



Legal Protection for Victims of Defamation through Restitution

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<http://dx.doi.org/10.18415/ijmmu.v11i1.5287>

Abstract

This study aims to explain the legal protection of victims of defamation through restitution. This is normative legal research, which is a legal method that is carried out by studying library material or secondary data and research on the legal foundations, legal systematics, legal synchronization, legal history, and comparison of the law. The results of the research show that the legal protection for victims of defamation through restitution has not been implemented because there are no specific rules governing the protection of general law and restitution of victims in the positive law of Indonesia. Conditions like this have discredited the position of a victim of defamation which also has the potential to suffer economic losses. Furthermore, the differences in the protection provided by such law have been contrary to the legal norms contained in the Constitution 1945 of Indonesia as contained by Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) which essentially governs all citizens equal status in the law, have the right to equal treatment before the law and are free from discriminatory treatment on any basis.

Keywords: *Legal Protection, Victim, Defamation, Restitution*

Introduction

Freedom of opinion and expression has a harmonious meaning. This can be seen from some official documents that show that the right to freedom of expression is often directly compared with the right to freedom. Besides, some use the term freedom of speech and expression. (freedom of speech and expression). But in the end, meaningfully all these terms have the same meaning.¹

Indonesia is a constitutional democracy.² Following the provisions of Article 1, paragraph (2) of the Basic Law of the Republic of Indonesia Constitution 1945, a constitutional democratic state places the sovereignty of the state in the hands of the people whose implementation is carried out according to the basic law. The consequence of a constitutionally democratic rule of law is that any person who expresses

¹Muhammad Roqib, Et.al, “Hak atas Kebebasan Berekspresi dan Berpendapat di Indonesia dengan di Amerika Serikat”, *Jurnal Perspektif Hukum Universitas Airlangga*, Vol. 20, No. 1, May 2020, p. 43.

²Afrizal Razqi, Et.al, “Pembatasan Kebebasan Berekspresi dan Berpendapat Menurut Undang-Undang Nomor 12 Tahun 2005 Tentang Pengesahan *International Covenant on Civil and Political Right*”, through <https://ejournal.unesa.ac.id/index.php/novum/article/view/46338>, accessed on 10 October 2023.

or expresses his or her opinion or thought in the territory of Indonesian law must be protected by law. Legal protection must be provided as a form of guarantee of freedom of opinion and expression in Indonesia.

The history of giving legal protection in the opinion of everyone in Indonesia has been thought of by the founders of the nation since trying to formulate the constitution of the country. At the time the Constitution of the country was to be formulated, there was a debate between Ir. Soekarno, Hatta, Soepomo, and Yamin about the content and form of the state, including the need not to include rules on human rights in the state constitution.³ The debate ended with the birth of Article 28 of the Constitution of 1945. The birth of this article was the basis for the freedom of association and gathering and expressing thoughts in Indonesia.

Act Number 9 of 1998 on the Freedom of Expressing Opinions in Public Speech (Freedom of Speech Law) also regulates the same right, this is a technical regulation concerning the submission of opinions in public. The rule is loaded in Article 1 para. 1 of the Act of Freedom of Speech Law which contains the same norm that freedom of expressing opinions is the right of every citizen of the country to express opinions orally, in writing, and so on freely and responsibly by the provisions of the legislation in force.

The provisions of Article 1 para. 1 of the Freedom of Speech Law Act, freedom of opinion appears also to be offset by liability according to the content of the laws and regulations in force. The provision constitutes a mandate implementation of Article 28J paragraph (1) of the Constitution of 1945 which obliges everyone to respect the human rights of others in the orderly life of society, nation, and country.

Technically, the restriction is also stipulated in Article 23 (2) of the Human Rights Act that the submission of opinions must take into account the values of religion, morality, order, public interest, and the integrity of the nation. Therefore, in addition to the right to freedom of opinion and expression, Indonesia also imposes restrictions on the use of such rights. The aim, as enshrined in Article 73 of the Human Rights Act, is to ensure that the human rights and fundamental freedoms of others are recognized and respected.

The above illustration suggests that the fundamental rights of human beings such as the right to express opinions, the right to move, the right to assembly, and the right to speak can be restricted (*derogable rights*).⁴ Therefore, the existence of regulations governing criminal acts of defamation in Indonesia is a legitimate thing. This is by the legal norms contained in Article 28J paragraphs (1) and (2) of the Constitution of 1945.

The restrictions laid down in the above regulations are intended to guarantee the safeguarding of the human right of a person to freedom of opinion and expression in respect of others so that the existing freedom does not result in sacrifice or injury to others. Even if it is violated, the victim must be given legal protection because his fundamental rights have been infringed.

