

THE EMBODIMENT OF LEGALITY PRINCIPLES IN HUMILIATION CRIMINAL OFFENSE

Amir Ilyas¹

***Abstract---**This study is aimed to find out the embodiment of the legality principles of criminal law both the provisions in the Criminal Code (KUHP) and those in the Information and Electronic Transaction Law (UUITE). It uses normative-juridical research with primary legal materials (laws and verdicts of the constitutional court) and secondary legal material (literature on insult criminal law). An analysis legal material is performed by qualitative analysis, describing vague legal norms, then performing legal interpretation and conceptualization. The results showed that the provisions of humiliation criminal offense both contained in KUHP and UUITE did not meet the principle of legality, there are still provisions of humiliation criminal offense whose elements of criminal offenses are vague, such as in the kinds of humiliation: defamation, accusation with slander, humiliating people those who have died, and humiliation through ITE means. In this paper examine the criminal law of humiliation in KUHP and UUITE in terms of the embodiment of the principle of legality, namely in the classification of the third and fourth part. Whereas in the enforcement of criminal law that must protect human rights, if there are unclear provisions, multi-interpretations, it is certainly impossible to realize.*

***Keywords---**Legality; Humiliation; Defamation; Slander*

I. Introduction

In general, the human rights activists and researchers oppose the provisions of humiliation criminal law in which it is still in effect today. Such opposition is certainly difficult to separate from the influence of western thinkers, especially from U.S and Australia countries as they protect from the basic ideals of democratic statehood along with equality of human rights. Everyone is given the right and freedom to speak, each person is given the freedom to express opinion (Anonymous, 2010). These two fundamental rights have become the basis of argumentation if the provisions of humiliation criminal law are stigmatized as the waste basket articles.

All provisions relating to the humiliation offense are considered as articles, in addition to curbing the freedom of right to speak and express opinions in public, they are usually used as shields by the authorities to be arbitrary to the people when there are critics and suggestions on the embodiment and government policy. The increasingly higher competition, in which there are more and more manufacturers involved in fulfilling the needs and desires of customers, causes every company to put orientation on customer satisfaction as a primary goal (Solimun, & Fernandes, 2018).

In the end, the struggle of human rights activists, gained a place in the State's ideals which relied on democracy by being granted by the Constitutional Court on the judicial review of humiliation article to the President and Vice-President

¹Department of Criminal Law, Faculty of Law, Hasanuddin University, Indonesia. E-mail: amir_fh_unhas@yahoo.com

(Article 134, 136 bis and Article 137 of the Criminal Code) (The Decision of the Constitutional Court, 2006), humiliating the government of the Republic of Indonesia (Article 154 and 155 of the Criminal Code) (The decision of the Constitutional Court, 2007). By the Constitutional Court *a quo* article was declared contrary to the constitution and has no binding power.

It is different from the provision of public humiliation in which the humiliated object is an individual, not a position (such as the President or head of State) or not an object which is humiliated by a group (community). Even though material tests have been submitted in the Constitutional Court, those articles namely Article 310 of the Criminal Code (KUHP) remain declared not to contradict the 1945 Constitution of the Republic of Indonesia, *in casu* has binding powers to remain in force (The decision of the Constitutional Court, 2008).

In such context, the question is to what extent the relevance of the provisions of humiliation criminal law still needs to be maintained. According to the author, stands on the opinion that these provisions should still be maintained with some improvements, or in the legal language it should be revised towards a better law. Both for officials who conduct the law, as well as for social arrangements that act on behalf of themselves as the people in general, and individuals in particular (Moeljatno, 1959). Lecturers are human resources that have a very central role in all activities in college and have a stake in the framework of character building of students to deal with the reality of a life filled with competitiveness (Indarti, 2017).

The basis of the author's argument to maintain these provisions, including: *The first*, the influence of human rights from western countries, is not the protection of rights as freely as possible, but whose rights to express opinions are limited to not disturbing or raping the rights of others, as well as in Article 28 J of the 1945 Constitution of the Republic of Indonesia concerning the limitation of human rights as long as based on the law. In line with that, the existence of humiliation criminal law in its realization through material or formal criminal law is supported by the protection of human rights for any person suspected committing a criminal offense. *The second*, criminal law, especially material criminal law, *in abstracto* law should be realized if it is present as a reflection of human relations. By a certain community, they still consider the humiliation offense a despicable act. Certainly, the nature of offense is based on the action in question violates the essential law, namely maintaining peace (Van Apeldoorn, 1980).

The second reason as mentioned above can be traced back to the writing of Farid (1987), that in eastern communities that uphold ethics, and the culture of "*mapatabe*" in the Bugis-Makassar tribe from the very beginning it was very easily offended if they are humiliated (*ripakasiri*). No doubt for the Bugis-Makassar tribe if they are humiliated it usually leads to murder. In that event, the act of murder was considered an honorable act, "*mate risantangi*," so that the act of his murder should not be criminalized. Farid called it that this was the reason for the elimination of criminal. In the analysis of nonparametric paths, the assumption of homoscedasticity should be fulfilled. Normal OLS estimation when studying parametric temporarily produces unbiased and consistent estimator (Fernandes, 2019).

Nevertheless, a description of criminal law in the context of customary law as proposed by Farid was aimed at being humiliated in cases such as a girl who was brought away by a young man was considered a humiliation offense, a criminal act was humiliated (*ripakasiri*), but the meaning contained in the term "*siri*" is the fall of "*self-esteem*" it can be equalized with one element of the humiliation offense, namely the attack of "honor" and "reputation." Honor and reputation are nothing but what is meant by *self-esteem*. The pelvic rocking movement in the creation dance movement of Minangkabau ethnic group is one example of a movement that is opposite to or not in harmony with the philosophy of Minangkabau itself (Hutahayan, 2019).

