

## The Application of the *Conditio Sine Qua Non* Principle on the Crime of Damage through Social Media

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**Abstract:** *Technological sophistication is not the only cause of the rise of defamation cases. There are other contributing factors, from the perspective of the perpetrator, the criminal act of online defamation occurs because the perpetrator does not use social media wisely. On the other hand, from a regulatory point of view, the problem of formulating norms in the online defamation article is also a contributing factor. Formal offenses and complaint offenses (absolute) that are adopted in the article on defamation through social media cause various problems, which are then exacerbated by the absence of regulations regarding causality teachings and sentencing guidelines for judges in making decisions. This study aims to find solutions or alternatives that can be used to deal with the high number of cases of defamation through social media. This study uses a normative and prescriptive literature study, using a statutory, conceptual and doctrinal approach. The results of the study indicate that the use of the teaching of *conditio sine qua non* fulfills the concept of the deterrent effect theory which is the goal of sentencing and the goal of national development (policy direction), both *ius constitutum* and *ius constituendum*. The teaching of *conditio sine qua non* not relevant and coherent with law enforcement in defamation cases through social media, so it is necessary to regulate and guide of the causality teachings (certainty), or the renewal of norms in the formulation of defamation through social media.*

**Keywords:** *Condition sine qua non; deterrent effect theory.*

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## INTRODUCTION

The concept of the rule of law that is promoted in the way of life is in line with existing democratic values, due to the formulation of the 1945 Constitution of the Republic of Indonesia (abbreviated: UUD NRI) 1945) comes from a mutual agreement through people's sovereignty, which then includes human rights, known as constitutional rights.<sup>1</sup>

Human rights are rights that are owned by every human being, and this is attached to him because of their status and position as a human being.<sup>2</sup> In this regard, human rights as the embodiment of democratic values are reflected in Article 28, Article 28E Paragraph (2), Article 28E Paragraph (3), and Article 28F of the 1945 Constitution of the Republic of Indonesia

Information and communication technology has been designed with a web-based basis that changes the way of communicating quickly (*real time*), without being hindered by space and time, which just stares at the screen can carry out interactive dialogues with other social media users. Social media can also be a social networking site, where each user can create a web page that connects with friends to share information and communicate with each other.<sup>3</sup> Social media is composed of the

words '*media*' which is defined as a communication tool, and '*social*' which means social interaction in social life, so social media is a product of social processes due to the sophistication of information and communication technology.<sup>4</sup>

The development of social interaction methods through social media affects changes in behavior and the order of human life, then this results in the emergence of new values, new norms, new rules and so on.<sup>5</sup> Over time, the freedom of opinion and expression that is exercised through social media tends to be free, resulting in various consequences that harm others. One of them: insulting and defamation through social media. The new norm is in the form of an effort to criminalize acts of humiliation and defamation as offenses (criminal acts). This is a form of protection of a person's reputation which is also a human right,<sup>6</sup> as well as a constitutional right guaranteed in Article 28 G Paragraph (1) of the 1945 Constitution of the Republic Indonesia.

The rights to freedom of opinion and expression are not absolute, so there are restric-

<sup>1</sup> Ni'matul Huda, *Ilmu Negara* (Jakarta: Raja Grafindo Persada, 2011), 188. see: Sirajuddin and Winardi, *Dasar-Dasar Hukum Tata Negara Indonesia* (Malang: Setara Press, 2015), 43 it is stated that Indonesia is a constitutional democracy (law) country, which means that democratic values are upheld along with the fulfillment and protection of human rights (constitutional rights) which have been guaranteed by the state constitution, the 1945 Constitution of the Republic of Indonesia.

<sup>2</sup> Miriam Budiardjo, *Menggapai Kedaulatan Untuk Rakyat* (Bandung: Mizan, 1998), 10.

<sup>3</sup> Anang Sugeng Cahyono, "Pengaruh Media Sosial Terhadap Perubahan Sosial Masyarakat Indonesia,"

*Jurnal PUBLICIANA* 9, no. 1 (2016): 142–143, <https://journal.unita.ac.id/index.php/publiciana/article/view/79>.

<sup>4</sup> Mulawarman and Aldila Dyas Nurfitri, "Perilaku Pengguna Media Sosial Beserta Implikasinya Ditinjau Dari Perspektif Psikologi Sosial Terapan," *Buletin Psikologi* 25, no. 1 (2017): 37, <https://jurnal.ugm.ac.id/buletinpsikologi/article/view/22759>.

<sup>5</sup> Wahyu Erfandy Kurnia Rachman et al., "Tindak Pidana Pencemaran Nama Baik Di Media Sosial Berdasarkan Peraturan Perundang-Undangan," *Rechtidee* 15, no. 1 (2020): 135, <https://journal.trunojoyo.ac.id/rechtidee/article/view/6484>.

<sup>6</sup> Anton Hendrik Samudra, "Pencemaran Nama Baik Dan Penghinaan Melalui Media Teknologi Informasi Komunikasi Di Indonesia Pasca Amandemen UU ITE," *Jurnal Hukum & Pembangunan* 50, no. 1 (2020): 93, <http://jhp.ui.ac.id/index.php/home/article/view/2484>.

tions on the rights -This right is stated in Article 28J Paragraph (1) of the 1945 Constitution of the Republic of Indonesia by requiring everyone to respect the human rights of others. There is a conflict of constitutional rights that is so striking between the right to freedom of opinion and expression and the right to respect for one's dignity, so both are challenges for the state to accommodate in a balanced way. The state is responsible for providing rules that limit the rights of opinion and expression for the common good, including security and public order in a democratic society. The Criminal Code (KUHP) and the Law of the Republic of Indonesia Number 11 of 2008 concerning Information and Electronic Transactions, along with the amendments to the Act, namely the Law of the Republic of Indonesia Number 19 of 2016 (UU ITE) is the limit in question, where both regulate offenses against insults and/or defamation (*online defamation*).

