



## **CRIMINAL POLICY TO THE INSULT AND DEFAMATION ACTIONS IN SOCIAL MEDIA BASED ON JUSTICE VALUES**

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### **Abstract**

"Twittering" in social media without considering legal corridor can end up in the realm of law, because twittering can be subject to legal offense. Socialization of Law Number 11 Year 2008 About Information and Electronic Transactions is not well spread. Therefore, there are many people who do not know the articles in the law that can ensnare the unlawful acts. Moreover, the existence of Circular Letter of the Chief of Police of the Republic of Indonesia Number 6 year 2015 regarding hate speech gets controversy in the society. The researcher formulated the problem in this study are: How is criminal policy against insults and/or defamation in Social Media handled based on justice values? This research was based on constructivism paradigm. The research type was descriptive and Prescriptive and used empirical juridical approach method. Primary data collection was done by doing observation and interview, while secondary data were primary legal material, secondary law materials and tertiary legal material. The data analysis used was descriptive qualitative. The results of the study and discussion show that the weaknesses in the regulation of insult and/or defamation in social media in Indonesia, namely: the provisions governing insult and defamation issues are regarded as not giving a strong foundation, from the juridical, philosophical and sociological aspects. It can lead to "multiple interpretations". Is it for the prevention actions, punishment or restraining freedom of expressions? Even the offense of complaint makes Article 27 paragraph (3) UUIE become "rubber article". Article 27 paragraph (3) UUIE is also overlapping (inconsistent) with the 1945 Constitution, Law Number 14 Year 2008 on Public Information Transparency, Law Number 40 Year 1999 About Press, Law Number 8 Year 1999 About Consumer Protection, and Article 310 and Article 311 Penal Code. The excess is the uncertainty of the law in overcoming content that contains insult and/or defamation content on social media. Therefore, the idea of the study is about criminal policies against insult and/or defamation in social media, and also this study is expected to provide input for the improvement of the rule of law in the criminal policy against insult and/or defamation in social media.

**Keywords:** Criminal Policy, Insults and Defamation, Social Media, Justice Values

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## **1. Introduction**

Social media is becoming a new space in human life, and it seems to be the second home for its users. Social media or apps like Facebook, Twitter, Blackberry Messenger (BBM), Line, WhatsApp, Youtube, Google, Yahoo Messenger, and others are used as a means of writing, sending photographs, videos, or negative content such as pornography, immoral, gambling, threats, extortion, fraud by various modes, seductions, tricks, to deeds containing insult and/or defamation. Any information such as news, articles, videos, photos, containing negative content accessed through social media can spread and take place so quickly. The speed of disseminating technological information is much faster all over the world than conventional information dissemination. Similarly, acts that contain insult and/or defamation in social media spread very quickly. When the information is transmitted or sent to social media (upload), within a few seconds the spread is cannot be undone.

Investigator Ditkrimsus (Directorate of Special Crimes) Police of North Sumatra arrested a lecturer of Library Science at the University of North Sumatra (USU) named HimmaDewiyanaLubisa.k.aHimma for allegedly spreading hoax information about bombs in 3 (three) churches in Surabaya. A nurse from Batam City, Riau Islands, named RiaSiregar was arrested by SatReskrim (Criminal Unit) PolrestaBarelang. This arrest was due to post a status that contains SARA (Tribe, Religion, Race and between group. A housewife with initials WF (37) in Aceh has to deal with the police after uploading pitiful postings on social media. And still many other cases that led to the realm of law as a learning point for anyone who will use social media to express opinions, criticism, and freedom of expression. All must refer to the legal corridor.

Article on defamation or offense of reputation in Article 27 paragraph (3) UUIE has congenital defects, confusion formula, and inconsistency of criminal law. As long as the criminal threat a maximum of 6 years in prison and/or a fine of Rp. 1.000.000.000 (one billion rupiah) in Article 27 paragraph (3) UUIE is not revised, it is incriminating those who are considered to be violating this article. Immediate perpetrators may be detained during an investigation because of their criminal sentences of more than 5 (five) years imprisonment. The size of the crime in Article 27 Paragraph (3) of UUIE is equivalent to theft and murder cases, even beyond the punishment for the corruptor.

