

RESEARCH ARTICLE

# The Crime Of Damage After the Constitutional Court's Decision Number 76/PUU-XV/2017

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## ABSTRACT

From 2009 until now, there have been 30 cases tried by the Court with the use of Article 27 paragraph (3) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions. These various cases have raised opinions from some people who consider defamation offenses contrary to the spirit of reform that upholds freedom of thought and expression. Crime of reputation after the Constitutional Court Decision Number 50/PUU-VI/2008, Constitutional Court Decision Number 2/PUU-VII/2009, Constitutional Court Decision Number 5/PUU-VIII/2010, Constitutional Court Decision Number 31/PUU-XIII/ 2015, and the Decision of the Constitutional Court Number 76/PUU-XV/2017 concerning the Review of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 regarding Information and Electronic Transactions against the 1945 Constitution of the Republic of Indonesia are regulated in detail with one of the points, namely making changes in Article 27 paragraph (3) of the ITE Law and reducing criminal threats in 2 (two) provisions.

**Keywords:** Reputation Offenses; Legal Certainty; Constitutional Court.

## INTRODUCTION

Freedom of expression is the right of every individual since birth which the constitution has guaranteed. Therefore, the Republic of Indonesia, as a legal and democratic state, has the authority to regulate and protect its implementation. This freedom of thought and expression is held 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 expression. Freedom of expression, including freedom of opinion, is one of the most

fundamental rights in state life.<sup>1</sup>

The state does not give the presence of these rights but human rights. According to John Locke's hypothesis, human rights are individual rights that are natural and owned by every human being since he was born in the world. One is the right to speak and express opinions owned by every Indonesian people regardless of ethnicity, race, and religion. Freedom of speech and expression can be done in various forms such as writing, books, discussions, articles, and mixed other media of opinion. Ideally, the more mature a nation is, the more freedom of speech and expression of thought it will be respected.<sup>2</sup>

They are viewed from the other side related to human nature as a creature created by God, in humans inherent rights that are fundamental (basic) and universal. These rights are gifts from God Almighty that humans have since they were born because of their position as human beings without segregating race, religion, skin color, caste, belief, gender, and nationality. It is supra-legal which does not depend on the laws of a country, does not come from the generosity of the state, but comes from a source higher than manufactured law.

Therefore, its existence cannot be reduced by anyone (non-derogable rights). It is the obligation of every human being and even every country to uphold and protect these rights. One of them is Indonesia, a country that adheres to democratic principles to be highly respected. Freedom of association, opinion and expression refer to Article 28F, Indonesia's 1945 Constitution (2nd Amendment, adopted in August 2000) and Article 19 of the United Nations Universal Declaration of Human Rights (UDHR). Article 28F of the 1945 Constitution states that everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, receive, possess, store, process, and convey information using all available channels.<sup>3</sup>

Whereas Article 19 of the United Nations Universal Declaration of Human Rights (UDHR), which was declared on December 10, 1948, affirms that everyone has the right to freedom of opinion and expression, in this case including the freedom to hold certain opinions without interference and to seek, accept and convey information and ideas/ideas through any media without any restrictions. Although there is a guarantee for freedom of opinion and expression, the exercise of these rights is not unlimited. The limiting rule in Article 29, paragraph 2 of the United Nations declaration, which states that in exercising his rights and freedoms, everyone must be subject only to the limitations established by law for the sole purpose of ensuring the recognition and respect for the rights and freedoms of others and to fulfill the requirements of the aspects of morality, order and the general welfare in a democratic society.”<sup>4</sup>

Freedom of opinion, expression, association, and assembly, all guaranteed by the constitution, have a close relationship with the increasingly rapid development of technology today. Technological developments make the difference between distance and time meaningless. All human needs are now easier to fulfill, especially the human need for information. The need for this information can be used as discussion material regardless of the distance and time due to the many communication media available today. The development of this technology makes

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<sup>1</sup>Bahder Johan Nasution, 2012, *Negara Hukum dan Hak Asasi Manusia*, Mandar Maju, Bandung, hlm. 3.

