



**Criminal act of Defamation before and after the
Establishment of Law Number 11 year 2008 Concerning
Information and Electronic Transaction**

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THESIS ADVISOR RECOMMENDATION LETTER

The thesis entitled “**CRIMINAL ACT OF DEFAMATION BEFORE AND AFTER THE ESTABLISHMENT OF LAW NUMBER 11 YEAR 2008 CONCERNING INFORMATION AND ELECTRONIC TRANSACTION**” prepared and submitted by Grace Pongmassangka Tangkeallo in partial fulfillment of requirements for the degree of Bachelor of Law in the Faculty of Humanities has been reviewed and found to have satisfied the requirements for a thesis fit to be examined. I therefore recommend this thesis for Oral Defense.

Cikarang, Indonesia, May 21st, 2018

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DECLARATION OF ORIGINALITY

I declare that this thesis, entitled “**CRIMINAL ACT OF DEFAMATION BEFORE AND AFTER THE ESTABLISHMENT OF LAW NUMBER 11 YEAR 2008 CONCERNING INFORMATION AND ELECTRONIC TRANSACTION**” is, to the best of my knowledge and belief, an original piece of work that has not been submitted, either in whole or in part, to another university to obtain a degree.

Cikarang, Indonesia, May 21st, 2018

Grace Pongmassangka Tangkeallo

PANEL OF EXAMINE APPROVAL SHEET

“CRIMINAL ACT OF DEFAMATION BEFORE AND AFTER THE ESTABLISHMENT OF LAW NUMBER 11 YEAR 2008 CONCERNING INFORMATION AND ELECTRONIC TRANSACTION” has been submitted by Grace Pongmassangka Tangkeallo majoring in Law from the Faculty of Humanities has been accessed and approved to have passed the Oral Examination on Cikarang

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ABSTRACT

The purpose of this research is to analyze and discover the application of Law concerning Defamation by answering 2 (two questions): The law regulation concerning criminal act of defamation before the establishment of Law number 11 year 2008; and how criminal act of defamation were regulated after the establishment of the Law number 11 year 2008.

Method of research that is being used is Normative-Legal Research, which is by research and review source of law related to the concept of defamation. The data used for this research is secondary data that is obtained by visiting the National Library of *Universitas Indonesia* and other books that can be find on the Internet. Another source is by studying a previously written thesis concerning the similar matter and court verdict of criminal case concerning defamation.

This research result are: first, regulation concerning defamation are regulated under the Criminal Penal / Criminal Code of Indonesia (KUHP) and the regulation are divided into the types and target of defamation. Before the establishment of law number 11 year 2008 concerning Information and Electronic Transaction (ITE Law), there are no specific law concerning defamation when it is occurred in the electronic media. Second, after the establishment of ITE Law, defamation occurring in the electronic media, such as Internet website and online social media, are regulated using ITE Law and KUHP.

Key Words: Defamation, Law of Information and Electronic Transaction

ABSTRAK

Tujuan dari penelitian ini adalah untuk menganalisa dan menemukan penggunaan hukum terkait pencemaran nama baik dengan menjawab 2 (dua) pertanyaan: Peraturan hukum terkait pencemaran baik sebelum adanya UU no. 11 tahun 2008; dan bagaimana pengaturan tindak kriminal terhadap tindak pencemaran nama baik sesudah hadirnya UU no. 11 tahun 2008.

Metode penelitian yang digunakan adalah Penelitian Normatif, yang meneliti dan mengkaji sumber hukum yang terkait dengan tindak pencemaran nama baik. Jenis data yang digunakan untuk penelitian ini adalah data sekunder yang didapatkan dengan mengunjungi perpustakaan nasional Universitas Indonesia dan buku-buku lainnya yang dapat ditemukan di Internet. Data lain yang digunakan untuk penelitian ini termasuk mempelajari tesis yang berhubungan permasalahan yang sama dan surat keputusan pengadilan mengenai kasus pencemaran nama baik.

Hasil penelitian ini adalah: pertama, peraturan terkait pencemaran nama baik diatur di Kitab Undang-Undang Hukum Pidana (KUHP) dan peraturannya terbagi menjadi tipe pencemaran (penistaan) dan target dari pecemaran. Sebelum hadirnya UU no. 11 tahun 2008 mengenai Informasi Transaksi dan Elektronik (UU ITE), tidak ada peraturan spesifik mengenai pencemaran nama baik yang terjadi di media elektronik. Kedua, sesudah terbitnya UU ITE, pencemaran nama baik yang terjadi di media elektronik, seperti Website Internet dan sosial media online, diatur menggunakan UU ITE dan KUHP.

Kata Kunci: Pencemaran Nama baik, UU ITE

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Praise and Prayers here I offer to God Jesus for His kindness, guidance and blessing I may complete this thesis. This thesis is presented to fulfill one of the requirements in accomplishing the Bachelor Degree of Law.

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CHAPTER I

INTRODUCTION

A. BACKGROUND

Human has always been a social living being. They tend to socialize, forming a group and communicate with one another as a natural social being they are. Thus, the technology can be considered a useful communication tools because it has the ability to spread information in a large, even worldwide range in a short time and easy way. The traits of people as a social being can be seen by their ability to speak their mind. This was also part of human rights as the rights to speak and to express themselves. The law that protects people from expressing their mind and opinion is also known as freedom of speech.

It is a common thing as a human being to search for information. In the case of young adult to adults who has the needs to follow up with the current news and/or trends, commonly they would search for that information using the available media. In this era, their biggest source of information is through media, may it be printed in a poster or magazine, visually shown on TV, or simply from the Internet which known by people as the easiest and cheapest information provider.

Technology development has increased greatly by the support of the Globalization. Generally speaking, this globalization involves of the advance in many subjects that in worldwide scale. This vast development is continuously evolved in order to fulfill the needs of people to get the Information. The technology includes computerization system, personal gadget, including the Internet. Nowadays, almost everyone knows about the Internet and it has become the ultimate source of communication tools in everyday life.

By using communication technology, mankind has reach the convenience of communication likes never before in the previous era. This has helped people connecting and communicating easily. Being able to communicate easily and forming strong bonds with one another is the purpose of the communication tools

invention, but unfortunately, the purpose of communicating may not entirely be in a positive intention.

As we know, nowadays people around the globe has their gadget and Internet in their grip of their hand and able to meet new and a lot of people with easily in this Internet known also as “cyber world”. But do keep in mind that conflict may happen with the presence of two different minds. With two humans, a quarrel ensues, 100 people will create competition, and 1000 people will create confrontation. Internet allows people that never met each other before, people that come from different background, and even two or more group of people which opinion counterparts with the other. By this encounter, there are no guarantee how, where or when problems and dispute might happen. The chance of dispute may increase especially to those who had negative intention for using this technology.

People want and need information that is accurate, relevant, economic, fast, specific, and easy to be obtained.¹ According to Pirolli; human beings are adaptive in “creating” their behavior according to their information environments. The Internet has provided efficiency and advantages as communication tools where it has been socially acknowledge and used as tools to exchange information.

Methods of exchanging information through the Internet may be used by Electronic Mail (e-mail) or through Social Media such as Facebook, Twitter and others provided method by the connection of the Internet. The convenience of the Internet usage has influence people to use it more often, thus, the Internet user keep increasing from time to time. The number of Internet user in Indonesia could reach 70 million or counted 28% of total population. Social media user such as Facebook reach until 50 million or counted as 20% of total population, meanwhile Twitter user reach the amount of 40 million or counted as 16% of total population.²

Social media as communication tools have allowed information exchange from distance, may it for personal communication between 2 persons, or even for

¹ Iik Novianto, “*PERILAKU PENGGUNAAN INTERNET DIKALANGAN MAHASISWA*”, accessed <http://journal.unair.ac.id/filerPDF/Jurnal%20IHK%20Novianto.pdf> at 22 December 2016, 02:35 West Indonesian Time

² Tim Pusat Humas Kementrian Perdagangan RI, *PANDUAN OPTIMALISASI MEDIA SOSIAL UNTUK KEMENTRIAN PERDAGANGAN RI* (Jakarta Pusat: PUSAT HUBUNGAN MASYARAKAT, 2014, Cetakan 1), p.2

open public. As mentioned before, the user of social media are continuously increasing. Whereas the usage of social media has increased, not less of this “user” uses this social as tools and/or media to expressed themself and their opinion. This opinion could be made in the minds of positive or in negative intention; but when there are those whose opinion is against one another, it could lead to argument, and another way into verbal abuse, and may even reaches to a serious matter such as terrorizing and/or bullying. This serious matter leading into an act of crime, and crimes that involves the Internet or computer (electronic media) can be considered as Cyber Crime.

Set of rules and regulations shall stand as borderline of what’s right and binding people from any form of action that may damage another. While this regulations and the law were made to protect and to settle dispute, this “dispute” in correlation with the Internet and computer were regulated with cyber law. There is even an international organization that functions in combatting the International Crime and Cybercrime, which also known as the Interpol where its member has reached into 192 countries and Indonesia is one of the country member.

This globalization of Information has placed Indonesia as part of the world’s information community, therefore the making of regulation concerning organization of Electronic Information and Transaction at the national level is required in order that the development of Information Technology can be carried out in an optimal, distributive, and widespread manner throughout all levels of society to advance the intellectual life of the people.³ In Indonesia, the law for cyber is written in the Law number 11 year 2008 and its amendment Law number 19 Year 2016.

Indonesia as a country has established Law number 11 year 2008 regarding *Informasi dan Transaksi Elektronik* (also known as: Information and Electronic Transaction) and further on will be mentined as “ITE Law”. This law is to be used for relating matter of Computer Crime and Cyber Crime in Indonesia. Later on in 2016, the ITE Law has been revised and made as the amendment Law number 19

³ Law of Indonesia Number 11 Year 2018 (P.1: Considering (b))

Year 2016. This law is made with the needs to security and legal certainty in the usage of information technology, media, and communications.

By the concern regarding how the act of defamation is being regulated in comparison before and after the Law of ITE, the writer have taken interest into the law influence towards the people in Indonesia and decided to write the thesis with the title “**CRIMINAL ACT OF DEFAMATION BEFORE AND AFTER THE ESTABLISHMENT OF LAW NUMBER 11 YEAR 2008 CONCERNING INFORMATION AND ELECTRONIC TRANSACTION**” as final research in completing the bachelor degree in President University.

B. PROBLEM IDENTIFICATION

Based on the written background, the problems to be identified in this research are:

1. How does the act of defamation is regulated before the creation of Law of Indonesia number 11 Year 2008 concerning Information and Electronic Transaction?
2. How does the Law of Indonesia number 11 Year 2008 concerning the Information and Electronic Transaction acts as regulation for the act of defamation?

C. OBJECTIVE OF THE RESEARCH

This research was done with the purpose to:

1. To analyze the regulation concerning defamation before the creation of Law of Indonesia number 11 year 2008 Concerning Information and Electronic Transaction.
2. To analyze the influence of law number 11 year 2008 concerning Information and Electronic Transaction in regulating the act of Defamation.

D. BENEFIT OF RESEARCH

This research is meant to give benefit to the reader. The benefits of this research includes:

1. Theoretically, this research is expected to elaborate the writer's knowledge, especially about the development of law regarding the act of defamation.
2. Practically, this research was meant as the writer's complication in studying as a bachelor of law student. This research is also expected to become a reference for readers in discussion regarding the same theme of this thesis.

E. THEORITICAL FRAMEWORK

Social Media has been well known and often being used nowadays. It has proved its use and efficiency in information exchange. Meanwhile, Indonesia as a democratic country has elaborated the freedom of speech ever since this country stands. By the existence of Freedom of Speech along with its right is being protected by law, so people not just in Indonesia, but also around the world are using their right for expressing their opinion.

In Indonesia, those freedom of speech laws consist such as UUD RI 1945 Pasal 28 E ayat (3) "*Setiap orang berhak atas kebebasan berserikat, berkumpul, dan mengeluarkan pendapat*". This constitution of Indonesia has described Indonesia's democracy in terms of freedom of speech.

As people are using their right of speech, there are those who misused this 'right'. This misuse of rights can be in form of speaking without consideration to other people. This would mean someone would purposely choose their words badly, turning it into a form of crime, such as bullying, hate speech, terrorizing, and insulting. Or in another way, the speaker/writer in social media may not consider their words is wrong because of their rights to speak, but the opponent may consider otherwise because of the feeling of uncomfortable, insulted, or affronted.

Indonesian Police also have made regulation regarding hate speech known as SURAT EDARAN KAPOLRI Number:SE/6/X/2015. These regulations were made with the foundation of several other laws including Law of Indonesia no. 11 year 2008 regarding Information and Technology Transaction. The number 11 year 2008, later on to be revised and now act as amendments known as law number 19 year 2016, are made as restrictions and also to solve the matter of conflict happening within the technology and electronic involve, including the internet and social media. Law no 11 year 2008 is still valid until now unless for

some article which has been updated in the newest amendments in law No. 19 year 2016.

