



INTERPRETATIONS OF ARTICLE 156A
OF THE INDONESIAN CRIMINAL CODE ON

BLASPHEMY AND RELIGIOUS DEFAMATION

(A LEGAL AND HUMAN RIGHTS ANALYSIS)

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LeIP

**Interpretations of Article 156a of the Indonesian Criminal Code on Blasphemy
and Religious Defamation (A Legal and Human Rights Analysis)**

Indonesian Institute for the Independent Judiciary (Lembaga Kajian dan Advokasi
Independensi Peradilan – LeIP) In collaboration with WSD Handa Center for Human
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Table of Contents

Preface, by Astriyani	v
Preface, by David Cohen.....	vii
List of Judgments.....	ix
CHAPTER I	
INTRODUCTION.....	1
1.1. Background and Purpose	1
1.2. Research Questions.....	3
1.3. Research Methodology	3
1.4. Report Structure	4
CHAPTER II	
CONCEPTS, DEFINITIONS AND INTERNATIONAL	
HUMAN RIGHTS FRAMEWORK ON BLASPHEMY	6
2.1. Blasphemy in Concept and Definition	6
2.2. Definition of blasphemy in various countries.....	10
2.3. Blasphemy and Human Rights	15
2.3.1. The Human Rights Framework and Blasphemy.....	15
2.3.2. Blasphemy Cases at the European Court of Human Rights	22
CHAPTER III	
REGULATION OF BLASPHEMY AND	
HUMAN RIGHTS IN INDONESIA	24
3.1. Regulatory Framework on Blasphemy in Indonesia	24
3.2. The guarantee of the right to freedom of thought, religion/belief, and freedom of opinion and expression in Indonesia	32
3.2.1. Derogations and Limitations of Rights in Indonesian Legislation	34
3.2.2. Law No. 1/PNPS/1965 and Violation of Human Rights.....	37

CHAPTER IV	
THE APPLICATION OF BLASPHEMY ARTICLES IN INDONESIAN COURTS	39
4.1. General Overview of Blasphemy Cases	39
4.2. Classification of the Application of Blasphemy Articles.....	43
CHAPTER V	
THE APPLICATION OF THE BLASPHEMY ARTICLE IN INDONESIA	50
5.1. Analysis of the Application of the Elements of Article 156a letter a of the Criminal Code	50
5.1.1. Judicial interpretation of the Elements of Article 156a letter a of the Criminal Code in Judgment	51
5.1.2. Analysis on the Application of Elements	57
5.1.3. Case Study	68
5.2. Analysis on the Application of Procedural Law in the Proceedings of Blasphemy Cases	78
5.2.1. The Principle of Legality: A deficient law	79
5.2.2. Judicial Independence: Stigma, Impartiality and Massive Pressure.....	80
5.2.3. A Violation of Presumption of Innocence Principle	84
5.2.4. Due Process of Law and Equality of Arms	85
5.2.5. The violation of other rights	89
CHAPTER VI	
AN ATTEMPT TO LIMIT THE SCOPE OF BLASPHEMY: A REINTERPRETATION OF THE ELEMENTS AND A REFORMULATION OF ARTICLE 156A OF THE CRIMINAL CODE	90
6.1. An Attempt to Limit the Blasphemy Article	90
6.2. Reinterpreting Article 156a letter a of the Criminal Code	92
6.3. Reformulating Article 156a of the Criminal Code.....	95
CHAPTER VII. CONCLUSION AND RECOMMENDATIONS	97
APPENDIX 1 : COURT DECISIONS	101
BIBLIOGRAPHY	105

Preface, by Astriyani

There is not a significant number of blasphemy cases in Indonesia. But every time there is an event that is considered blasphemous, the controversy will spread in the community. This is understandable given the substance associated with personal beliefs that makes everyone seem to have an interest in the incident. Controversies related to blasphemy are also always sensitive and often cause polarization in a society that can lead to division.

In this situation, LeIP sees the role of the court as one of the pillars to be central in a democratic state. The court is expected to be a balancing pendulum of social life. It must maintain order and security, on the one hand, while maintaining and protecting the human rights of all citizen groups on the other. Based on this consideration, LeIP considered the importance of conducting research on the application of articles on blasphemy in Indonesia.

The application of criminal articles concerning blasphemy is always complex. This matter is not only faced by law enforcers in Indonesia but also in other countries as was discovered by the researchers of this study. Law enforcement always has to deal with the contestation between principles and concepts that, at first glance, contradict each other. For example, contradiction between the right to freedom of expression and belief with the reasons for justifying the limitations, which are also known in the guidelines for the application of the principle of human rights. For law enforcement in Indonesia, the substantial challenge of applying blasphemy laws is mainly due to the formulation of articles that invite multiple interpretations. Also, the reality that our current socio-political context has been far different from the context when the article were set forth in 1965.

External challenge judges also appear in the form of majority pressure groups and limited security facilities provided by the state. Meanwhile, from within, the judge must struggle with himself to be free of his personal values and beliefs so that he can be neutral and give the fairest decision.

Findings, conclusions, and recommendations in this research may not be able to answer all the complexities and challenges mentioned above. However, we hope that this research can contribute to helping law enforcement officers, and especially judges, to interpret and implement blasphemy articles in a more structured and discipline manner. This would include using an international legal framework that is relevant in determining their decisions, with complete and consistent legal considerations in the application of those articles. We hope that the court decisions will, in the long run, become one of the foundations for stronger protection of human rights and the life of a more mature democracy in Indonesia.

Jakarta, 9 July 2018

Executive Director of Indonesian Institute for the Independent Judiciary

Astriyani, S.H., MPPM.

Preface, by David Cohen

This study by LeIP provides the most comprehensive analysis of the prosecutions for blasphemy in Indonesia since the adoption of the various laws and regulations that define this area. While in many countries, as the report shows, blasphemy has either been removed from the criminal codes or is now rarely prosecuted, the situation in Indonesia is different. Not only have blasphemy prosecutions increased over the past decades but such cases have also become increasingly politicized.

With the growth of religious intolerance expressed through political parties, some religious organizations, and public demonstrations, the study shows how such extraneous pressures have had an impact upon prosecutions and ultimate verdicts of guilt and innocence. Nowhere, perhaps, was this made more clear than in the prosecution and conviction of Ahok, the governor of Jakarta in 2017. The influence of political parties during an ongoing election campaign and the impact of the ability to mobilize mass demonstrations clearly appeared as the case progressed. Such events present a major challenge to judicial institutions and to the rule of law in Indonesia. It is the pressing need to defend and preserve the rule of law and its constituent principles, such as the right to a fair trial, or the right to an impartial, competent, and independent judge, that has provided the motivation for this study. As will become clear, even larger issues of human rights in a democratic society are at stake here as well.

This context of the rule of law and the protection of basic human rights provides both the framework and the limits of LeIP's analysis. The issue of whether blasphemy should be criminalized at all is a political issue and is beyond the scope of this research that focuses on the interpretation and application of the existing law. Of course, the demonstration of features of the existing laws that give rise to ambiguities or problems of interpretation can provide guidance for future revisions. The primary purpose of this study, however, is to provide a systematic legal analysis that reveals serious issues in the past and current application of the blasphemy law. The principle of the certainty and predictability of the law is foundational to the rule of law in a democratic society. The study demonstrates that widely divergent interpretations of the law have resulted in inconsistent and arbitrary outcomes. It also shows that in the process of reaching judgment in blasphemy cases fundamental human rights guarantees under both Indonesian and international law have too often been ignored.

The analysis of the blasphemy cases provided in this report is therefore important for a number of reasons. In regard to the legal doctrinal aspects of the blasphemy law, the analysis clearly shows the inconsistency and arbitrary character of the interpretation of the required elements for conviction. This appears most clearly in regard to the required mental element (*mens rea*) which is in fact the defining component of the law as currently drafted. It also demonstrates that convictions have in most cases not been based upon the elements actually articulated in the statute but rather upon misinterpretations of the law or the personal beliefs and opinions of prosecutors and judges. Further, it shows the basic lack of rigor and consistency in the role of so-called expert testimony in these cases.

In regard to larger human rights issues the report also demonstrates a number of important defects and challenges in current judicial practice. First, the prosecution of blasphemy intrinsically raises serious issues of freedom of belief, religion, and conscience, as well as freedom of expression. The report shows how such rights, guaranteed by the Indonesian Constitution, Indonesian Law 39 of 1999, and by international human rights instruments binding upon Indonesia are rarely considered by the judges in blasphemy cases. Yet, under those laws it is a fundamental duty of judicial institutions to protect and enforce such rights by balancing them against the interests of public order and security that are also referenced in these legal instruments. Second, the report shows that there is both a misunderstanding of the fundamental requirements of judicial independence and impartiality and in some cases a failure to meet the obligations which these principles impose. Nowhere is this more clear than in the report's analysis of the way in which demonstrations and other forms of public pressure influence the outcome of blasphemy cases. This, as well as other aspects of the trial process, result in a denial of basic fair trial rights.

This report thus compels our attention because its balanced and objective analysis of judicial practice in blasphemy prosecutions reveals serious issues of justice, human rights, and the rule of law that must be addressed. The report points the way forward to how the challenges such issues pose should be met in a manner appropriate to a democratic society where all citizens enjoy equal rights and dignity before the law.

Jakarta, 9 July 2018

David Cohen

Director of the WSD Handa Center for Human Rights and International Justice,
Stanford University

List of Judgments

1. Decision of Tasikmalaya District Court No.117/Pid.B/PN.Tsm jo. Supreme Court Decision No. 2529 for Defendant Abraham Bentar;
2. Decision of Central Jakarta District Court No. 677/Pid.B/2006.PN.JKT.PST for Defendant Lia Aminuddin;
3. Supreme Court Decision No. 787 K/Pid/2006 atas nama Terdakwa Sayyid Fauzi Alaydrus;
4. Decision of Medan District Court No. 744/Pid.B/2009/PN.Mdn Jo. Supreme Court Decision No. 1334 K/Pid/2010 for Defendant Pdt. W. Alegan Mosses;
5. Decision of Temanggung District Court Putusan No. 06/Pid.B/2011/PN.TMG for Defendant Anotinus Richmond Bawengan;
6. Decision of Blitar District Court No. 197/Pid.B/2011/PN.Blt for Defendant Miftakhur Rosyidin;
7. Supreme Court Decision No. atas nama 1839 K/Pid/2011 for Defendant Ondon Juhana;
8. Decision of Bandung District Court No. 295/ PID.B/2012/PN.BDG for Defendant Heidi Eugene;
9. Decision of Klaten District Court No.03/Pid.B/2012/PN.KLT for Defendant Andreas Guntur Wisnu Sarsono;
10. Decision of Muaro District Court No. 45/Pid.B/2012/PN.MR for Defendant Alexander Aan;
11. Decision of Ende District Court No. 55/Pid.B/2012/PN.END for Defendant Ronald Tambunan;
12. Decision of Sampang District Court No. 69/Pid.B/2012/PN.Spg for Defendant Tajul Muluk;
13. Decision of Dompu District Court No. 73/Pid.B/2012/PN.DOM for Defendant Charles Sitorus;

14. Decision of Ende District Court No. 84/Pid.B/2012/PN.END for Defendant Herison Yohanis Riwu;
15. Decision of Kalabahi District Court No. 148/Pid.B/2012/PN.KLB for Defendant Alfred Waang;
16. Decision of Pati District Court No. 10/Pid.Sus/2013/PN.Pt for Defendant Muhamad Rokhisun;
17. Decision of Sangata District Court No. 47/Pid.B/2013/PN.SGT for Defendant Bantil als Muhammad Ganti;
18. Decision of Trenggalek District Court No. 155/Pid.B/2013/PN.TL for Defendant Agus Santoso;
19. Decision of Lubuk Pakam District Court No. 1192/Pid.B/2013/PN.LP for Defendant Khairuddin;
20. Decision of Dompu District Court Putusan No. 33/Pid.B/2014/PN.DPU for Defendant Abraham Sujoko;
21. Decision of Banda Aceh District Court No. 80/Pid.B/2015/PN.Bna for Defendant T. Abdul Fatah;
22. Decision of Banda Aceh District Court No. 81/Pid.B/2015/PN Bna for Defendant M. Althaf Mauliyul Islam;
23. Decision of Banda Aceh District Court No. 83/Pid.B/2015/PN.Bna for Defendant Fuadi Mardhatillah;
24. Decision of Banda Aceh District Court No. 85/Pid.B/2015/PN.Bna for Defendant Ridha Hidayat;
25. Decision of Sengkang District Court No. 31/Pid.B/2016/PN.Skg for Defendant Makmur bin Amir;
26. Decision of Klaten District Court No. 391/Pid.Sus/2016/PN.Kla for Defendant Agung Handoko;
27. Decision of North Jakarta District Court No. 1537/Pid.B/2016/PN.Jkt.Utr for Defendant Basuki Tjahaja Purnama alias Ahok.