Recorded data released by the Directorate of Cybercrime, Bareskrim Polri (Ditpidisiber), where the number of complaints of defamation cases (*online defamation*) in 2019 was only 153 complaints, but in 2020 it increased quite rapidly to 1,477 complaints.<sup>7</sup> As of the writing of this article, the number of *online defamation* cases was 3,898 complaints.<sup>8</sup> So, that the ITE Law is the embodiment of the enforcement of *cyber crime*,<sup>9</sup> so through this

instrument the state is given the authority to impose sanctions (criminals) for anyone who violates these rules. Therefore, since the enactment of the ITE Law, cases of criminal acts of defamation through social media have become *trending topic* and continue to increase significantly.<sup>10</sup>

The formulation of the article on defamation through social media is qualifies as a formal offense and a complaint offense (absolute) causing everyone who feels that their rights have been violated, to easily report the perpetrator without a strong burden of proof. In this article, we will discuss the analysis of norms on defamation offenses through social media, including what the concept is, the consequences of the formulation of formal offenses adopted, and the urgency of applying the causality teaching model (causal verband) in order to find the causes of the criminal act of defamation, either through social media. In essence, the purpose of writing this article is to analyze the extent to which the application of the teaching of causality in law enforcement of criminal defamation (*online defamation*) is required, as well as to provide recommendations to the government to harmonize the relevant regulations.

## METHOD

This research uses normative research, as stated by Peter Mahmud Marzuki that normative research uses legal rules, legal principles, and legal doctrines as tools to answer legal problems that occur. Thus, the writing produced should be prescriptive (solution and recommended), and not descriptive (only describing legal issues).<sup>11</sup> The approach method

<sup>7</sup> "Statistik Aduan Patroli Siber Tahun 2019-2021," *Ditpidisiber*, last modified 2020, <https://patrolisiber.id/statistic>.

<sup>8</sup> *Ibid.*

<sup>9</sup> Yogi Prasetyo, "Hati-Hati Ancaman Tindakan Pidana Pencemaran Nama Baik Di Media Sosial Dalam Undang-Undang Informasi Dan Transaksi Elektronik," *Legislasi Indonesia* 18, no. 4 (2021): 502-513, <https://e-jurnal.peraturan.go.id/index.php/jli/article/view/772>.

<sup>10</sup> *Ibid.*

<sup>11</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Cetakan 13. (Jakarta: Prenadamedia Group,

used is a statutory approach, a conceptual approach, and a doctrinal approach.

The steps taken are to collect data and cases that show the occurrence of various problems in the formulation of norms (rules) for criminal defamation (*online defamation*). Inventory of legal materials, ranging from related laws and regulations, articles in journals, books as library references, as well as complementary information on online sites. Analyze and apply legal theories to the point of problems that occur, and finally by outlining the results and conclusions of writing articles, as well as providing recommendations and suggestion.

## ANALYSIS AND DISCUSSION

### Concept Of The Crime Of Defamation Through Social Media In Legislation

Defamation can be interpreted as an act of someone who intentionally defame another person, resulting in damage, ugliness, or unfavorable impression in the eyes of society.<sup>12</sup>

The object of this defamation is not physical in nature, which affects a person's heart and feelings, in the form of a person's sense of self-worth or dignity, including honor and good name which tends to be personal (*in personality*).<sup>13</sup> Defamation causes a sense of decline or downfall, and defamed one's self-esteem or dignity, so that the person who is de-

famed becomes humiliated or embarrassed.<sup>14</sup>

In common law countries, defamation is categorized into the genus of civil law, where a civil lawsuit (act against the law) is the basis for the plaintiff to bring a defamation case to a civil court. For example, in the United States, the criteria for being able to file a defamation suit, both in writing and orally, are:<sup>15</sup>

1. It is objectively proven that the accused is indeed guilty;
2. Defamation must be announced, so that it involves a third party (can also be the general public) other than the plaintiff and the defendant;
3. Defamation must cause (financial) loss, whether loss of money, property, business relationships, which can be measured quantitatively;
4. Defamation is not specifically protected by the Constitution, except in the case of giving testimony in court, or statements by members of parliament.

This is different from defamation in *civil law system countries*, which place more emphasis on defamation as a crime.<sup>16</sup> When a person defames another person to be known publicly, for which a third party considers the person (who was defamed) to have despicable behavior that is contrary to morality in society, then the act is categorized as an offense (criminal act). Acts that damage a person's reputation so that his name becomes bad in

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2017).

<sup>12</sup> Nindya Dhisa Permata Tami, "Studi Komparasi Pengaturan Pencemaran Nama Baik Menurut Hukum Pidana Dan Hukum Perdata Di Indonesia," *Law Reform* 9, no. 1 (2013): 108, <https://ejournal.undip.ac.id/index.php/lawreform/article/view/12437>.

<sup>13</sup> Firman Satrio Hutomo, "Pertanggungjawaban Pidana Pencemaran Nama Baik Melalui Media Sosial," *Jurist-Diction* 4, no. 2 (2021): 653, <https://e-journal.unair.ac.id/JD/article/view/25783>.

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<sup>14</sup> *Ibid.*, 657-658.

<sup>15</sup> "When to Sue for Defamation, Slander, and Libel," *The Law Dictionary*, accessed October 29, 2021, <https://thelawdictionary.org/article/when-to-sue-for-defamation-slander-and-libel/>.