The Government has reconstructed a criminal policy in Article 27 paragraph (3) of the UUIE which prohibits the dissemination of electronic information and/or electronic documents containing insult and/or defamation content through social media as a means. Although the usual offense of the article has been changed to complaint offense, the threat of criminal sanction has also been reduced from 6 (six) years in prison to 4 (four) years imprisonment, a fine of 1 billion rupiah to 750 million rupiah, and the addition of the provisions on "the right to forgotten" at the request of the person concerned on the basis of the court's determination, but the policy to reconstruct the article is still deemed incomplete.

## **2. Research Methods**

This research was based on the paradigm of constructivism. It is a paradigm which the truth of a social reality is seen as the result of social construction, and the truth of a social reality is relative. The research properties used were descriptive and prescriptive. In addition to describe and figure out the facts in the field descriptively as well as analyze the facts through statutory approach to perform prescriptions. The method used in this

research was the empirical juridical approach method. Sources of the data in the study consisted of data obtained directly and from library materials. This study used secondary and primary data obtained through data collection methods in the following way: Library study and field study were done by conducting interviews. Data analysis method used was descriptive qualitative. Researchers are expected to analyze it by combining every problem that exists.

### **3. Research and Discussion Result**

#### **Criminal Policy Against Insults and/or Defamation in Social Media In Indonesia Nowadays**

People now are in national and international new civilization where people are in information technology based on a digital environment. The Internet has brought considerable impact to the world community by bringing the concept of a global village, where people can connect to one another without any limitations of space and time. Businesspeople, officials, governments and many people around the world are using the Internet as part of the national and international business as well as the personal lives of everyday people. The existence of some types of business is not possible without the Internet.

Information and communication technology has also changed the behavior of society and human civilization globally. With the emergence of the Internet, emerging a new kind of world that had never before known by humans, the world called virtual world. The emergence of the virtual world has changed the habits of many people especially in his life accustomed to using the Internet. The development of information and communication technology causes world relations to become borderless and cause significant social, economic and cultural changes that take place so quickly that this

provokes new crimes. In the virtual world, people do a lot of evil (crimes) that cannot be done in the real world. The crime is committed by using electronic information means as a means of deed. The development of information technology is increasingly sophisticated, of course, it will lead to the quantity and quality of crime, increased from conventional to unconventional (advanced crime) with a sophisticated modus operandi also, so that in the legal system required substance, culture, and special techniques and procedures to uncover crime.

Based on the provisions set forth in the Criminal Code, as for the articles used to ensnare criminal defamation is set forth in chapter XVI on defamation contained in Articles 310 up to Article 321 of the Criminal Code. Article 310 may be used to ensnare defamatory offenders who have a deliberate subjective element whereas their objective element attacks the honor or reputation of a person by accusing something, which means that it is publicly known. If the act has been fulfilled with elements of the offense then the article may be used as long as there is no special rule (*LexSpecialis*). R Soesilo in his book and his complete commentary chapter by chapter on page 225 in a book entitled *The Penal Code (KUHP)*, in the elucidation of Article 310 of the Criminal Code, explains that, "defaming" is "to attack one's honor and reputation". The attacked person usually feels "shame", the "honor" attacked here is only about the honor of "good name". Not "honor" in the sexuality domain, or the honor that can be defamed because of offended members of his cock in the sexual harassment. In principle, this good name is set out in the Criminal Code, Chapter XVI on Insults. It is contained in Articles 310 up to Article 321 of the Criminal Code.

