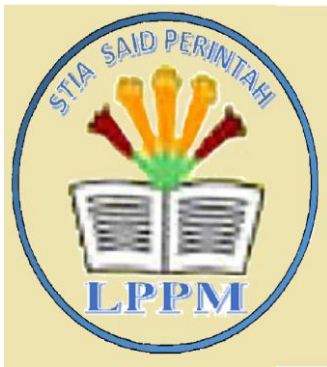


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Abstract

Although freedom about religion has been guaranteed in Pancasila and the 1945 Constitution, in reality problems in society related to religion still occur, such as insults, degrading the beliefs of a group to problems related to the place of worship of a religion. The constitution, which guarantees freedom of expression, is widely abused so that there are unlawful acts, one of which is blasphemy. Judges with free and independent judicial power or the principle of freedom of judges, play an important role in realizing justice for society. However, the disparity of punishment in blasphemy cases has caused controversy about the freedom of judges who are considered not to meet the sense of justice of society.

The focus of this study is on the disparity of punishment in blasphemy cases that go viral on social media. This is a descriptive research with a normative legal approach method (normative juridical) carried out by means of a literature study. The data collection tool used in this study is data in the form of document studies and literature tracing. The analytical knife in research is legislation, legal Grand Theory such as evidentiary theory and legal principles such as the principle of Equality before the Law, the Principle of Fair Trial, the principle of freedom of judges, the principle of contante justitie, the principle of justice, certainty and expediency of law and the principle of Nemo Judex Idoneus In Propria Causa.

Based on the results of the study, it is understood that the principle of judge freedom is based on a negative evidentiary system, but with their beliefs and freedom, judges in deciding cases are often influenced by the judge's culture, namely the subjectivity of judges and the existence of intervention and intimidation which results in the disparity of punishment in blasphemy cases which is a fairly sensitive issue in Indonesia.

Keywords ; Disparity, Conviction, Blasphemy, Religion

Introduction

The issue of blasphemy has recently become a trending topic in Indonesia. This is not a new thing but because of the increasingly sophisticated technology and the increasingly massive flow of information, it makes people so quickly and easily access news related to blasphemy, so that blasphemy has become viral on social media and has become a trending topic. On the other hand, freedom of expression guaranteed by the law is often misused into unlawful acts, verbally attacking others, posting hate speech, slander, hoaxes and others that can damage people's image or kill the character of others.

One form of abuse of freedom expression is the criminal act of blasphemy, carrying out propaganda published on social media in the name of certain religious teachings that are multiplied as the most correct religious teachings and radically demonizing and insulting the teachings and symbols of other religions. These factors make the issue of blasphemy so viral and greatly affect the harmony in the diversity of Indonesian society.

According to research conducted by the Setara Institute, from 1965 to 2017, 97 cases of blasphemy were found in Indonesia. The Indonesian Legal Aid Foundation (YLBHI) noted that in 2020 until May, there were 38 cases of blasphemy (suakaonline.com). Some of the blasphemy allegations that have gone viral include blasphemy allegations made against Basuki Thajaja Purnama or Ahok, Paul Tzang, Saifuddin Ibrahim and M. Kace. Among the three viral blasphemy cases, until now only the blasphemy cases alleged against M. Kace have been processed by law and have been executed.

Indonesian law prohibits blasphemy, which is regulated in the criminal code article 156 a; that is, to criminalize those who are publicly upfront of issuing hostility, abuse or blasphemy towards a religion adhered to in Indonesia or with the intention of inciting someone not to adhere to a particular religion. There is also a Decree of President Ir. Soekarno, No. 1/PNPS/1965, concerning the prevention of abuse and or blasphemy. The use of technology and social media related to alleged acts of blasphemy also ensnared the suspects/defendants of blasphemy, under the ITE Law.

Head of the Public Information Bureau (Karo Penmas) public relations of the Police Headquarters, Brigadier General Ahmad Ramadhan said, for the time being, the case that ensnared Saifudin Ibrahim was related to the allegations in Article 45 paragraph (2) juncto Article 28 paragraph (2) of Law 19/2006 concerning ITE. And Article 156 of

the Criminal Code or Article 156 a of the Criminal Code, and Article 14 paragraph (1) paragraph (2), as well as Article 15 of Law 1/1946 on Criminal Law Regulations. These articles, concerning blasphemy against religion, hate speech based on ethnicity, religion, race and interfaith (Agus Yulianto dan Bambang Noroyono, 2022).