<sup>16</sup> Ari Wibowo, "Kebijakan Kriminalisasi Delik Pencemaran Nama Baik Di Indonesia," *Pandecta: Jurnal Penelitian Ilmu Hukum* 7, no. 1 (2012): 3, <https://journal.unnes.ac.id/nju/index.php/pandecta/article/view/2358>.

the eyes of the public must be said to have injured a person's good name and honor, so protection efforts are needed so as not to violate democratic values, human rights, and the concept of the rule of law.<sup>17</sup>

Defamation which was not a criminal act has now turned into an offense (criminal) which is regulated through various laws and regulations. The decision of the Constitutional Court Number 2/PUU-VII/2009, is the result of a judicial review of the (old) ITE Law, in which it contains the judge's consideration which states that criminal law protects a person's good name, dignity, and honor as a consequence of the protection of constitutional rights, so that sanctions are imposed Criminal law is not contrary to the 1945 Constitution of the Republic of<sup>18</sup> In Indonesia, defamation is a prohibited act because it is subject to the applicable criminal law, where this is in accordance with the character of the Indonesian nation which upholds the norms of decency and religious norms, especially if the act of defaming another person also contains slander.<sup>19</sup>

According to Simons, criminal law contains permissible acts (*gebod*) and prohibited acts (*verbod*) which are formulated by legislators, where through the law it is regulated regarding the imposition of sanctions or pun-

ishment for those who violate these rules.<sup>20</sup> The function and purpose of criminal law is actually to protect the legal interests of everyone from disgraceful acts, which consist of the interests of human life, human body or body, one's honor, one's independence, and property.<sup>21</sup>

The regulation regarding defamation through social media is regulated in Article 27 Paragraph (3) of the ITE Law, which mentions prohibited acts. Separately, it is also regulated through Article 45 Paragraph (3) of the ITE Law, namely regarding criminal sanctions for anyone who commits a criminal act of defamation as referred to in Article 27 Paragraph (3) of the ITE Law.

The ITE Law is a law (*lex specialis*) which regulates *cyber crime*, namely special criminal law outside of the Criminal Code. ITE Law adopts the concept of administrative criminal law (*administrative penal law*)<sup>22</sup> with a *double-track system* that applies the provisions of administrative sanctions in addition to criminal sanctions. The formulation of the article on prohibited acts has been determined by legislators as "despicable acts or acts that violate values and morality in social life." Furthermore, in numbers 115-116 sub c-3, Appendix II of the Law of the Republic of Indonesia Number 12 of 2011 concerning the Establishment of Legislation which pro-

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<sup>17</sup> Ibid,8.

<sup>18</sup> Fairuz Rhamdhatul Muthia and Ridwan Arifin, "Kajian Hukum Pidana Pada Kasus Kejahatan Mayantara (Cybercrime) Dalam Perkara Pencemaran Nama Baik Di Indonesia," *RESAM Jurnal Hukum* 5, no. 1 (2019): 34–35, <https://jurnal.stihmat.ac.id/index.php/resam/article/view/18>.

<sup>19</sup> Asrianto Zainal, "Pencemaran Nama Baik Melalui Teknologi Informasi Ditinjau Dari Hukum Pidana," *AL-Adl* 9, no. 1 (2016): 62, <https://ejournal.iainkendari.ac.id/index.php/al-adl/article/view/668>.

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<sup>20</sup> EY Kanter and SR Sianturi, *Asas-Asas Hukum Pidana Dan Penerapannya* (Jakarta: Alumni AHM-PTHM, 1982), 237.

<sup>21</sup> Suyanto, *Pengantar Hukum Pidana* (Yogyakarta: Deepublish (Budi Utama), 2018), 15-16.

<sup>22</sup> Mohammad Rezki Ramadhan Mahfi, "Undang-Undang Informasi Dan Transaksi Elektronik (UU ITE) Dalam Perspektif Hukum Pidana Administrasi (Administrasi Penal Law)," *Badamai Law Journal* 5, no. 1 (2021): 140–149, <https://ppjp.ulm.ac.id/journal/index.php/blj/article/view/10055>.



vides guidelines on the technique of drafting laws and regulations, it is explained that the content material in the form of criminal provisions is placed separately in a separate Chapter which is located after the main content rules and before the Transitional Provisions or Closing Provisions.

The legal politics of the establishment of the ITE Law was to protect the public from digital crimes, cybercrimes due to the misuse of sophistication of computer-based information and communication technology and digitization. The ITE Law, known as *cyber law* in Indonesia, was born as a form of legal protection for perpetrators of information exchange activities, telecommunications and electronic transactions as well as other activities that use the internet as a medium.<sup>23</sup> However, the political-legal concept of the ITE Law actually experienced a shift. The ITE Law no longer upholds the *ultimum remedium principle*, so the ITE Law is faster to ensnare perpetrators who violate it by prioritizing criminal sanctions (*primum remedium*).

Article 27 Paragraph (3) of the ITE Law is formulated:

*Any person intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that contain insults and/or defamation.*

Based on this formulation, the elements can be described as follows:<sup>24</sup>

#### Subjective Elements

<sup>23</sup> M. Nanda Setiawan, "Mengkritisi Undang-Undang ITE Pasal 27 Ayat (3) Dilihat Dari Sosio-Politik Hukum Pidana Indonesia," *DATIN Law Jurnal* 2, no. 1 (2021): 1–21, <https://ojs.umb-bungo.ac.id/index.php/DATIN/article/view/561>.

<sup>24</sup> Erwin Asmadi, "Rumusan Delik Dan Pidanaan Bagi Tindak Pidana Pencemaran Nama Baik Di Media Sosial," *DE LEGA LATA: Jurnal Ilmu Hukum*

1. Everyone: What is meant by everyone is an individual, whether an Indonesian citizen, a foreign citizen, or a legal entity (Article 1 Number 21 of the ITE Law).
2. Intentionally and without rights: This element is formulated as a cumulative element. Therefore, it must be proven that the perpetrator has committed the prohibited act knowingly and arbitrarily, and knowingly committed the act without rights (or unlawfully).

#### Objective element

1. Distributing and/or transmitting and/or making it accessible: In the explanation of Article 27 Paragraph (1) of the ITE Law (amendment), it is stated that:
  - a. "distributing": sending and/or disseminating Electronic Information and/or Electronic Documents to many people or various parties through the Electronic System.
  - b. "transmit": send Electronic Information and/or Electronic Documents addressed to one other party through the Electronic System.
  - c. "make accessible": all actions other than distributing and transmitting through Electronic Systems that cause Electronic Information and/or Electronic Documents to be known to other parties or the public. The phrase makes it accessible, contradicts the phrase "intentionally" (without intention with intent), resulting in inconsistencies in the formulation of the article.<sup>25</sup>
2. Electronic Information and/or Electronic Documents containing insults and/or

6, no. 1 (2021): 23–26, <http://jurnal.umsu.ac.id/index.php/delegalata/article/view/4910>.

