

LEGAL IMPLICATIONS OF DEFAMATION PROVISIONS IN INDONESIA'S ELECTRONIC INFORMATION AND TRANSACTIONS LAW: BETWEEN PROTECTION OF REPUTATION AND FREEDOM OF EXPRESSION

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Abstract

This article explores the legal implications of the criminal defamation provisions under Indonesia's Electronic Information and Transactions Law (ITE Law), particularly in light of the tension between the protection of personal reputation and the constitutional guarantee of freedom of expression. Employing a doctrinal legal analysis, this study examines the normative structure of Article 27 paragraph (3) and its amendments, judicial interpretation by the Constitutional Court, and its compatibility with human rights principles. The research method used by the researcher in this study is normative legal research, with a legal approach and a conceptual approach. The findings indicate that the current legal framework remains prone to abuse and over-criminalization, risking the suppression of democratic discourse. The article recommends a more proportional regulatory approach that aligns with international human rights standards and constitutional values in Indonesia.

Keywords: Defamation, ITE Law, Legal Implications, Freedom of Expression, Protection of Reputation,

Introduction

The purpose of criminal law is to provide individuals and groups with a sense of security as they carry out their daily activities. This sense of security is characterized by a feeling of calm without worry about potential threats or harmful acts. Criminal offenses, also referred to as criminal acts, criminal incidents, or offenses, are prohibited and punishable by criminal law. These are acts

that can cause harm¹²³⁶. For example, defamation on social media. Users of social media platforms such as Facebook, Twitter, and Instagram often use these platforms to share information. Unfortunately, not all of this information is positive or accurate.

Regulations are basically formulated to uphold justice and protect society, but what happens when the elements contained in the

¹²³⁶ Sudaryono and Natangsa Surbakti, *Hukum Pidana Dasar-Dasar Hukum Pidana Berdasarkan KUHP Dan RUU KUHP* (Surakarta: Muhammadiyah University Press, 2017).

articles of the regulation contradict the reality, seeing that in practice they become a means of punishing certain individuals.¹²³⁷

The legal provisions of Article 310 of the Criminal Code regarding defamation are not explicitly stated. The criminal offense of defamation, as stipulated in Article 310(1) of the Criminal Code, has been amended and declared conditionally unconstitutional by the Constitutional Court Decision No. 78/PUU-XXI/2023. Regarding acts that are prohibited, accompanied by threats or penalties in the form of specific criminal sanctions for those who violate such prohibitions, we will refer to these as criminal acts or offenses.

It must be emphasized that those who commit acts that harm or attack the dignity and honor of an individual in society are engaging in actions that contradict the proper and fair conduct of social interaction. To determine which acts are considered criminal offenses, we adhere to the principle of legality, which states that every criminal offense must be defined as such by law (Article 1(1) of the Criminal Code).¹²³⁸

Furthermore, Article 27A of Law No. 1 of 2024 on the Second Amendment to Law No. 11 of 2008 on Information and Electronic Transactions states that: "Any person who intentionally attacks the honor or reputation of another person by making an accusation, with the intent that such accusation be made known to the public in the form of electronic information and/or electronic documents transmitted through an electronic system." Based on the Explanation of Article 27A of Law No. 1 of 2024 on the Second Amendment to Law No. 11 of 2008 on Information and Electronic Transactions, as follows: "Attacking the honor or reputation" refers to acts that degrade or damage the reputation or dignity of another

person, thereby causing harm to that person, including defamation and/or slander.

With the enactment of the legal product, namely Law of the Republic of Indonesia Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE Law), various matters related to the internet are regulated, including criminal penalties for violations of the aforementioned law. The law establishes regulations regarding the criminalization of defamation through social media, including several innovations and expansions of criminal law principles, evidence, and penalties.¹²³⁹

The criminal offense of defamation applicable in Indonesia has legal implications for society, namely: The provisions of Article 310 of the Criminal Code, Paragraph 1, and Article 27A of the ITE Law, which adopt the wording of Article 433 of Law No. 1 of 2023 on the Criminal Code, namely the New Criminal Code, are deemed to be in conflict with Articles 28d and 28f of the Constitution of the Republic of Indonesia. This could be used as a "rubber clause" to restrict the freedom of speech of citizens who wish to express their opinions or criticize the government, as expressing such opinions could be labeled as defamation.