<sup>2</sup>El Muhtaj Majda, 2007, *Hak Asasi Manusia dalam Konstitusi Indonesia*, Kencana, Jakarta, hlm.29.

<sup>3</sup>I Dewa Gede Palaguna, 2013, *Pengaduan Konstitusional (Constitutional Complain): Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Sinar Grafika, Jakarta, hlm. 43-44.

<sup>4</sup>Jimly Asshiddiqie, 2008, *Menuju Negara Hukum yang Demokratis*, Konpres, Jakarta, hlm. 687.

human creativity and innovation seem to have found their place. Freedom of expression can also be poured through various media, both electronic media and print media. The utilization of Information Technology, media, and communication has changed both the behavior of society and human civilization globally. The development of information and communication technology has also caused world relations to be borderless and caused significant social, economic, and cultural changes to take place rapidly. The Internet allows individuals to share views and find objective information. Although it has many positive impacts, information technology is currently a double-edged sword because, in addition to contributing to the improvement of human welfare, progress, and civilization, it is also an effective means of acts that can be considered against the law.<sup>5</sup>

According to Chris Garrett, social media are tools, services, and communication that facilitate relationships between people and who have the same interests or interests.<sup>6</sup> Today, social media has offered various social networking features that are attractive for all people, such as; Facebook, Instagram, Path, Line, and Whatsapp. Based on a survey conducted by Lens Indonesia, Indonesia is one of the 3rd most significant social media user countries in the world, with 66.4 million users in 2014. In 2015 social media users increased to 75.84 million. This number continues to expand and reaches 84.5 million users in 2016.<sup>7</sup> With a large number of social media users, it should be accompanied by knowledge and understanding of the use of social media. This understanding aims to make social media users more careful not to be entangled in criminal penalties. This is since a large number of social media users also results in an increasing number of cases of defamation through social media.<sup>8</sup>

This significant growth has made policymakers in Indonesia begin to regulate the internet, especially by recriminalizing acts that have been handled in the Criminal Code. This regulation and recriminalization are manifested in Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE). Specifically in the law, one of the problems, mainly related to freedom of expression, is the regulation in Article 27 paragraph (3) in conjunction with Article 45 paragraph (1) of the ITE Law. This provision is considered a duplication provision, and its formulation is much more rubbery than the similar provisions in the Criminal Code.<sup>9</sup>

Article 27 paragraph (3) of the ITE Law is considered to ignore the principles of the rule of law, violates the principles of people's sovereignty, violates the principle of *lex certa* and legal certainty, Article 27 paragraph (3) of the ITE Law has the potential to be misused, violates the freedom of expression, opinion, spread information, and Article 27 paragraph (3) has a frightening long-term effect. According to the Institute for Criminal Justice Reform, the American Bar Association Rule of Law Initiative (ABA ROLI) stated that from 2009 to 2017, there were 30 cases tried by the Court where the defendants were charged with the use of Article 27 paragraph (3) of the ITE Law.<sup>10</sup>

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<sup>5</sup>Barda Nawawi Arief, 2006, *Tindak Pidana Mayantara*, Jaya Grafindo, Jakarta, hlm. 4.

<sup>6</sup>Science of Social Media, Chris Garret, diakses melalui <http://www.chrisg.com/> 30 April 2019 Pukul. 23.00 WIB.

<sup>7</sup>[http://lensaIndonesia12.rssing.com/chan-36292530/all\\_p4.html](http://lensaIndonesia12.rssing.com/chan-36292530/all_p4.html) diakses pada 22 Nopember 2016 pkl. 17.04 WITA 30 April 2019 Pukul. 23.00 WIB.

<sup>8</sup><http://news.okezone.com/read/2017/01/01/338/1580516/sepanjang-2016-kasus-pencemaran-nama-baik-di-polda-metro-jaya-meningkat> diakses pada 30 April 2019 Pukul. 23.00 WIB.

<sup>9</sup>Raida L. Tobing, 2010, "Efektifitas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik", *Laporan Penelitian*, Badan Pembina Hukum Nasional Kementerian Hukum dan HAM, Jakarta, hlm. 110.

