

THE SYMPTOMS OF OVER-CRIMINALIZATION ON DEFAMATION THROUGH ELECTRONIC MEDIA IN INDONESIA

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ABSTRACT

This paper discusses the emergence of stigma in society regarding the existence of symptoms of over-criminalization in terms of handling defamation cases as contained in Article 27 paragraph (1) and (3) of Law Number 19 of 2016 concerning Amendments to Law Number 11 Year 2008 concerning Information and Electronic Transactions (ITE Law) by law enforcement. Among other things, due to the provisions in several articles in the ITE Law which still have multiple interpretations so that it requires a more comprehensive explanation, understanding of law enforcement that emphasizes the principle of legality compared to the principles/theories of criminal law that exist in the criminal law system, as well as the criminalization policy of the ITE Law itself which puts forward the criminal aspects more than other aspects, which results in freedom of opinion which is the right of every individual since birth and guaranteed by the constitution to be increasingly questioned. This research uses normative legal research. The problem approach used in this study includes the statute approach, the conceptual approach and the case approach.

Key words: criminal act, defamation, over-criminalization, electronic media

A. INTRODUCTION

Technological progress in the era of globalization has developed very rapidly. While legal acts in cyberspace is a very worrying phenomenon, considering gambling, fraud, terrorism, and the dissemination of destructive information have become part of the activities of perpetrators of crime in cyberspace. The virtual world seems to have two opposing sides. On the one hand, the internet is able to provide benefits and convenience for its users, especially in terms of information and communication. But on the other hand, negative and detrimental impacts can also be easily exploited by irresponsible actors.¹

While freedom of opinion is the right of every individual from birth, which has been guaranteed by the constitution. Therefore, the Republic of Indonesia as a law and democratic state has the authority to regulate and protect its implementation. Independence of thought and issue of opinion is regulated in the fourth amendment to the 1945 Constitution of the Republic of Indonesia Article 28 E paragraph (3) which states that, "Everyone has the right to freedom of association, assembly, and issuing opinions". Freedom of expression is included in freedom of opinion which is one of the most fundamental rights in state life.²

Law Number 19 of 2016 concerning Information and Electronic Transactions Regarding Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE Law) is a legal umbrella in Indonesia related to regulations in the field of Information Technology and Electronic Transactions. However, in its development, the ITE Law has caused a lot of controversy in terms of protection of freedom of speech from the community, even often disturbing the sense of humanity and justice in society. Some case examples show that the rules contained in the ITE Law can easily ensnare users of electronic media with alleged criminal acts of defamation.

As an illustration, the writer takes 2 (two) cases which are quite phenomenal because they capture the attention of many people. The first case is a case that first happened using criminal act of defamation in the ITE Law. Meanwhile, the second case is the last case using criminal act of defamation in the ITE Law, which even caused the President of the Republic of Indonesia, Joko Widodo and the House of Representatives (DPR) of the Republic of Indonesia, in accordance with their authority, to intervene by giving amnesty,³ because the case has permanent legal force (in kracht van gewijsde) in the existing judicial process.

First, the Prita Mulyasari case versus the Omni International Hospital that occurred in August 2008. This case began with the sending of electronic mail (e-mail) by Prita about her complaints about the services she received from the Omni International Hospital under the title "Omni International Fraud Hospital Alam Sutera Tangerang" to customer_care @ banksinarmas.com, relatives and readers of detik.com. Furthermore, the complaint was responded by the Omni International Hospital by filing a civil suit and criminal report against Prita because they were considered to have committed criminal defamation. By law enforcement officers, the complaint is qualified as an offense in accordance with Article 27 paragraph (3) of the juncto (jo) Law Article 45 paragraph (3) concerning ITE. Subsequently, the Tangerang District Court (Indonesian: Pengadilan Negeri, P.N.) Judges released Prita in 2009, but the Public Prosecutor filed an appeal, and the appeal was granted by the Supreme Court (Indonesian: Mahkamah Agung, M.A.), and declared Prita guilty. Even though in the end, the Supreme Court in September 2011 through the Judicial Review decision in Case Decision Number 22 PK/Pid.sus/2011 handed down a free decision to Prita.

¹Soemarno Partodihardjo, Tanya Jawab Sekitar Undang-Undang No. 11 Tahun 2008 Tentang Informasi Dan Transaksi Elektronik (Question and Answer about Law Number 11 Year 2008 concerning Information and Electronic Transactions), Jakarta: Gramedia Pustaka Utama, 2009, p. 70.

²Muhammad Rizaldi, "Pencemaran Nama Baik Melalui Internet (Defamation Through Internet): Verdict Study Number 1333/Pid.Sus/2013/PN.JKT.SEL", Decision Annotation, Jakarta: Indonesian Judicial Monitoring Society, Faculty of Law, Universitas Indonesia (Indonesian: Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia, MaPPI – FHUI, 2015), p.1.

