

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

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Settlement of Criminal Defamation in the Digital Realm through Restorative Justice Efforts

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ABSTRACT

The restorative justice approach focuses on an approach that creates conditions to realise justice and balance for the perpetrators and victims of the crime itself. In the crime of defamation through the digital realm, the application of the ultimum remedium principle needs to be maximised, because basically the loss lies in reputation, so that with the restorative justice approach can be formulated compensation suffered by the victim with the restoration of the victim's condition as before. This research is a normative research using legal and non-legal materials as data sources. The approaches taken are conceptual approach and statutory approach. To find out how Indonesian positive law regulates restorative justice, a comprehensive study of the relevant regulations is needed. The results of this research confirm that restorative justice can balance the protection of human dignity and freedom of opinion or prevent the criminalisation of defamation cases and does not always lead to the criminalisation of the perpetrator, especially in defamation cases.

Keywords: Restorative Justice, Defamation, Digital Realm.

I. INTRODUCTION

The criminal offence of defamation is an act that attacks the good name. Defamation is the utterance of words (or a series of words/sentences) by way of accusation of committing certain acts, and which is directed at the honour and good name of a person which may result in that person's sense of self-worth or dignity being defamed, humiliated or degraded. Defamation in the digital realm is a crime that utilises information technology. The development of the level of crime is now difficult to stem, including with the advancement of computer technology which is expected to reduce existing crimes, but precisely with the advancement of computer technology, the motive for crime is also growing.

The crime of defamation is a complaint offence. Complaint offence itself is one type of offence or criminal offence in which the formulation of the offence is explicitly stated, that the criminal

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offence can only be prosecuted if there is a complaint from the person concerned. As a complaint offence, the prosecution depends on the will and desire of the person affected by the criminal offence or the person concerned, in other words, the person affected by the criminal offence has a role in determining whether the perpetrator of the offence is prosecuted or not.

The crime of defamation is regulated in Chapter XVI of Book II of the Criminal Code, namely Articles 310 to 321 of the Criminal Code. The Criminal Code explains that in general, defamation is regulated in Chapter XVI and is grouped into 7 (seven) parts, namely: oral defamation, written defamation, slander, mild defamation, slanderous complaints, false prejudice, and defamation of a deceased person. The focus of this research is on the criminal offence of defamation/insult in the digital realm, of course the regulations used refer to more specific regulations. In accordance with the principle of *lex specialis derogat legi generalis*, a principle that interprets the law which states that the special law *lex specialis* overrides the general law *legi generalis*.

The issue of criminal defamation in the digital realm or insult is classified into cybercrime which has been specifically regulated in Article 27 paragraph (3) of Law Number 19 Year 2016 on Electronic Information and Transactions (ITE), an amendment to Law Number 11 Year 2008 on Electronic Information and Transactions (ITE), whose criminal penalties are clearly explained in Article 45 paragraph (3) of Law Number 19 Year 2016 on Electronic Information and Transactions (ITE). Perpetrators of criminal defamation through the digital realm can be convicted if they fulfil the objective elements stipulated in the Article. The ITE Law is a regulation or rule that serves as a signpost for the community in interacting and expressing opinions through this internet-based virtual world.

The enactment of the ITE Law aims to prevent crimes in electronic systems or in cyberspace, but based on the facts that occur there are still crimes of defamation in the digital realm that occur. A person can be subject to Article 27 paragraph (3) of the ITE Law on the condition that the elements in the provisions of the Article must be fulfilled during examination and proof. A person must bear all the consequences of their actions and behaviour if they have committed a criminal act because they have violated the existing law. At this time there are also many people who interact in the digital world not in good ethics, cyberspace is used as a means to offend, convey the ugliness of others with the aim of being known to many people, without realising that the actions taken can lead to a criminal offence. Data collected from the Indonesian National Police in 2022, the National Police has taken action against 162 cases of defamation in the digital realm. The ITE Law is a form of law enforcement in interacting or expressing opinions via the internet. For this reason, it is hoped that all internet users can interact in the

digital world with good ethics and comply with the rules related to this matter.

In 2016, Law Number 19 of 2016 concerning Electronic Information and Transactions was issued, which is an amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions. This ITE Law is a signpost in using electronic media and of course this Law contains ethics in using electronic media including prohibited acts and sanctions for people who violate the ITE Law. This law is a law that specifically regulates electronic-based information and transactions. Article 27 paragraph (3) of Law Number 19 Year 2016 on Electronic Information and Transactions explains that defamation through electronic systems is a prohibited act, which is punishable as stipulated in Article 45 paragraph (3) of Law Number 19 Year 2016 on Electronic Information and Transactions. The purpose of the ITE Law is for people to comply with the orders and prohibitions stipulated in the Law. The presence of the ITE Law is also expected so that people can use electronic media with good ethics so that crimes through electronic systems are no longer found. The crime through the electronic system in question is defamation through the digital realm, which is currently still widely found starting from among the general public as well as from officials. This then becomes a train of thought for the author to find out and analyse how the law enforcement of the perpetrators of criminal defamation through the digital realm and so that no more crimes like this occur, it is necessary to know what steps need to be taken.