<sup>25</sup> Ibid.

defamation: Conceptually, the definition of Electronic Information is explained in Article 1 Number 1 of the ITE Law, while the definition of Electronic Documents is explained in Article 1 Number 4 of the ITE Law.

The phrases of insult and/or defamation are ambiguous, where if the (old) ITE Law is interpreted in its entirety there is no explanation whatsoever about what is meant by defamation. So, referring to the Constitutional Court Decision Number 50/PUU-VI/2008, it is interpreted that what is meant by the phrase insult and/or defamation in the (old) ITE Law is referring to Article 310 and Article 311 of the Criminal Code.<sup>26</sup> Then, this interpretation is reflected in the ITE Law (amendment), in which an article-by-article explanation is added, which states that the provisions in Article 27 Paragraph (3) of the ITE Law refer to the provisions in the Criminal Code regarding defamation and/or slander.

The offense of defamation and/or slander is conventionally regulated in Chapter XVI concerning Humiliation, which is categorized into the following forms:<sup>27</sup>

- 1) Article 310 Paragraph (1) of the Criminal Code: insulting (*smaad*);
- 2) Article 310 Paragraph (2) of the Criminal Code: insulting with writing (*smaad-schrift*);
- 3) Article 311 of the Criminal Code: slander (*last*);

<sup>26</sup> Samudra, "Pencemaran Nama Baik Dan Penghinaan Melalui Media Teknologi Informasi Komunikasi Di Indonesia Pasca Amandemen UU ITE.", 98.

<sup>27</sup> Devi Angeliawati, "Pertanggungjawaban Pidana Terhadap Pelaku Tindak Pidana Pencemaran Nama Baik Melalui Media Sosial Studi Putusan Nomor 6/Pid.Sus/2017/Pn Slr," *Celebes Cyber Crime Journal* 1, no. 1 (2019): 15–16, <https://journal.lldikti9.id/cybercrime/article/view/128>.

- 4) Article 315 of the Criminal Code: light insult (*eenvoudige belediging*);
- 5) Article 317 of the Criminal Code: complaining with slander (*lasterlijke aanklacht*);
- 6) Article 318 of the Criminal Code: ordering by slandering (*lasterlijke verdachtmaking*).

Of the various forms of insults and defamation in the Criminal Code, none of the articles that describe the consequences (losses) resulting from the act of defamation by the perpetrator was found. For example, Article 310 Paragraph (1) of the Criminal Code stipulates that:

Whoever intentionally attacks someone's honor or reputation by accusing someone of something, which means it is clear so that it is known to the public, is threatened with libel with a maximum imprisonment of nine months or a maximum imprisonment of nine months. a maximum fine of four thousand five hundred rupiah.

#### Subjective element

1. Whoever: is every person or perpetrator of a criminal act who is charged with responsibility for all actions taken according to the formulation of the article, so that the fulfillment of the "whoever" element depends on the fulfillment of the elements in the formulation.
2. (With) intentional: reflects the element of error, meaning that the act was carried out consciously, with the knowledge and will of the perpetrator, as well as a sense of being aware of the actions and consequences that occurred.
3. Which means clear so that it is known to the public: the perpetrator must have a purpose, which includes an inner spiritual attitude. In the phrase "which means it is

clear so that it is known to the public,” it can be interpreted that by having the “intention” to broadcast/announce, the actor can already be said to have fulfilled the elements. The phrase “known to the public” shows ambiguity, thus contradicting the intent of the phrase “transmitting” in Article 27 Paragraph (3) of the ITE Law.

#### Objective elements

1. Attacking someone’s honor or reputation: what is meant by attacking is not attacking or physically attacking, but in this element the act of attacking can be interpreted as throwing, saying or expressing something that violates someone’s rights, in the form of honor and good name.<sup>28</sup> This respect for honor and dignity is given by the general public to a person, either because of his actions, status, or position.<sup>29</sup>
2. By accusing something: means making accusations or expressing verbal statements, in the form of embarrassing things, then the accusation does not have to be a word about actions (victims) that are against the law, such as: stealing, molesting, and so on. Accusing someone of having an affair (although having an affair is not an act that is prohibited in criminal law), but this certainly makes the honor, self-respect and dignity of the accused person fall.<sup>30</sup> In es-

sence, accusing something does not have to be a false or untrue accusation.<sup>31</sup> Even accusing something that is true (a fact), if the “something” is in nature injuring the right to honor or good name, it is still said to have fulfilled this element.

To make it easier to understand the formulation of Article 310 Paragraph (1) of the Criminal Code, the elements of error in the formulation of this offense are composed of:<sup>32</sup>

- 1) “deliberate attacking someone’s honor or good name,” then what is meant is “deliberate” mental attitude aimed at attacking honor or the good name of people.
- 2) “accusing something, which means it is clear so that it is known to the public,” then the mental attitude of “intention” is aimed at being known (in general) for what is being accused of that person.

Written defamation is regulated in Article 310 Paragraph (2) of the Criminal Code. The formulation has the same elements as the formulation of Article 310 Paragraph (1) of the Criminal Code. It’s just that this written defamation is done “by writing or an image that is broadcast, displayed, or posted in public.”

The crime of slander includes the crime of libel and written defamation as regulated in Article 311 Paragraph (1) of the Criminal Code, with the formulation of the article as follows:

*If the person who commits the crime of libel or written defamation is allowed to prove what is alleged is true, not prove it, and the accusation is made contrary with what is known, then he is threatened with slander with a maximum imprisonment of four years.*

<sup>28</sup> Asmadi, “Rumusan Delik Dan Pidana Bagi Tindak Pidana Pencemaran Nama Baik Di Media Sosial.”

<sup>29</sup> Aditya Burhan Mustofa, “Tindak Pidana Pencemaran Nama Baik Melalui Media Internet Ditinjau Dari Perspektif Hukum Pidana” (Fakultas Hukum Universitas Sebelas Maret, 2010), <https://digilib.uns.ac.id/dokumen/detail/13764/Tindak-pidana-pencemaran-nama-baik-melalui-media-internet-ditinjau-dari-perspektif-hukum-pidana..>

<sup>30</sup> Samudra, “Pencemaran Nama Baik Dan Penghinaan Melalui Media Teknologi Informasi Komunikasi Di Indonesia Pasca Amandemen UU ITE.”