This legal umbrella is intended so that the Indonesian people can maintain a single diversity, uphold tolerance between religious people and be wiser in using freedom of expression and not be easily provoked, so that the life of the nation and state, especially life between religious people in Indonesia can take place harmoniously. However, in law enforcement, it must also be fair and not cut down on votes.

In the blasphemy case, which has recently gone viral on social media, it shows the phenomenon of disparity in criminal convictions or convictions of defendants. There are defendants who are sentenced to light sentences, there are also defendants who are sentenced to severe sentences, disparities that are far apart. One example of a disparity in punishment that can be presented in this study is the blasphemy case with the defendant M. Kace who was sentenced to 6 years in prison by the Bandung High Court, The verdict at the appeal level is what changes the verdict given in the court of first instance, namely PN Ciamis who sentenced M. Kaceto 10 years in prison. The sentence imposed on M. Kace, was much heavier than the sentence imposed on Yahya Waloni who was only sentenced to 5 months in prison by the South Jakarta district court, even though both committed acts against the same law, namely blasphemy and hate speech and both were subject to the same criminal article, but the verdicts imposed by the judge were very different.

The judge's verdict is strongly influenced by the principle of freedom of judges, where a judge in examining and deciding a case, is free in digging, following and understand the legal values that live in society, and be free from any outside influence that can change his beliefs about his sense of justice. Abdul Latif from the Faculty of Law, Universitas Muslim Indonesia-Makassar in his research said that, The right of justice seekers is to obtain a free and impartial judiciary (the principle of fair trial), to be treated equally with fellow justice seekers (the principle of equality before the law), and to obtain a verdict in a reasonable, simple time and low cost (principle of contante justitie), this is a basic need for everyseeker of justice (Abdul Latif, 2013).

The issue is, is it with the freedom of judges that result in disparities in sentencing that are in accordance with justice? Does not the impact of this disparity of punishment

actually cause polemics in society, because it is felt that there is no justice in the form of a disparity in punishment for a case with the same articles and with almost the same motives.

This is the reason why we conducted research that aims to analyze the problem of criminal disparity in blasphemy cases in Indonesia and then examine the problem by referring to the substance of the Criminal Articles and the legal principles related to this writing problem. This research also aims to provide scientific benefits theoretically and practically in order to enforce laws that are certain, fair and useful.

Theoretical Framework

Sentencing Disparities

The judicial system gives a privileged position to judges. The judge is in charge of examining the case, presiding over the proceedings and deciding the case based on valid and valid evidence. Behind the special position of the judge, it must be balanced with heavy responsibility. Judges are not only responsible to the law but also accountable to the community, even to God Almighty.

The responsibility of the judge is not just to preside over the trial but more than that, it is to strive for justice in deciding cases. The judge must be assured that his decision gives justice on the basis of the Almighty Godhead. Judges become central figures in law enforcement, because the duties and behavior of judges become a benchmark in law enforcement in courts. The responsibility of the judge to God Almighty, becomes an obligation that he must realize.

Bismar Siregar said that the duty of judges as law enforcers is in the framework of the Law as a tool of engineering, meaning that judges are required to formulate legal values that living in a society that is considered to be disruptive to the balance and deserves punishment, but in the provisions of the written law there are no rules governing it (Agus Maksum Mulyohadi, 2015). Law Number 48 of 2009 concerning Judicial Power states that the freedom of judges in exercising their judicial authority is not absolute. Justice upheld by the Judge must remain based on the corridors of values contained in Pancasila.

But in fact, it is not uncommon for verdicts to be born that are controversial in nature. Not infrequently, there is also a severe criminal conviction against a criminal offender, while another convict is sentenced to a light sentence or even released, even

though the article violated is the same. This difference is referred to as disparity. Criminal disparity is the application of unequal crimes to the same offence in practice in court. There are various factors underlying the onset of criminal disparities. The judicial ruling basically refers to the legal facts submitted by the public prosecutor in the form of an indictment. But basically, the occurrence of disparities is also determined by the attitudes, values, and personality of judges. In reality, the inner atmosphere has the influence of judges in taking legal interpretations, as an attempt to give a verdict on the case being handled.

Criminal disparities are inherently problematic in law enforcement. On the one hand, it is the freedom of judges in seeking justice, which is guaranteed by law, but on the other hand, it creates legal uncertainty, especially the dissatisfaction of the public or the litigants is very likely. What needs to be done, is a policy that can be used as a guide in criminal convictions so that the emergence of criminal disparities can be minimized.