UUITE (Electronic Transaction Information Law) is a *LexSpecialis* of the Criminal Code. It is known that Law Number 11 of 2008 on Information and

Electronic Transactions Article 27 paragraph (3) regulates defamation in social media. The Article has its subjective element is intentionally and its objective element is to distribute and/or transmit and/or make accessible Electronic Information and/or Electronic Document which has insult and/or defamation charge. Although there is still a lack of normality in the sentence transmitting and/or distributing that is governed by Article 27 paragraph (3) of the UUIE, but until now the article is still used by law enforcement officers to avoid any legal vacuum. Crime in the virtual world is a modern crime that emerged along with the development of science and technology. Crime in cyberspace has different characteristics from conventional crimes contained in the Criminal Code (Penal Code).

Article 27 paragraph (3) UUIE has limitations which may threaten the freedom of opinion of netizens (people who use internet services), silencing vocal such as anti-corruption activist, journalist, and whistleblower. The norms of insult and/or defamation in Article 27 paragraph (3) of the UUIE and in the Criminal Code are the same, the difference lies in its medium, its perpetrator, its criminal acts, and elements in public. There are 4 (four) patterns of problems arising from Article 27 paragraph (3) UUIE, namely as a means of revenge, shock therapy, silencing criticism, and a means to barter other legal cases. The public has the right to express their opinions without fear of being monitored, curbed or silenced. Noting the philosophical and juridical meaning in Article 27 paragraph (3) UUIE, the Indonesian Government has not been able to protect the freedom of its own citizens. Freedom of Network (SAFENET) called for the government to stop the practice of silencing opinion in cyberspace.

Social media becomes a public space, an open space, and an alternative space. Everyone can be a resource person, write, send photos, videos, and any content he

wants in social media. Any information such as news, articles, videos, photos, containing negative content accessed through social media can spread and take place so quickly. The speed of disseminating technological information is much faster all over the world than conventional information dissemination. Similarly, acts that contain insult and/or defamation in social media spread very quickly. When transmitted or sent to social media (upload), within a matter of a few seconds, inevitably impacts its spread.

In some countries, there is difference law enforcement implementation related to the cases of violations on the distribution contents of insult and/or defamation on social media. Let us see in Germany. Cited from the guardian, the German government issued a regulation that can finance social companies related media about hoax news. The German parliament asked social media companies to remove hate speech content, hoax news, and others within 24 hours of complaints. In Germany, social media companies are also required to report every 6 months regarding the complaints they receive. Not only Germany, the French state also implements strict rules related to social media. The French government created an employment regulation that allows employers to assess prospective workers based on social media accounts he/she has. This will certainly make the French people more careful in using social media. Not only that, France also warned parents not to post photos of their children to social media because of related privacy regulations. This arrangement allows children to sue their parents related to their childhood photos uploaded on social media.

So, the freedom of social media does not necessarily make the nations go hand-in-hand and let the wild in social media. In fact, it turns out to make a very strict regulation. Russia for example, it requires a blogger with 3,000 readers every day to

comply with Russian media regulations. Quoted from the BBC, August 1, 2014, this included ensuring that bloggers are not anonymous and storing social activity data for the past 6 months. This information should be placed on servers that exist in Russia. This allows the Russian government to gain access to media user data social.

While in Malaysia, it has also been criticized by InternationalAmnesty. Amnesty Malaysia deploredFahmi Reza's case of uploading a caricature of Malaysian Prime Minister on Facebook. Malaysia has a regulation called Communications and Multimedia Act 1998 (CMA). This arrangement allows the Malaysian government to punish users of social media related to criticism of the government. There is also the case of Muhammad AmirulAzwan Mohammed Shakri who stumbled on the insult case of Crowned Prince of Johor on Facebook. Mid-May 2016 also there were cases of some football fans who examined the police for criticizing the Johor crown prince football team.

