

RESEARCH ARTICLE

Spamming in Indonesian Criminal Law Perspective: The Nature Elements

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Abstract

Internet has become something important in the development of means of communication. One of the communication facilities found on the internet is internet relay chat or what is often known as chat. Chat applications that are real time are often misused for the purpose of spreading viruses, promotions, and other purposes known as spam. The act of spamming is the sending of unwanted messages by someone who has a chat account. This causes the account owner to feel uncomfortable with these conditions. Spamming or generally referred to as junk messages is one of the crimes that emerged along with the development of technology. Currently, in Indonesia there is no regulation that specifically regulates spam. Therefore, a criminal law policy is needed to overcome this problem.

Keywords: *Spam; Cybercrime; Criminal Law*

1. INTRODUCTION

Information technology in today's digital information era continues to grow very quickly and is increasingly important for society. Its use is also increasingly widespread in all aspects of life (Sanusi, 2005). The presence of the internet that allows people to live virtual (virtually) has brought a tremendous impact, with the internet humans can talk, shop, learn, play and other activities like life in the real world (Wahid & Labib, 2007; Nte, Esq, Enokie & Bienose, 2020).

In the information age as it is today, the existence of information has a very important meaning and role in all aspects of life and is one of the necessities of life for everyone, both individually, individual groups, and society. It can be said that in the information society, information functions as a bloodstream for the human body. Information plays an important role in determining political, social, and business decisions (Sanusi, 2005; Lemuel, 2019).

The invention of electronic media (E-mail) is an extraordinary contribution to human civilization in communicating, social media replaces correspondence activities that previously used paper and delivery facilities via postal services where cost and time are the main factors that have always been a big problem. In each delivery process (Wall, 2004; Hedley, 2006; Broadhurst & Chang, 2013). With electronic media, time and cost become very efficient so that it is no longer a problem that needs to be thought about. If a person were to send a thousand letters to a thousand different addresses, how long would it take him to: write; print; wrap; and send the letter to the addresses, it will definitely take a lot of time, effort and money. Compare this with electronic media technology which only requires a simple and fast process (Arifin, 2020; Kharismadohan, 2021).

The discovery of e-mail is tainted by an act called e-mail spamming. The perpetrators of spamming are usually called spammers, spammers do spamming, giving rise to Spam Mail. Spam Mail is defined as e-mail that contains things that we do not want and are sometimes sent from people we do not know at all (Saleh, 2007). Spam or junk e-mail is a problem for users of today's internet mail applications. E-mails that often contain propaganda often make internet mail users feel disadvantaged, because a lot of time and resources are devoted to sorting and separating spam from e-mails that are really needed (Tarigan, 2004; Bawono, 2019; Broadhurst & Chang, 2013). Spam e-mail is often also referred to as Unsolicited Commercial E-mail (UCE), this is because most of the e-mails sent by spammers are profit-oriented or commercial electronic mails, usually containing offers of services, goods, or other things that are considered interesting, even though they are not necessarily needed and desired by the recipients. The following are typical contents of spam e-mails that are commonly encountered:

1. Spam that offers medicinal or health products, for example e-mails that offer drugs to enlarge one part of your body or drugs that are claimed to be able to lose weight drastically.
2. Spam that offers a way to get rich quick.
3. Spam that offers financial services or products, such as offering loan funds or ways to reduce debt bills.
4. Spam that offers educational facilities such as university scholarships or obtaining a degree for a certain fee.
5. Spam that offers gambling services on the Internet (On-Line Gambling).
6. Spam that offers discounts on certain products or offers pirated computer application programs (software) (Saleh, 2007).

The rapid growth of Spam today is motivated by business needs that see the great benefits of e-mail facilities in supporting business promotion activities. With spam, it is possible to offer goods/advertisements to reach millions of potential consumers at a low cost. Spam brings huge profits to the part of the business community who need cheap and effective promotion and advertising. It is as if Spam is considered a money-printing machine for business professionals. The growth of UCE can be interpreted as the growth of money-making machines for spammers, while on the e-mail account owner's side it is considered as the growth of e-mails that are highly undesirable.

Spam also causes harm and inconvenience to other parties. Broadly speaking, the disadvantages that can be caused by spam are:

1. For users, repeated spam is not only unsightly, but also a waste of time and internet costs for readers or users.
2. The available e-mail (Storage Mail-Box) must be larger.
3. For e-mail service providers, spam takes up some bandwidth. This is very annoying because the bandwidth cannot be used for other activities.