Defamation reports in Indonesia have happen a few times, for example: Verdict No: 384/Pid.Sus/2015/PN.Mtr and No:196/Pid.Sus/2014/PN.BTL (ITE). This verdict is from a case of reported defamation act regarding someone who conducts the act of defamation through post on the Facebook wall. As there are cases where defamation occurs through the social media by expressing someone's opinion, the writer made this research to focus on a problem where an opinion can be considered as defamation.

While the defamation in the social media (Internet) is being regulated under the Law number 11 year 2008, before this law is established, the law concerning defamation itself were regulated under the Criminal Code of Indonesia (KUHP). In this KUHP, specifically under the article of 310 until 321, is regulated the regulation concerning defamation. And even if now the defamation occurring in the Internet has been regulated under the law number 11 year 2008, the regulation of KUHP is still valid.

F. RESEARCH METHODOLOGY

1. Legal Approach

This research uses the method of Normative Legal Research, so the legal approach for this research is a statu approach. By statue approach, this is a method of approach by using law and regulation, especially in the Law number 11 year 2008.

2. Source of Data

The data obtained by this research is by using secondary data, which is a data that is obtained by literature. The utilities of secondary data are for early data/information uses, obtaining the theoretical basis/legal basis, and to obtain the term definition.⁴ Secondary data can be categorized into three types:

- a. Primary legal data, as the data that has the connection with the research problem. The datas are: Indonesian Criminal Code (KUHP), Law no. 11

⁴ Burhan Ashshofa, "Metode Penelitian Hukum, PT. Rineka Cipta", Jakarta, 1996 p.103

year 2008 and its amendments Law no.19 year 2016 concerning Information and Technology Transaction.

- b. Secondary legal data, which is the data that related to the definition of the primary legal data, including: books related to defamation, cyber crime, thesis, and legal journal.
- c. Tertiary legal data, which is the data as complementary to the primary legal data and secondary legal data, such as dictionary.

3. Data Collecting

The data is mainly collected by news article, previous journal, thesis, and other related written data, which have been approved. The secondary data in form of books and thesis were gathered in a Library, to be exact the *Universitas Indonesia* library.

4. Data Analysis Method

The method of analyzing the data is by qualitative. The data are collected and read thoroughly before and then moving on to consider logically and law-based on the data whether it is useful or not for this mini thesis.

G. SYSTEMATIC WRITING

CHAPTER I INTRODUCTION

This chapter is an introduction of this research overall. This chapter explains the research background, problem identification, research objective, research benefit, theoretical framework, research methodology, and systematic writing.

CHAPTER II LITERATURE REVIEW OF THE DEFAMATION, CYBERCRIME AND CYBERLAW

This chapter will be focusing on the foundation theory, which will provide the explanation of the definition and terms used in this research. This consist the theories such as Defamation, Cybercrime and Cyber law.

CHAPTER III CONCEPT OF DEFAMATION IN THE DEVELOPMENT OF INDONESIAN CYBER LAW

This chapter will focus in the regulations and cases related to the research in this thesis. This include the focus of the specific theory of the Defamation, Defamation Delicts, Law and Sanction regarding Defamation and Cybercrime, Crime and the Law that regulates, and also the Case Studies from Verdict of Defamation as Cybercrime Case.

**CHAPTER IV COMPARISON OF THE LAW FOR THE ACT OF
DEFAMATION BEFORE AND AFTER THE
ESTABLISHMENT OF ITE LAW**

This chapter will answer and discuss the question in the Problem Identification, which is the regulation concerning the act of defamation before and after the establishment of Law of Indonesia number 11 year 2008 and how criminal act of defamation is regulated after the establishmen of Law number 11 year 2008.

CHAPTER V CONCLUSION AND SUGGESTION

This chapter presents the conclusion obtained from the answers of this research problem and suggestion could be given from the result of this thesis research and writing in the future.

CHAPTER II

LITERATURE REVIEW CONCERNING DEFAMATION, CYBER CRIME, AND CYBERLAW

A. THE ACT OF DEFAMATION

In American and England, the word “defamation” comes from the word: to defame. To defame can be interpret: “to harm the reputation of a person or group by unfair means such as making false statements.”⁵

The act of “affronting” according to R. Soesila (1990:225), is to “attack someone’s honor and good name.” resulting the victim to feel ashamed⁶

According to Pressman (2003), “defamation is a false or unjustified injury to someone’s good reputation”. Another definition: “the tort of making a false statement of a fact that injures someone’s reputation.” This definition uses the word “reputation”. In an act of defamation, a statement has becomes a matter/problem because that statement have caused injury or harm towards someone’s reputation.⁷

In conclusion, defamation is an act when someone either purposely or not have spread accused someone in a negative content which may leads to offend the accused and harm their good names and/or pride.

1. The act of defamation and its definition

Defamation means as an assault to injures someone’s good name or reputation. The term “defame” and “injured” is used to describe the loss and damage toward someone’s reputation. The word reputation is an image of a

⁵ Dr. Tjipta Lesmana, M.A., “*Pencemaran Nama Baik dan Kebebasan Pers antara Indonesia dan Amerika*”, Penerbit Erwin – Rika Press, Jakarta, 2005, p.26

⁶ Ibid p.21

⁷ Ibid, p.27

certain individual in the eyes of society. And some may think it is important to maintain their reputation.

From the matter of defamation, comes the question: is defamation must depend on whether that person (the victim) feels offended for their reputation? According to Prof. Dr. Wirjono Prodjodikoro, it is impossible because each person have different honor in his or her reputation. There are those who easily offended, and there are those who are not easy to offend, so there is no sure way to determine when defamation occurs.⁸

According to Prof. DR. Wirjono Prodjodikoro, reputation/pride must be considered where the common people might feel offended or not. It is possible for someone, for example; young children, to not easily feel offended. Therefore, there might be unnecessary to consider there is a crime act of defamation going on by this condition. In reality, the feeling of “offended” does not being measured by the attack (may it be insult or false statement), it is measured by how the receiver may felt about this words. One word, for example “You are stupid” may be viewed as criticism, or it can also be viewed as an insult. Whether it will feel as an insult or it was simply an opinion or critics, it is depends by the person whose words were meant to.⁹ In the other side, people are free to speak their opinion, even in the form of critics, as how people have the rights of speech.

Defamation as its written in Indonesian Criminal Code (KUHP) Art 310: *Barang siapa dengan sengaja menyerang kehormatan atau nama baik seseorang dengan menuduhkan sesuatu hal, yang maksudnya terang supaya hal itu diketahui umum, diancam karena pencemaran, dengan pidana penjara paling lama sembilan bulan atau pidana denda paling banyak empat ribu lima ratus rupiah.*

In other words, any person knowingly (purposely) attack someone’s honor or good name by accusing something and it is meant to known by public can be considered as defamation.

⁸ Ibid

⁹ Ibid p.98-99

One of the keywords of an act of defamation is the word “reputation” or “good name”. Defaming meaning to destroy, harm, someone’s or a group of people’s reputation/honor by methods that is unfair such as spreading (publishing) statement that is not made by fact.¹⁰

Another definition of reputation is: “the estimation of a person’s character or worth in the eyes of the community.” Reputation refers more to the character or personality of an individual, not their achievement. So when someone with good personality is faced with a negative stigma, they will be ashamed and feel offended. Good people (in terms of morals) that were publically announced to have visited a brothel might feel ashamed. There are possibility that the person did visit the place but with the purpose that does not against propriety (for example: for the purpose of social studies). However, the general citizen who read or hears the news might think negatively and it have disgraced and reputation of the individual.¹¹

Someone’s reputation could be positive and it could be negative. The one that decides whether it’s positive or negative is the community itself. In the statement: “A person’s reputation is commonly held opinion of his character.” the word “a commonly held opinion”, or “in the eyes of the community”. So, reputation is an opinion that resides in the eyes of the society towards an individual.¹²

2. Types of Defamation

Defamation were classified into 8 categories, according to the civil law of Indonesia, there are:

- a. Verbally: Slander, belediging, laster (Penghinaan lisan) (Art 310)
- b. Written: Libel, smaad schriff (Pencemaran tertulis) (Art 310)
- c. Defamation, laster (Fitnah) (Art 311-314)
- d. Eenvoudige belediging (Penghinaan ringan / menyerang kehormatan) (Art 315)
- e. Lasterlijke aan klacht (Pengaduan fitnah) (Art 317)

¹⁰ Ibid, p.29

¹¹ Ibid

¹² Ibid, p.30

- f. (Penghinaan terhadap orang mati secara lisan) (Art 320)¹³
- g. (Penghinaan terhadap orang mati secara tertulis) (Art 321)

Defamation delict are specifically regulated in chapter XVI KUHP (Indonesia Criminal Code), it consist of 12 articles, from art 310 until 321.¹⁴ Chapter XVI KUHP starting from article 310 until 321 are entitled “Defamation”. In other words, the act of affronts or false accusation are includes as defamation.

The term “libel” comes from the word “libelius” or “libelif” in Latin. In America’s law, the act of “defamation” is divided into “libel” and “slander”. Libel is a defamation that was done in written, this include hand written, email, website pages, and announcement that was shown in an exposed and public place to be seen by public. Meanwhile, slander refers to defamation in verbal.

Opinion from Judge in a case in 1933 of *Kimmerle versus New York*: “Libel covers all written communications that tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of their confidence and friendly intercourse in society.

3. Targets and Victim of the defamation

Defamation usually relates to insults, and those insults have the purpose of “attacking” someone’s good name or pride. The insults with the target of hurting someone’s or something’s pride are being directed to a few targets. Those targets can be divided towards:

- a. Personal / Private
- b. A certain group
- c. Religion
- d. Towards deceased person
- e. Towards government officials, or president or foreign government officials.

¹³ R. Soesilo, “Kitab Undang-Undang Hukum Pidana Serta Komentar-Komentarnya lengkap Pasal Demi Pasal, (Bogor, Politea, 1998), p.143

¹⁴ OpCit, Dr. Tjipta Lesmana, p.21

B. FREEDOM OF SPEECH

1. Definition of Freedom of Speech

The main substance of Human Rights is the freedom and right for privacy. Freedom lies to the ability of people to make their own decision. This freedom is existential because it is part of the person itself and cannot be separated. Freedom is an ability and capability to give meaning and ways of life, also the ability to accept or to refuse any possibilities or value that is offered by another person.¹⁵ The activity in the Internet relates to the freedom of expression, as it is one of the tools, which allows people to expressed themselves where this Internet is a space that can be accessed in public.

The rights to expressed oneself may act as proof towards freedom and democracy. People in democratic are allowed to vote or participate in public decision or to share public information because of this freedom of speech. As the freedom of speech is being protected by the law, each person has the right in giving out their opinion through the available media, may it be verbally or in a form of written and visual media.

Regarding to the freedom of speech, an act such as searching information through internet, communicating through social media, are involved deeply towards the freedom and rights to expressed oneself. And so, people have exchange information through the Internet where it is a place that can be accessed publically and borderless across the world.

2. Regulation concerning Freedom of Speech

Laws regarding freedom of speech is protected and written under the law of Indonesia. This law includes Indonesian Constitutional Law, UUD RI 1945 Art 28 E (3) "*Setiap orang berhak atas kebebasan berserikat, berkumpul, dan mengeluarkan pendapat.*" and Art 28 "*Setiap orang berhak untuk berkomunikasi dan memperoleh informasi untuk mengembangkan pribadi dan lingkungan sosialnya, serta berhak untuk mengembangkan pribadi dan lingkungan*

¹⁵ Emiliana Krisnawati, "*Problematik cyber law bagi perkembangan hukum Indonesia*", dalam Satya Arinanto, dan Ninuk Triyanti (ed), *Memahami Hukum*, p.179-183

sosialnya, serta berhak untuk mencari, memperoleh, memiliki, menyimpan, mengolah, dan menyampaikan informasi dengan menggunakan segala jenis saluran yang tersedia.” This law speaks about the rights of people to speak and obtain information.

Another regulation is the Law number 9 year 1998 concerning freedom of expression in public Art 2: “*Setiap warga negara, secara perorangan atau kelompok bebas menyampaikan pendapat sebagai perwujudan hak dan tanggung jawab berdemokrasi dalam kehidupan bermasyarakat, berbangsa dan bernegara.*” This regulation also speaks about the freedom in democracy, and Law number 39 Year 1999 Art 23 (2) concerning Human Rights: “*Setiap orang bebas untuk mempunyai, mengeluarkan, dan menyebarkan pendapat sesuai hati nuraninya, secara lisan dan atau tulisan melalui media cetak maupun elektronik dengan memperhatikan nilai-nilai agama, kesusilaan, ketertiban, kepentingan umum, dan keutuhan negara*” as law that allows opinion exchange through any media with certain consideration.