The enactment of Law No. 1 of 2024 (the second amendment to the ITE Law) and the Constitutional Court Decision No. 78/PUU-XXI/2023 further complicate the legal standing and interpretation of defamation provisions. This article thus seeks to address the following research problems: how does the defamation provision under the amended ITE Law relate to Indonesia's constitutional framework?

Purpose of the Study

Based on the focus of the article "Legal Implications of Defamation Provisions in Indonesia's Electronic Information and

¹²³⁷ Fairus Rachmawati Augustina, Januari Nasya, and Ayu Taduri, "Implikasi Pasal Multitafsir UU ITE Terhadap Unsur Penghinaan Dan Pencemaran Nama Baik," in *Seminar Nasional Hukum Universitas Negeri Semarang* (Semarang, 2021), 491–508, <https://doi.org/https://proceeding.unnes.ac.id/index.php/snh/article/view/735>.

¹²³⁸ Lukman Hakim, *Asas Hukum Pidana: Buku Ajar Bagi Mahasiswa* (Yogyakarta: Deep Publish, 2020).

¹²³⁹ Adi Darmawansayah et al., "Tinjauan Yuridis Cybercrime Dalam Tindak Pidana Pencemaran Nama Baik Menurut Undang-Undang Republik Indonesia Nomor 1 Tahun 2024 Tentang Perubahan Kedua Atas Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi Dan Transaksi Elektronik," *Ius Facti: Jurnal Berkala Fakultas Hukum Universitas Bung Karno* 3, no. 1 (2024): 405–27, <https://doi.org/http://dx.doi.org/10.61802/ifu.v1i1%20Juni>.

Transactions Law: Between Protection of Reputation and Freedom of Expression,” the purpose of this paper can be formulated as follows to analyze the legal construction of defamation provisions under Indonesia’s Electronic Information and Transactions Law (ITE Law), particularly concerning the normative formulation and its development through legislative amendments, in order to assess its conformity with the principle of legality (*nullum crimen sine lege*).

Research Method

This research uses a doctrinal legal analysis approach, focusing on a normative study¹²⁴⁰ of statutory regulations, judicial decisions, legal principles, and scholarly commentary. Primary legal materials: ITE Law (including Law No. 11/2008, Law No. 19/2016, and Law No. 1/2024), the 1945 Constitution, and Constitutional Court Decisions. Secondary legal materials: Legal commentaries, scholarly journal articles, and comparative studies on digital defamation and freedom of expression. Legal interpretation methods: grammatical, systematic, and teleological interpretation to analyze the validity, scope, and legal impact of the defamation provision.

Conceptual Framework

1. Concept of Legality in Criminal Law

The principle of legality is a fundamental pillar of criminal law, affirming that no act may be punished without a prior legal provision governing it (*nullum crimen, nulla poena sine lege*). In the context of defamation under the ITE Law, the principle of legality requires that criminal norms be formulated clearly (*lex certa*), strictly (*lex stricta*)¹²⁴¹, and without room for multiple interpretations.

The defamation provision in Article 27(3) of the ITE Law is often contested because its formulation relies on the construction of the offense of insult under the Criminal Code (KUHP), thereby potentially creating legal uncertainty. Therefore, the principle of legality serves as an instrument to assess the normative validity of this provision.¹²⁴²

2. The Concept of Defamation in Criminal Law

Defamation is a form of protection for a person’s honor and reputation. In Indonesian criminal law, this concept was originally regulated in the Criminal Code (KUHP) and later expanded to the digital realm through the ITE Law.

Conceptually, defamation involves the following elements :

- the existence of a statement or information;
- the statement attacks a person’s honor or reputation;
- it is made with the intent to be made public.

In the digital context, the expansion of electronic media amplifies the impact of information dissemination, thereby making the legal consequences more complex.

3. Concept of Freedom of Expression

Freedom of expression is a fundamental right guaranteed by the 1945 Constitution of Indonesia (Article 28E, paragraph (3), and Article 28F) as well as international human rights instruments such as the United Nations ICCPR.¹²⁴³

This concept provides individuals with the space to express opinions, criticism, and information without state pressure. However, this freedom is not an absolute right, as it may be

¹²⁴⁰ Juanrico Alfaramona Sumarezs Titahelu, “Masalah Atau Isu Hukum Dalam Penelitian Hukum,” in *Metode Penelitian Hukum*, ed. Elan Jaelani (Bandung: Widina Bhakti Persada, 2023), 39–55.