More deeply, it can be said that spam begins to disturb the peace and at the same time disturbs the privacy of individual e-mail recipients, exhausts the functions of internet communication facilities owned by internet users and often the content of messages in it can be said to be far more disturbing than ordinary advertising models or advertisements through telephone. Seeing from the losses and disturbances that can be caused by the activities carried

out by spammers, the author believes that e-mail spam (unsolicited mail) is appropriate if it is categorized as a crime that occurs in the online world (Chohwanadi, 2014).

Until now in Indonesia there is no law that provides specific settings for e-mail spam. In fact, along with the development of higher communication quality and the need for internet services, e-mail facilities are very important for the community and the existence of spam is increasingly being complained of.

2. METHOD

The type of research used is normative juridical (legal approach), namely research that is focused on examining the application of rules or norms in applicable positive law. This type of normative juridical research is carried out by examining various formal legal rules such as laws, regulations and literature containing theoretical concepts which are then linked to the problems that will be discussed in this thesis (Marzuki, 2008). The approach used is the statute approach, the conceptual approach and the comparative approach. The statute approach is carried out by reviewing all laws and regulations related to the legal issues being handled. Conceptual approach (conceptual approach) is an approach that moves from the views and doctrines that developed in the science of law. By studying these views and doctrines, it is the basis for research in building a legal argument in solving the legal issues faced. The comparative approach is an approach taken by comparing the laws of one country with the laws of other countries on the same matter (Sidharta, 2013; Samekto, 2015). The sources of legal materials used in this scientific article consist of primary legal materials and secondary legal materials. The primary legal materials used consist of:

1. Criminal Code
2. Law no. 1 of 1946 concerning Criminal Law Regulations;
3. Law no. 36 of 1999 concerning Telecommunications (State Gazette of the Republic of Indonesia of 1999 Number 154, Supplement to the State Gazette of the Republic of Indonesia Number 3881);
4. Law no. 11 of 2008 concerning Information and Electronic Transactions (State Gazette of the Republic of Indonesia of 2008 Number 58, Supplement to the State Gazette of the Republic of Indonesia Number 4843).

While the secondary legal materials used consist of textbooks related to law and data in the form of examples of spam and data on the value of public losses due to spam obtained through the internet.

3. RESULT AND DISCUSSION

A. *Criminal Law Policy Against the Acts of Spreading Spamming*

In the Big Indonesian Dictionary, what is meant by policy is a series of concepts and principles that become the outline and basis of a plan in the implementation of a leadership job, and ways of acting (government, organization) and a statement of the ideals of goals, principles or intentions as guidelines for management. in an effort to achieve the target. Meanwhile, according to Barda Nawawi Arief, the term criminal law policy is taken from the term policy or politics. Therefore, criminal law policies can also be referred to as criminal law politics. In addition to being referred to as criminal law politics, criminal law policies can also be called penal policies or criminal law policies.

According to Marc Ancel, penal policy is a science as well as an art that aims to enable positive legal regulations to be better formulated and to provide guidance not only to legislators, but also to courts that apply laws and to implementer of court decisions (Arief, 1996; Astagiri, 2010).

Further regarding the above, Barda Nawawi Arief argues that criminal law policy is a series of processes consisting of 3 policy stages, namely:

1. Formulative policies, namely the stage of formulating or enacting laws;
2. The judicial/applicative policy stage is the stage of applying criminal law; and
3. Executive policy stage (Arief, 1998).

Of the three stages/processes above, Barda Nawawi Arief stated that the formulation stage is the initial stage and becomes a source of foundation for the next stage, namely application and execution. In addition, the formulation stage is the most strategic stage. The formulation stage cannot be separated from legislative policy. Legislative policy is a plan or program from legislators regarding what will be done in dealing with certain problems and how to carry out or implement the planned program.

In this regard, Muladi and Barda Nawawi Arief argue that in general, legislative policies in the context of criminal law policies include:

1. Planning on what actions will be addressed because they are deemed harmful;
2. Planning on what sanctions will be imposed on the perpetrators of the act; and
3. Planning regarding criminal justice procedures or mechanisms (Arief & Muladi, 1996).

From the three things above, this scientific article discusses the first stage of legislative policy in the context of criminal law policy, namely determining prohibited acts that will be tackled because they are considered dangerous and detrimental.