Until now, it cannot be denied, for the Bugis-Makassar tribe if they feel humiliated in public, especially if they are slandered (accused of a disgraceful act which they do not doing in essence), do not hesitate to detach the *badik* (slanderer

is killed by stabbing). Hence, the essence of the humiliation criminal law for the Bugis-Makassar tribe here, at least if there is a humiliation, because there is still a way for revenge through criminalization for acts that attack honor and reputation is a preventive measure from continuing to murder offenses. Just that needs to be considered and needs to be emphasized, the humiliation criminal law as contained in the Criminal Code (KUHP) and the Information and Electronic Transaction Law (UUITE) must be returned to the main principles in criminal law, namely the principle of legality. Methodologists have developed mediation analysis techniques for a broad range of substantive applications (Solimun and Fernandes, 2017).

Related to that, the definition of the principle of legality according to the author refers to the classification proposed by Machtell Boot which cites the opinion of Jesheck and Weigend on Hiariej (2012), that there are 4 (four) meanings of the principle of legality: *First*, related to criminal provisions, it must not be retroactive (*nullum crimen nulla poena sine lege praevia or lex praevia*). *Second*, the criminal provisions must be written and may not be criminalized based on customary law (*nullum crimen nulla poena sine lege scripta or lex scripta*). *Third*, the formulation of criminal provisions must be clear (*nullum crimen nulla poena sine lege certa or lex certa*). *Fourth*, the criminal provisions must be interpreted strictly and prohibited analogies (*nullum crimen nulla poena sine lege stricta or lex stricta*).

In this paper will only examine the criminal law of humiliation in KUHP and UUITE in terms of the embodiment of the principle of legality, namely in the classification of the third and fourth part. The criminal law of humiliation, both contained in the Criminal Code and contained in UUITE, there are still elements of criminal offenses that are not yet clear and tend to be interpreted in terms of the provisions being multi-interpretations (Mispansyah, 2018). Whereas in the enforcement of criminal law that must protect human rights, if there are unclear provisions, multi-interpretations, it is certainly impossible to realize (Irwansyah and Yunus, 2017).

A concrete example of this situation in the Criminal Code (KUHP) can be looked in Article 310 and 315. Both of these articles are equally qualified as a classification of humiliation qualifying “defamation.” Then to see the distinctive nature of the way to do it is only relying on the doctrine of criminal law experts, so that including severe humiliation is an attack on honor and reputation performed by accusing an act, while ordinary humiliation is performed in a way that is in the form of terms such as dogs, crazy, blighter, stupid, and so on. The distinctive is not at all contained in the editorial of the articles. Similar to the humiliation criminal law stipulated in Article 27 paragraph 3 of the UUITE, namely an act of humiliation using electronic means eliminates the types of humiliation contained in the Criminal Code, so that the legal consequences of some types of humiliation contained in the Criminal Code such as defamation, slander, accusation with slander, humiliation with deeds, humiliation for person who have died, should each of them differ in their punishments, by UUITE equalize the overall criminal sanctions, provided that they are performed using electronic means.

Starting from the legal issues as mentioned above, the object of study is focused in 2 (two) parts: (1) How is the embodiment of the principle of legality of humiliation criminal law based on the Criminal Code (KUHP)?; (2) How is the embodiment of the principle of legality of humiliation criminal law based on the Information and Electronic Transaction Law (UUITE)?

II. Method of the Research

The research is a normative-juridical research, namely the conceptual approach which aims to examine the laws in the humiliation criminal law, also with theoretical studies from the existing literature then related to the problems as main discussion in this research (Marzuki, 2010). It analyzes 2 (two) legal issues, namely (1) the vagueness of norms related to the provisions of humiliation both in the Criminal Code and in the UUITE; (2) overlapping norms related to humiliation criminal law in the Criminal Code and UUITE.

Furthermore, from the two legal issues, it is directed at the implementation of the main legal principles in criminal law, namely the principle of legality. Against vague norms they must be emphasized, clarified to meet the principles of *lex certa* and the principle of *lex stricta*. Whereas legal norms overlap, they are also guided by the principle of legality, so that the criminal provisions applied are balanced between the wrongdoing of the perpetrator and the criminal liability. The results of the interpretation are then reviewed one by one, and doing legal conceptualization in formulating provision of humiliation that meet the principles of criminal law.

III. Result and Discussion

If considers all provisions of the humiliation criminal law in the Criminal Code and UUIITE, it can simply be classified into 4 (four) forms, namely viewed seen from the way to do, humiliated objects, the content of humiliation, and the locus of happening.

The form of humiliation when viewed from how to do it consists of 2 (two) parts, namely:

- 1) It is performed by verbal means;
- 2) It is performed by written manner;

All kinds of humiliation in the Criminal Code, such as defamation, slander, accusation with slander, humiliation of civil servants, humiliation with deeds, humiliation for person who have died, humiliation of the president, head of a friendly country, State symbols, humiliation of tribes, races, religion, between-groups, and humiliation of public power allows it to be done by verbal means, and it is also possible to do it in a written manner. There has been an incident in the case of humiliation that occurred in Gowa district, namely Fadli Rahim as a perpetrator humiliating the Regent of Gowa through the Blackberry Messenger, by the public prosecutor charged with Article 27 paragraph 3 of the UUIITE *jo* Article 310 paragraph 1 of the Criminal Code. The accusation is clearly wrong by applying Article 310 paragraph 1, because in the doctrine of criminal law experts, they agree to Article 310 paragraph 1 as a defamation of how to do it verbally. Even though the humiliation was clearly performed out by the actor by write on a social media status (*Blackberry Messenger*) (The verdict of the State Court of Sungguminasa, 2014).

The problem is that humiliation that performed by using electronic means must be written forever? Of course not, it is possible someone could record his/her voice, and then he distributed it to electronic media, for example to Youtube, allowing its humiliation to be performed verbally. Specific to verbal humiliation, before developing a criminal law of humiliation through UUIITE electronic means, by Prodjodikoro (1974) in interpreting Article 315 (light humiliation), about what was meant in advance the person himself was exemplified that the telephone pronunciation directly to the humiliated person had fulfilled the element, because there is no difference with face to face.

