
Defamation in the Digital Age: An Analysis of the Application of Restorative Justice under Indonesian Criminal Law

Emaliawati

Sekolah Tinggi Hukum Bandung

*Email Corresponding: emaliawati@gmail.com

Article Info

Article history:

Received: 04/3/2023

Received in revised: 23/3/2024

Accepted: 30/3/2024

Publish: 15/4/2024

Keywords: Law; Media;

Enforcement; Restorative;

Technology.

Abstract

The development of human civilisation is greatly influenced by advances in the field of communication and information, particularly through digitalisation. The negative impact of the freedom to access information and communication technology is also evident in the increasing number of cases of law violations through electronic media, including defamation. This research aims to examine how Indonesian criminal law handles defamation cases in the digital era, as well as the potential application of restorative justice in this context. The research questions include: how Indonesian criminal law handles defamation cases in the digital era; whether restorative justice can be applied in defamation cases, and how it is applied according to Indonesian criminal law; and how criminal liability for perpetrators of defamation in the digital era. The research method used is normative analysis through document studies and primary, secondary, and tertiary legal literature. The results of the research highlight the importance of understanding the criminal liability of defamation offenders under Indonesian criminal law. This research also explores the concept and application of restorative justice in defamation cases in the digital era, as well as its implications for the Indonesian criminal law framework.

INTRODUCTION

The development of human civilisation is closely linked to advances in communication and information, especially in the context of technological digitalisation. This phenomenon supports the rapid exchange of knowledge and provides great benefits to the common welfare, including in behaviour, actions and opinions. The right of the Indonesian people to access and develop information and communication technology is guaranteed by the 1945 Constitution of the Republic of Indonesia Article 28C paragraph (1) and Article 28F. This development is influenced by the Industrial Revolution 4.0 and has affected people's mindset and behaviour. To address this trend, Indonesia has adjusted its legal framework in the field of information and communication technology, specifically with Law Number 11 of 2008 concerning Electronic Information and Transactions which was later amended by Law Number 19 of 2016 concerning Electronic Information and Transactions (ITE Law).

Electronic media has become an integral part of everyday life, providing a means to interact, communicate and access entertainment. Freedom of speech is supported by electronic media, providing unlimited space for creative expression and public participation. However,

the negative impacts of this freedom include an increase in cases of legal offences through electronic media or social media, such as defamation.

One of the offences that often occurs in the digital era is defamation. According to data from the National Police's Robinopsnal Bareskrim for the period 1 to 19 January 2022, the National Police has cracked down on 162 defamation cases involving electronic media. This number shows a significant increase from the same period in the previous year, which recorded 118 cases, representing an increase of approximately 37%. In 2022, the prosecution of defamation cases through electronic media was carried out by 27 Polda, an increase from 22 Polda in the previous period (Kasus Pencemaran Nama Baik Menangka, 2022).

In addition, there are several cases experienced by public figures regarding defamation cases. (Raizza, 2022), such as: 1) In 2017, there was an incident involving soap opera player Lyra Virna in the context of legal issues with one of the travel agents. This incident stems from the unek-unek by LV through the Instagram social media platform related to the travel agent's service that did not fulfil the promise to send her on Umrah. Although according to her subjective perception, LV had fulfilled all the necessary criteria. Feeling disturbed by the negative impact on his company's reputation, the owner of the travel agency took legal action by reporting LV for alleged defamation. As a result, on 16 March 2018, LV was officially named as a suspect in the case; 2) In 2018, a presenter known for her beauty and a performer in a sitcom series named BJ, was involved in a legal case related to defamation. In fact, in that case, he was sentenced to four months in prison. This incident stemmed from an act of harassment committed by BJ against a friend.

At that time, BJ was carried away by emotion and ostracised the complainant with words accusing her of being a pimp, which later led to a criminal report; 3) In 2019, musician AD was forced to serve a period of detention as a suspect in a defamation case. This information was presented through an official source from the Viva page. AD, was sentenced by the Panel of Judges of the Surabaya District Court to one year in prison. This was due to actions that were proven to be defamation through video content (vlog), in which he inappropriately called the masses of the Coalition of Bela NKRI with harsh words when confronted. In addition to his suspect status, AD, was also restricted from leaving the country by the East Java Regional Police, who submitted a detention request to the Immigration Office; and 4) Some time ago, NM was named as a suspect in a case of alleged defamation reported by DM. On Tuesday, 25 October 2022, NM was officially detained at the Serang Detention Centre. The detention was a consequence of her uploading a photo of DM in May 2022 through her personal Instagram account. In her upload, NM allegedly made edits by adding words believed to contain elements of insult or defamation.

