

ISBN : 978-979-98722-3-4

PROCEEDINGS OF INTERNATIONAL CONFERENCE ON VICTIMOLOGY AND VICTIMS ASSISTANCE IN INDONESIA

20th -22nd September 2016 Purwokerto, Central Java, Indonesia



FACULTY OF LAW UNIVERSITAS JENDERAL SOEDIRMAN
2016

PROCEEDINGS OF INTERNATIONAL CONFERENCE ON VICTIMOLOGY AND VICTIMS ASSISTANCE IN INDONESIA

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Ukuran: 21 x 29,7 cm; Hlm: vi + 322

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PREFACE

International Conference on Victimology and Victims Assistance (ICVVAI) was held on the campus of Universitas Jenderal Soedirman (Unsoed) in Purwokerto during 21-22 September 2016 with the theme of "The Role Of Victimology in Strengthening the Rights and Positions of Victims in Criminal Justice System".

This conference is the effort of academicians and activists of victimology to show its global existence in contributing critical studies and ideas to the science development, especially in victimology. In the practice, the lack of victimology perspective application in handling the victims and the restraint of the act against the law, is not only accumulating the issues of case settlement, but it also sets the victims apart from their fundamental rights to obtain the justice. As well as the lack of the world society's contribution in studying victimology, including in Indonesia, the scientific forum for victimology has never been arranged before. This is for sure inversely proportional to the victimology's role, that in point of fact its benefits could be explored for the victims' interests.

In this conference, more than 200 scientific participants had many fruitful discussions and exchanges that contributed to the success of the conference. These conference proceedings contain papers solicited from the speakers, participants and other interested parties for the ICVVAI. Abstracts that were presented were split almost equally between the three main conference areas based on subthemes. This proceedings will be widely disseminated to all conference participants throughout the world, and also will be accessible through the internet's world wide web.

We would like to thank all participants for their contributions to the conference program and for their contributions to these proceedings.

The Editors

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LEGAL PROTECTION FOR VICTIMS OF RELIGIOUS OFFENCES ON THE INTERNET

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Abstract

The boom in information and communication technologies (ICTs) over recent decades has brought completely new ways of establishing and maintaining relationships. But in very different ways, people are vulnerable to multiple form of violence that threaten their physical and psychological integrity. Various media and new technologies are explored, but particularly the Internet and mobile phones and the convergence between the two are discussed. The hate speech religious offences or religious community was easily found on the internet. The victims on certain social media can report it to the manager's for blocked. But on some websites, such things can not be done, so that those who feel victimized ended up doing the same thing to the first attack. Cyberwar through words will continued without ended. State responses alone will never be sufficient. This happens for several reason. First, the possibility of anonymity; second, the rapidly growing anarchy in cyberspace as a form of culture wild-wild west; the third, still weak law enforcement in the field of cybercrime – especially religious offences; fourth, the possibility of committing crime outside the criminal jurisdiction of a country; and fifth, diminishing of tolerant awareness. There should be a criminal policy and strong in handle this crime, and growing healthy behaviors for Internet users to communicate with other users.

Keywords: cybercrime, religious offences, internet, anonymity, anarkhi.

INTRODUCTION

The Country through the constitution has provided a guarantee of freedom to its citizens to freely associate and assemble, issued thoughts with spoken and written (Article 28 jo with Article 28E of the 1945 Constitution), freely and responsibly in accordance with the requirement of the legislation in force (Article 1 paragraph (1) of Law No. 9 of 1998 on Freedom of Expression in Public). This guarantee then emphasized by the requirement concerning the right to develop themselves through the fulfillment of basic needs, get education and gain the benefits of science and technology, art and culture to improve the quality of life and for the welfare of mankind (Article 28C paragraph (1)).