³The 'Amnesty' is regulated in the 'Emergency Law No. 11 of 1954 concerning Amnesty and Abolition, but this law does not provide a clear legal definition of Amnesty and Abolition. In Marwan and Jimmy, Kamus Hukum (Law Dictionary), Surabaya: Reality Publisher, 2009, p. 41. Amnesty is a general statement issued through or by law concerning the revocation of all consequences of the conviction of a particular criminal act or a group of criminal acts.

Secondly, the Baiq Nuril versus HM case that occurred on August 2012. This case began when Nuril was called by HM, the Principal at Nuril's place as a teacher at the time. In a telephone conversation, HM talked about his personal experiences with Nuril. The conversation which was allegedly highly charged with sexual harassment was then recorded by Nuril. Until on December 2014, one colleague borrowed Nuril's cell phone. Subsequently, his colleague took the recorded conversation between HM and Nuril, where the recording was leaked. On that matter, HM reported Baiq Nuril to the police. After going through a fairly long legal process, on July 26 2017, the Panel of Judges of the Mataram District Court, West Nusa Tenggara (Indonesian: Nusa Tenggara Barat, NTB) had freed Baiq Nuril once from all the charges of the Public Prosecutor. But the Public Prosecutor filed an appeal to appeal to the Supreme Court (MA) on the basis of Article 27 Paragraph (1) and (3) jo Article 45 paragraph (1) and (3) ITE Law. In the end, the Supreme Court, through the appeal and review decision, still declared Nuril guilty.⁴

Associated with a court ruling on 2 (two) cases above as well as other similar cases, it seems that there was an alleged over-criminalization attempt in handling defamation cases as contained in this ITE Law. Among others due to the provisions in several articles in the ITE Law which still contain multiple interpretations so that they require a more comprehensive explanation, understanding law enforcement that puts forward the principle of legality compared to the principles/theories of criminal law that exist in the criminal law system, as well as the criminalization policy of the ITE Law itself which prioritizes aspects of punishment compared to other aspects. This was also conveyed by the Institute for Criminal Justice Reform (ICJR) which stated that the revision of the ITE Law had to remove articles containing multiple interpretations and the potential to become over-criminalization.⁵ Besides that, there is a Supreme Court Circular Letter (Indonesian: Surat Edaran Mahkamah Agung, SEMA) Number 13 Year 2008 in terms of requesting an Expert Statement in the ITE case. Which according to SEMA has been requested by all Judges to be careful in hearing defamation cases, because there is a conflict of interest, by not merely based on the legal provisions only.

B. RESEARCH METHOD

This paper uses normative research methods. The approach that is employed in this research is in the form of a statute approach, through a review of the laws and regulations as well as regulations relating to the issue being discussed,⁶ and in this case, various legal rules are the focus as well as the central point from research. In addition, the legal concept analysis approach (conceptual approach) is also another approach used in this research. This research begins by describing the legal facts, then looking for a solution to a legal case with the aim of resolving the legal case.⁷ In this study used legal materials as contained in the Criminal Code (Indonesian: Kitab Undang-undang Hukum Pidana, KUHP) and in the ITE Law, as well as court rulings. Then for secondary legal material in the form of books, journals and other literature, which are related to the discussion of the criminal law system in Indonesia. The collection technique used is the study of documents conducted by examining legal materials that are relevant to the research discussion.

C. DISCUSSION

C.1. Criminal Acts and Criminal Liability

Basically, the use of criminal law is actually not always a necessity, if preventive activities that are not criminal law still have a strategic position, even holding key positions that must be intensified and made effective.⁸ Based on this, then when criminal (material) legal efforts are promoted, Indonesia should renew its rigid and imperative criminal system into a criminal system that prioritizes aspects of humanity that uphold justice.

The statement above is also parallel with Ross's view which states:⁹

"Prevention, or more generally the influencing of behavior, is only adequate answer when the question is posed as one of aim of penal legislation. Retribution, i.e., requirement of guilt as a precondition and measure of punishment, is only adequate answer when the question is posed as one of what restrictive moral consideration limit the state's right to use as means of influencing behavior".

Moeljatno¹⁰ in 1955 in his inauguration speech as professor of criminal law at Gajah Mada University, had expressed his views on the principle of "no criminal without fault" (Geen straf zonder schuld, actus non facit reum nisi mens sist rea) or better known as dualistic theory. This theory is not mentioned in written law but it is contained in unwritten law which also applies in Indonesia. Basically, this teaching separates criminal acts and criminal liability. Crime refers to the prohibition of actions and does not include liability. Whether the person who commits the act is then also sentenced to a crime, as threatened, it depends on the question of whether in carrying out this act he has a 'fault'.