It often happens that the Decision of the Judge is influenced by the extra intervention of the Judiciary, it can be in the form of pressures from individuals who have certain positions of power, or from certain groups that have the power and power of the masses, the presence of pressure in the form of "magic letters", and so on, which makes the judge uneasy and feel that it is in the freedom of judges to make decisions on a case.

Freedom of Expression

People often feel afraid to criticize the government or officials, especially on social media. Every time they hear a case of people being scooped up for violating the provisions of the ITE Law related to freedom of expression which is accused of being unlawful, it obviously gives people goosebumps. So that for some people, such fear is a phenomenon of freedom of expression that is threatened, even has an impact on the suspended animation of democratic life in a nation and state.

Constitution, the 1945 Constitution in Article 28E paragraph (3) of the 1945 Constitution "Everyone has the right to freedom of association, assembly and expression of opinion". Furthermore, Article 28 F of the 1945 Constitution

"Everyone has the right to communicate and obtain information in order to develop his personal and social environment, as well as the right to seek, obtain, possess, store, process and convey information using any kind of available channels".

This constitutional mandate, in line with Article 19 paragraph 2 of the International Covenant on Civil and Political Rights, which has been ratified by the Indonesian government." Everyone has the right to freedom of expression; this right includes the freedom to seek, receive and disseminate information and ideas of any kind, regardless of national borders, whether orally, in writing or in print, in the form of works of art, or through any other medium of its choice."

Freedom of expression is the right of everyone to seek, receive and disseminate information and ideas in any form, in any way. This includes oral expressions, printed or through audiovisual material, as well as cultural, artistic and political expressions. This right also relates to freedom of association, which is the right to form and join groups, associations, trade unions, or political parties of your choice, as well as freedom of peaceful assembly, such as participating in peaceful demonstrations or public gatherings. Freedom of expression also supports other human rights such as the right to freedom of thought, belief and religion.

The term freedom of expression dates back to the time of the Athenian Policy in Greece about 2400 years ago. The ancient Greeks pioneered the word "parrhesia" which means "freedom of speech" or "to speak frankly". However the type of freedom of expression at that time was actually still very limited and only applied to a small group of people in power. Later, the citizens of Athens developed the concept of freedom of expression for all citizens. Leaders, philosophers, scholars, artists, workers, and various other citizen groups used freedom of expression to develop knowledge and criticize polis government. This concept continued to be developed until it became the concept of freedom of expression we know today been fought for since the Dutch colonial era. Soewardi Soerjaningrat wrote the article *Als ik een Nederlander* (If I Were a Dutchman) in the newspaper *De Expres*. This paper contains criticism of the Dutch government's plan in 1913 to celebrate the 100th independence from the French colonies, and the residents of the Indies were forcibly charged for the celebration. Soewardi's writings were considered inflammatory. The Dutch silenced Soewardi's opinion by arresting and imprisoning him. A few months later, he was exiled to the Netherlands for 6 years. Freedom of expression continues to be fought by Indonesians, including when fighting for liberation from repressive and exploitative colonialism. Throughout 2020, many activists, journalists, academics, students and the public were silenced, intimidated, and criminalized while peacefully expressing their opinions.

Amnesty International, a social institution founded in 1961 until now, recorded at least 119 cases of violations of the right to freedom of expression using the ITE Law throughout 2020, the highest number in the last six years. In addition to criminalization with the ITE Law, in 2020 there were at least 60 cases of digital attacks and intimidation experienced by organizations, activists, journalists and academics as of November 30, 2020.

Civil liberties in Indonesia in 2020 also declined, even the worst since the last 10 years. Civil liberties are one of the indicators of the democracy index compiled by the Economist Intelligence Unit (EIU), covering freedom of expression, freedom of assembly and freedom of the press. From a score of 1-10, Indonesia's civil liberties fell to 5.59. If freedom of expression deteriorates, freedom of the press, freedom of thought, religion and belief, freedom of assembly, freedom of speech, right to privacy and our right to life could be threatened (www.amnesty.id, 2021).

Blasphemy

The trend of blasphemy appeared some time ago, at that time the condition of the Indonesian nation was quite hot, although it did not cause chaos and bloodshed, this hot atmosphere was very pronounced, even in remote villages also felt the atmosphere of Jakarta, there were mass demonstrations in large numbers and volumes. One of these things is caused by many factors, for example, differences in perceptions about Pancasila arise, so that the debate becomes widespread and unproductive. The emergence of political propaganda under the guise of religion, to various publications on social media content that insults and harasses and contains hate speech from one group against another group and here religion is used as a political tool. There were many news in various mass media related to the condition in question, which was colored by several Islamic defense actions driven by Habib Rizieq and his friends who demanded a blasphemy case alleged to Basuki Tjahaja Purnama or often referred to as Ahok, so that the political temperature was even hotter when approaching the DKI Regional Election.

