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ANALYSIS OF JUDGE DECISION NUMBER 1537/PID.B/2016/PNJKT.UTR RELATED TO PENAL CODE AGAINST BLASPHEMY PERPETRATOR

Achmad Arif

Universitas Darussalam Gontor
Email : achmadarif@unida.gontor.ac.id

Haerul Akmal

Universitas Darussalam Gontor
Email : haerulakmal@unida.gontor.ac.id

Muhammad Imam Subagja

Universitas Darussalam Gontor
Email : ibnuhuska@gmail.com

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ABSTRACT

The discourse on religious blasphemy is one that raises a lot of polemics. In the Indonesian context, this does not only occur in the domain of positive law, but also extensively in the domain of Islamic thoughts. The underlying issue of the argument is whether the penalty to whom blaspheme such a religion in accordance of the satisfaction and teaching of every adherent of religion in Indonesia, such types of questions emerge in discussions regarding the matter of what is most relevance in accordance of the teachings of the defied religion which in this case is Islam. This research aims to find out the sanctions imposed by the judge in case No.1537/Pid.B/2016/ PN. JktUtr. according to the perspective of Islamic law and also the law in force in Indonesia so that the normative juridical approach method used with logical thinking is deductive.

Keywords: Penal Code, Blasphemy, judge

INTRODUCTION

Indonesia is a country that consists of various tribes, races, cultures, languages, customs and religions. One of Indonesia's diversity is the recognition of more than one religion in Indonesia. As a guarantee of freedom of religion in this country, the Constitution of the Republic of Indonesia Year ' 1945 hereinafter written by UUD NKRI year 1945 has been guaranteed in article 28E paragraph (1) and (2). Freedom of religion as non derogable rights that cannot get discriminatory treatment. The guaranteed freedom of religion is not only guaranteed in the 1945 Constitution of the Republic of Indonesia, it is also guaranteed in Article 22 of Law Number 39 of 1999 concerning Human Rights.



Achmad Arif, Haerul Akmal and Muhammad Imam Subagja

Blasphemy is a disturbing act in national life. As is well known that Indonesia has recognized six religions: Islam, Christianity, Hinduism, Buddhism, Catholicism and Confucianism as stipulated in the Explanation of Law Number 1/PNPS/1965 concerning Prevention of Abuse and Blasphemy of Religion. This is an attempt by the government to maintain relations in the life of the nation and state. Based on SETARA Institute's research from 1965 to 2017 there have been 97 cases of blasphemy in Indonesia. The last case is Basuki Tjahaja Purnama alias Ahok (2017) who inserted Surah Al Maidah verse 51 when delivering a speech at Kepulauan Seribu.

In a previous research which examined Judgment Number 1537/Pid.B/2016/PN.Jkt.Ut. related to the application of Article 156a of the Criminal Code which examined the evidence related to the blasphemy elements as well as legal considerations of judges who dropped the defendants into committing criminal offenses against religion. In this research, the researcher examined the penal code related to blasphemy accused in terms of Islamic law and legal positive law in Indonesia.

The underlying issue of the argument is whether the penalty to whom blaspheme such a religion in accordance of the satisfaction and teaching of every adherent of religion in Indonesia, such types of questions emerge in discussions regarding the matter of what is most relevance in accordance of the teachings of the defied religion which in this case is Islam. This research aims to find out the sanctions imposed by the judge in case No.1537/Pid.B/ 2016/ PN. JktUt. according to the perspective of Islamic law and also the law in force in Indonesia so that the normative juridical approach method used with logical thinking is deductive.

METHOD

To understand this research in the form of definition that is suitable for any variables that exists in the topic, the researcher use library research, the research done by reviewing books, articles, journals or other that have relevance to the topic. Besides, to know the relevance between the existing law that the researcher analyze in this study, the researcher try to see using normative juridical approach method that examine and interpret matters that are theoretical concerning the principles, conceptions, doctrines and legal norms relating to proof of criminal cases.

The sources of research used in this study are: *First*: Primary sources are the main source of research that the researcher collects from the books of Muslim scholars such as Abdul Qadir Audah which discussed Islamic law and the books of jurists that exist whole the world which discussed Indonesian criminal code and law. Besides, the researcher also examines Indonesian jurisprudence that charged blasphemy cases in Indonesia. *Second*: Secondary sources are books or journals or websites that can provide further particulars in the topic the researcher has.

