

**JURIDICAL REVIEW CONCERNING INTELLIGENT AND WITHOUT RIGHTS  
TO DISTRIBUTE AND/OR TRANSMIT AND/OR ACCESS ELECTRONIC  
INFORMATION AND/OR ELECTRONIC DOCUMENTS THAT HAVE  
A CONTAMINATION AND/ OR DEFAULT  
(Study of Decision Number 204/Pid.Sus/2021/PN Tjk)**

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**ABSTRACT:** This research was conducted with the aim of knowing how the criminal act of defamation according to the Criminal Code and how the criminal act of defamation according to Law Number 19 of 2016 concerning ITE. By using a normative juridical research method, it is concluded: 1. The crime of defamation is regulated in detail in the Criminal Code. The Criminal Code is formulated in Articles 310 and 311 of the Criminal Code. the elements of defamation or insult according to Article 310 of the Criminal Code are: 1. intentionally; 2. to attack honor or reputation; 3. accuses of committing an act; 4. broadcast the accusations for public knowledge. If these elements of insult or defamation are only spoken (verbally insulting), then the act is classified in Article 310 paragraph 1 of the Criminal Code. However, if these elements are carried out by means of letters or pictures that are broadcast, shown or pasted (blasphemed with letters), the perpetrator can be charged with or subject to legal sanctions in Article 310 paragraph 2 of the Criminal Code. However, not all criminal acts of defamation can be punished, if the act is clearly committed in the public interest or forced to defend themselves (Article 310 paragraph 3 of the Criminal Code).

**Keyword:** Defamation, Good Name, ITE

## **INTRODUCTION**

Indonesia is a state of law, this is stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Furthermore, Article 27 paragraph (1) reads "All citizens are equal before the law and government and are obliged to uphold the law and government with no exceptions". For legal protection, it is emphasized in Article 28 D paragraph (1) Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law.

In the current digital era, the internet is very closely related to everyday life. The internet is a communication network that has a function to connect one electronic media to another quickly and precisely. However, with its functions, people sometimes misuse it unwisely in using the internet. One of the most common uses of the internet in society is defamation. Defamation is any person who intentionally and without rights distributes and/or transmits and/or creates, damages self-esteem, dirty self-esteem or good name of a person, and the act is carried out against the law or contrary to ethics.<sup>1</sup>

Ethics comes from the Greek *ethos* (singular word) which means: place to live, pasture, stable, habit, custom, character, attitude, way of thinking. The plural is *ta etha*, which means custom. In this case, the word ethics has the same meaning as morals. Moral comes from the Latin word: *Mos* (singular form), or *mores* (plural form) which means customs, habits, behavior, character, character, morals, way of life.<sup>2</sup>

According to Bertens there are two meanings of ethics: as practical and as reflection. As a practical matter, ethics means values and moral norms that are either practiced or not practiced, even though they should be practiced. Ethics as practical means the same as morality or morality, namely what to do, not to do, appropriate to do, and so on. Ethics as a reflection is a moral thought.<sup>3</sup>

Rules or norms are provisions that stipulate what actions must be done, prohibited from being done or allowed to be done by people in certain situations. In other words, consciousness and its logical function give rise to rules about how to behave in human consciousness. This ability along with the values and rules of behavior that it raises causes humans to have the freedom to determine their own attitude towards anything and decide for themselves to do any action according to their own beliefs and choices. Man is fully responsible and must be responsible for whatever he decides and does and because of that he can always be held accountable for whatever actions he has done, because all of them are the result of his free choice.<sup>4</sup>

Information and communication technology media connects people in all parts of the world. Almost all human activities can be carried out through this new media, starting from communication, transactions, and others. Indonesia is the 9th largest country with smartphone

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<sup>1</sup> Fani Indriani. 2016. Tinjauan Yuridis Tindak Pencemaran Nama Baik Melalui Media Sosial Berdasarkan Pasal 27 Ayat (3) Undang-Undang Nomor 11 tahun 2008 Tentang Informasi Dan Transaksi Elektronik Dikaitkan Dengan Kebebasan Berpendapat, JOM Fakultas Hukum, Vol III No 1, hlm. 5.

<sup>2</sup> Abuddin Nata. 2017. Akhlak Tasawuf dan Karakter Mulia. Raja Grafindoh, Jakarta, hlm. 75

<sup>3</sup> Bertenz K. 2007. Etika. PT Gramedia Pustaka Utama, Jakarta, hlm. 22.

