

RESTORATIVE JUSTICE ON BLASPHEMY CASES: OVERVIEW OF THE PROSECUTORS ROLE AND LEGAL REFORM oleh Rd M IKHSAN dkk

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RESTORATIVE JUSTICE ON BLASPHEMY CASES: OVERVIEW OF THE PROSECUTORS ROLE AND LEGAL REFORM

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ABSTRACT

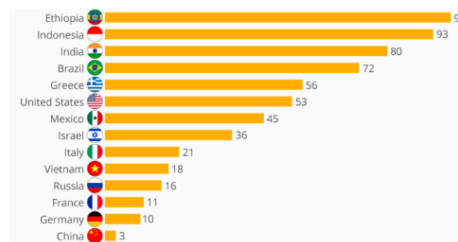
The absence of a clear definition and limitation of blasphemy can threaten justice in law enforcement in Indonesia. This has an impact on the process of resolving the blasphemy cases. Thus, the settlement of the penal or the courts in the settlement of blasphemy cases is considered ineffective. Based on that background, the problems that will be raised in this research are: How is the criminal law reform related to blasphemy in Indonesia based on the concept of restorative justice? How can the Prosecutor's Office play a role in the reformulation of blasphemy based on the concept of restorative justice? This study uses a descriptive normative research method with a qualitative approach. The research approach used is the statutory approach. The results of the study show that law enforcement in blasphemy tends to lead to pros and cons. This is due to problems with the regulation of blasphemy in Indonesia. There is no concrete definition of blasphemy and limitation on blasphemy in various laws in Indonesia. Therefore, there is a need for reformulation of blasphemy in Indonesia, one of which is through non-penal ways based on the concept of restorative justice by Law Enforcement Officials in Indonesia, one of which is the Prosecutor's Office. The reformulation is by: reforming legal regulations and provisions in the National Criminal Code and Draft of Criminal Procedure (RKUHAP); reformulation of administrative sanctions; and reformulation through penal mediation.

Keywords: Blasphemy, Prosecutor's Office, Restorative Justice.

Introduction

Indonesia is known as a multicultural country with a wealth of tribes, religions and races.¹ These multiculturalities are protected by the government and Indonesian law, including religious aspects which are protected in Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD 1945).² In the UUD 1945, religion is recognized as a human right which is regulated in Article 28 E and Article 29.³ Various religions such as Islam, Catholic Christianity, Protestantism, Hinduism, Buddhism and Confucianism are growing in Indonesia and are recognized by the government.⁴ The position of religion in Indonesia is one of the important aspects in people's lives, this can be seen from Figure 1 below:

Figure 1. Percentage of world countries that consider religion is important⁵



From Figure 1 can be seen that Indonesia ranks as the second largest in the world whose people state that religion is an important aspect in their lives. Basically every religion around the world has different beliefs. However, these differences can lead to a dangerous conflict if not handled properly.⁶ One type of religious conflict that often occurs in Indonesia is blasphemy. Based on data from the Setara Institute, cases of religious blasphemy in the period 1965-2017 continued to increase.⁷ This can be seen from the graph of Figure 2 below:

¹ Gina Lestari, "Bhinneka Tunggal Ika: Khasanah Multikultural Indonesia di Tengah Kehidupan SARA", *Jurnal Pendidikan Pancasila dan Kewarganegaraan*, Vol. 28 No. 1, 2015, p. 31

² Budiyono, "Hubungan Negara dan Agama Dalam Negara Pancasila", *Fiat Justitia: Jurnal Ilmu Hukum*, Vol. 8 No. 3, 2014, p. 411.

³ Budiyono, "POLITIK HUKUMKEBEBASAN BERAGAMA DAN BERKEPERCAYAANDI INDONESIA", *Yustisia* 2, 2 (2013): 108-119, 108.

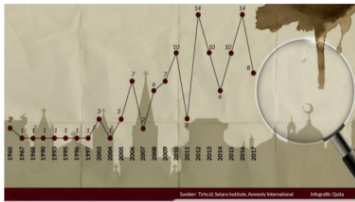
⁴ Khotimah, "Agama dan Civil Society", *Jurnal Ushuluddin* 21, 1 (2014): 121-132, 122.

⁵ <https://www.statista.com/chart/4189/which-nationalities-consider-religion-most-important/>, accessed on 14 July 2022.

⁶ Inayatul Ulya, "Pendidikan Islam Multikultural Sebagai Resolusi Konflik Agama di Indonesia", *Fikrah: Jurnal Ilmu Aqidah dan Studi Keagamaan*, Vol. 4 No. 1, 2016, p. 22.