CHAPTER I

INTRODUCTION

1.1. Background and Purpose

In the last several years there has been a serious setback in the protection of freedom of religion and expression in Indonesia, marked by the more confined space and limited diversity allowed for religions and beliefs. Provisions on religious defamation, or more commonly known as blasphemy, have often been used to indict and convict members of traditionally minority religions and beliefs. Amnesty International reported that throughout 2005-2014 there were 39 people convicted for religious defamation and sentenced to between 5 months to 6 years of incarceration.¹

One particular case that drew the public's attention, and motivated massive demonstrations in the capital, was the early 2017 case against then-Governor of Jakarta and incumbent in the election, Basuki Tjahaya Purnama. Setara Institute reported that the majority of the blasphemy cases have been characterized by considerable public interest and pressure.² Furthermore, in many of these cases,

¹ Amnesty International, *Prosecuting Belief, Indonesia's Blasphemy Law*, 2014, p. 40.

² Setara Institute, "Rezim Penodaan Agama 1965-2017, Ringkasan Eksekutif Laporan Riset Tematik Kebebasan Beragama dan Berkeyakinan", Setara Institute, 27 February 2017, p. 3.

inadequate and inconsistent legal arguments in interpreting the charging statutes have not reflected relevant constitutional and legal principles or applicable human rights norms comprehensively.

Blasphemy in Indonesia is prescribed in Presidential Stipulation Number 1/PNPS/1965 on the Prevention of Abuse and/or Defamation of Religion. This article was then incorporated into the Criminal Code as Article 156a. In practice, this provision is used in conjunction with provisions of other legislations, among others, Law Number 11 of 2008 on Electronic Information and Transactions (ITE Law) as amended by Law Number 19 of 2016. However, the second amendment of the 1945 Constitution offers a guarantee of freedom of religion, belief, opinion, and expression, as does Law Number 39 of 1999 on Human Rights. Within these two legal frameworks of limitation and protection of freedom of religion and freedom of expression, the interpretation of the law on religious defamation in Indonesia has become unclear. Law enforcement often relies upon personal religious values, morality, and political inclinations rather than legal analysis to justify their decisions.

The frequent resultant problem of arbitrariness or the poor quality of legal reasoning is related to a more fundamental problem: the lack of knowledge and application of relevant principles of statutory interpretation and legal analysis. These shortcomings arise from the nature and quality of legal education. This is apparent from the limited and often unsound argumentation found in the courts' opinions at all levels, but particularly at the cassation level. The problem is exacerbated by the lack of clarity of the applicable statutes so that there is little that can be drawn from the legislation to guide the court in interpreting the blasphemy provisions.

Various studies and initiatives to promote religious freedom have been conducted, especially by civil society organizations. However, there have been no comprehensive studies that not only map out the issues but also provide alternative legal argumentation, based on human rights principles and obligations, to interpret the legal provision in blasphemy cases. This research is ultimately intended to fill this gap of legal and human rights analyses on the articles related to religious defamation, to be used by the law enforcement, judges, academics, and legal practitioners in evaluating the application of blasphemy articles.

1.2. Research Questions

The main questions this study is expected to answer are:

- 1) How does the legal framework proscribe blasphemy in Indonesia?
- 2) How are the Indonesian legal provisions on blasphemy applied and interpreted?
- 3) How can the legal provisions on blasphemy be interpreted according to the prevailing human rights legal framework and principles?

1.3. Research Methodology

In response to the above questions, the study pays attention to a number of issues, together which provide the background and purpose for blasphemy regulations in Indonesia; the formulation, scope, and elements of the blasphemy article in Indonesian law; the application of procedural law in blasphemy cases; and other factors that contribute to the application of the blasphemy article in Indonesia.

In general, this is an empirical legal research that combines dogmatic and empirical legal approaches in an effort to obtain an understanding on the law at the normative and practical levels. The various questions that emerge in this research will also be analyzed from a human rights perspective, which has also been adopted into the Indonesian legal framework, to look at how the principles operate within the application of blasphemy articles. This research is ultimately aimed at providing legal resource to be used by law enforcement, judges, academics, and legal practitioners to approach the legal issues of blasphemy and other related aspects.

To answer the research questions, data and information were collected by investigating qualitative data by combining literature sources with field data obtained through *in-depth interviews*.

A literature study will identify the main issues in blasphemy, analyze legislations, and lay out the opinions of judges and legal scholars in responding to legal issues found in blasphemy cases. The literature sources are national law, national and international human rights instruments, court judgements, academic papers or publications. These resources are surveyed for information on blasphemy, related concepts, doctrines, paradigms, and blasphemy laws, how they are formulated and enforced, throughout history, in various countries or at international human rights courts, as compared to one another.

The main resource for analysis is court judgments. Different studies on blasphemy have identified and looked at different numbers of cases. LeIP has limited itself to only those with accessible opinions for qualitative analysis. We refer to a number of other quantitative data sources but primarily explore at depth twenty-seven judgments. These judgments were selected for two reasons: (i) in those cases the defendants were charged with Article 156a; and (ii) copies of the complete opinions can be obtained.

Meanwhile, in-depth interviews were conducted to see how the blasphemy provision was applied at various court levels; and to obtain input from experts as to how they *should be* applied in legal cases. For this purpose, the researchers interviewed a collection of resource persons who have dealt with or have knowledge of blasphemy and related legal issues, as well as knowledge and understanding of human rights. These respondents were judges, defense attorneys, academics, and human rights activists.

1.4. Report Structure

This research report is structured as follows:

- Chapter 1:** “Introduction”, lays out the background of the importance of this study, which is to outline the legal issues in blasphemy cases, as well as to come up with an alternative legal argumentation to interpret blasphemy articles. This chapter also specifies the research methodology involved.
- Chapter 2:** “Concepts, Definitions and International Human Rights Framework on Blasphemy”, expands upon the various concepts and definitions of blasphemy. In addition, this chapter also specifies international human rights legal framework and principles, how they are applied and enforced in blasphemy cases in a variety of international courts around the world.
- Chapter 3:** “The Regulation on Blasphemy and Human Rights Law in Indonesia”, starts by providing a background of blasphemy legislation in Indonesia. The chapter then details the elements of the blasphemy article and how they are considered in court decisions.
- Chapter 4:** “The Application of the Blasphemy Article in Indonesia”, categorizes the blasphemy cases and examines how the judiciary parses the criminal elements of blasphemy.

- Chapter 5:** “Analysis of the Blasphemy Article in Indonesia”, provides an analysis of the different interpretations that have been seen in judgments of blasphemy cases. This chapter also explores the contributing factors to those interpretations.
- Chapter 6:** “An Attempt to Limit the Scope of Blasphemy: A Reinterpretation of the Elements and a Reformulation of Article 156a of the Criminal Code”, explains how the blasphemy provisions should be interpreted by heeding the elements within the articles regulating this act and ensuring that they are in line with the national laws governing human rights principles.
- Chapter 7:** “Conclusions and Recommendations”, presents the outcomes of the research and the recommendations for the improvement of the blasphemy provisions and how they are applied in cases.

CHAPTER II

CONCEPTS, DEFINITIONS AND INTERNATIONAL HUMAN RIGHTS FRAMEWORK ON BLASPHEMY

In the discourse of freedom of thought, conscience, and religion, including the one here in Indonesia, there are two concepts that are often debated: *blasphemy* and *defamation of religion*. These two concepts are similar in the sense that they aim to protect the integrity of religion or certain divine entities.

2.1. Blasphemy in Concept and Definition

Black's Law Dictionary' entry on *blasphemy*, which comes from two Anglo-Saxon traditions of the United Kingdom and the United States, states: "In general, blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God".³ In American law, blasphemy is defined as "Any oral or written reproach maliciously cast upon God, His name, attributes, or religion".⁴

³ Henry Campbell Black, *Black's Law Dictionary*, 4th Edition (Revision), p. 216, <http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf>, accessed 4 October 2017. As a comparison, based on Mariam-Webster dictionary, Blasphemy is defined as: (i) the act of insulting or showing contempt or lack of reverence for God); (ii) the act of claiming the attributes of deity; and (iii) irreverence toward something considered sacred or inviolable.

⁴ *Ibid.*

Etymologically, the word *blasphemy* comes from the Greek “blasphemia” meaning “malicious statement”.⁵ The meaning of *blasphemy* is very broad and depends on the religion in question, for example the expansive definition of blasphemy includes exhibiting disrespect towards God, doubting His powers and refusing to obey His instructions.⁶ Neville Cox wrote that “the Old Testament terms for blasphemy all stem from the words *Naats* and *Naqab* meaning to pierce or sting, and the word *Gadaph* meaning to cut into or revile, which suggests that within Judaism (and possibly Christianity) blasphemy involves an attack that causes pain”. In Islamic thought “blasphemy involves a contemptuous or hostile attack (*Sabb*) either on God himself (*Sabb Allah*) or on the Prophet Mohammad (*Sabb al-Rasul*) or on other sacred things”.⁷ As suggested by David A. Robertson, “the concept of blasphemy was derived from monotheistic religion such as Judaism, Christianity and Islam which prohibit someone (or a group) from defaming god or sacred things (including prophets and saints) in these religions”.⁸

As blasphemy was understood as contemptuous action directed to God or to the divine,⁹ blasphemy cases involve an attack on the divine and not an attack on believers.¹⁰ “The type of expression banned by blasphemy laws around the globe ranges from the destruction of holy books to statements that call into question religious beliefs to depictions deemed disrespectful of God or holy figures”.¹¹ This is echoed by Venice Commission’s Committee on Culture, Science and Education that stated that blasphemy can be defined as “the offence of insulting or showing contempt or lack of reverence for God and, by extension, towards anything considered sacred”.¹² A study conducted by Pew Research Center’s Forum on Religion and Public Life defined blasphemy as “*remarks or actions contemptuous of God or the divine*”.¹³

However, there is a different definition of blasphemy that considers the effect of the act on the religious feelings of believers or on public peace. Aswad, Hussain and Suleman stated that the prohibited acts under blasphemy law sometimes include expression that is generally disrespectful of religious beliefs and those who insult religious feelings.¹⁴ The same is suggested by Simister dan Sullivan in that blasphemous words are punishable for their manner, their violence or ribaldry or more fully stated, for their tendency to

⁵ Riaz Hassan, “*Expressions of religiosity and blasphemy in modern societies*”, <http://press-files.anu.edu.au/downloads/press/p35161/pdf/chapter11.pdf>, accessed 4 October 2017.