(A) Research Methodology

Researchers use a normative juridical research approach method that will approach legislation and concept approaches. data collection techniques documentation methods or document studies sourced from primary legal materials, secondary legal materials, and tertiary legal materials. The research specification used in this research is descriptive analytical research in order to describe and convey in detail, systematically and thoroughly related to everything that is connected and related to the research topic raised. Researchers conduct data analysis with a qualitative approach to primary data and secondary data.

(B) Problem Formulation

The discussion that will be a limitation in this research is explained by the following problem formulation:

1. How is the Settlement of Criminal Offences of Defamation in the Digital Realm Based on Restorative Justice in Indonesian legislation?
2. Why is it necessary to resolve the criminal offence of defamation in the digital realm through restorative justice efforts?

II. SETTLEMENT OF THE CRIME OF DEFAMATION IN THE DIGITAL REALM BASED ON RESTORATIVE JUSTICE IN INDONESIAN LEGISLATION

Restorative justice in Indonesia has been adopted in practice by all law enforcement institutions as an option in resolving criminal cases. The Chief Justice of the Supreme Court, Attorney General, Police, Minister of Law and Human Rights of the Republic of Indonesia on 17 October 2012 have made a memorandum of agreement Number 131/KMS/SKB/X/2012. Number M-HH-07.HM.03.02 Year 2012, Number KEP-06/E/EJP/10/2012, Number B/39/X/2012 on the Implementation of the Adjustment of the Limitation of Minor Crimes and the Amount of Fines, Rapid Examination Procedures and the Implementation of Restorative Justice, in Article 1 paragraph 2 it is explained about the definition of restorative justice, which is the settlement of minor criminal cases carried out by investigators at the investigation stage or judges from the beginning of the trial by involving victims, perpetrators, families and relevant community leaders together to find a fair solution and emphasize the restoration of the original situation.

Following up on the Memorandum of Understanding, the Chief of the Indonesian National Police issued Circular Letter Number SE/8/VII/2018 on the Application of Restorative Justice in Criminal Case Resolution. This Circular Letter provides recommendations to not only interpret restorative justice as a peaceful effort but to emphasise the fulfilment of justice to all parties involved. Investigators can use a restorative justice approach if material and formal requirements are met. The act does not cause public unrest, does not have an impact on social conflict, there is a willingness of all parties not to object and waive the right to sue before the law. Related to the act, the perpetrator's guilt is relatively not serious and not a recidivist and all criminal offences can be pursued restorative justice for general crimes that do not cause human victims.

Based on the Regulation of the National Police of the Republic of Indonesia Number 8 of 2021 concerning the handling of criminal offences based on restorative justice, it states that the handling of criminal offences based on restorative justice in Article 3 paragraph 1 must meet the requirements: General; and or Special. Then the General requirements are further elaborated in Article 4 which includes material and formal requirements. Material requirements as stated in Article 5 letter, include:

- a. Does not cause unrest and/or rejection from the community;
- b. does not have an impact on social conflict
- c. does not have the potential to divide the nation

- d. not radicalism and separatism
- e. not a repeat offender of criminal offences based on a court decision; and
- f. not a criminal offence of terrorism, criminal offence against state security, criminal offence of corruption and criminal offence against life;

Then in the Regulation of the Public Prosecutor of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice in article 5, provides an opportunity for public prosecutors to take a restorative justice approach to suspects who are first-time offenders and their actions are punishable by no more than 5 (five) years and the resulting loss is not more than Rp. 2,500,000.00. (two million five hundred rupiah). The restorative approach in Circular Letter Number SE/8/VII/ and Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 is casuistic, the assessment and consideration is carried out subjectively by the investigator and also the public prosecutor by taking into account the subject, object, loss and background of the criminal act which will determine whether or not restorative justice efforts can be made.

The defamation article in the digital realm is Article 27 paragraph (3) of the ITE Law jo. Article 45 paragraph (3) of Law 19/2016 which stipulates that every person intentionally, and without the right to distribute and / or transmit and / or make accessible electronic information and / or electronic documents that have insulting and / or defamation content shall be sentenced to a maximum imprisonment of 4 years and / or a maximum fine of Rp750 million. Looking at the provisions of the material requirements of the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice in article 5 and Regulation of the Indonesian National Police Number 8 of 2021 concerning handling Criminal Acts Based on Restorative Justice article 3, of course, restorative justice efforts should be optimised with consideration of restoring the original situation between the victim and the perpetrator as well as a warning rather than imposing criminal penalties on the perpetrator.