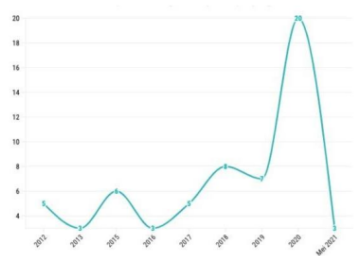
⁷ Muhammad Dahri, "Tindak Pidana Penodaan Agama di Indonesia: Tinjauan Pengaturan Perundang-Undangan dan Konsep Hukum

Figure 2: Graph of Blasphemy in Indonesia 1965-2017⁸



From Figure 2 below, it can be seen that cases of blasphemy in Indonesia have often increased since 1965-2017. Meanwhile, from 2017 to 2021 cases of blasphemy in Indonesia have also often experienced an increase as can be seen from Figure 3 below.

Figure 3: Graph of Blasphemy in Indonesia 2012-2021⁹



Islam", *AT-TAFAHUM: Journal of Islamic Law*, Vol. 1 No. 2, 2017, p. 57.

⁸ <https://tirto.id>, accessed on 14 July 2022.

⁹ <https://kumparan.com>, accessed on 14 July 2022.

¹⁰ Asfinawati, Muhammad Isnur, Febi Yonesta, *Factsheet Penodaan Agama*, Jakarta: Yayasan

From Figure 3 proves that cases of blasphemy are vulnerable in Indonesia, with the number of cases increasing every year. From these data, it can be seen that religion in Indonesia is an important aspect, but cases of blasphemy of religion often occur in Indonesia and even increase every year. So that related to this, it can be questioned how the legal arrangements related to blasphemy in Indonesia have been running so far.

Basically the legal regulations governing blasphemy are Articles 156, and Law No. 1/PNPS/1965 concerning the Abuse and/or Blasphemy of Religion or the Law on Prevention of Blasphemy. However, there is nothing in the regulation that specifically defines the elements of blasphemy, and acts such as what is said to be blasphemy. This often raises debates among various legal experts.¹⁰ Even the Jakarta Legal Aid Institute (LBH) states Article 156a of the Criminal Code and Law no. 1/PNPS/1965 is too flexible because the formula is not clear.¹¹ In addition, based on the fact sheet written by Asfinawati,

Lembaga Bantuan Hukum Indonesia (YLBHI), 2018, p. 57

¹¹ Nurkholis Hidayat, Muhammad Isnur dan Febi Yonesta, *Peradilan Kasus-Kasus Kebebasan Beragama dan Berkeyakinan, Rangkuman 8 Studi Kasus: Dampak, Pencapaian, Hambatan dan Strategi*, LBH Jakarta, 2011, p. 8.

Muhammad Isnur and Febi Yonesta, they state that there are no definitions, explanations, meanings, and elements of blasphemy in the legal regulations. Whereas it is known in criminal law known as the principle of legality which an law should be clear and no analogies may be made. Unclear definitions result in multiple interpretations, rubber and a very high possibility of arbitrary punishment.¹² Based on the explanation above, it can be observed that the legal policy on blasphemy has several problems in the regulation of the blasphemy law.

Various legal problems in the settlement of blasphemy can cause various pro and con reactions from the Indonesian people. The settlement of acts of blasphemy often lead to actions, both peaceful and violent.¹³ One example of the resolution of a blasphemy case that led to violence is the Saleh case of the October 10, 1996 riot in Situbondo.¹⁴ The case was initiated by Saleh who was reported for blasphemy against Islam which led to a riot that

resulted in 5 deaths and damage to 34 churches.¹⁵ While an example of a form of peaceful action in the settlement of blasphemy is the Ahok 2016 case. Ahok or Basuki Tjahaja Purnama was charged with blasphemy against Islam, the case rises several Islamic Defending Peace Actions in various regions. These actions include Action 14 October 2016, Action 411, and Action 212. These actions basically demand the same thing, namely the fair enforcement of the law against Ahok who is considered committed blasphemy.¹⁶

Thus, the settlement of the court or penalty in blasphemy is considered not effective enough. So that there is a need for reformulation of criminal law enforcement against blasphemy through out-of-court or non-penal. Basically the problem solving method can be taken through two paths, namely the solution with the penal and non-penal. But in fact, if there is a problem, especially those related to criminal law (criminal cases), the method of solving the problem is

¹² *Ibid.*

¹³ Lola Amelia, Arfianto Purbolaksono, Muhammad Reza Hermanto, Zihan Syahayani, *Indonesia 2016*, Jakarta: The Indonesia Institute Center for Public Policy Research, 2016, p. 34.

¹⁴ Carluna Ixhi Carmin, "Kerusuhan 10 Oktober Tahun 1996 Situbondo", *AVATARA, e-Journal Pendidikan Sejarah*, Vol. 6, No. 1, 2018, p. 134.

¹⁵ Uli Parulian Sihombing, Pulton, Siti Aminah, Muhammad Khoirul Roziqin, *KETIDAKADILAN DALAM BERIMAN Hasil Monitoring Kasus-Kasus Penodaan Agama dan Ujaran Kebencian atas Dasar Agama di Indonesia*, Jakarta: The Indonesia Legal Resources Center (ILRC), 2012, p. 21.