3. Borderline in Freedom of Speech

Freedom of Speech is necessary and act as human rights. While the law is protecting the rights of speech, the law also mentions that while sharing information and opinion, people needs to take consideration of the information they are sharing. Unfortunately, people may forget to take consideration and the rights of speech were misused and turned into act of crime as it is regulated in *Surat Edaran Kapolri*, Indonesian Criminal Code, and *ITE Law*.

In the Indonesian Constitutional Law Art 28 were mentioned that “*Setiap orang berhak untuk berkomunikasi*” this explains that anyone has the rights to communicate. It is also stated in Art 23 (2) Law No.39 year 1999 concerning Human Rights (*Hak Asasi Manusia*) that “*setiap orang bebas mengeluarkan pendapat*”, this proofs that the Law in Indonesia are given people their rights to speak. However, in that same Article were also mentioned “*dengan memperhatikan nilai-nilai agama, kesusilaan, ketertiban, kepentingan umum, dan keutuhan negara*”. This is the very borderline of freedom of speech as it

explains that people must pay into consideration the moral and value before using this freedom of speech.

As explained in the in the Law of Information and Technology Transaction (or Informasi and Transaksi Elektronik / ITE Law) it can be considered as an act of crime when someone is knowingly and without rights has distributed information that contains affronts and/or defamation.

C. DEVELOPMENT OF INFORMATION TECHNOLOGY AND COMMUNICATION

Internet in this era have become one source of information that can be accessed from anywhere and anytime. It was also called as source of information because it can connects from one information site (data) to another in a very short time.

The number of Internet user in Indonesia could reach 70 million or counted 28% of total population. Social media user such as Facebook reach until 50 million or counted as 20% of total population, meanwhile Twitter user reach the amount of 40 million or counted as 16% of total population.¹⁶

The condition described before has proof that he variation of act in exchanging information has developed along with the movement of time and technology. One of the developments of Technology in information exchange that are commonly known and used these days is the Internet.

As the global communications network is extended, increasing pressure is placed on all societies to conform to the ethos and norms of the information society. Although political and cultural differences between societies remain, the norms of the information society develop along with the use of computers, communications, and information systems.¹⁷

1. INTERNET

a. Definition of Internet

What do people know about Internet? Internet, or in other word, Inter-
Network is a gathering of computer network which relates to sites such as

¹⁶ Opcit, Tim Pusat Humas Kementrian Perdagangan RI, p.2

¹⁷ Zhang Jingwei People's Daily Online (China's state-run newspaper), Jan. 26, 2010 // Weinberg Nathan, "Computers in the information society", (United State of America: Westview Press, Inc., 1999),p.16

academics, governance, commercial, organization and/or individuals.¹⁸ Internet in this era have become one source of information that can be accessed from anywhere and anytime. It was called as source of information because it can connects from one information site (data) to another in a very short time.

The underpinnings of the Internet are formed by the global interconnection of hundreds of thousands of otherwise independent computers, communications entities and information systems.¹⁹ Those applications for example includes:²⁰

- 1.) WWW (world wide web)
- 2.) Electronic mail / Email / Messaging
- 3.) File Transfer
- 4.) Remote Login
- 5.) IRC (Internet Relay Chat)

The information through the Internet in modern society flows as if it cannot be contained. This happened because of the easy and reachable Internet access that is offered by phone provider to anyone regardless age. Various use of information from the Internet can be gained from people from any society. May it workers or professionals, nowadays truly is easy to obtain information and data. By simply typing keywords in a search engine, they can obtain the information they needed.²¹

Internet offers more variants and options in information exchange, which is different with the other communication tools. So it's not like telephone, whose purpose is to sent audio and text, or facsimile, which can only sent information in form of text or pictures. In this Internet, we are able to share audio, text, pictures and all can be transmitted in the same time, allowing two-way communication. Furthermore, this Internet has

¹⁸ Graifhan Ramadhani, *Modul Pengenalan Internet*, p.26

¹⁹ Robert E. Kahn and Vinton G. Cerf, *What Is The Internet (And What Makes It Work)* (December, 1999), p.2

²⁰ *ibid*

²¹ Anggara, Supriyadi W.E, Ririn Sjafriani, "Kontroversi UU ITE (menggugat pencemaran nama baik di rumah maya)", (Jakarta: Degrad Publishing: 2010), p.2

made it possible to conduct a transaction with two or more parties, without needing to meet all the parties in the same room dimension and time.²²

The era of information and communication technology is different nowadays than before. In this era, Internet has become the “king” of information with number of user that reach hundreds of millions people all over the world. The number of Internet provider has exceed to 500 millions for the first time in the 2010, meanwhile the number of mobile broadband subscriber has increased by 940 million.²³ Basically, Internet acts as network, which connects between computers with another computer. For the case of smartphone, the phone service provider will act and provide the connection for the Internet and will connect through the software application available in the smartphone.

b. History of Internet

In the beginning, the Internet was a limited communication tools that is developed by military in the 1960. The first purpose of this creation is so that military and government agent are able to keep the communication and information exchange through their computer during war. And so, based on this, begun the project of Computer Network research by “Advanced Research Projects Agency” (ARPA). This project was called and known as Arpanet and is officially funded by the US Department of Defense.²⁴

And so, from the intentions of creating a better communication tools during the war era, there born the Internet. While continuously developing, it didn't stop for only being a tool of war, by the conveniences of the Internet offered; it has became commonly used until it turned into the Internet in this nowadays. Here, people from all range of age, race, and nationality are using this Internet.

c. Internet Usage and It's Purpose

²² Hince IP Pandjaitan, dkk, *Membangun Cyberlaw Indonesia yang Demokratis* (Jakarta: Indonesia Media Law & Policy Centre, 2005), p.93

²³ OpCit, Iik Novianto,

²⁴ Anggaram dkk, *Kontroversi Undang-undang ITE*, (Jakarta: PT Penebar Swadaya, 2010), p.3

The use of the Internet to meet the needs of as a source of information due to the easy, fast, accurate, inexpensive and accurate.²⁵ For example, people used spread information verbally or using a letter or post card in the past, and now, it shift into texting (SMS), including the Electronic Mail (E-mail). This E-mail has manage to replace the method of information exchanging because it provides people preference, which is efficient, cheap and easy to use.

Another reason why people chooses to use internet is that according to Sisson and Pontau, this was caused because the internet has provide the service that can't be found like any other types of information source.²⁶

According to Mc Quail, Blumler, and Brown (1972), they have categorized motives of media usage form the result of their research in England. Those are:²⁷

- 1) Diversion - This usually was done as diversion from their daily routine and problems in the user's life.
- 2) Social Relationship - Making a relationship with someone over the media.
- 3) Personal Identity and individual psychology - Self-identifying or self-confirmation of their own identity and existence.
- 4) Surveillance - keeping up with information that may impact someone or help someone when dealing with something.

According to Quarterman and Mitchell in Herring (1996), the purpose of Internet usage was divided into 4 (four) categories, which is:²⁸

- 1) Internet as communication media; because it can be used by any user from around the globe.
- 2) Data exchange media; it can exchange information quickly and less costly by using E-mail and WWW (World Wide Web).
- 3) Media to search information or data; because if the vast development of Internet, it was made the web as one of the most important and accurate information resource.

²⁵ Op.Cit, Iik Novianto

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

- 4) Community; the Internet now has provide the possibilities to create a new kind of community which members varies from around the globe.

d. Internet influence

Internet is known as tools and proof the advanced of humanity in information and technology. It offers people information that none ever exist before its birth. Unfortunately, good things are not the only things they offer. Not that it was meant to happen, but the opportunity for wrongdoing arises with the opportunities of the Internet.

The Internet has offers the advantages as communication tools, such as the cheap and convenience way of communication, allows to connect between one computer and another regardless distance and country, and many more aspect may it for the use of individual, business, or even national and international necessities.

As mentioned earlier regarding the advantages of the Internet, this Internet also has its own disadvantages. By providing borderless communication, it also made it possible for people to conduct activities that are illegal by the help of this convenience tool. This includes stealing electronic data, spreading false information fast and vast, and others possible act that can be done through the cyber world.

2. SOCIAL MEDIA

Just like its name, social media it's a media used by people to socialize and usually it was an indirect socialization. It is a social network on the web, where people usually joins into a certain network and connecting to new people, or it can also be real-world friends that is also joining into the same social network. By following the progression of technology, the social media now is also counted as media to expressed people's opinion due its ability to function as information exchange tools.

Social media can also be described in these following characteristics:

- 6.) Participation

Social media encourages contributions and feedback from everyone who is interested. It blurs the line between media and audience.

7.) Openness

Most social media services are open to feedback and participation. They encourage voting, comments and the sharing of information. There are rarely any barriers to accessing and making use of content – password-protected content is frowned on.

8.) Conversation

Whereas traditional media is about “broadcast” (content transmitted or distributed to an audience) social media is better seen as a two-way conversation.

9.) Community

Social media allows communities to form quickly and communicate effectively. This each communities were made to share common interests within the group/community member for example; may it be some hobby such as passion for photography, certain religious community or even political preference.

10.) Connectedness

Most kinds of social media thrive on their connectedness, making use of links to other sites, resources and people.²⁹

As it is explained, social media allows people to connect with one another where the elements of Participation, Openness, Conversation, Community and Connectedness can be found within its functions. There are several available social media to be used and accessed and among the social media, there are commonly known and used in the latest trends. According to website DreamGrow, an internet marketing and social media company has gathered data of social media visitors based on global and US data.

Commonly Used Social Media according to DreamGrow³⁰

²⁹ Antony Mayfield, “*WHAT IS SOCIAL MEDIA?*”, accessed by http://www.icrossing.com/uk/sites/default/files_uk/insight_pdf_files/What%20is%20Social%20Media_iCrossing_ebook.pdf, at 22nd December 2016 20:00 west Indonesia time

Top Social Networking Sites

Social Network	Facebook	YouTube	Instagram	Qzone	Weibo
Monthly Active User	2,200,000,000	1,500,000,000	800,000,000	563,000,000	376,000,000

Top Social Networking App

Social Network	WhatsApp	Messenger	WeChat	Instagram
Monthly Active User	1,500,000,000	1,300,000,000	989,000,000	800,000,000

D. COMPUTER CRIME AND CYBER CRIME

As the globalization has made its effect to humanities, it has helped and gives improvements to people in many ways including the information exchange. Improvements may bring good things, but it also brings another. The convenient use of Internet as information exchange has also become tools towards crime, which in this case known as computer crime or cybercrime.

Cybercrime are happening in Indonesia since year 1983, especially in banking field. In the next years until nowadays, Cybercrime happens rather often in Indonesia, this includes computer program pirating, cracking, carding (credit card use by a non legitimate user), bank fraud, pornography, and domain name.³¹

This cybercrime is a crime that knows no boundaries (borderless) and time of the act were usually because the victim and the criminal were placed in different place and/or country. The act of crime can be conducted by monitoring the computer that is connected with the Internet and this can be done worrying about crime witness. This crime can be categorized as Transnational Crime where it usually involves more than one country's law enforcer. IT crime or cybercrime has different characteristic compared to the crime in general, may it be in the

³⁰ Priit Kalas, "Top 15 Most Popular Social Networking Sites and Apps [May 2018]", accessed by <http://www.dreamgrow.com/top-15-most-popular-social-networking-sites/amp/>, at May 18th May 2018 west Indonesia time

³¹ Widodo, opcit, p.45

criminal, victim, crime intention and place (crime scene) until it needed a special operation and law settings.³²

1. Cyber world

The term “world” is where the inhabitant of living beings, objects, and nature. So, the term Cyber world (also known as cyberspace) has the similar traits, which is a world that acts as the place where the inhabitant were “gathered” and connected through the computer in a certain place known also as “space” or “cyberspace”. Just like real world, virtual world (Internet) can also attract the act of crime, whether it was meant simply with no purpose (pranking) or it was made to obtain something. These phenomena are usually being called as cybercrime.³³

One of the acts of crimes that use the Internet as its “tools” were defamation. The use of Internet for exchanging information was made easy nowadays; it also helps to spread information that contains false information, including information that contains the traits of defamation.

The regulation within Law of ITE including the Civil Law that regulates about defamation, were necessary because the information exchange through the internet (electronic media) have special characteristic and were borderless in terms of spreading and exchange information.