The cases involving public figures in the context of defamation, as outlined above, highlight the legal complexities associated with the use of social media and online platforms. In some cases, such as those of LV, BJ, and AD, and NM, the public figures were involved in actions that were deemed to violate the Electronic Information and Transaction Law (UU ITE) by expressing comments or content that were deemed harmful to other parties, either directly or indirectly.

The application of the ITE Law in these cases shows that the use of social media as a means of communication and expression has a significant impact on the reputation and honour

of individuals or companies. In such cases, suspects are often involved in legal proceedings involving investigation, detention and even criminal conviction. Therefore, awareness of the legal limitations of using social media is crucial for public figures and the general public. There needs to be a deep understanding of the legal consequences that may arise from any content published online, as well as the need to prioritise ethics and responsibility in interacting in the digital space.

However, this shows that defamation through electronic media needs attention, because the application of the ITE Law is considered to have changed its purpose, which was originally formed as a control over freedom of speech that resulted in negative actions and harmed other parties, then experienced an expansion of interpretation because the ITE Law did not provide a clear enough understanding of the offence, Where there is no reference to the limit of exceptions and has no explanation that can qualify the content and context that can be said to be defamation, so that any content and context that has elements of argument and criticism can be considered an insult and ultimately makes Article 27 paragraph (3) considered an article that criminalises freedom of speech. (Safitri & Wahyudi, 2022). In addition to the ITE Law, the regulation on defamation is also a special part of the offence of defamation contained in Article 310 of the Old Criminal Code and Article 433 of Law No. 1 of 2023 concerning the Criminal Code (New Criminal Code). The exceptions to both articles in the Old Criminal Code and Law No. 1 of 2023 (New Criminal Code) are if the act is committed in the public interest or out of necessity for self-defence.

Criminal law, which has been used as one of the means to overcome criminal offences, is built on the basis of a retributive paradigm so that its repressive and coercive nature is very dominant. Based on the retributive paradigm, crime prevention is the sole authority of law enforcement officials. In addition, crime prevention based on the retributive paradigm is also *offender oriented*. In contrast to the retributive paradigm, the restorative *justice* paradigm offers another way of tackling criminal offences. (Bazemore & Schiff, 2005). As an alternative to tackling criminal offences, restorative justice offers a comprehensive and effective solution (Bazemore & Schiff, 2005). The concept of restorative justice aims to achieve a balance between perpetrators and victims of crime, in addition the criminal process will be flexible, not rigid, informal and can be resolved quickly so as to save money, time and energy (Apriyanto, 2016).

The number of cases involving the ITE Law regarding defamation has led the Polri to issue Polri Circular Letter Number: SE/2/11/2021 concerning Ethical Culture Awareness to create a clean, healthy and productive Indonesian digital space (hereinafter referred to as SE Polri). In the SE Polri, Polri has the principle that criminal law is the last resort in law enforcement (*ultimatum remidium*) and prioritises *restorative justice* in resolving every existing case.

To show the originality of this research related to defamation, it is necessary to have a previous study as a benchmark, as researched by: 1) Juliadi Lingga, Marlia Sastro, and Budi Bahreisy, in 2022 on the Application of Restorative Justice to the Crime of Defamation (Analysis of the Decree of Termination of Prosecution Number: Print 01/I.2.20/Ep.3/09/2020), with the aim of investigating and analysing the application of the concept of restorative justice in the criminal justice system in Indonesia, especially in the settlement of defamation cases.

The focus of the research also includes identifying problems related to the application of restorative justice, resolving defamation cases based on this paradigm, and identifying obstacles and efforts made by the Public Prosecutor's Office in applying restorative justice to criminal offences. Thus, this research aims to develop a better understanding of the effectiveness and challenges in the implementation of restorative justice in the context of law enforcement in Indonesia, particularly in handling defamation cases. (Lingga et al., 2022); 2) Hartanto, Djoko Budiarto, and Hyronimus Rhiti, in 2022 on the Application of *Restorative Justice* by the Police Against Defamation in the Digital World, with the purpose of this study is to discuss the application of *Restorative Justice* by the Police related to defamation cases in the digital world, as well as to explore the implementation of *Restorative Justice* in accordance with the National Police Chief's Circular Letter on Ethical Cultural Awareness in Indonesia's digital space. This research also aims to discuss the limits of freedom of expression and legal protection against criminal defamation, with reference to concrete cases involving Article 310 of the Criminal Code and Article 311 of the Criminal Code (Hartanto et al., 2022); 3) Pardomuan Aris Suranta, in 2023 on the Application of Restorative Justice Against Perpetrators of Defamation Crimes in Indonesia, with the aim of resolving defamation crimes through information technology with a restorative justice approach that is expected to fulfil the value of certainty, expediency and legal justice in society and implement the values of Pancasila which always prioritises deliberation in society (Suranta, 2023).