¹⁶ *Ibid.*, p. 33.

always done using the penal way.¹⁷ So that the settlement of non-penal crimes can be an alternative solution when the existing law actually experiences criticism and contra from various parties.

So that in responding to various problems in the settlement of blasphemy in criminal law reform, an alternative has now emerged, namely through a non-penal settlement with the concept of restorative justice.¹⁸ The use of the concept of restorative justice in the settlement of criminal cases has also become the focus of Indonesian law enforcement officials today, including the Prosecutor's Office. As it is known that the Prosecutor's Office is one of the law enforcement agencies in Indonesia¹⁹ which has also focused on law enforcement based on the concept of restorative justice. This can be seen with the issuance of the Indonesian Prosecutor's Office Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative

Justice.²⁰ Thus, in this case the Prosecutor's Office has an important role in resolving blasphemy based on the concept of restorative justice.

Behind the many issues and problems that exist in the settlement of blasphemy, this research will attempt to provide reformulation of criminal law policies in the settlement of blasphemy that creates a sense of justice in society based on the value of restorative justice. This research is different from other research because in this study it will provide the idea of reformulation involving the Prosecutor's Office as one of the law enforcement agencies that play an active role in resolving criminal cases using the concept of restorative justice. Based on that background, the problems that will be raised in this research are: How is the criminal law reform related to blasphemy in Indonesia based on the concept of restorative justice? How can the Prosecutor's Office play a role in the reformulation of

¹⁷ Kristian & Christine Tanuwijaya, "Penyelesaian Perkara Pidana Dengan Konsep Keadilan Restoratif (*Restorative Justice*) Dalam Sistem Peradilan Pidana Terpadu Di Indonesia", *Jurnal Mimbar Justitia*, Vol. I No. 02 2015, p. 592.

¹⁸ David B. Wilson, Ajima Olaghere, Catherine S. Kimbrell, *Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis*, USA: U.S Department of Justice Office of Justice Programs Office of Juvenile Justice and

Delinquency Prevention Grant, 2017, p. 13.

¹⁹ Sanyoto, "PENEGAKAN HUKUM DI INDONESIA", *Jurnal Dinamika Hukum* 8, No. 3 (2008): 199-204, 199.

²⁰ Cholida Hanum, "PROSPEK KEADILAN RESTORATIF DALAM PERATURAN PERUNDANG-UNDANGAN DI INDONESIA", *VERITAS: Jurnal Program Pascasarjana Ilmu Hukum* 7, No. 1 (2021): 1-18, 15.

blasphemy based on the concept of restorative justice? This study uses descriptive normative research method with a qualitative approach and the research approach used is the statutory approach.

Discussion

1. Criminal Law Reform Related to Blasphemy in Indonesia Based on the Concept of Restorative Justice

Basically, the legal provisions related to blasphemy are regulated in Article 156 of the Criminal Code and Law No. 1/PNPS/1965 concerning the Abuse and/or Blasphemy of Religion or the Law on Prevention of Blasphemy. However, Article 156a of the Criminal Code which in practice is often referred to as the "rubber article".²¹ This is because, in Article 156a of the Criminal Code, it is not sufficient to explain in detail what actions are intended or categorized as hostile, abuse and blasphemy against religion. Even after looking at the explanation section in the

Criminal Code, there is no clear explanation of the meaning of these elements. This element has caused controversy, what is classified as hostility, abuse, or blasphemy against a religion is considered multiple interpretations. The multi-interpretation of this element is because it does not meet the principle of legal legality.²² An unclear formulation will only create legal uncertainty and hinder prosecution in criminal law, because through this unclear formulation, the public can always defend themselves.²³

In addition to the Law on the Prevention of Blasphemy, there is a view that the regulation is unconstitutional or contrary to human rights. Based on it does not meet the formal requirements of legislation because it was formed during the Guided Democracy period so it must be declared invalid. The reason is because the Law on Prevention of Blasphemy was formed during the revolution which not in accordance with the 1945 Constitution. Then the law was considered to cause discrimination

²¹ Muhammad Farid, Gunawan Jatmiko, Damanhuri W. N, "Kebijakan Kriminalisasi Terhadap Tindak Pidana Penodaan Agama Dalam Perspektif Ham", *POENALE: Jurnal Bagian Hukum Pidana*, Vol. 3 No. 4, 2015, p. 3.

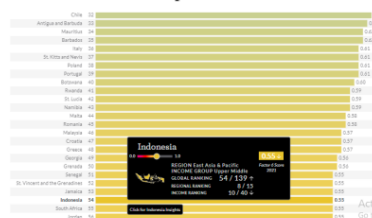
²² Uli Parulian Sihombing, Pulton, Siti Aminah, Muhammad Khoirul Roziqin, *Ketidakadilan Dalam Beriman Hasil Monitoring Kasus-Kasus Penodaan*

Agama dan Ujaran Kebencian atas Dasar Agama di Indonesia, Jakarta: The Indonesia Legal Resources Center (ILRC), 2012, p. 65.