¹²⁴¹ Margie Gladies Sopacua, Iqbal Taufik, and Serhiu Ablamskyi, “Comparative Legal Analysis of the Resolution of Physical Violence Crimes Against Women in Indonesia and Malaysia,” *Law Reform: Jurnal Pembaruan Hukum* 21, no. 2 (2025): 241–65, <https://doi.org/https://doi.org/10.14710/lr.v21i2.65211>.

¹²⁴² Judy Marria Saimima et al., “Layered Hybrid Model in Criminal Resolution: Integrating Epkeret and State Law Under Legal Pluralism in Indonesia,” *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 26, no. 1 (2026): 1–15, <https://doi.org/10.30631/alrisalah.v26i1.2180>.

¹²⁴³ Margie Gladies Sopacua, “Perception of Indonesia and Afghanistan in Preventing Psychic Violence Against the Household Women,” *Jarler: Jambura Law Review* 5, no. 2 (2023): 251–77, <https://doi.org/10.33756/jlr.v5i2.18529>.

restricted to protect the rights of others, including their reputation.

A major issue arises when criminal defamation provisions are used to restrict legitimate expression, particularly criticism of public officials.

Results and Discussion

1. The Fundamental Purpose of the Principle of Legality

In the Indonesian criminal justice system, the principle of legality is explicitly regulated in Article 1 paragraph (1) of the Criminal Code, which states: "No act can be punished except based on the strength of criminal law provisions in legislation that existed before the act was committed." This provision indicates that the principle of legality has three main functions, namely:

a. Protective Function

The principle of legality protects citizens from arbitrary criminalization. The state cannot punish someone based on unclear or non-existent norms. In the context of defamation under the ITE Law, this protective function becomes very important considering that the digital space is a highly dynamic and open space for expression.¹²⁴⁴

If the formulation of defamation offenses in the ITE Law does not meet legal certainty standards, citizens are at risk of being criminalized for expressions that are actually part of criticism, opinion, or social control in a democratic society.

b. Instrumental Function

The principle of legality functions as an instrument of legal certainty that provides guidelines for law enforcement officers in applying criminal law. Criminal norms must provide objective parameters to

determine whether an act meets the elements of a crime.

In Article 27 paragraph (3) of the ITE Law, phrases such as "defamatory content" and "defamation" often become problematic because they do not have a rigid definition within the ITE Law itself, but refer to the provisions of defamation in the Criminal Code. This condition creates an interpretative dependency that can affect legal certainty.

c. Democratic Function

The principle of legality guaranties that criminalization is the result of a democratic process thru the enactment of laws by the legislative body. This means that the restriction of citizens' rights, including freedom of expression, must obtain democratic legitimacy.¹²⁴⁵

In the context of the ITE Law, it is necessary to question whether the criminalization of defamation in the digital space is truly a social necessity or rather an instrument for limiting criticism against those in power.

Elements of the principle of legality, in modern criminal law doctrine, the principle of legality has four main elements¹²⁴⁶:

1. *Lex Praevia* (Non-Retroactivity)

Criminal law may not be applied retroactively. A person may only be punished under a law that was in effect before the act was committed. In the context of the ITE Law, this principle ensures that changes to the provisions regarding defamation cannot be applied to acts committed before those changes took effect.

2. *Lex Scripta* (Written Law)

Criminal provisions must be codified in legislation. Customary law cannot serve as

¹²⁴⁴ Joseph William and Wilma Silalahi, "Analisis Judicial Review Delik Penghinaan UU ITE Putusan Mk 105/PUU-XXII/2024," *Causa: Jurnal Hukum Dan Kewarganegaraan* 16, no. 6 (2026): 851–60, <https://doi.org/https://doi.org/10.6679/53ep9r16>.

¹²⁴⁵ Muhammad Din Al Fajar et al., "No Title," *Causa: Jurnal Hukum Dan Kewarganegaraan* 16, no. 5 (2026): 71–80, <https://doi.org/https://doi.org/10.6679/ahk65105>.

¹²⁴⁶ Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2016).

the basis for criminal prosecution. The defamation provisions in the ITE Law formally satisfy this element because they are codified in law; however, issues arise regarding the quality of the normative wording.

3. *Lex Certa* (Clarity and Precision)

Criminal norms must be formulated clearly to avoid multiple interpretations. This principle is the main point of criticism against Article 27(3) of the ITE Law because the elements of “insult” and “defamation” are elastic and subjective. This lack of clarity opens up a wide scope for interpretation by investigators, prosecutors, and judges. From the perspective of the Constitutional Court of the Republic of Indonesia, legal certainty is part of the rule of law guaranteed by the constitution.