<sup>31</sup> Hutomo, “Pertanggungjawaban Pidana Pencemaran Nama Baik Melalui Media Sosial.”

<sup>32</sup> Ibid.



After the perpetrator of defamation and/or written defamation fails to prove the truth of his accusation, then the act is considered as “slander.” The opportunity to prove whether or not an alleged thing is true only applies in terms of: (1) the judge deems it necessary to examine the truth in order to consider the defendant’s statement, whether the act was carried out in the public interest, or was compelled to defend him-self, and (2) this also applies to officials (the state) accused in terms of what he did was to carry out his duties (Article 312 of the Criminal Code).

### **Relationship of Formal Offenses and Doctrine of Causality in Articles of Defamation Through Social Media**

The elements of prohibited acts in criminal acts of defamation through social media can be described as follows:

1. distributing and/or transmitting and/or making it accessible Electronic Information and/or Electronic Documents containing insults and/or defamation (Article 27 Paragraph (3) of the ITE Law);
2. The Electronic Information and/or Electronic Documents contain things that are offensive to a person’s honor or reputation by alleging something, for the public to know, either orally or in writing or an image that is broadcast, shown, or posted in public, unless the act it is intended for the public interest or because it is forced to defend oneself (Article 310 of the Criminal Code);
3. The Electronic Information and/or Electronic Documents contain things in the form of written contamination or defamation (slander), where the perpetrator cannot prove the truth of his accusation (Article 311 Paragraph (1) of the Criminal Code).

The formulation of Article 27 Paragraph (3) *in conjunction with* Article 45 Paragraph (3) of the ITE Law is a form of expansion of the criminal act of defamation (conventional) into a more modern form or model, namely defamation through social media with the help of technological sophistication.<sup>33</sup>

According to EY Kanter and SR Sianturi in their book entitled *Principles of Criminal Law in Indonesia and Its Application*, the formulation of offenses is divided into 2, namely:<sup>34</sup>

- 1) Formal offenses, with the formulation of articles that only regulate prohibited acts without questioning the consequences of the act.
- 2) Material offenses, the formulation of the article is much more complete, apart from consisting of prohibited acts, it also mentions the consequences arising from the act, if both have been fulfilled it is considered a full criminal act (*voltooid*).

The same thing was also stated by Adami Chazawi, that the formulation of an offense can be carried out in 2 ways, namely: (1) formally, where the benchmark is the completion of the prohibited act, then the criminal act is completed without depending on the consequences arising from the conduct of the act, on the other hand, (2) materially, if the consequences of a prohibited act have arisen, then from that time the perpetrator is said to have committed a criminal act.<sup>35</sup>

<sup>33</sup> Galih Puji Mulyono, “Kebijakan Formulasi Tindak Pidana Pencemaran Nama Baik Dalam Bidang Teknologi Informasi,” *Jurnal Cakrawala Hukum* 8, no. 2 (2017): 163, <https://jurnal.unmer.ac.id/index.php/jch/article/view/1669>.

<sup>34</sup> Kanter and Sianturi, *Asas-Asas Hukum Pidana Dan Penerapannya.*, 237.

<sup>35</sup> Adami Chazawi, *Stelsel Pidana, Tindak Pidana, Teori-Teori Pemidanaan & Batas Berlakunya Hukum*

The purpose of formal offenses is the formulation of offenses in a criminal law rule that is structured in such a way. There is only a formulation of what actions are determined as prohibitions along with the criminal threats. Based on the formulation of Article 27 Paragraph (3) *in conjunction with* Article 45 Paragraph (3) of the ITE Law and Article 310 *in conjunction with* Article 311 of the Criminal Code, the regulation of defamation through social media is qualified as a formal offense. It does not require a consequence of the act committed as an (absolute) condition in the formulation of the offense, so that when the elements of the prohibited act have been fulfilled, it is considered a criminal act of defamation.

This formal formulation is prone to be misused, especially the criminal law system in Indonesia which adheres to the principle of legality. For example, the case of Stella Monica Hendrawan (SMH), a beauty clinic patient who was caught in a criminal defamation case (Article 27 Paragraph (3) *in conjunction with* Article 45 Paragraph (3) of the ITE Law). SMH was sentenced to 1 year in prison for allegedly defaming L'viors Beauty Clinic, with the intention of vilifying or damaging reputation.

Starting from SMH which uploaded screenshots on social media *Instagram*, which contained complaints in the form of complaints from fellow L'viors consumers,<sup>36</sup> L'viors re-

ported SMH on the pretext that SMH's uploads were considered detrimental, damaged L'viors' reputation so that it was not impossible for his "name" to be bad and lower the level of customer trust.<sup>37</sup> SMH was caught in the "rubber" Article of the ITE Law, but in the end through Decision Number 658/Pid. Sus/2021/PN Sby dated December 14, 2021, SMH was acquitted of charges.<sup>38</sup> The Public Prosecutor was not careful in formulating the indictment. Even though the articles used to ensnare SMH are classified as formal offenses and complaint offenses (absolute) which are prone to be played by actors, then the application in law enforcement should be carried out in its entirety.

Based on Article 1 Paragraph (1) of the Criminal Code it is stated that: "*an act cannot be punished, except based on the strength of the provisions of the existing criminal legislation.*" Consequently, with the fulfillment of the causes (prohibited actions) in the formulation of the defamation article, it is legal if the perpetrator is reported/ committed with accusation of defamation. Does that mean that the accused (who is being complained of) deserves to be charged with criminal responsibility? This is where the causality (*causal verband*) should function properly. The study of a series of legal events, evidence, to the assessment of legal facts in determining causality (cause and effect) at the level of evidence is quite important, in order to provide a reference for judges on their belief in making a decision that is as fair as possible (*ex aequo et bono*). .

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*Pidana* (Jakarta: Raja Grafindo Persada, 2010), 119.