²³ Jan Rummelink, *Hukum Pidana: Komentar Atas Pasal-pasal Terpenting dari Kitab Undang-undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, Jakarta: Gramedia, 2003, p. 358.

because of restrictions on a number of religions recognized by the state.²⁴ This problem in law enforcement against blasphemy also has an impact on Indonesia's law enforcement index at the global level, which makes Indonesia's law enforcement score lower than other countries in the world. This can be seen from Figure 4 below.

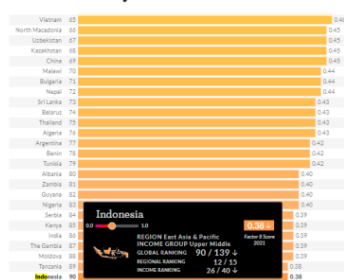
Figure 4. Indonesia Law Enforcement Index in Global Scope²⁵



Based on Figure 4, it can be seen that Indonesia ranks 54th out of 139 countries in the world in law enforcement index with a score of 5.5. The score is the same as other countries such as South Africa and Jordan. However, this score is below other African countries such as Mauritius,

Botswana, Rwanda, Namibia, and even Indonesia's neighboring countries such as Malaysia and Singapore have higher scores than Indonesia. For example, Malaysia is in 46th place with a score of 0.57 and Singapore is ranked fourth with a score of 0.86. These rankings and scores indicate that law enforcement in Indonesia that has been running so far has not been optimal when compared to law enforcement in other countries in the world. The law enforcement score is directly proportional to the low score of the criminal justice index in Indonesia globally which can be seen in the following figure:

Figure 5. Indonesian Criminal Justice Index Globally²⁶



²⁴ Mudzakir, *Penulisan Kerangka Ilmiah Perencanaan Pembangunan Hukum Nasional Tindak Pidana Terhadap Agama Dalam Kitab Undang-Undang Pidana (KUHP) Dan Undang-Undang Nomor 1/PNPS/1965 Tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama (Kajian Terhadap Praktek Penegakan Hukum Dan Prospek Pengaturannya Dalam Hukum Positif Indonesia)*, Jakarta: Pusat Perencanaan Pembangunan Hukum Nasional

Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Hak Asasi Manusia, 2010, p. 27.

²⁵ <https://worldjusticeproject.org/rule-of-law-index/global/2021/Indonesia/Regulatory%20Enforcement/>, accessed on 14 July 2022.

²⁶ <https://worldjusticeproject.org/rule-of-law-index/global/2021/Indonesia/Criminal%20Justice/>, accessed on 14 July 2022.

Figure 5 shows that Indonesia's criminal justice scores and rankings are not better than Indonesia's law enforcement scores and indexes. Indonesian criminal justice ranks 90th out of 139 countries in the world with a score of 0.38. Indonesia's score and ranking is below African countries such as Malawi, Benin, Tunisia, Algeria, Zambia, Nigeria, Kenya, Gambia, Tanzania, even Indonesia's neighboring countries such as Vietnam, Thailand, Sri Lanka, Malaysia, Singapore, are in higher ranking than Indonesia. Thus, the index ranking of law enforcement and criminal justice in Indonesia shows that law enforcement in Indonesia still requires various improvements in various aspects so that criminal law reform is needed so that criminal law enforcement in Indonesia can run more optimally.

Based on the description above, it can be seen that there are various problems related to the regulation and enforcement of the blasphemy law. So that it can be said that the

implementation of the Blasphemy Law turns out to have pros and cons with criticism from various views which consider that this law is no longer effectively applied in today's social life. This Blasphemy Law often contains words that are not clear and difficult to define, so that it tends to be misunderstood and excessively applied.²⁷

Legal reform related to blasphemy is a non-negotiable thing to provide fair legal protection for all Indonesian people.²⁸ One form of criminal law reform is to settle cases through non-penal as a form of criminal law policy. Institute for Criminal Justice Reform or ICJR²⁹ views that the direction of reforming Indonesian criminal law in the future must be carried out with the following paradigms and approaches: (i) criminal law that protects human rights, civil liberties and democracy; (ii) fair and humane criminal law by strengthening due process and restorative justice; (iii) abolishing criminal acts and imprisonment for

²⁷ Oloan Siahaan, "KEBIJAKAN HUKUM PIDANA DALAM MENANGGULANGI TINDAK PIDANA PENISTAAN AGAMA DI INDONESIA (Studi Pada Kelompok Gafatar)", *Jurnal NESTOR Magister Hukum* 1, no. 1 (2017): 1-36, 6.

²⁸ Binsar Zaroha Ritonga, Y.A. Triana Ohoiwutun, "Tindak Pidana Penodaan Agama di

Indonesia (Kajian Kasus Syiah Sampang dan Gafatar Aceh)", *Interdisciplinary Journal On Law, Social Sciences and Humanities* 2, 1 (2021): 28-43, 41, doi: 10.19184/ijl.v1i2i1.21975.

