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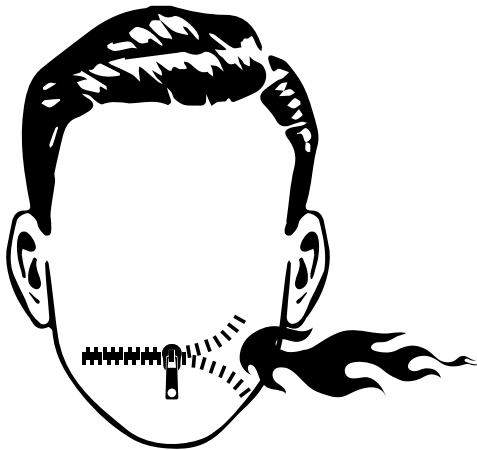
Indonesia Criminal Law Update



Indonesia's Legal Framework on Defamation Law

Issue No. 3/2017

ICLU | Indonesia Criminal Law Update



Letter From Editor

This edition of ICLU elaborates the legal framework on defamation law in Indonesia. The discussion will cover all provisions regarding both criminal defamation and civil defamation currently incorporated in various Indonesian laws.

It is noteworthy that the current situation on freedom of expression in Indonesia becomes more interesting for discussion. In particular, the discussion regarding the use of defamation articles in many cases related to the freedom of expression.

We are hoping that this edition of ICLU will help you as the readers to gain proper knowledge regarding defamation law in Indonesia.

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Indonesia's Legal Framework on Defamation Law Indonesia

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About ICJR

Since its establishment in 2007, the Institute for Criminal Justice Reform (ICJR) commits to take the initiatives in supporting overall criminal justice reform. ICJR is formed with a mission to support collective actions in honoring the Rule of Law and realizing criminal justice system with strong human rights protection.

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The increasing rate of court cases on defamation is highlighted by commentators and human rights activists. However, before diving down into the human rights debate, it is important to see how lawmakers in Indonesia decide to formulate defamation articles and how the court renders decisions on defamation cases.

Overview

Indonesia inherits its defamation legal framework from the Dutch Criminal Code or *Wetboek van Strafrecht* ("**WvS**"), which was ratified under *Wetboek van Strafrecht voor Nederlandsch Indie* or Kitab Undang-Undang Hukum Pidana ("**KUHP**"). This legislation entered into force on 1 January 1918, by the issuance of *Koninklijk Besluit* (King's Decree) No. 33 dated 15 October 1915. KUHP stipulates defamation articles in various provisions and chapters. For instance, defamation towards a person is formulated under Chapter XVI on Defamation, which covers several criminal act ranging from libel to defamation against a deceased person.

Furthermore, KUHP also acknowledges other provision using defamation as an offense, such as defamation towards a public institution. Additionally, KUHP also incorporated defamation against the President and Vice President, which already revoked by the Constitutional Court under Decision No. 013-022/PUU-IV/2006. This decision states that elected President and Vice President in a democratic country are no longer having the privilege that differs them from ordinary citizens. In addition to KUHP, defamation articles are also incorporated under several other laws, which will be discussed later under this edition of ICLU.

Provisions regarding defamation are always interesting to discuss in Indonesia, as it is directly linked with the freedom of expression. Even though Indonesia already ratified the International Covenant on Civil and Political Rights ("**ICCPR**"), which stipulates freedom of expression and explicitly states such right under the 1945 Constitution, Indonesia is of the

view that criminal provisions regarding defamation is still needed. This is evident from the issuance of many legislations other than KUHP that incorporate defamation articles.

Furthermore, discussion over defamation articles in various legislations becomes public debates nowadays. The increasing rate of court cases on defamation is highlighted by commentators and human rights activists. However, before diving down into the human rights debate, it is important to see how lawmakers in Indonesia decide to formulate defamation articles and how the court renders decisions on defamation cases. This approach will examine on whether or not the formulation of defamation articles hampers freedom of expression as part of human rights, and how the court views defamation law in Indonesia.

Framework on Constitutional Guarantee

Since its enactment on 18 August 1945, the 1945 Constitution has guaranteed freedom of speech and expression, which is evident from Article 28 quoted below:

"The freedom to associate and to assemble, to express written and oral opinions, and so forth, shall be regulated by law".