Furthermore, in this writing, it will be limited only to the types of public and specific humiliation outside the Criminal Code, namely in the UUIITE. As described at the beginning, the discussion is solely on the formation of humiliation criminal law in accordance with the principle of legality in order to avoid the imposition of vague criminal law of humiliation, in order to create a criminal law of humiliation that continues to protect human rights. Indeed, punishing a guilty person based on the nature of criminal law; written, clear, strict, and explicit. It also includes freeing someone who does not prove their actions contain mistakes, even in the doubt any person must be punished only that which is beneficial for them.

Embodiment of Legality Principles of Humiliation Criminal Law Based on the Criminal Code

In essence, the provisions of criminal law must be clear, not justified to analogize. What happens now? Almost all elements of the offense of humiliation require further interpretation. If so, the interpretation is only based on grammatical interpretation, which is certainly still justified. Too vague the elements of criminal acts will clearly be easier to rape human rights.

Before inventorying the provisions of criminal law on common humiliation, regarding any part of the classification and its elements which are still vague (unclear), so that it causes multi-interpretations, it is important to note the classification of common humiliation offenses contained in the Criminal Code, especially Chapter XVI (Article 310 to Article 321). These classifications can be divided as follows:

- 1) Defamation consisting of:
 - a) Light defamation (Article 315 of the KUHP);
 - b) Ordinary defamation (Article 310 paragraph 1);
 - c) Highly-qualified defamation (Article 310 paragraph 2)
- 2) Slander (Article 311);
- 3) Defamation or slander against officials (Article 316);
- 4) Accusation with slander (Article 317);
- 5) Defamation by deeds (Article 318);
- 6) Humiliation to person who has died (Article 320, 321)

Based on the six types of humiliation above, actually the type of humiliation can be simplified in only 2 (two) groups, namely:

- 1) Defamation; and
- 2) Slander

The type of humiliation if viewed from a humiliated object, namely official, the form can be in defamation or slander. This also applies to humiliation of people who have died which if what is indicted to be not true is included as slander, whereas if the accusation is true then it is included as defamation. Two other forms of humiliation (Article 317 and 318) are included as a form of slander-qualified humiliation, must be from what is indicted by the perpetrator do not contain a true for the victim. Furthermore, several provisions of this common humiliation contain many ambiguities from the elements which will be described one by one as follows:

Defamation

The type of humiliation in the form of defamation, that what was indicted is not true for the victim. Therefore, the defamation with slander is different in punishment. Defamation in a range of prison (four months, nine months to one year). Actually it is different from slander which is punished with imprisonment for a maximum of four years.

The experts of criminal law disagree, related to the qualification of humiliation, some call it a criminal act of aspersion (Chazawi, 2009), and some call it a defamation offense (Soesilo,1995; Lamintang and Samosir, 1997; and Marpaung, 1997). Which is actually the more appropriate term?

According to the author is tends to use the term defamation. This is based on the reasons: (1) In the dictionary meaning, from the original language (Dutch) "*smaad*" as stated by Van Der Tas (1950), he interpreted "defamation deeds is defamation". As well as Bons (1955) also gives definition: "defamation," "insult", "blemish". Furthermore, which gives an odd definition, namely Subekti and Tjitrosoedibio (1982), he means: "slander," by Simorangkir (1972) also confuses what is meant by slander and defamation, "humiliated deed or defamation to others, attacks the reputation/honor of others by

broadcasting so that it is publicly known; *laster*. While, in several dictionaries such as those written by Safioeddin (1978) and Mulano (1982), they interpreted “*smaad*” as “aspersion.” From several these opinions it can be understood that only in dictionaries compiled from van Der Tas and L. Bons is a dictionary of Dutch to Indonesia, so it is very logical that the translation of the two is more reliable. (2) Related to that, the opinion that is more corroborating, that the term of defamation is more suitable for Article 310 of the Criminal Code (KUHP), and the term “aspersion” is used more on the themes of “environment.” In essence the subject of human law is being having soul and with respect and honor, so it is very appropriate to say that degrading honor is an act of defamation or blemish, position or honor is difficult to see how the situation becomes aspersion, but if it is defamed, it is related to human beings who are recognized as having self-esteem.

The weakness of Article 310 of the Criminal Code in relation to the principle of legality is that it occurs in 2 (two) ways: (1) Article 310 paragraph 1 is clearly not written clearly that what is regulated is defamation performed verbally; (2) from Article 315, which on average by criminal law experts classifies it as a light humiliation, there is one element, namely “... or before the person himself verbally or with a deed...” in addition, it is also distinguished if Article 315 is a form of light humiliation if the objective element (the way) indicted it with the term even though there is no such text in the article.

The article on defamation should be regulated as follows:

1. For verbal defamation, the next sentence “verbal/oral” must be written so that it does not occur multi-interpretations, because with only the phrase “defamation” then it can mean verbal defamation, it can also mean written defamation. It cannot be used as a benchmark that because verse 2 deals with written defamation and immediately says that verse 1 is a verbal defamation, the way of such interpretation is included in the category of analogy interpretation;
2. For the category of light humiliation which can be said to be fulfilling as a criminal act, because “performed before a person with an act/deeds” needs to be reviewed, that it is not always the ways performed by such person, the level of his deed is in accordance with criminal responsibility. For the Bugis-Makassar tribe, if their faces are spit on, for example, or are stamped with their skullcaps, then for them it will be more humiliation if they are indicted as a thief for example. Therefore, it is better if such humiliation is classified as a severe humiliation, such as in defamation in Article 310 paragraph 1;
3. As distinctive nature, between Article 310 and Article 315, it must be reaffirmed, in the sentence in the form of an objective element, that it is fulfilled as a light defamation if the ways of attacking honor and reputation by indict a “term.”
4. Article 315 should be placed in Article 310 paragraph 1 sequentially, so that the sequence is clear, from verse 1 (light defamation), verse 2 (ordinary defamation/verbal or oral defamation), verse 3 (severe or written defamation).

Slander

Basically, what distinguishes between slander and defamation is if the slander what indicted by a person in terms of content is not true. While on defamation, what indicted is true. Both the true and not true are all prosecuted, because the level of deed or the level of harm is different so the criminal liability is different.