⁶ L.W. Levy, *Blasphemy: Verbal Offences against the Sacred From Moses to Salman Rusdhie*, Knopf, 1993, p.3.

⁷ Neville Cox, “*The Development of Irish Blasphemy law*”, <https://www.constitution.ie/AttachmentDownload.ashx?mid=54533e30-c843-e311-8571-005056a32ee4>, accessed 4 October 2017.

⁸ Haidar Adam, “*Blasphemy Law in Muslim-Majority Countries: religion-state relationship and rights based approaches in Pakistan, Indonesia and Turkey*”, http://www.etd.ceu.edu/2015/adam_haidar.pdf, accessed 4 October 2017.

⁹ *Ibid.*

¹⁰ Cox, *loc.cit.*

¹¹ Evelyn M. Aswad, Rashad Hussain and M. Arsalan Suleman, “*Why the United States Cannot Agree to Disagree on Blasphemy Laws*”, <https://www.bu.edu/ilj/files/2014/05/Aswad-US-and-Blaspemy.pdf>, accessed 4 October 2017.

¹² Venice Commission, *Blasphemy, insult, and hatred: finding answers in a democratic society*, Council of Europe Publishing, 2010, p. 19. Venice Commission is the alias for The European Commission for Democracy through Law, which is the Council of Europe’s advisory body on constitutional matters.

¹³ Aswad, Hussain dan Suleman, *loc.cit.*

¹⁴ *Ibid.*

endanger the peace then and there, to deprave public morality generally, to shake the fabric of society and to be a cause of civil strife.¹⁵

The Irish Law Reform Commission suggested a legal definition of “blasphemy” as “matter the sole effect of which is likely to cause outrage to a substantial number of adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion”.¹⁶ This element of “*religious feelings*” is also found in the European Court of Human Rights’ judgment in the case of *Otto-Preminger Institut v Austria*. The court upheld the Austrian authorities’ confiscation of the film *Das Liebeskonzil* in the interest of Roman Catholics in the region, based on Article 10.2 of the European Human Rights Convention on the restriction of the exercise of free expression.¹⁷

Based on the aforementioned definitions, there are two concepts of blasphemy: one that focuses on the insult to God or other sacred things of a religion, and another that also considers the effect of that insult on the adherents’ religious feelings. The second notion is blasphemy as religious insult, comprising insult based on belonging to a particular religion and insult to religious feelings.¹⁸

Internationally, there is no consensus on the definition of *defamation of religion* or *blasphemy*, even though there have been efforts to integrate the concept into the international legal order. A resolution was introduced, for example, by Pakistan, acting on behalf of the Organization of Islamic Cooperation (OIC), at the UN Commission on Human Rights in 1999 to combat “hatred, discrimination, intolerance, and acts of violence, intimidation, and coercion” directed at Islam. However, subsequent negotiations reached a more general resolution.¹⁹ Resolution 1999/82 on “*Defamation of Religion*” does not define what religious defamation is but urges all States, within their national legal framework, in conformity with international human rights instruments, to:

“.. take all appropriate measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance, including attacks on religious places, and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief.”²⁰

The concern and criticism against regulations prohibiting blasphemy or defamation of religion are rooted in its conflict with freedom of expression and the silencing of debate of ideas. According to Matt Cherry and Roy Brown, religions and other worldviews often

¹⁵ Ifdhal Kasim, “Perkembangan Delik Agama Dari Masa Ke Masa”, <http://lama.elsam.or.id/mobileweb/article.php?act=content&m=6&id=2356&cid=805&lang=in>, accessed 4 October 2017.

¹⁶ *Ibid.*

¹⁷ European Human Rights Court, *Otto-Preminger-Institut v Austria*, 19 EHHR 34, ECtHR 295-A, 20 September 1994.

¹⁸ Venice Commission, *op.cit.*, p. 20.

¹⁹ Brett G. Scharffs, “*International Law and The Defamation Of Religion Conundrum*”, *The Review of Faith & International Affairs*, 11(1), 66-75, 2013, p. 67.

²⁰ UN Human Rights Commission, *Commission on Human Rights resolution 2000/84 Defamation of religions*, E/CN.4/RES/2000/84, 27 April 2000, para 4.

include views about the truth and morality of other religions and beliefs, including fundamental doctrines that flatly condemn the doctrines of other religions.²¹ One example, the fundamental Christian claim that “Jesus is the son of God” may be blasphemous to Muslims, while the Muslim claim that Jesus was a prophet but not the son of God, may be blasphemous to Christians. If the beliefs of one religion are seen as “defamatory” by the followers of another, laws against “defamation” could produce a vicious spiral of increasing limits to freedom of expression.²²

Ultimately, blasphemy laws continue to be used to protect politically dominant religions from dissent and to prosecute objections to human rights abuses in the name of religion. Blasphemy laws are also used to exempt powerful religious institutions from scrutiny and criticism, prohibiting critical evaluation and debate about religions and religious institutions, thereby restricting the freedom to compare and choose between beliefs.²³ The same view was expressed by Asma Jahangir, the former UN Special Rapporteur for Freedom of Religion or Belief:

“[i]f it was defamation to say that one religion was better than another, the result would be the religious prosecution of those who embarked on intellectual analysis of religions or those who were within their rights to say that their religion was superior”.²⁴

Related to this, Agnes Callamard is of the opinion that blasphemy laws have an effect on human rights and freedoms. She said:

“Blasphemy laws are the anti-thesis of human rights. [...] they censor, they create a climate of fears, and they stifle artistic creativity, academic research, scholarship and freedom. They may also lead to imprisonment and death – thus violating the most potent human rights of all - the right to mental and physical integrity, and the right to life.”²⁵

The notion and meaning of blasphemy have changed and broadened, igniting controversy because of consequent conceptual variety and vagueness. Moreover, along with the development of international human rights norms, blasphemy has come into conflict with human rights protection and enjoyment, such as freedom of religion, belief, and conscience, as well as freedom of opinion and expression.

²¹ Matt Cherry dan Roy Brown, “*Speaking Freely about Religion: Religious Freedom, Defamation and Blasphemy*”, International Humanist and Ethical Union, Policy Paper, 2009, p. 7.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Agnes Callamard, “*Freedom of Speech and Offence: Why Blasphemy Laws Are Not The Appropriate Response*”, Equal Voices, 18, June 2006, p.3, <https://www.article19.org/data/files/pdfs/publications/blasphemy-hate-speech-article.pdf> , accessed 4 October 2017.

2.2. Definition of blasphemy in various countries

There are no internationally binding regulations on the acts signified as blasphemy or defamation of religion. UN Resolution 1999/82 on Defamation of Religion was adopted to encourage states to proscribe it in their national law. The resolution gives countries latitude to prescribe blasphemy and to adjust it to international law.

Currently there are seventy-one countries, or around 37% of all the countries of the world, with blasphemy laws.²⁶ Typically, blasphemy laws were formed to protect all religions within those countries, but there are 15 countries where blasphemy laws protect only certain religions, such as Islam, Christianity, Buddhism, and Judaism, or at least pays more attention to those religions than the rest. There are countries where on paper the provisions protect all religions but in practice protect only one particular religion. This is the case in Malaysia, where in reality only Islam is protected, and Poland, where Christianity is protected.²⁷

Tabel: Religions Protected by Blasphemy Provision in Various Countries

Protected Religion	Country Name
Islam	Afghanistan, Somalia, Tanzania, Algeria, Iran, Jordan, Morocco dan Western Sahara, Saudi Arabia, United Arab Emirates, Yemen.
Kristen	Austria, Finland, Germany, Yunan.
Budha	Thailand
All religions in statute, but only certain ones in practice	Malaysia (Islam), Poland (Christianity).
Others	Qatar (Abrahamic religions, such as Islam, Christianity, and Judaism).

²⁶ Based on regionality, 25.4% are in the Middle East and North Africa, 25.4% in Asia Pacific, 22.5% in Europe, 15.5% in Sub-Saharan Africa and 11.2% in the America Continent. See Joelle Fiss dan Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring the World's Blasphemy Laws*, United States Commission on International Religious Freedom, July 2017, p. 3, 17.

²⁷ Source from www.end-blasphemy-laws.org, accessed 4 November 2017.

Tabel: Religions Protected by Blasphemy Provision in Various Countries	
Protected Religion	Country Name
Islam	Afghanistan, Somalia, Tanzania, Algeria, Iran, Jordan, Morocco dan Western Sahara, Saudi Arabia, United Arab Emirates, Yemen.
Christianity	Austria, Finland, Germany, Yunan.
Budhism	Thailand
All religions in statute, but only certain ones in practice	Malaysia (Islam), Poland (Christianity).
Others	Qatar (Abrahamic religions, such as Islam, Christianity, and Judaism).

The scope of the definition of blasphemy varies in different countries: First, blasphemy is the act that insults, attacks, or disrespects God or sacred or holy things of a religion. Second, blasphemy also includes those individuals or institutions that attack, insult, or disrespect the religious feelings of religious believers. Lastly, in several countries, blasphemy laws cover additional acts such as the spreading of religions other than Islam, attacking a religious leader, undermining a Muslim's religious conviction, the eating of pork as a Muslim, and even the prohibition of atheism and apostasy.

Tabel: The acts considered blasphemy in various countries	
Type of act	Country Sample
To insult, attack, and disrespect God or sacred or holy things of a religion	Thailand, Greece, Finland, Germany, Ireland, Italy, Leichtenstein, Montenegro, Turkey, Nigeria, Brazil, El Savador, etc.
To insult, attack, or disrespect God or sacred or holy things in a religion, or to disrespect the religious feelings of believers.	India, Philippines, Kazakhstan, Pakistan, Austria, Cyprus, Poland, Russia, Ethiopia, Gambia, etc.
To spread religion other than Islam	Aljazair, Tunisia, Jordania.
To attack a religious leader	Rwanda.
To undermine a Muslim's faith	Algeria, Morocco.
To eat pork if you are Muslim	United Arab Emirates
Atheism	Bangladesh, Kuwait.

The report released by United States Commission on International Religious Freedom in 2017 stated that many blasphemy laws are vaguely worded and are in contradiction to international legal standards. In particular, blasphemy laws fail to specify intent and enumerate the

acts prohibited.²⁸ However, certain countries establish the exception for when an act will not be charged with blasphemy is when it is conducted in “good faith”. This can be seen in Article 296 of the Criminal Code of Canada:

“No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.”

Table: States that includes the element of intent	
States whose blasphemy laws specify the intent	
Mens rea language	Countries
“intention” or “intending”	Brunei, Bangladesh, Cyprus, India, Malaysia, Nigeria, South Sudan, Sri Lanka, St. Vincent and the Grenadines, Tanzania, Zambia, Zimbabwe
“Good faith”	Canada, Guyana, St. Lucia.
“Maliciously”	Greece, Switzerland
“Purpose of offending,” “in order to offend”	Finland, Russia, Spain
“Deliberate,” “deliberately” or “deliberate intention”	Indonesia, Kazakhstan, Singapore

Sumber: Joelle Fiss and Jocelyn Getgen Kestenbaum, Respecting Rights? Measuring the World's Blasphemy Laws, United States Commission on International Religious Freedom, July 2017, page 24.