<sup>4</sup> Bernard Arief Sidharta. 2017. Ilmu Hukum Indonesia: Upaya Pengembangan Ilmu Hukum Sistematis Yang Responsif Terhadap Perubahan Masyarakat, Yogyakarta, hlm. 3.

users in the world. It is calculated that there were 57.7 million users in 2014, and 71.6 million in 2015, and this number is increasing and is estimated to reach 100 million in 2017. Smartphones are the most popular devices for accessing the internet (65.7 percent of the total population of internet users), followed by desk computers. (52 percent of the total population of internet users), laptops (45.1 percent of the total population of internet users), and tablets (1.9 percent of the total population of internet users).<sup>5</sup>

In January 2021, the number of people using the internet worldwide will reach 4.66 billion. This number increased by 316 million people (7.3 percent) compared to the same period last year. Currently, the global internet penetration rate reaches 59.5 percent. One of the triggers is the Covid-19 pandemic which makes people have to stay at home and connect using the internet. The number of internet users in the world may even be greater than the figures above. Currently, there are 4.2 billion social media users worldwide. This figure also experienced an increase of about 490 million users in the last 12 months. An increase from the previous year by 13 percent. In fact, half of the global population (about 53 percent) are now social media users.<sup>6</sup>

Defamation according to Article 310 of the Criminal Code is to attack someone's honor or good name by accusing something, which means it is clear so that it is known to the public. This includes in the form of writings and images that are broadcast, displayed, and posted in public. Law Number 11 of 2008 concerning Information and Electronic Transactions (State Gazette of 2008 Number 58), hereinafter referred to as UU ITE, emerged in its time by declaring itself as a new legal regime. <sup>6</sup> This law is predicted to be a solution to problems arising from electronic transactions and information, including electronic information that contains content that defame others. Prior to the issuance of the ITE Law, legal rules regarding defamation were regulated in Chapters II, VIII, and XVI of the Second Book of the Criminal Code. In 2016, the ITE Law was amended by adding norms and explanations about criminal acts of defamation in Law no. 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (State Gazette of the Republic of Indonesia of 2016 Number 251), hereinafter referred to as Amendments to the ITE Law.

Legal consequences are all consequences that occur from all legal actions carried out by legal subjects against legal objects or other consequences caused by certain events which by the law in question itself have been determined or considered as legal consequences. This legal

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<sup>5</sup> Anton Hendrik Samudra dan Andrian Julius. 2017. Online Transaction Fraud Methods in Indonesia and the Norm of Deterrence: The Challenges and Obstacles dalam Elfina L. Sahetapy et.al., Tackling Financial Crimes: Various International Perspectives. Genta Publishing, Yogyakarta, hlm. 165-166.

<sup>6</sup> <https://www.liputan6.com/tekno/read/4469008/pengguna-internet-dunia-tembus-466-miliar-rata-rata-online-di-smartphone-diakses-pada-tanggal-27-Oktober-2021>

consequence then gives birth to rights and obligations for legal subjects. Or in other words the consequences of the law are the consequences caused by legal events.

There was a case that occurred in Bandar Lampung on May 13, 2020, because of jealousy a person with the initials YP committed a criminal act of defamation against the United States. At that time the defendant (YP) knew that AS (the victim) had sent a chat and called the defendant's girlfriend (AF), immediately YP asked for clarification from AS, but YP was not satisfied with the answer from AS. Because in an emotional state YP opened his Instagram account and saw the victim's witness uploading a photo on his Instagram account, because in an emotional state, the defendant took a screenshot and reposted the photo via his Instagram account instastory with the caption ``Cheap girl, how come you don't dare to be called? wkwkwkwk`` by directly tagging the victim's witness's Instagram account, it can be seen and accessed by many people and known by the victim's friends. In this case the defendant has been charged by the Public Prosecutor with a single charge as stipulated in Article 45 paragraph (3) in conjunction Article 27 paragraph (3) of the Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Transactions Electronic. Stating that the defendant (YP) was found guilty, sentenced him to 5 months imprisonment.

### **Problem**

1. What are the factors causing the criminal act of defamation based on the study of Decision Number 204/Pid.Sus/2021/PN Tjk?
2. How is criminal responsibility for perpetrators of criminal defamation based on Decision Number 204/Pid.Sus/2021/PN Tjk in information and electronic transactions?
3. What is the basis for the judge's consideration in Decision Number 204/Pid.Sus/2021/PN Tjk in information and electronic transactions?

### **Research Methode**

The research method uses a normative and empirical juridical approach. The types of data used are secondary data and primary data. Collecting data through library research (library research) and field research (field research). The data analysis used is juridical qualitative.