In the context of the legality principle, it no longer necessary to prove the truth of what the performer said was charged to the judge to order the performer. The basis of argument is in addition to being one of the progress levels of criminal law enforcement, is easier for the defendant to get legal assistance, imposition of the defendant to prove their actions is more in line with the defendant’s human rights, the defendant is not the examined object (*accustoir principle*, Ilyas and Nursal, 2016) but as a subject facing the subject (law enforcement) to defend their rights.

Defamation or Slander against Civil Servants

The classification of this type of humiliation as stipulated in Article 316 of the Criminal Code is only type of humiliation that is different from other types of humiliation in Chapter XVI on humiliation. The difference can be seen from: (1) humiliated objects, namely officials. If connected with other provisions of humiliation outside Chapter XVI, such as humiliating to public authority, then in reality the legal interest to be protected is no other than the public interest; (2) in line with the first distinctive nature, because the legal interest to be protected is in the public interest, the type of offense is not an accusation, but a general offense.

In order to more clearly regulate the article on humiliation in the future, especially in the revision of the Criminal Code, the types of humiliation that are qualified as humiliation aimed at protecting the public interest are placed in a Chapter of "Humiliation." For example, Chapter XVI A consists of several provisions as common humiliation, and then in Chapter XVI B also stipulates some of the provisions as a specific humiliation.

Accusation with Slander

The type of humiliation that is qualified as an accusation with slander is often not true in the application of the law. Sometimes a criminal act turns out to be a false report crime (Article 220 of the Criminal Code), but by the police applies the provisions of Article 317 of the Criminal Code concerning accusation with slander. Such events have occurred in the humiliation of Budi Waseso (BW) by the Governor of Gorontalo (Rusli Habibie) who was reported by BW so that eventually charged with an article of accusation with slander (The Decision of the State Court Gorontalo, 2015).

More clearly, the following is quoted in Article 317 paragraph 1 of the Criminal Code which confirms:

"Anyone who intentionally takes or orders to write a false accusation letter to a State official about someone so that the honor or reputation of person becomes offended then is punished for accusation with slander, imprisoned of four years."

In relation to the principle of legality, the ambiguity of the Article above lies on the objective element of "false accusation" and "about a person." If the sentences are combined from these elements it will write "false accusation about a person." The ambiguity sentence about the addressed "essence of falsify," what the content of false report or is the person being reported is not the performer of the humiliation content intended by the slanderer?

Furthermore, Chazawi (2009) stated that what was meant by Article 317 of the Criminal Code, the false is the person, not the deed or action. It is possible that what is reported is true, for example the act of impregnating a neighbor girl. It is true there are people who impregnate, because pregnancy is real. But the false is the person who is indicted or reported, because it is not he who made it, but someone else. The proportion of independent commissioner is used to measure corporate governance because the existence of an independent board of directors is needed to encourage the implementation of good corporate governance principles and practices in the company (Purbawangsa, 2019).

By considering Article 220 of the Criminal Code, it seems that the element of "false accusations about a person" can then be understood if it turns out that Article 317 of the Criminal Code is understandable if the person being reported is not from the performer of the alleged crime. Therefore, for Article 317 of the Criminal Code to meet the principle of "*lex certa*", it should be formulated as follows:

"Anyone who intentionally takes or orders to write a false accusation letter to a State official about someone so that the honor or reputation of person becomes offended then is punished for accusation with slander, imprisoned of four years."

By returning to Article 311 about slander, which is one of the core elements is what is indicted to be incorrect, and then Article 317 of the Criminal Code can be said that what is indicted to be wrong is concerning the person who is not the performer of what he indicted. Therefore, Article 317 of the Criminal Code is derived from Article 311, so the defendant also has the right to make a defense related to proof if what he reports can be true, that the accused is the right as the perpetrator of what is indicted.

However, it should be noted that even though the defendant could prove the truth of what he reported, he would still be entangled with defamation offenses as stipulated in article 310 of the Criminal Code namely defamation which is what is accused of being humiliated is true.

IV. Slander-Qualified Deeds

The type of humiliation and classifying slander-qualified deeds is regulated in Article 318 paragraph 1 of the Criminal Code which confirms:

“Anyone who intentionally commits an act causes a suspect with another person to commit an act that can be punished then be punished for slander, with a jail sentence of four years.”

As stated by Prodjudikoro (1974) quoting A. Heyman’ opinion, that this type of humiliation is not found in Dutch WvS, only in the Dutch East Indies WvS, the reason for adding one such type of humiliation is based on Indonesia’s specific circumstances, which often occur within the house is secretly placed or hidden by an item, which if found, raises a presumption, that the occupant of the house is committing a criminal act concerning the object.

There are various nomenclatures of this type of humiliation, Chazawi (2009) called it a false assumption, Marpaung (1997) called it slander with deeds, while Soesilo (1995) called it a slander indict, another by Prodjudikoro (1974) called it a slander-qualified deed. Which term is the most appropriate?

In terms of the text or formulation of the provisions it is more appropriate to be said as an act of “indict with slander,” but if observed from the sequence of criminal events, that must be preceded by actions that can be punished, then from the performer accusing those things to others, then the opinion of Prodjudikoro is more appropriate, namely slander-qualified deed.

If it is said that the article regulates slander accusation, then what is the difference between Article 311 of the Criminal Code which regulates “slander.” Is not in article 311 can also be said as an accusation with slander?

Provisions regarding slander-qualified humiliation in Article 317 and Article 318 of the Criminal Code are nothing but derivatives of “slander” contained in Article 311. What the difference is only the way, if Article 311 is sufficiently false accusation, while Article 317 and Article 318, must be preceded by a sequence of actions from the slanderer. Article 317 requires that the slanderer make a complaint, and Article 318 the slanderer must do an act that can be punished then the act he has committed is indicted to other, even though he is not the performer or the perpetrator.

In the Bugis-Makassar tribe, if reviewed from a humiliated object or slandered, it is commonly referred to as “*masulle lempa*,” changing the criminal actor, even though it is not he who did it. Presumably, for Article 318 meets the legality principle, *lex stricta, lex certa*, it should be formulated with the following conditions:

“Anyone who intentionally commits an act causes a suspect with another person to commit an act that can be punished then be punished for slander, with a jail sentence of four years.”