Some of these things show that the criminal act of defamation is becoming more frequent and poses new challenges for the Indonesian criminal law system in the ever-evolving digital era. This research aims to examine the criminal liability of defamation offenders, by assessing the effectiveness of existing criminal sanctions. In addition, this study also analyses the application of restorative justice as an alternative to resolving defamation cases in accordance with Law No. 11 of 2008 on Electronic Information and Transactions, as amended by Law No. 19 of 2016 on Amendments to Law No. 11 of 2008 on Electronic Information and Transactions and amended again by Law No. 2 of 2024 on the Second Amendment to Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law).

METHODOLOGY

This research uses a multidisciplinary approach that combines legal theory, principles of justice, legal rules, and law enforcement practices, this research is expected to provide new insights into a more comprehensive and effective law enforcement strategy in handling defamation cases in Indonesia. This desk research examines primary legal materials, namely laws and regulations concerning the object of research, such as the 1945 Constitution of the Republic of Indonesia, Law No. 1 of 2023 concerning the Criminal Code (KUHP), and Law No. 11 of 2008 concerning Electronic Information and Transactions, as amended by Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and Transactions and amended again by Law No. 2 of 2024 concerning the Second Amendment to Law No. 11 of 2008 concerning Electronic Information and Transactions (ITE Law) to understand the applicable legal framework. Secondary legal materials in the form of academic literature, results of previous research, and documentation from relevant seminars and

symposiums, to provide context and interpretation of primary legal materials. Tertiary legal materials such as legal dictionaries and encyclopaedias will be used to support the understanding of terminology and concepts in this research. This research uses data collection techniques in the form of *study of documents* and *study of literature*, with qualitative analysis to interpret and understand the legal implications of the data obtained.

RESULTS AND DISCUSSION

1. Criminal Liability in Information and Electronic Transaction Offences

Criminal liability is the responsibility imposed on the perpetrator of a criminal offence relating to the basis for imposing criminal sanctions. A person is considered to have criminal responsibility if the offence is against the law. However, the responsibility will be lost if there are elements that cause the loss of the ability to be responsible in a person (Amrani & Ali, 2015).

Criminal responsibility for someone who commits an offence or a criminal act requires the principles of criminal law. One of the principles of criminal law is the legal principle of *nullum delictum nulla poena sine pravia lege* or often referred to as the principle of legality. This principle becomes the main unwritten basis in sentencing people who have committed criminal acts, not convicted if there is no fault, meaning that a person can only be held accountable if the person makes a mistake or commits an act that violates the laws and regulations (Ali, 2012).

The basis of criminal responsibility is guilt, where guilt takes the form of intent (*opzet*) or negligence (*culpa*). If it is proven that the elements of a criminal offence are fulfilled, then the guilt is also proven and the person is automatically convicted, so that criminal responsibility must fulfil the elements of a criminal offence. To prove that a person has committed a criminal offence, it is necessary to connect the person with his/her actions in order to be held accountable, which is proven by:

- a. The subject must match the formulation of the law;
- b. There is a fault in the person;
- c. Such actions are unlawful;
- d. The act is prohibited and penalised by law;
- e. The act is performed in accordance with the place, time and other circumstances specified in the law (Kanter & Sianturi, 2002).

This principle of legality implies that there is no action that is prohibited and threatened with punishment if it is not determined in advance in the law. The elements of criminal responsibility that must be fulfilled to state that a person can be held accountable, among others:

- a. Capable of taking responsibility. The element of being able to take responsibility includes the state of his soul, including not being disturbed by continuous or temporary illness, not defective in growth, not disturbed due to hypnosis, anger, subconscious influence and so on. In addition, the ability of the soul includes being able to realise the nature of the action, being able to determine his will for the action, whether to carry it out or not, and being able to know the reprehensibility of the action.
- b. Fault. Fault is considered to exist, if intentionally or due to negligence has committed an act that causes conditions or consequences prohibited by criminal law and is carried

out with the ability to be responsible. In criminal law, the perpetrator of a criminal offence is considered capable of responsibility if his actions contain elements of committing a criminal act, above a certain age is capable of responsibility, has a form of guilt in the form of intent (*dolus*) and negligence (*culpa*), and there is no excuse.

- c. There is no excuse. An excuse is a reason that removes the guilt of the defendant, whereby the defendant is not convicted because there is guilt, even though the act committed is still unlawful and remains a criminal act. Excuses in the Criminal Code are divided into three forms, namely: force (formulated in Article 48 of the Criminal Code), forced defence that exceeds the limit (formulated in Article 49 Paragraph (2) of the Criminal Code), and the execution of official orders without authority that is realised by good faith (formulated in Article 51 Paragraph (2) of the Criminal Code). (Maramis, 2012).