On the one hand, there are groups that use religious sentiments in choosing leaders, because there are indeed orders or instructions in Scripture, while on the other hand there are groups that use the sentiment of "Diversity" as a form of weapon to silence political opponents. For Indonesians who are religious and tend to fanaticism, blasphemy or blasphemy against religious values or symbols, is a very sensitive issue

and prone to potential conflict. However, on the other hand, Indonesia as a country of law based on Pancasila still seeks to show the values of humanism and tolerance, one way is by still respecting and complying with applicable legal provisions.

Blasphemy is an act of insult, blasphemy or disrespect for holy figures, religious artifacts, customs and beliefs of a religion based solely on personal opinions or beyond its competence (mal of practice). In the original word, the word "blasphemy" comes from the Middle English word *blasfemen*, the Old French *blasfemer*, and the Late Latin *blasphemare* from the Greek *βλασφημέω*, which was formed from *βλασ*, "hurting" *δαμνήμη*, "speech, conversation, speech". Combined, these words mean *blasphemia*, which means "hurtful speech", and also *blasphemein* "speaking where hate exists" which also becomes a joke for blasphemy and blame. God which can be found in Ps. 74:18; Isa. 52:5; Rom. 2:24; Rev. 13:1, 6; 16:9, 11, 21. In addition, this word also represents something that is evil, speaks, or abuses something for the purpose of hurting, demeaning, and so on (1 Kings 21:10 LXX; Acts 13:45; 18:6, etc. - Wikipedia, 2021).

In some countries and in some cases, blasphemy regulations are enforced to limit the threat of acts or speech that attack adherents of the majority religion, as well as serve as a protection of religious beliefs for minority adherents. Although for some reason, the state can still have a regulation on blasphemy even though the country has completely banned blasphemy, it can be used to punish or allow those who feel humiliated to punish the perpetrator. This regulation may be retaliated and enforced for blasphemous acts, acts against norms, prohibiting a person from worshipping, religiously degrading behavior or also for hate speech.

Blasphemy comes from the word *nista*, which means low and despicable. Then to put it to rest is to despise or despise. The association of the word *nista* is the words *disgrace*, *reproach* and *stain*. Thus, the words *blasphemy* or *deseccration* actually have the same meaning, that is, the assumption that someone who shows something is low, despicable or tainted. As for these words, it is possible that they will come out of a person's mouth when in a state of anger and hatred. In Arabic, the term *al-istihzai* is known as the connotation of *sakhira* (harassing) with the content of harassment of the harassed party accompanied by *i'tiqad* (Akbar, 2019).

According to Koentjara Ningrat, Blasphemy is a combination of the words *blasphemy* and *religion*. Religion according to Koentjaraningrat is defined as a system

composed of four elements, namely; religious emotions, belief systems, rite systems and people or social unity, All these elements are interrelated and integrated as a whole. Meanwhile, the word Blasphemy according to the KBBI has the basic word *nistaw* which means insult, reproach or low so that blasphemy can be interpreted as insulting, harassment and demeaning. From the series of explanations above, it can be said that blasphemy is an attempt to demean, harass or demean something which is believed to be the principle of one's belief either in the form of speech or deed.

The definition of blasphemy in the Criminal Code is not clearly explained. According to J.C.T. Simorangkir, the meaning of blasphemy is a deliberate attack on the good name and honor of another person or a group either oral or written with the aim of being known by the wider community (J.C.T. Simorangkir, 1995).

Meanwhile Arief Barda Nawawi, (2010) said that criminal activities related to religion can be divided into 3 (three) criteria, namely;

1. Criminal acts according to religion, that is, covering everything that is prohibited according to religion, although state law does not classify such acts as prohibited acts. In this case it is generally described in the scriptures of his religion. Such as killing, adultery, or stealing.
2. Criminal acts against religion, which include acts and / or utterances that intersect or aim to degrade the Majesty and glory of God, The Word and Its Nature, Prophets/Apostles, religious activities, Religious Institutions, Scriptures, places of worship and so on.
3. Criminal acts related to religion or religious life, namely including all speech or deeds that can disturb the tranquility and comfort of the individual or group in carrying out their religious activities.

In order to create a sense of comfort and order in society, a legal umbrella is needed to guarantee and/or protect every individual or group for their human rights. Including the right to obtain a sense of comfort in carrying out religious activities (worship) as stated in article 28E paragraphs 1 and 2 of the 1945 Constitution (Arief Barda Nawawi, 2010).