⁴(Online 5 July 2019). Available on <https://www.liputan6.com/news/read/4005486/perjalanan-kasus-baiq-nuril-hingga-putusan-pk-ditolak>. See also in Case Decision Number 83PK/Pid.Sus/2019. (Seen on 9 August 2019).

⁵ (Online 5 Agustus 2019). Available on <https://nasional.kompas.com/read/2019/08/05/09314481/icjr-minta-pasal-multitafsir-dan-berpotensi-overkriminalisasi-di-uu-ite>. (Seen on 9 August 2019).

⁶P.M. Marzuki, *Penelitian Hukum* (Legal Research). Jakarta: Prenada Media, 2005, p. 93.

⁷Z.A. Amirudin, *Pengantar Metode Penelitian Hukum* (Introduction of Legal Research Method), Jakarta: Rajawali Pers, 2010, p. 118

⁸Muladi dan Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana* (Theories and Criminal Policy), Bandung: Alumni, 1984, p. 159

⁹Alf Ross, *On Guilt, Liability and Punishment*, London: Stevens and Sons, 1975, p. 60-61.

¹⁰Moeljatno, "Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana" ("Criminal Act and Liability in Criminal Law"). (Scientific Speech in the Anniversary of Universitas Gadjah Mada, on 19 December 1955). See also, Moeljatno, *Asas-asas Hukum Pidana* (The Principles of Criminal Law), Jakarta: Rineka Cipta, 2008, p. 165.

Parallel to Moeljatno's view, according to Roeslan Saleh,¹¹ committing a crime does not always mean that the perpetrator is guilty of it. To be able to account for someone in criminal law requires the conditions to be able to impose a crime against him, for committing the crime. Hence, in addition to having committed a crime, criminal liability can only be prosecuted when the crime is committed with a 'fault'. In interpreting fault, Roeslan Saleh stated,¹² 'Fault' is that a criminal offender can be denounced, because in terms of society he actually can do otherwise if he does not want to do the act.

According to Barda Nawawi Arief,¹³ that criminal acts only discuss actions objectively, whereas things that are subjective related to the inner attitude of the perpetrators of the crime must be excluded from the definition of criminal acts, because the perpetrators' inner attitudes are included in the scope of errors and criminal liability that form the basis of ethics perpetrators can be convicted. According to William,¹⁴ "The act constituting a crime may in some circumstances be objectively innocent".

According to the opinion of the author, with the separation of criminal acts and criminal liability as above, it will cause the fault to be excluded from the element of criminal activity and placed back as a determining factor in criminal liability. However, how this concept is applied in legal practice needs deeper elaboration. On the one hand, criminal liability, especially if seen as part of the implementation of the task of judges in examining, hearing, and deciding cases. That is, the concrete form in the application of this theory can be seen practically from the judge's task in dropping the decision in court.

If the theory of the separation of criminal acts and errors above is related to defamation cases using the ITE Law regime as mentioned previously by the author, namely the Prita Mulyasari case and the Baiq Nuril case, as well as other similar cases, then it can illustrate that the handling of these cases by law enforcement, turns out to prioritize the principle of legality merely by ignoring the principle/theory of the separation of criminal acts and errors that have been accepted in the criminal law system in Indonesia. Whereas according to Chairul Huda, an act seen as a crime is a reflection of the community's rejection of the act, and therefore the act was later denounced. Criminal liability is essentially a mechanism established by law to react to violations of agreements that deny certain acts.¹⁵

C.2. The Criminalization of Defamation through Electronic Media

Essentially, the criminalization policy is part of a criminal policy using the means of criminal law (penal) and therefore includes part of the "criminal law policy" (penal policy).¹⁶ As for the definition of criminalization, the Black's Law Dictionary states that criminalization is the act or an instance of making a previously acted criminal act, usually by passing a statute.¹⁷ While Ted Honderich defines "Criminalization" as "making a given behavior and the attendant formal and informal processes and effects no longer punishable by criminal law".¹⁸ Criminalization is also defined as a process to make an act as a crime so that it can be prosecuted and determine how the sanctions.¹⁹

According to Soerjono Soekanto, criminalization²⁰ is an act or determination of the authorities regarding certain acts which are considered by the community or groups of people to be criminal acts²¹ or according to Soedarto, criminalization is a process of determining an act that was not a criminal act into an act criminal. This process ends with the formation of a law in which the act is threatened with criminal sanctions.²²

Unlike the criminal law experts who partly explore criminalization theories that originate from the criminal law itself, Husak bases the theory of criminalization from outside the criminal law. According to Husak, state power in making criminal rules is not only limited by a number of criteria that originate from criminal law (internal constraints), but is also limited by criteria that come from outside the law (external constraints). Husak asserted that the criminalization policy must meet internal