If these elements are fulfilled, then the person concerned can be found guilty or make criminal responsibility, so that they can be punished. Although guilt has been accepted as an element that determines criminal responsibility, the meaning of guilt is still debated among experts.

The term criminal offence comes from the term known in Dutch criminal law, namely *strafbaar feit* (Chazawi, 2002). The word *strafbaar feit* consists of *feit* which in Dutch means part of a reality or *een gedeelte van de werkelijkheid*, while *strafbaar* means punishable, so that literally the word *strafbaar feit* is translated as "part of a punishable reality" (Lamintang, 1984).

According to Soerdjono Soekanto and Purnadi Purwacaraka,

"Crime is defined as a criminal attitude or human behaviour that falls within the scope of behaviour formulated by the rules of criminal law that violates the law and is based on guilt." (Soekanto & Purwacaraka, 1992).

On the other hand, the development of information and communication technology has led to the emergence of new criminal offences that have different characteristics from conventional criminal offences. The misuse of these technological developments is inseparable from its unique nature, causing complicated problems related to the problem of overcoming it.

The ITE Law is a law that regulates information and electronic transactions. In Article 1 number 1 of the ITE Law, which states that:

"Electronic information is one or a set of electronic data, including but not limited to writings, sounds, images, maps, designs, photographs, Electronic Data Interchange (EDI), electronic mail, telegram, telex, telecopy or similar, letters, signs, numbers, access codes, symbols, or processed representations that have meaning or can be understood by a person capable of understanding them."

Meanwhile, electronic transactions based on Article 1 number 2 of the ITE Law are legal actions carried out using computers, computer networks, and/or other electronic media. Electronic transactions in popular language are often said to be *electronic transactions* or *e-commerce*.

ITE Law was drafted in order to support information technology through legal infrastructure and regulation, so that the utilisation of information technology can be carried

out safely and prevent misuse based on the norms and culture prevailing in Indonesian society. In addition, the ITE Law also guarantees legal certainty for the existence of information or data generated by electronic systems and the accountability of the electronic system itself. Several legal provisions also regulate the implementation and consequences of its utilisation, both for individual, communal, national and even international legal interests (Ramli, 2008).

In its implementation, several provisions in the ITE Law are then clarified by several Government Regulations, namely regarding the establishment of Reliability Certification Bodies (Article 10 Paragraph (2)), Electronic Signatures (Article 11 Paragraph (2)), Electronic Certification Providers (Article 13 Paragraph (6)), Implementation of Electronic Systems (Article 16 Paragraph (2)), Implementation of Electronic Transactions (Article 16 Paragraph (2)), Electronic Agent Operator (Article 22 Paragraph (2)), Domain Name Management (Article 24 Paragraph (4)), Interception Procedure (Article 31 Paragraph (4)), and the Role of Government on the Utilisation of Information Technology and Electronic Transactions (Article 40 Paragraph (6)).

Restorative Justice is a "victim-centred response to crime" that allows victims, offenders, their families, and representatives of the community to address the harm and loss caused by the criminal offence" (Hutauruk, 2008). The main problem in enacting or implementing restorative justice approaches or concepts in a legal system in general and in the criminal justice system in particular lies in the settlement mechanisms offered by restorative justice approaches or concepts, which are different from the settlement mechanisms offered by the current criminal justice system and therefore still difficult to accept. This is because the mechanism offered by the restorative justice approach or concept prioritises the concept of mediation and reconciliation in which perpetrators, victims, law enforcement officials and the wider community participate directly in resolving criminal cases, which is certainly inversely proportional or contrary to the traditional criminal justice system that has been in place for a long time and is still valid today. This paragraph needs to be rearranged in its flow and sentence structure by taking into account these two notes, so that the flow of discussion is more systematic and flowing without any redundancy.

These perceptions arise from the focus and view of a criminal offence and the concept of justice achieved through the resolution of criminal cases. The current view of the meaning of crime and punishment in the traditional criminal system emphasises that an offence is an act committed by an offender that violates state norms. Justice is considered to be achieved when the charges are proven and the offender is sentenced by the state, which has the authority to enforce the law. However, this approach is often inadequate in taking into account the interests of victims and communities, which should also be taken into consideration in the resolution of criminal cases in a legal system that involves various parties. (Kristian, 2014).

The application of restorative justice principles has major barriers that lie in resistance to change and the tendency of complainants or victims to focus on their emotions. This often leads to making a report rather than exploring alternative pathways. Once a report is made, the victim has the opportunity to consider other options, after receiving an explanation from the police about the impact of the report or through mediation efforts initiated by the perpetrator to reach an agreement between the perpetrator and the victim. Thus, effective education and

clear communication from the police can help victims understand the benefits of restorative justice. It offers not only resolution but also restoration for all parties involved.