Blasphemy laws in various countries impose a diversity of penalties, from fines to capital punishment, both separately and cumulatively. The majority of countries with blasphemy laws prescribe imprisonment for the offense. Iran and Pakistan are two examples of countries with severe punishment of death for “insulting the Prophet”. Qatar, Malaysia, and the UAE impose the death penalty for apostasy. Meanwhile, Sudan is one example where a country imposes corporal punishment, which includes whipping of no more than forty lashes.²⁹ Some countries only impose fines (Austria, Ireland, and Rwanda), whereas others only have imprisonment (Bangladesh, Kazakhstan, Germany, Montenegro, Turkey,

²⁸ Fiss dan Jocelyn, *op.cit.*, p. 24.

²⁹ *Ibid.*, p. 25.

Nigeria, Tanzania, Canada, El Savador, Jordan, Israel, and Vanuatu). Meanwhile, countries that impose both imprisonment and fines cumulatively are India, Russia, Somalia, Suriname, Algeria, Kuwait, Morocco, Oman, and Yemen. Countries that impose either imprisonment or fines alternatively are Malaysia, Iraq, Thailand, Finland, and Qatar. Several other countries, such as Eritrea and Saudi Arabia, do not specify the penalties for blasphemy.

Table: Criminal Penalties for Blasphemy in Various Countries	
Penalty	Countries
Death (for insulting the prophet)	Iran, Pakistan.
Death (for apostasy)	Qatar, Malaysia, UAE, Arab Saudi, Sudan, Afghanistan, Brunei Darussalam, Iran, Yemen.
Imprisonment	Bangladesh, Kazakhstan, Germany, Montenegro, Turkey, Nigeria, Tanzania, Canada, El Salvador, Jordan, Israel, Vanuatu, Indonesia, Cyprus.
Fines	Austria, Ireland, Rwanda.
Imprisonment and fines (cumulatively)	India, Russia, Somalia, Suriname, Algeria, Kuwait, Morocco, Oman, Yemen.
Imprisonment and fines (alternatively)	Malaysia, Iraq, Thailand, Finland, Qatar, Indonesia
Corporal punishment (whipping)	Sudan.
No penalty specified	Eritrea, Saudi Arabia.

In contrast to many countries that still retain blasphemy laws, there are also countries that have abolished them for different reasons. These countries are Iceland, Malta, Norway, the United Kingdom, France, Denmark, the Netherlands, and Sweden.³⁰ In Iceland and Denmark, blasphemy laws were abolished because they violated the right to “freedom of speech”^{31,32} In Malta, the reason cited for the abolition was that the vilification of religion provision was not in line with the idea of a democracy. Maltese Justice Minister Owen Bonnici argued, “In a democratic country, people should be free to make fun of religions, while not inciting hatred”.³³ France, a country that has a tradition of separation

³⁰ Lihat <http://blasphemy.nz/international/countries-that-have-repealed-or-abolished-blasphemy-laws/>, accessed 4 October 2018.

³¹ “Iceland MPs vote to abolish blasphemy laws”, <http://www.dw.com/en/iceland-mps-vote-to-abolish-blasphemy-laws/a-18560798m>, accessed 20 January 2018.

³² “Denmark becomes fifth European country to abolish ‘blasphemy’ laws since 2015”, <https://humanism.org.uk/2017/06/02/denmark-becomes-fifth-european-country-to-abolish-blasphemy-laws-since-2015/>, accessed 20 January 2018.

³³ States that afford special protection for Islam are Afghanistan, Somalia, Tanzania, Algiers, Iran, Jordan, Morocco and Western Sahara, Saudi Arabia, United Arab Emirates (UEA), and Yemen. Whereas Austria, Finland, Germany and Greece give special attention to defamation against the church or Christianity, Thailand granted special attention to blasphemy against Buddhism, and Qatar affords special protection for Abrahamic religions namely Islam, Christianity, and Judaism.

of religion and the state, has stated secularism as the reason to abolish blasphemy laws.³⁴ In the UK, Evan Harris, a Liberal Democrat Member of Parliament, said that blasphemy laws are unnecessary because public outrage can be dealt with by general public order offences, and God does not need the protection of blasphemy laws. After a lengthy debate, the UK finally rid their national law of blasphemy offences.³⁵ Lastly, in 2014, the Dutch parliament voted to repeal the law on insulting God in the Netherlands, which was drafted in the 1930s.³⁶

The same movement towards abolition of blasphemy laws is seen in other countries. In Ireland, in 2015, there was a debate and a referendum to abolish blasphemy offence on the recommendation of the Constitutional Convention. The Prime Minister at the time, Enda Kenny, said that the planned referendum would not be held during his Government. However, the Minister for Communications, Alex White, urged the government to go ahead with the referendum, citing the 1991 Law Reform Commission recommendation to delete the blasphemy reference from the Constitution.³⁷ In Jamaica, a government-committee report recommended an abolition of Jamaica's Defamation Laws. In 2011, the House of Representatives approved a further report from a joint select committee on this review, but it does not appear to have been followed through and "blasphemous" libel remains on statute.³⁸

Blasphemy laws are still applied in many countries although several have abolished them. In some, mainly European, countries, these blasphemy laws have been amended to make them more in line with principles that respect of human rights, and the focus to combat intolerance and hate crimes. A substantial majority of countries have no blasphemy provisions in their penal codes.

³⁴ Source from <https://end-blasphemy-laws.org/countries/europe/france/>, accessed 7 March 2018.

³⁵ Lucinda Maer, "The Abolition of the Blasphemy Offences", <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04597>, accessed 4 October 2017.

³⁶ Frud Behzan, "Dutch Parliament To Revoke Blasphemy Law", <https://www.rferl.org/a/dutch-parliament-revokes-blasphemy-law/24785198.html>, accessed 7 March 2018. Lihat juga "Countries that have repealed or abolished blasphemy laws", <http://blasphemy.nz/international/countries-that-have-repealed-or-abolished-blasphemy-laws/>, accessed 7 March 2018.

³⁷ Source from <https://end-blasphemy-laws.org/countries/europe/ireland/>, accessed 20 January 2018.

³⁸ *Ibid.*

2.3. Blasphemy and Human Rights

2.3.1. The Human Rights Framework and Blasphemy

International and regional human rights laws have set out various provisions to protect individual rights, including freedom of thought, freedom of religion and belief, and freedom of speech/opinion and expression. These rights have often been referenced as contradictory to blasphemy regulations. These rights are stipulated, in the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), among others.

Article 18 of the UDHR:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Article 18 of the ICCPR:

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Based on the above provisions, the scope of freedom of thought, conscience, and religion are: (i) freedom to change religion or belief; (ii) freedom to adopt a religion or belief of choice; (iii) freedom to manifest one's religion or belief in teaching, practice, worship and observance, either alone or in community with others and in public or private; and (iv) the freedom to manifest religion may only be limited by provision based on law, and are necessary to protect: (a) public safety, (b) public order, (c) public health, (d) public morals, or (e) the fundamental rights and freedoms of others.

The concept of freedom of religion/belief distinguishes between: (i) the freedom to believe in a teaching as religion/belief that is internal freedom (*forum internum*), which cannot be interfered with and is categorized as a non-derogable right; and (2) the freedom to manifest religion/belief that is categorized as external freedom (*forum externum*), which can be restricted under certain criteria.

The assertion on the meaning of freedom of religion/belief is found in General Comment 22 of the Human Rights Committee on Article 18 of the ICCPR.³⁹ The document's first three points details what freedom of religion/belief includes, which are:

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18 (1) is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of the Covenant.
2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.
3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19 (1). In accordance with articles 18 (2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

³⁹ UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, CCPR/C/21/Rev.1/Add.4, 30 July 1994.

The General Comment also asserts the prohibition to coercion to adopt, retain, replace, or recant a religion or belief, including with the threat of violence or penal sanctions. This is stated in Paragraph 5:

“The Committee observes that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief. Article 18 (2) bars coercions that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as for example those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant are similarly inconsistent with article 18 (2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.”

In addition, the United Nations have also adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in 1981.⁴⁰ This declaration contains further details to freedom of religion or belief.

At the same time, Article 19 of the ICCPR stipulates that freedom of opinion includes the freedom to seek, receive and impart all kinds of information and ideas, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person’s choice. This article also states that the exercise of these rights carries special duties and responsibilities. The restrictions to the exercise of these rights may be done, but only if provided by law and are necessary to respect the rights or reputations of others, to protect national security or public order, or public health or morals.

By these provisions, the ICCPR guarantees the protection of these rights and also provides for permissible restrictions/limitations of certain rights. In general, Article 20 of the Covenant proscribes any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Aside from that, Article 27 of ICCPR also stipulates that with regards to State parties with national, religious, or linguistic minority groups, the people who belong to such groups should not be denied their rights within the society, together with the other members of the group, to practice their own religion or use their own language. Referring to the General Comment No. 22 of UN Human Rights Committee, even when a religion is acknowledged as a state religion or determined to be an official or traditional religion,

⁴⁰ UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, 25 November 1981.

or that the adherents of the religion constitute the majority of the population, the State should still guarantee the enjoyment of the rights guaranteed in the ICCPR, including those guaranteed in Article 18 and 27, and guarantee that there shall be no-discrimination against those who adhere to other religions or those who do not adhere to any religion or belief. Paragraph 9 of the General Comment No. 22 state that:

“The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. **The measures contemplated by article 20, paragraph 2 of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups.** The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination. Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the right to freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.”

At the regional level, there are similar stipulations on freedom of religion/belief, opinion and expression.⁴¹ In Southeast Asia the ASEAN Human Rights Declaration provides for freedom of religion, belief, opinion, and expression in Articles 2, 22, and 23. In Europe, these rights are found in Article 9 and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom. Both articles stipulate the protection of rights and also the requirements for permissible limitations of the exercise of those rights. These provisions are often invoked to address the relationship between blasphemy and human rights, especially in disputes at the European Human Rights Court.

⁴¹ The regional human rights instruments here refer to *European Convention for the Protection of Human Rights and Fundamental Freedom*, *American Convention on Human Rights*, *African Charter of Human and People's Rights*, dan *Arab Charter on Human Rights*.

European Countries also published the **European Guidelines on Freedom of Religion or Belief, for the promotion and protection of freedom of religion or belief. These Guidelines talk about, among others: (i) new forms of media that provides those who feel offended by criticism or rejection of their religion or belief the tools to instantly reply; (ii) that the right to freedom of religion or belief, as enshrined in relevant international standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.**⁴² In addition, this document recommends the decriminalization of blasphemy offences and advocates against the use of the death penalty, physical punishment, or deprivation of liberty as penalties for blasphemy.

Referring to the above instruments, the points of contact between blasphemy and human rights are at least in two areas: first, the acts that are considered blasphemy are often opinions, expressions, and views on religion or beliefs. Second, if restrictions on the manifestation of freedom of religion/belief and expression are imposed, there must be legal justification for the restrictions.

General Comment No. 10 of the Human Rights Committee on Article 19 of the ICCPR states that paragraph 3 restrictions on the exercise of freedom of expression may not put in jeopardy the right itself. Correspondingly, according to General Comment No. 34, blasphemy laws are incompatible with the ICCPR, *except if strictly limited to curtailing incitement to “discrimination, hostility or violence”*.

The Report of UN Special Rapporteur on Freedom of Religion and Belief and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance also states that defamation of religions may offend people and hurt their feelings but it does not directly result in a violation of their rights to freedom of religion.⁴³ International law does not allow for limitation of opinion or belief that is different from the majority of the population or state recognized beliefs.⁴⁴ Restriction of rights must be necessary and appropriate, useful and reasonable. The word “necessary” indicates that every restriction must be proportional to the value which the restriction serves to protect.