V. Humiliation to People Who Have Died

In terms of its regulation, the qualifications of the type of humiliation offense to people who have died there are differences of opinion from criminal law experts. Soesilo (1995) stated that Article 320 of the KUHP is only defamation-

qualified humiliation to people who have died. He also stated that this type of humiliation does not regulate the light humiliation for humiliated objects “dead people.” While Chazawi (2009) argues that in Article 320 paragraph 1 of the KUHP there are no other types of verbal or written-qualified humiliation which can also occur for the humiliated object, that is, the person who has died. In his opinion, Chazawi (2009) was also different from Soesilo, for Chazawi the provisions regarding light humiliation for people who had died were also included in Article 321 of the KUHP. A strong reason, Chazawi, namely in terms of punishment in Article 321 and Article 320 there are differences. More severe criminal punishment from Article 320 compared to Article 321 of the KUHP.

For further assessment, it is important to quote from Article 320 and 321 which regulate this type of humiliation.

Article 320 paragraph 1 it is affirmed: *“anyone who humiliate the person who has died and the commit is defamation with by the letter is punished with a maximum sentence of four months and two weeks or a maximum fine of Rp.4500-.”*

Furthermore, in Article 321 paragraph 1, it is affirmed: *“anyone who broadcasts, shows or attaches letters or images that are humiliating, or defamation to other people who have died, with the intent that the contents or image of the letter are known to the public or known to the public is punished with a maximum sentence of one month and two weeks or a maximum fine of Rp. 4500.”*

According to the author, as all the provisions that regulate the problem of humiliation of people who have died, only derivatives of the type of verbal and written defamation only, in which the humiliated object or directed to the accused are people who have died. Interpretations by Soesilo and Chazawi are not exact. Article 320 paragraph 1 and Article 321 paragraph 1 contain the types of verbal and written defamation. There is no type of light humiliation in the article.

Article 321 paragraph 1 if carefully examined from its elements *“...broadcasts, shows or attaches letters or image...”* in fact there are also elements of the type of written defamation-qualified humiliation. Please pay attention again to Article 310 paragraph 2 of the Criminal Code which confirms:

“If performed by writing or images that are broadcast, publicly showed, or attached, then those who commit it are punished for being defamation with writing with a maximum sentence of one year and four months or a maximum fine of Rp. 4,500-.”

An irregularity between Article 320 paragraph 1 and Article 321 paragraph 1, in terms of the threat of prison sentences is different, but in terms of the fine is equalized, namely Rp. 4500.

In the opinion of the author, regarding the principle of legality in the humiliation criminal law, there are 2 (two) things that are important to be considered again in connection with the provision of humiliation for people who have died, as follows:

1. Humiliation that were initially qualified in the two main items, namely defamation and slander, then in line with that should also humiliation in the form of defamation (light, ordinary/verbal, severe/written) and slander should be applied to the humiliated object that has died;
2. Regarding criminal liability of humiliation to people who have died, there is no need to distinguish between criminal threats and other types of humiliation, such as defamation with their types, slander with their types for people who are still alive. Indeed, there are basically distinguishing characteristics of the legal interests that are to be protected, one is a person who is humiliated because he is still alive, and the other is a family (heirs) of those who have died, but if viewed from the core elements of offense, namely attacks on honor and reputation, still both protect the honor and reputation.

The final noting of the type of humiliation contained in this Criminal Code, especially the humiliation to people who have died, namely: (1) a term that would be more appropriate to use, namely humiliation people who have died, not

defamation to people who have died, and also not slander to people who have died. By using the term humiliation to people who have died, it is already covered by both defamation and slander (2) Can an accusation with slander and defamation act occur in the humiliated object died? The answer is can.

The reason is, in the form of humiliation with slander, there is a possibility that what reported or indicted is qualified as a criminal act, and there is a possibility that it is not a criminal act, only immoral acts (for example, a lecturer in his life invaded his students) then reported to the rector, then it can still be qualified as an accusation with slander against people who have died. About a case can be stopped by law because the suspect has died; it is not relation whether or not the legal interest is to be protected from the humiliated person. As long as the accusation or report has reached the authorities or State authorities, it has been qualified as a humiliation in the form of accusation with slander.

Similarly, a slander-qualified humiliation it can also occur in the humiliated object to people who have died. If in his life, by the slanderer has ever committed theft, then the stolen item is kept in the house of the person who was still alive, after a while he died, and for the performer that can be punished, and indict that thief from the item before, and now died, then in that case occur slander to people who have died.

Embodiment of the Legality Principles of Humiliation Criminal Offenses Based on the Information and Electronic Transaction Act (UITE)

The humiliation criminal law as contained in Act No. 11 of 2008 concerning Information and Electronic Transactions is regulated in 2 (two) provisions, includes:

Article 27 paragraphs 3 confirm: “Everyone intentionally and without rights distributes and/or transmits and/or makes accessible electronic information and/or electronic documents that have humiliation content and/or defamation.”

In several cases, often the humiliation that occurs through ITE facilities, in the element of distributing, transmitting, and making accessible, the judges who are trying such cases is difficult to define the three elements. In fact, there is usually no unity of opinion among judges when handling cases of humiliation that occur through ITE.

In essence, the amendment to the provisions of the humiliation criminal law in UITE cannot be released from the Decision of Constitutional Court No: 50/PUU-VI/2009 as stated in its legal considerations:

“The validity and interpretation of Article 27 paragraph (3) of UITE cannot be separated from legal norms in the principal Article 310 and Article 311 of the Criminal Code as *genus delictis* which require accusation to be prosecuted, must also be treated against acts prohibited in Article 27 paragraph (3) UITE, so article *a quo* must also be interpreted as an offense requiring an accusation (*klacht*) to be prosecuted before the court.”