2. Computer Crime and Cyber Crime

The Technology and Information System (Internet) has triggered some changes in the definition of Computer Crime because earlier focus of the Law was on the Hardware, which is the Computer. Now by the development of the Internet Network, the definition and focus of the Cybercrime has widened into the activity of Cyber World through the Internet.³⁴

³² Petrus Reinhard Golose, “Buletin Hukum Perbankan Dan Kebanksentralan, Perkembangan Cybercrime Dan Upaya Penanganannya Di Indonesia ke arah Pengembangan kebijakan yang menyeluruh dan terpadu”, (Jakarta: 10 Agustus 2006), p.6

³³ OpCit, Budi Suhariyanto. p.9-11

³⁴ Budi Suhariyanto., SH., MH, *Tindak Pidana Teknologi Informasi (cybercrime) : Urgensi Pengaturan dan Celah Hukumnya* (Ed. 1, Cet. 1), (Jakarta: Rajawali Pers, 2012) p.9-11)

According to Al Wisnubroto, a crime is a computer crime if:

- a) An act of crime that related with computer and/or computer system
- b) An act of crime by using computer
- c) The act were done illegally, with no rights or unethical
- d) The act causing the computer to unable to operates accordingly
- e) The act may resulting material loss or immaterial loss (example: time, value, service etc.)³⁵

Another description regarding crime conditions to be considered as computer/cyber crime according to Sutan Remy Shadeini is:

- a) Tools or media for the act of crime is the computer program and the target is computer system or something that exist in the virtual world (non computer), or
- b) Even if the tools are done by a non-computer, but if the target was the computer system.³⁶

When the act of crime has meet this condition described previously, the crime can be categorized as cybercrime or computer crime.

One of the elements of crime Cyber crime (Computer crime) can also be divided by the motive or intention in doing the act:

- 2) Cybercrime with an intention of crime.

This act is pure was done with the intention of criminal act. This motives usually uses the Internet as their media/tools in succeeding their act.

For example: Carding; stealing credit card number through online transaction.

- 3) Cybercrime in the “grey-area”

This act needs a few considerations before determining if one’s act was a criminal act because sometimes the intention was not for criminal act.

For example: Probing or Port scanning; this was an act to gather information from the specified port, whether it is open or closed.

³⁵ Aloysius Wisnubroto, “Kebijakan Hukum Pidana Dalam Penanggulangan Penyalahgunaan Komputer”, (Yogyakarta: Universitas Atmajaya Yogyakarta: 1999), P.23-24

³⁶ Sutan Remy Syahdeini, “Kejahatan & Tindak Pidana Komputer”, (Jakarta: PT Utama Pusaka Grafiti : 2009), p.40-41

There are a few factors that cause the increase of computer crime. Those factors are:

- a) The cost of computer are getting cheaper; including the cost for Internet service. This factor (berpengaruh) the increasing number of Internet user. The increase of cellular provider that includes the ability to access the Internet has contributed in the increasing Internet user.
- b) The easy accessed towards the information and communication network, the setting-up Wi-Fi (wireless fidelity) that increases and spreads in public places.
- c) The arrival of smartphones that allows the accessed of Internet; meaning to access the Internet does not necessarily has to use PC (Personal Computer) or laptop.
- d) Convenience because almost every information that can be accessed through the Internet. This even includes the information of how to make a bomb.
- e) To access the Internet can be done at anywhere including the unreachable place (hiding place) from the law enforcer and from other parties that can me the target of crime (victim).³⁷

The crime that knows no boundaries (borderless) and time of the act were usually because the victim and the criminal were placed in different place and/or country. The act of crime can be done by monitoring the computer and connected with the Internet without worrying about crime witness. This crime can be categorized as Transnational Crime where it usually involves more than one country's law enforcer. IT crime or cybercrime has different characteristic compared to the crime in general, may it be in the criminal, victim, modus operandi³⁸ and place (tempat kejadian perkara) until it needed a special operation and law settings.³⁹

³⁷ Ibid, p.47

³⁸ Modus operandi definition: a particular way or method of doing something especially one that is characteristic or well-established

³⁹ OpCit, Petrus Reinhard Golose, p.6

3. Types of Cyber Crime

Cybercrime is where the computer technology and Internet evolution has also significantly implement evolution in the crime applicant in the cyber world.⁴⁰

This Cyber crime can be categorized into offences such as:

- 1) Offences towards secrecy, integrity, and data availability in computer system. This includes:
 - a) Illegal access
 - b) Illegal interception (to record/listen to signals/radars)
 - c) Data interference
 - d) System interference
 - e) Misuse of devices
- 2) Computer related offenses: forgery and fraud
- 3) Content related offenses child pornography
- 4) Offences related to infringements of copyrights⁴¹

These cybercrime are crimes that were done with the computer (internet). There are also crimes that only uses the Internet as a tool; for example, Carding⁴².

Cyber crime are divided into two parts⁴³: The Advanced Cybercrime (also known as high-tech crime) where this focuses on the attack of the computer for both hardware and software, for example: Carding and Hacking/Cracking; and another were Cyber-enabled crime, where the traditional or common crimes were advanced and done with the help of computer and/or internet, such as Fraud and Defamation.

a. Advanced Cybercrime

⁴⁰ Josua Sitompul, *Cyberspace, Cybercrimes, Cyberlaw: Tinjauan Aspek Hukum Pidana*, (Jakarta: Tatanusa, 2012), p.26

⁴¹ Mardjono Reksodiputro, "Menyelaraskan Pembaruan Hukum", (Jakarta: Komisi Hukum Nasional Republik Indonesia : 2009), p.139-140

⁴² Carding is a term describing the trafficking of credit card, bank account and other personal information online as well as related fraud services. Activities also encompass procurement of details, and money laundering techniques.

⁴³ Taken in the website of Interpol: Crime areas; about cybercrime (<https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime>)

Advanced cybercrime is a crime that focuses on the computer. This crime was only possible by the existence of computer and Internet because the attack concentrate on the computer for both hardware and software.

According to Andi Hamzah, Crime towards computer can be classified into:

- a) Crime towards computer system:
 - Concerning input, erasing, adding materials
 - Concerning data processing, by changing, damaging, etc.
- b) Crime towards computer tools:
 - Harming was done by damaging computer hardware⁴⁴

Example of Cybercrime that has happened in Indonesia are; Internet smuggling, pagejacking (mousetrapping), spam (junk mail), intercepting, cybersquatting, typosquatting. And the act of crime that is targeting the computer system or computer networks is: cracking, defacing, denial of service (DoS), Distributed Denial Of Service Attack (DdoS), virus spreading (worm) and logic bomb⁴⁵

b. Cyber-enabled Crime

Just as it is written, Cyber-enabled crime are act of crime that has the ability/possibility to be conducted through cyber-world, turning the crime into cybercrime. Unlike the advanced cybercrime, these crimes were originally common crime that can occur with or without the help of the computer and Internet. For example: Fraud, when the act were done by the help of electronic media, the case will uses Law of ITE and considered as cybercrime. Another example is written in this research itself, which is Defamation that has occurs in the social media and takes form as cybercrime.

⁴⁴ Andi Hamzah, "Aspek Aspek Pidana Di Bidang Komputer", (Jakarta: Sinar Gradika: 1989), P.14-15

⁴⁵ Widodo, opcit, p.45

E. CYBER LAW IN INDONESIA

It is a lie to claim that the Internet is an absolutely free space without regulation. The truth is that it is the extension of the real world. Therefore, implementing monitoring according to a country's national context is what any government has to do.⁴⁶ In the era of Information and Technology nowadays, a very rapid development and advance of Information Technology have contributed to changes in the people's life activities in the various fields that have had direct effect on the emergence of new forms of legal acts.⁴⁷

The globalization of information has placed Indonesia as part of the world's information community, therefore the making of regulation concerning organization of Electric Information and Transactions at the national level is required in order that the development of Information Technology can be carried out in an optimal, distributive, and widespread manner through all levels of society to advance the intellectual life of the people.⁴⁸

The variety ways to access and exchange the information, especially through the help of the Internet, have influence people to use them to carry information. But they tends to forget or to ignore by the fact that the Internet is a public space that may be accessed with anyone, allowing the information there to be accessed regardless the risk and privacy of that certain information. Some of that information may even consider as an act against the law. As a country of law, Indonesia needed a formal law, a law that regulates the cyber-space. This regulation was meant to facilitate the needs of people, especially Indonesian citizen, who suffers for loss or involved in a problem regarding the usage of the Internet.⁴⁹

1. Definition of Cyber law

Cyber-crime has been repeatedly increasing from time to time, following the era of the developing technology and Internet. It is not just the increasing amount of crime act, but also the varieties way of the cyber-crime itself. In a

⁴⁶ OpCit, Weinberg Nathan, p.439

⁴⁷ Law of Indonesia Number 11 Year 2008, considering (c)

⁴⁸ Ibid

⁴⁹ OpCit, Hinca IP Pandjaitan, dkk, P.10

few modern countries, they have developed a specified law for the cybercrime, calling it the Cyber law.

There are crimes that can be done in the Internet or computer. These new crimes has created new problem when it comes to investigation and prosecution for the law enforcer. The consequence is; electronic information and transaction requires strong protection towards the wrongdoing act.⁵⁰

According to Josua Sitompul, the principal of cyber law is a regulation towards society's behavior which the violators of the regulation (law) shall receive penalty or sanction. Despite that cyber world is a virtual space, law is still needed to regulate the behavior of the people, because: First, The people in the virtual world exist in the real world. Second, even though it happened in the virtual world, the transaction that was done has influence in the real world, may it be economic or non-economic.⁵¹

Cyber law nowadays are necessary due to the cyber world has influenced the society, although cyber law is more complicated due to the:

- a. The cyber activity are not bound by territory
- b. Action taken in the cyberspace tends to be formless (untouchable)
- c. The difficulty to provide evidence because electronic data tends to be easy to change, hacked, falsified, and sent to various place on the globe in the count of seconds.
- d. Copyrights are possible to be violated by the help of technology
- e. It is not possible to use conventional law^{52 53}

In case of countermeasures for computer misuse the penal policy are necessary. This policy must be concentrated into two directions. The first, were directed into application policy, which is a policy regarding how to operate the law of crime that is valid in case of handling the misused of computer in the present times. While the second were policy that is directed

⁵⁰ OpCit, Sutan Remy Syahdeini p.8

⁵¹ OpCit, Josua Sitompul, P.38-39

⁵² Ilmukomputer.org/rethink on cybercrime and cyberlaw. Accessed at 23 April 2013

⁵³ Conventional law: Species of special law and has its source in the agreement of those who are subject to it. (Partnerships)

to a formative policy area or known as penal law reform, which is a policy, that were made to summarize regulation in specific Criminal Law to countermeasure the computer misuse in the future.⁵⁴

2. Cyber Law to encounter Cybercrime in Indonesia

Cyber law is a law or regulation that focuses on the usage of information technology and virtual world. The cyber law regulates the rule regarding crime in the Internet, including the law which purpose is to protect.

Indonesia is a *rechtstaat* (*negara hukum*); meaning the country that acknowledges the existence of law. As *rechtstaat*, there are two substance of country of law, which is: Authority under the law and equality before the law (*kekuasaan yang tunduk pada hukum dan adanya persamaan setiap orang dihadapan hukum*)⁵⁵ This law functions is not simply as social control, but it has the purpose of creating changes in the people.⁵⁶

Indonesian Law number 11 year 2008 concerning Information and Electronic Transaction (ITE Law) is the first cyber law in Indonesia that regulates specifically regarding information and electronic transaction. The content of the ITE Law can be categorized into 2 (two) parts, which is:

- a. Regulation regarding information and electronic transaction
- b. Regulation regarding the prohibited act⁵⁷

As the crime has developed into a borderless crime by using the Information Technology and Communication, the needs for the law has give birth to Law No.11 year 2008 at 21 April 2008 and later it also evolve and created the amendments as law no. 19 Year 2016 concerning Information and Electronic Transactions. This law was made as guidelines so that the law enforcer may use it to settle dispute of cyber-related crime.

⁵⁴ OpCit, Aloysius Wisnubroto, p.4

⁵⁵ OpCit, Mochtar kusumaatmadja, p.15

⁵⁶ *ibid*

⁵⁷ Josua Sitompul, Opcit, p.44

CHAPTER III

CONCEPT OF DEFAMATION IN THE DEVELOPMENT OF INDONESIAN CYBER LAW

A. DEFAMATION AS AN ACT OF CRIME

The act of defamation is an act that harm/injure the good image of society towards that certain person.⁵⁸ This defamation is regulated under the law of Indonesia to control human behavior and also to settle dispute that happens by the act of defamation.

In Criminal Code of Indonesia (KUHP), the classifications of Defamation are:

- a. Art 310 (1): Slander, belediging, laster (Verbally)
- b. Art 310 (2): Libel, smaadschrift (Written)
- c. Art 311-314: Defamation, laster (Fitnah / untruthful statement)
- d. Art 315: Eenvoudige belediging (Penghinaan ringan / indirectly)
- e. Art 317: Lasterlijke aanklacht (untruthful report/announcement)
- f. Art 318: Lasterlijke verdachtmaking (false accusation)
- g. Art 320: (Defamation towards the deceased, verbally)
- h. Art 321: (Defamation towards the deceased, by written)⁵⁹

The defamation in general was regulated under Indonesian Criminal Code as written above and any form of act according to the Criminal Code can be considered as criminal act.