After the demise of the New Order, constitutional guarantee on freedom of speech was later affirmed under Article 28E (3), which states:

"Every person shall have the right to the freedom to associate, to assemble and to express opinions"

And Article 28F, which states:

"Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by utilizing all available types of channels."

Nevertheless, freedom of speech and expression—in essence—are part of human rights that subject to limitation. Therefore the abovementioned articles are limited by Article 28J (2), which states that

"In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of sati sfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

Legal Framework on Freedom of Expression

In the relation between defamation and freedom of speech/expression, some legislations are incorporating the protection of freedom of speech and expression, such as Law No. 39 of 1999 on Human Rights ("**Human Rights Law**").¹

Article 14

"(1) Every person has the right to communicate and obtain information they need to develop themselves as individuals and to develop their social environment;

(2) Every person has the right to seek, obtain, own, store, process, and deliver information using all available facilities"

Article 23 (2)

"Every person has the freedom to hold, impart and widely disseminate his beliefs, orally or in writing through printed or electronic media, taking into consideration religious values, morals, law and order, the public interest and national unity."

Article 25

"Every person has the right to express his opinion in public, and this includes the right to strike, according to the prevailing laws and regulations."

In addition, Indonesia has ratified the ICCPR under Law No. 12 of 2005.² Therefore, all protection guaranteed under Article 19 of the ICCPR are embedded into the Indonesian national legal system.

Criminal Defamation under KUHP

Criminal Defamation is mainly regulated under Chapter XVI of KUHP.³ The provisions under this chapter stipulate crime of defamation against a person.

Previously, KUHP incorporated article regarding defamation against the President and Vice President, which was revoked by Constitutional Court Ruling No. 013-022/PUU-IV/2006.

¹ See Human Rights Law <http://peraturan.go.id/uu/nomor-39-tahun-1999.html>

² See Law No. 12 of 2005 <http://www.peraturan.go.id/uu/nomor-12-tahun-2005.html>

³ See KUHP [http://www.hukumonline.com/pusatdata/detail/lt4c7b7fd88a8c3/nprt/38/wetboek-van-strafrecht-\(wvs\)-kitab-undang-undang-hukum-pidana-\(kuhp\)](http://www.hukumonline.com/pusatdata/detail/lt4c7b7fd88a8c3/nprt/38/wetboek-van-strafrecht-(wvs)-kitab-undang-undang-hukum-pidana-(kuhp)). KUHP was declared as criminal code applicable in Indonesia according to Law No. 1 of 1946. See <http://www.dpr.go.id/dokjdih/document/uu/814.pdf>

Article 310

- (1) The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs.*
- (2) If this takes place by means of writings or portraits disseminated, openly demonstrated or put up, the principal shall, being guilty of libel, be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiahs.*
- (3) Neither slander nor libel shall exist, as far as the principal obviously has acted in the general interest or for a necessary defence.*

Article 311

- (1) Any person who commits the crime of slander or libel in case proof of the truth of the charged fact is permitted, shall, if he does not produce said proof and the charge has been made against his better judgment, being guilty of calumny, be punished by a maximum imprisonment of four years.*
- (2) Deprivation of rights under Article 35 (1) to (3) may be pronounced.*

Article 315

A defamation committed with deliberate intent which does not bear the character of slander or libel, against a person either in public orally or in writing, or in his presence orally or by battery, or by a writing delivered or handed over, shall as simple defamation, be punished by a maximum imprisonment of four months and two weeks or a maximum fine of three hundred rupiahs.

Article 316

The punishments laid down in the foregoing articles of this chapter may be enhanced with one third, if the defamation is committed against an official during or on the subject of the legal exercise of his office.

Article 317

- (1) Any person who with deliberate intent submits or causes to submit a false charge or information in writing against a certain person to the authorities, whereby the honour or reputation of said person is harmed, shall, being guilty of calumnious charge, be punished by a maximum imprisonment of four years.*
- (2) Deprivation of rights under Article 35 (1) to (3) may be pronounced.*

Article 318

- (1) Any person who with deliberate intent by some act falsely cast suspicion upon another person of having committed a punishable act, shall, being guilty of calumnious insinuation, be punished by a maximum imprisonment of four years.
- (2) Deprivation of rights under Article 35 (1) to (3) may be pronounced.