Freedom of Judges

The freedom of judges is the main principle of the judiciary regulated in the Judicial Power Law which states;

"Judicial Power is the power of an independent state to administer the judiciary to uphold law and justice based on Pancasila for the implementation of the State of Law of the Republic of Indonesia".

The freedom of judges is based on the independence of the Judicial Power in Indonesia, guaranteed in the Indonesian Constitution, namely the 1945 Constitution, as in article 24 paragraph 1 of the 1945 Constitution which states: "Judicial power is an independent power to administer the judiciary to enforce the law". Furthermore, judicial power is regulated in Law Number 48 of 2009 concerning Judicial Power.

In accordance with the mandate of Article 24 paragraph (2) of the 1945 Constitution as further regulated in Law Number 48 of 2009 concerning Judicial Power, article 18 states;

"Judicial Power is exercised by a Supreme Court and judicial Bodies under it in the General Judicial Environment, Religious Justice Environment, Military Justice Environment, State Administrative Court Environment and a Constitutional Court".

The free, independent judicial power in this provision contains the understanding that the judicial power is free from all interference by extra-judicial powers, except in matters as referred to in the 1945 Constitution of the Republic of Indonesia.

Yahya Harahap mentioned that the freedom of judges here is not unlimited freedom, by highlighting the arrogance of power by using that freedom to justify all means. But such freedom must refer to the application of laws derived from appropriate and correct legislation, interpreting the law appropriately through a justified approach, and the freedom to seek and find the law (www.pa-marabahan.go.id).

Freedom or Independence is defined as being free from the influence and coercion of the executive or all other State Powers, assets or recommendations that come from extra-judicial parties, except in matters permitted by law. Demjikian also includes freedom from internal judicial influences in passing judgments.

Research Methods

This research is classified as a type of normative juridical research, namely research conducted to examine legal norms and principles. Furthermore, this research was carried out with the Statute Approach, conceptual approach and comparative approach (Bahder Johan Nasution, 2008). The types of data used in this study are primarch legal materials, namely the invitation-invitation regulation, the following, secondary legal materials, namely references, reference books, accredited scientific

journal articles, news links and so on. Furthermore, tertiary legal materials such as, legal dictionaries, large dictionaries Indonesian, encyclopedias and others. The data collection technique in this study is library research or document/literature studies. Furthermore, these legal materials are analyzed qualitatively, in order to describe the results of the research in the discussion.

Discussion

Indonesia's constitution calls the words "fair" and "fair" broad-spectrum, not just about the legal process in the courts. The word fair in the first paragraph of the preamble to the 1945 Constitution is used to refer to the world order that must be formed according to humanity and justice.

The word "fair" in the formulation of Pancasila in the fourth paragraph of the preamble to the 1945 Constitution is in relation to the principle of universal humanism, namely a just and civilized humanity and the principle of social justice for all Indonesian people. The broad spectrum of use of the word fairness in the 1945 Constitution shows that justice is a central concept in a good constitutional life.

Paradigmatically, the concept of justice embodied in the 1945 Constitution relates to the concept of a non-liberal legal state, but a state of social law. The concept of a social law state does not merely emphasize the procedural-formal aspects of an open and fairness nature, but puts forward the ethical goal of fulfilling the general welfare and the quality of a better life. This ethical goal is demonstrated by the state's goal of realizing the general welfare and educating the nation and realizing social justice for all Indonesians.

Indonesia is a country of law contained in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia of 1945. Tahir Azhari, stated that although in the explanation of the 1945 Constitution of the Republic of Indonesia, the term *rechtsstaat* is used, but what is embraced by the Indonesian state is neither the concept of *rechtsstaat* nor the rule of law, because the concept of the state of law is actually not a concept born from Indonesian culture but from the western world, as stated by Satjipto Rahardjo who was quoted by Yance Arizona who stated that;

"The state of law is a modern concept that does not grow from within Indonesian society itself, but imported goods".

The process of becoming a country of law is not part of the socio-political history of the Indonesian nation in the past, as happened in Europe. The state of law is a building that is imposed from the outside. Thus, to build a state of law is to build the behavior of a legal state, to build a new civilization (Made Hendra Wijaya, 2015). Satjipto Rahardjo argues that, the state is not only a legal, political and social building, but also cultural. Therefore, we can observe the cultural dispositions of a country. On the other hand, a country of laws is also "required" to present its cultural face. Indonesia has a view as a country of law with distinctive characteristics, namely the state of Pancasila law (Rahardjo, 2009).