The material and intangible losses in cases of defamation can be described from a few cases that have ever existed. The first case is the case No. 771/Pid.Sus/2020/PN Bdg Jo. 418/Pid./Sus/2020/PT BDG Jo. 1850 K/ Pid. Sus/2021 where the accused defamed the good name of a legislative candidate and was sentenced to prison for 9 (nine) months and fined Rs. 10,000,000.00 (ten million rupees). There are also the perpetrators who were punished by imprisonment only for 2 (two) years without a fine in the case of defamation in Kualasimpang (Vide: Judgment No. 65/Sid.2020/20/PN Ksp) and there are also cases in

³ Bagir Manan, *Perkembangan Pemikiran Dan Pengaturan Hak Asasi Manusia Di Indonesia*, Jakarta: P.T. Alumni, 2006, p. 22.

⁴ Esa Lupita Sari, Et.al, "PENGHAKIMAN SEPIHAK MELALUI MEDIA SOSIAL DALAM PERSEPSI KEBINEKAAN DAN HAK ASASI MANUSIA, through http://mhn.bphn.go.id/i_dex.php/MHN/article/view/146, accessed on 10 October 2023.

which he was punished only by a trial penalty (Vid. Judgement No. 9/pid.B/2022/PN Sgi Jo. 218/PID/2022 /PT BNA).

The loss of the state in the matter of defamation of the good name is not as much as the loss suffered by the victims.⁵ However, the victim does not receive any compensation in the trial through a criminal judgment except to see the perpetrator imprisoned and/or fined.

Research Method

The method used in the preparation of this research is the method of normative juridical approach, which is a legal method that is carried out by studying library material or secondary data and research on the legal foundations, legal systematics, legal synchronization, legal history and comparison of the law.⁶

Discussions

Everyone has the right to express and to express his opinion. It is the right of the person to communicate or to express a thing. The purpose of this right is that what he wants may be realized. Everyone must have a will that in some circumstances can be the same as others but in other conditions can also be different. Therefore, the pattern of transmission or manifestation of people's will can also vary depending on what is to be realized.

This freedom of opinion and expression is one of the characteristics of a democratic state. Therefore, democratic states have always sought to make rules to guarantee the implementation of such freedom. The goal is for everyone in the country to be able to assemble, express opinions, and discuss openly and freely.⁷ One such democracy is Indonesia.

The right to freedom of association, assembly, and expression is subsequently reaffirmed in Article 28E, paragraph (3) of the Second Amendment of the General Assembly of 1945, which states that everyone has the right to the freedom to associate, assemble, and express opinions.

The rule of right of opinion in the 1945 UUD has made it a basic law to be considered. Since it is included in the constitution as the basic law, then more technical legal provisions concerning freedom of opinion and expression in Indonesia should be guided by the UUD in 1945. Such technical rules must be respected and enforced by the State.⁸ Such enforcement is guaranteed and protected by the State by law for several reasons, among others:⁹

1. Everyone has to communicate something and express himself as a means of meeting his needs and reaching his maximum potential;
2. Everyone needs to communicate something and express himself in a way of seeking the truth and knowledge that he wants to know;
3. Everyone should communicate a thing and
4. express themselves as a way to participate in the decision-making process as in political times;

⁵ Rahmat Fadli, Et.al, "Reformulasi Sanksi Pidana Pencemaran Nama Baik Melalui Media Online *Reformulation Of Criminal Sanctions On Defamation Through Online Media*", *Kanun Jurnal Ilmu Hukum Fakultas Hukum Universitas Syiah Kuala*, Vol. 21. No 2, August 2019, p. 330.

⁶ Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI Press, 1986, p. 10.

⁷ Charles Tilly, *Democracy*, New York: Cambridge University Press, 2007, p. 8.

⁸ Tanang Haryanto, Et.al, "Pengaturan tentang Hak Asasi Manusia Berdasarkan Undang-Undang Dasar 1945 Sebelum dan Setelah Amandemen", *Jurnal Dinamika Hukum*, Vol. 8 No. 2, May 2008, p. 141.

⁹ Marwandianto, Et.al, *Hak atas Kebebasan Berpendapat dan Berekrupsi Dalam Koridor Penerapan Pasal 310 dan 311 KUHP*, *Jurnal Ham* Vol. 11 No. 1, April 2020, p. 2.

The guarantees of legal protection are further embodied in several technical regulations. There is Act No. 39 of 1999 on Human Rights. Article 14 (2) of the Human Rights Act permits everyone to seek, acquire, possess, store, process, and transmit information by any means available. In addition, Act No. 9 of 1998 on the Freedom of Expressing Opinions in Public Affairs also regulates the same rights.