<sup>10</sup>Institute for Criminal Justice Reform, 2018, *Menimbang Ulang Pasal 27 Ayat (3) Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik (UU ITE)*, Jakarta, hlm.15-40.

Realizing to ensure the realization of legal certainty, the Constitutional Court issued 5 (five) decisions related to Article paragraph (3) of Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE)..<sup>11</sup> The decisions are the first, the Constitutional Court Decision Number 50/PUU-VI/2008,<sup>12</sup> second, Constitutional Court Decision Number 2/PUU-VII/2009,<sup>13</sup> third, Constitutional Court Decision Number 5/PUU-VIII/2010,<sup>14</sup> fourth, Constitutional Court Decision Number 31/PUU-XIII/2015,<sup>15</sup> fifth, Constitutional Court Decision Number 76/PUU-XV/2017 concerning the Review of Law Number 11 of 2008 concerning Information and Electronic Transactions as amended by Law Number 19 of 2016 regarding Amendments to Law Number 11 of 2008 concerning Information and Transactions Electronic against the 1945 Constitution of the Republic of Indonesia.<sup>16</sup>

After the decision of Constitutional Court Number 76/PUU-XV/2017, the phenomenon of deformation is expected to continue to increase in line with the democratic direction of the Indonesian state. Although, on the other hand, in a democracy, one's right to express, express opinions, and so on is free, but that does not mean that freedom is unlimited because norms limit every space. Release defined by standards must also have normative limitations so that there is no tendency from various parties to use criminal law to punish someone who expresses an opinion. This becomes even more important when looking at who the criticism, comment, or expression is directed at, someone who has the status of a state official. Another example of a case related to freedom of expression that ultimately led to a conviction was a Civil Servant (PNS) named Fadli Rahim from Gowa Regency, South Sulawesi, who committed defamation through the Line instant messaging application against the Regent of Gowa, Ichsan Yasin. Spleen. The chat history of the perpetrators in closed group lines was then spread over the internet to the Regent of Gowa. The perpetrators were charged with Article 27 paragraph (3) of

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<sup>11</sup>Jimly Asshiddiqie dan Ahmad Fadlil Sumadi, 2016, *Putusan Monumental Menjawab Problematika Kenegaraan*, Setara Press, Malang, hlm.xxvii.

<sup>12</sup>Putusan Mahkamah Konstitusi Nomor 50/PUU-VI/2008 telah ada penegasan bahwa Pasal 27 ayat (3) UU merupakan delik aduan. Dalam pertimbangan Mahkamah Konstitusi butir (3.17.1) dijelaskan, “Bahwa terlepas dari pertimbangan Mahkamah yang telah diuraikan dalam paragraf terdahulu, keberlakuan dan tafsir atas Pasal 27 ayat (3) UU ITE tidak dapat dipisahkan dari norma hukum pokok dalam Pasal 310 dan Pasal 311 KUHP sebagai “genus delict” yang mensyaratkan adanya pengaduan (klacht) untuk dapat dituntut, harus juga diperlukan dalam perbuatan yang dilarang dalam Pasal 27 ayat (3) UU ITE, sehingga Pasal a quo juga harus ditafsirkan sebagai delik yang mensyaratkan pengaduan (klacht) untuk dapat dituntut di depan Pengadilan”.

<sup>13</sup>Permohonan ditolak karena Pasal 56 ayat (1) dan Pasal 60 Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi.

<sup>14</sup>Menyatakan Pasal 31 ayat (4) Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik mengenai *ketentuan lebih lanjut mengenai tata cara intersepsi/penyadapan sebagaimana dimaksud pada ayat (3) diatur dengan Peraturan Pemerintah* bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

<sup>15</sup>Putusan ini seolah membuka kembali pentingnya kewenangan *constitutional question* atau pengujian norma konkret adalah suatu mekanisme pengujian konstitusionalitas undang-undang di mana seorang hakim dari Mahkamah Agung yang sedang mengadili suatu perkara menilai atau ragu-ragu akan konstitusionalitas undang-undang yang berlaku untuk suatu perkara, maka ia mengajukan pertanyaan konstitusional ke Mahkamah Konstitusi mengenai konstitusional suatu undang-undang. Mahkamah Konstitusi menyatakan Pasal 319 Kitab Undang-Undang Hukum Pidana sepanjang frasa “*kecuali berdasarkan Pasal 316*” bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