Article 320

- (1) Any person who in respect of a deceased person commits an act that, if the person were still alive, would have been characterized as libel or slander, shall be punished by a maximum imprisonment of four months and two weeks or a maximum fine of three hundred rupiahs.
- (2) This crime shall not be prosecuted than upon complaint by either one of the blood relatives or persons allied by marriage to the deceased in the straight line or side-line to the second degree, or by the spouse.
- (3) If by virtue of matriachal institutions the paternal authority is exercised by another than the father, the crime may also be prosecuted upon complaint by this person.

Article 321

- (1) Any person who disseminates, demonstrates openly or puts up a writing or portrait of defamatory or for a deceased slanderous contents with intent to give publicity to the defamatory or slanderous contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of one month and two weeks or a maximum fine or three hundred rupiahs.
- (2) If the offender commits the crime in his profession and during the commission of the crime two years have not yet elapsed since an earlier conviction of the person by reason of a similar crime has become final, he may be deprived of the exercise of said profession.
- (3) This crime shall not be prosecuted except upon complaint by the persons indicated in Article 319 and the second and third paragraph of Article 320.

Previously, KUHP incorporated article regarding defamation against the President and Vice President,⁴ which was revoked by Constitutional Court Ruling No. 013-022/PUU-IV/2006; and defamation against the government,⁵ which was declared contradicts the 1945

⁴ Articles 134, 136 bis, and 137 of KUHP were declared contradict the 1945 Constitution by the Constitutional Court under Decision No. 013-022/PUU-IV/2006 <http://www.mahkamahkonstitusi.go.id/index.php?page=download.Putusan&id=160>

⁵ Articles 154 and 155 of KUHP were declared contradict the 1945 Constitution by the Constitutional Court under Decision No. MK No 6/PUU-V/2007 <http://www.mahkamahkonstitusi.go.id/index.php?page=download.Putusan&id=183>

Constitution by Constitutional Court Ruling No. 6/PUU-V/2007 and defamation against public bodies.

Defamation Articles against President and Vice President revoked by the Constitutional Court

Article 134

Deliberate insult against the President or Vice President shall be punished by a maximum imprisonment of six years a maximum fine of three hundred Rupiahs.

Article 136 bis

Deliberate insult in Article 134 also includes the act de scribed in Article 315, if this has been committed in the absence of the insulted person, either in public by acts or not in public but in the presence of more than four persons, or only in the presence of a third party who is present notwithstanding his own will and who takes offence of it, by acts as well as by words or in writing

Article 137

*(1) Any person who disseminates, demonstrates openly or puts up a writing or portrait containing an insult against the President or Vice President with intent to make the contents public or enhance the publicity thereof, shall be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred Rupiahs.
(2) If the offender commits the crime in his profession and during the commission of the crime two years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be deprived of the exercise of said profession.*

Defamation Articles against the Government revoked by the Constitutional Court

Article 154

Any person who publicly gives expression to feelings of hostility, hatred or contempt against the Government of Indonesia, shall be punished by a maximum imprisonment of seven years or a maximum fine of three hundred Rupiahs

Article 155

*(1) Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the Government of Indonesia are expressed, with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred Rupiahs.
(2) If the offender commits the crime in his profession and during the commission of the crime five years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be released from the exercise of said profession.*

Defamation against Public Bodies

Article 207

Any person, who with deliberate intent in public, orally or in writing, insults an authority or a public bodies set up in Indonesia, shall be punished by a maximum imprisonment of one year and six months or a maximum fine of three hundred Rupiahs.