Arrangements regarding freedom of opinion and expression were emphasized by Article 28F, which determines that every people are entitled to communicate and get information to develop personal and social environment, also has the right to seek, obtain, possess, store, process and convey the information by using all available channels. However, the freedom granted it was not free in the sense of freely, because the state provides the freedom limits. Article 28J of the 1945 Constitution determine that freedom limits, namely the obligation to respect the human rights of others in an orderly society, nation, and state (paragraph (1)), and the limits established by law with the sole purpose of securing due recognition and respect for the rights and freedoms of others and to meet the demands of a fair in accordance with considerations of morality, religious values, security and public order in a democratic society.

Internet as a product of science and technology has become a medium for citizens to expressing what has been guaranteed in the constitution. If the medium is the internet, then the space or place is cyberspace. There is a metaphor that calls cyberspace as a place to develop freedom of opinion and expression that comparable with wild-wild west of the culture of the American Western Frontier,¹ indicated by certain characteristics such as freedom, courage, individualism, perseverance, strength,² land was plentiful, the opportunity which guarantees their prosperity (economic unlimited),³ minimal role of government and the absence of the rule.⁴

Cyberspace has become the new place for Internet users (netizens) to express what can not be done in the real world. They consider freedom in terms that freely, so that almost all the comments about anything can be found there, not to mention the comments or opinions were actually forbidden or offend many people. One is the speech or hate speech which religion offenses. Many of the comments are actually unusually expressed and can lead to conflict between religious communities, however, it seems the state is powerless to publish. It can not be separated from the characteristic of cyberspace as a space of freedom, the lack of rules and no one can claim sovereignty over it.

Many countries fail to restrict or censoring the internet content. Even Yen said, that the government's efforts will fail because the nature of internet operational that decentralization makes it impossible for the country to become a single controller activity in cyberspace.⁵ Difficulty in regulating cyberspace is also recognized by Lessig⁶ and even at the first time Barlow extremely said, the state is not entitled to set it.⁷

Cyberspace with virtual reality is a representation or simulation of the real life. There is the possibility of a virtual world is limited freedom with certain restrictions, although not completely successful because of the difficulty setting of cyberspace.⁸ Even if there is a regulation, it would be difficult to enforce because it is constantly evolving, and anyway there is a law that developed in the online internet formed by bottom up.⁹

A hate speech on the Internet that are attacking God, prophet, religion, religious leaders or religious people are truly rude. Comments that are offensive is milling about every time on the internet, and with the borderless nature of cyberspace is causing hate speech can be done anywhere and anytime. A bad

¹ Clay Calvert, "Comment, Regulating Cyberspace: Metaphor, Rhetoric, Reality, and the Framing of Legal Options", 20 *HASTING COMM. & ENT. L.J.* (1998); dan Michael Froomkin, "The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution", 143 *U. PA. L. REV.* 709, 718 (1995).

² Jonathan J. Rusch, "Cyberspace and the 'Devil's Hatband'", 24 *SEATTLE U. L. REV.* 577, 578-81 (2000).

³ Alfred C. Yen, "Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace", *Berkeley Tech. L.J.* 17:4 (2002).

⁴ David G. Post, "The 'Unsettled Paradox': The Internet, the State, and the Consent of the Governed", 5 *IND. J. GLOBAL LEGAL STUD.* 521, 539 (1998); dan David R. Johnson & David G. Post, *The New 'Civic Virtue' of the Internet, in THE EMERGING INTERNET: THE 1998 REPORT OF THE INSTITUTE FOR INFORMATION STUDIES*.

⁵ Alfred C. Yen, *op. cit.*

⁶ Look at Lawrence Lessig, 2006, Code Version 2.0. New York: Basic Book. Kesulitan pengaturan internet bukan hanya bersebab karena terus berkembangnya teknologi, akan tetapi negara juga menghadapi dilema karena sifatnya borderless dan kebebasan yang diciptakannya. Look at Khanisa, "Dilema Kebebasan Dunia Maya: Kajian dari Sudut Pandang Negara", *Widyaiset*, Vol. 16 NO. 1, April 2013, page. 23-30.