Indonesia has just started a regulation on social media when it passes Act No. ITE 11 Year 2008. Based on this article Kominfo (The Ministry of Information) had blocked some social media such as Bigo live, Vimeo, Reddit, and others. Kominfo reasoned that the social media platform is not in accordance with the Indonesian government's policy regarding the use of social media. Kominfo also strived that hoax news content and hate speech can be reduced in social media in Indonesia. Socialization of Law Number 11 Year 2008 on Information and Electronic Transactions is also uneven, so many people who do not know the articles in the law that can ensnare unlawful acts. Not to mention the existence of Circular Letter of the Chief of Police No. 6 of 2015 on hate speech reap the controversy. This letter is considered a threat to freedom of expression. Circular Letter of Hate Speech

is basically guidance the police in the field when there is alleged hate speech that is applicable internally for the Police environment. The purpose of the Chief of Police issued circular letter on Hate speech is to inform members to understand the steps of handling hate speech.

Prior to the Circular Letter of hate speech issued, the provisions concerning the prohibition of hate speech such as defamation have actually existed and regulated in a number of laws and regulations. This is a guide for people to be careful in expression, whether it is in the daily social media. These laws and regulations have also been mentioned in the Circular Letter of HateSpeech beside the Book of Criminal Law Article 156, Article 157to trap the alleged perpetrators of the hatred. The rules of the legislation are:

#### **Criminal Policy Against Insults And Or Defamation Through Social Media Based on Justice Values**

Social media has many useful benefits (positive) for the community, especially the users, but it also has many bad impacts. It becomes a means to crime with a particular mode that varied and systematic. Given its wide scope and rapid propagation throughout the world, and the legal protection to freedom of expression within a democratic country, the provisions governing the contents of insult and/or defamation in social media must be reconstructed through criminal policy. The Government has reconstructed a criminal policy in Article 27 paragraph (3) of the UUIITE which prohibits the dissemination of electronic information and/or electronic documents containing insult and/or defamation content through social media as a means. UU ITE No. 19 of 2016 has made changes, especially in article 45 with the addition of Article 45 A and article 45 B which is the addition of 8 articles of criminal provisions in the Law of ITE in 2008 which all serve to ensnare the

perpetrators of crimes related to the crime of Information Technology (Cyber Crime). The amendment of the basic elements of the provision of Article 45 paragraph (1) of ITE Law Number 11 of 2008 to Article 45 paragraph (3) of Law of 19 No. 2016 concerning insult/defamation is about the duration of punishment. Previously in Article 45 paragraph (1) UU ITE Number 11 of 2008 in the form of imprisonment for a maximum of 6 (six) years is reduced to 4 (four) years, and a fine of 1 billion to 750 million. The impact of the reduction of imprisonment in UU ITE number 19 of 2016 is that the suspect/defendant cannot be detained by the investigator, public prosecutor or by the judge. Because a suspect/defendant can be detained if the criminal penalty for a crime he committed more than 5 (five) years. In addition to the provisions of Article 45 paragraph (1) of ITE Law Number 11 of 2008, there are also changes in the explanation of the provision of Article 27 of ITE Law Number 11 of 2008 which was previously written "clear" then in the explanation of Article 27 of the 2016 ITE Law becomes: The contempt in the Criminal Code is set forth in Chapter XVI in which there is a clan of defamation. In UU ITE Number 11 of 2008, insult or defamation is an ordinary offense that can be processed legally, even if there is no complaint (report) from the victim. But as explanation Article 27 UU ITE Number 19 year 2016 which refers to the Criminal Code, it is turned into a complaint offense (klachtdelic), which requires the victim to make a complaint (report) to the authorities. The content of the explanatory norm of Article 27 of UU ITE Number 19 of 2016 indirectly adopts the consideration of Constitutional Court Decision Number 50/PUU-VI/2008 Jo Decision of the Constitutional Court Number 2/PUU-VII/2009. It is mentioned that the enforcement and interpretation of Article 27 paragraph (3) of the UUIE cannot be separated from the basic legal norms in