Article 208

(1) Any person who disseminates, openly demonstrates or puts up a writing or portrait containing an insult against an authority or public bodies set up in Indonesia with intent to give publicity to the insulting contentor to enhance the publicity thereof, shall be punished by a maximum imprisonment of four months or a maximum fine of three hundred Rupiahs

(2) If the offender commits the crime in his profession and during the commission of the crime two years have not yet elapsed since an earlier conviction of the person on account of a similar crime has become final, he may be deprived of said profession

Civil Defamation

Defamation is also incorporated under the Indonesian Civil Code ("KUHPerdata"). In general, defamation is classified as tort (*perbuatan melawan hukum*) under Article 1365 of KUHPerdata⁶ quoted below:

"Every unlawful act that causes damage onto another person obliges the wrongdoer to compensate such damage."

In addition, to request for damages after a criminal defamation is proven, Article 1372 of KUHPerdata⁷ is used, as quoted below:

"The civil claim with respect to an insult is extend to compensation of damages and to the reinstatement of good name and honour. The Judge must, in the consideration thereof, have regard to the severity of the insult, also the position, status and financial condition of the parties involved and the circumstances"

⁶ See KUHPerdata, <http://www.hukumonline.com/pusatdata/detail/17229/node/686/burgerlijk-wetboek-kitab-undang-undang-hukum-perdata>

⁷ See KUHPerdata, <http://www.hukumonline.com/pusatdata/detail/17229/node/686/burgerlijk-wetboek-kitab-undang-undang-hukum-perdata>

Criminal Defamation outside KUHP

As an offense or an act, criminal defamation is stipulated under many laws other than KUHP. One of which is stipulated under Law No. 32 of 2002 on Broadcasting ("**Broadcasting Law**").⁸ The Broadcasting Law states under Article 36 (5) (a) in conjunction with Article 57 (d) that:

"Broadcast content must not include slander, instigation, misleads, and/or lies; The sanction of maximum imprisonment of 5 (five) years and/or a fine of maximum Rp1.000.000.000,00 (one billion Rupiah) for radio broadcasting and the sanction of maximum imprisonment of 5 (five) years and/or a fine of maximum Rp10.000.000.000,00 (ten billion Rupiah) for television broadcasting"

Furthermore, defamation using the internet as a medium is specifically formulated under Law No. 11 of 2008⁹ and Law No. 19 of 2016 on Electronic Information and Transaction ("**IT Law**").¹⁰ The IT Law, as stipulated under Article 27 (3) in conjunction with Article 45 (3), states that:

"Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation shall be sentenced to imprisonment of 4 (four) years at maximum and/or fine of IDR 750 million at maximum."

Criminal defamation can also be found under Government Regulation in Lieu of Law No. 1 of 2014¹¹ in conjunction with Law No. 8 of 2015¹² in conjunction with Law No. 10 of 2016¹³ on Election of Governor, Regent, and Mayor ("**Regional Election Law**"). The Regional Election Law, as stipulated under Article 69 (b) in conjunction with Article 187 (2), states that:

"A campaign is prohibited to: affront a person, religion, ethnicity, race, certain group, Governor Candidate, Deputy Governor Candidate, Regent Candidate, Deputy Regent Candidate, Mayor Candidate, Deputy Mayor Candidate, and or political party; violation towards this provision shall be sentenced to imprisonment of 3 (three) months at minimum or 18 (eighteen) months at maximum and/or fine of IDR 600 thousand at minimum or IDR 6 million at maximum."

The recently passed Law No 7 of 2017 on General Election ("**General Election Law**") also stipulates criminal defamation. Article 280 (1) (c) in conjunction with Article 521 states that:

⁸ See Broadcasting Law, <http://www.hukumonline.com/pusatdata/detail/11783/node/111/uu-no-32-tahun-2002-penyiaran>

⁹ See IT Law, <http://peraturan.go.id/uu/nomor-11-tahun-2008.html>

¹⁰ See Amendment to IT Law, <http://www.hukumonline.com/pusatdata/detail/lt584a7363785c8/node/534/undang-undang-nomor-19-tahun-2016>

¹¹ See Regional Election Law, <http://peraturan.go.id/perpu/nomor-1-tahun-2014.html>

¹² See Regional Election Law, <http://peraturan.go.id/perpu/nomor-1-tahun-2014.html>

¹³ See Regional Election Law, <http://peraturan.go.id/uu/nomor-10-tahun-2016.html>

"Organizer, participants, and team of general election campaign are prohibited to affront a person, religion, ethnicity, race, certain group, candidates, and/or other general election participants; such violation shall be sentenced imprisonment of 2 (two) years at maximum and fine of IDR 24 million at maximum."