⁷ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, electronic version can be found at <http://www.eff.org/barlow/Declaration-Final.html>, accessed on 19 December 2000.

⁸ Rob Shields, 2003, *Virtual: Sebuah Pengantar Komprehensif*, Yogyakarta: Jalasutra.

⁹ Lawrence Lessig, *op. cit.*

comment is not one direction, but from many different directions that led to a mutual contempt, slander and invective.

This condition causes there is an impression that the government failed to address the issue of hate speech which attacks religion, as if the omission occurred. The government is busier with pornographic contents rather than hate speech. This condition causes the impression that in cyberspace anarchy is growing rapidly, as has been expressed by Valauskas.¹⁰ when commenting on freedom on the internet. This paper would try to discuss about legal aspects of hate speech in particular relating to religion offenses and legal protection for victims of that acts.

DISCUSSION

Hate Crime (Religion Offences) in Indonesian Criminal Law

The word of "hate speech" often translated as "hate speech". There are two terms that are often used in international law of human rights, namely "incitement" and "hate speech". United Nation Human Rights Committee more often use the term incitement. In practice, there was indeed a difference between the expert and the country's legal system, there is more emphasis word itself, there the consideration of the impact on the humanitarian and human existence, and some are seeing the impact on others who called for the of hate speech.¹¹

The differences between incitement and hate speech lie in intention of a speech that is intended to cause a certain impact, either directly (actual) or indirectly (a stop on the intention). If the speech delivered in the fervent and excited it turned out to inspire his audience to commit violence or hurt another person or group, then in that position also an incitement was successfully done.¹²

However, David O. Brink affirms that there many statements or speech that are discriminatory but are not included in the category of hate speech. This can be illustrated on bias and evil stereotypes, but not to the degree of stigmatization, degrading, very hurt or injure. Hate speech, as Brink stated, worse than a discriminatory statement. It uses the traditional nickname or symbol to harassing someone because of his attachment to a particular group and as an expression of insult to the target in order to effect psychological.¹³

Point of contact of hate speech within the framework of the human rights at two discourse of rights, namely: a) freedom of religion or belief; and b) freedom of expression and opinion, c) the protection of race and ethnicity. Through the International Covenant on Civil-Political Rights and a number of other international documents, the global community has agreed on the boundaries of both those rights, so that restrictions on a right (expression and speech) to protect certain rights (freedom of religion) is not supposed to be seen within the framework of a dichotomous.¹⁴

¹⁰ Edward J. Valauskas "Lex Networkia: Understanding The Internet Community", *First Monday Peer-Reviewed Journal on the Internet*, October 7, 1996, electronic version can be found at <http://www.firstmonday.org/issues/issue4/valauskas/> accessed on 25 March 2003. Also read Agus Raharjo, Anarki di Cyberspace (Pandangan Filosofis tentang Kausa Maraknya Cybercrime), *Makalah* pada Konferensi Ke-5 Asosiasi Filsafat Hukum Indonesia, Surakarta, 17-18 November 2015.

¹¹ M. Choirul Anam and Muhammad Hafiz, "Surat Edaran kapolri tentang Penanganan Ujarn Kebencian (Hate Speech) dalam Kerangka Hak Asasi Manusia", *Jurnal Keamanan Nasional*, Vol. 1 No. 3, 2015, Jakarta: Pusat Kajian Keamanan Nasional, Universitas Bhayangkara, page. 345

¹² *Ibid*

¹³ *Ibid*, page. 346

¹⁴ W. Cole Durham and Brett G. Scharffs, 2010, *Law and Religion: National, International, and Comparative Perspective*, New York: Aspen Publisher, page. 202.