Article 310 and article 311 of the Indonesian Criminal Code as the genus of offence which requires the existence of a clause to be prosecuted, it shall also be treated against the act prohibited in Article 27 paragraph (3) of the UUIE, so that the a quo Article should also be interpreted as the offense which requires a complaint (klacht) to be prosecuted before the Court. Although the usual offense of the article has been changed to complaint offence, the threat of criminal sanction has also been reduced from 6 (six) years in prison to 4 (four) years imprisonment, a fine of 1 billion rupiah to 750 million rupiah, and the addition of the provisions on "the right to forgotten" at the request of the person concerned on the basis of the court's determination, but the policy to reconstruct the article is still deemed incomplete and does not overcome the problems. The Government of Indonesia is also currently disclosing the ownership of accounts in social media must be in accordance with identity cards. This is to reduce the crime in social media. From the total population of Indonesia of 256.2 million are connected to the internet. From the total Internet users are as much as 71.6 million Facebook users or 54%. Instagram users are 19.9 million or 15%. Many government and private institutions also use social media to communicate. Therefore, social media needs to get serious attention by all parties.

The community is more careful in using oral or written expressions. The government together with Parliament need to improve the information law in conducting transactions either directly or through electronic media because many articles that are contrary to human rights are more wise in issuing the words/statements or personal statements either through oral or written. When we will make a complaint, please attach the evidence that can be accountable. From the case discussed, it is observed that in the history of the development of criminal law

in Indonesia there are 3 (three) kinds of theories which suggest the purpose of punishment, namely the theory of absolute (vergeldingtheorien), relative theory (doeltheorien), and joint theory (vernengingstheorien). The theory examines the reasons for justification of the criminal penalty against Florence Sihombing as set forth in Article 27 paragraph (3) of the UUIE.

Under certain circumstances, based on the considerations of the defendant, the victim, the dangerous nature, the crime, the condition of the community, and the justice, the cybercrime agent may still not be included in the LAPAS (jail), even though sentenced to imprisonment. Alternatively, no more than 1 (one) year, so the status as a conditional prison convict. Basically, cybercrime perpetrators remain sentenced to imprisonment, but the execution is suspended (sentence). In the judgment ruling the judge ordered that the criminal does not need to be implemented in jail, but must meet certain requirements that are explicitly described. These requirements include general requirements and special requirements. If the requirement is violated, then the convict shall be subject to imprisonment. The legal basis is Article 14a paragraph (1) of Book I of the Criminal Code.

The citation sentence is not defamation. This can be seen from the decision of the cassation of the Supreme Court Number 955 K/Pid.Sus/2015 which rejected the appeal request of the prosecutor, the criminal case committed by members of parliament who upload status on his/her facebook, that there has been a deviation of funds ... in the city. .. according to the BPK (Finance Checking Department) audit report. In the legal considerations of the cassation judges' panel that "the words of the defendant are not the words of the defendant himself, but the excerpt from the State Institution Resume statement (BPK) according to the results of the BPK audit

report, the words are not addressed to certain parties, and not with the meaning of broadcasting false/libel. " Thus, a court decision of the first instance that frees the defendant from all charges can be regarded as an affirmation of the freedom of social media users, to the extent that what is written and uploaded is based on sources that can be legally accountable but not addressed to certain parties. However, this case will have a different point of view, if only the defendant named certain names/officials who have not been prosecuted by law enforcement agencies/investigators.

#### **4. Conclusions**

Based on the provisions set forth in the Criminal Code, as for the articles used to ensnare criminal defamation is set forth in chapter XVI on defamation contained in Articles 310 up to Article 321 of the Criminal Code. Article 310 may be used to ensnare defamatory offenders who have a deliberate subjective element whereas their objective element attacks the honor or reputation of a person by accusing something. It means that it is publicly known. If the act has been fulfilled with elements of the offense then the article can be used as long as there is no special rule (LexSpecialis). UUIE is a LexSpecialis of the Criminal Code. It is known that Law Number 11 of 2008 on Information and Electronic Transactions Article 27 paragraph (3) regulates defamation in social media. The article has its subjective element is intentionally and its objective element is to distribute and/or transmit and/or make accessible Electronic Information and/or Electronic Document which has contents of insult and/or defamation.

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