In the human rights discourse, there is a tendency towards abolition of blasphemy laws because of the debate regarding the application of blasphemy laws and permissible limitations to rights. Abolitionists argue that there is no international consensus

⁴² Council of the European, *EU Guidelines on the promotion and protection of freedom of religion or belief*, 24 June 2013, Para 32, <https://eeas.europa.eu/sites/eeas/files/137585.pdf>, accessed 7 November 2017.

⁴³ UN General Assembly, *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, A/HRC/2/3*, 20 September 2006, para 37

⁴⁴ UN Human Rights Commission, *Report Submitted by Mr. Abdelfattah Amor, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1995/23: Addendum*, 2 January 2 1996, para 82, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=780, accessed 7 November 2017.

regarding the kinds of acts within the scope of blasphemy and its often expansive, vague, and subjective provisions in various countries. Blasphemy laws have also been applied arbitrarily as means of persecution.⁴⁵ Human rights experts have expounded that blasphemy laws have generated religious tension and agreed that permissible limitation to freedom of expression are not meant to protect belief systems and religions from criticism.⁴⁶

In a joint statement in 2009, three UN special rapporteurs have stated that there are difficulties in providing an objective definition of the term “defamation of religions” at the international level. Meanwhile, at the national level, blasphemy laws can be counter-productive and are often applied in a discriminatory manner, such as to persecute religious minorities, dissenters, as well as atheists and non-theists.⁴⁷ Frank La Rue, in his 2010 annual report as then-UN Special Rapporteur for Freedom of Expression, proposed to have every restriction or limitation be clear and unambiguous, compatible with international human rights law, and to have their continued relevance analyzed periodically. Heiner Bielefeldt, former UN Special Rapporteur for Freedom of Religion or Belief, had a more action-oriented view by stating that countries should repeal criminal provisions that impose sanction on blasphemy, apostasy, proselytism, because the provisions impede individuals from minority religions to enjoy fully their right to freedom of religion or belief.

At a regional level, The Council of Europe’s European Commission against Racism and Intolerance (ECRI), in 2007 has stated that national law should only penalize expressions about religious matters that intentionally and severely disturb public order and potentially cause public violence. Subsequently, in a report on the relationship between Freedom of Expression and Freedom of Religion in 2008, recommended the offence of blasphemy to be abolished and not be reintroduced.⁴⁸

Criticism on the enforcement of blasphemy laws in relation to human rights continues to be articulated. The *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred of 2012* says that states that have blasphemy laws should repeal them because the stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion. This document also affirms that blasphemy laws are counter-productive and that there are many examples of blasphemy

⁴⁵ Freedom House, “The Impact of Blasphemy Laws on Human Rights: Indonesia”, Policing Brief, Freedom House Special Report, October 2010, p. 3.

⁴⁶ *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, 5 October 2012, Para 19.

⁴⁷ Pernyataan bersama Githu Muigai, UN Special Rapporteur on *contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, Asma Jahangir UN Special Rapporteur on *freedom of religion or belief* and Frank La Rue, UN Special Rapporteur on *the promotion and protection of the right to freedom of opinion and expression*, 22 April 2009, <http://www2.ohchr.org/English/issues/religion/docs/SRjointstatement-22april09.pdf>, accessed 4 November 2017.

⁴⁸ Venice Commission, *Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, Sesi Umum ke 76, 17-18 October 2008, para 89 (c).

laws being used to persecute minority groups.⁴⁹ In 2017, the UN Human Right Council adopted a resolution urging states to abolish the death penalty for apostasy, blasphemy, adultery and consensual same-sex relations.⁵⁰ **This resolution is a follow up to the UN Secretary General's report on the death penalty and discrimination, addressing the disproportionate impacts of the death penalty on those facing discrimination.**⁵¹

Even though there is an abolitionist mainstream, there are groups of nations that defend blasphemy laws. These proponents argue that expressions that are religiously offensive must be restricted to preserve communal harmony and that this limitation is in line with Articles 19.3 and 20.2 of the ICCPR.⁵² At a meeting in 2009, Pakistan, on behalf of the OIC, submitted a proposal to adopt an optional protocol to the ICERD that would ban defamation of religions.⁵³ The OIC continue to push for an international blasphemy law because it believes "Islamophobia" is a significant problem and therefore the OIC's Human Rights Commission stated that prejudice towards Muslims requires an "international code of conduct for media and social media to disallow the dissemination of incitement material". This push was also triggered by the film "Innocence of Muslims" that was considered to violate the freedom of religion and belief of Muslims, and therefore freedom of expression must be limited to responsible speech. Furthermore, the OIC statement encouraged all governments to pass legislation to limit acts that lead to incitement and hatred based on religion.⁵⁴

Subsequently, the discourse to penalize blasphemy or religious defamation shifted to a discourse to combat intolerance. This is seen from the adoption of the 2011 Resolution 16/18 on Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.⁵⁵ This resolution demonstrates that it is possible to combat intolerance in a way that does not violate freedom of speech.⁵⁶ Zainal Abidin Bagir explained that this resolution was not intended to be a binding law that enforces criminal penalties, but the use of dialogue and education to overcome intolerance, as long as it is not manifested in the form of incitement to hatred or acts of violence.⁵⁷

⁴⁹ *Rabat Plan of Action, op.cit.*, para 19.

⁵⁰ UN General Assembly, A/HRC/36/L.6, 22 September 2017, point 6.

⁵¹ UN Human Rights Council, *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Yearly supplement of the Secretary-General to his quinquennial report on capital punishment*, 16 July 2016, A/HRC/30/18, accessed from <http://www.refworld.org/docid/55d2fa994.html>

⁵² A number of UN members who are part of the Organization of the Islamic Conference (OIC) and Africa Group, primarily Egypt, Al Jazair, and Pakistan, took the initiative to incorporate prohibition of religious defamation in human rights legal framework. See Freedom House, *op.cit.*, p. 9.

⁵³ In a meeting in 2009, Pakistan on behalf of OIC proposed to adopt an Optional Protocol to the ICERD that prohibits defamation of religions. "Nigeria, on behalf of the African group, submitted a similar proposal. The United States, Canada, and members of the European Union pushed back, arguing that existing international law is sufficient to address incitement to racial or religious hatred, and that better implementation, including the promotion of tolerance and education, should be the focus". See Freedom House, *op.cit.*, p. 12.

⁵⁴ Kyle Wideltitz, *A Global Blasphemy Law: Protecting Believers at the Expense of Free Speech*, Pepperdine Policy Review, 6(2), 2013, p. 12-13.

⁵⁵ See Zainal Abidin Bagir, *Kerukunan dan Penodaan Agama, Alternative Penanganan Masalah*, Center for Religious and Cross-Cultural Studies (CRCS), Laporan Kehidupan Beragama di Indonesia, Book Two, December 2017, p. 13.

⁵⁶ Wideltitz, *op.cit.*, p. 12.

⁵⁷ *Ibid.* See UN Resolution on *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief*, A/HRC/RES/16/18, 12 April 2011, point 6.

2.3.2. Blasphemy Cases at the European Court of Human Rights

The European Court of Human Rights has tried various cases related to blasphemy and how it pertains to the rights that are guaranteed in the European Convention on Human Rights.⁵⁸ The court, in deciding whether violations of human rights have occurred, aside from referring to the provisions of the European Convention of Human Rights, also applies the doctrine of margin of appreciation. This doctrine provides some latitude and allows European countries to establish particular policies in meeting its Convention obligations. Based on this doctrine, the legislative, executive, and the judicial branches of states exercise 'discretion' within a certain boundary when undertaking their functions with regards to the Convention. This doctrine specifies the method or standard for the Court to assess whether states' implementations of the Convention are in accordance with their culture and legal tradition without diminishing/contravening the purpose of Convention.

The application of the "margin of appreciation" doctrine is considered on a case-by-case basis and, accordingly, the degree of margin depends on context provided in each case. For this reason, this doctrine has been used as an effective defense by countries accused of violating human rights (as per Convention) before the Court. The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention. However, the application of the margin of appreciation doctrine is done by reference to a number of principles of interpretation, which are (i) effective protection; (ii) subsidiarity and review; (iii) permissible interferences with Convention rights, as prescribed by law, to achieve legitimate aims, that are necessary in a democratic society; (iv) proportionality; (v) the "European Consensus" standard as written in the Convention.⁵⁹

The European Court of Human Rights has developed a number of principles to distinguish legitimate/allowable expressions from those that are prohibited. One of those principles include the right to express controversial, insulting, or offensive opinions, including those that target ideas about belief. This is seen in the Court's decision in the case of *Handyside v. United Kingdom* in 1976 that establishes that expressions are protected even if they offend, shock or disturb, and added that these are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".⁶⁰

⁵⁸ About European Human Rights Court can be seen at: <http://echr.coe.int/Pages/home.aspx?p=home>

⁵⁹ Source from: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P65_400, accessed 7 November 2017.

⁶⁰ Global Freedom of Expression, *Handyside v United Kingdom*, Columbia University, <https://globalfreedomofexpression.columbia.edu/cases/handyside-v-uk/>, accessed 7 November 2017.

Another example can be viewed in the *case of Klein v Slovakia*, the European Court of Human Rights Court decided not to uphold the ruling of the Slovakian court that punished Klein for publicly insulting the belief of a group of residents. The Slovakian Court was of the opinion that the contents of the article had violated the rights of Christians as guaranteed by the Constitution. Contrary to that, the European Court of Human Rights did not see Klein trying to discredit and disparage a group of Catholics, because the article did not interfere with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith. The domestic (Slovakia) court concluded that the publishing of the article has interfered with other persons' right to freedom of religion and that this was the basis for the sanction imposed on him. However, this claim of interference on Klein's part and the restriction of his freedom of expression do not correspond to a pressing social need and was not proportionate to the legitimate aim pursued. The European Court of Human Rights then decided that the interference was not 'necessary in a democratic society' and for that reason it constitutes a violation of Article 10 of the Convention.

CHAPTER III

REGULATION OF BLASPHEMY AND HUMAN RIGHTS IN INDONESIA

3.1. Regulatory Framework on Blasphemy in Indonesia

As blasphemy and human rights have become a source of debate in international fora, the blasphemy provision in Indonesia also has generated controversy about how its application may conflict with human rights obligations under national laws and international obligations. The provision on blasphemy in Indonesia is found in Article 156a of the Criminal Code. It originated from Article 4 of Law No. 1/PNPS/1965 on the Prevention of Abuse and/or Defamation of Religion. The PNPS stands for *Penetapan Presiden* or Presidential Stipulation, its original status before it was adopted as a proper law in 1969.⁶¹

⁶¹ Indonesia, *Undang-Undang Nomor 5 Tahun 1969 tentang Pernyataan Berbagai Penetapan Presiden dan Peraturan Presiden Sebagai Undang-Undang*, Annex IIA.