¹¹Roeslan Saleh, *Perbuatan Pidana dan Pertanggungjawaban Pidana; Dua Pengertian Dasar dalam Hukum Pidana* (Criminal Act and Criminal Liability; Two Basic Understanding in Criminal Law), Jakarta: Aksara Baru, 1983, p. 89

¹²*Ibid.*, p. 77

¹³Barda Nawawi Arief, *Kapita Selekta Hukum Pidana* (The Capita Selecta of Criminal Law), Bandung: Citra Aditya Bakti, 2013, p. 107. According to Barda Nawawi Arief, this conception is used in The Draft of Criminal Code (RKUHP).

¹⁴Glanville William, *Criminal Law: General Part*, London: Stevens & Sons, 1961, p. 22.

¹⁵Chairul Huda, *Dari 'Tiada Pidana Tanpa Kesalahan' Menuju Kepada 'Tiada Pertanggungjawaban Pidana Tanpa Kesalahan: Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana* (From 'No Criminal Without Fault' To 'No Law Liability Without Fault': Critical Analysis about Separation Theory about Criminal Act and Criminal Liability), Ed. IV, Jakarta: Kencana Prenada Media, 2011, p. 68.

¹⁶Barda Nawawi Arief, *Op. Cit.*, p. 240.

¹⁷Bryan A. Garner, (Ed). *Black's Law Dictionary*, Ed. IX, USA: West. A. Thomson Reuters Business, 2009, p. 431.

¹⁸Ted Honderich, *Punishment; The Supposed Justifications*, London: Penguin Books, 1979, in Yenti Garnasih, *Kriminalisasi Pencucian Uang (Money Laundering Criminalization)*, Jakarta: Fakultas Hukum Pasca Sarjana Universitas Indonesia, 2003, p. 23.

¹⁹"There are three critical stages in the criminalization process. In the first, a determination is made as to what should be made criminal. Criminal law constrains an individual's freedom of action; to do what is criminal invites a prosecution and, upon conviction, punishment in the second or grading stage, offices a fitted within a general scheme of crimes that indicate their relative seriousness. The generally involves setting a punishment for violation of the law. The severity of the penalty that is attached to the crime indicates the seriousness that parliament or the courts have attached to the offence. Lastly, the criminal law will be applied in individual cases, with the particular sanction in each case, should the defendant be convicted, determined by the particular fact and circumstances of the case, in Janet Dine and James Gobert, *Cases & Materials on Criminal Law*, (wy), quoted from, Yenti Garnasih, *ibid.*, p. 23.

²⁰Contrary to criminalization is decriminalization, which is a process of abolishing altogether the nature of the conviction of an act that was originally a criminal offense. The definition of decriminalization must be distinguished from the definition of depenalization, which is a process of eliminating criminal threats against acts which were originally criminal acts, but prosecution is still possible by other means, namely through civil law or administrative law. Soedarto, *Hukum dan Hukum Pidana (Law and Criminal Law)*, Bandung: Alumni, 2007, p. 31-32.

²¹Soerjono Soekanto, *Kriminologi Suatu Pengantar (Criminology as an Introduction)*, Jakarta, Ghalia Indonesia, 1981, p. 62.

²²Soedarto. *Op. Cit.*, p. 32 dan p. 151. Read also Soedjono, *Pertanggungjawaban Dalam Hukum Pidana (Liability in Criminal Law)*, Bandung: Alumni, 1981, p. 22. Muladi, *Demokratisasi, Hak Asasi Manusia, dan Reformasi Hukum di Indonesia (Democratization, Human Right and Law Reformation in Indonesia)*, Jakarta: The Habibie Center, 2002, p. 255.

constraints including: prohibited acts must be evil, there are non-trivial losses or non-trivial losses, which are heavy (the nontrivial harm or evil constraint); the wrongfulness constraint, criminal liability can only be given in accordance with the mistakes committed by the perpetrators (the principle of giving a fair sentence); there is a balance between wrongdoing and criminal sanctions (proportionality in punishment); and the crime must be proven (the burden of proof constraint).²³

Husak also pointed out the importance of paying attention to criteria outside criminal law which he called external constraints. Husak asserted that the legislators must pay attention to the constraints regarding the basis of criminal justification derived from the Basic Law. First, regarding fundamental rights or freedoms, both derived from the Basic Law such as the right to express opinions and fundamental rights that are ingrained in national culture such as marriage. Second, is the non-fundamental freedom.²⁴ Related to the rearrangement of defamation articles, therefore it can also be analyzed based on the external constraints of Husak, especially regarding the requirement for legislators to pay attention to the 1945 Constitution of the Republic of Indonesia.