<sup>16</sup>Menolak Permohonan Para Pemohon terkait Pengujian Pasal 45 ayat (2) Undang-Undang Nomor 19 Tahun 2016 tentang Perubahan Atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

the ITE Law. Another example is Baiq Nuril Maknun, a temporary worker at SMAN 7 Mataram charged with Article 27 paragraph (3) of the ITE Law.<sup>17</sup>

Defamation cases that occur often make the ITE Law a legal snare when in fact, the essence of the birth of the ITE Law is to protect transactions in the electronic sector so that the investment climate that increasingly uses sophisticated internet-based technology reduces the possibility of committing crimes such as fraud, forgery and the like based on transactions through the medium. Electronic. Even though it has this purpose and nature, the ITE Law is still often misused by parties who feel that their reputation or popularity has been harmed. This paper will try to discuss how to regulate defamation in the laws and regulations in Indonesia and the criminal responsibility of perpetrators of defamation of officials after the decision of the Constitutional Court Number 76/PUU-XV/2017.

## DISCUSSION

### *Regulation of Criminal Defamation in Indonesian Legislation*

#### *1. Reputational Crimes According to the Criminal Code*

Defamation is defined as defamation, Slander, Libel which in Indonesian is translated into defamation, Slander (oral), Slander (written). Slander is oral defamation (Slander verbally), while Libel is written defamation (Slander in writing). In Indonesian, there is no term to distinguish between Slander and Libel.<sup>18</sup> Meanwhile, in Black's Law Dictionary, defamation is defined as an act that endangers the reputation of others by making false statements to third parties. If the accusation of defamation involves a matter of public concern, the plaintiff must prove his statement regarding the defendant's guilt.

In common law countries, the term slander is used to designate a crime, lie, and slander made orally. Meanwhile, crimes, lies, and defamatory statements made with writing or pictures are called libel. Slander and libel allow for legal action, both civil and criminal, to prevent various kinds of slander and unfounded criticism. In these common law countries, defamation is defined as the public disclosure of someone's private 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.<sup>19</sup>

The reputation offense was first introduced in the Statute of Westminster in 1275 under the name scandalum magnatum, which stated that from now on, it is no longer allowed for people to presumptuously utter or publish false news and stories that could create conflict or possible conflict or slander between the king and his people or the people. big in this country.<sup>20</sup> Scandalum Magnatum aims to create a peace process from conditions that can threaten public order rather than protect the reputation and restore the good name. The offense of importance in Indonesia, the violation of the genus, can be found in Chapter XVI of the Criminal Code on Humiliation. R Soesilo, in the explanation of Article 310 of the Criminal Code, stated that insulting is attacking

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<sup>17</sup>Institute for Criminal Justice Reform, 2018, *Korban Pelecehan yang Menjadi Tersangka*, Jakarta, hlm.1-20.

<sup>18</sup>Abdurrahman Harits Kateren, "Analisis Yuridis Tindak Pidana Cybercrime dalam Perbuatan Pidana Pencemaran Nama Baik Ditinjau Dari Undang-Undang Nomor 8 Tahun 2011 tentang Informasi Transaksi dan Elektronik dan Hukum Pidana", *USU Law Journal*, Vol.6, No. 6 Desember 2018.

<sup>19</sup>Ari Wibowo, "Kebijakan Kriminalisasi Delik Pencemaran Nama Baik di Indonesia", *Jurnal Pandecta*, Volume 7. Nomor 1. Januari 2012.