Defamation can be defined as an act that *defiles a person's good name*, in the English phrase defamation is defined as defamation (*slander*), *slander*, *libel*. *Slander* is *oral defamation*, while *libel* is *written defamation*. (Alam, 2012). To determine whether an act is categorised as defamation, it is necessary to assess various factors, because in this case what is to be protected is the obligation of every person to respect others from the aspect of good name and honour in the eyes of others. Good name is a good judgement according to public opinion or a person's personality based on their moral aspects, so that to measure it is based on the judgement or general opinion of a society where the act is committed and what the context of the act is. While honour is the feeling of a person in the eyes of society, where everyone has the right to be treated honourably as a member of society, so that to measure it is determined according to the environment of the community where the deed is done (Mudzakir, 2004).

Before the existence of social media, the regulation of defamation was regulated in the provisions of the Criminal Code articles, namely Article 310 and Article 315, which formulated defamation qualified as defamation (*smaad*) and written defamation (*smaadschrift*). Defamation and libel are also regulated by Article 27 Paragraph (3) of Law No. 11 of 2008 as amended by Law No. 19 of 2016 on Electronic Information and Transactions. Historically, the provisions of Article 27 Paragraph (3) of the ITE Law refer to the provisions of insult or defamation regulated in the Criminal Code ("KUHP"), specifically Article 310 and Article 311 of the KUHP. The Criminal Code explicitly states that defamation is a complaint offence.

2. Application of Restorative Justice in Defamation in the Crime of Information and Electronic Transaction (ITE)

A person who is proven to have committed a criminal offence, must be responsible for his actions in a form that relates to the sanctions that will be imposed and how severe and the length of time the punishment will be imposed. Criminal acts or acts that are against the law are known as delicts or *strafbaar feit*.

Defamation, whether committed directly or through social media or the internet, is a complaint offence, which can only be processed by the police if there is a complaint from the victim. Without a complaint, the police cannot investigate the case. Complaint offences refer to a type of criminal offence where prosecution can only be carried out if there is a formal complaint from the victim of the criminal offence. In the context of defamation, a complaint offence indicates that defamation cases can only be prosecuted if the victim who feels his or her good name has been defamed directly reports the incident to the authorities. The legal process related to defamation, as regulated in Indonesia's Electronic Information and Transaction Law (UU ITE), requires a formal complaint from the victim before legal action can be taken.

The victim's right to file a complaint in defamation cases is very important because prosecution depends on the consent and co-operation of the aggrieved victim. This means that the victim has control over the legal process related to the defamation they have experienced, thus giving the victim the power to decide on the steps taken in dealing with the offence against the victim's good name.

In practice, the concept of complaint offences in the context of defamation can affect victims' access to justice, as it depends on their decision to report the act to the authorities. In addition, this also shows the need for awareness and adequate legal protection for victims of defamation so that victims can take legal action according to their wishes and needs.

The act of defamation does not need to be a punishable act, such as embezzling, stealing, etc., but simply an ordinary act that is embarrassing to the person concerned if the public finds out about it. The act can be done orally and/or in writing/pictures. However, if the defamation or insult is done in defence of the public interest or in self-defence, then the accusation may be exempted and not punishable.

In addition, a sentence or words that are considered insulting or defamatory, in order to be criminally charged, must fulfil the element of being in public, meaning that if it is done directly it must be in front of two or more people, and if through social media it must be done in a place that can be seen by many people, such as in *group chats*, *posts* on social media / internet media and so on. Sentences or words that are considered insulting but are sent directly to the person concerned are not categorised as insults or defamation, because the element of public knowledge is not fulfilled.

Changes in the regulation of the Electronic Information and Transaction Law (ITE Law) from 2008 to 2016, and then in 2024, have resulted in a significant impact on the handling of defamation cases. Previously, under the 2008 ITE Law, defamation was considered an ordinary offence that could be prosecuted even without a complaint from the victim, referring to the General Criminal Code (KUHP). However, amendments to the 2016 ITE Law changed the characteristics of this criminal offence to a complaint offence, which requires the victim to actively make a complaint to the competent authorities so that the case can be followed up legally.

The norms in Article 27 of the 2016 ITE Law indirectly refer to the Constitutional Court (MK) Decision that tested Article 27 Paragraph (3) of the ITE Law against the 1945 Constitution, specifically MK Decision Number 50/PUU-VI/2008 and MK Decision Number 2/PUU-VII/2009. Although Article 27 Paragraph (3) of the ITE Law provides an explanation of the criminal offence of defamation, its interpretation cannot be separated from the main legal norms in Article 310 and Article 311 of the Criminal Code.

It should be noted that the definition of defamation is not explicitly explained in the ITE Law, so it refers to the Explanation of Article 27 Paragraph (3) of the ITE Law which refers to Article 310 Paragraph (1) of the Criminal Code. Defamation is defined as the act of attacking a person's honour or good name by spreading allegations with the aim of making them known to the public.