²⁹ <https://icjr.or.id/about-us/>, accessed on 19 May 2020.

victimless crimes; and (iv) strengthening regulations on corporate criminal liability.³⁰

It is necessary to have the option of resolving cases of blasphemy through a non-penal route because the settlement through the penal route experiences various obstacles. On the one hand, the Public Prosecutor who often uses cumulative charges while still choosing Article 156a letter a of the Criminal Code, namely the perpetrators of blasphemy is sentenced to a maximum of 5 years in prison. But on the other hand, in its application it is often inversely proportional, namely judges who often impose criminal sanctions with light imprisonment, but there are also those who are sentenced to heavy crimes. This should have been understood first from the police investigators before applying the articles in the Criminal Code.³¹ Therefore, law enforcement officials or APH such as police, prosecutors and

judges currently prioritize the principle of restorative justice in law enforcement in Indonesia.³²

2. The Role of the Prosecutor's Office in the Reformulation of Blasphemy Based on the Concept of Restorative Justice

Settlement of criminal cases outside the court by the Prosecutor's Office needs to be done immediately. It is considered the current judicial practice, which is often rises negative public spotlight on the prosecution of criminal cases by the Prosecutor which is considered not to fulfill the public's sense of justice.³³ This can be seen from the various problems in law enforcement in cases of blasphemy as described previously. Therefore, in the future the Indonesian criminal justice system needs to implement a restorative justice mechanism, so that prosecutors no longer need to submit to court cases that

³⁰ Institute for Criminal Justice Reform (ICJR), "Ringkasan Eksekutif ICJR", p. 3. Diakses pada <http://icjr.or.id/wp-content/uploads/2019/11/Ringkasan-Eksekutif-Kertas-Kerja-Rekomendasi-Arah-Pembaruan-Kebijakan-Pidana.pdf>.

³¹ I Wayan Artana, "TINJAUAN YURIDIS SANKSI PIDANA TERHADAP PENISTAAN AGAMA", *Kerta Dyatmika* 14, no. 1 (2017): 1-10, <https://doi.org/10.46650/kd.14.1.538.%p>.

³² Henny Saida Flora, "KEADILAN RESTORATIF SEBAGAI ALTERNATIF DALAM PENYELESAIAN TINDAK PIDANA

DAN PENGARUHNYA DALAM SISTEM PERADILAN PIDANA DI INDONESIA", *UBELAJ* 3, No. 2 (2018): 142-158, 145.

³³ Forum Indonesia untuk Transparansi Anggaran (Seknas FITRA) & Indonesia Judicial Research Society (IJRS), *Laporan Penelitian Meningkatkan Kualitas Penanganan Perkara Melalui Penganggaran Berbasis Kinerja (BPK) di Kejaksaan RI Studi Kasus Di 6 Wilayah: Kejati DKI Jakarta, Kejati Jawa Timur, Kejati Kalimantan Barat, Kejati Maluku Utara, Kejati Sumatera Utara, dan Kejati Papua*, Jakarta: Indonesia Judicial Research Society, 2020, p. 66.

according to public justice are sufficient to be resolved out of court.

The application of restorative justice by the Prosecutor's Office is based on the Attorney General's Regulation or Perja Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. However, Perja Number 15 of 2020 has a weakness, namely the legal certainty contained in Article 5 paragraph (5), which states that for criminal acts paragraphs (3) and (4) do not apply in the event that there are casuistic conditions which according to the consideration of the Public Prosecutor with the approval of the Head The District Attorney's Branch or the Head of the District Attorney's Office cannot be stopped from prosecuting. While in this Perja, there is no information regarding the parameters used by the Public Prosecutor in deciding whether a criminal case is casuistic or not. So when referring to this article, the size of the case that can or cannot be terminated based on Restorative Justice is still uncertain. Therefore, Article 5 paragraph (5) can be a gap for problems and also multiple interpretations in the

application of criminal acts paragraphs (3) and (4).

Another weakness is that there is a time limit regulated in Article 9 paragraph (5) of Perja Number 15 of 2020 with a period of 14 days from the submission of the file so that the delay in stopping prosecution based on restorative justice is not optimal.³⁴ Therefore, it is necessary to have a complete regulation that guides the Prosecutor's Office in resolving cases based on the concept of restorative justice. The regulation explicitly states certain cases that use restorative justice. As stated in Article 30 paragraph (1) of the Prosecutor's Law, blasphemy is one of the powers of the Prosecutor's Office. So that it is necessary to reformulate the regulations that guide the Prosecutor's Office, it is necessary to regulate the prevention of blasphemy based on restorative justice. The reformulation can be done by:

a. Reformulation of Legal Regulations and Provisions Regarding Blasphemy

³⁴ Angela Claudia Scolastika Manurung, Made Sugi Hartono, Dewa Gede Sudika Mangku, "IMPLEMENTASI TENTANG PRINSIP RESTORATIVE JUSTICE DALAM PERKARA TINDAK PIDANA

PENGRUSAKAN (STUDI KASUS NO. PDM532/BLU/08/2020)", *e-Journal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum* 4, No. 2 (2021): 542-543, 552.