In line with the previous Constitutional Court decision, the first judicial review of Article 27 paragraph 3 of the UITE through the decision of the Constitutional Court No: 50/PUU-VI/2008 on page 110, the interpretation of the article in the Constitutional Court’s opinion was stated:

“Considering that both the House of Representatives and the experts who submitted by the Government have explained before the Constitutional Court that Article 27 paragraph (3) of UITE does not regulate new criminal law norms, but only reinforces the enactment of humiliation criminal law in the Criminal Code into the new Acts because there are a special additional element is the development in the field of electronics or cyber with very special characteristics. Therefore, the interpretation of norms contained in Article 27 paragraph (3) of a quo Act concerning humiliation and/or defamation cannot be separated from the criminal law norms contained in Chapter XVI concerning humiliation contained in Article 310 and Article 311 of the Criminal Code, so that the

constitutionality of Article 27 paragraph (3) of UUIITE must be linked to Article 310 and Article 311 of the Criminal Code”.

“Separate from the Constitutional Court’s considerations as described in the previous paragraph, the enactment and interpretation of Article 27 paragraph (3) of UUIITE cannot be separated from the basic legal norms in Article 310 and Article 311 of the Criminal Code as genus delicts that require accusation (klacht) to can be prosecuted, it must also be treated against acts prohibited in Article 27 paragraph (3) of UUIITE, so that a quo Article must also be interpreted as an offense requiring an accusation (klacht) to be prosecuted before the Court.”

Explicitly, in the decision of the Constitutional Court, it was clearly stated that the humiliation offense that occurred through ITE facilities was a crime by accusation. This consideration is followed by Article 45 paragraph 5 of the revised UUIITE. At the same time, in the explanation of Article 27 paragraph 3, based on the decision of the Constitutional Court above, it is stated that the provisions of humiliation in the UUIITE refer to the provisions of defamation and/or slander stipulated in the Criminal Code.

Although, the provisions of humiliation in UUIITE have undergone much amendment, both because of the judicial review through the Constitutional Court or through limited revisions by the House of Representatives, if we consider again the provisions are still very far from the legality principle of the criminal law.

In the elements of criminal act, it is not clear content contained in it, even one element that has a double meaning. Likewise, on the nature of the offense, namely crime by accusation alone does not rest on the essence of humiliation contained in the Criminal Code, where there are also categories of humiliation categorized as ordinary offenses. Also included in criminal liability, regardless of the punishment philosophy, punish someone according to their commit (*culpa poena paresto*). There are many types of humiliation offense in the Criminal Code that differ in criminal liability, but if it is possible to occur through ITE facilities the criminal liability are equated as a whole.

Element Ambiguity of Humiliation Offense through ITE Facilities

In Article 27 paragraph 3 of UUIITE affirms:

“Everyone intentionally and without rights distributes and/or transmits and/or makes accessible electronic information and/or electronic documents that have content of humiliation and/or defamation.”

As provisions above, there are several elements which still contain ambiguity, so that it is difficult in the enforcement of humiliation criminal law, including:

- 1) No rights;
- 2) Distributing, transmitting, making accessible
- 3) Humiliation and/or defamation.

What is meant no rights in the provision? If considers precisely about the provision, it means that no rights is a person who does not have a right to distribute, transmit, make accessible electronic information or electronic documents. But if returned with the main essence of each provision of criminal law, then the meaning of no rights is a part of unlawful acts, so that the nature of being unlawful is actually combined with an objective element, it contains humiliation.

It can be understood if it is traced back to the objective element of all types of humiliation contained in the Criminal Code, namely “attacks on honor and reputation.” So, a person has no right to distribute and/or transmit and/or make

accessible electronic information and/or electronics document because it is contrary to the subjective legal obligations of performer who have violated the honor and reputation of others.

Chazawi (2009) further interpreted that what is meant no rights in Article 27 paragraph 3 of UUIITE is closely related to Article 310 paragraph 3, namely that there are people who has a right to distribute and/or transmit and/or making accessible to electronic information and or electronic documents contains a humiliation content if in the public interest and for reasons of self-defense.

The author disagrees with Chazawi's opinion; the basis of his argument is the reason for the elimination of criminal it is not relation to against the law. That is certain, the reason for the exclusion of the criminal is not in the substance of "rights," anyone who violates the rights of others, the legal consequences must be responsible for their actions.

According to the author, for the formulation of the provisions of Article 27 paragraph 3 of the UUIITE, it is not necessary to include the element "no rights" because if the element of the type of humiliation, namely an attack on honor and reputation, it means that the element of no rights has been contained in it.

Continue to the next element, which also experiences ambiguity even though it has been explained in the explanation of Article 27 paragraph 1. In its explanation, what is meant by distributing is sending and/or transmitting electronic information and/or electronic documents to many people or various parties through electronic systems; what is meant by transmitting is sending electronic information and/or electronic documents addressed to one other party through an electronic system; what is meant by making accessible is all other actions other than distributing and transmitting through electronic systems that cause electronic information and/or electronic documents to be known by other parties or the public.

How to understand the explanation above? It is difficult to understand without illustrating in an example. A case of distributing, for example "A" wants to humiliate "B" as a corruptor using E-mail, then he sends news or information to "C" only. It is different, for example, by transmitting, it means the possibility of "A" who wants to humiliate "B", still with the same ITE facilities, namely E-mail he sends news or information "B" as a corruptor to "C, D, E," and so on. While in the case of "making accessible" in which "A" to write on his Facebook a status page, if "B" is a corruptor.

Regarding the elements of making accessible, it based on the explanation of Article 27 paragraph 1 of the UUIITE, in line with what was stated by Chazawi:

"The intention of Act creator in terms of including the element of action in the third place, it is intended to avoid if there are difficulties in terms of proof of two other actions. Then there is a third reserve of action, which can accommodate that difficulty."

Based on the intentional element of each type of humiliation, both contained in the Criminal Code and in the UUIITE, the conditions is the habits of many people in cyberspace to distribute information or electronic documents that contain humiliation, could be and it is very possible for people to spread links or images without any intention of attacking the honor and reputation of others on social media (facebook, twitter), a person is accustomed to spread links, without reading the content of the link, is it not in that context that he has no intention of making humiliation.