<sup>20</sup>Abdul Wahid dan Mohammad Labib, 2005, *Kejahatan Mayantara (Cyber Crime)*, PT. Refika Aditama, Bandung, hlm. 103.

someone's honor and good name. Those who are shot are usually embarrassed. The recognition that is attacked here is only about the benefit of a good reputation, not the honor in the sexual field or the honor that can be defamed because of being offended by the genitals in an environment of sexual lust. In principle, defamation is regulated in the Criminal Code, Chapter XVI concerning Humiliation, contained in Articles 310 to 321 of the Criminal Code. Looking at R. Soesilo's explanation in Article 310 of the Criminal Code, it can be concluded that the Criminal Code divides six kinds of insults.

First, blasphemy in Article 310 paragraph (1) of the Criminal Code states that anyone who intentionally damages someone's honor or good name by accusing him of committing an act with a clear intention will get the accusation spread, shall be punished for blasphemy, with a maximum imprisonment of nine months. . According to R. Soesilo, to be punished according to this Article, the humiliation must be carried out by accusing someone of having committed a particular act intending to make the accusation public (known to the public). The alleged action does not need to be an act that can be punished, such as stealing, embezzling, adultery, and so on. It is enough with everyday actions, of course, a shameful act.

Second, blasphemy with a letter in Article 310 paragraph (2) of the Criminal Code which states that if this is done in writing or insulting with writing or pictures that are broadcast, shown to the public or posted, then the person who commits it will be punished for cursing in writing and with imprisonment for - nine months long. According to R. Soesilo, as explained in Article 310 of the Criminal Code, if the accusation is made in writing (letters) or pictures, then the crime is called "blasphemy by letter." So a person can be prosecuted under this Article if the accusation or insulting words are made with letters or pictures.<sup>21</sup>

Third, slander in Article 311 of the Criminal Code states that whoever commits the crime of cursing or blaspheming in writing, if he is permitted to prove his accusation if he cannot prove it and if the accusation is made. At the same time, it is known to be untrue. The punishment for slander is imprisonment for -four years. Referring to R. Soesilo's explanation in Article 310 of the Criminal Code, the actions in Article 310 paragraph (1) and paragraph (2) of the Criminal Code do not include insulting or insulting in writing (cannot be punished) if the accusation is made to defend the public interest or is forced to defend self. In this case, the judge will only examine whether it is true that the defendant has committed the insult because he is motivated to defend the public interest or defend himself if the defendant asks to be examined (Article 312 of the Criminal Code). Suppose the question of defense cannot be considered by the judge, while during the examination, it turns out that what is alleged by the defendant is not valid. In that case, the defendant is not blamed for blasphemy anymore but is subject to Article 311 of the Criminal Code (slandering).

Fourth, minor insults in Article 315 of the Criminal Code states that any intentional insult that is not like defamation or written defamation, which is committed against a person, either in public orally or in writing, or front of the person himself by word of mouth or deed, or by a letter sent or received to him shall be punished by a maximum

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<sup>21</sup>R. Soesilo, 2009, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Politeia, Bogor, hlm. 230.

imprisonment of four months and two weeks. This kind of insult is carried out in a public place in the form of insulting words. R Soesilo, in the explanation of Article 315 of the Criminal Code, states that if the insult is carried out in other ways than "accusing an act," for example, by saying "asshole" and so on, it is included in Article 315 of the Criminal Code and is called "mild insult." This light insult can also be done by deed. According to R. Soesilo, insults are carried out by acts such as spitting in the face, holding the heads of Indonesians, pushing or removing Indonesian caps or headbands. Likewise, a poke, make, smack, go, which is persecution, but if it is done not too hard, it can also cause humiliation.<sup>22</sup>

In the Criminal Code, there is also a special offense of humiliation. It is contained in Articles: 134, 136 bis, 137 (all three are no longer valid), 142, 142a, 143, 144, 154a, 154 and 155 (not applicable), 156, 156a, 157, 207, 208 of the Criminal Code. It is stated that the mention of special insults in the articles of the Criminal Code does not use the *lex specialis* indicator but is based on the general nature of the forms of humiliation. The general trait is that humiliation attacks a sense of self-worth regarding the honor and reputation of an individual or group of people. Causes feelings of shame, anger, irritation, hurt, demeaning self-esteem, or groups of people. All these feelings make people uncomfortable and painful. Based on the general nature of insults, the insults in these articles for any reason must be accepted as part of the forms of insults.