In the context of a democratic country, it is important to question the relevance of giving criminal sanctions to defamation or humiliation cases. In countries that consistently implement democracy, the articles of defamation in criminal law are considered as a threat to freedom of expression. Therefore, actions that are considered detrimental to one's reputation, will usually be held accountable through civil law, not criminal. In the United States (US) for example, criminal liability is not known for acts of defamation or contempt, because it is considered contrary to the First Amendment in the US Constitution which guarantees freedom of speech and freedom of the press. This was even more pronounced after the US Supreme Court's ruling in the New York Times versus Sullivan case in 1964.²⁵ Since the ruling was issued, civil lawsuits were very rarely filed against defamation cases.²⁶ The same thing happened in the Netherlands, the provision of defamation in the Dutch "Penal Code" has changed to a civil case since 1978.²⁷ Most other developed countries have also removed criminal charges due to defamation.²⁸

If the definition of criminalization above, especially the view of Husak is related to defamation cases using the ITE Law regime, as mentioned earlier by the author, namely the Prita Mulyasari case and the Baiq Nuril case, as well as other similar cases, then it is illustrated that the handling of these cases by law enforcement, turns out to prioritize aspects of criminal law. While the nature of criminal law as *ultimum remedium* must be the final consideration for the legislators. If there are other means to achieve goals, there is no need to use criminal law as a means. This is also in line with the views of Roeslan Saleh:²⁹

"In general, it can be said that by law, in principle, all actions can be declared as criminal acts, but good lawmakers will decide so only if other ways to overcome them are deemed to fail or will fail. When such a thing will happen, it cannot just be stated in general. He depends on the state of life of certain people at a certain time. Meanwhile, it also plays a role regarding what are the principles pursued by criminal law". Roeslan further said, "In general we can say that if the government believes certain goals can be achieved by civil law or administrative law, then he will turn away in whole or in part from criminal law ...".

C.3. Criminal Acts and Criminal Liability in Defamation through Electronic Media

The provisions contained in Article 27 paragraph (3) in conjunction with Article 45 paragraph (1) of the ITE Law appear to be simple when compared to the articles of defamation in the Criminal Code which are more detailed. Therefore, the interpretation of Article 27 paragraph (3) of the ITE Law must refer to the articles of defamation and contempt in the Criminal Code, because within the ITE Law itself, there is no understanding of defamation. By referring to Article 310 paragraph (1) of the Criminal Code, defamation is interpreted as an act of attacking the honor or reputation of someone by accusing something that has a clear purpose so that it is known publicly. The formulation of Article 27 paragraph (3) of the ITE Law states that: "*Everyone intentionally and without the right to distribute and/or transmit and/or make access to electronic information and/or electronic documents containing contempt and/or defamation*". Meanwhile according to Article 310 paragraph (1) of the Criminal Code states: "*Anyone who intentionally attacks the honor or reputation of a person by accusing something, which means clear so that it is known publicly, is threatened because of pollution with a maximum of nine months imprisonment or a maximum fine. four thousand and five hundred rupiah*". While related to the provision of criminal defamation in the ITE Law, it is regulated in Article 45 Paragraph (1).

The provisions of Article 27 paragraph (3) of the ITE Law cannot be separated from the main legal norms of Article 310 and Article 311 of the Criminal Code as a *genus delict*, which requires a complaint. Strictly speaking, Article 27 paragraph (3) of the ITE Law is a complaint offense. This is as contained in the Decision of the Constitutional Court (MK) Number 50/PUU-VI/2008. As for the intended victim as a person (*natuurlijk person*) not a legal entity (*recht person*). Therefore, if there is a report of a criminal offense without a complaint from the victim in the form of a legal entity (*recht person*) including but not limited to a person (*natuurlijk person*) who is not the party who experienced direct defamation according to the article in question related to defamation based on Article 27 paragraph (3) jo Article 45 paragraph (3) of the ITE Law, so from the outset it should be ruled out by investigators.

Furthermore, the provisions contained in Article 27 paragraph (3) jo Article 45 paragraph (3) of the ITE Law consist of several elements, each of which must be fulfilled and cannot stand alone, so the logical consequence of this is that the Public Prosecutor must be able to prove the whole these elements in his indictment. The elements are as follows:

²³Douglas Husak, *Overcriminalization: The Limits of The Criminal Law*, Oxford: Oxford University Press, 2009, p. 55-102.

²⁴*Ibid.*

²⁵Halim, M., et al. (2009). *Menggugat Pasal-Pasal Pencemaran Nama Baik (Suing Articles of Defamation)*, Jakarta: LBH Pers, p. 27.