In the past, defamation may be done through verbal or written (media), as the usage of Internet nowadays as communication tool, it is now possible to do the act of defamation through the Internet.⁶⁰ Defamation can be done and divided into two, which is: Verbally: A verbally expressed of defamation; and Written:

⁵⁸ OpCit, R. Soesilo, p.91

⁵⁹ OpCit, R Soesilo, p.143

⁶⁰ Taken from thesis: Novi Safitri, titled: TINJAUAN YURIDIS TENTANG DELIK PENGHINAAN DAN/ATAU PENCEMARAN NAMA BAIK DALAM PASAL 27 AYAT (3) UU NO.11 TAHUN 2008 TENTANG INFORMASI DAN TRANSAKSI ELEKTRONIK, 2013

Defamation done in written content. This explains any forms and any media can be used to harm someone's reputation.

1. Components of Crime

The term "defamation" is an action that may cause injury/harm towards someone's reputation, which can be considered as violations towards regulation that protects someone's reputation.

Terms or circumstances that is being communicated or publicized through the Internet can be considered as affronts (defamation) if it were not truthful and cause harm or loss towards the party/parties as the victim, may it be something that harms their reputation or material. Publication or Statement towards another people (parties) can be defined as defamation when it is done, may it in form of words or statement that is written in public and contains the connotation that may harm the reputation of someone or some entity.⁶¹ The act of defamation is intended to harm someone's reputation, than the objective trait of the defamation itself is how damaged does one person's reputation from that defamation act.⁶²

According to Moeljatno, element in the act of crime is:

- a. Action and Result (Kelakuan dan Akibat)
- b. Condition that creates action possibility (keadaan yang menyertai perbuatan)
- c. Addition of condition that weigh the crime (keadaan tambahan yang memberatkan pidana)
- d. Objective elements (unsur melawan hukum yang obyektif)
- e. Subjective elements (unsur melawan hukum yang subjectif)⁶³

Defamation is considered as an act of crime because it fulfills the element of crime. **Action and Result**; is where the act of defamation resulting someone's reputation to be harm. **Condition of the act**; this element focuses on the target of the defamation. Anyone is possible to become the target of the defamation

⁶¹ OpCit, Wirjono Prodjodikoro, p.97

⁶² Ibid

⁶³ Moeljatno, "Asas-asas hukum pidana", Jakarta; Rineka Cipta, 1993, p.63

and there must be a condition of the target to be accused of something. The conditions were generally in form of attacking and the accusation usually contains hatred or affronts. **Addition condition that weighs the crime**; this condition focuses on how the defamation can be considered as act of crime. This condition includes where the accusation (defamation) was a false statement and how it effects to the surroundings. Another elements is Subjective and Objective, where the **Subjective** is where the action were done by 'knowingly' or in other words, there are 'awareness' in conducting the act of affronting/defaming; and the **Objective** is the purpose. The purpose of affronting itself is to harm the reputation of the targets.

According to R. Soesilo in the book of *Kitab Undang-Undang Hukum Pidana Serta Komentor-Komentarnya*, was describing about Art 310 KUHP about defamation. It explains defamation was divided into 6 (six) types, which is:⁶⁴

- a. Element of Objective: It is an act to "attack", meaning it delivers accusation whether it's verbally or non-verbal towards someone that could result as an insult towards someone's good name or pride.
- b. Element of Subjective: and act that was done on purpose with the intention of attacking someone's good name or pride.
- c. Sacrilege with (written) letter: If an accusation was done through letters or image, it can be considered as Sacrilege.
- d. Slander (Fitnah): another word for defamation, telling an untruthful words
- e. Light Insult: An accusation used other than "accusing an act"; mostly by using cursing words.
- f. False Accusation: Someone who on purposely falsified a letter or accusation; and/or writing a false letter relating with someone.

The Criminal Code Law of Indonesia Art 310 are focusing on 2 actions that are forbidden by the law, which is:

- 1.) Attacking someone's honor/dignity (*kehormatan*) by accusing something, where the action were meant to be known (*diketahui*) by public, and

⁶⁴ OpCit, R. Soesilo, p.91

- 2.) Attacking someone's reputation (*nama baik seseorang*) by accusing something, where the actions meant to be known by public.

The Article 310 focuses on the term of "*suatu perbuatan tertentu*". The term "certain / *sesuatu*" and "something / *sesuatu hal*" were made in general it can be interpret into a larger meanings. The elements of Art 310 is:

1. Knowingly (*dengan sengaja*)
2. Attacking other's reputation or good name (*menyerang kehormatan atau nama baik orang lain*)
3. Accusing of doing certain things (*menuduh melakukan suatu perbuatan tertentu*)
4. With the intention to be known/aware by public (*dengan maksud yang nyata supaya diketahui oleh umum*)⁶⁵

a. Knowingly

Knowingly also mean purposely. This element means when the act of defamation is done with awareness that the action is a defamation (insulting / affronting the others)

b. Attacking other's reputation or good name

The term as "attack" is more referring to "violates".⁶⁶

The term "good name" was meant as reputation in front of the public towards someone may it because of his or her activity/job or status/authority atau kedudukan (status).

c. Accusing of doing certain things

The word "certain things" comes from German as: *bepaald feit*; meaning the act that was accused were clear, from where and when it occurs.⁶⁷

If it were unclear regarding the time and place for the act, then the act were include as light defamation (indirect), for example: you are a liar; you are a thief; etc. A proper accusing would be, for example: Person A went and steals at X's house last week.

d. With the intention to be known/aware by public

This element must be proven where the intention to be known by public.

For example:

- Announced in public with voice/sound that can be heard by others

⁶⁵ Lenden Marpaung S.H., TINDAK PIDANA TERHADAP KEHORMATAN; PENGERTIAN DAN PENERAPANNYA, PT RajaGraffindo Persada, Jakarta, p.15

⁶⁶ Ibid

⁶⁷ Ibid

- When two person involve in a fight (argument) where one party accuses the other, in a loud voice and (can be) heard by people⁶⁸

B. DEFAMATION DELICTS

According to law and jurisprudence in Indonesia, the “the emotions that contains Hostility, Hatred or Belittle” is what can be interpret as “defamation/affronts/insult”. This interpretation can be considered as formal or material defamation. Formel Belediging (Formal defamation) is an act of affronts in form of words or statement that is impolite or improper. Materiel belediging (Material defamation) is an act that may appear as defamation by seeing it thoroughly. Nowadays, the term defamation may not only be seen by simple statement, but the defamation also tends to be in form of implicit (hidden meaning) within the statement itself.⁶⁹

Defamation delict in the ITE Law is a Law of *Lex Specialis* from the Indonesian Criminal Code. This ITE law were made for the needs of technology development, thus it is called as *Lex Specialis*.

The principle of law regarding *Lex Specialis* has the function to act as limitative and dynamic regulation. This characteristic is made for; (1) to determine the specific law or regulation to be used when there are two different regulations, and (2) which regulations shall be applied as one law. The *lex specialis* were under the principle of ‘*logische soecuakuteit*’ or known as ‘logical exclusivity’ which means that when the criminal provisions are considered as ‘special’ when it has fulfilled the characteristic of *Lex Specialis*.⁷⁰

1. Types of Delict

Delict (delik) can be divided into certain category, such as:

- 1.) Misdrijven en overtredigen (*delik kejahatan dan delik pelanggaran*);
- 2.) Materiele en formeledelicten (*delik materiel dan delik formel*);

⁶⁸ Ibid

⁶⁹ Indriyanto Seno Adji, “Korupsi dan Permasalahannya”, (Jakarta: Diadit media press: 2012), P.60

⁷⁰ Ibid, p.93

- 3.) Commissiedelicten en omissiedelicten (*delik komisi dan delik omisi*);
- 4.) Zelfstandige en voorgezette delicten (*delik yang berdiri sendiri dan delik yang diteruskan*);
- 5.) Aflopende en voortdurende delicten (*delik selesai dan delik berlanjut*);
- 6.) Enkelvoudige en samengestelde delicten (*delik tunggal dan delik berangkai*);
- 7.) Eenvoudige en gestelde (*delik bersahaja dan delik berkualifikasi*);
- 8.) Doleuse en culpose delicten (*delik sengaja dan delik kelalaian atau culpa*);
- 9.) Politieke en commune delicten (*delik politik dan delik komun atau umum*);
- 10.) Delicta propria en commune delicten (*delik propia dan delik komun atau umum*);
- 11.) Delicts that can be separated for the need of law protection such as national security, delict towards the people, delict morality, delict of possession and etc.
- 12.) In Indonesia, according to Indonesian Criminal Code Art 284, it is also known the *delik umum* and *delik khusus* such as delict economy, corruption, subversion, etc.⁷¹

In the terms of law, defamation is divided in Material Defamation (*Penghinaan Materil*) and Formal Defamation (*Penghinaan Formil*). Material defamation is a defamation where its content were truth or fact that were stated in objective manner, it may be in a form of written or verbal. The way of stating is in proper manner and objective (*zakelijk*) so that there are possibilities to prove the truth of the accusing statement. Formal Defamation is a defamation that focuses on the way of stating (delivery) and does not focused on the context of words. Generally, this method of defaming is done rather informal, rude, or impolite, and not in objective manner and was intended to “attack”. In this defamation there is no possibility to prove the truth of the accusing statement.⁷² In conclusion, defamation delict is a formal

⁷¹ OpCit, Andi Hamzah, p104-105

⁷² Oemar Senoadji, “Perkembangan Delik Pers di Indonesia: Profesi Wartawan”, (Jakarta: Erlangga, 1991), p.37

delict, meaning it is an act of crime when the action has been done. So only when the defamation has been done, it may be punished.

2. Defamation as *Delict Aduan*

The word “delict” comes from Latin “*delictum*” that is used to describe the word meaning of “*strafbaar feit*”. *Strafbaar feit* are made of three words: *straf*, *baar*, and *feit*. The word “*straf*” means crime (punishment); *baar* means may/can; and *feit* as an act.⁷³ In other word, the word “*strafbaar feit*” are translated into an act that can be punished.

The delict in defamation act is categorized as “delict aduan”. Delik aduan is where a plaintiff shall be landed in consent of the victim. The prosecutor may only prosecute after a report from the victim have been sent and received.

According by the prosecution method, “Delict Aduan” means an act can only be prosecuted after a report from the victim (as the individual/entity) who has the rights to land a plaintiff. In other words, the reason to make the delict as “*delik aduan*” for the victim will have priority because certain terms the victim is the one who had suffer the loss.⁷⁴

The act of crime defamation can be sued by crime and/or civil code depending from plaintiff of the victim. Most of the time the plaintiff must be proven the truth before being brought to the court. However, the victim may submit a civil plaintiff to the court like a few press delict that was made in the year 2003.⁷⁵

Delik aduan can be divided into 2 categories; which is “*delik aduan mutlak*” (absoluut klachdelict) and “*delik aduan nisbi*” (relatief klachdelict). *Delik Aduan Mutlak* (absoluut klachdelict) is delicts that can only be prosecuted after a report was made. The accusation in this absoluut klachdelict

⁷³ Adam Charzawi, “*Pelajaran Hukum Pidana (Bagian 1)*”, (Jakarta: RajaGrafindo Persada, 2010), p.68-69.

⁷⁴ E.Y. Kanter dan S.R. Sianturi, “*Asas-asas Hukum Pidana di Indonesia dan Penerapannya*”. Jakarta: Stora Grafika, 2002. p.416

⁷⁵ Ibid, p.25

ini is where an accusation is not limited to any individuals. Absoluut klachdelict includes:

- a. *Penghinaan* / Defamation (pasal 319, 320, 321)
- b. *Perjinahan* (pasal 284)
- c. *Delik kesusilaan* (pasal 293, 287)
- d. *Delik pembukaan rahasia* (pasal 322, 323)
- e. *Kawin lari* (pasal 332)
- f. *Pengancaman / chantage* (pasal 369)
- g. *Delik penerbitan / percetakan tertentu* (pasal 485)

Delik aduan nisbi (relatief klachtdelict), focuses towards the crime where the accusation were directed between family members. The family relation must be stated when landing a plaintiff. The accusations are limited towards the people who were mentioned in the plaintiff.⁷⁶ *Delik aduan nisbi* were generally consist of crime towards family possessions, including:

- a. *Pencurian* (Art 367)
- b. *Pemerasan dan pengancaman* (Art 370)
- c. *Penggelapan* (Art 391)
- d. *Penipuan* (Art 391)
- e. *Peruasakan barang* (Art 411)

According to Van Hamel, those who have the rights to (mengadukan suatu delik aduan) is those whom according to the case have the traits and/or have become victim or suffer a loss due to the act of crime (defamation).⁷⁷

In accordance to the prosecution method the defamation delict is a “*Delik aduan*” in accordance to Indonesian Criminal Code Art 319 “*Penghinaan yang diancam dengan pidana menurut bab ini tidak dituntut jika tidak ada pengaduan dari orang yang terkena kejahatan*”. This article speaks that the crime can only be considered as crime and able to be prosecuted when there are a reports/complaint from the involved subject.