The Chief of the Indonesian National Police, on 19 February 2021, again issued a Circular Letter regarding restorative justice in Circular Letter Number SE/2/11/2021 concerning Ethical Cultural Awareness to Realise a Clean, Healthy and Productive Indonesian Digital Space. This circular was issued as an effort to follow up on the dynamics and situation of society towards the implementation of the Electronic Information and Transaction Law. This Circular Letter provides recommendations to investigators to coordinate with the Public Prosecutor to provide mediation space that aims to promote a restorative justice approach as an implementation of the

ultimum remedium principle. The Chief of Police Circular Letter No. SE/2/11/2021 is very influential to become a bridge that harmonises and protects a person's honour from defamation in the digital realm and to prevent the criminalisation of defamation, considering that cases related to the Electronic Information and Transaction Law continue to increase and are dominated by defamation cases in the digital realm which are ranked second after online fraud cases, and the application of the Electronic Information and Transaction Law which is considered to have many contradictory things with the right to freedom of opinion and expression through electronic media which creates injustice for the community.

However, regulations regarding restorative justice in positive law in Indonesia have not explicitly and comprehensively regulated defamation in the digital realm and there is no classification of content and context of defamation that can be resolved with a restorative justice approach and the substance is still focused on the recovery of victims, there is no emphasis on restoring the victim's relationship with the perpetrator. Therefore, a comprehensive regulation is needed regarding the restorative justice approach in the criminal offence of defamation in the digital realm. The application of restorative justice in Indonesia needs to be outlined in the form of a Law or at least in a Government Regulation. The guidelines regulated are not only related to procedural aspects but also the stages needed to realise reconciliation and recovery of victims, perpetrators, and the environment affected by criminal acts. Procedures are needed that promote the ability of citizens to resolve their own problems. The role of the state through investigators, prosecutors, and judges is limited as facilitators and mentors in efforts to realise reconciliation and recovery of victims, perpetrators, and the environment affected by criminal acts.

III. THE EXISTENCE OF RESTORATIVE JUSTICE EFFORTS IN THE SETTLEMENT OF DEFAMATION CRIMES IN THE DIGITAL REALM

Looking at the essence of insult, defamation is an act that attacks a person's honour or good name so that it results in the victim feeling embarrassed and his reputation being tainted or damaged. The assessment of actions that are considered insults or defamation must pay attention to content and context. Simply put, the content that is at issue can be assessed in terms of language. Meanwhile, the context can be assessed from a social or psychological aspect. In essence, it is the person concerned who can determine and subjectively assess whether the content has attacked his honour or good name, because the Constitution provides protection for dignity as part of human rights, so that in defamation contains a complaint offense, which basically provides protection to the victim because other people do not necessarily feel and have the same assessment as the victim. While the context can be objectively assessed against the

content, because the context can include the purpose and intent of the perpetrator transmitting or creating information or in other words the dissemination of content. So it needs expert opinion to provide an assessment of the context.

Criminal law in Indonesia basically adheres to the *ultimum remedium* principle which positions imprisonment as the last resort, so it is fitting that the restorative justice approach becomes a habit and an important part of the implementation of the *ultimum remedium* principle. The pattern of punishment that aims as retaliation against the perpetrator's actions contained in the absolute theory must be formulated towards recovery as the original state. The restorative justice approach can be an alternative to harmonise the legal protection of a person's honour and prevent the criminalisation of defamation due to the principle of restoring the situation of the victim and the perpetrator. Although there have been many regulations that serve as guidelines and options for promoting restorative efforts, in relation to criminal defamation, it has not been running optimally.

The restorative justice approach in Indonesia is important for defamation crimes in the digital realm because victims can restore their good name or losses based on the classification of the perpetrator or compensation and the relationship between the perpetrator and the victim can be restored and repaired, compared to the ordinary punishment system. However, this does not mean that all defamation offences in the digital realm can be pursued with restorative justice. Consideration and assessment of content, context, and harm need to be made. It would be better if there is a comprehensive classification that clarifies between criticism, suggestion and insult so that the judgement is not subjective.

IV. CONCLUSION

Restorative Justice is a way of resolving criminal cases that involves the perpetrators and victims, this approach not only gives the perpetrators of criminal acts punishment, but also restores the victim's condition and restores the relationship between the victim and the criminal offender socially. The Restorative Justice approach involves the victim in the process of resolving criminal offences, while also requiring the perpetrator to take responsibility for their actions based on an acknowledgement of the crime and the perpetrator's awareness of their actions. Simply put, Restorative Justice is a theory of justice that places the recovery of the parties (victims and perpetrators) against the losses arising from criminal acts. The implementation of Restorative Justice against criminal defamation in the digital realm can be carried out as long as the victims and perpetrators of criminal acts find a bright spot in mediation, especially in cases of defamation in the digital realm in the form of apologies,

compensation, or other forms because it is only limited to the relationship between the perpetrators of criminal acts and defamation. Meanwhile, cases that are potentially divisive, SARA, radicalism, and separatism cannot be applied Restorative Justice.

Restorative justice approach to criminal defamation in the digital realm needs to be done to overcome the criminalisation of defamation while still protecting the dignity of a person from defamation. Restoration to the original state can be done with a peace agreement and the ability to compensate for losses with clarifying actions or other things according to the agreement and the personal relationship between the victim and the perpetrator will return to its original state and strive to be better. This of course needs to be done instead of giving punishment to the perpetrator of defamation in the digital realm because the legal principles in the State of Indonesia adhere to the *ultimum remedium* principle of punishment where the provision of punishment is the last resort in creating legal order.

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