4. *Lex Stricta* (Strict Interpretation)

Criminal provisions must be interpreted strictly and may not be expanded through analogy. In the enforcement of the ITE Law, there is a tendency to broaden the definition of defamation to include criticism, satire, or political expression. This contradicts the *lex stricta* principle.

The application of the legality principle to the defamation provisions in the ITE Law is crucial because this offense lies at the intersection of the protection of individual dignity and freedom of expression. Normatively, Article 27(3) of the ITE Law exhibits the following characteristics:

- a. an open-textured norm, as its elements are not defined exhaustively;
- b. a dependency norm, as it relies on the interpretation of defamation in the Criminal Code;
- c. subjective enforcement, as it is heavily influenced by the victim’s perception.

These characteristics raise serious implications for the principle of legality, namely:

- a) Potential overcriminalization is lawful expression may be criminalized;
- b) Chilling effect is the public fears voicing criticism;
- c) Selective prosecution is law enforcement may be used discriminatorily.

The principle of legality from a constitutional and human rights perspective from a constitutional perspective, the principle of legality relates not only to the formality of norms but also to the substantive quality of norms. Restrictions on freedom of expression must meet three main requirements:

1. prescribed by law;
2. legitimate aim;
3. necessity and proportionality.

2. The Evolution of Defamation Provisions in Indonesia’s Electronic Information and Transactions Law

The legal framework governing criminal defamation in Indonesian law has undergone significant transformation alongside the development of information and communication technology. Historically, the concept of defamation was first regulated in the Criminal Code (KUHP), specifically in Chapter XVI on Insults. Under the KUHP system, insult is viewed as a crime against honor, aimed at protecting an individual’s dignity and reputation from attacks that could diminish their social standing in society.

Conceptually, the regulation of defamation in the KUHP has a personal character and is limited to conventional communication spaces. However, the development of the digital space has expanded the spectrum of communication, making the potential for reputational harm greater, faster, and more widespread. It is this situation that prompted lawmakers in Indonesia to incorporate defamation provisions into the cyber law regime through the ITE Law.

The enactment of Law No. 11 of 2008 on ITE Law introduced Article 27(3), which prohibits the distribution, transmission, or making accessible of electronic information containing defamatory or slanderous content. Normatively, this article represents an extension of the offense of defamation from the physical to the digital realm.

However, since its enactment, Article 27(3) has drawn serious criticism due to its wording, which is considered overly broad and vague. The main issue lies in the phrase “defamatory content,” for which no restrictive definition is provided in the ITE Law. As a result, the provision has become heavily reliant on the interpretation of defamation under the Criminal Code, which systematically creates a dual legal regime.

In 2016, through Law No. 19 of 2016, the government revised the ITE Law. The main changes regarding defamation involved reducing the criminal penalties and clarifying the offense’s complaint-based nature. This transformation reflects the state’s acknowledgment of the problem of abuse of this provision.

Nevertheless, the 2016 revision did not address the substantive problem, namely the lack of clarity regarding the elements of the offense. This has caused criminal policy issues to persist.

Subsequent changes through Law No. 1 of 2024 demonstrate further efforts to clarify the normative framework. However, substantively, the core criminalization of digital expression remains intact.

Theoretically, the evolution of these norms reveals three patterns of development:

First, the expansion of criminalization into the digital sphere (criminal law expansion). Second, procedural modifications without substantial reform¹²⁴⁷, third, the strengthening of state control over digital communication.

From a criminal law perspective, this development indicates that the state continues to maintain a repressive approach to reputation disputes in the digital sphere, rather than developing civil law-based remedies.

3. Legal Implications on Freedom of Expression

The criminal provisions on defamation in the ITE Law create complex legal implications for freedom of expression as a fundamental right in a democratic state. Constitutionally, freedom of expression is guarantyd by the 1945 Constitution thru Article 28E paragraph (3) and Article 28F. This right is a fundamental foundation of democracy because it allows citizens to: “expressing opinions; criticizing public policies; overseeing state power”.

However, in practice, Article 27 paragraph (3) of the Electronic Information and Transactions Law is often used to criminalize expressions that actually fall within the realm of criticism, opinion, or public oversight.