⁷⁶ Wirjono Prodjodikoro, “*Tindak-tindak Pidana Tertentu di Indonesia*”, (Bandung, Refika Aditama, 2003), p.156-157

⁷⁷ A.Z. Abidin dan Andi Hamzah, “*Pengantar Dalam Hukum Pidana Indonesia*”, (Jakarta: PT Yarsif Watampone, 2010), p. 286-287

Unlike the other delict regulations in the Indonesia Criminal Code, defamation delict that is regulated in Law of Indonesia (ITE Law) does not specified if the delict were a “*delik aduan*” or “*delik biasa*”. In other words, there are still several differences in the “defamation delict.” However, the methods of prosecution are done after report from the victim.

C. LAW TO ANTICIPATE THE DEVELOPMENT OF TECHNOLOGY INFORMATION AND COMMUNICATION IN THE ACT OF DEFAMATION

Internet has given the society a bigger and easier chance to express their thoughts. Unfortunately, with this chance and their freedom of speaking, some people sometimes seems to forgotten on how to behave once they started to interacted, especially if it were through an electronic social media. This attitude that reflects no manner has lead to an act that against the law and one of them is defamation.

In order to prevent and to find a solution for the cybercrime, the law made for it and was called cyber law. Each country has their version in this “cyber law”. In Indonesia, the law was known as ITE Law. ITE Law were made as Law Number 11 Year 2008 and later on Law of Indonesia Number 19 year 2016 are made, containing the revised version of the previous ITE Law.

1. Cyber law in concern of defamation in the cyber space

As the crime has developed into a borderless crime by using the Information Technology and Communication, the needs for the law has give birth to Law No.11 year 2008 at 21 April 2008 and later it also evolve and created the amendments as law no. 19 Year concerning Information and Electronic Transaction (ITE Law). This law can be considered as Cyber law for Indonesia was made to functions as guidelines so that the law enforcer may use this as settlement for the cyber-related crime.

Criteria of cybercrime that proofs the necessity of cyber law:

- a. Computer can be done by the executant from a far distance
- b. Computer crime can be done by undetected place from law enforcer.
Sometimes the crime was done by the same location in the same building itself.
- c. Computer crime can be done by anonym.
- d. Scale of computer crime can be directed towards numerous targets
- e. Financial damage that was done by computer crime can be severe.
- f. Physical damage by computer crime can be considered severe and to fix the damage may take a long time, and also it cost rather expensive.
- g. Computer crime can be done without the presence of the second party, which is why it is almost impossible for the law enforcer to invite a witness.
- h. The doer (subject) of computer crime that has advanced technique are able to immediately erase the trace so that it can not be tracked by law enforcer while that trace were necessary as evidence towards the investigator. The trace itself was in form as electronic evidence.⁷⁸

To countermeasure the misuse of computer, penal policy is necessary. This policy must be concentrated into two directions. The first, were directed into application policy; which is a policy regarding how to operate the present-valid law of criminal law for the case of handling the misused of computer; and the second were policy that is directed to a formulate policy or known as penal law reform which is a policy that were made to formulate the appropriate criminal law for the future case of computer misuse⁷⁹

Cyber law, or also known as cyber space law are the law that was specifically made to anticipate the matters happening in the cyberspace. The law must be made so that an act shall be punishable as the law regulates it, just as according to the principle "*mellum selectum mellum peona sine*

⁷⁸ OpCit, Sutan Remy Syahdeini, p.45-46

⁷⁹ OpCit, Aloysius Wisnubroto, p.4

previee lege poenale".⁸⁰ By the help of cyber law, the law enforcer may execute this law function towards the cyber-criminal.

In Indonesia, the effort of managing this matters in the cyber-space is by creating the Law number 11 year 2008 concerning Information and Electronic Transaction (also known as ITE Law); which later on at 2016, as proof that the ITE Law is continuously updated, the revised version of the ITE Law.

The Law of ITE have mentioned prohibited act of spreading false information or information that contains defamation. The Law Number 11 year 2008 Art 27 (3) contains the regulation of defamation as prohibited act: "*Setiap orang dengan sengaja dan tanpa hak mendistribusikan dan/atau mentransmisikan dan/atau membuat dapat diaksesnya informasi elektronik dan/atau dokumen elektronik yang memiliki muatan penghinaan dan/atau pencemaran nama baik.*" This article is translated "Any person who knowingly distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation."

Indonesia has its regulation regarding defamation in general and ITE Law as the *lex specialis*. These regulations varies from the Criminal Code and Law of Indonesia and within the law, there are also sanctions for the law violations.

2. ITE Law as Cyber law in Indonesia

Law of Indonesia Number 11 year 2008 concerning Information and Electronic Transaction (ITE Law) regulates the cyber (computer) crime. The classifications of crime regulated under this law, are:

- a. Pornography (Art 27 (1))
- b. Online gambling (Art 27 (2))
- c. Defamation (Art 27 (3))

⁸⁰ OpCit, Emiliana Krisnawati, p179-183

- d. Black mailing or threats (Art 27 (4))
- e. Fraud (Art 28 (1))
- f. Information containing discrimination (*bermuatan SARA*) (Art 28 (2))
- g. Information containing threats (Art 29)
- h. Computer or Computer System Cracking (Art 30 (1))
- i. Interception (Art 31 (1))
- j. Electronic Information/Documents Interference (Art 32 (1))
- k. Removing or transferring information/electronic documents (Art 32 (2))
- l. Act of crime towards computer system (Art 33)
- m. Computer crime towards hardware of software of computer (Art 34 (1))
- n. Computer crime that cause harm to another people (Art 36)
- o. Computer crime that was conducted outside Indonesia (Art 37)
- p. Computer crime that was done by corporate (Art 52 (4))
- q. Computer and/or electronic system cracking that belongs to the government / public facilities (Art 52 (2))

3. Cyber law as *lex specialis*

Lex specialis derogat legi generalis: is one of the law principles, it means that a specific law regulation will override the general law regulation.

According to Bagir Manan, there are few principles that needed to be paid attention in the principle of *lex specialis derogat legi generalis*, which is:

- a. Regulations that can be found in the general regulation are still valid, except the one that is specifically regulated under special legal rules.
- b. Regulations in the *lex specialis* must be in accordance to the regulation in the *lex generalis*.
- c. Regulations must be in the same legal environment with the *lex generalis*.⁸¹

According to Nono Makarim, a law can become a *lex specialis* must fulfill a few conditions, which is:

⁸¹ Bagir Manan, "Hukum Positif Indonesia (Suatu Kajian Teoritik)", (Yogyakarta: FH UII Press, 2004), p.56.

- a. Have fulfilled the condition in a prespective of formal law or material law which in accordance to the legal studies.
- b. Have fulfilled the condition of self-contained regimes, which is a group of primer regulation concerning one topic and related to the group of secondary regulation and the one that takes first priority is the primer regulation. For this matter, the group of primer regulation must contain the regulation regarding rights, obligation and authority, also the regulation that related to the method of implementation, including the specific regulation concerning the law violators.⁸²

D. REGULATION AND SANCTION IN INDONESIA CONCERNING DEFAMATION

1. Regulation and sanction in Indonesia

In general, Indonesia has at least 3 (three) classifications of sanction, which is:

- Criminal penal sanctions (*Sanksi Hukum Pidana*)
- Civil legal sanctions (*Sanksi Hukum Perdata*)
- Administrative sanctions (*Sanksi Administrasi/Administratif*)⁸³

a. Criminal Penal Sanctions

In the article 10 of Criminal Code (KUHP), Criminal Penal Sanctions are divided into 2 (two) categories, which is the primary sanctions (*hukuman pokok*) and additional sanctions (*hukuman tambahan*).

- 1) Primary Sanctions (*Hukuman pokok*)
 - a) Death Penalty (*Hukuman Mati*)
 - b) Imprisonment Sentence (*Hukuman Penjara*); this sanction is regulated under article 12 and 14 of Indonesian Criminal Code

⁸² Wina Armada Sukardi, "Kajian tuntas 350 Tanya Jawab UU Pers dan Kode Etik Jurnalistik", (Jakarta: Dewan Pers, 2012), p.271

⁸³ Diakses dari website Hukum Online (alamat: <http://www.hukumonline.com/klinik/detail/lt54890ad57c011/hukuman-hukuman-yang-dikenal-di-indonesia>)

- c) Confinement Sentence (Hukuman Kurungan); this sanction is regulated under the article 22 of Indonesian Criminal Code
- d) Fine (Denda); this sanctions is regulated under article 30 (2) of Indonesian Criminal Code
- e) *Hukuman Tutupan*; this sanction were regulate under the Law no, 20 year 1946.

2) Additional Sanctions (Hukuman tambahan)

- a) Revocation of certain rights (pencabutan beberapa hak yang tertentu)
- b) Deprivation of certain goods (perampasan barang yang tertentu)
- c) Judge verdict (pengumuman keputusan hakim)

b. Civil Legal Sanctions

The sanction in the Civil Code of Indonesia takes form of sanction such as:

- 1) Obligation to meet certain achievements
- 2) The loss of certain lawful condition, followed by the creations of a new law conditions

In the real practice of the sanction, the judge is the rightful position to judge and decide (give verdict) to the related subject in form of:

- Material Compensation
- Immaterial Compensation

Under the article 1365 of Indonesian Civil Code, it is mentioned that the act that against the law which cause loss towards others (another party), obligate the guilty (subject) to give compensation of the loss.

c. Administrative Sanctions

Administrative sanction is a sanction that is given towards the administrative offenders (violators) or law and regulations in related to administrative. In general, administrative sanction takes form in:

- 1) Fine
- 2) Frozen or up to revocation of certificate and/or permission
- 3) Temporary dismissal for administration service (*pelayanan administrative*) up to reduction of production rations (*pengurangan jatah produksi*)

1. Law concerning defamation in Indonesia

The regulations concerning defamation in Indonesia are regulated into several laws. The general regulation is regulated in the Criminal Code (KUHP) and there are laws that act as *Lex Specialis*, meaning when the act of defamation is done under several circumstances, target, media, etc.

a. KUHP

Defamation law in the Indonesian Criminal Code (KUHP) is regulated under the article 310 until 320:

1. Art 310 (1) as *smaad* (verbally). This often known as defamation; concerning “knowingly (on purpose) attacking someone’s reputation and good name by accusing something, and obvious so that it shall be known by public”
2. Art 310 (2) as *smaadschrift* (written). Is a defamation where the act is done by “written or image that is spread, shown or placed in public”
3. Art 311 (1) as *laster (fitnah)*, is where “those who conducted the act of defamation (*smaad* or *smaadschrift*) are permitted to bring the evidence if the accusation were true, yet didn’t and the accusation were against what they had known.
4. Art 315 as *eenvoudige bleediging (penghinaan ringan)*, is where “knowingly yet doesn’t necessary has the traits of defamation (indirect defamation)
5. Art 317 (1) as *lasterlijk aanklacht (pengaduan fitnah)*, is where “dengan sengaja mengajukan pengaduan atau pemberitahuan palsu kepada penguasa, may it be written or to be written, about someone so that their reputation or good name were affronted.

6. Art 318 (1) as *lasterlijk verdrachtmaking* (*menimbulkan persangkaan palsu*) is “the act that knowingly creating a false accusation towards someone that they will conduct an act of crime.”⁸⁴

The defamation in Criminal Code Art 320 and 321 were the act of defamation done to the deceased. This defamation mainly concerns about the affronts towards honor and reputation of special traits people.