According to Oemar Seno Adji, mentioning that the country of Indonesian law has Indonesian characteristics. One of the main characteristics in the state of Pancasila law is the guarantee of religious freedom as a recognition of human rights. But the freedom in question is freedom in a positive sense, where there is no place for atheism or anti-religious propaganda on Indonesian earth. Other characteristics of the Pancasila law state are: close relations between religion and the state, relying on religious freedom in a positive sense, atheism is not justified, communism is prohibited, upholding the principles of kinship and harmony (Made Hendra Wijaya, 2015). As a state of law, one of the important principles of the state of law is the guarantee of the implementation of independent judicial power, free from the influence of other powers to administer the judiciary in order to uphold law and justice. Article 24 paragraph (1) of the Constitution of the Republic of Indonesia of 1945 confirms that the judicial power is an independent power to administer the judiciary to uphold law and justice.

The freedom of judges in the Judicial system is carried out "For The Sake Of Justice Based On The One True God" is in accordance with Article 29 of the Constitution of the Republic of Indonesia of 1945 which specifies that the state is based on the Almighty Godhead and the state guarantees the freedom of each resident to embrace their respective religions and to worship according to their religion and beliefs.

What is meant by "judicial independence" is to be free from outside interference and free from all forms of pressure, both physical and psychic. In determining the severity of the sentence to be imposed, the judge must pay attention to the good nature or evil nature of the accused so that the verdict imposed is appropriate and fair to the wrongs he committed.

As a country of law, there is also a guarantee of freedom of assembly, association and opinion. Some call it a guarantee of freedom of expression. The right to freedom of expression and opinion in Indonesia is regulated in the 1945 Constitution Article 28, Article 28E paragraph (2), Article 28E paragraph and (3) Article 28F. Article 28 and Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states "Everyone has the right to freedom of association, assembly and expression of opinion".

Article 28F states;

"Everyone has the right to communicate and obtain information in order to develop his personal and social environment, as well as the right to seek, obtain, possess, store, process and convey information using any type of available channel".

But freedom of expression is often misinterpreted and abused. Under the pretext of freedom of expression, an unlawful act arose in the form of blasphemy in which the alleged blasphemy harassed and stained the nobility of other religions based on narrow fanaticism built by himself.

According to Koentjara Ningrat, Blasphemy is an attempt to demean, harass, or demean something that is believed to be a principle of one's belief either in the form of speech or deed. J.C.T. Simorangkir, stated that the meaning of blasphemy is a deliberate attack on the good name and honor of another person or a group either oral or written with the aim of being known by the wider community.

Criminal sanctions against perpetrators of blasphemy crimes are regulated in Articles 156, 156a, 157 which regulates the issue of crimes against religion and public order, in Article 175-177 it regulates violations of religious gatherings, and in Articles 178-181 it is called *Grabdelikte* and *Leichenfrevell* respect for religious ceremonies for the deceased person (corpse). The articles in the Criminal Code do not very clearly discuss blasphemy.

Article 156; whoever publicly expresses feelings of hostility, hatred or contempt towards one or several classes of the people of the country, shall be threatened with the threat of imprisonment for not more than four years or a fine of not more than four thousand five hundred rupiah. The word class in this chapter and the next chapter means each part of the Indonesian people that is different from one or another part because of race, country of origin, religion, place of origin, descent, nationality, or position according to constitutional law.

Article 156a; sentenced to imprisonment for a period of five years whoever deliberately in public expresses feelings or commits acts;

1. Which is essentially hostile, abusive or desecrating towards a religion professed in Indonesia.
2. With the intention that people should not adhere to any religion, which precipitates the Almighty Godhead.

Article 157;

1. Whoever broadcasts, performs, or pastes writings or paintings on publicly, whose contents contain statements of feelings of hostility, hatred or humiliation among or against the classes of the people of Indonesia, with the intention that their contents are known or better known to the public, are punishable by imprisonment for a maximum of two years and six months or a fine of not more than four thousand five hundred rupiah.
2. If the person guilty of committing the offence at the time of his search and at that time it has not passed five years since his conviction becomes permanent because of such an offence also the person concerned may be barred from carrying out the search.

With the advancement of information technology, information related to this alleged blasphemy is very accessible and viral. This can easily cause potential SARA conflicts if not addressed properly and wisely.