According to history, President Soekarno issued this statute to respond to growing tension between Muslims and followers of folk religions/traditional belief systems (“aliran kepercayaan”).⁶² And so, this statute was formulated to protect [major/organized] religions and the interests of their followers.⁶³ The accompanying Elucidation to this Law presents a number of arguments for its legislation. First, the Law is formulated as a response to the emergence and development of various spiritual belief systems and organizations in society that are considered to be in contradiction to religious teachings and laws. Second, the emergence and development of these spiritual belief systems and organizations are related to violations of law, the rupturing of national unity,⁶⁴ the abuse and misappropriation of religion, and defamation (Ind. “penodaan”, lit. stain, smear).⁶⁵ Third, the spiritual beliefs and organizations are considered to have developed in the direction that endanger existing religions.⁶⁶ The regulation was also formulated during a time of emergency and political tension where groups insult and offend each other on the basis of their constituencies and ideologies.⁶⁷ According to another view, this regulation was also adopted for fear of possible actions taken by members by the Indonesian Communist Party.⁶⁸

Law No. 1/PNPS/1965 covers two aspects: first, it contains the prohibition to, in public, recount, recommend, and attempt to gain public support, to interpret a religion that is adhered to in Indonesia or to perform religious activities that are similar to the religious activities based on the central doctrines of religion. This provision can be taken to mean the prohibition to publicly disseminate and conduct the act of interpretation that is considered “deviant”.⁶⁹ In subsequent articles the prohibition is followed by an administrative procedure that can lead to the dissolution of organizations or criminal prosecution of individuals. This means that, according to the law’s provisions, the act

⁶² This regulation was passed into law in 1969, making blasphemy as a threat to national security and prohibiting all types of religious expressions that deviate from the state definition of ‘religion’ and providing de facto basis for the acknowledgment for six religions (Islam, Protestant Christian, Catholic, Hindu, Buddha, and Confucianism) as official religions. The consequence of not attaining this official recognition for ethnic religious and belief groups is that they were not afforded legal protection. See Robert W. Hefner, *Negara Mengelola Keragaman di Indonesia: Kajian Mengenai Kebebasan Beragama Sejak Masa Kemerdekaan*, dalam Zainal Abidin Bagir (ed), *Mengelola Keragaman dan Kebebasan Beragama di Indonesia: Sejarah, Teori, dan Advokasi*, Center for Religious and Cross Cultural Studies, First Book, 2014, p. 32.

⁶³ See the statement of Edy O.S. Hiariej in the Constitutional Court Decision No. 140/PUU-VII/2009, p. 259. See also interview with Salman Luthan, 25 November 2018.

⁶⁴ Referring to the views of Yusril Ihza Mahendra, Law No.1/PNPS/1965 was issued to prevent disharmony, conflicts and tension against societal groups. See Constitutional Court, Decision No. 140/PUU-VII/2009, p. 267.

⁶⁵ Indonesia, *Undang-Undang No. 1/PNPS/1965*, Elucidation point 2.

⁶⁶ Muhammad Isnur (ed), *Agama, Negara dan Hak Asasi Manusia, Proses Pengujian UU 1/PNPS/1965 tentang Pencegahan, Penyalahgunaan, dan/atau Penodaan Agama di Mahkamah Konstitusi*, LBH Jakarta, 2012, p. 6.

⁶⁷ *Ibid.*, p. 7.

⁶⁸ Uli Parulian Sihombing, *Menggugat Bakor Pakem: Kajian Hukum Terhadap Pengawasan Agama dan Kepercayaan di Indonesia*, Indonesian Legal Resource Center, 2008, p. 28-30. See also interview with Zain Badjeber, 21 December 2016.

⁶⁹ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Pliteia, 1996, p. 134-135

of misappropriating religious tenets will prompt administrative sanction against the organization first before criminal prosecution is considered. This is clearly seen in Articles 1, 2, and 3.

Article 1 Law No. 1/PNPS/1956 states:

“Every person is prohibited from intentionally in public to recount, recommend, and strive for public support, to conduct an interpretation on a religion that is adhered to in Indonesia or to perform religious activities that resemble religious activities from the central doctrines of a religion.”

Article 2 states:

“(1) Whoever violates the provision mentioned in article (1) is given the order and stern warning to discontinue their actions in a joint decree of the Minister of Religion Affairs, minister/Attorney General and the Minister for Home Affairs.

(2) If the violation mentioned in paragraph (1) is committed by an organization or a spiritual belief system, then the President of the Republic of Indonesia can dissolve that organization and declare the organization or belief system as banned, among others after the President receives advice from the Minister of Religious Affairs, the Minister/Attorney General and the Ministry for Home Affairs.”

Article 3 states:

“If after action has been taken by the Minister for Religious Affairs together with the Minister/Attorney General and the Minister for Home Affairs or the President of the Republic of Indonesia according to the provision in article 2 against persons, organizations or belief systems, they still continue to violate the provisions in article 1, then the persons, adherents, members and/or board members of the organization of the belief is penalized with imprisonment for as long as 5 years.”

According to Bagir, Article 1 of Law No. 1/PNPS/1965 prohibits two things: to recommend or to seek public support to perform (1) religious interpretation and (2) deviant religious activities.⁷⁰ Furthermore, Mudzakir explains that the implementation of the aforementioned Articles 1, 2, 3 are provisions that are aimed to rectify and are actions that are administrative in the case of deviant interpretations and activities. For those who infringe, they will be given a warning reprimand and in the event that violation continue they will be given a criminal penalty; if the violation is committed by an organization then the organization can be dissolved, and in the event that actions have been taken and the violation continues then the persons, adherents, members and/or board members of

⁷⁰ Bagir, *Kerukunan dan Penodaan...*, op.cit. p. 3.

the organization of the belief is penalized with incarceration for as long as 5 years.⁷¹ The application of the articles is conducted in stages.⁷²

Second, the Law No. 1/PNPS/1965 proscribes a criminal act, as is found in Article 4 or Article 156a in the Criminal Code which states:

“It is penalized with imprisonment for as long as five years whoever **intentionally** in public expresses a sentiment or commits an act: a. that essentially has the **nature of** hostility, abuse or defamation against a religion that is adhered to in Indonesia; b. **with the purpose** so that people not adhere to any religion that is predicated upon the Believe in the One God.”

The official elucidation of the article states:

“The purpose of the provision as been sufficiently clarified in the general elucidation above. The manner to express the sentiment or to carry out the action can be spoken, written, or otherwise.

Letter a.

The criminal offense here is solely (in essence) **directed at the purpose** to be hostile or to insult.

Therefore, the written or spoken expositions conducted objectively, *zakelijk* [straightforwardly/matter-of-factly] and scientifically regarding a religion that are accompanied by an attempt to avoid words or arrangements of words that are hostile or insulting, do not constitute a criminal act according to the article.

Letter b

Persons committing that criminal offense here, apart from disturbing the serenity of religious people, are basically betraying the first principle of the State [Pancasila] in a total way, and for that reason it is proper that the acts are penalized appropriately.”

Based on that Article 156a of the Criminal Code the term “religious defamation” [blasphemy] emerged in Indonesian criminal law.⁷³ Prior to that, the Criminal Code also had a provision that is ‘considered’ to be part of blasphemy in Article 156 of the Criminal Code, which prohibits any hostile, hateful, or insulting statements against a group or several groups in Indonesia. The definition of ‘group’ in this article is construed as each component of the Indonesian people different one from another, among others because of ‘religion’.

⁷¹ Interview, Mudzakir, 2 November 2017.

⁷² Bajeber, *loc.cit.*

⁷³ Bagir, *Kerukunan dan Penodaan...*, *op.cit.*, p. 1.

Article 156 of the Criminal Code states:

“Whoever in public expresses a sentiment of hostility, hate or insult against one or several groups of the people of Indonesia, faces imprisonment of as long as four years or a fine of at most four thousand five hundred rupiahs.”

“The wording ‘group’ in this article and subsequent article means each component of the Indonesian people different one from another or others due to race, country of origin, religion, location, origin, descent, nationality or status according to constitutional law.”

The existence of this Article 156 of the Criminal Code provides an argument on the legal basis of Article 156a. This blasphemy provision is often categorized as a “religious offense”. Referring to an article by Ifdhal Kasim, the idea for the formulation of religious offenses came from the 1st National Legal Seminar in 1963. One of the resolutions of the seminar states that for the future criminal law reform, there needs to be an in-depth analysis on religious offenses in the Criminal Code. This is based on the recognition of the first principle of the Pancasila, which is the Belief in the One God, which is the *prima causa* in the Pancasila state, with Article 29 of the 1945 Constitution that needs to be the basis of religious life in Indonesia, that justifies, even obliges, the introduction of religious offenses in the Criminal Code. The issue of religion in legal life and reality in Indonesia is considered a fundamental factor, so that it can be understood that that factor could be used as a strong basis for the creation of religious offenses. These religious offenses can coexist with obscenity offenses and can even take religious elements as a source of inspiration. The idea that developed in the 1st National Legal Seminar was realized with the issuance of the Law No. 1/PNPS/1965, particularly Article 4 that added a new article in the Criminal Code, which is Article 156a.⁷⁴

Ifdhal Kasim adds that these “religious offenses” can cause confusion, since it carries with it three definitions or mental associations, which are (i) offenses according to religion; (ii) offenses against religion; and (iii) offenses related to religion. Moreover, the religious offenses in their three meanings have been scattered in the now applicable Criminal Code. Ifdhal added that, referring to the view of Oemar Seno Adji, the “religious offenses” in question are those of the second and third definition.⁷⁵

Referring to Oemar Seno Adji’s view, the problem with the introduction of Article 156a is the consequence of the problem with Article 156 that punishes statements against a “Group”, in this case a “Religious Groups”. The provision will raise questions when the same statements are related to the Prophet, Holy Book, other Religious Institutions and against god.⁷⁶ The construction and debate is then considered as an analogizing

⁷⁴ Ifdhal Kasim, *loc.cit.*

⁷⁵ *Ibid.*

⁷⁶ Oemar Seno Adji, *Hukum (Acara) Pidana Dalam Prospekti*, Erlangga, 1976, p. 97.

as a prohibition in Criminal Law, where the statements are forms of violations against the “groups” (Article 156 KUHP).⁷⁷ With such legal construction, raises the question on whether the legal construction (Article 156 KUHP) will be retained for the issue of those statements as blasphemy to the extent of the violation against a (religious) group in Article 156 of the Criminal Code. The problem and debate of legal construction, as Expansion/ Legal Interpretation or Legal Analogy, is what underlie the emergence of Presidential Stipulation No. 1 of 165 as a response to the problem of religious defamation.⁷⁸

That the scope of Law No. 1/PNPS/1965, including the blasphemy offense has a broad dimension: not only does it respond to the problems of the actions that insult God but encompasses efforts to protect religious feelings. This is apparent from the Barda Nawawi Arif’s view, that the criminalization of the actions on religion is necessary by referring to a number of theories. First, the theory of protection of religion, where religion is seen as a legal interest/object that will be protected by the state through the legislations it produces. Second, the theory of the protection of religious feelings, that explains that the legal interest that will be protected is the religious feelings/sentiments of the religious people. Third, the theory of protection, where the religious peace/serenity among the adherents of religion/belief is the legal interest protected according to this theory.⁷⁹

In its development, the existence of Law No. 1/PNPS/1965 had been questioned and has had its constitutionality reviewed multiple times before the Constitutional Court. The Constitutional Court decisions, in 2010, 2013 and most recently in 2018, concluded that the law was constitutional but from the aspects of legislation, wording, and legal principles needed improvement.⁸⁰ The Constitutional Court emphasized the need for the Law to be revised both in the formal scope of legislation and in its substance in order to have clearer material elements so that it does not cause interpretation mistakes in practice, the authority of which is the legislators’ through the normal legislation process.⁸¹ One Constitutional Court judge gave a dissenting opinion, which is that the law must be declared unconstitutional, due to a fundamental change to the 1945 Constitution, mainly in the provisions on human rights, especially those that are found in Chapter XA on Human Rights, from Article 28A to Article 28J.⁸² Other reasons are the occurrence of various issues that often cause arbitrary actions in the implementation of the law and the contradictions of its articles with the several articles of the 1945 Constitution, especially Article 28E, Article 28I, and Article 29 of the 1945 Constitution.⁸³

⁷⁷ *Ibid.*, p. 98.

⁷⁸ *Ibid.*

⁷⁹ Barda Nawawi Arief, *Delik Agama Dan Penghinaan Tuhan (Blasphemy) Di Indonesia Dan Perbandingannya Di Berbagai Negara*, Universitas Diponegoro, 2007, p. 2.