Conflicts or crimes based on religious issues in a legal (criminal) perspective have fundamental problems, namely in the formulation of criminal law laws which are part of criminal law politics.³⁵ Criminal law policy or criminal law politics is a strong foundation in building article construction that favors diversity and does not take away the ideals of democracy. It is time for articles that have the potential to conflict with human rights values need to be evaluated and reformulated.³⁶ So it is necessary to have a criminal law policy in the reformulation of regulations related to blasphemy by containing clear definitions and limitation on blasphemy with consideration of the interests of freedom of expression in Indonesian law (*lex certa dan lex scripta*).

Reformulation can be carried out on regulations regarding blasphemy, such as Article 156a of the Criminal Code and the Law on the Prevention of Blasphemy of Religion which has been the main source of law in the settlement

of blasphemy. Reformulation or revision of the provisions on blasphemy must ensure the legality of blasphemy by providing clarity on the intent of prohibited acts, including clarity on their elements. In addition to reformulation, it is necessary to have a reinterpretation to provide confirmation on how to understand the intent of 156a letter a of the Criminal Code, as well as provide an explanation of the elements in the article.³⁷

As for changes to legal provisions related to blasphemy, it has been regulated in the Law No. 1 of 2023 concerning Criminal Code or National Criminal Code. However, in the formulation of Article 156a of the Criminal Code and Article 304 of the Draft Criminal Code, there are no substantial differences regarding the elements of the criminal act of blasphemy. In addition, the two articles do not formulate the forms of acts of insulting religion in a limited manner.³⁸ What kinds of actions should constitute an "insult to religion"? can the

³⁵ Sudarto, *Hukum dan Hukum Pidana*, Bandung: Alumni, 1981, p.159.

³⁶ Dian Andriasari, "Kritik Terhadap Penerapan Pasal 156a KUHP Ditinjau Dari Perspektif Kehidupan Demokrasi di Indonesia", *VeJ*, Vol. 3 No. 2, 2017, p. 296.

³⁷ Arsil, Dian Rositawati, Muhammad Tanziel Aziezi, Nur Syarifah, Zainal Abidin, *Penafsiran terhadap*

Pasal 156a Kitab Undang-Undang Hukum Pidana tentang Penodaan Agama (Analisis Hukum dan Hak Asasi Manusia), Jakarta: Indonesian Institute the Independent Judiciary Lembaga Kajian dan Advokasi Independensi Peradilan (LeIP), 2018, hlm. 116.

³⁸ *Ibid.*, hlm. 16.

category/criteria be made? What is the difference between the terms insults, blasphemy, and blasphemy in cases related to religion?³⁹ Therefore, the formulation in the National Criminal Code related to blasphemy is also required to be refined.

However, regarding the settlement of blasphemy cases through restorative justice, it has basically become a discussion in improving the National Criminal Code. At the General Hearing Meeting of Commission III DPR-RI with the Heads of BPHN, PBNU, Muhammadiyah, KWI, PGI, PUBI, PHDI and Prof. Dr. Frans Magnis Suseno in the context of discussing the National Criminal Code Related to Reporting Blasphemy of Religion, has agreed that blasphemy is only reported by religious institutions and not individuals can be approved for mediation before proceeding to court.⁴⁰ As is known, the mediation process is a form of restorative justice.

Thus, if restorative justice efforts have been drafted in the National Criminal Code, then related to the law enforcement process that will involve

law enforcement officers. It is also necessary to reformulate the Criminal Procedure Code or the Criminal Procedure Code. There is a need for provisions of the Criminal Procedure Code that regulate the legal process for law enforcement officers in implementing restorative justice efforts including the mediation process. So that in terms of the RKUHAP it regulates the Prosecutor's process of law enforcement efforts through restorative justice in every case, including cases of blasphemy.

b. Reformulation Through Administrative Sanctions

Basically, the concept of law enforcement against blasphemy through administrative sanctions has been regulated in Article 2 of the Law on Prevention of Blasphemy of Religion, namely by warning and disbanding teachings or organizations that are considered deviant from religion. However, what happens in its implementation is that every person suspected of committing blasphemy is not given a warning in advance, but tends

³⁹ Laporan Singkat Rapat Dengar Pendapat Umum PANJA RUU KUHP Komisi III DPR-RI Dengan Kepala BPHN, PBNU, Muhammadiyah, KWI, PGI, PUBI, PHDI dan Prof. Dr. Frans Magnis Suseno Dalam Rangka Pembahasan

RUU Tentang Kitab Undang-Undang Hukum Pidana, 2017, diakses pada <https://www.dpr.go.id/dokakd/dokumen/RJ3-20190430-105446-9816.pdf>.