<sup>36</sup> Adhigama Budiman et al., *Amicus Curiae (Sahabat Pengadilan) Untuk Pengadilan Negeri Surabaya Pada Perkara Nomor 658/Pid.Sus/2021/PN.Sby Atas Nama Terdakwa Stella Monica Hendrawan "Keluhan Konsumen Bukan Perbuatan Pidana* (Jakarta: Institute for Criminal Justice Reform, 2021), <https://icjr.or.id/wp-content/uploads/2021/11/Amicus-Curiae-Stella-Monica.pdf>.

<sup>37</sup> Ibid.

<sup>38</sup> "Putusan PN SURABAYA Nomor 658/Pid.Sus/2021/PN Sby," *Sistem Informasi Penelusuran Perkara Pengadilan Negeri Surabaya*, last modified 2021, [http://sipp.pn-surabayakota.go.id/index.php/detil\\_perkara](http://sipp.pn-surabayakota.go.id/index.php/detil_perkara).

The doctrine of Causality is one of the doctrine was used to determine which actions could be said to cause an effect that was prohibited in criminal law. Therefore, the coherence of legal events must really be considered so that in a reasonable and logical manner it influences and becomes a factor in the occurrence of the prohibited result (action).

The doctrine of causality is one of the most important doctrines in law enforcement (criminal), which includes the causes (actions) that produce results (things that are prohibited). The teaching of causality is usually used in articles that formulate the consequences in them. For example, in Article 338 of the Criminal Code concerning murder which requires the loss of a person's life (as a result) of the act which caused the result to occur, this is where the doctrine of causality has been clearly used. In simple terms, the doctrine of causality is used only for offenses that require conditions in the form of certain consequences in order to be prosecuted (criminal), so that material offenses and offenses qualified by the consequences of course use this doctrine of causality in law enforcement to determine criminal liability.<sup>39</sup>

As for impure omission offense, where someone who should have an obligation to act (for example, so that the prohibited result does not occur) does not do such a thing, then it can be said that the occurrence of the result is due to negligence.<sup>40</sup> The question then is, what about law enforcement for criminal acts

which in the formulation of the article adhere to formal offenses, such as defamation offenses through social media?

Conceptually, Daniel E. Little provides a comprehensive understanding of *social explanation* which leads to the teaching of causality. He revealed that there are 3 basic instruments that are strung together to find out whether an action is the cause of its consequences, including the following:<sup>41</sup>

- 1) *Causal Mechanism* (CM), a series or sequence of events and/or actions that are carried out consistently so that it guides an action (cause) to the effect.
- 2) *Inductive Regularity* (IR), then the cause must be a regular thing and have the possibility to cause that effect.
- 3) *Necessary and Sufficient Condition* (NSC), then the cause is an important and sufficient factor. In a cause there are factors that are an absolute requirement to be able to cause a certain effect. In addition, other supporting factors also contribute to a series of causes to cause an effect.

Understanding the concept of causality above, it is possible to expand the meaning of formal offenses which do not explicitly contain the elements of effect in their formulation. In line with the legality principle adopted in the criminal justice system in Indonesia, the act that causes (*in fact*) the occurrence of a prohibited result is interpreted that the prohibited actions (in a formal offense) can be equated with the intended result (in a criminal offense material). When law enforcers justify the act (*in fact*) it does cause things that are prohibited in the formulation of the article (formal offense), then from that moment on what has

<sup>39</sup> Andi Sofyan and Nur Azisa, *Buku Ajar Hukum Pidana* (Makassar: Pustaka Pena Press (Anggota IKAPI Sul-Sel), 2016), 58, <https://core.ac.uk/download/pdf/83871315.pdf>.

<sup>40</sup> Ahmad Sofian, "Ajaran Kausalitas Dalam R KUHP," *Aliansi Nasional Reformasi KUHP*, last modified 2016, accessed April 1, 2016, <https://reformasikuhp.org/ajaran-kausalitas-dalam-r-kuhp/>.

<sup>41</sup> Ahmad Sofian, *Ajaran Kausalitas Hukum Pidana*, Cetakan I. (Jakarta: Prenada Media Group, 2018), 19-21.

been done by the maker of the offense is considered to have fulfilled the elements for further prosecution (criminal).

### **The Application of the Doctrine of Causality with Expansion of Accountability**

There are 4 types doctrine of causality that have developed and are often used by law enforcers or judges in examining, adjudicating, and deciding cases.

1. The doctrine of *conditio sine qua non*, in the Indonesian translation, is interpreted as “all causes are conditions,” so the causal factors that are arranged in a series of legal events must be equated with one another. According to Von Buri, if one of these conditions is missing, it will cause a shock that does not have the proper effect, so this teaching is also called the ‘equivalence’ or *bedingungtheorie*.<sup>42</sup>
2. The doctrine of individualizing (*individualiserende theorien*), is a teaching that finds causal factors (singular) more specifically. Schepper considers cause as an act which logically, reasonable and based on certain science determines criminal responsibility for prohibited consequences, so according to him cause must be distinguished from responsibility.<sup>43</sup> According to Binding, the cause is the last condition, namely the closest condition and cannot be separated from the concrete consequences that occur (*conditio proxima*).<sup>44</sup>

3. The doctrine of generalizing (*generaliserende theorien*), has the same goal as the doctrine of individualizing, which is to find a single causal factor. However, what makes the difference is the method of discovery. In this generalization teaching, the search for causal factors is carried out before the event (the forbidden effect occurs), where according to reasonable (logical) reasoning and experience in general, *in abstracto* it must be realized that the action taken will cause the (prohibited) effect to arise.<sup>45</sup> Von Kries called this teaching the subjective adequate theory (*subjective prognosis*), where the benchmark is the mental attitude of the perpetrator before he commits an offense, so knowledge and awareness are the main factors.<sup>46</sup> Rumelin called it the objective theory of adequate (*objektivenachtragliche prognosis*), where the causal factors must meet the general requirements (which are based on habits or something that often happens) according to most people, it is indeed considered a causal relationship (cause and effect).<sup>47</sup>
4. The doctrine of relevance, popularized by Langenmeijer and Mezger. Unlike other teachings of causality, in this teaching the state is given the power to formulate, determine, and stipulate its own criminal rules. Find out what kind of actions might be the cause of the prohibited consequences, which lead to the formation of laws and regulations by the authorized state institutions.<sup>48</sup>

<sup>42</sup> Ahmad Sofian, *Ajaran Kausalitas Hukum Pidana - Google Books* (Jakarta: Kencana, 2018), 27-28.