## **2. *Reputational Crime According to Law No. 19 of 2016 about Information and Electronic Transactions***

Regulations regarding reputation/defamation criminal offenses can be found in Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions. Article 27 paragraph (3) of Law Number 11 of 2008 regarding Electronic Information and Transactions (UU ITE 2008) states that everyone intentionally and without rights distributes and transmits and makes electronic information and electronic documents accessible, containing insults and defamation. The formulation of the article includes four essential elements, namely every person, intentionally and without rights, distributes and transmits, and makes accessible, information and electronic transactions that contain insults and defamation.<sup>23</sup>

The criminal threat for Anyone who fulfills the formulation of the offense in Article 27 paragraph (3) of the 2008 ITE Law is contained in Article 45 (1), which states that Anyone who meets the elements as referred to in Article 27 (1), paragraph (2), paragraph (3) or paragraph (4) shall be sentenced to a maximum imprisonment of 6 (six) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah). Until the enactment of the 2008 ITE Law, many parties considered that the criminal threats formulated in the provisions of Article 45 were too severe. The government finally accommodated this objection by revising several provisions in the 2008 ITE Law. The draft of the Law on Amendment to Law Number 11 of 2008 was signed by President Joko Widodo on November 25, 2016, to become Law Number 19 of 2016 concerning Amendments to the Law. -Law Number 11 of 2008 concerning Information and Electronic Transactions. Previously, the text of the Law was ratified at the Plenary Meeting of the House of Representatives of the Republic of Indonesia on October 27, 2016. The text of the Law

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<sup>22</sup>*Ibid.*

<sup>23</sup>Eddie Sius Riyadi (Ed), 2010, "Pidana Penghinaan adalah Pembatasan Kemerdekaan Berpendapat yang Inkonstitusional", *Amicus Curiae (Komentar Tertulis) dalam Perkara Pengadilan Negeri Tangerang Nomor 1269/PID.B/2009/PN.TNGKasus*, Lembaga Studi dan Advokasi Masyarakat, Jakarta, hlm. 30.

was then recorded in the State Gazette of the Republic of Indonesia of 2016 Number 251 and Supplement to the State Gazette Number 5952 and began to be promulgated on November 25, 2016.

As previously explained, there are seven essential substances in Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions, namely.<sup>24</sup> First, making changes in Article 27 paragraph (3), among others: (1) adding an explanation of the term distributing, transmitting, and making electronic information accessible; (2) confirming that the provision is a complaint offense, not a general offense; (3) confirms that the criminal element in the provision refers to the provisions for defamation and slander as regulated in the Criminal Code. This change was made to avoid multiple interpretations of the provisions of insults and defamation. Second, reduce the criminal threat to 2 (two) provisions as follows: (1) the threat of imprisonment for humiliation and defamation of a maximum of 6 (six) years to a maximum of 4 (four) years and a fine of a maximum of Rp. 1 billion to a maximum of Rp. 750 million; (2) the threat of imprisonment for sending electronic information containing threats of violence or intimidation for a maximum of 12 years to a maximum of 4 years and a fine of a maximum of Rp. 2 billion to a maximum of Rp. 750 million.<sup>25</sup>

Third, adding an explanation of electronic information as legal evidence in Article 5 paragraphs (1) and (2). Fourth, to synchronize the law on search, confiscation, arrest, and detention procedures as regulated in Article 43 paragraph (5) and (6) with the Criminal Procedure Code (KUHAP). Fifth, strengthen the role of Civil Servant Investigators (PPNS) as regulated in Article 43 paragraph (5) of the ITE Law to cut access to information technology (ICT) crimes. Sixth, adding the provision of "right to be forgotten" or "right to be forgotten" in Article 26, namely the obligation to delete content irrelevant for electronic system organizers based on court decisions. Seventh, strengthening the role of the Government to prevent the dissemination of harmful content on the Internet as regulated in Article 40. Based on this provision, the Government has the authority to cut off access and order Electronic System Operators to terminate access to electronic information that has unlawful content.