One way to overcome this crime is by enforcing the law which aims to provide a deterrent effect, ensure legal certainty and meet a sense of justice. Indonesia itself adheres to a system of proof according to the law negatively, it is seen in Article 183 of the Criminal Procedure Code which reads as follows, "A judge may not sentence a person unless with at least two valid evidence he obtains a conviction that a criminal act is it really happened and that it was the defendant who was guilty of doing so". Law-based Proof by Negative (Negative Wettelijke Bewijstheorie) is a system of proof combined from a system of positive statutory proof and a system of proof according to the judge's beliefs.

However, not all court judges' verdicts provide justice, in fact, there are also court decisions that cause controversy. The trial judge was accused of cutting down or disparity in sentencing. This is considered so because the verdict of the court judge is very different from one perpetrator to another even though the case heard is the same,

namely the blasphemy case. It was this disparity that gave rise to a new polemic, one example of the disparity of punishment in blasphemy cases was the decision of PN Ciamis who convicted M Kace, a man accused of blasphemy and hate speech, with a sentence of 10 years in prison, then the 10-year sentence was trimmed to 6 years in prison. This is in accordance with the verdict read by the high judge of the Bandung High Court (PT) on Monday (6/6/2022).

The sentence that ensnared M. Kace was very different from the sentence imposed on Yahya Waloni, who was also charged with blasphemy and hate speech. Yahya Waloni was only sentenced to 5 months in prison, 2 months lighter than the JPU charges, whereas, Article 28D paragraph 4;

"Everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law".

Similarly, the criminal articles that are violated and imposed on them are the same, namely Article 156 and Article 156A of the Criminal Code which are articles of blasphemy. Meanwhile, Article 28 paragraph 2 of the ITE Law regulates the prohibition of hate speech related to ethnicity, religion, race, and inter-group (SARA).

The impact of this criminal disparity sparked controversy in a society that judged this disparity to be a form of injustice because both perpetrators of blasphemy both abused freedom of opinion and expression, claiming the teachings of their religion to be the most correct while the teachings of other religions were false or heretical, this was done for their own desired purposes. Criminal justice system is a series of legal mechanisms organized by government agencies and agencies with the aim of, among others, rehabilitating perpetrators, preventing other crimes and providing moral support for victims.

On the one hand, the Court with judicial power guarantees the freedom of judges in deciding a case without any intervention or intimidation from any party, while on the other hand the community expects the court's decision to be able to provide justice. But there is often also an intervention in the judge's decision. In blasphemy cases where judges get pressure or interference from certain groups of people, so there is a disparity in sentencing, namely the gap or difference in sentences imposed by judges between one perpetrator and another, in the same case and with the same criminal elements.

Here it can be seen that there is a clash between the principle of freedom of judges and what is meant by the principle of justice and fairness. The principle of judge

freedom allows judges to decide sentences based on the judge's own judgment, sometimes the judge's judgment is subjective or even gets outside pressure. Meanwhile, on the other hand, the principle of justice and fairness requires every action of the state administrative agency or official to always pay attention to aspects of justice and fairness. The principle of justice demands action in a proportional, appropriate, balanced and in harmony with the rights of everyone.

The Supreme Court and all judicial bodies under it have implemented bureaucratic reforms and have taken fundamental, comprehensive, and systematic measures, so that the goals and objectives that have been set can be achieved effectively and efficiently. One form of bureaucratic reform that continues to be echoed by the Supreme Court is in terms of improving the quality of judges' decisions and the professionalism of all judicial institutions under it.

One form of improving the quality of judges' decisions and the professionalism of the judicial institution is when judges are able to pass judgments by paying attention to three very essential things, namely justice (*gerechtigheit*), certainty (*rechsecherheit*) and expediency (*zwachmatigheit*). But in legal practice there are still disparities in punishment, for example in cases of blasphemy. So often there appears an adagium, the law is sharp downwards, blunt upwards. Or the law is cut down and favors the majority group or the ruling group. These critical voices are spontaneous reactions to the disparity of judges' decisions in adjudicating a criminal case. Meanwhile, the right of the community is to obtain a judiciary treated equally with fellow seekers of justice (the principle of equality before the law), as well as obtaining a verdict in a reasonable, simple time and light cost (principle of *contante justitie*), it is a basic need for every seeker of justice.

In the judiciary in Indonesia, there is also an important principle in the judicial process, namely "*Nemo Judex Idoneus In Propria Causa*". This principle is aimed at preventing the Judge from being partial in carrying out his duties, the Judge must be fair. The waiver of the principle of "*Nemo Judex Idoneus In Propria Causa*" resulted in a judicial institution being not independent and impartial as the concept of a state of law.