<sup>43</sup> Rahmanuddin Tomalili, *Hukum Pidana* (Yogyakarta: Deepublish (Budi Utama), 2019), 129.

<sup>44</sup> Ahmad Sofian, “Kausalitas Dalam Hukum Pidana Pada Keluarga Civil Law Dan Common Law,” in *Prosiding Seminar Nasional Hukum UMS* (Surakarta: Publikasi Ilmiah Universitas Muhammadiyah Surakarta, 2015), 323, <https://publikasiilmiah.ums.ac.id/handle/11617/5679>.

<sup>45</sup> Tomalili, *Hukum Pidana*, 132.

<sup>46</sup> Ibid, 133.

<sup>47</sup> Sofian, “Kausalitas Dalam Hukum Pidana Pada Keluarga Civil Law Dan Common Law.”, 325.

<sup>48</sup> Sofyan and Azisa, *Buku Ajar Hukum Pidana.*, 65-66.

Referring to the Criminal Code as the basic rule of criminal law (material) in Indonesia, is it regulated regarding the doctrine of causality model in the Criminal Code. It is not found in the Criminal Code regarding the doctrine of causality in law enforcement.<sup>49</sup> The Criminal Code only formulates prohibited acts, along with their consequences (material offenses), along with criminal threats (sanctions) imposed on the perpetrator so that he is properly accountable. The causal relationship (cause and effect) looks so simple, in the theory of criminal law it is said that the goal is to determine the relationship between a person's actions (*in fact*) and the consequences that are prohibited by law (*in law*), which can then be known who the perpetrator is crime, along with whether or not and the amount of sanctions (criminal) that can be imposed on him.<sup>50</sup>

The concept of causality is also not explained in the 2019 R-KUHP. However, in this renewal there are several article formulations which were originally formal offenses which were changed to material offenses. The change in the type of offense does not apply to criminal acts of defamation and insult. The teaching of causality is not included in the 2019 R-KUHP, moreover criminal acts of defamation and humiliation still adhere to formal offenses, so to determine criminal liability, law enforcers refer to the doctrine of free causality.

The use of any teaching of causality is allowed, because it is not regulated with certainty and is limitative in the criminal justice

system in Indonesia, both the current rules (*ius constitutum*) and the future ones (*ius constituendum*). Based on this, Remelink argues that the criminal justice system in Indonesia is more accurately said to adhere to the type of relevance causality teaching,<sup>51</sup> because it refers to positive laws that are compiled and formed by the state.

Quoted in Andi Hamzah's book entitled *Indonesian Criminal Law*, it is stated that the objectives of punishment are: (1) *Reformation*, namely rehabilitating and making criminals (convicts) turn into better people in the social community, after serving their sentence; (2) *Restraint*, an effort to restrain or exile criminals to be detained in prisons in order to maintain order and security in society; (3) *Retribution*, retaliation against criminals for their actions that are detrimental or disturbing; and (4) *Deterrence*, a prevention effort that prioritizes a deterrent effect so that criminals or other people are afraid and do not take actions that are prohibited by law.<sup>52</sup> Broadly speaking, there are 3 basic theories of imposing sanctions or punishments, namely:<sup>53</sup>

- 1) Absolute theory or theory of retaliation (*vergeldings theory*), which focuses on the motive of revenge, so that crimes must be repaid with misery in the form of imposing a commensurate punishment.
- 2) Relative theory or goal theory (*doel / utilitarian theory*), then punishment must prioritize its goals or benefits. The imposition of crime to prevent and control crime, so that crime does not recur, as well as maintain public order from the disturbance of

<sup>49</sup> Sofian, "Ajaran Kausalitas Dalam R KUHP.", 7

<sup>50</sup> Muh. Nizar and Amiruddin Lalu Sabardi, "Ajaran Kausalitas Dalam Penegakan Hukum Pidana (Studi Putusan Mahkamah Agung Nomor 498 K/PID/2016)," *Jurnal Education and Development* 7, no. 1 (2019): 190, <https://journal.ipts.ac.id/index.php/ED/article/view/1140>.

<sup>51</sup> Sofian, "Ajaran Kausalitas Dalam R KUHP.", 7.

<sup>52</sup> Andi Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2017), 27-28.

<sup>53</sup> Usman, "Analisis Perkembangan Teori Hukum Pidana," *Jurnal Ilmu Hukum* 2, no. 1 (2011): 67-76.



the perpetrators of the crime. This theory is identified with preventive action (*preventive act*) from interference.

- 3) Combined theory, developed to integrate the two previous theories.

This relative theory is becoming increasingly popular, and is much more effective when used to correct a situation that has been chaotic as a result of a crime. In general, it is divided into 2 parts, namely:<sup>54</sup>

- 1) General prevention theory (*algemene preventie theory*), which is oriented to making the general public afraid (deterrent) so as not to commit the crime.
- 2) The special prevention theory (*bijzondere preventie theorieen*), which focuses on the inmate so that he feels deterrent and does not repeat the crime again, this avoids the repetition of the crime (*recidivists*).

In the midst of various things that become problematic points in law enforcement of criminal defamation, the selection and use of the right type of causality is the solution. In addition to the criminal justice system in Indonesia which does not regulate and limit the use of causality teachings in law enforcement, even though law enforcers are given the freedom to use any type of causality doctrine they believe in and want. However, in choosing and using this type of causality teaching, law enforcers should use the purpose of punishment and national development goals (policy directions) as the basic reasons.

The deterrent effect theory is one of the relevant theories to be used in law enforcement, especially in cases that continue to increase rapidly. Thus, the theory of deterrence effect based on efficiency and impact is the right parameter that can be used by judges in making decisions, solely so that the defendant

gets a recompense for his actions, while at the same time providing a broad positive impact on people's lives.