²⁶*Ibid.*

²⁷*Ibid.*

²⁸*Ibid.*

²⁹Roeslan Saleh, "Arah dan Asas dalam Kebijakan Kriminalisasi dan Dekriminalisasi" ("The Direction and Principle in Criminal and Decriminalization Policy"), (Paper presented at *Seminar Nasional Kriminalisasi dan Dekriminalisasi dalam Pembaharuan Hukum Pidana Indonesia*, organized by UII, Yogyakarta, 15 July 1992), p. 1.

1. The Element "Intentionally and Without Rights"

The validity and application of Article 27 paragraph (3) jo Article 45 paragraph (3) of the ITE Law must be linked to Article 310 and Article 311 of the Criminal Code as a *genus delict*. This is based on the Constitutional Court Decision Number 50/PUU-VI/2008 in the *ratio decidendi*, stating:

"Considering that both the DPR and the Experts proposed by the Government have explained before the Court hearing that Article 27 paragraph (3) of the ITE Law does not regulate new criminal law norms, but only confirms the enactment of norms of criminal law in contempt of the Criminal Code into new laws because there are special additional elements, namely developments in the electronic or cyber fields with very special characteristics. Therefore, the interpretation of the norms contained in Article 27 paragraph (3) of the *a quo* Law concerning defamation and / or defamation cannot be separated from the criminal law norms contained in Chapter XVI concerning Insult contained in Article 310 and Article 311 of the Criminal Code, so the constitutionality of Article 27 paragraph (3) of the ITE Law must be related to Article 310 and Article 311 of the Criminal Code."

"That apart from the Court's consideration outlined in the previous paragraph, the validity and interpretation of Article 27 paragraph (3) of the ITE Law cannot be separated from the main legal norms in Article 310 and Article 311 of the Criminal Code as a *genus of delict* which requires a complaint (*klacht*) for can be prosecuted, must also be treated for acts prohibited in Article 27 paragraph (3) of the ITE Law, so that the Article *a quo* must also be interpreted as an offense that requires a complaint (*klacht*) to be prosecuted before the Court".³⁰

In the provisions of Article 27 paragraph (3) jo Article 45 paragraph (3) of the ITE Law expressly expresses the elements "intentionally and without rights" as an offense that must be proven by the Public Prosecutor. That is, the Public Prosecutor must be able to prove in his indictment that there is an element of "intentional and without rights". As it is known, intentionality is a form of fault, which is one of the elements that determines criminal liability.³¹

More about the element of 'intentional' can be explained, that the condition of a crime committed intentionally is the principle of "*willens en wetens veroorzaken van een gevolg*", namely to desire and understand the occurrence of an action and its consequences. Means there must be a will (*oogmerk*) and knowledge that the actions taken will have certain legal consequences, where the element of intent has 3 gradations, namely:

1. intentional intent (*opzet als oogmerk*);
2. intentional awareness of the consequences (*opzet bij zekerheids-bewustzijn*);
3. intentionality with possibility (*opzet bij mogelijkheids-bewustzijn*).³²

With regard to the above, Article 27 paragraph (3) jo Article 45 paragraph (3) of the ITE Law applies three intentional gradations, where the Public Prosecutor must objectify and concretize them by proving which intentions are carried out by the Defendant. The inability of the Public Prosecutor in proving which gradation is one of the 'intentional' elements, causes the judge to issue a free decision on the defendant.

Meanwhile, the element "without rights" is one form of violating the law.³³In principle, against the law becomes an absolute element in criminal acts, if explicitly mentioned in the formulation of offense. Because Article 27 Paragraph (3) jo Article 45 Paragraph (3) expressively *verbis* the element "without rights" as an offense, the Public Prosecutor is also obliged to prove that an act of spreading information as charged is carried out without rights.

If it is against the law as *bestandellen van het delict* or explicitly stated in the formulation of a criminal offense, the Public Prosecutor must include and elaborate it in the indictment and then prove it in court. The inability of the Public Prosecutor to prove this element against the law, the logical consequence is that the defendant must be acquitted of the indictment of the public prosecutor (*vrijspraak*). However, it is different from the position against the law as *elementen van het delict*, although it is not explicitly stated in the formulation of a criminal offense, but against the law as *elementen van het delict* is required to exist in every crime. In practice, the Public Prosecutor in this matter does not need to include and elaborate it in the indictment and there is also no obligation to prove it in court, but the Defendant is trying to prove that the actions he did were not illegal. When it is against the law that *elementen van het delict* is not found in the act committed, then the logical consequences of the defendant must be released from all charges (*onslag van alle rechtsvervolging*).³⁴

2. The Element "Electronic Information and/or Electronic Documents which have content of defamation and/or defamation"

It is known that, Article 27 paragraph (3) jo Article 45 paragraph (3) of the ITE Law is a *species delict* from Article 310 of the Criminal Code as a *genus delict*. According to R. Soesilo, the insult referred to in Article 310 of the Criminal Code is "attacking one's honor and good name". Against this insult, it can only be prosecuted if there is a complaint from the person suffering (offense complaint). The object of the humiliation must be "an individual person", meaning that it is not a government

³⁰Constitutional Court Ruling Case Number 50/PUU-VI/2008.