It is true, the person does not have the intention to humiliation, but keep in mind, the intentional nature of the humiliation offense, the intention does not need to be proven (*animus jurendi*), enough for performer to be aware that he wants and knows the consequences of his actions. A reason that should be borne by the perpetrator or performer that it must be from the start and want to know that what is distributed will attack the honor and reputation of others.

It should be necessary in cases of humiliation through ITE facilities, restrictions on who is meant by the humiliation offender. It is enough for only the main actors, namely the first to make, the first to distribute content of humiliation in electronic media can be punished with an article of humiliation through ITE facilities. Or at least for the offender of nest

distribution if the act of humiliation has widespread implications, it does not need to be prioritized for criminal proceedings, prior to the process of negotiation, mediation or peace of the parties. Because if all the disseminators of humiliating content through ITE facilities want to be charged with criminal acts, there are many who can be entangled, and as a result the correctional institutions may be over-occupied by all perpetrators of insults through ITE.

The notion of distributing, transmitting, and making accessible were as a reference should be further explored from ITE's experts. Distributing at least aimed at actions to anyone who duplicates electronic information, can be in the form of screenshots, printed out, then distributed/disseminated. While transmitting, as a form of action that puts humiliation information directly into an electronic media so that dissemination can occur. Unlike the case with the act of "making accessible" in the language of ITE, it directed at people who share "links" for example in electronic media so that eventually links containing content of humiliation become widespread.

The element of offense based on the latest UUIE also experienced ambiguity of meaning, namely in the element of "humiliation and/or aspersion." From the fragment of the element at least it can be interpreted that it allows a person to commit humiliation as well as aspersion. Is the sentence not ambiguous? Obviously it is very ambiguous. In Chapter XVI of the Criminal Code regarding the humiliation consists of 2 (two) main offenses, namely defamation and slander. Humiliation is not the name/qualification of a criminal act, but a group of criminal offenses that have similar characteristics to the legal interests to be protected by these crimes.

The revised UUIE, a hope to concretizes these elements, but in reality still lack. As explained in the revised UUIE, humiliation in the UUIE refers to the provisions of defamation and/or slander stipulated in the Criminal Code. Such explanations still have weaknesses, because in the Criminal Code, defamation and slander still have other types of humiliation, including light defamation, accusation with slander, slander act, humiliation to officials/civil servants, humiliation to people who have died. That does not include other offense outside of the Criminal Code Section XVI, such as humiliation to the president and vice-president, to the head of a friendly country, to State or religion symbols, to the Indonesian government, to the group and public power.

Therefore, for the elements of Article 27 paragraph 3 of UUIE are not vague, fulfilling the principle of *lex certa*, it should be formulated in the sentence: "Everyone intentionally distributes and/or transmits and/or making accessible electronic information and/or electronic documents which has a humiliating content."

The Nature of ITE Offense

Both the decision of the Constitutional Court No: 50/PUU-VI/2009 and the latest UUIE, namely Act No. 19 of 2016 have locked the provisions of humiliation in the qualification of crime by accusation.

What are the legal consequences with such qualifiers? The consequence is the type of humiliation offense other than defamation and slander, among others: an accusation with slander, slander act, humiliation to people who have died, to the officials/civil servants, to the head of a friendly country, to State or religious symbols, to the group, to the religious leaders and to the public power in the Criminal Code which is qualified as a public offense, can be directly processed by law without any accusation from victims. If it happens through ITE facilities, then Article 27 paragraph 3 of the UUIE cannot be applied.

Hence, if on social media Facebook, for example there is a person making a post, himself who is trampling on the scriptures through a video, it is certainly difficult to ensnare the perpetrator based on Article 27 paragraph 3 of the UUIE, because it is evident in the original offense (Article 156 A KUHP) the humiliation offense to the religion is an ordinary offense.

Article 27 paragraph 3 does not need to be qualified as a crime of accusation. It includes the provisions of "... contain humiliation...", then by itself various forms of conventional types of humiliation can be included, whether as a common offense or crime of accusation, referring to the type of humiliation, ordinary offense or accusation, provided through ITE facilities, it can be ensnared by Article 27 paragraph 3 of the UUIE.

It is also important to note, that in several provisions of humiliation that have been revoked based on the decision of the Constitutional Court, such as humiliation to the President and vice-president, to the Indonesian government if it occurs through ITE facilities, the perpetrators cannot be punished. At least the perpetrator can only be charged with defamation-qualified humiliation, Article 27 paragraph 3 of UUIE jo Article 310 of the Criminal Code.

VI. Conclusion

The embodiment of the legality principle of humiliation criminal offense based on the Criminal Code, by revising a number of humiliation provisions in Chapter XVI of the Criminal Code which must divide the types of humiliation include: light defamation, ordinary (verbal) defamation, written defamation (severe-qualified defamation), slander, accusation with slander, slanderous act, and humiliation to people who have died. Likewise with the embodiment of the legality principle of humiliation criminal law based on the UUIE, every type of humiliation contained in the Criminal Code must be synchronized with each other so that the provisions of humiliation that occur through ITE facilities fulfill the principles of legality, *lex stricta* and *lex certa*.

In the conventional criminal law of humiliation as stipulated in the Criminal Code, the provisions regarding verbal defamation must be emphasized; light defamation which one of the elements is "committed by action" should be one element of criminal acts in ordinary defamation. Slander-qualified humiliation does not need to regulate the obligation for the judge to burden the defendant of what he has accused, right or not, because this has become the right of the defendant within the scope of formal criminal law. Accusation with slander must contain a clear element, namely "false accusation about a person not as the performer of what is alleged" so that the difference between the crime of a false report and the crime of slander-qualified humiliation. Slander-qualified action, this nomenclature is more appropriate to use than false presumption, or accuse by slander, because of the form of its occurrence, the performer must do an act that can be punished first, and then from the act it is alleged to someone else. While the humiliation to people who have died, in addition to having to accommodate various derivatives of the model of defamation and slander, must also equate the criminal liability between humiliations to people who are still alive with people who have died. Indeed, the main purpose of the establishment of matters concerning the provision of humiliation of people who have died, not to protect the legal interests of the deceased person, but with the intention of protecting the legal interests of the heirs, the same criminal liability should be followed, because the object and the interest to be protected are the same, namely the honor and reputation of others.