Data collection method that used in this study is the documentary method, which means the researcher examines the data written in the primary or secondary



Analysis of Judge Decision Related to Penal Code Against Blasphemy Perpetrator

sources. Besides, this study also uses comparative method, which means comparing laws studied to determine the relevance and differences among them.

Analysis Method ⁴ Content analysis is a technique used to analyze and understand text. Content analysis can also be interpreted as an investigation technique that seeks to decipher objectively, systematically and quantitatively. ³ Descriptive method is a method designed to gather information about presenting existing conditions and to describe the nature of the situation as it exist at the time of study and to explore the causes of particular phenomena.

RESULT AND DISCUSSION

Blasphemy in Islamic Law

In Islamic law, blasphemy has the meaning of deeds which can be categorized as the deeds of the destroyer of faith whose threats are included in committing major sin for the perpetrators, because this is contrary to Islamic religious norms which have been revealed by Allah in the form of the Qur'an and the prophet Muhammad as his final messenger.

Blasphemy according to Poerwadarminta is the same as insult to religion, because the meaning of blasphemy is reproach, defamation, or insult.¹ Blasphemy of religion in Islamic criminal law according to Sayyid Sabiq is called *sabbu-d-ddin*.² The insult to the religion of Islam is to denounce or insult the Qur'an and the hadith, abandon or ignore what is contained in both (the Qur'an and the Hadith), and turn away from the law in the Qur'an and the Hadith. So it can be concluded that the blasphemy of religion is a person who performs boundaries either by words or acts intentionally that demean or denigrate a particular religion.

In Islamic law also explains that someone who blasphemes religion is an act that is categorized as a destroyer of the faith, which is threatened with a great sin (for the perpetrators). Therefore, this is contrary to Islamic religious norms that exist in the holy book of the Qur'an.

Blasphemy is a criminal offense that enters the SARA domain. This domain is very sensitive, especially in our society. Indonesia itself has many different tribes, cultures and religions that serve as guidelines for daily life. Therefore, for people who abuse the life guidelines, through deliberate speech or actions, they are included in the

¹ W.J.S Poerwadarminta, *Kamus Besar Bahasa Indonesia*, (Jakarta: Balai Pustaka, 2016) p. 802.

² Sayyid Sabiq, *Fiqhu-s-Sunah*, translated by Muhammad Muhammad Nabhan Husein under title *Fikih Sunnah*, (Bandung: PT. Al Ma'arif, 1984) volume 9, 10, 11 p. 303.

Achmad Arif, Haerul Akmal and Muhammad Imam Subagja

offense of blasphemy. People who can be said to blaspheme religion include 2 types, they are:

1. Words: If someone who is an adult and is not mentally handicapped, deliberately denigrates or insults with words either by writing or by public utterances addressed to a person or group or certain religion/belief including those whom they believe in, such as: prophets, books and others.
2. Action: If someone is clearly committing an act of contempt for someone or on religious beliefs on purpose, and is done by someone who is an adult and not mentally handicapped, then it can be called blasphemy. The second feature is very clear and does not require study because it is done openly.

Then after fulfilling the elements above, Islam will give a punishment in accordance with the deeds he did. from a person's criminal acts and legal basis, Islam divides criminal acts into 3:

1. *Jarimah Hudud*: The word *hudud* is the plural form of the word *hadd*. Etymologically, the word *hadd* means the dividing line between two things so they do not mix with one another or so that one of them does not enter the other region. According to Ahmad Hanafi, *jarimah hudud* is a rahmah that is threatened with *hadd* punishment, that is a predetermined type and amount of punishment and is Allah's right.

Punishment which includes the right of God is every punishment desired for the public interest (community) such as to maintain the peace and security of the community, and the benefits of the sentence will be felt by the whole community. Penalizing is part of the purpose of religion. Because penalty is based on the right of Allah, it cannot be aborted, both by individuals and by society. Whereas the term *hadd* in terminology is an act or not doing according to the text that has been determined forbidden and at the same time the penalty.