³¹Chairul Huda and Lukman Hakim, *Tindak Pidana Dalam Bisnis Asuransi* (Criminal Act in Insurance Bussines), Jakarta: LPHI, 2006, p. 98.

³²P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (The Basic of Indonesia Criminal Law), Bandung: Citra Aditya Bhakti, 1997, p. 309. Look also E.Y. Kanter and S.R. Sianturi, *Asas-asas Hukum Pidana* (The Principles of Criminal Law), Jakarta: Stora Grafika, 2002, p. 202.

³³Andi Hamzah, *Asas-Asas Hukum Pidana* (The Principles of Criminal Law), Jakarta: Rineka Cipta, 2014, p. 104. Also look Chairul Hudadan Lukman Hakim, *Op. Cit.*, p. 77.

³⁴*Ibid.*

agency, an administrator of a community, a group of residents, and so on. In order to be punished according to the provisions of Article 310 of the Criminal Code, the humiliation must be carried out by accusing someone of certain acts in order to make the accusation known or widely known. The act referred to here is a shameful act.³⁵ Meanwhile according to Adami Chawazi, "Defamation is an act that attacks the good name. Offensive reputation is to convey words (words or a series of words/sentences) by accusing certain acts of being committed, and those aimed at the honor and good name of a person which can result in a person's sense of dignity, humiliation, humiliation or humiliation".³⁶ As for Leden Marpaung stated, "Honor or good name is something that is owned by humans who are still alive. Because it is a crime against honor and reputation is generally directed against someone who is still alive. "As for legal entities, he said" no honor".³⁷

To prove the existence of contempt according to Article 27 Paragraph (3) jo 45 Paragraph (3) of the ITE Law, first there must be proven defamation in Article 310 of the Criminal Code as a *lex generalis* (general regulation) of defamation. Plus one more element in particular, which is also proven defamation using electronic means, where the scope of criminal offenses of the general form and the specific form must be the same. Therefore, if Article 310 of the Indonesian Criminal Code is not met or is not proven, then by itself, the element is not fulfilled or is not proven either Article 27 Paragraph (3) jo 45 Paragraph (3) of the ITE Law.³⁸

Likewise, Article 27 paragraph (3) from the ITE Law is *lex specialis* (special regulation) of Article 310 of the Indonesian Criminal Code. Acts in Article 310 paragraph (1) and paragraph (2) of the Criminal Code do not enter into blasphemy or blasphemy with writing (not punishable by law), if the accusation is made to defend the public interest or forced to defend themselves. This is as stated by Muladi which explained the relation of Article 310 to 311 of the Criminal Code, that is, those who can report defamation as stated in Article 310 of the Criminal Code are those who are attacked by their honor, are demeaned, so that their names become publicly reprehensible. However, there is still a defense for those accused of defamation if they submit information to the public (Article 310 paragraph (3) of the Criminal Code). First, the delivery of information is intended for the public interest. Second, to defend yourself. Third, to reveal the truth, so that people who convey information, verbally or in writing are given the opportunity to prove that the purpose is true. If it cannot prove the truth, it is called defamation or defamation according to Article 311 of the Criminal Code.³⁹

If the two elements contained in Article 27 paragraphs (1) and (3) in conjunction with ITE Law Article 310 of the Criminal Code are related to the actions of Prita Mulyasari and Baiq Nuril who convey factual information experienced and then harm them through electronic media, so this information needs to be known by the community. This certainly does not meet the elements requested by Article 27 paragraph (3) and (1) of the ITE Law in conjunction with Article 310 of the Criminal Code. Because Article 310 of the Criminal Code itself as a *genus delicti* Article 27 paragraph (3) and (1) of the ITE Law has excluded criminal acts of defamation of: First, the delivery of information is intended for the public interest. Second, to defend yourself. Third, to reveal the truth, so that people who convey information, verbally or in writing are given the opportunity to prove that the purpose is true.