⁸⁰ Constitutional Court, Decision No. 140/PUU-VII/2009, p. 298.

⁸¹ *Ibid.*, p. 304-305.

⁸² See the Statement of Justice Maria Farida. *Ibid.*, p. 316.

⁸³ *Ibid.*, p. 321-322.

Criminal Elements of Article 156a of the Criminal Code

Based on the textual provision of Article 156a of the Criminal Code and its Official Elucidation, the criminal elements in the article at least include: (i) whoever, which can be interpreted as every person; (ii) intentionally; (iii) in public (iv) expresses a sentiment or commits an act; (v) that essentially has the nature (vi) of hostility, abuse or defamation against a religion adhered to in Indonesia. Meanwhile, for Article 156a letter b, the criminal elements include: (i) whoever, which can be interpreted as every person; (ii) intentionally; (iii) in public expresses sentiment or commits act; (iv) with the purpose (v) so that people not adhere to any religion, that is predicated upon the Belief of the One God.

Referring to the Official Elucidation in Law No. 1/PNPS/1965, the meaning of the elements of the criminal act are:

- The element of “in public” is as commonly defined with the words in the Criminal Code. The Constitutional Court explained that the phrase “in public” in the wording of Article 156a of the Criminal Code is the same phrase used in other offenses in the Criminal Code, among others Article 156 of the Criminal Code, Article 156 para. (1) of the Criminal Code, and Article 160 of the Criminal Code. The phrase “in public” in Article 160 of the Criminal Code, Article 162 of the Criminal Code and Article 170 of the Criminal Code. This view refers to the opinion of R. Soesilo in his book titled “Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya” [the Criminal Code and Commentaries], which is “the place where the public visits or where the public can hear,” “in a public place and where with many people/a crowd” and “a place where the public can see”.⁸⁴
- The element of “intentionally”, in limited to solely (*in essence*)⁸⁵ directed at the purpose of to be hostile to or to insult. Written or spoken exposition that are done objectively, straightforwardly and scientifically on a religion that is accompanied **by an attempt to avoid words or word arrangements that are hostile or insulting, are not criminal.**
- The element of “to express sentiment or commit an act” is done spoken, written, or otherwise.
- The element of “having **the nature** of hostility”, has no explanation [considered sufficiently clear] and is only explained as an act **directed at the intent** to be hostile.
- The element of “abuse of religion”, no explanation [considered clear].
- The element of “defamation of religion”, no explanation and only explained by an act that is **directed at** the intent to insult.

⁸⁴ Constitutional Court, Decision No. 84/PUU-X/2011, p. 144.

⁸⁵ Another phrase that was not provided with adequate elucidation is the phrase “in essence”. Zain Bajebber explained that the phrase “in essence” is not a legal term but rather is more appropriately defined as a political term. Bajebber, *loc.cit.*

- The element of “a religion adhered to in Indonesia” includes the religions of Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism. The elucidation in Article 1 also states that other religions, such as: Judaism, Zoroastrianism, Shintoism, Taoism are not prohibited in Indonesia. They receive the full guarantee as afforded by article 29 paragraph 2 (of the pre-amendment 1945 Constitution) and are left to be, as long as they do not violate the provisions found in this regulation or other legislations.
- The element of “**with the purpose** so that people not adhere to any religion”, no explanation is given and only stated that the perpetrator apart from disturbing the serenity of religious people, basically betrays the first principle of the State in total.

The reference to the explanation of the Article was only obtained from the elucidation in Law No. 1/PNPS/1965 and refers to a number of views of criminal law experts, that subsequently has their application interpreted in court judgments. With limited explanation in Law No. 1/PNPS/1965, the interpretation of the elements of Article 156a of the Criminal Code refers to the views of experts of criminal law.

Indrianto Seno Adji elaborated that the law is intended to protect the aforementioned religious serenity from defamation/insult as well as teachings to not adhere to religion that is founded on the Belief in the One God. An important aspect related to the elements of Article 156a of the Criminal Code in its letter (a) is the “*actus reus*” from the form of act that can be penalized as a fault (*schuld*), both “*opzet*” [intention] (in various forms) and “*culpa*” [negligence] (in various forms), and unlawfulness (*wederrechtelijkheid*), both formal and material. The element of this article also requires an intent as a form of “*mens rea*”.⁸⁶ This means that, Article 156a of the Criminal Code in letter a in the part of the element of “intentionally in public”, the phrase “intentionally” must be understood as a form of *Opzet Als Oogmerk* (intention as purpose).⁸⁷

The reference to “**the nature of hostility**” is important because it makes clear that the test is not how the words are perceived but what is their nature in themselves. In other words, if the words or acts are not intrinsically offensiver it doesn’t matter if some persons are offended by them. So, for example, quoting the Koran correctly is not by its nature offensive even if it offends some persons that an individual has quoted it. The word “essentially” is also important because it reinforces the element of the nature of the act itself.

⁸⁶ Indriyanto Seno Adji, *Hukum & Kebebasan Pers*, Diadit Media, 2008, p. 29-30 and 60-61.

⁸⁷ *Ibid.*

The phrase “**with the purpose**” is important because this goes beyond general intentionality. The act of utterance must actually be directed towards undermining faith/religion. ***This means that a specific intent rather than general intent is required.*** For example, criticism that is not aimed at undermining faith would not qualify even if the criticism is intentional.

Directed at the purpose also makes clear that ***general intent is not enough***. The act must be purposive, which is a higher requirement than general intent. It must aim at insulting. These are all difficult elements to prove and are also important in explaining how the balance between this law and freedom of expression is to be struck. Words which offend persons are not criminal unless they were specifically intended to insult or abuse or undermine belief.

Based on the above, Article 156a of the Criminal Code still requires further explanation on the elements of crime for it to be consistently applied.

3.2. The guarantee of the right to freedom of thought, religion/belief, and freedom of opinion and expression in Indonesia

Since the beginning of the reform in 1998, Indonesia has committed itself to guaranteeing the respect, protection, and fulfillment of human rights.⁸⁸ The Indonesian Constitution, the 1945 Constitution, and various legislations subsequently provided guarantees to human rights, including the right to freedom of religion or belief and the right to freedom of opinion and expression. The right to freedom of religion/belief and the right to freedom of opinion and expression are constitutional rights as stipulated in the 1945 Constitution.

Article 28E para. (1) and (2):

“Every person is free to adhere to religion and worship according to their religion, to choose education and teaching, to choose an occupation, to choose citizenship, to choose a place of residence within the boundaries of the state and to leave it, as well as the right to return.

“Every person has the right to freedom to have faith in a belief, to state thoughts and positions, according to their conscience”

⁸⁸ This commitment is enshrined in the People’s Consultative Assembly No. VII/MPR/1998 on Human Rights that determines: (i) assigning the task to state high institutions and all governmental apparatus to respect, enforce, and disseminate comprehension on human rights to the entire society and (ii) assigning the task to the President and the People’s Representatives Assembly to ratify various international human rights instruments provided that they do not conflict with Pancasila and the 1945 Constitution. The Decree also affirms the view and stance of Indonesia as a nation on human rights and international human rights instruments which content and elucidation constitute as an indivisible part of the Decree.

Article 29 paragraph (2):

“The State guarantees the freedom of every resident to adhere to their own religion and to worship according to their own religion and belief.”

Article 28E paragraph (3):

“Every person has the right to freedom of association, assembly, and the expression of opinion”.

In another article in the 1945 Constitution, the right to freedom of thought and conscience, as well as the right to have a religion are included in the right that cannot be diminished in any circumstance, which in international law, these rights are known as ‘non-derogable rights’.⁸⁹ This is stated in Article 28I Paragraph (1):

“The right to live, the right to not be tortured, the right to freedom of thought and conscience, the right to have a religion, the right to not be enslaved, the right to be recognized as a person before the law, and the right to not be prosecuted under retroactive law are human rights that cannot be diminished in any circumstance.”

These rights that cannot be diminished in any circumstances are also found in Law No. 39 of 1999 on Human Rights. Article 4 of the law states:

“The right to live, the right to not be tortured, the right of freedom of the person, of thought and conscience, the right to have a religion, the right to not be enslaved, the right to be recognized as a person and of equality before the law, and the right to not be prosecuted under retroactive law and are human rights that cannot be diminished under any circumstance and by anyone.”

Indonesia also has become party to various international human rights agreements that define its international human rights obligations. There are, as a matter of record, eight international human rights agreements that have been ratified or acceded by Indonesia, among them the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As a consequence of that ratification, Indonesia has an international obligation to guarantee the respect, protection, and fulfillment of various rights guaranteed by various international agreements on human rights. That obligation includes to guarantee the enjoyment of the rights provided by making or revising its national regulations to make them in line with the purposes of various international agreements.

In addition, Indonesia has acknowledged the existence of international human rights law that has been accepted by Indonesia as part of its national law. Article 7 of Law No. 39 of 1999 gives the right to citizens to utilize all national legal avenues and

⁸⁹ UN, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2 (2).

international forum for all violations of human rights as guaranteed by Indonesian law and international law on human rights that Indonesia has accepted. In Article 71 it is also stated, the Government is obligated and responsible to respect, protect, enforce, and promote human rights as stipulated in Law No. 39 of 1999, other legislations, and international law on human rights that Indonesia has accepted.

3.2.1. Derogations and Limitations of Rights in Indonesian Legislation

Indonesian legislation, in addition to guaranteeing various human rights, also prescribes derogations and limitations on the enjoyment of rights. Article 28J para. (2) of the 1945 Constitution and Article 73 the Law No. 39 of 1999 are the provisions on derogations and limitations of recognized rights.

Article 28J paragraph (2) of the 1945 Constitution:

“In exercising their rights and freedoms, every person must submit to the limitations prescribed by law with the sole purpose of to guarantee the recognition as well as the respect for the rights and freedoms of others and to meet the just demand according to the considerations of morality, religious values, security, and public order within a democratic society.”

Article 73 of Law No. 39 of 1999:

“The rights and freedoms prescribed in this law can only be limited by and based on law, solely to guarantee the recognition and respect for the human rights as well as fundamental freedoms of others, morality, public order, and national interest.”

The notions of derogation and limitation in those two provisions were devised by reference to international human rights instruments. However, they still generate debate; first, the limitations are generally prescribed and do not distinguish between derogations and limitations. Referring to the provisions in the ICCPR, the state parties can derogate from their obligation based on “public emergency which threatens the life of the nation”, “to the extent strictly required”, “not inconsistent with their other obligations under international law”, as well as “do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin”.⁹⁰ The ICCPR firmly states that the derogation from obligation is not allowed from the rights prescribed in Article 6 (right to life), Article 7 (right to be free from torture), Article 8 (right to be free from slavery), Article 11 (right to not be imprisonment on the grounds of a civil contract), Article 15 (right not to be prosecuted under retroactive law), Article 16 (right to recognition as a

⁹⁰ *Ibid.*, Article 4 (1).

person before the law) and Article 18 (right to religious freedom).⁹¹

Second, the limitation is done based on the consideration to guarantee the recognition and respect for the rights and freedoms of others, with considerations of morality, religious values, security, public order, in a democratic society. The limitation in the context of Indonesian law adds the element of 'religious values', which actually is not found in international human rights law. The limitation based on religious 'values' is considered problematic, since it has the tendency to refer to particular and the majority religious values or beliefs, which frequently violates the rights of minorities. But, this limitation is clearly superseded by Article 18 and the non-derogable right to religious freedom. In other words, in cases where the limitation infringes freedom of religion that limitation cannot stand.