Thus, it can be understood that the special characteristics of *Jarimah Hudud* are: first, the penalty is certain and limited, in the sense that the penalty has been determined by *Shara'* and there is no maximum and minimum limit. Second, the penalty is only Allah's right, or if there are human rights, then Allah's rights are more prominent.³

In connection with the *hadd* penalty, the understanding of Allah's right here is that the penalty cannot be abolished by an individual (person who is a victim or his family) or by the community represented by the state. Understanding the

³Sayyid Sabiq, *Fiqhu-s-Sunah*, translated by Muhammad Muhammad Nabhan Husein under title *Fikih Sunnah*, (Bandung: PT. Al Ma'arif, 1984), p. 13

Analysis of Judge Decision Related to Penal Code Against Blasphemy Perpetrator

rights of Allah as stated by Mahmud Syaltut is a right whose benefits return to the community and are not certain for someone.

2. *Jarimah Qishash-Diyat*: According to the language, the word *qishas* is a form of noun, while the form of the verb is *qashasha* which means to cut. Or it also comes from the word *iqdashasha* which means "to follow", ie to follow the actions of the offender in return for his actions.

Jarimah qishash-diyat are acts that are threatened with *qishash* or *diyat* penalty.⁴ Penalty in the form of *qishash* or *diyat* is the form of penalties that have determined the limit and do not have the lowest limit or the highest limit, but become individuals (human rights), with the understanding that the victim can forgive the perpetrators of *Jarimah* and if forgiven by the victim, then the penalty be delete.⁵

The characteristics of *jarimah qishas-diyat* are first, the penalty is certain and limited, that is determined by *syara'* and there is no maximum or minimum limit. Second, the penalty is the right of individuals (individuals), in the sense that, the victim or his family has the right to provide forgiveness to the offender.

3. *Jarimah Ta'zir*: According to etymology, the word *ta'zir* comes from *azzara* whose synonyms prevent and reject, educate, glorify and respect, help, strengthen and help.⁶ Whereas in terminology, *ta'zir* defined by al-Mawardi is as follows: *ta'zir* is an educational penalty for acts of sin (immorality) for which the penalty has not been determined by *syara'*. Wahbah Zuhaili gave the definition of *ta'zir* which is similar to al-Mawardi, which is a penalty determined for immoral acts or *jinayah* which is not subject to *hadd* and not *kifarat*.⁷

The term *jarimahta'zir* according to Islamic criminal law is an action in the form of educative (teaching) against the perpetrators of sins that are not sanctioned with *hadd* and *kifaratnya*. Or in other words, *ta'zir* is an educative punishment determined by the judge. So *ta'zir* is a penalty for criminal acts/offenses that have no provisions in the text regarding the penalty. *Ta'zir* penalties do not have certain penal limits, because the *shariah* only mentions a set of penalties,

⁴ Sudarsono, *Pokok-Pokok Hukum Islam, Prints II*, (Jakarta: Rineka Cipta, 2001), p. 531.

⁵ A. Hanafi, *Asas-Asas Hukum Pidana Islam*, (Jakarta: Bulan Bintang, 1967), p.8.

⁶ Ahmad Wardi Muchlis, *Hukum Pidana Islam*, (Jakarta: Sinar Grafika, 2005), p. 248.

⁷ R. Rojihah, Undergraduated thesis, "*Analisis Hukum Islam Terhadap Tindak Pidana Penadahan Dalam Putusan Pengadilan Negeri Semarang No.198/Pid.B/2013/Pn.Smg Tentang Tindak Pidana Penadahan Sepeda Motor*", (Semarang: IAIN Walisongo, 2014), p. 27.

ranging from the lightest to the most severe penalty. In other words, it is the judge who has the right to determine the type of crime and the penalty, because the legal certainty has not been determined by *syara'*.⁸

From this definition, it can be seen that *ta'zir* penalties do not have certain penalty limits, because *syara'* only mentions a set of penalties, ranging from the lightest to the most severe penalty. according to the researcher, the ruler (judge) has the right to determine the type of offense and the sentence, because the legal certainty has not been determined by *syara'*.