To determine whether an act is a crime, it must go through a criminalization policy process. According to Barda Nawawi Arief, the criminalization policy is a policy in determining an act that was originally not a criminal act (not punished) to become a criminal act (a criminal act). Furthermore, Barda Nawawi Arief stated that the criminalization policy is not just a policy of determining/formulating what actions can be punished (including criminal sanctions), but also includes the problem of how the formulation policy is structured in an integrated and harmonious legal system (Arief, 2003). Regarding the issue of criminalization, Sudarto argues that the use of criminal law must take into account the national goal, namely the welfare of the community and must consider the costs incurred. In addition, the criminalized act is an act that brings harm to the community and pays attention to the capabilities of law enforcement officers (Arief, 1996; Astagiri, 2010).

If it is related to the act of spreading spam through Electronic Media, with the countermeasures through criminalization policies, it is hoped that it can provide protection for the public and can maintain public order. In addition, overcoming the act of spreading spam through a criminalization policy is needed because the act of spreading spam through electronic media causes a lot of harm and unrest in the community.

In formulating regulations relating to the act of spreading spam through the government, the government can use a comparative approach. The comparative approach

is an approach taken by comparing the laws of one country with the laws of other countries on the same matter. One of the countries that has regulated spam in positive law is Singapore through the Spam Control Act issued in 2007.

Under the Spam Control Act, spam is defined as “Unsolicited commercial communications sent in bulk by electronic mail or by text or multi-media messaging to mobile telephone numbers, and to provide for matters connected therewith” (Rise, 2008; Polanski, 2008).

If referring to the Spam Control Act, the provisions regarding spam in it are regulated in the form of a formal offense. This is shown in the explanation of the elements of spam according to the Spam Control Act where in order for a message to be called spam it must meet the following requirements: “For the purpose of this Act, electronic message shall be deemed to be sent in bulk if a person sends, causes to be sent or authorises the sending of:

- 1) more than 100 electronic messages containing the same or similar subject- matter during a 24-hour period;
- 2) more than 1,000 electronic messages containing the same or similar subject-matter during a 30-day period;
- 3) more than 10,000 electronic messages containing the same or similar subject-matter during a one-year period” (Erdélyi, Benczúr, Masanés, & Siklósi, 2009).

Control Act is a message that is distributed with a certain amount within a predetermined time period. This is different from the current regulations in Indonesia regarding the spread of spam through social media (e-mail). Article 33 of the ITE Law, which can be linked to the act of spreading spam through social media, requires that there be a consequence as specified in Article 33 of the ITE Law, namely disruption of the electronic system or causing the electronic system to work improperly. If the two things above are compared to the act of spreading spam through social media (e-mail), then the formulation in the form of a formal offense is the most appropriate to apply to the act of spreading spam through social media (e-mail). This is because the material and non-material losses experienced by the community arise due to the act of sending spam through social media (email).

From the analysis above, it can be concluded that currently there are different rules between the Criminal Law in Indonesia and Singapore regarding the act of spreading

spam via SMS. If currently Singapore already has legal rules governing spam, then in Indonesia there is currently no legal regulation that specifically regulates spam. Therefore, the act of spreading spam via SMS needs to be criminalized in future criminal law policies because the act of spreading spam via SMS has actually harmed the public.

B. Spamming arrangements in the Criminal Code

However, there are provisions in the Criminal Code (hereinafter referred to as the Criminal Code) that can be used against spamming, namely Article 282 paragraph (2) concerning crimes against decency, "Whoever broadcasts, displays, or puts up in public writings, pictures or objects that violate decency, or whoever, with the intention of broadcasting, showing or affixing them in public, makes them, imports them into the country, transmits them, removes them from the country, or has in stock, or any person who openly or by circulating a letter without being asked, offers or shows as obtainable, is threatened, if there is good reason for him to suspect, that the writing, picture or object violates decency, with a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs.

To relate it to spamming, the elements that need to be considered in the article are "...anyone, openly or by distributing a letter without being asked,... if there is a strong reason to suspect that the writing, picture or item violates decency..." . However, the thing to note is that the article only covers spam that has material that violates decency, for example pornography.

C. Spamming Regulations in the Telecommunications Act

In Article 1 of Law Number 36 of 1999 concerning Telecommunications it is explained that Telecommunication is any transmission, delivery, and or reception of any information in the form of signs, signals, writings, pictures, sounds and sounds through wire, optical, radio, or other electromagnetic system. Telecommunications equipment is any equipment used in telecommunications. Furthermore, telecommunications equipment is a group of telecommunications equipment that allows telecommunications.