## **DISCUSSION**

Cyber crime is a crime in cyberspace. The classification of criminal acts regarding cyber crime is explained in Articles 27 to 37 of the ITE Law. The construction of these articles regulates in more detail the development of traditional crime modes as stated in the Criminal Code. One

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<sup>7</sup> Tami Rusli. 2017. Pengantar Ilmu Hukum. AURA, Bandar Lampung, hlm. 100

example of a cyber crime is a criminal act of defamation through electronic social media because it is carried out using electronic media. The lack of public awareness in using the internet wisely causes many problems.

The crime of defamation is an act that attacks the good name. Assault on reputation is conveying words (words or series of words/sentences) by facilitating certain actions and aimed at the honor and good name of people which can cause the person's sense of self-esteem or dignity to be desecrated, humiliated or humiliated. Article 27 paragraph 3 of Law Number 19 of 2016 concerning ITE.

According to the Constitutional Court Decision Number 50/PUU-VI/2008, the interpretation of the norms contained in Article 27 paragraph 3 of the ITE Law regarding insults and/or defamation cannot be separated from its genus, namely the norms of criminal law contained in Chapter XVI concerning insults that contained in Article 310 and Article 311 of the Criminal Code, so that constitutionally Article 27 paragraph 3 of the ITE Law must be linked to Article 310 and Article 311 of the Criminal Code. Thus, all elements of the criminal act of defamation in Article 27 paragraph 3 refer to the understanding and essence of the element of defamation from Articles 310 and 311 of the Criminal Code. The prohibition of containing insults as regulated in Article 27 and Article 28 of Law Number 19 Year 2016 is actually made to protect the rights of individuals and institutions because basically the information that we are going to publish should have obtained permission from the person concerned so that the person concerned does not feel harmed by the act so that it can be held accountable.

Crime in cyberspace is a modern crime that has emerged along with the development of science and technology. Crimes in cyberspace have different characteristics from conventional crimes contained in the Criminal Code. Law Number 11 of 2008 which was later amended by Law Number 19 of 2016 concerning Information and Electronic Transactions is a legal product that regulates problems in cyberspace or the internet. Several articles in the ITE Law that are prohibited from being violated in using the internet or actions that are prohibited from accessing the internet are Article 27, Article 28 and Article 29.

By using articles of the Criminal Code to ensnare perpetrators of defamation via the internet, some legal experts have declared that the Criminal Code cannot be applied, but some other legal experts think that the Criminal Code can reach it. However, apart from the debate, what is clear is that the Constitutional Court (MK) when giving a decision on the application for judicial review of Article 27 paragraph 3 of Law Number 11 of 2008 concerning Information and Electronic Transactions, in its legal considerations stated: publicly known, or broadcast in Article 310 paragraph 2 of the Criminal Code cannot be applied in cyberspace, so it requires an extensive element, namely distributing and/or transmitting, and/or, and/or making accessible

electronic information and/or electronic documents containing content. humiliation and/or Defamation.

In essence, the Constitutional Court stated that certain articles in the Criminal Code were deemed insufficient to answer legal issues that arose as a result of activities in cyberspace. Indeed, the rule of defamation law is not only accommodated by the Criminal Code but also legal products outside the Criminal Code which also apply criminal sanctions, where the legal product is Law Number 11 of 2008 as amended in Law Number 19 of 2016 concerning ITE . Therefore, referring to the decision of the Constitutional Court as mentioned above, in the case of defamation via the internet, the law used to resolve it is the ITE Law, not the Criminal Code. What is meant by the intentional or intentional element here is that the person does know and wants the information containing the contamination to be spread to damage someone's honor or good name. However, it cannot be categorized as defamation according to Article 27 paragraph 3 of the ITE Law if the following elements are not fulfilled. Therefore, it must also be seen that the element "without the right to distribute", so that there must be an element of intentionality and an "element without distributing", where both elements are cumulative. Thus, the element of "without the right to distribute" is interpreted: that information containing defamation is intentionally disseminated or distributed to everyone, such as to various mailis and not only limited to friends. However, if he spreads the information he has only to his own friends, then that means he does have the right.

How about just forwarding emails or forwarding/distributing information obtained from friends to other friends?. For cases like this, the responsibility for distribution is only to the friends who sent it. Therefore, this cannot be ensnared in the article on defamation according to the ITE Law. Thus, the notion of distribution is distribution in the sense that it only provides information to friends. If someone intentionally spreads libelous information to mailings A, B and C and sends it to everyone, not just friends, then that person has "unrightfully distributed" defamatory information.

The defamation article in the ITE Law does indeed cause controversy. In fact, it is considered that this is the emergence of a new style of rubber article or hatzaaiarticleen. This article is also considered more cruel than the defamation article in the Criminal Code, because there is a large disparity in terms of punishment. Criminal sanctions, which are regulated by the ITE Law are higher than articles in the Criminal Code and the maximum number is 6 years in prison, and is one of the conditions for people to be detained first in the investigation process compared to Article 310 of the Criminal Code which only provides a threat of 9 months in prison. . Thus, the substance of the accusation is the same, but under the ITE Law, the punishment given is heavier than the Criminal Code. Whereas in the provisions of Article 27 paragraph 3 and Article 45 paragraph 1 of the ITE Law there is no clear definition of what is meant by insult or defamation.