From the explanation above, it can be concluded that the act of blasphemy by Ir. Basuki TjahjaPurnama as stated in the judge's decision No.1537/Pid.B/2016/PN.JktUtr. included in the category of *jarimahta'zir* because of the following:

1. have committed acts of blasphemy by saying that Muslims have been deceived by Almaidah verse 51. utterances given by Ir. Basuki Tjahaja Purnama formally can be categorized as an act of blasphemy against Islam.
2. blasphemous acts carried out by unbelievers can be categorized as *jarimah hudud* whose conditions are incomplete, so that it is categorized as *ta'zir* as explained above.

Thus, blasphemy can be punished. In Islamic law, it is often referred to as *jarimah*, which is a prohibition on *syara'* that is threatened by both *hadd* and *ta'zir*. *Hadd* itself is a legal penalty that is clearly stated in the text of the Qur'an and the hadith. Meanwhile, according to Islamic law, *ta'zir* penalty is a penalty that is a fine (*ta'zir*) and not to be destroyed. Because of the mercy of the people who offended the law of the community, the forgiveness given to him did not abolish it altogether, except only to relieve the punishment of the perpetrator.

When viewed from the target of the applied law, this *ta'zir* sentence can be divided into several penalties⁹, including:

1. **Death Penalty:** *Ta'zîr* is essentially a lesson and is not destructive, therefore the death penalty as a *ta'zîr* penalty is an exception and the penalty cannot be extended or handed over to the judge, and determines the sentence imposed;¹⁰
2. **Caning:** Caning is a fundamental punishment in Islamic law, where the *hudud* verdict has been determined, for example, 100 times for *zina* and 80 times for

¹³ Rokhmadi, *Reaktualisasi Hukum Pidana Islam (Kajian Tentang Formulasi Sanksi Hukum Pidana Islam)*, (Semarang: Department of Religion IAIN Walisongo Semarang, Research Center in 2005), p. 56.

⁹Ahmad WardiMuslih, *Hukum Pidana Islam*, (Jakarta: SinarGrafika, 2005), p. 267

¹² Ibnu Mas'ud - Zainal Abidin, *Fiqh Mazhab Syafi'i*, (Bandung: CV Pustaka Setia, 2000), p. 325.

Analysis of Judge Decision Related to Penal Code Against Blasphemy Perpetrator

- qazf*, while for the *ta'zîr* verdict there is no amount. And in *ta'zîr* caning is preferred;
3. **Imprisonment:** There are two types of prison penalty in Islamic law, namely limited prison penalty and unlimited prison penalty. Limited prison penalty is limited, namely: The lowest penalty is one day, while the highest limit is not specified. While other is not limited to: the time has been determined in advance;¹¹
 4. **Isolation:** Regarding the period of isolation in jarimah *ta'zîr*, according to the Syafi'i and Ahmad schools, it is no more than one year so that it does not exceed the period of isolation that has been determined as penalty for *had*, which is also one year. According to Imam Abu Hanifah, the period of isolation can be more than one year, because the isolation here is the penalty of *ta'zîr* and not the punishment of *had*;
 5. **Penalty for fines or compensation:** Penalty for fines is also determined by Islamic Sharia, for example, for stealing fruit that still depends on the petition which is fined with double the price.

Blasphemy in Indonesian Legal Law

Blasphemy of religion is an act of speech, attitudes or actions committed by a person or group or person or institution or organization in the form of, provocation or insults to individuals or other groups through various aspects such as ethnicity, culture, customs and religion. Intentionally or unintentionally harms, insults a particular religion, belief in a religion that results in other religions and other beliefs being offended.¹²

It should be noted that the blasphemy of that religion occurred at the time the Qur'an was revealed and continues today. Based on the definition above, it can be concluded that what is meant by blasphemy is an act of insulting, degrading, and claiming a religion, perpetrators of religious teachings, or religious attributes or symbols that are viewed as sacred.

