decline in people's trust in them can cause material losses because it will affect income. Because it results in material losses, defamation cases in many countries can also be resolved using civil law instruments.

Based on the description above, the criminalization of defamation offenses is intended to protect one's honor and good name, and to encourage someone to treat others according to their dignity as human beings. The protection of this honor and dignity is guaranteed in the 1945 Constitution, namely Article 28 G Paragraphs (1) and (2).

8. CONCLUSION

From this research, it was found that the criminal policy of placing defamation acts in cyber is that an act that is included in the category of evil act causes harm to the victim in the form of damage to good name or dignity. Likewise, in fact, the form of defamation is an act that deviates from the norms, religion and habits of society. On that basis, the act of defamation is criminalized in the formulation of the provisions of the ITE Law so that it can become a legal umbrella to be a middle ground for justice seekers and punishment for the perpetrators who commit these acts.

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