Nonetheless, the content of Article 27 Paragraph (3) of the ITE Law is simpler than the more detailed defamation-related articles in the Criminal Code. Therefore, the interpretation of Article 27 Paragraph (3) of the ITE Law must still refer to the articles related to defamation in the Criminal Code to determine the substance and proper handling of defamation cases in the current Indonesian legal context.

Criminal responsibility refers to the process of punishing the perpetrator of a criminal offence, who is proven to have violated the law by fulfilling the specified criminal elements.

The concept of criminal responsibility involves two main aspects: the occurrence of a prohibited act and the ability to be held responsible.

From the aspect of the occurrence of a prohibited act, a person is considered to be criminally responsible if the act is unlawful or cannot be justified on legitimate grounds (*rechtsvaardigingsgrond*). This means that a criminal act must meet the standards set out in the law as a prohibited act or declared as an offence. From the aspect of ability to be responsible, criminal responsibility can only be applied to individuals who are considered "capable of responsibility". This means that the individual has sufficient mental capacity and knowledge to understand their actions as well as the legal consequences that may arise as a result of such actions.

In the context of defamation cases, criminal liability is applied to perpetrators who have committed acts of defamation that violate the provisions of the law. This means that the perpetrator must be found to have committed the prohibited act (as defined in the ITE Law and the relevant Criminal Code) and have the capacity to be held responsible for their actions. The legal process will determine whether the perpetrator has actually broken the law and whether they have the capacity to be held criminally liable for the defamatory act committed.

The articles governing defamation in the Electronic Information and Transaction Law (UU ITE) and the Criminal Code (KUHP) are still considered 'rubber articles', due to the ease with which these articles can be used to penalise criticism and opinions that are deemed to be out of line. The use of defamation articles often poses challenges especially in distinguishing between legitimate expressions of opinion and unlawful insults. These articles face criticism for providing broad powers to prosecute individuals for defamation, even in the context of criticism that is supposed to be protected by freedom of expression.

In an effort to address this issue, the government passed Law No. 1 Year 2023 on the Criminal Code (KUHP) which seeks further adjustment and clarification on the definition and enforcement of defamation. The main objective was to minimise the disparity between the criminal laws contained in the ITE Law and the Criminal Code by incorporating the provisions in the ITE Law into the Criminal Code with appropriate adjustments. Finally, this amendment repealed the criminal defamation provisions contained in the ITE Law, particularly Articles 27 and 28. However, Law No. 1 Year 2023 retained the criminal defamation of the government or presidential institution, by providing a clearer delineation between legitimate criticism and unlawful insults. These efforts aim to maintain a balance between freedom of expression and the protection of the honour and reputation of individuals, and prevent the misuse of the law to silence constructive criticism that is valuable in the context of a modern democracy. Continued analysis is needed to ensure that the revised law provides sufficient protection for free speech while respecting legal and ethical values in society.

The fundamental right to freedom of expression is a cornerstone of promoting human rights, peace and democracy in Indonesia. This is crucial in advancing the overall human rights climate in Indonesia, as well as to ensure that the rights enshrined in the Bill of Rights can carry out their vital work and be free from intimidation and violence. People who use social media and the internet must be wiser in expressing their freedom of speech so that it does not become a criminal offence, by adhering to ethics. Although the ITE Law was drafted in the spirit of creating a sense of security for everyone in the *online* media, in reality it is the ITE

Law that becomes a weapon for whistleblowers who are usually those with power and the reported are ordinary people or activists who lack power. To understand the ethics of expressing freedom of speech, there is a need for digital literacy for the community, especially in producing content.

Restorative justice offers an alternative approach that focuses on restoration and community order in resolving defamation cases. The foundation of criminal law regarding the purpose of protecting and maintaining legal order, as well as community order as a whole, can be the basis for the application of restorative justice. This approach not only considers the suffering of victims and perpetrators, but also considers social harmony as a whole.

The philosophy of restorative justice in criminal law is not simply an attempt to reduce or combine criminal and civil law, but rather to restore the function of punishment in criminal law that is oriented towards recovery that benefits all parties, not merely retaliation. The sociological foundation of restorative justice is also relevant because it reflects the social and cultural values of Indonesian society that tend to prioritise deliberation in resolving everyday disputes. In the context of defamation cases, this approach can promote reconciliation and restoration of relationships damaged by the harmful act.

The application of restorative justice in defamation cases can involve various relevant parties, including the victim, the offender, and the community at large. Through restorative processes such as mediation or dialogue, the ultimate goal is to repair the damage caused by the defamatory act, restore the dignity and reputation of the victim, and provide an opportunity for the offender to take responsibility for his or her actions in a way that promotes healing and reconciliation. As such, restorative justice can be an effective tool in maintaining public order and promoting peace and unity within communities.