Meanwhile, the formulation of the provisions of the criminal law of humiliation as regulated in UUIE, it should only contain elements "contain humiliation," alone, without being followed again by the phrase "and/or defamation" in order to accommodate the types of conventional humiliation. Then, on the nature of the humiliation offense through ITE facilities, it does not need to be classified as a crime by accusation, enough the nature of the offense follows the provisions of humiliation contained in the Criminal Code. Finally, criminal liability against humiliation through ITE facilities, can use a criminal penal system, plus 1/3 (one third) of the punishment as a criminal threat of humiliation regulated in the Criminal Code.

REFERENCES

- [1] Anonymous, (2010) "Defamation of Crimes Is the Limitation of Unconstitutional Opinion of Opinion", Briefing Paper, No. 2, Elsam, Jakarta.
- [2] Apeldoorn, L. V. (1980), Introduction to Legal Studies, Pradnya Paramita, Jakarta.
- [3] Bons, L. (1955), Dutch-Indonesian Dictionary, N.V. Kon Boekhandel en Drukkerd G Kolf & Co, Djakarta.
- [4] Chazawi, A. (2009), Insulting Positive Criminal Law, PMN, Surabaya.
- [5] Farid, A.Z.A., (1987), Principles of Criminal Law Part One, Bandung: Alumni.
- [6] Farid, A.Z.A., (1997), Cultural Contribution of South Sulawesi for National Law Formation. "National Legal Identity" Editor, Artidjo Alkostra, Yogyakarta: FH UII.
- [7] Fernandes, A.A.R., Hutahayan, B., Solimun, Arisoesilarningsih, E., Yanti, I., Astuti, A.B., Nurjannah, & Amaliana, L. (2019), "Comparison of Curve Estimation of the Smoothing Spline Nonparametric Function Path Based on PLS and PWLS In Various Levels of Heteroscedasticity", IOP Conference Series: Materials Science and Engineering, Forthcoming Issue.
- [8] Hiarij, E.O.S (2012), Theory and Proof Law, Erlangga, Jakarta.
- [9] Hutahayan, B. (2019), Performance art strategy for tourism segmentation: (A silat movement of Minangkabau ethnic group) in the event of tourism performance improvement, Journal of Islamic Marketing, Forthcoming Issue
- [10] Indarti, S.,Solimun,Fernandes, A.A.R.,Hakim, W. (2017). "The effect of OCB in relationship between personality, organizational commitment and job satisfaction on performance", Journal of Management Development, Vol 36 No 10, pp 1283-1293.
- [11] Ilyas, A. and Nursal, M. (2016), The Basics of the Law, Rajawali Press, Jakarta.
- [12] Irwansyah, H. W. and Yunus, A. (2017), "Environmental audit as instrument for environmental protection and management", The Business & Management Review, Vol. 9 No. 2, pp. 228-232.
- [13] Lamintang & Samosir, D. (1987), Indonesian Criminal Law, Sinar Baru, Bandung.
- [14] Marpaung, L. (1997), Criminal Acts of Honor, Rajawali Press, Jakarta.
- [15] Marzuki, P. M. (2010), Legal Research, Kencana, Jakarta.
- [16] Mispansyah, M. (2018), "A Comparison Approach in Corruption Eradication: An Empirical Examination", Hasanuddin Law Review, Vol. 4 No. 2, pp. 219-232. doi: <http://dx.doi.org/10.20956/halrev.v4i2.1077>
- [17] Moeljatno, (1959), Criminal acts and liability in criminal law, Jajasan Badan Penerbit Gadjah Mada, Jogjakarta.
- [18] Mulano, I. R. (1982), Legal Discussion, Explanation of Dutch-Indonesian Legal Terms, Ghalia Indonesia, Jakarta.
- [19] Prodjodikoro, W. (1974), Specific Criminal Acts in Indonesia, Eresco, Bandung.
- [20] Purbawangsa, I., Solimun, S., Fernandes, A. and Mangesti Rahayu, S. (2019), "Corporate governance, corporate profitability toward corporate social responsibility disclosure and corporate value (comparative study in Indonesia, China and India stock exchange in 2013-2016)", Social Responsibility Journal, Forthcoming Issue. <https://doi.org/10.1108/SRJ-08-2017-0160>.
- [21] Safioeddin, A. (1978), Glossary of Simple Words about Law, Alumni, Bandung.
- [22] Simorangkir, J.C.T. (1972), Law Dictionary, Pradnya Paramita, Jakarta.
- [23] Soesilo, R. (1995), The Criminal Code, and the Comments Complete Article by Article, Politea, Bogor.
- [24] Solimun, & Fernandes, A.A.R. (2018), "The mediation effect of customer satisfaction in the relationship between service quality, service orientation, and marketing mix strategy to customer loyalty", Journal of Management Development, Vol 37 No 1, pp 76-87.
- [25] Solimun, Fernandes, A.A.R. (2017). "Investigate the Instrument Validity Consistency Between Criterion Validity and Unidimensional Validity (Case Study in Management Research)", International Journal of Law and Management, Vol 59 No 6, pp 1-10.
- [26] Subekti & Tjitrosoedibio, R. (1982), Law Dictionary, Pradnya Paramita, Jakarta.
- [27] The Decision of the Constitutional Court (2006), No. 13-022/PUU-IV/2006.
- [28] The Decision of the Constitutional Court (2007), No. 6/PUU-V/2007.
- [29] The Decision of the Constitutional Court (2008), No: 14/PUU-VI/2008.
- [30] The Decision of the State Court Gorontalo (2015), No. 98/Pid.B/2015/PN. Gto
- [31] The verdict of the State Court of Sungguminasa (2014), No. 324/ Pid.B/ 2014/PN-SGM.
- [32] Van Der Tas, H. (1950), Dutch-Indonesian Law Dictionary, Timun Mas, Djakarta.