Therefore, the implementation of human rights in Indonesia is regulated and guaranteed by the provisions of the laws (Article 28I para. (5) of the Constitution of 1945). Even to guarantee the recognition and respect for the rights and freedoms of others and to satisfy fair demands under moral considerations, religious values, security, and public order in a democratic society, according to the provisions of Article 28J, paragraph (2) of the 1945 Constitution, the right and freedom of each person may be restricted within the limits laid down by law.

Independence or freedom of opinion as provided for in Article 4 letter a Jo. Article 6 letters a, b, and c of the Freedom of Speech Law Act also stipulate that citizens can express their opinions only when they are done responsibly, respecting the rights and freedoms of others, and by the moral and legal values applicable. This means that freedom of opinion and expression in Indonesia cannot be exercised in absolute freedom. This is arranged to avoid opinions or expressions that may contain irresponsible information. Such information is potentially harmful to others. But the human rights of others must also be protected so as not to be harmed by the freedom of opinion and expression of others.¹⁰

The regulation on criminal acts of defamation in Indonesia exists to provide balanced legal protection for the existence of rules that guarantee the freedom of opinion and expression of everyone. Such restrictions are justified under Article 29 of the Universal Declaration of Human Rights and Article 19, paragraph 3, of the International Covenant on Civil and Political Rights (ICCPR), provided that the restriction of the right is contained in a clear rule of law (*prescribed by law*).¹¹

The ICCPR restrictions on the right of opinion have also been applied in several other countries, such as Malaysia, Saudi Arabia, and South Korea. Article 499-500 of the Penal Code of Malaysia threatens perpetrators of name defamation either with imprisonment for a certain period which can be extended for two years or a fine or both. Sections 307 - 310 of Act No. 17571 of 2020 on Amendment of Law No. 293 of 1953 on the Code of Criminal Law (KUHP) threaten the perpetrators of name defamation with either imprisonment, jail, deprivation of rights, or fine.¹² Article 3 of the Criminal Code of Saudi Arabia threatens perpetrators of reputation defamation either with criminal imprisonment not exceeding one year and/or a fine not exceeding five hundred thousand riyals.¹³

According to the provisions of international law, the Constitution, which is Article 28J paragraph (2) of the Constitution of 1945 and Article 73 of the Human Rights Act above, then the limitation of the right of every person in the exercise of his fundamental rights in Indonesia is indeed justified as long as it has been established by law. Some of the laws that restrict the right of opinion and expression are:

1. Article 310 paragraphs (1) and (2)
2. Article 320 paragraph (1) of Law No. 1 of 1946 on the Criminal Law Regulations (Indonesian Penal Code); Article 27 paragraph (3) Jo. (Information and Electronic Transaction Law);

Article 310 paragraphs (1) and (2) of the Covenant provide for a limitation for a person in the opinion of not attacking the honor or good name of a person by accusing him of something (oral or

¹⁰ Rhona K.M. Smith, Et.al, *Hukum Hak Asasi Manusia*, Yogyakarta: PUSHAM UII, 2008, p. 101-102.

¹¹ Marwandianto, *Et.al, Op.Cit*, p. 5.

¹² Hasbullah, Et.al, "Tindak Pidana Pencemaran Nama Baik Melalui Media Elektronik: Studi Perbandingan Indonesia dan Korea Selatan", *Jurnal Hukum Pidana & Kriminologi Fakultas Hukum Universitas Pancasila*, Vol. 03, No. 02, Oktober 2022, p. 26.

¹³ Anisa Mufida, "Perbandingan Pemberian Sanksi Pencemaran Nama Baik di Media Sosial antara Indonesia dan Arab Saudi", *Jurnal Adalah Universitas Islam Negeri Syarif Hidayatullah Jakarta*, Vol. 4, No. 3, 2020, p. 12.

written) to be known to the public. According to R. Soesilo, the act of the accused must not always be punishable according to the law - invitation only, but any act that can cause shame to the person when the matter is known to the public.¹⁴ The same is the law of the law, which provides for the same thing, but with the object of the accusation of the dead.

These limitations of opinion and expression are also regulated in other laws other than the Penal Code, namely Act No. 19 of 2016 on Amendments to the Act No. 11 of 2008 on Electronic Information and Transactions. Article 27 (3) Jo. Article 45 (3) of the ITE Act restricts any person from distributing and/or transmitting or making accessible Electronic Information and/ or Electronic Documents that contain insulting charges and/or defamation of the name either intentionally or without any right.