Legally, there are three main implications:

a. Chilling Effect on Public Participation

The chilling effect occurs when society limits itself from speaking out due to fear of punishment. This phenomenon is very problematic in a democratic system because freedom of expression is not only an individual right but also an instrument of public participation. When criticism of public officials can be classified as defamation, the space for public deliberation is reduced.

b. Overcriminalization of Expression

Overcriminalization occurs when the state uses criminal law to resolve conflicts that are actually more appropriately handled thru non-criminal mechanisms. In the context of defamation, the use of

¹²⁴⁷ Nanci Yosepin Simbolon, Juanrico Alfaramona Sumarezs Titahelu, and Rosmalinda, “Study On The Reconstruction Of The Concept Of Criminal Sanctions In The Juvenile Justice System,” *Journal of Law and*

Sustainable Development 11, no. 10 (2023): 1–24, <https://doi.org/https://doi.org/10.55908/sdgs.v11i10.1109>.

prison sentences as a response to reputational harm creates an imbalance between protecting honor and restricting freedom. In the doctrine of modern criminal law, criminal law must be the ultimum remedium. However, in the practice of the ITE Law, criminal law often becomes the primum remedium.

c. Selective Enforcement

The ambiguity of the norm formulation allows for selective law enforcement. This has the potential to be used by parties with economic, social, or political power to pressure others thru criminal instruments. In a rule of law country, selective law enforcement contradicts the principle of equality before the law¹²⁴⁸.

The role of the Constitutional Court of the Republic of Indonesia is very important in providing interpretative boundaries regarding defamation provisions in the ITE Law. Thru various rulings, including Ruling No. 78/PUU-XXI/2023, the Court emphasized that criminal norms must meet the standard of legal certainty.

The principle of legal certainty requires that:

“the community clearly knows the prohibited actions; law enforcement agencies have objective limits in the application of the law”.

In the context of Article 27 paragraph (3), the Court faces a dilemma between upholding reputation protection and maintaining freedom of expression. The Court fundamentally recognizes the importance of protecting reputation as part of human rights. However, the Court also emphasized that such protection should not eliminate the space for legitimate criticism.

From the perspective of constitutional law theory, the Court's decision demonstrates the application of the balancing test principle:

Protection of Reputation ↔ Freedom of Expression

However, the main problem remains: The court did not abolish the norm, but only limited its interpretation. Practically, this has not yet sufficiently addressed the potential for abuse at the law enforcement level.

4. International Human Rights Perspective and Comparative Legal Analysis

According to General Comment No. 34 of the UN Human Rights Committee and decisions of the European Court of Human Rights (ECtHR), criminal sanctions for defamation should be used as a last resort. Indonesia's practice falls short of this standard, risking a violation of international obligations under ICCPR.

In the perspective of international human rights law, the criminalization of defamation is increasingly viewed as an instrument that must be strictly limited. United Nations Human Rights Committee thru General Comment No. 34 emphasizes that states must exercise caution in applying criminal law to expression.

Criminalization can only be justified if it meets the principle legality, necessity, proportionality. In global practice, there is a tendency to decriminalize defamation.

For example:

The United Kingdom has abolished criminal libel as part of civil liberties reform. The United States applies a high standard for proving defamation, especially against public figures, thru the principle of actual malice. Germany maintains the offense of insult but with strict limitations thru the principle of proportionality.

Compared to that practice, Indonesia still maintains a broad criminal approach. The legal implication is the potential

¹²⁴⁸ Juanrico Alfáromona Sumarez Titahelu et al., “Strengthening Pela-Gandong Alliance Based on John Rawls’ Theory of Justice,” *Hasanuddin Law Review* 1, no. 3 (2015): 417–29.

inconsistency with Indonesia's international obligations under the ICCPR.

Comparatively, legal reform in Indonesia needs to move toward:

1. clarifying the elements of the offense in a limited manner;
2. distinguishing between public criticism and personal attacks;
3. prioritizing civil mechanisms;
4. limiting the use of prison sentences.

Thus, the international perspective shows that reputation protection remains important, but it should not sacrifice freedom of expression as the core of constitutional democracy.

Conclusion

The current formulation and implementation of defamation provisions under Indonesia's ITE Law pose serious threats to freedom of expression. Although intended to protect individual reputation, these provisions lack clarity and proportionality, which undermines legal certainty and democratic discourse. A reorientation toward civil remedies or administrative sanctions, aligned with international standards, is urgently needed. Furthermore, future reforms should adopt a more precise legal drafting technique and consider the balancing test as applied in constitutional and human rights law.

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