Another form of defamation were regulated under a few Article and categorized as specialized (*lex specialis*) defamation, such as:

1. Art 142, 143, 144: Defamation towards king/ruler or head of state of the neighboring country/nation
2. Art 142 (a) and 154 (a): Defamation (acts that affronts) towards nationality flag of Republic Indonesia and defamation towards foreign nationality flag.
3. Art 156 and 157: Defamation towards certain race in Indonesia
4. Defamation related to religion (blasphemy)
 - a. Art 156 (a) affronts where the act is expressing a certain emotion or action that desecrate (insult) towards certain religion in Indonesia.
 - b. Art 177 (1) affronts towards head of religion heads that undergo their religion routine/duty
 - c. Art 177 (2) Affronts towards object for religious or prayers needs/routine
 - d. Art 503 (2) Affronts by the act of creating nuisance nearby worshipping place (*tempat beribadah*)
5. Art 207 and 208: Defamation towards law authorities (legal entity)⁸⁵

b. Law ITE Law no 11 year 2008 and its amendments Law no. 19 year 2016 concerning Information and Electronic Transactions

According to Indonesia Law Number 11 year 2008 Chapter VII, section Prohibited Acts, Article 27 stated that:

⁸⁴ OpCit, Adami Chazawi, p.9-13

⁸⁵ ibid

- i. (1) Any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents against propriety,
 - ii. (3) Any Person who knowingly and without authority distributes and/or transmits and/or accuses to be accessible Electronic Information and/or Electronic Records with the contents of affronts and/or defamation
- c. Broadcasting Law (Indonesian Press Law) (59 Law No. 32 Year 2002)**
Defamation under the Press Law was regulated in the Art 57, 58, and 59 of Indonesian Law number 32 Year 2002, concerning Broadcasting Law.
- d. Law no. 42 year 2008**
Defamation under the Article 41 (1) and Article 214 of Law number 42 year 2008 concerning presidential and vice presidential election (Art 41 (1) check Art 214)
- e. Law no 8 year 2012**
Defamation towards election of DPR DPD and DPRD in the Article 86 (1) and Article 299 of Indonesian Law Number 8 year 2012 concerning General Election (pemilihan umum).
- f. Indonesian Civil Code**
Regarding plaintiff of defamation by using Indonesia Civil Code Art 1376, it is stated that defamation are not considered as slander if it were done towards public interests.⁸⁶ Specifically, article 1376 of the Indonesia Civil Code stated: *“Tuntutan perdata tentang penghinaan tak dapat dikabulkan jika tidak ternyata adanya maksud untuk menghina itu dianggap tidak ada, jika si pembuat nyata-nyata telah berbuat untuk kepentingan umum atau untuk pembelaan darurat terhadap dirinya.”*

⁸⁶ Ibid, p.26

If the plaintiff were using Indonesia Civil Code, it is generally used the article 1365 of the Indonesia Civil Code in accordance to the article 1372.⁸⁷

Pasal 1365: *Tiap perbuatan melanggar hukum, yang membawa kerugian terhadap seseorang lain, mewajibkan orang yang karena salahnya menerbitkan kerugian itu, mengganti kerugian tersebut.*

Pasal 1372: *Tuntutan perdata tentang hal penghinaan adalah bertujuan mendapat penggantian kerugian serta pemulihan kehormatan dan nama baik.*

If the matters concerning the defamation are truly made for public interest, according to Soesila, the judge will be given the authorization to decide.⁸⁸

E. DEFAMATION CASE IN INDONESIA

There are several cases of Defamation that were done by using Computers, Internet, and Social Media. So this crime of defamation include as cybercrime.

The case discussed here is taken where the crime that was reported has gone through trials and receive the verdict. This section will discuss about crime case of defamation through the social media that has reach the court and receive the verdict. The case file is downloaded from official website of *Direktori Putusan Mahkamah Agung Republik Indonesia*.⁸⁹

a. Case Furqan Ermansyah

Verdict No: 384/Pid.Sus/2015/PN Mtr⁹⁰

Court: PN Mataram

⁸⁷ OpCit, Dr. Tjipta Lesmana, p.25-26

⁸⁸ OpCit R. Soesilo,

⁸⁹ *Direktori Putusan Mahkamah Agung Republik Indonesia*, accessed by <https://putusan.mahkamahagung.go.id/pengadilan/mahkamah-agung/>

⁹⁰ *Direktori Putusan Mahkamah Agung Republik Indonesia*, accessed by <https://putusan.mahkamahagung.go.id/putusan/a4a9c5209b77c9680dbe910c8aeec361>

- 1) The defendant “FURQAN ERMANSYAH” was born in Mataram at January 3rd 1968 and lives in Mataram.
- 2) The defendant at the date 18 November 2014, 24 November 2014, and December 2014 or at other time in the year 2014, located in Facebook Group of “Forum Diskusi Membangun NTB”, has knowingly and without authority distributes and/or transmits and/or accuses to be accessible Electronic Information and/or Electronic Records with the contents of affronts and/or defamation posted towards the victim named TAUFAN RAHMADI.
- 3) The event started when the defendant, “FURQAN ERMANSYAH” posted a criticism the defendant has posted 3 (three) times using his Facebook account with the name Rudy Lombok in the group Forum Diskusi Membangun NTB, which is:
 - i. Dated at 18 November 2014, there were posted a thread and the post receive 245 comments and 34 likes. The post were written: *“FILM terbaru dengan pemeran utama TAUFAN RAHMADI di produksi oleh INSTITUT FILM dibiayai oleh BADAN PROMOSI PARIWISATA DAERAH NTB silahkan ditonton, dengan cerita tentang PROMOSI PRIBADI bukan tentang promosi PARIWISATA NTB”*. It is translated: The newest MOVIE starring TAUFAN RAHMADI produced by INSTITUT FILM paid by BADAN PROMOSI PARIWISATA DAERAH NTB, please watch, the story about PRIVATE PROMOTION and not a promotion of the NTB Tourism (*Pariwisata*).
 - ii. Dated at 24 November 2014, there were posted a thread and the post receive 57 comments and 35 likes. The post were written: *“ANEHNYA SEBUAH BUKTI PERJALANAN ada yang aneh dalam BOARDING PASS tiket antara pengurus BPPD NTB dan SALES MANAGER GARUDA INDONESIA dengan PESAWAT, JAM PENERBANGAN dan NOMOR PENERBANGAN yang sama TAPI BERBEDA BOARDING PASS”*. It is translated: THE ODDITY OF TRAVEL RECIPT there’s something strange/unusual in the BOARDING PASS ticket between the committee BPPD NTB and SALES MANAGER GARUDA

INDONESIA with the PLANE, DEPARTURE, and FLIGHT NUMBER that is similar BUT DIFFERENT BOARDING PASS.

- iii. Dated at 16 December 2014, there were posted a thread and the post receive 182 comments and 35 likes. The post was written: “KORUPSIKAH BPPD NTB ? Mengapa website bppdntb.com ditutup ? Apakah ada unsur korupsinya ? Dengan menjual paket tours dan memberikan rekening atas nama MIASA yang notabene seorang guide mana anggota BPPD NTB silahkan menjelaskan kepada masyarakat... uang 6 Miliar Rupiah tersebut adalah uang besar,,”. It is translated “IS BPPD NTB CORRUPT? Why is the website bppdntb.com were closed ? Is there contains corruption ? By selling tour package and giving a bank account number under the name MIASA where the person is a guide – where is the BPPD NTB member, please explain to civilian... the money 6 billion rupiah is a large sum of money...”.
- 4) The victim as witness, TAUFAN RAHMADI was aware of the post that was made by the defendant in the Facebook after being told by the witness: MOHAMAD NURSANDI and DARWIN WITARSA, where in its content contain affronts and/or defamation that is directed towards the witness TAUFAN RAHMADI and the office BPPD NTB.
- 5) By the act of the defendant FURQAN ERMANSYAH, the witness-victim TAUFAN RAHMADI feel insulted and his reputation were harmed.
- 6) In accordance to the Art 27 (3) Jo, Art 45 (1) Law of Indonesia No. 11 Year 2008, the judge have come into verdict:
 - i. The defendant FURQAN ERMANSYAH has been proven guilty in the act of “knowingly and without authority distributes and/or transmits and/or accuses to be accessible Electronic Information and/or Electronic Records with the contents of affronts and/or defamation”;
 - ii. The defendant are sentenced imprisonment for 10 (ten) months;
 - iii. Decided that the sentence are not necessarily to be done unless in later day there are Judge decision with the authority that decides otherwise before the probation for 1 (one) year ended;

- iv. The defendant is burdened to pay the case cost in total of Rp.2.500,- (two thousand five hundred rupiah).

b. Case Ervani Emy Handayani

Verdict No: 196/Pid.Sus/2014/PN.BTL (ITE) ⁹¹

The case focuses on the indictment where the defendant is reported to have committed an act of crime defamation by using Facebook.

Court: PN Bantul

Indictment: The accused was submitted an indictment with the number PDM-65/BTL/Euh.2/10/2014 with the accusation:

- 1) The accused ERVANI EMY HANDAYANI at 30 May 2014 or during some other time between May until July 2014, who lives in Kampung Gedongan RT005/-, Desa Bangunjiwa, Kecamatan Kasihan Kabupaten Bantul D.I.Yogyakarta, have committed the act *“dengan sengaja dan tanpa hak, mendistribusikan dan/atau mentransmisikan dan/atau membuat dapat diaksesnya Informasi Elektronik dan/atau dokumen Elektronik yang memiliki muatan penghinaan dan/atau pencemaran nama baik”*
- 2) The accused were employed at Kebun Raya and Kebun Binatang Gembira-loko Yogyakarta. The accused own a social media account, Facebook, with the name ERVINA EMY HANDAYANI since 2010. The accused had a husband named ALFA JANTO who worked as security at Toko Jolie Jogja Jewellery located at Jalan Kyai Mojo No.27-29 Pingit, Kecamatan Jetis Kota Yogyakarta, since 13 March 2014 where he was determinate as security without being given severance pay, salary, and also the other right replacement money.
- 3) The accused consider this act was unfair towards her husband, as their family economy has degraded. Unable to hold her emotion and disappointment, the accused decided to express her emotion through her social media, a Facebook account, with the name ERVINA EMY

⁹¹ *Direktori Putusan Mahkamah Agung Republik Indonesia, accessed by <https://putusan.mahkamahagung.go.id/putusan/7f03df80b65e767fe264d29d75564344>*

HANDAYANI, and started to write her expression of disappointment written “Indeed, Mr. Har is kind, (in Indonesia, it was written with slang language and it is written: “Iya sih Pak Har baik, Yg gak baik itu yang namanya Ayas dan Spv lainnya....., Kami rasa dia gk pantas dijadikan pimpinan Jolie Jogja Jewellery. Banyak yg lebay dan msh labil spr anak kecil!”) and posted it on her Facebook wall

- 4) Later on at 3 June 2014, the post was found by other people (public) and read by DIAH SARASTUTY al AYAS.
- 5) Because of the post, DIAH SARASTUTY felt affronted by the accused, uncomfortable, and believe that her name have been defamed and ashamed considering her position as the leader of the Toko Jolie Jogja Jewellery. She believes that this would affect the company (store) and her own personal good name.

The accused had been charged with violations of:

- 1.) The first charge: Law of Indonesia 11 year 2008 art 45 (1) Jo Art 27 (3) regarding the ITE

This charge concerns the elements of:

- a.) Any Person;
 - b.) Knowingly and without authority distributes and/or transmits and/or cause to be accessible Electronic Information and/or Electronic Records with the contents of affronts and/or defamation;
- 2.) The second charge: Indonesian Civil Code article 310 (1)
 - a.) Barang siapa; (Anyone);
 - b.) Dengan sengaja menyerang kehormatan atau nama baik orang dengan jalan menuduh dia melakukan suatu perbuatan dengan maksud yang nyata untuk menyiarkan tuduhan itu supaya diketahui umum;
 - 3.) The third charge: Indonesian Civil Code article 311 (1)
 - a.) Barang siapa (Anyone);
 - b.) Melakukan kejahatan mencemar atau mencemar dengan surat dalam ia diizinkan membuktikan kebenaran tuduhannya itu;

Regarding the charges, there have been considerations such as:

- According to experts opinion, Dr. Henry Subiakto, SH.,MA, the post of the accused can not be considered as defamation but more to a criticism because there are no specific accusations to act as prove as defamation. (According to Article 27 Law number 11 year 2008, the proof must be a sure thing and not mere accusations)
- According to experts opinion, Dr. Muhammad Arif Setiawan,SH.,MH., defamation is an act to “attack” others, and if it were read thoroughly (By Indonesian dictionary), there are no accusation from the writer/accused but the post were more of a description of a situation.

Considering of the provided evidence, the witnesses’ statement, the defense of the accused and also the experts opinion, the judges have come to a decision where this case shall not be considered as defamation. And so, the accused are free from the charges against the accused.

From the case above, it can be known that opinion may be considered as defamation and brought to the court with the charges of defamation in Indonesian Civil Code and Law of Indonesia.

But despite being accused and stand in the court for the charges, the truth of a defamation and opinion will be judged thoroughly to see if the act can be considered as crime.

CHAPTER IV – COMPARISON OF THE LAW FOR THE ACT OF DEFAMATION BEFORE AND AFTER THE ESTABLISHMENT OF ITE LAW

A. REGULATION CONCERNING DEFAMATION BEFORE THE ITE LAW

1. Law concerning Concerning Defamation in Indonesia

Indonesia Criminal Code (KUHP) regulates regarding the defamation delict.

Defamation delicts are divided into 8 classifications.