Satjipto Rahardjo defines legal protection as a form of granting assistance to the human rights of someone who has been harmed by others. Therefore, the victims of freedom of opinion and expression must also be protected by law.

The rights of victims of crime in general have been regulated by positive laws in Indonesia, namely, in Act No. 31 of 2014 amending the Law No. 13 of 2006 on the Protection of Witnesses and Victims. The question of the right to compensation for material and intangible damages has also been formulated in Article 5 (1) letter m and o Jo. Article 7A paragraph (1) of the Witness Protection Act, that is, the victim is entitled:

1. To obtain reimbursement of transport costs as necessary;
2. to obtain temporary subsistence assistance until the expiry of the term of protection;
3. To receive compensation in the form of compensation for loss of property or income, for loss resulting from suffering directly related as a result of a criminal offense, and/or for compensation of costs of medical and/or psychological care.

The above provision applies to all victims of crime. This is in line with the definition of the victim itself as contained in some of the provisions of the legislation. Some of these regulations include the Act No. 31 of 2014 on Amendments to the Law No. 13 of 2006 on the Protection of Witnesses and Victims, Act No. 5 of 2018 on Amending the Law No. 15 of 2003 on the Establishment of Government Regulations to Replace the Act of 2002 No. 1 on the Suppression of Criminal Prosecutions of Terrorism. (UU Terorisme).

Other regulations that define victims of crime are Act No. 21 of 2007 on the Suppression of Criminal Prosecutions of Trafficking in Persons, Law No. 11 of 2012 on the System of Child Penal Justice, Government Regulation No. 35 of 2020 on Amendments to Government Regulations No. 7 of 2018 on the Granting of Compensation, Restitution, and Assistance to Witnesses and Victims (PP Restitutions), the Supreme Court Regulation Number 1 of 2022 on the Procedures for the Completion of Applications and the Provision of Reparation and Indemnity to Victims of Crime, and the Regulations of the Witness and Victim Protection Institution No. 1 of 2011 on the Service Guidelines for Applying to the Protection of witness and victim protection institutions. (Peraturan LPSK).

Article 1 Paragraph 3 of the LPSK Act, article 1 paragraph 11 of the Terrorism Act, Article 3 paragraph 1 of the Human Trafficking Law, Article 4 paragraph 1, Article 2 of the PPR Restitution Act, and Article 6 of the Rules of the PPSK define a victim of a crime in the same basic sense, that is, a person who suffers physical, mental, and/or economic loss caused by a crime. The definition of the victim

¹⁴ Bernadetha Aurelia Oktavira, "Perbuatan yang Termasuk dalam Pasal Pencemaran Nama Baik", trough <https://www.hukumonline.com/klinik/a/perbuatan-yang-termasuk-dalam-pasal-pencemaran-nama-baik-lt517f3d9f2544a> accessed on 20 Oktober 2023.

indicates that as a result of a criminal act of defamation victims also have the potential to suffer physical, psychological, and/or economic loss.

The definition of restitution in some legislative provisions has essentially the same meaning, i.e. compensation for damages granted to the victim by the offender as a result of the offense committed by the perpetrator. However, the scope or scope of the restitution between the laws governing restitution is different.

Article 48 (2) of the TPPO Act, Article 71D (1) of Law No. 35 of 2014 on Amendments to Act No. 23 of 2002 on the Protection of Children, and Article 4 of the Perma Restitusi which includes the coverage of restitution including compensation for material and/or immaterial losses at the same time. Whereas in Article 11 of the Act 7A paragraph (1) of LPSK, Article 36 A paragraph (2) of Terrorism Act, and Article 1 of the 5 of Jo. Article 19 (1) of PP Restitution, its coverage only compensates for material losses.

These rights are granted only to the victims of certain crimes. This is stipulated in Article 5, paragraph 2, of the Protection of Witness Act, which stipulates that the right of the victim of criminal acts is only granted to the crime victims in specific cases. According to his explanation, certain criminal acts are serious human rights violations, corruption, money laundering, terrorism, trafficking in human beings, narcotic drugs, psychotropics, sexual offenses against children, and other offenses resulting in the victim being placed in a very life-threatening situation.

As regards the rights of the victims of crime number 17 above, restitution is also granted for crimes established by the LPSK only. This is regulated in Article 7A paragraph (2) of the Law. Article 2 paragraph (1) letter a of the Perma Restitution also reaffirms that restitution shall be provided only for certain criminal matters, such as crimes of serious human rights violations, terrorism, trafficking in persons, racial and ethnic discrimination, crimes related to children, and other crimes stipulated by the Decision of the Court.