⁴⁰ *Ibid.*

to be directly brought to the court with a criminal process. Therefore, in this case, the Prosecutor's Office can play a role in reaffirming what has been regulated in Article 2 of the Law on the Prevention of Blasphemy of Religion by prioritizing administrative sanctions. So that the court ways is used as a last effort. The stages that can be carried out by the Prosecutor's Office based on the Law on Prevention of Blasphemy of Religion are:⁴¹

- 1) Stages of investigation carried out by adherents of the religion concerned, namely by religious leaders. If there is an allegation of blasphemy, it is reported to the Government in this case the Ministry of Religion and the Attorney General's Office of the Republic of Indonesia.
- 2) The government through the Supervisors of Beliefs (Ministry of Religion, Ministry of Home Affairs and the Attorney General's Office) conducts a study of the teachings contents or actions that are suspected of deviating or desecrating a religion, which can be concluded whether the teachings or actions are classified as blasphemy of religion or not.

3) Against teachings or actions that are classified as blasphemy, policies can be carried out:

- Conducting warnings and coaching gradually.
- Give a warning to return to the true religious teachings and disperse.
- Dissolution of religious groups that deviate from the teachings of their religion and prohibit them.
- If the dissolution and prohibition are ignored, then the next step is to take action through a criminal process to be submitted to the court.
- The action of the criminal court process is the last alternative if through persuasive policies and the imposition of administrative sanctions is ineffective or does not want to stop its activities, then the imposition of criminal sanctions is used. The use of criminal law as an ultimatum remedium against crimes against religion.

c. Reformulation Through Penal Mediation

⁴¹ Mudzakir, *Op.Cit.*, p. 119.

Based on Article 1 point 3 of the Prosecutor's Law, it stipulates that prosecution is the authority of the Prosecutor's Office, while related to prosecution by the Prosecutor's Office based on restorative justice. It is regulated in Article 2 of the Regulation of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020.⁴² On a practical level, factually penal mediation with a restorative justice approach has been used as a reference in the settlement of various criminal cases in Indonesia. Based on data from the Attorney General's Office, as conveyed by the Attorney General, as of August 1, 2021, there were 304 criminal cases that had been successfully resolved with restorative justice. According to the Attorney General, criminal acts that dominate settlements through penal mediation and restorative justice are crimes of persecution, crimes of theft, and crimes in the field of traffic.⁴³ So that in the case of blasphemy, the Prosecutor

can also resolve it through penal mediation.

Penal Mediation is the settlement of criminal cases through deliberation with the help of a neutral mediator, attended by victims and perpetrators along with their parents and community representatives, with the aim of recovering for victims, perpetrators, and the community.⁴⁴ The settlement of blasphemy through penal mediation can be used as an alternative non-penal solution because in this concept the perpetrator is required to be responsible for what he did. This is like the concept of restorative justice or penal mediation which emphasizes the importance of the role of victims and community members to encourage perpetrators to be responsible to victims, restore emotional and material losses to victims, encourage dialogue or negotiations to resolve problems that have occurred so as to save the community from prolonged conflict.⁴⁵ So that the perpetrators of

⁴² Maria Angelina, Edi Setiadi, "Penerapan Restorative Justice dalam Perkara Tindak Pidana Kecelakaan Lalu Lintas Dihubungkan dengan Peraturan Jaksa Agung No 15 Tahun 2020 tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif", *Prosiding Ilmu Hukum Seminar Penelitian Sivitas Akademika Unisba* 7, no. 1 (2021): 305-310, 307, <http://dx.doi.org/10.29313/v7i1.25039>.

⁴³ I Wayan Didik Prayoga, I Ketut Rai Setiabudi, "Relevansi Mediasi Penal di Indonesia dalam

Perspektif Pembaharuan Hukum Pidana", *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 4 (2021): 841-856, 843.

⁴⁴ DS. Dewi dan Fatahillah A. Syukur, *Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia*, Depok: Indie-Publishing, 2011, p. 86.

⁴⁵ Joshua, Dressler, *Encyclopedia of Crime and Justice: Abortion-Cruel & Unusual Punishment (Volume 1)*, New York: Gale Group Thomson Learning, 2002, p. 1333.

blasphemy can be held responsible for the mistakes that having made because disturbed religious people.

The draft KUHAP has explained the provisions related to penal mediation at the investigation level.⁴⁶ However, penal mediation can also be carried out at the prosecution level or at a court hearing with considerations of legal certainty, legal benefits and legal justice. In this case, penal mediation at the prosecution stage, which is the authority of the Prosecutor's Office, is based on the principle of opportunity, which gives the prosecutor the authority to set aside the case, even though there is sufficient evidence, for the public interest, with or without condition.⁴⁷ The penal mediation at the stage of prosecuting blasphemy cases can be carried out with a mechanism after the transfer from the investigator to the public prosecutor. At this stage the public prosecutor should not directly forward the crime to the court but encourage the parties to make peace. Or the public prosecutor can immediately stop the prosecution if there has been a settlement outside the process

of the criminal justice system. So that in this case the Prosecutor's Office becomes the facilitator and mediator, and stops the prosecution process.⁴⁸