The compilation of religious offenses can be based on an alternative or a combination of several theories, depending on the interests of the law to be protected. In the "Research Report on the Influence of Religion on Criminal Law" LPHN,

¹¹ A. Hanafi, *Asas-Asas Hukum Pidana Islam*, (Jakarta: Bulan Bintang, 1967), p. 336-337

¹² Nuhri M. Nuh, *Penistaan agama dalam perspektif pemuka agama Islam*, (The Indonesian Ministry of Religion, Research and Development Agency and Education and Training Center, Center for Religious Life Research, 2014), p. 23.

mentioned three types of theories that can be used as the basis for the formation of these offenses, including:

- a. *Friedensschutz Theorie* is a theory that views public order or peace as the interests of the law that must be protected.
- b. *Gefuhlschutz Theorie* is a theory that wants to protect religious feeling.
- c. *Religionsschutz Theorie* is a theory that views religion as a legal interest that must be protected.

According to Article 156a, the elements of criminal blasphemy are as follows:

1. Whosoever

According to Sudarto, that the first element of a criminal offense is an act of a person and basically those who commit a criminal offense are humans. The formulation of a criminal offense in the law usually starts with the words "Whosoever...", the word "Whosoever" means no more than anyone.¹³

2. Intention

The second element of deliberate error in the broadest sense is the inner connection between the creator and the act that is harmed by the maker (criminal liability).

This inner connection can be either deliberate or culpa. What is interpreted intentionally, the Criminal Code does not provide a definition. Directions to be able to find out the meaning of intent can be taken from M.v.T (Memorie van Teolichting), which defines intent (opzet) as willing and knowing what is done. The person who does the act intentionally wills the action and besides that he knows or is aware of what is done.¹⁴

In this case someone does something intentionally can be divided into 3 (style) mental attitude that shows the level or form of intentionality. The intentional features are as follows:¹⁵Intentional intent, Intentionally conscious of certainty, Intentionally aware of the possibility (*Doluseventualis* or *Voorwaardelijkopzet*).

3. Public

Public restrictions based on Arrest on 9 June 1941 put forward by WAMCremers in his book "*WetboekvanStrafrech*" are as follows: "An insult is

¹³ Sudarto, *Hukum Pidana 1*, (Semarang: Yayasan Sudarto dan Fak. Hukum UNDIP, 1990), p. 50.

¹⁴ Sudarto, *Hukum Pidana 1*, p. 19.

¹⁵ Sudarto, *Hukum Pidana 1*, p. 19.

Analysis of Judge Decision Related to Penal Code Against Blasphemy Perpetrator

carried out in public, if it occurs in an open place for public visit and everyone can hear it".¹⁶

According to Lamintang, the use of the words "in public" in the formulation of a criminal act regulated in Article 156a of the Criminal Code does not mean that the feelings issued by the perpetrators or the actions carried out by the perpetrators must occur in public places, rather, it is sufficient if the feelings of the offender can be heard by the public /general public or the actions of the offender can be seen by the public.¹⁷

4. Get out a feeling or do something.

In this case, the prohibited behavior in Article 156a of the Criminal Code can be carried out by the perpetrators either verbally, in writing or by action.

5. Hostile and abuse or blasphemy of a religion that is adopted in Indonesia.

The religion referred to in Article 156a of the Criminal Code is as explicitly stated in Law Number 1/PNPS of 1965, namely Muslims, Christians, Catholics, Hindus, Buddhists and Confucius.

Regarding which feelings or acts may be viewed as acts or acts of hostility, abuse, or blasphemy of a religion adopted in Indonesia, the law does not appear to provide an explanation and it is likely that the legislature has allowed the judges to interpret free of any feelings or acts that are considered hostile, abusive or defamatory to any religion adopted in Indonesia.¹⁸

In Juhaya and Syihabudin's opinion that the phrase "blasphemy of a religion" is interpreted as a direct desecration of religion, both oral and written, regardless of whether it will endanger public order or not.¹⁹

So it can be concluded that the blasphemy sentence is a sentence that contains insulting meanings denouncing religion both verbally and in action.

Penal code in the Criminal Code are actually reactive in an action, while sanctions are more anticipatory action against the perpetrators of these acts.²⁰

¹⁶ Drs. P.A.F Lamintang, S.H, *Hukum Penitensier Indonesia*, (Jakarta: PT. Sinar Grafika, 2012), p. 301.

¹⁷ Drs. P.A.F Lamintang, S.H, *Delik-Delik Khusus Kejahatan Terhadap Kepentingan Hukum Negara*, (Jakarta: PT. Sinar Grafika, 2010), p. 464.