Court Ruling Regarding Defamation

Constitutional Court Decisions

The Constitutional Court ("MK") has rendered several decisions regarding criminal defamation. These decisions are important due to the fact that they are the grounds for amendment towards vague provisions, such as Article 27 (3) of the IT Law. In addition, these decisions are also important as they guarantee the freedom of expression and democracy in Indonesia.

MK Ruling No. 50/PUU-VI/2008: Article 27 (3) of the IT Law must refer to Article 310 in conjunction with Article 311 of KUHP

Under this Decision, MK argues that:

"Considering that the parliament and government expert have testified before the Court that Article 27 (3) of the IT Law does not regulate new criminal provision norm, rather it only affirms the applicability of defamation norm under KUHP into the new law due to a specific additional element, which is the development within electronic or cyber world that has specific characteristic. Therefore, the interpretation of the norm under Article 27 (3) of the law in question concerning affront and/or defamation, cannot be separated from the criminal law norm under Chapter XVI on Defamation stipulated under Articles 310 and 311 of KUHP, and as a consequence the constitutionality of Article 27 (3) of the IT Law must be related to Articles 310 and 311 of KUHP"

This Decision is important as it ensures that the elements under Article 27 (3) of the IT Law are not separated from Article 310 in conjunction with Article 311 of KUHP. This further leads to the consequence that all provisions under Article 310 in conjunction with Article 311 of KUHP are attached to Article 27 (3) of the IT Law, such as justification, the status of crime by accusation (*delik aduan*), and other elements under KUHP.

MK Ruling No. 013-022/PUU-IV/2006:¹⁴ Defamation against the President and Vice President is Unconstitutional

In essence, MK states that defamation against the President and Vice President is unconstitutional with the following consideration:

"...The dignity of the President and Vice President is subject to honor in the context of protocol; however, the leaders who were chosen by the society cannot be given a privilege that places them into a position and treatment as human beings that have different essential dignity before the law compared to other citizens. Moreover, the President and Vice President cannot have a legal privilege treatment that is discriminatively different with the general public who has the supreme sovereignty. Except in regards to procedural matters, for the purpose of their function [as leaders] certain privilege can be given to the President and/or Vice President."

With this consideration, the provision is declared contradict Article 27 (1) of the 1945 Constitution;¹⁵

"Considering that Articles 134, 136 bis, and 137 of KUHP can cause legal uncertainty (rechtsonzekerheid) due to their volatile nature of interpretation on whether a protest, statement, opinion or thought are critics or defamation towards the President and/or Vice President."

Such provision contradicts Article 28D (1) of the 1945 Constitution¹⁶ and may hamper the communication and information, which is guaranteed by Article 28F of the 1945 Constitution;¹⁷

"Considering that Articles 134, 136 bis, and 137 of KUHP can also hamper the freedom of expressing thought orally, in written, and expression when these three articles in question are always used by law enforcers towards rally momentum in the field".

Such provision contradicts Articles 28,¹⁸ 28E (2),¹⁹ and (3) of the 1945 Constitution;²⁰

¹⁴ See MK Decision No. 013-022/PUU-IV/2006 <http://www.mahkamahkonstitusi.go.id/index.php?page=download.Putusan&id=160>

¹⁵ Article 27 (1) of the 1945 Constitution: *All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions*

¹⁶ Article 28D (1) of the 1945 Constitution: *Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law*

¹⁷ Article 28F of the 1945 Constitution: *Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels*

¹⁸ Article 28 of the 1945 Constitution: *The freedom to associate and to assemble, to express written and oral opinions, and so forth, shall be regulated by law.*

¹⁹ Article 28E (2) of the 1945 Constitution: *Every person shall have the right to the freedom to believe his/her faith (kepercayaan), and to express his/her views and thoughts, in accordance with his/her conscience*