Restorative justice is an approach to criminal justice that promotes the principles of restoration and reconciliation, involving dialogue and mediation between offenders, victims, their families and other involved parties. Key principles of restorative justice include:

- a. **Responsive to Damage:** Restorative justice recognises that criminal acts cause wider damage than simply a breach of the law. The approach aims to respond to and repair the damage caused, including damage to the relationship between offender and victim and the impact on society.
- b. **Participation and Collaboration:** Restorative justice processes involve the active participation of all relevant parties, such as offenders, victims, families and communities. Collaboration in determining solutions that can restore relationships and empower all parties involved is the main focus.
- c. **Restoration and Reintegration:** The primary goal of restorative justice is healing, both for the victim and the offender. This includes restoring the victim's dignity, understanding the impact of their behaviour, and giving the offender the opportunity to make amends and reintegrate into society.

Restorative justice processes often involve open dialogue between offenders and victims, overseen by a mediator or facilitator. The dialogue aims to understand each party's perspective, formulate a mutual agreement to repair the impact of the act, and build mutual understanding and empathy.

In addition to dialogue, mediation is also often used in restorative justice. The mediator acts as a neutral party who helps facilitate communication between the offender and victim to reach an amicable agreement or dignified settlement.

The number of defamation cases within the scope of ITE, Polri in the SE Polri states that the principle of criminal law resolution is the last solution in law enforcement and must prioritise restorative justice in every case. In its implementation, regarding defamation, there needs to be education and persuasion efforts to the community so that there are not many complaints or reports against the perpetrator, because the offence of defamation is a complaint offence. Thus, in receiving reports or complaints, investigators need to communicate with the parties directly, especially with the victim and facilitate by providing the widest possible space for mediation. Investigators also need to conduct a comprehensive review and case title by involving the Criminal Investigation Agency and the Directorate of Cyber Crime so that a collective and collegial decision can be made based on existing data and facts.

Peaceful efforts are a priority for investigators, especially if the parties want it. It was also stressed that if the victim wanted the case to be submitted to court but the perpetrator/suspect had realised and apologised and promised not to reoffend, then the perpetrator/suspect could not be detained. In the process, the victim and perpetrator are given space to discuss again and are mediated by the Police before the case file is submitted to the public prosecutor. If this happens, then the investigator must continue to coordinate with the Public Prosecutor in the implementation of justice and provide advice on the implementation of mediation at the prosecution level.

Restorative practices must be able to obtain an agreement or suspend the practice for the duration of the process. Agreements must be voluntary from the parties involved and contain only simple and fair accountability. Participation in the restorative process must be based on all parties recognising the basic facts of the case. In subsequent legal proceedings, participation may not be used as evidence of an admission of guilt. Elements such as the imbalance of abilities and age of the parties concerned, time limits or thinking abilities are issues that must be taken into account when carrying out restorative procedures, as well as real dangers related to the safety of the parties concerned. Criminal justice officials must do all they can to help victims and/or offenders reintegrate into society and to hold offenders accountable to victims and affected communities when the process cannot continue or an outcome cannot be achieved. Before and after the restorative process, the parties are entitled to legal counsel. If the perpetrator or victim is a child, parental assistance is mandatory. Parties are fully informed of their rights, the nature of the process and the potential outcomes of their decision before agreeing to participate in the restorative process. During the restorative process, discussions should remain private and should not be shared with others unless the parties agree. Agreements made through restorative justice programmes should form the basis for offender accountability, and should be treated the same as decisions made by the courts.

CONCLUSION

The criminal liability of the perpetrator of criminal defamation based on Article 27 Paragraph (3) and Article 310 of the Criminal Code is no longer relevant and has been amended through Law No. 1 Year 2023 on the Criminal Code. The concept of the application of

restorative justice in defamation cases as a criminal offence of electronic information and transactions can be applied starting from the time the report enters the police and the investigation is carried out. This is realised by providing a wide space for the parties to reach peace. If no peace agreement is reached and the victim wants to continue the legal process while the perpetrator has realised his mistake and apologised, then the prosecution will continue but the perpetrator will not be detained. If an agreement has been reached but one or both parties do not comply with the results of the agreement, then the mediation is considered defective and returns to the process of deliberation to reach an agreement. If the case has entered the criminal justice process, and the mediation process as restorative justice is still carried out at various stages and then an agreement is reached to withdraw the charges, then based on the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, the prosecution can be stopped and revoked. The author's suggestions are that restorative justice in the settlement of criminal defamation cases related to the ITE Law needs more attention, although the conditions for its validity and sanctions have been clarified in the 2016 ITE Law, and Law No. 1 of 2023 concerning the Criminal Code, but the implementation of restorative justice also needs a more comprehensive approach starting from the time of investigation in accordance with SE POLRI, so that there is no accumulation of cases related to defamation in the justice system. Then, there needs to be a common paradigm and measurement in determining defamation, not only on the part of law makers and law enforcers, but also on the public who need to be educated persuasively about the limits of defamation. With this common paradigm, it is hoped that there will be an increased awareness of ethics and morals in social interaction, especially in the social media and internet space, so that defamation cases can be minimised.