¹⁸ Drs. P.A.F Lamintang, S.H, *Delik-Delik Khusus Kejahatan Terhadap Kepentingan Hukum Negara*, p. 479.

¹⁹ Juhaya S.Praja, *Delik-Delik Agama Dalam Hukum Pidana di Indonesia*, (Bandung: Angkasa, 1982) p. 72.

Achmad Arif, Haerul Akmal and Muhammad Imam Subagja

According to Alf Ross penal codes are sanctions that must meet two conditions/objectives. First, the criminal is subject to the imposition of suffering on the person concerned. Second, the criminal must constitute a statement of denunciation of the perpetrator in question. Second, the crime must be a statement of denial of the perpetrators' repentance.²¹

The formulation of penal code in the Criminal Code generally uses two choices, for example imprisonment or fines (alternative systems). If viewed from the standpoint of nature, penalties are a legal consequence of violation of a rule, the sentence imposed due to violation of a norm by someone.

Regarding the rules on blasphemy, the penalty imposed is imprisonment as a criminal sanction by making the offender suffer, the blasphemy penalty is regulated in Article 2 of Law Number 1/PNPS/1965 jo Law No. 5/1965 and article 156a of the Criminal Code, Article 2 of Law Number 1/PNPS/1965 mentions:

paragraph (1):

"Anyone who violates the provisions in Article 1 is given an order and a strong warning to stop the act in a joint decision of the Minister of Religion, Minister/Attorney General and the Minister of the Interior".

paragraph (2):

"If the violation referred to in paragraph (1) is carried out by an organization or some type of belief, then the President of the Republic of Indonesia can dissolve the organization and declare the organization or flow as a prohibited organization or sect, one after the President receives consideration from the Minister of Religion, Minister / Attorney General and Minister of Foreign Affairs."

paragraph (3):

"If after an action is taken by the Minister of Religion together with the Minister / Attorney General and the Minister of the Interior or by the President of the Republic of Indonesia according to the provisions of Article 2 against people, organizations or beliefs, they still continue to violate the provisions in Article 1, then people, adherents, members and or members of the management of the organization concerned from that sect are sentenced to prison for up to five years."

Paragraph 4 is stated in the Criminal Code in a new Article, namely Article 156a which reads:

²⁰ M Solehuddin, *Sistem Sanksi dalam Hukum Pidana*, (Jakarta: PT. Raja Grafindo Persada, 2003), p. 32.

²³ M Solehuddin, *Sistem Sanksi dalam Hukum Pidana*, p. 141.

Analysis of Judge Decision Related to Penal Code Against Blasphemy Perpetrator

"Convicted with imprisonment for up to five years, whoever deliberately publicly issues or acts:

- a. Which is basically hostility, abuse or blasphemy of a religion that is embraced in Indonesia.
- b. With the intention that people do not embrace any religion that is based on Godhead ".

The imprisonment is imposed if the suspect has been proven legally and convincingly and decided by the court with a maximum threat of five years in prison, said to be maximum, meaning that the number of criminal offenses for blasphemy in the Criminal Code is five years in prison or even a minimum sentence can be given.

CONCLUSION

Based on the description and analysis that has been stated in previous chapters, the research results can be concluded as follows: According to Islamic criminal law, the penalty for blasphemy while the perpetrator is moslem is the death penalty as it was *jarimahhadd* for playing the religion of Allah. In the other hand the penalty given to the non-moslem perpetrators of blasphemy in the view of Islamic law is the penalty given to *jarimahta'zir*, which the judge has the full power to provide criminal sanctions against the perpetrators according to the impact of what has been done. The penalties given in *ta'zir* are as follows: Death Penalty, Caning, Imprisonment, Isolation, Penalty for fines or compensation.

Indonesia has banned religious blasphemy in its Criminal Code. Article 156 (a) targets any person who deliberately publicly expresses feelings or commits acts of hostility, abuse or defamation of a religion that is held in Indonesia or with the intention that people do not adhere to any religion. Violations of Article 156 (a) are sentenced to prison for up to five years.

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Achmad Arif, Haerul Akmal and Muhammad Imam Subagja

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