²⁰ Article 28E (3) of the 1945 Constitution: *Every person shall have the right to the freedom to associate, to assemble and to express opinions*

MK Ruling No. 6/PUU-V/2007:²¹ Criminal Provision on Statement of Opposition and Resentment against the Government is Unconstitutional

MK argues that the qualification of crimes or criminal act under Articles 154 and 155 of KUHP is a formal offense, which only requires the fulfillment of prohibited act (*strafbare handeling*) without correlation with the outcome of an act. Consequently, the formulation of both articles causing the tendency of abuse of power, as it can be arbitrarily interpreted by the authority. A citizen who intends to deliver critics or opinion towards the government, which is a constitutional right guaranteed by the 1945 Constitution, will be easily qualified by the authority as a statement of "hostility, resentment, or defamation" against the government, as a result of the lack of certain criteria to differentiate between critics/opinion and feelings of hostility, resentment, or defamation.

MK also argues that Articles 154 and 155 of KUHP can be considered irrational, due to the fact that it is impossible for a citizen in a free and sovereign country becomes hostile to his/her country and government, for the exception of subversion.

MK Ruling No. 31/PUU-XIII/2015:²² Defamation Against State Official or Civil Servant is a Crime by Accusation

MK argues that the defamation article against a state official or civil servant is a crime by accusation (*delik aduan*). Previously, pursuant to Article 319 of KUHP, Article 316²³ that stipulated a state official or civil servant is a normal offence (*delik biasa*).

Under its consideration, MK says that:

"In relation to Article 319 of KUHP, the phrase 'except based on Article 316' that differs the treatment between the general publik and civil servant/state official, in the case of report over defamation, including the criminal punishment, the Court views that it is no longer relevant to differentiate the provision that defamation towards the member of general public is a crime by accusation—including the criminal punishment—while defamation towards a civil servant or state official is not a crime by accusation—including its criminal punishment. Such differentiation, according to the Court, is not in accordance with the Indonesia's national aspiration to achieve equal and just society, as formulated under the 1945 Constitution—on both its preamble and its articles."

Court of General Jurisdiction Decisions under the Supreme Court

The court of general jurisdiction under the Supreme Court ("MA") has rendered several important

²¹ See MK Decision No. 6/PUU-V/2007, <http://www.mahkamahkonstitusi.go.id/index.php?page=download.Putusan&id=183>

²² See MK Decision No. 31/PUU-XIII/2015 <http://www.mahkamahkonstitusi.go.id/index.php?page=download.Putusan&id=2265>

²³ Article 316 of KUHP : *The punishments laid down in the foregoing articles of this chapter may be enchanted with one third, if the defamation is committed against an official during or on the subject of the legal exercise of his office*

cases related to defamation—both civil and criminal. These decisions become the reference to see the development of defamation law in Indonesia.

Legitimate Defence

In the traditional sense, the legitimate defence during a criminal or civil defamation cases is whether or not public interest is involved or self-defence reasoning. It is stipulated under Article 310 (3) of KUHP which states that:

“Neither slander nor libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence.”

Practically, legitimate defences acknowledged by the Court is developed further than what is stated under the law.

In regards to publicly/openly

In regards to letters that are addressed to relevant institution or certain individuals, the Court is of the view that this cannot be categorized as “publicly/openly”.²⁴

“Considering that the letter sent by the Defendant is not addressed for the general public, such as report in a newspaper or displayed in public places, which is required by Article 310 of KUHP”

In the context of private correspondence using short message service (“**SMS**”) and phone call, the Court also argues that such action does not fall under the category of “publicly/openly”.²⁵

“Considering that the action conducted by the Defendant, stating that the victim has slept with another male which originated from the words of the victim, in addition what the Defendant said was not addressed to the general public but only using SMS”

Regarding Absolute Crimes by Accusation

The defamation article requires that the victim must report it directly to the police and cannot be represented by the legal counsel. This view is held by the Supreme Court²⁶

“Considering that as the party who reported the crime is PT. Duta Pertiwi, the person who made the report shall be the President Director of the company, because only the President Director who can represent a company, while under the case in question the person who made the report is Dormauli Limbang, S.H., M.H., who was the legal counsel of PT. Duta Pertiwi, in contrast Article 72 of