According to these definitions, spamming is included in the scope of telecommunications because spamming is basically a form of sending information in the form of

writing and/or images using delivery media via the internet. The device used is a computer.

Article 38 of the Telecommunications Law states that: "Everyone is prohibited from taking actions that can cause physical and electromagnetic disturbances to the operation of telecommunications:

1. Physical action that causes damage to a telecommunications network so that the network cannot function properly;
2. Physical actions that can cause telecommunications links to not work properly;
3. The use of telecommunications equipment that is not in accordance with the applicable technical requirements;
4. Improper use of telecommunications equipment that works with radio waves, causing disturbance to other telecommunications operations; or
5. Improper use of non-telecommunication tools so as to cause unwanted technical effects in a telecommunications operation".

Spammer actions send e-mail in large numbers, repeatedly and continuously causing the mailbox to become overloaded so that it is difficult to open and even cannot be opened. In internet traffic, the spammer's actions can also consume a large enough bandwidth, causing slow internet access.

The sending of Spam in this large amount physically can be said to have disrupted the telecommunications network, in this case the internet network used for e-mail sending traffic so that the network cannot function properly and results in the telecommunications connection not working properly.

Criminal sanctions that can be imposed on spammers are stated in Article 55 of the Telecommunications Law: "Whoever violates the provisions as referred to in Article 38, shall be sentenced to a maximum imprisonment of 6 (six) years and or a maximum fine of Rp. 600,000,000.00 (six hundred million rupiah)".

D. Spamming in Human Rights Law

In Law Number 39 of 1999 concerning Human Rights, there are provisions that regulate the rights of the community to obtain and convey information. This means that people's freedom to use e-mail facilities as a means of

daily communication is a human right and a basic freedom which can be seen in the Human Rights Law in Chapter III, Part Three on the Right to Self-Development which states as follows:

Article 14 paragraph (1): "Everyone has the right to communicate and obtain information needed to develop their personal and social environment".

Article 14 paragraph (2): "Everyone has the right to seek, obtain, possess, store, process, and convey information by using all types of available means".

As part of society, spammers have the right to use e-mail facilities to communicate and convey information using all available means. However, this action does not mean that spammers can use their rights as widely as possible according to their wishes and needs in spamming.

The spammer's actions are always limited by his obligation to always respect the rights of others, morals, ethics, including the rules of social life, nation and state. It is set in: Article 69 paragraph (1): "Everyone is obliged to respect the human rights of others, morals, ethics, and the order of life in society, nation and state". Article 69 paragraph (2): "Every human rights of a person creates a basic obligation and responsibility to respect the human rights of others reciprocally and it is the duty of the government to respect, protect, uphold and promote them".

Seeing the norms contained in the two articles above, it can be concluded that every member of the community has the right to use the e-mail facility in their daily life activities but must still be obliged to respect the human rights of others, morals, ethics, and order. life in society, nation and state because every human right always creates a basic obligation and responsibility to respect the human rights of others reciprocally (Prasetya, 2021; Chrismanto, Lukito, & Sudirohusodo, 2017).

The government has the obligation and responsibility to respect, protect, enforce, and promote the implementation of the use of the human rights of the Republic of Indonesia. The implementation of these obligations and responsibilities must be in accordance with what is stipulated in this law, other laws and regulations, and international human rights law (Putra, 2016).

4. CONCLUSION

Spamming is an act that can cause a lot of harm to other parties. Several countries such as the United States with the Controlling the Assault of Non-Solicited Pornography and Marketing Act 2003 (CAN-SPAM ACT 2003) and Australia through the Spam Act 2003 have regulated spamming laws in more detail and certainty. Meanwhile, in Indonesia, the regulation of the act of sending spam is still found scattered in several laws and regulations and even that does not specifically regulate spamming. To ensure justice and legal certainty while protecting the interests of the majority of Indonesian people who use communication networks via the internet, regulatory norms are needed in order to reduce or at the same time prevent greater losses from spamming activities.

5. DECLARATION OF CONFLICTING INTERESTS

The Author declares that there is no potential conflict of interest in the research, authorship, and/or publication of this article.

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Quote

Like almost everyone who uses e-mail, I receive a ton of spam every day. Much of it offers to help me get out of debt or get rich quick. It would be funny if it weren't so irritating.

Bill Gates

ABOUT AUTHORS

Alex Chandra Pamungkas is graduated from Faculty of Law Universitas Negeri Semarang, Indonesia. Now, he is serving as researcher and volunteer at Law and Technology Studies Center.