Such a fact leads to a potential loss of the right of the victims of other crimes such as the victim of a crime of defamation to claim and obtain damages. The provisions of Article 310 paragraphs (1) and (2) and Article 320 paragraph (1) of the Covenant also do not accommodate the matter of compensation for such losses. The same charge is also listed in Article 27 (3) Jo. Article 45 (3) ITE Law. The advantage of the ITE Act is the addition of criminal sanctions fines only for perpetrators who can catch the perpetrator. But the fine eventually goes into the state's cash as a non-tax state income instead of replacing the losses suffered by the victims. The victims of the crime of defamation of the good name suffered material and intangible losses (insult, loss of confidence, etc.) but the state gained money from the crime.

The reason for this is that there are no special rules governing the protection of the general law and restitution of victims of criminal acts of name defamation both in Article 310 paragraphs (1) and (2) and Article 320 paragraph (1) of the Covenant, as well as in Article 27 paragraph (3) of the ITE Act, and in the LPSK Act itself. The Perma Restitusi that allows the victims of crime to file a claim for both material and/or intangible restitution to the court personally does not solve the problem because it can only be filed for criminal offenses referred to in the LPSK Act. However, the claim for restitution of defamation is sufficiently substantiated, that is, under Article 98 paragraph (1) and Article 101 KUHAP Jo. Article 1372 KUHPperdata. This combination of criminal matters and restitution is also to enforce the mandate of legislation that wants the process of justice to be carried out quickly, simply, and at a low cost.

The discrimination of forms of legal protection in such legislative provisions indicates that the granting of rights to victims of crime is currently partial. The victims of crimes other than those mentioned in the LPSK Act and the Perma Restitution may be given general legal protection when it has

been established by the Decision of the LSPK concerning their conduct. The restitution of the victim of the crime can also be considered by law enforcement when its proceedings are carried out by the IPSK. This is like some cases that have been tried that although it does not include certain criminal acts referred to in the Law, because it is filed its restitution by the IPSK, then accepted. Some of these cases are persecution caused by death (Decree No. 467-468/Pid.B/2022/PN Stb), criminal acts of the press (Decision No. 1917/PID.Sus/2021/PN Sby), crimes of theft with violence and rape (Declaration No. 940/Pid. B/2022 /PN Tng), domestic violence crimes (Decrees No. 254/Sud/2023/PN Jkt. Sel).

This indicates that legal protection for victims of crime cannot be granted unless established or proposed by the ICC, although the basic definition of victim of crime is the same, i.e. both people who are potentially suffering physical, mental, and/or economic losses as a result of a crime. Furthermore, the differences in protection provided by such law have also been contrary to the legal norms in the Constitution as contained in Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the Constitution of 1945 which essentially governs all citizens equal status in the law, have the right to equal treatment before the law and are free from discriminatory treatment on any basis.

Compensation for material or intangible damage is a right of every victim of a crime. By the provisions of Article 98 (1) of the Covenant, the victim of a criminal offense may submit a claim for damages through a trial at once. Repay losses in criminal law as called Article 1 number 1 Perma Restitution is known as restitution.

The victimological perspective judges that this restitution is closely related to redress for physical loss, moral or property loss, status, as well as loss for loss of victims' rights as a result of the perpetrator's criminal attack. The granting of restitution is an indication of the perpetrator's responsibility to the victim of the crime to compensate for all the losses suffered.¹⁵

Conclusion

The legal protection for victims of crimes of defamation through restitution has not been implemented as there are no special rules governing general law protection and restitution for victims of criminal offenses of polluting good name in positive law in Indonesia. Conditions like this have discredited the position of a victim of a crime of defamation that also has the potential to suffer economic losses. Furthermore, the differences in protection provided by such law have been contrary to the legal norms contained in the Constitution of the State of Indonesia as contained by Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of UUD 1945 which essentially governs all citizens equal status in the law, have the right to equal treatment before the law and are free from discriminatory treatment on any basis.

Suggestion

Let the legal protection of victims of crimes of defamation through immediate restitution be regulated through the provisions of the laws in Indonesia. It is a measure of reparation for physical loss, moral or property loss, status, as well as loss of the rights of the victim as a result of the perpetrator's criminal attack. The granting of restitution is also a form of responsibility of the perpetrator to the victim of a crime to compensate for all the losses suffered, so that protection for victims of the crime of defamation can be realized.

¹⁵ Angkasa, "Restitusi bagi Korban Tindak Pidana Korupsi dalam Perspektif Viktimologi", *Paper*, Purwokerto: Fakultas Hukum Universitas Jenderal Soedirman (UNSOED), 3 September 2013.

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