Right of religion and belief is a fundamental right protected, even including one of the rights that can not be restricted in any situation (non-derogable rights)¹⁵ as regulated in Article 28 paragraph (1) of the 1945 Constitution and Article 4 of the International Covenant on Civil and Political Rights (ICCPR). It was different with the right of expression and speech are not absolute and can be limited. Restriction of the right of expression and opinion based on the opinion of the UN Human Rights Committee can do to respect and protect the reputation of another person, someone who is invidious as part or member of a community, such as religious or ethnic.¹⁶ Article 20 paragraph (2) International Covenant on Civil and Political Rights (ICCPR) affirms that all advocacy of hatred on the basis of nationality, racial or religion constitutes incitement to discrimination, hostility or violence shall be prohibited by law. This article asserts that the state should prohibit all forms of hatred boost in domestic law, including incitement to discrimination, have no impact on violence based on national identity, race, or religion.¹⁷

Related with this hate speech, Indonesian Criminal Code are generally set in Article 310 paragraph (1), paragraph (2), Article 311 paragraph (1) Criminal Code. However, those articles are more related to personal attacks, are individuals, whereas in hate speech, religion offenses in particular, attacks aimed at the whole people of one religion, so that the number of victims was mass. Besides these chapters are not related to the use of internet media for the purpose of the crime, although can be enforced with the interpretation, but it will feel not same.

Regulation related to the speech of hatred by using the existing internet based on Article 28 paragraph (2) Law No. 11 of 2008 on Information and Electronic Transactions. This article specifies that any person intentionally and without the right to disseminate information intended to cause hatred or hostility individual and / or a particular group of people based on ethnicity, religion, race and intergroup (SARA). The criminal provisions of this article contained in Article 45 paragraph (2), which specifies that any person who meets the elements referred to Article 28 paragraph (1) or paragraph (2) shall be punished with imprisonment of 6 (six) years and / or fine of not more Rp1,000,000,000.00 (one billion rupiah).

Criminal acts against the interests of religion can be divided into two types, namely offenses concerned with religion (Relating, concerning), and offenses directed against religion (against).¹⁸ In the first category, the criminal act was not aimed directly and harm the religion itself. In the second category, that criminal acts really harm the religion and directly attacked. Here deliberate act or statement addressed directly to religion.¹⁹

The criminal acts directed against religion can be found in Article 156, Article 156a and Article 157 Penal Code. Article 175-177 set about violations against religious gatherings, and Article 178-181 named Grabdelikte and Leichenfravel or a sense of respect for the deceased and his tomb as the basis for criminal

¹⁵ The consequence of this designation is to provide reassurance to anyone, anywhere, anytime and in any situation, can exercise their right to worship and carry out his belief freely without coercion. It has become the normative framework that is recognized by the global community. See the description at Manfred Nowak, "Permissible Restriction on Freedom of Religion or Belief", at Tore Lindholm, et.al., ed., *Facilitating Freedom of Religion or Belief: A Deskbook*, USA: Martinus Nijhoff Publisher, 2004, page. 147. Also look at M. Choirul Anam and Muhammad Hafiz, *op.cit*, page. 344

¹⁶ Look in the UN Human Rights Committee General Comment No. CCPR/C/CG/34, formulated in Jenewa, 12 September 2011, 102th session committee, paragraphs 9 and 37.

¹⁷ M. Choirul Anam and Muhammad Hafiz, *op.cit*, page. 345.

¹⁸ Oemar Seno Adji, 1985, *Hukum Pidana Pengembangan*, Jakarta: Erlangga, page. 96-96

¹⁹ Supanto, 2007, *Delik Agama*, Surakarta: LPP and UNS Press, page. 98

prosecution. Article 156 and 15a to do with restrictions on freedom of expression, issued statements or acts against religious group that is different from other groups because of their religion, or the religion itself as its object.²⁰

Article 156a include statements addressed to the religion itself, not a group, but has not been directed against the prophet as the founder of the religion, holy books, religious leaders, and religious institutions. Also not covered by the statement that pollute the name of God, which in other countries called Godslatering, Gotteslasterung. Group and religion are essentially inseparable with the prophets, holy books, religious leaders, religious institutions, and can be added godslatering. The legislation now needs to be equipped with such blasphemy or godslatering.²¹