### ***Criminal Acts of Defamation After the Decision of the Constitutional Court Number 76/PUU-XV/2017***

The criminal act of defamation through electronic media cannot be separated from the role of information technology as a means of committing criminal acts. Internet-based information technology has a role as a facility to express freedom of opinion and expression and facilitate the realization of other human rights. The completion of ownership such as the right to education and the right to participate in cultural life and enjoy the benefits of scientific development and its application, as well as civil and political rights, the right to freedom of association and assembly.

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<sup>24</sup>Muhammad Reza Hermanto, dkk, 2016, "Revisi UU ITE: Era Baru Kebebasan Berespres?", *Update Indonesia: Tinjauan Bulanan Ekonomi, Hukum, Keamanan, Politik dan Sosial*, Volume X, Nomor 12 Desember 2016 The Indonesian Institute, Jakarta.

<sup>25</sup>Agus Satory, "Undang-Undang Informasi dan Transaksi Elektronik dalam Perspektif Sosiologi", *Jurnal Hukum De'rechstaat*, Volume 3, Nomor 2, September 2017.

The great potential and advantage of the Internet lie in its unique characteristics, such as its speed, worldwide reach, and the confidentiality of its identity.<sup>26</sup>

At the same time, the power of the internet to spread information quickly and mobilize the masses has also created fear for governments and authorities. This has led to increased restrictions on Internet use through the use of advanced technology to block content, monitor and identifies activists and critics, criminalize legitimate expression, and adopt specific regulations that justify restrictive measures.<sup>27</sup> Restrictions on freedom of expression are justified by the Convention on Civil Rights and Political Rights but remain within strict limits. Various expressions should not be criminalized, including insults in addition to acts prohibited under the international criminal law, even though the purpose of humiliation is to protect one's honor. About this problem, almost every year, the UN Human Rights Commission, in its resolutions on freedom of expression, always raises its concerns about the ongoing abuse of legal provisions on defamation and criminal libel.<sup>28</sup>

Some people consider freedom of speech to be a human right. Still, other people see this as a form of provocation or defamation that must be subject to certain sanctions or punishments for the perpetrators or violators. Utilization of information technology causes a consequence of changing the object of a criminal act originally in the form of a person's good name or honor into electronic documents and electronic information that has a polluting content. The differences in the objects of criminal acts also result in changes in the disclosure of criminal acts of defamation through electronic media. Disclosure of defamation cases must use specific methods based on telematics theory because the crime that occurred uses special techniques and uses advances in information technology.<sup>29</sup> Apart from the pros and cons, the law, through its legal products, has regulated defamation through the internet in Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE) and its amendments, namely Law Number 19 of 2016 concerning Amendments to Law No. 11 of 2008 and also regulated in general, are handled in Articles 310 and 311 of the Criminal Code (KUHP).

The criminal act of defamation is an act that attacks the good name. Assault on reputation conveys words (words or series of words/sentences) by accusing them of committing specific actions. These are aimed at the honor and good name of a person, which can cause the person's sense of self-esteem or dignity to be trashed, humiliated, or humiliated. Article 27 paragraph (3) of the ITE Law has confirmed that the article is a complaint offense which is also supported by various Constitutional Court Decisions Number 50/PUU-VI/2008, Constitutional Court Decision Number 2/PUU-VII/2009, Constitutional Court Decision Number 5/PUU-VIII/2010, Constitutional Court Decision Number 31/PUU-XIII/2015 and Constitutional Court Decision Number 76/PUU-XV/2017 concerning Judicial Review of Law Number 11 of 2008 concerning Information and Electronic Transactions as amended by Law -Law Number 19 of 2016 regarding Amendments to Law Number 11 of 2008 regarding Information and Electronic Transactions against the 1945 Constitution of the Republic of Indonesia. This means

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<sup>26</sup>Galih Puji Mulyono, "Kebijakan Formulasi Tindak Pidana Pencemaran Nama Baik dalam Bidang Teknologi Informasi", *Jurnal Cakrawala Hukum*, Vol.8, No.2 Desember 2017.