Furthermore, even though based on the principle of legality,⁴⁰ there may be nothing wrong with the above conviction, meaning that the contents of the court's decision as long as the Judge decides that he believes has based himself on positive law that can be said to be legally valid. However, in line with Moeljatno's view, "In accordance with Article 14 paragraph (2) of the 1950 Provisional Constitution (UUDS) which reads: No one may also be prosecuted for punishment or sentenced, except because of existing legal rules and applicable to it. Thus, also for the entry into force of customary criminal law a solid basis is given. Even though the temporary Constitution is no longer valid, in my opinion, from the reading of Article 5 paragraph 3b of the 1951 Emergency Law No. 1 above, no one would deny the validity of the provision based on the non-validity of Article 14 Paragraph 2 of the Provisional Constitution".⁴¹ The term rule of **Law (Recht)** which is certainly broader in understanding than just the rule "law" (*wet*), because the notion of "law" (*recht*) can be in the form of "written law" or "unwritten law".

In the end, as much as possible should be able to eliminate the stigma of the community related to the emergence of symptoms of overcriminalization in criminal acts of defamation under this ITE Law. An example can be seen from the court's decision on Prita, Baiq Nuril and other similar cases. Among others due to the provisions in several articles in the ITE Law which are still multiple interpretations so that it requires a more comprehensive explanation, an understanding of law enforcement that prioritizes the principle of legality compared to the principles/theories of criminal law that exist in the criminal law system, as well as the criminalization policy of the ITE Law itself which is more prioritize aspects of punishment compared to other aspects. As for the duties of the Judge in court, it is associated with handling defamation cases based on the ITE Law, so that as far as possible it can also eliminate stigma in society, who see it as if the judicial work is only seen as an act of adjudication that only prioritizes the formulation of offense, as well as ignoring the existing criminal law principles that underlie it. The "noble" task of being Judges in the matter of 'adjudicating' is considered to have been completed when the actions of the defendant have matched the entire offense formula, without further elaborating whether the charged actions are actually in

³⁵The Explanation of Chapter XVI Articles 310 to 321 of the Criminal Code. See also R.Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal (Criminal Code and also its Comments on Article by Article)*, Bogor: Politeia, 1995, p. 225-226.

³⁶Adami Chawazi, *Hukum Pidana Positif Penghinaan (Positive Criminal Law about Defamation)*, Surabaya: ITS Press, 2009, p. 89.

³⁷Leden Marpaung, *Tindak Pidana Terhadap Kehormatan (Criminal Act about Honor)*, Jakarta: Sinar Grafika, 2010, p. 47.

³⁸Constitutional Court Ruling Case Number 50/PUU-VI/2008.

³⁹(Online 30 May 2015). Available on <http://www.hukumonline.com/berita/baca/hol12901/ancaman-pencemaran-nama-baik-mengintai-tanggal-30-may-2015>-Prof. Muladi, Guru Besar Hukum Pidana, "Ancaman Pencemaran Nama Baik Mengintai" ("The Threat of Defamation Lurks"). (Seen on 9 August 2019).

⁴⁰The principle of legality is contained in the Criminal Code, Article 1 paragraph (1) which reads, "An act cannot be convicted, except based on the strength of the provisions of existing criminal laws".

⁴¹Moeljatno. *Asas-asas Hukum Pidana (The Principles of Criminal Law)*, *Op. Cit.*, p. 28

contrary to the appropriateness in community and whether the defendant's circumstances are actually appropriate to serve as the basis for criminal conviction.⁴²

D. CONCLUSION

1. The appearance of court decisions that impose verdicts (*veroordeling*) on users of electronic media facilities on the basis of Article 27 paragraph (1) and (3) jo Article 45 paragraph (1) and (3) of the ITE Law, often disturbs the sense of justice in the community, this results in the emergence of stigma in society. Among others due to the provisions in several articles in the ITE Law which are still multiple interpretations so that it requires a more comprehensive explanation, an understanding of law enforcement that prioritizes the principle of legality compared to the principles/theories of criminal law that exist in the criminal law system, as well as the criminalization policy of the ITE Law itself which is more put forward the criminal aspects compared to other aspects.
2. Defamation offenses contained in Article 27 paragraph (3) of the ITE Law is a *species delict* of Article 310 of the Criminal Code as a genus delict, which is also strengthened by the Constitutional Court Decision Number 50/PUU-VI/2008. The logical consequence of this is that the Public Prosecutor in his indictment must include all elements contained in the provisions of the article charged against the defendant, where as a result of not fulfilling one of the elements in the indicted article, the defendant must be given a free decision (*vrijspraak*). If it is related to the actions of Prita Mulyasari and Baiq Nuril who convey factual information experienced and then harm them, so this information needs to be known by the public, this certainly does not meet the elements requested by Article 27 paragraph (3) and (1) of the Law ITE jo Article 310 of the Criminal Code. Because Article 310 of the Criminal Code itself as a genus delict Article 27 paragraph (3) and (1) of the ITE Law has excluded criminal acts of defamation as long as: First, the delivery of information is intended for the public interest. Second, to defend yourself. Third, to reveal the truth, so that people who convey information, verbally or in writing are given the opportunity to prove that the purpose is true.

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