The law and definition of Defamation are ruled in the KUHP, which is:

- a. Number 310 (Art 1): Slander, belediging, laster (PENGHINAAN LISAN)
- b. Number 310 (Art 2): Libel, smaad schriff (Pencemaran tertulis)
- c. Number 311-314: Defamation, laster (Fitnah)
- d. Number 315: Eenvoudige belediging (PENGHINAAN RINGAN / menyerang kehormatan)
- e. Number 317: Lasterlijke aan klacht (Pengaduan fitnah)
- f. Number 320: (PENGHINAAN TERHADAP ORANG MATI SECARA LISAN)
- g. Number 321: (PENGHINAAN TERHADAP ORANG MATI SECARA TERTULIS)⁹²

SR Sianturi divided defamation in the Chapter XVI Book I Indonesia Criminal Code into 4 categories, which is:

- a. Defamation towards individual (in general) (article 310 - 315)
- b. Defamation towards bureaucrat when they are on duty (article 316)
- c. Defamation reports (article 317-319)
- d. Defamation towards the deceased (article 320-321)⁹³

⁹² OpCit, R. Soesilo, p.143

⁹³ SR Sianturi, "Tindak Pidana di KUHP Berikut Uraianannya", (Jakarta: Alumni, 1983) p.557 Sianturi, "Asas Asas Hukum Pidana Dan Penerapannya, (Jakarta: Alumni Ahaem. Petehaem: 1996),

2. Sanctions and legal consequences towards the act of Defamation

One of the leading ways to regulate behavior is through law, and cyber law is significant force in the regulation of online behavior.⁹⁴ Therefore, the sanction given by the law is necessary to regulate people's behavior.

Defamation was regulates under the Indonesian Criminal Code article 310:

- 1) *Barang siapa sengaja menyerang kehormatan atau nama baik seseorang dengan menuduhkan sesuatu hal, yang maksudnya terang supaya hal itu diketahui umum, diancam karena pencemaran dengan pidana penjara paling lama sembilan bulan atau pidana denda paling banyak empat ribu lima ratus rupiah.*
- 2) *Jika hal itu dilakukan dengan tulisan atau gambaran yang disiarkan, dipertunjukkan atau ditempelkan di muka umum, maka diancam karena pencemaran tertulis dengan pidana penjara paling lama satu tahun empat bulan atau pidana denda paling banyak empat ribu lima ratus rupiah.*
- 3) *Tidak merupakan pencemaran atau pencemaran tertulis, jika perbuatan jelas dilakukan demi kepentingan umum atau karena terpaksa untuk membela diri.*

In the first Art of KUHP (Indonesian Criminal Code) it was mentioned that “*suatu perbuatan tidak dapat dipidana kecuali berdasarkan kekuatan ketentuan perundang-undangan pidana yang telah ada*” This also means that Crime are punishable when there are law that regulates. This law includes all the existed and acknowledged law in this country.

In the Art 1 (1) KUHP it uses the word “perundang-undangan pidana” does not mean it only includes the law in Formil only, but all the regulation as materiel were included as law such as Peraturan Pemerintah, Keputusan Presiden, Peraturan Daerah and the others that does not specifically mentions

⁹⁴ OpCit, Weinberg Nathan, p.335

of criminal sanctions, may it include in the civil penal law or administrative penal law.⁹⁵

Any form of defamation may be punished, but it is also limited on the method of defaming. There are conditions of punishable defamation, which are: (1) In public and verbally. This can be done when someone have give a statement (announcement) where other people can hear it (in public), this act were done by speaking through voice with or without audio as tools (such as megaphone, speaker, etc.). (2) In public and by letters or written. This is where the defamation were in form of written and can be seen/read by public. This includes banner, posters, and posted or uploaded in the Internet via blog or social media. The two condition of defamation mentioned earlier were done in public without sending the “message” directly to the target. There are another condition which is directly sending the message/statement that contain defamation directly to the target, such as: (1) directly to the target, verbally. This condition is where the defamation was done directly by speaking to the target with the purpose of the target to hear and aware of what the speaker said. (2) Directly to the target, by action. Defamation can also be done by action, this includes where the action include mimicking, physical contact or any form of action that can cause defamation, and this act were done in the presence and awareness of the target. (3) By letters (written) that is sent and received by the target. This defamation takes written form and can be send by any media such as letters or electronic mail. In summary, an act that fulfills the condition as defamation is punishable by law, may it be directly or indirectly.

B. REGULATION CONCERNING DEFAMATION AFTER THE PUBLICATION OF ITE LAW

⁹⁵ Loebby Loqman, Makalah Perkembangan Asas Legalitas Dalam Hukum Pidana Indonesia, (Aliansi Nasional Reformasi KUHP, BPHN, Depkumham dengan UNDIP, Semarang: 2004), p.8

1. Law concerning concerning Defamation as Cybercrime in Indonesia

There are 3 things that needed to be understand regarding the term “with the contents of affronts and/or defamation within the Art 27 (3) of the ITE Law:

- 1) This element is the element of condition that included (within) to the object of information and/or electronic document. Even though this element can be differentiate but inseparable.
- 2) By this element, the character of law violations can be seen because this is where the intention and purpose is located (can be seen). This element is also proof that there are protection towards someone reputation and good name.
- 3) As the indicator that the criminal act is a *lex specialis* from the form of general defamation, while the general regulation is in Criminal Code of Indonesia (KUHP)⁹⁶

a.) Components of Crime according to Defamation case verdict

In previous chapter, there are 2 (two) cases of defamation that have been brought to the court and receive the verdict from the judge. These verdicts have considered the elements of crime for the defamation case.

a. Case FURQAN ERMANSYAH

Indictment: Art 27 (3) Jo Art 45 (1) Law no. 11 year 2008:

- 1) *Setiap orang*
- 2) *Dengan sengaja dan tanpa hak*
- 3) *Mendistribusikan dan/atau mentransimiskan dan/atau membuat dapat diaksesnya Informasi Elektronik dan/atau dokumen elektronik yang memiliki muatan penghinaan dan/atau pencemaran nama baik.*

b. Case ERVANI EMY HANDAYANI

First Indictment: Art 45 (1) Jo Art 27 (3) Law no. 11 year 2008:

- 1) *Setiap orang*

⁹⁶ Adami Chazawi, Opcit, hal. 283

- 2) *Dengan Sengaja dan tanpa hak mendistribusikan dan/atau mentransmisikan dan/atau membuat dapat diaksesnya Informasi Elektronik dan/atau dokumen elektronik yang memiliki muatan penghinaan dan/atau pencemaran nama baik.*

Second Indictment: Art 310 (1) Criminal Code:

- 1) *Barang Siapa*
- 2) *Dengan sengaja menyerang kehormatan atau nama baik orang dengan jalan menuduh dia melakukan suatu perbuatan dengan maksud yang nyata untuk menyiarkan tuduhan itu supaya diketahui umum*

Third Indictment: Art 311 (1) Criminal Code:

- 1) *Barang siapa*
- 2) *Melakukan kejahatan mencemar atau mencemar dengan surat dalam ia diizinkan membuktikan kebenarannya itu*

2. Sanctions towards the act of Defamation as Cybercrime

The case for legal consequences for defamation through social media uses the Law of Electronic Information and Transactions. The sanctions written in ITE Law is written in the Chapter XI – Penal Provisions Article 45 – 52 (Law Number 11 Year 2008 and Law Number 19 Year 2016) The element of defamation delict written under the Law number 11 year 2008 Art 27 can be summarized into:

- a. Element of knowingly (awareness) and no rights
- b. The act of distributing and/or transmitting and/or cause accessible towards Electronic information and/or electronic records.
- c. Contents of affronts and/or defamation

Law Number 19 year 2016 contains the latest version of the ITE Law. The sanctions were written under Article 45 of the ITE Law:

- (1) Any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents against propriety in reference to the Article 27 (1) shall be sentenced to Jail Imprisonment not exceeding 6 (six) years and/or a Fine not exceeding Rp.1.000.000.000,00 (One billion rupiah).
- (3) Any Person who knowingly and without authority distributes and/or transmits and/or accuses to be accessible Electronic Information and/or Electronic Records with the contents of affronts and/or defamation in reference to the Article 27 (3) shall be sentenced to Jail Imprisonment not exceeding 4 (four) months and/or a Fine not exceeding Rp.750.000.000,00 (Seven hundred million rupiah)

a.) Sanctions based on defamation case verdict

The case of Furqan Ermansyah as discussed in previous chapter is a reported defamation case that has been brought to the court and receives the verdict from the judge. In the verdict, the defendant Furqan Ermansyah has been proven guilty and received the sentences given by the court. The sentences are:

- a. 10 month imprisonment
- b. Probation for 1 year before the imprisonment
- c. Court fee in total of Rp.2.500,- (two thousands and five hundred rupiah)

In previous chapter has also discussed regarding sentences in Indonesia. In the case of Furqan Ermansyah, the defendant has been given Hukuman Pokok (imprisonment) and Administrative sanctions (fine). The sentences of imprisonment may change depending on the court decision in the future after considering the condition of the defendant after the probation within 1 year.

3. Influence in the publication of ITE law as regulation towards Defamation

The crime regulated in ITE law Art 27 does not regulate a certain new forms of crime because the defamation delict has been regulated in criminal code (KUHP). But because of the media and tools are using the Internet so it needs an explanation regarding distributing, transmitting, and make it accessible. The terms “distributing” can be interpret as giving or sharing to a numerous people or numerous places (such as market or stores), while the terms “transmitting” can be interpret as sending or forwarding messages from someone to another person. This can become problematic because the terms such as distributing, transmitting or access is technical terms that does not equally the same between the IT and real life.⁹⁷

Since the general regulation regarding defamation have been written under KUHP, the defamation regulated by ITE law has no specific explanation regarding “defamation” and this could be generalize and reaches anyone with any statement, may it be a true defamation, opinion, criticism.

According to Prof. H. Mardjono Reksodiputro, SH, MA, defamation is an act that must be punished because it is considered as crime and it may cause loss/harm, may it be physically or emotionally towards the victim. If the act did not cause harm but cause damage, then the act is considered as an act against the law (Civil/Perdata). Therefore, evidence for the act of defamation should be beyond reasonable doubt, or in other words, there should not be any doubt in proofing this act of defamation.⁹⁸

There are still no specific explanation regarding the defamation, despite the ability to provide proof and evidence, the interpretation of the defamation still can be mislead.

⁹⁷ OpCit, Anggara, Supriyadi, p.67-68

⁹⁸ Taken from thesis: Novi Safitri, titled: TINJAUAN YURIDIS TENTANG DELIK PENGHINAAN DAN/ATAU PENCEMARAN NAMA BAIK DALAM PASAL 27 AYAT (3) UU NO.11 TAHUN 2008 TENTANG INFORMASI DAN TRANSAKSI ELEKTRONIK, (Delivered during lecture “Seminar Usulan Penelitian Tesis, Program Pasca Sarjana Fakultas Hukum Universitas Indonesia, Salemba, 30 may 2012.), 2013

The mislead of interpretation can be based by 2 matters:

1. When someone cannot be sure if the action is against the law.
2. That the uncertainty of the regulation may cause the arbitrary enforcement⁹⁹

Due to the possibility of misinterpretation of defamation, it is the duty of law enforcers and the court to consider when there are reports of defamation.

⁹⁹ OpCit, Mardjono Reksodiputro, p.58

Chapter V

Conclusion and Suggestion

A. CONCLUSION

1. Before the establishment of law number 11 year 2008 established, the regulation concerning defamation are regulated under Indonesian Criminal Code (KUHP). This defamation is regulated under the article 310 until 321. There are others regulation regarding defamation depending on the target and media. Defamation done by media is regulated under Press law, in Law no. 32 year 2002 under the Art of 57 until 59. Defamation regarding presidential election is regulated under Law no. 42 year 2008 under the Art 214. Defamation regarding governor election is regulated under law no.8 year 2012 under the Art of 86 and 299. As the electronic media were not as oftenly used as nowadays, there are no specific regulation concerning defamation in the electronic media before then. The act of defamation before were done by verbal and written before the active use of social media.

2. After the establishment of law number 11 year 2008 concerning Information and Electronic Transaction, this law functions as Cyberlaw in Indonesia, including the regulations concerning the act of defamation happening in the electronic (social) media. This ITE Law functions as Lex Specialis concerning defamation. While the existence of ITE Law has helped in regulating cybercrime, this law has no specific interpretation concerning the act of defamation itself. Therefore, the act of defamation is still using the KUHP even when the law of ITE has been established. However, since the existance if this ITE Law, it is also easy for people to criminalized an act of defamation while the defamation itself has different concept in each person's mind.

B. SUGGESTION

1. The government needs to immediately established a specific definiton concerning the defamation that there will be more efficient and fulfill the needs and protection for the people.
2. To prevent the act of defamation in social media, people must raise awareness of sympathy, etiquette and the existence of law itself. By being aware of the results if someone were carelessly spreading information, the act of cybercrime may be prevented and dispute can be avoided.
3. If the act of defamation has already occurred and someone may feel like they have become a victim, settling dispute of this matter can be done by mediation. This will prevent criminalization and it is possible to settle by discussing and negotiating to find a win-win solution in the right manner.

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