²⁴ See MA Decision No. 1378 K/Pid/2005

²⁵ See MA Decision No. 1845 K/Pid/2009

²⁶ See MA Decision No. 183 K/Pid/2010

KUHP concerning Absolute Crime by Accusation, the person who has the right to report is the President Director representing PT. Duta Pertiwi"

Mentioning Names:

In defamation cases, the Court views that mentioning specific names is important.²⁷

"Considering that after the panel of judges examining the comments from the Defendant as mentioned above, the Defendant never mentioned the name of witness Dra. NURFARHATI, M.Si and the Defendant never attack the honor of witness Dra. NURFARHATI, M.Si by accusing something".

Regarding Public Interest

In many cases, the Court views that critics are part of an effort from the public to give warning for other parties and this is acknowledged as a legitimate defense under Article 310 (3) of KUHP.²⁸

"The Panel of Judges views that the Defendant's email as mentioned above does not contain any affront or defamation, as the wordings are critics and for the sake of public interest to prevent the public from the practice of hospitals or doctors that do not give proper medical services to the person who is currently ill and hoping to be cured"

In regards to the Truth of the Statement

Regarding this consideration, the Court views that the truth of a statement mainly related directly to a situation covering the personal situation of a defamation victim.²⁹

"Considering that none of the evidences provided by the Public Prosecutor (witness and written) can prove that Anton (victim witness) is a person that can be trusted, particularly in his duty as member of local parish council, officially appointed by the local bishop"

In regards to statement delivered emotionally

As of this reasoning, the Court considers the doctrine deliberation with possible conscience as the starting point to adopt the view of statement delivered emotionally.³⁰

²⁷ See Raba Bima District Court Decision No. 292/Pid.B/2014/PN. Rbi

²⁸ See Tangerang District Court Decision No. 1269/Pid.B/2009/PN. TNG

²⁹ See Denpasar Court of Appeal Decision No. 116/Pid/2011/PT.DPS

³⁰ See Bantul District Court Decision No. 196/Pid.Sus/2014/PN.BTL

“Considering that according to the elaboration mentioned earlier, the Panel views that the action of the defendant falls under the category of deliberation with possible conscience (opzet bij mogelijkheid-bewustzijn), that is the defendant posted a status in facebook for the purpose of expressing his thoughts and it is possible that his critics will affront another person and consequently that status has affronted witness Diah Sarastuty a.k.a. Ayas, however the Panel viewed that the defendant action when posted a status in facebook is not containing affront, defamation, or libel”

In other cases, a decision also considers the emotional situation when the incident occurred.³¹

“Considering that the words of the defendant: I do not want to apologize let me die in my ancestor's land, is not a crime as stipulated under Article 315 of KUHP. Furthermore, the word “SUNTILI” is not an affront; According to the Court of Appeal based on his defendant hand gesture and the words “SUNTILI” which means upset, such is not an affront, but only the expression of his upset from the Defendant to himself and it is not addressed to the victim”

In regards to the statement delivered with good faith

As of this reason, there are some decisions that consider the purpose and objective of a statement:

“Considering that the content of the letter sent to witness Dr. S.J.M. Koamesah is a claim over a land that related to a civil case, due to the Defendant felt the entitlement over the land possessed by the witness; considering that the copy of the letter sent by the Defendant was addressed to officials such as Chief of Departmental Police (Kapolres), District Attorney (Kajari), and Chief Judge of the District Court as the law enforcers. This is logical as the Defendant's claim related to legal matter. The copy of the letter also addressed to other government officials that govern land ownership, such as the National Land Agency (BPN), Head of District (Camat), and Head of Subdistrict (Lurah).”