REFERENCES

- Alam, W. T. (2012). *Pencemaran Nama Baik di Kehidupan Nyata dan Dunia Internet*. Wartapena.
- Ali, M. (2012). *Dasar-dasar Hukum Pidana*. Sinar Grafika.
- Amrani, H., & Ali, M. (2015). *Sistem Pertanggungjawaban Pidana*. Rajawali Pers.
- Apriyanto, E. (2016). Penerapan Restorative Justice Sebagai Bentuk Diskresi Kepolisian Dalam Penyelesaian Perkara Tindak Pidana Penipuan di Polrestabes Semarang. *Jurnal Polrestabes Semarang*, 57.
- Bazemore, G., & Schiff, M. (2005). *Juvenile Justice Reform and Restorative Justice: Building Theory and Policy from Practice*. Willan Publishing.
- Chazawi, A. (2002). *Pelajaran Hukum Pidana I; Stelsel Pidana, Tindak Pidana, Teori-Teori Pemidanaan & Batas Berlakunya Hukum Pidana*. Raja Grafindo Persada.
- Hartanto, Budiarto, D., & Rhiti, H. (2022). Penerapan Restorative Justice Kepolisian Terhadap Pencemaran Nama Baik dalam Dunia Digital. *Jurnal Hukum Caraka Justitia*, 2(2), 95–114. <https://doi.org/http://dx.doi.org/10.30588/jhcj.v2i2.1100>
- Hutauruk, R. H. (2008). *Penanggulangan Kejahatan Korporasi*. Gramedia.
- Kanter, E. Y., & Sianturi, S. R. (2002). *Asas-Asas Hukum Pidana Di Indonesia Dan Penerapannya*. Stora Grafika.
- Kasus Pencemaran Nama Baik Meningkat*. (2022). PUSIKNAS Bareskrim Polri.
- Kristian. (2014). *Penerapan Keadilan Restoratif (Restorative Justice) Ditinjau Dari Teori Keadilan, Teori Kemanfaatan dan Teori Negara Hukum (Khususnya Negara Hukum*

-
-
- Pancasila) Dalam Rangka Penyelesaian Perkara Pidana Di Indonesia.* Universitas Parahyangan.
- Lamintang, P. A. F. (1984). *Dasar-Dasar Hukum Pidana Indonesia.* Sinar Baru.
- Lingga, J., Sastro, M., & Bahreisy, B. (2022). Penerapan Keadilan Restoratif Terhadap Tindak Pidana Pencemaran Nama Baik. *Suloh: Jurnal Fakultas Hukum Universitas Malikussaleh*, 10(2), 560–584. <https://doi.org/10.29103/sjp.v10i2.9135>
- Maramis, F. (2012). *Hukum Pidana Umum dan Tertulis di Indonesia.* Raja Grafindo Persada.
- Mudzakir. (2004). *Delik Penghinaan dalam Pemberitaan Pers mengenai Pejabat Publik, Dictum 3.*
- Raizza. (2022). *8 Artis Ini Dipolisikan Karena Pencemaran Nama Baik.* IntipSeleb Lokal.
- Ramli, A. M. (2008). *Laporan Perencanaan Pembangunan Hukum Bidang Teknologi Informasi dan Komunikasi.* Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI.
- Safitri, Ma. N., & Wahyudi, E. (2022). Pendekatan Restorative Justice Dalam Tindak Pidana Pencemaran Nama Baik Melalui Media Sosial Sebagai Implementasi Asas Ultimum Remedium. *Esensi Hukum*, 4(1), 12–23.
- Soekanto, S., & Purwacaraka, P. (1992). *Sendi-sendi dan Hukum Indonesia.* Citra Aditya Bakti.
- Suranta, P. A. (2023). Penerapan Restorative Justice Terhadap Tindak Pidana Pencemaran Nama Baik Dalam Hukum Pidana Islam. *INNOVATIVE: Journal Of Social Science Research Volume*, 3(6), 94–107. <https://doi.org/10.24239/comparativa.v3i1.27>

Conflict of Interests Statement : The author(s) declares that the research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest

Copyright: This work is licensed under a Creative Commons Attribution-ShareAlike 4.0 International License.

Intellectual Law Review (ILRE): Is an open-access and peer-reviewed journal published by Yayasan Studi Cendekia Indonesia (YSCI)