Therefore, to determine whether the element of defamation has been fulfilled, one must also refer to Article 311 of the Criminal Code. Unfortunately, the Constitutional Court has even further confirmed the existence of the defamation article in the ITE Law. In its decision, the Constitutional Court stated that the state has the authority to prohibit the distribution/transmission of such information as part of protecting citizens' rights from threats of insults or defamation attacks. Article 27 paragraph 3 states that the Constitutional Court does not contradict the 1945 Constitution. In its considerations, the Constitutional Court recognizes the right of every citizen to seek, obtain, possess, store, process and store information. However, this right must not eliminate the rights of others to protect themselves, their families, their honor, their dignity and their good names. Therefore, it is the state's authority to regulate this that can be justified in order to create a more conducive situation for the fulfillment of the right to personal protection, family, honor, dignity, and one's good name.

According to the Constitutional Court, Article 27 paragraph 3 of the ITE Law only says that anyone intentionally and without rights distributes or transmits information or electronic documents that contain elements of insult. And the limitation is not carried out in order to suppress or suppress the basic rights to seek and obtain information. It was also added that the limitation in question could not necessarily be said to be a form of rejection or denial of democratic values.

However, an important note in the decision of the Constitutional Court that is quite reassuring is the answer to the ambiguity of the offense. If we open article 27 paragraph 3 of the ITE Law, in fact it does not explain whether this offense is included in the category of complaint offense or ordinary offense. Therefore, in its legal considerations, the Constitutional Court stated that in essence the inclusion of Article 27 paragraph 3 of the ITE Law was included in the complaint offense. If judging the decision of the Constitutional Court as a whole, it seems that the Constitutional Court did not look further at the philosophical values contained in the article on Defamation which leads to Articles 310 and 311 of the Criminal Code which are products of the Dutch colonialists, which could easily be used as a tool by the authorities to imprison people. , so that the Constitutional Court still stated that Article 27 paragraph 3 of the ITE Law remained in effect, even though the criminal sanctions were much heavier than the articles of insult in the Criminal Code. What is less important, apart from being regulated in the ITE Law, the Article on Defamation is also contained in Law Number 31 of 2002 concerning Broadcasting. This is regulated in Article 36 paragraph 5 of the Broadcasting Law which reads: "Broadcast content is prohibited: slanderous, inciting, misleading and/or lying; highlight elements of violence, obscenity, gambling, narcotics and drug abuse; or opposing ethnicity, religion, race and between groups. Based on the foregoing matters, law enforcement officers, both the police as the spearhead of the implementation of the Criminal Code and the Prosecutor's Office who file

prosecutions, need to be careful and not easy to follow up on reports regarding defamation or humiliation considering that these are very subjective in nature.

## CONCLUSION

Based on the results of research and discussion, it can be concluded that:

1. The crime of defamation is regulated in detail in the Criminal Code. The Criminal Code is formulated in Articles 310 and 311 of the Criminal Code. the elements of defamation or insult according to Article 310 of the Criminal Code are: 1. intentionally; 2. to attack honor or reputation; 3. accused of committing an act; 4. broadcast the accusations for public knowledge. If these elements of insult or defamation are only spoken (verbally insulting), then the act is classified in Article 310 paragraph 1 of the Criminal Code. However, if these elements are carried out by means of letters or pictures that are broadcast, shown or pasted (blasphemed with letters), the perpetrator can be charged with or subject to legal sanctions in Article 310 paragraph 2 of the Criminal Code. However, not all criminal acts of defamation can be punished, if the act is clearly committed in the public interest or forced to defend themselves (Article 310 paragraph 3 of the Criminal Code). In submitting criticism or opinions, it is protected by human rights and applicable laws and regulations.
2. The crime of defamation is explicitly regulated in Law Number 19 of 2016 namely in Articles 27, 28 and 29 which prohibits distributing and/or transmitting and/or making accessible electronic information, which contains insults and/or defamation. . Article 27 paragraph 3 of the ITE Law, to be categorized as a criminal act of defamation, the following elements must be proven: Deliberately, without rights (without permission), Aiming to attack the good name or honor, To be known by the public In addition, defamation is also regulated in Law Number 31 of 2002 Article 36 paragraph 5 concerning Broadcasting, which states that broadcast content is prohibited from being slanderous, inciting, misleading and/or lying.

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