The history of the development of the doctrine of causality *conditio sine qua non* was originally popularized by Von Buri in 1873. The essence of the teaching is that every act (condition) and all factors contained in a series of events (criminal acts) cannot be simply eliminated, all of which lead to effect, and must be considered as a result (*causa*) of equal value.<sup>55</sup> In other words, the doctrine of *conditio sine qua non* has implications for the expansion of criminal liability,<sup>56</sup> because anyone can be charged with criminal responsibility as long as he is standing and is the cause in the series of criminal cases. The refinement of theory by Van Hamel stated that the application of the teaching of causality *conditio sine qua non* (Von Buri) should be accompanied by the application of the theory of error, so in addition to the act (which causes) the result, it must also be found that the perpetrator is indeed guilty, either by intention or negligence to be responsible.<sup>57</sup>

The doctrine of causality with the application of the principle of *conditio sine qua non* fulfills the concept of the theory of the deterrent effect, then with the expansion of criminal liability, everyone who is concerned and influences the occurrence of an effect that is prohibited by law becomes involved in being held accountable for his actions. Factors and conditions that are part of a crime are parts that are arranged independently to form a cer-

<sup>54</sup> Ibid., 71

<sup>55</sup> Lhedrik Lienarto, "Penerapan Asas Conditio Sine Qua Non Dalam Tindak Pidana Di Indonesia," *Lex Crimen* 5, no. 6 (2016): 33–39, <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/13466>.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

tain series that gives rise to the same result.

This is different from the concept of participation as regulated in Article 55 and Article 56 of the Criminal Code, which in its series requires that the share occur on the basis of cooperation or division of labor which results in a criminal act. Therefore, the use of the doctrine of causality *conditio sine qua non* does look much more perfect to be used to determine criminal liability in defamation cases through social media.

The high number of cases of criminal defamation (*online defamation*) is caused by various factors, including the norm formulation factor and law enforcement. This can be seen from the number of reports/complaints of criminal defamation cases (*online defamation*) received by the Dittipidsiber of the Criminal Investigation Department of the Indonesian National Police, where as of the writing of this article there have been 3,898 total complaints.<sup>58</sup> In the Supreme Court Decisions directory data, since the last 3 years there has been a significant increase in decisions related to decisions (*inkracht van gewisjde*). When writing down the keywords for defamation (UU ITE), 249 data (2019), 276 data (2020), and 344 data (2021) were found.<sup>59</sup>

The formulation of the article adheres to a formal offense and a complaint offense, thus providing convenience for a person to subjectively complain to another person, provided that the act has fulfilled the elements in Article 27 Paragraph (3) *in conjunction with* Article 45 Paragraph (3) of the ITE Law and Article 310 *in conjunction with* Article 311 of

the Criminal Code without proving the existence or absence of consequences (losses suffered). The use of the principle of *conditio sine qua non* is hindered by the applicability of the complaint offense. Only he (who is complained of) can be charged with the article on defamation, so that investigators cannot reach other parties who also commit criminal acts of defamation without a complaint and approval from the victim concerned.

The balance of types of offenses in the *on-line defamation* provides a positive value. Just imagine if the offenses used were ordinary offenses? So, the subjectivity may be destroyed, but on the other hand firmness (repressive efforts) in law enforcement will be formed. Defamation is related to individual interests, the position of equal parties, as well as individual parties as reporters who defend their interests, so that against this private crime the state continues to accommodate it through criminal law which is implemented through complaint offenses (absolute).<sup>60</sup>

Finally, the use of the doctrine of *conditio sine qua non* with the extension of liability has no relevance and is not coherent with the formulation of the article on defamation (*online defamation*). The application of the principle of *conditio sine qua non* based on the expansion of liability can ensnare anyone in order to provide a deterrent effect, if it does not collide with the application of the (absolute) complaint offense in the formulation of the defamation article.

## CONCLUSION

The formulation of the norm in the *on-*

<sup>58</sup> "Statistik Aduan Patroli Siber Tahun 2019-2021."

<sup>59</sup> "Direktori Putusan Mahkamah Agung Republik Indonesia," accessed March 17, 2022, <https://putusan3.mahkamahagung.go.id/search.html?q=%22Pencemaran%20nama%20baik%22&cat=98821d8a4bc63aff3a81f66c37934f56>.

<sup>60</sup> Yasser Arafat, "Penyelesaian Perkara Delik Aduan Dengan Perspektif Restorative Justice," *Borneo Law Review* 1, no. 2 (2017): 134, <http://jurnal.borneo.ac.id/index.php/bolrev/article/view/714>.

*line defamation* article as regulated in Article 27 Paragraph (3) *in conjunction with* Article 45 Paragraph (3) of the ITE Law is rightfully dubbed the “rubber article,” because it is flexible and can be pulled anywhere at will. According to the user who plays. Formal offenses facilitate law enforcement because they are not limited by the elements of the consequences or losses for the actions committed. Complaint offenses (absolute) further facilitate the flow of reports (complaints) subjectively because indeed this defamation is about the heart and feelings of someone who is qualified as a private crime.

For example, he who is offended or feels defamed or insulted can certainly take legal action to ensnare his target. This problem looks more complex when the criminal justice system in Indonesia does not regulate sentencing guidelines in making decisions by judges, including the type of causality teaching in law enforcement that is used too freely.

The use of the doctrine of causality *conditio sine qua non* is a teaching that determines whether an action (*in fact*) causes a prohibited result (*in law*), so that liability (criminal) can be determined according to the results of the analysis (if it is proven that the act is the cause of the offense). The doctrine of causality *conditio sine qua non* fulfills the concept of the deterrent effect theory, which is relevant to reducing the number of criminal cases of defamation through social media which is increasing day by day. However, with the application of the (absolute) complaint offense, it is difficult to apply the doctrine of the *condition sine qua non*. The government or legislators should consider providing regulations and guidelines for applying the doctrine of causality (certain) to *online defamation* offenses, or at least changing the defamation of-

fense which was originally a formal offense formulation into a material offense.

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