“Considering that the action of the Defendant who wrote a letter to the supervisor of the victim, Head of Criminal Detective Unit of Aceh, which is Head of Regional Police Office of Aceh, as a form of justice seeker so that his report is followed up and his right to a pretrial is not hampered. It is proven that the witness as the Head of Criminal Detective Unit persuade the Defendant by giving IDR 500 thousand, so that the Defendant can give postponement of investigation towards over fake pest position and did not continue the pretrial, can be the reason for the Defendant to deliver his complaint towards the witness' supervisor. Therefore it is not a form of libel/written defamation”

³¹ See Southeast Sulawesi Court of Appeal Decision No. 02/Pid/2011/PT. Sultra

In the context of warning using internet websites, the Court also considered the intention and objective of dissemination of information that can be considered libel.³²

“Considering that the action committed by the Defendant in form of messages using website, it can be categorized to give a warning to another person for the action of the Defendant. Whereas, the most injured party in the relationship between the Plaintiff and Defendant is the Defendant, as the Defendant that must be responsible for the action of himself to the Plaintiff who is still a minor”

Upcoming Legislation

During the discussion of the Draft Bill on Criminal Code (“**RKUHP**”), the government reinserted the defamation articles that have been revoked by MK. For instance, article on defamation against the President. Articles 263 and 264 of RKUHP have been agreed by the government and parliament to be part of Indonesia national criminal law.

Article 263

“(1) Every person who publicly affront the President or the Vice President, shall be sentenced with imprisonment of 5 (five) years or maximum fine under Category IV

(2) An action cannot be categorized as an affront if such action under paragraph (1) is conducted for public interest or self-defense.”

Article 264

“Every person who broadcasts, publishes, or hangs a writing or a picture to be seen by the public, or plays a recording that can be heard by the public, that consists of defamation against the President or Vice President by the objective that the content of the defamation to be known by the public, shall be sentenced by imprisonment of 5 (five) years or maximum fine under Category IV.”

The difference between Articles 143, 136 bis, 137 of KUHP and Article 263 and 264 of RKUHP is the adoption of legal justification (*alasan pembenar*).

Meanwhile, defamation against the government is also incorporated under RKUHP

Article 284

“Every person who publicly commits a defamation against a legitimate government that cause mischief within the society, shall be sentenced by imprisonment of 3 (three) years or maximum

³² See Supreme Court Decision No. 2142 K/PDT/2009

fine under Category IV"

Article 285

"Every person who broadcasts, publishes, or hangs a writings or picture to be seen by the public, or play a record to be heard by the public, which contains affront against the legitimate government so that the affront can be known by the public and causing mischief within the society, shall be sentenced by imprisonment of 3 (three) years or maximum fine under Category IV."

The difference between Articles 154, 155 of KUHP and Articles 284, 285 of RKUHP is the phrase "causing mischief within the society".

In addition, the difference with other defamation articles is the punishment³³

Criminal Action	KUHP	Punishment	RKUHP	Punishment
Defamation	310 (1)	9 months of imprisonment or fine IDR 4.5 million	540 (1)	1 year of imprisonment or fine under Category II
Defamation using letter	310 (2)	16 months of imprisonment or fine IDR 4.5 million	540 (1)	2 years of imprisonment or fine under Category III
Libel	311	48 months of imprisonment	541 (1)	5 years of imprisonment or fine under Category IV
Mild affront	315	134 weeks of imprisonment fine IDR 4.5 million	543	1 year of imprisonment or fine under Category II
Affront against civil servant	316	Additional one third (1/3) from the principal punishment	544	Additional one third (1/3) from the principal punishment
Report of libel	317	48 months of imprisonment	545 (1)	5 years of imprisonment or fine under Category IV
False accusation	318	48 months of imprisonment	547	4 years of imprisonment or fine under Category IV

³³ Specific to Articles 207 of KUHP and Article 407 of RKUHP, there is also a distinction in the phrase "causing mischief within the society"

Affront against a deceased person	320	134 weeks of imprisonment or fine IDR 4.5 million	548 (1)	1 year of imprisonment or fine under Category II
Affront against a deceased person in public	321	6 weeks of imprisonment or fine IDR 4.5 million	549 (1)	1 year of imprisonment or fine under Category II
Affront against a public institution	207	18 months of imprisonment or fine IDR 4.5 million	407	24 months of imprisonment or fine under Category III
Affront against a public institution in public	208	4 months of imprisonment or fine IDR 4.5 million	408	36 months of imprisonment or fine under Category IV

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