Determination of the act as a crime against the interests of religion, relate to theories about religious offense underlying the criminal law to determine the existence of a religious offense. Oemar Seno Adji suggests there are three theories about religious offense, namely:²²

1. Friedensschutz Theorie, the theory that sees order/public tranquility as the legal interest protected;
2. Gefühlsschutz Theorie, the theory that sees the religious sense as the legal interest to be protected;
3. Religionsschutz Theorie, namely the theory that sees the religion is an sich as the legal interest to be protected/secured by the state.

Law Protection of Religious Offences

Victims of a criminal act is the person who suffers loss or suffering caused by offenders. During this time, the position of the victims received less attention because of the criminal justice system is too oriented to the offender.²³ Based on *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the United Nations (1985), victims are the people who individually or collectively have suffered, including physical pain or mental, emotional suffering, economic loss or substantial reduction of rights through acts or omissions in violation of criminal laws in countries members comprising the laws that violate the abuse of power.²⁴

Classical problem that arise is the criminal justice system as a base settlement of the criminal case does not recognize the existence of victims of crime as a seeker of justice. Victims of crime are not actively involved in the judiciary, can not directly file a criminal case to the court itself but through the designated agencies (police and prosecutors).²⁵ Victim relationship with the police or prosecutors only symbolic, this is different from the relationship between the defendant with a lawyer (Soeparman et al, 2001: 1).²⁶

Criminal Code as a reference in the procedural law does contain rights of the victim, but when viewed as a whole is minimal when compared with the protection of human rights offenders. This occurs because the system adopted by the Code of Criminal Procedure is retributive justice, which is a point

²⁰ Oemar Seno Adji, 1985, *op.cit*, page. 98, Supanto, *op.cit*, page. 99 and 101

²¹ Supanto, *op.cit*, page. 102

²² Oemar Seno Adji, 1981, *Hukum (Acara) Pidana dalam Prospekti*, Jakarta: Erlangga, page. 87

²³ Steven Schafer, 1980, *Compensation and Restitution on Victims of Crime*, Montclair, New Jersey, page. 8

²⁴ Arif Gosita, 2004, *Masalah Korban Kejahatan (Kumpulan Karangan) Kedudukan Korban di Dalam Tindak Pidana*, Jakarta : PT. Bhuwana Ilmu Populer, page. 44

²⁵ Mudzakir, 2001, *Posisi Hukum Korban Tindak Pidana Dalam Sistem Peradilan Pidana*, Disertasi, Jakarta: Universitas Indonesia.

²⁶ Soeparman dkk, *Kepentingan Korban Tindak Pidana Dilihat Dari Sudut Viktimologi*, Varia Peradilan, Majalah Hukum Tahun Ke XXII No. 260 Juli 2007, page. 51

protection policy is the criminal (Offender oriented) is not restorative justice policies that focus protection of victims of crime (victim oriented).²⁷

Law No. 13 of 2006 on Witness and Victim Protection in conjunction with Law No. 31 of 2014 is a regulations that try to balance the imbalance between the position of the perpetrator and victim. Through the Witness and Victim Protection Agency (LPSK), the victim is entitled to file to court a right to compensation in cases of gross human rights violations, the right to restitution or compensation which is the responsibility of the offender. Decisions on compensation and restitution awarded by the court (Article 7). Form of compensation to the victim can be divided into three, namely:

1. Providing of compensation to victims, namely as contained in Article 1 point 4 Government Regulation No.44 of 2008 is the compensation provided by the state since the perpetrators are not able to provide full restitution responsibility.
2. Providing restitution to victims, namely as contained in Article 1 point 5 Government Regulation No.44 of 2008 is the compensation given to victims or their families by the offender or a third party, which may include the return of property, the payment of compensation for the loss or suffering, or reimbursement of expenses for a specific action.
3. To provide assistance to victims, namely as contained in Article 1 point 7 Government Regulation No.44 of 2008 is a service provided to victims and/or witnesses by the Witness and Victim Protection Agency in the form of medical assistance and psycho-social rehabilitation.