<sup>27</sup> Frank La Rue, Laporan Pelapor Khusus PBB untuk Kebebasan Berpendapat dan Berekspreasi, Dewan Hak Asasi Manusia, Sesi-17, Agenda ke-3, GE.11-13201. hlm. 7

<sup>28</sup>Supanto, "Perkembangan Kejahatan Teknologi Informasi (*Cyber Crime*) dan Antisipasinya dengan Penal Policy", *Jurnal Yustisia*, Vol.5 No.1 Januari-April 2016.

<sup>29</sup> Atven Vemanda Putra dan Al. Wisnubroto.. "Eksistensi Pasal 27 ayat (3) Undang-Undang Nomor 11 Tahun 2008 Dalam Perkara Pencemaran Nama Baik" Program Studi Ilmu Hukum Universitas Atmajaya: Yogyakarta diakses melalui <http://e-journal.uajy.ac.id>

that cases can be processed by law if there are complaints from parties who are insulted because of contamination or damage. A person's good name can essentially be judged by the person concerned (exposed to humiliation or defamation). In other words, it is the victim who can think subjectively about the content or parts of the Information or electronic documents that he feels have attacked his honor or reputation.

After the decision of the Constitutional Court, anyone can be charged with threats of insults and defamation on the internet. Especially for internet users, criminal threats are formulated through Article 45 paragraph (3) of Law Number 19 of 2016. Through this provision, the perpetrators of defamation can be subject to 4 (four) years in prison and a fine of up to Rp. 750,000,000.00 (seven hundred and fifty million rupiahs). The main purpose of the presence of defamation laws is to maintain and protect one's reputation. However, in its application, care must be taken not to hinder the enjoyment of the right to freedom of expression and opinion and hinder the access of others to receive information. Insan Budi Maulana, who learned about cyber law from the course of Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE), emphasized the importance of using cyber law to solve cyberlaw problems in a civil manner, as in the United States, China, England, Japan, or Korea, Malaysia, and Singapore.<sup>30</sup>

## CONCLUSION

Based on the explanation above, it can be concluded that first, the regulation of criminal acts of defamation in Article 310 of the Criminal Code Book Two (Crime) Chapter XVI concerning Humiliation. There are three important notes related to defamation offenses. First, the offense is very subjective. Second, defamation is a spreading offense. Third, the person who commits defamation by accusing something considered to attack the good name of someone or another party must be allowed to prove the accusation. The regulations outside the Criminal Code are Law Number 32 of 2002 concerning Broadcasting (Broadcasting Law) and Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 about Information and Electronic Transactions (UU ITE). Second, the criminal act of defamation after the Constitutional Court Decision Number 50/PUU-VI/2008, Constitutional Court Decision Number 2/PUU-VII/2009, Constitutional Court Decision Number 5/PUU-VIII/2010, Constitutional Court Decision Number 31/PUU-XIII/2015, and Constitutional Court Decision Number 76/PUU-XV/2017 concerning Review of Law Number 11 of 2008 concerning Information and Electronic Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions against the 1945 Constitution of the Republic of Indonesia is regulated in detail by first, making changes in Article 27 paragraph (3) of the ITE Law. He was second, lowering the criminal threat in 2 (two) provisions. Third, adding an explanation of electronic information as legal evidence in Article 5 paragraphs (1) and

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<sup>30</sup>Insan Budi Maulana, "UU ITE atau Penegak Hukum Tanpa Jiwa", <https://maulanalawfirm.com/uu-ite-atau-penegak-hukum-yang-tanpa-jiva/> access at 03 Mei 2019, Pukul 01.00 WIB.

(2). Fourth, to synchronize the law on search, confiscation, arrest, and detention procedures as regulated in Article 43 paragraph (5) and (6) with the Criminal Procedure Code (KUHAP). Fifth, strengthen the role of Civil Servant Investigators (PPNS) as regulated in Article 43 paragraph (5) of the ITE Law to cut access to information technology (ICT) crimes. Sixth, adding the provision of "right to be forgotten" Seventh, strengthening the role of the Government to prevent the dissemination of harmful content on the Internet.

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