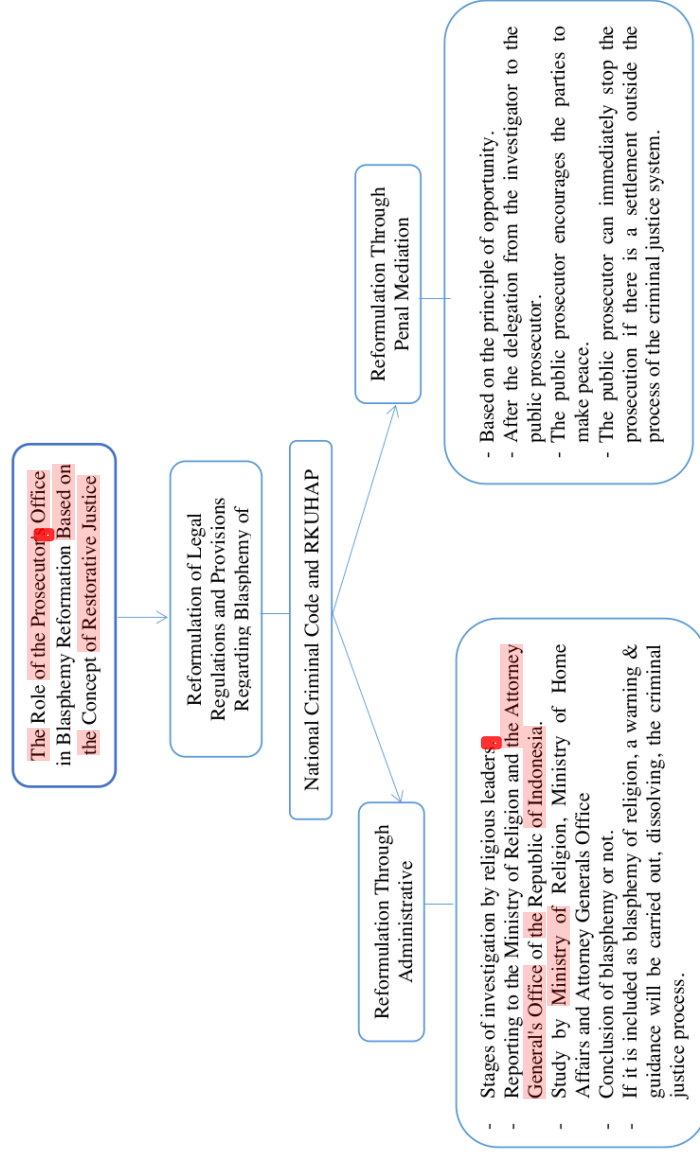
Thus, the reformulation of blasphemy based on the concept of restorative justice by involving the role of the Prosecutor's Office can be illustrated by chart below:

⁴⁶ Sahuri Lasmadi, "Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia", *Jurnal Universitas Jambi*, 2011, p. 6.

⁴⁷ Andi Hamzah, *Terminologi Hukum Pidana*, Jakarta: Sinar Grafika, p. 14.

⁴⁸ Rudini Hasyim Rado, Barda Nawawi Arief, Eko Soponyono, "Kebijakan Mediasi Penal Terhadap Penyelesaian Konflik Sara diKepulauan Kei Dalam Upaya Pembaharuan Hukum Pidana Nasional", *Jurnal Law Reform*, Vol. 12 No. 2, 2016, p. 274.

Blasphemy reformulation chart based on the concept of restorative justice involving the role of the Prosecutor's Office



D. CONCLUSION

There are problems with the blasphemy regulation in Indonesia which is regulated in the Law on Prevention of Blasphemy of Religion and the punishment of perpetrators of blasphemy often uses Article 156a of the Criminal Code. There is no concrete definition of blasphemy and the limitations of blasphemy in various laws in Indonesia, but perpetrators of blasphemy are always punished under Article 156a of the Criminal Code. Therefore, it is necessary to reform the criminal law against blasphemy in Indonesia. One form of criminal law reform is to settle cases through non-penal based on the concept of restorative justice. Basically, restorative justice is being developed by law enforcement officials in Indonesia, including the Attorney General's Office. However, the legal provisions related to the application of restorative justice in cases of blasphemy have not been regulated in Indonesian law. So that it is necessary to reformulate the legal regulations related to blasphemy based on the concept of restorative

justice. The Prosecutor's Office has an important role in the reformulation of blasphemy based on the concept of restorative justice. The reformulation can be initiated by reformulating the legal regulations and provisions in the National Criminal Code and RKUHAP. Then, in the National Criminal Code and RKUHAP, there are provisions that explain the enforcement of the blasphemy law by the Prosecutor's Office which prioritizes the enforcement of the blasphemy law through a non-penal restorative justice system. The formulation can be reformulated through the reformulation of administrative sanctions and reformulation through penal mediation.

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