Victims of hate speech, in the form of religion offence is not an individual as stated by Law No. 13 of 2006 jo Law No. 31 of 2014, but the victim is massive. If there is an attack against religion, then the effects which is appeared are not only the religion as the legal interest that should be protected (religionsschutz theories), but also religious sentiments of the people of these religions (gefühlsschutz Theorie) and public order is disturbed as a reaction of those hate speeches. Although those theory can be put separatly, but the thing that consequently happens is those combination. It could be used to analyze an act of hate speech on the internet.

If the victim is massive, whether the victim will have the rights as stated in that constitution. This case is difficult to answer, because of two things. First, the victim is massive, more than one or two people; second, victims location is everywhere, it complicate to determine who is actually truly disadvantaged; Third, the perpetrators are difficult to detect, because internet users could be anyone and they are anywhere; Fourth, the rights of victims can only be finalized after the judge's decision or after the judicial process is complete. Nevertheless a judicial decision which contain the rights of victims at once is rare; fifth, it would be difficult for the country to decide where and who are the victims in which their right should be fulfilled.

Related with those things, commonly the state is not really able to realize the rights of victims when the hate speech phenomenon is going on religion. In the end, the victims are only the survivors who will get nothing from the state, because the state can not or are not able to fulfilled the victims right or allowing victims to remain in misery. This is exactly what causes the frequent occurrence dissatisfaction of victims in the criminal justice system.

If the rights of the victim is given after the judicial process is completed, it will take quite a long time, suffering inflicted can be deepened. Moreover the characteristic of religion offence is as longer it

²⁷ Ibid.

happen as wider the effect along with news through the mass media and electronic media. Anyway there is no provision of victims' rights as a result of a religion offence, except continuously promises which is lie. The procedures on the constitution make victims eventually recover on their own without state intervention. Whether this is the country which is wanted, then how about the role of country in protecting the citizens.

Because of the internet's characteristic that can make people behave as anything and anywhere with anonymous identity, so that perpetrators can freely do the action. Although it can be revealed, but it takes quite a long time specially in the log of the user's internet usage tracking activity. These advantages and freedom which is offered by the Internet makes a person can do anything even though in real life he's really a polite person also believer.

The country has a lot of duties for facing hate speech offences, especially religion offences. The issue of religion is a sensitive issue, and often trigger social commotion. Law enforcement is easily intervened by invisible forces and consequently make the performance of law enforcement officers are not neutral. It seems that the state must be firm in this case on becoming the protector of citizens who are victims, or supporters of the action of this hate speech.

Internet is double-edged sword, it can be profitable and detrimental. It could support the harmonization through effective communication that exists between religious communities based on tolerance and dialogue. It also could be a factor of divisive people and nation if the communication is established based on suspicion or mistrust. Despite the country has minimal performance in the supervision of internet content - except on the sharing of pornography and terrorism- self-control of a user is effective measures in order not to fall into perpetrators of hate speech, or the survivors who are not considered at all by the state.

CONCLUSION

The development and utilization of information technology causes people can find freedom and express anything, including things that actually prohibited by the state. Hate speech which offense a specific religion is a competition to get as many people as possible to bring the people on their religion. It is the goal form of the related religion. The Internet allows it happens because people could pretend to be anything and anyone (anonymous). Poor regulation will create growing anarchy in rapidly, weak law enforcement, the issue of jurisdiction because it is borderless, and decrease societies tolerance on religious life. Intelligence, wit, and wisdom is needed in internet utilization to avoid being trapped into perpetrators or victims of hate speech.

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