For this reason, the justice-seeking community considers professional judges to be judges who are able to try and decide a case based on the principle of fair trial, a free and impartial judiciary is related to the principle of freedom of judges, where judges

must be objective and independent in deciding cases without intervention from anywhere. Furthermore, the judge must be guided by the principle of *Nemo Judex Idoneus In Propria Causa*.

Yahya Harahap mentioned that the freedom of judges here is not unlimited freedom, by highlighting the arrogance of power by using that freedom to justify all means. With the freedom of judges in harmony with the principles of law and normative law that apply, a court decision will be aligned in realizing the legal objectives, namely Certainty, Justice and legal expediency. The role of judges in the legal system is to realize the principles of justice, certainty and expediency of the law.

Conclusions

In the legal system and criminal justice, the occurrence of criminal disparities is influenced by various factors, the main of which is the freedom of legally protected judges. Judges are free to decide a case without getting pressure, threats, or other interventions. but often also the disparity of punishment occurs due to the less professional culture of judges, judges are too subjective and follow pressure or intervention from certain parties. In fact, judges with their freedom are actually expected by the justice-seeking community to create a judiciary that is in accordance with the principle of fair trial law, and the principle of *Nemo Judex Idoneus In Propria Causa*, so that the right of the community to be treated equally before the law (equality before the law) and obtain a trial that contains justice can be realized. The harmony of the freedom of judges with normative law and the legal principles mentioned above is in line with the role of judges in the judiciary, namely to realize Certainty, Justice and Legal Expediency.

Recommendation

In the practice of law, judges with their freedom protected by law can create a fair trial by harmonizing normative law and applicable legal principles.

Reference

- Abdul Latif. (2013). Kebebasan Hakim dan Problematikanya Dalam Sistem Peradilan Indonesia. *Jurnal Hukum & Peradilan*, 2(1), 1–19. <https://doi.org/10.21143/jhp.vol13.no5.985>.
- Agus Maksum Mulyohadi. (2015). Disparitas Pidana Putusan Hakim atas Perkara Pidana

- Anak Dalam Perspektif Perlindungan Hak-Hak Anak (Studi Kasus Pengadilan Negeri Boyolali Tahun 2009- 2013). *Jurisprudence*, 5, 127–136.
- Agus Yulianto dan Bambang Noroyono. (2022). Pendeta Saifuddin Ibrahim Tersangka Penistaan Agama. *Republika.Co.Id*. Retrieved from www.republika.co.id
- Akbar, I. A. (2019). Dinamika Kasus Penistaan Agama di Indonesia (Polemik Pemaknaan Ayat-Ayat Penistaan Dan Uu Penodaan Agama). *Qof*, 3(1), 89–105. <https://doi.org/10.30762/qof.v3i1.1068>.
- Arief Barda Nawawi. (2010). *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*. Yogyakarta: Genta Publishing.
- Bahder Johan Nasution. (2008). *Metode Penelitian Hukum*. Bandung: Mandar Maju.
- J.C.T. Simorangkir, R. T. E. dan J. T. P. (1995). *Kamus Hukum*. Jakarta: Sinar Grafika.
- Made Hendra Wijaya. (2015). Karakteristik Konsep Negera Hukum Pancasila. *Advokasi*, 5(2), 199–214. Retrieved from https://www.google.com/search?q=Karakteristik+Konsep+Negara+Hukum+Pancasila%2C+Jurnal+Advokasi+Vol.+5&sxsrf=ALiCzsadzj_Xzth1Wfw72eSdlpps1usvRg%3A1664765954905&ei=AIA6Y-P4NsGhseMPi-uXqAU&ved=0ahUKEwjgYG7iMP6AhXBUGwGHYv1BVUQ4dUDCA0&uact=5&oq=Karakteristik+Konsep+Negara+Hukum+Pancasila%2C+Jurnal+Advokasi+Vol.+5&gs_lcp=Cgdnd3Mtd2l6EAM6CggAEecQ1gQQsANKBAhBGABKBAhGGABQ1AhY1Ahg4RJoA3ABeACAAXeIAXeSAQMwLjGYAQCgAQKgAQHIAQjAAQE&scient=gws-wiz
- Rahardjo, S. (2009). *Negara Hukum yang Membahagiakan Rakyatnya*. Yogyakarta: Genta Publishing.
- Wikipedia. (2021). *Penistaan Agama*. Retrieved from <https://www.wikidata.org/wiki/Q510195>.
- www.amnesty.id. (2021). *Kebebasan Berekspresi*. Retrieved from <https://www.amnesty.id/kebebasan-berekspresi/>