Third, the concept of limitation is frequently contested with the rights guaranteed in Article 28I paragraph (1) of the 1945 Constitution, because of the phrase "... human rights that cannot be diminished under any circumstance." This dispute has raised the question regarding whether the limitation in Article 28J paragraph (2) applies in general to all prescribed fundamental rights, or it does not encompass the rights guaranteed in 28I paragraph (1) for their 'non-derogable' character. The Constitutional Court in its various decisions has given their interpretation of the polemic. The Court states that the limitation in Article 28J paragraph (2) of the 1945 Constitution has general applicability so that even though there is the clause 'cannot be diminished under any circumstance', the rights guaranteed in the 1945 Constitution can still be limited. The Court has interpreted Article 28I paragraph (1) on "the right to freedom of thought and conscience, the right to have a religion, ... are human rights that cannot be diminished under any circumstance," as those that can be permissibly limited according to Article 28J (2) of the 1945 Constitution. However, that judgment does not enjoy unanimous backing, as some judges have presented dissenting opinions. These dissenting judges have stated that Article 28I paragraph (1) of the Constitution are rights with an **absolute**⁹² nature of fulfillment so that they are not bound by the limitation of Article 28J.

Referring to Indonesia's international obligations as a state party to international human rights agreements, this Constitutional Court's interpretation of the limitation is a questionable one, as it is considered to not be in accordance with the 'approach' of international human rights instruments. The ICCPR differentiates between legitimate limitation of rights during peace time, conditions for which are specified in each article

⁹¹ *Ibid.*

⁹² "Absolute" in nature in this sense means that it cannot be derogated in any situation. The language used in Article 28I para (2) of the 1945 Constitution is "cannot be limited", which has created confusion as to whether it means that they are non-derogable in emergency situation or cannot be limited in any situation. The Judge in this dissenting opinion interprets "cannot be limited in any situation" as "absolute".

governing different rights and derogation, which is regulated in Article 4, setting the general condition for temporary limitation during emergency status for all rights with the exception of some as specified in the Article. Thus, Article 18 of the ICCPR governing FORB and Article 19 governing FOE both have provisions regulating conditions for legitimate limitation of the rights, while Article 4 specifies that FORB is a non-derogable right in time of emergency (at least for the *forum internum* of the right). On the contrary, in the 1945 Constitution, there is no differentiation between limitation in peace time and derogation in emergency. In addition to that, the Court's interpretation of limitations are not in line with the concept of limitation in international human rights law, in this case the Court has not distinguished the limitation related to '*forum internum*' and '*forum externum*' in the context of freedom of religion or belief.

That the right to freedom of thought (of conscience) and freedom of religion/belief are rights prescribed in Article 18 of the ICCPR, and these rights cannot be diminished in any situation. However, as a note, the prohibition to derogation for the right to freedom of religion/belief only refers to the conviction that has the character of '*forum internum*'. As previously mentioned, Article 18 of the ICCPR provides the limitation of the right to freedom of religion/belief only in actions that are religious manifestations in public, which is the freedom to practice and determine a person's religion or belief can only be limited by legal provisions, and are necessary to protect public safety, order, health, or morality, or the rights and fundamental freedoms of others. The same goes with the right to freedom of expression, as prescribed in Article 19 paragraph (3) of the ICCPR that carries with it special responsibilities and limitation clauses permissible with certain criteria, that is only if done in accordance to the law and to the extent necessary to: a) respect the rights or reputations of others; b) protect national security or public order or public health or morals.

The provisions of the Law No. 1/PNPS/1965, including Article 156a of the Criminal Code are problematic in the context of permissible limitations based on international human rights law. An example is the provision Article 1 Law No. 1/PNPS/1965 on the prohibition of interpretations deviating from the core religious tenets is a limitation of human rights. The Constitutional Court, stated that the Law No. 1/PNPS/ 1965 does not limit a person's conviction (*forum internum*), but only limit the manifestations of thoughts and positions according to a person's conscience in public (*forum externum*) that deviates from the core teachings of religions that Indonesian adhere to, to express feelings or to commit acts that **are mainly hostile**, abusing or defamatory against a religion adhered to in Indonesia.⁹³ The Constitutional Court also concurs with the Elucidation of Article 1 paragraph 3 of the Law on the Prevention of Blasphemy that the Government has to try to

⁹³ Constitutional Court, Decision No. 140/PUU-VII/2009, p. 288.

redirect the spiritual belief systems and organizations to a healthy view and towards the Belief in the One God, since that provision is not meant to prohibit spiritual groups, but to guide them in line with the Belief in the One God.⁹⁴

Yet, referring to UN's General Comment No. 22, the fundamental character of freedom of religion or belief is that it *cannot be derogated* even in a state of emergency.⁹⁵ Besides, the Law No. 1/PNPS/1965 that prohibits Atheism, even though in reference to UN's General Comment No. 22 on Article 18 of the ICCPR, freedom of religion or belief encompasses and protects theistic, non-theistic, and atheistic beliefs, as well as the right not to profess any religion or belief.

3.2.2. Law No. 1/PNPS/1965 and Violation of Human Rights

The existence of Law No. 1/PNPS/1965 is considered as a regulation that impedes the right to freedom of religion or belief. The impediments are among others by: (i) limiting the definition of religion because the state defines recognized official religions; (ii) the state intruding into the territory of *forum internum*, since it provides the authority to the state to determine the central tenets of religion; (iii) acts of compulsion or coercion against spiritual belief systems, where the state exercises its will to redirect them to a healthy view and towards the Belief in the One God; (iv) is discriminatory for the necessity to profess an official religion in demographic requirements; and (v) punishes beliefs/interpretations that are different from the mainstream.⁹⁶

In many cases related to blasphemy in Indonesia, the defendants were considered to have violated Article 156a of the Criminal Code on the prohibition to intentionally in public to express sentiment or commit acts that are essentially having the nature of hostility, abuse, or defamation of religion adhered to in Indonesia. With such a formulation this article proscribes actions that are not only considered to be 'blasphemous' but also 'hostile' and 'abusive'. This formulation is problematic from the perspective of international human rights law.

Another provision is related to the definition of "deviant interpretation" of religion, which often refers to the Article 1 of Law No. 1/PNPS/1965 that is "to interpret a religion adhered to in Indonesia or to perform religious activities that resemble religious activities of that religion, the interpretation or activities of which deviate from the central tenets of that

⁹⁴ *Ibid.*, p. 290.

⁹⁵ UN Human Rights Committee, *CCPR General Comment No. 22...*, *op.cit.*, para 1.

⁹⁶ Pultoni, Siti Aminah, Uli Parulian Sihombing, *Panduan Pemantauan Tindak Pidana Penodaan Agama dan Ujaran Kebencian atas Nama Agama*, the Indonesian Legal Resource Center (ILRC), 2012, p. 48-49.

religion.” The elucidation of ‘religious activities’ is “every kind of activity that is religious, such as naming a belief system as Religion, using terms in the exercise or practice of teachings of belief or conducting worship and others.”

The prescription on ‘interpretation that deviates’ from the core tenets of religion is a definition that does not fall in line with the provision in the ICCPR. This is due to the fact that often the parties accused of abuse of religion are from minority groups, which result in discriminatory actions against different and minority faiths. Such discrimination is prohibited by ICCPR Article 27

The notions of ‘abuse’ and ‘deviant interpretation’ are in conflict with the protection of the right and freedom of thought, conscience, and religion or belief from the freedom to manifest religion and belief. The UN General Comment No. 22 says that Article 18 of the ICCPR does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference as prescribed in article 19 (1) of the ICCPR. In accordance with Article 18 (2) and Article 17 of the ICCPR, no one can be compelled to reveal his thoughts or adherence to a religion or belief.⁹⁷

The same goes for the term “defamation of religion” as found in 156a KUHP, which is not explained adequately. The Elucidation of Law No. 1/PNPS/1965 only says that the act of ‘defamation of religion’ is done “spoken, written, or otherwise” and “solely (in essence) **directed at the purpose** to be hostile or to insult”. There is no further explanation regarding what is meant by having a purpose that inherently aims ‘to insult’, which results in a broad interpretation, even to target legitimate opinions and expression. Such a formulation, is similar to the formulation of blasphemy laws in other countries, which is very broad, vague and ambiguous.

⁹⁷ UN Human Rights Committee, *CCPR General Comment No. 22...*, *op.cit.*, para 3.

CHAPTER IV

THE APPLICATION OF BLASPHEMY ARTICLE IN INDONESIAN COURTS

4.1. General Overview of Blasphemy Cases

Since the blasphemy article came into effect, there have been many individuals to whom the article was applied, from HB Jassin in 1968,⁹⁸ to Arswendo in 1990,⁹⁹ to Basuki Tjahaja Purnama in 2017, which involved the allegation of Bible burning by an Indonesian Military (TNI) member who was tried in the Military Tribunal in Jayapura, Papua¹⁰⁰. All of them were charged with insult and religious defamation, and indicted with Article 156a letter a of the Criminal Code.

⁹⁸ HB Jassin is the editor of Sastra Magazine. Its August 8 1968 edition contained a short story with the title Langit Makin Mendung (The Skies Grow More Cloudy (LMM) authored by Ki Pandji Kusmin. The Short story was condemned by various parties, especially the Moslems. Responding to the reaction of the masses, the North Sumatra High Prosecutor Office banned the Sastra magazine edition's circulation, because the content was considered to be defaming the holiness of Islam. HB Jassin was put on trial and refused to give the real identity of the author to defend freedom of expression. See Pulton, Aminah, Sihombing, *op.cit.*, p. 51.

⁹⁹ Arswendo is the editor of Monitor Tabloid. On October 15, 1990, the Tabloid made a survey on the readers' most admired figures. The result of the survey placed Prophet Muhammad SAW on the 11th place, a ranking lower than the then President Soeharto, the Ministry of Scientific and Technology Research Habibie etc. Arswendo was indicted for blasphemy. The Court stated that the survey, which equated Prophet Muhammad SAW with ordinary humans defames him. This act constitutes a defamation (which in nature is hostile, misusing, or defaming) against Islam by using a press publication. *Ibid.*

¹⁰⁰ Arjuna Pademme, "Sidang kasus Alkitab terbakar dimulai, oknum TNI terancam pasal 156a KUHP", <http://www.tabloidjubi.com/artikel-8070-sidang-kasus-alkitab-terbakar-dimulai-oknum-tni-terancam-pasal-156a-kuhp.html>, accessed 0 July 2018. In this case the Defendant was sentenced two year and six month imprisonment and was dishonorably discharged from service as a member of TNI. See Liza Indriani, "Oknum TNI Akhirnya di Pecat dari Kesatuannya", <https://kabarpapua.co/oknum-tni-ini-akhirnya-dipecat-dari-kesatuannya/>, accessed 10 July 2018

Other articles used to charge actions related to blasphemy are Articles 156 and 157 of the Criminal Code, and Article 28 paragraph (2) of the Law on Electronic Information and Transaction.

From 1965 to 2000, Article 156a of the Criminal Code have only been applied 10 times, more frequently after 1998.¹⁰¹ Amnesty International noted that, since 2005 there have been 106 defendants tried under that article.¹⁰² The report by Setara Institute showed that since 1965 to 2017 there have been 97 blasphemy cases with a diversity of acts charged.¹⁰³ The majority of the charges of blasphemy occurred within the context of a difference in religious understanding and this indicates that the proposition of blasphemy was used more to muzzle dissent in the many ways citizens form faiths and beliefs. The report also says that the postulation of blasphemy is used as a tool to create and maintain a *status quo* for major religious groups within society.¹⁰⁴

The blasphemy cases in this research focus on 27 court judgments from the first instance and cassation levels¹⁰⁵ that contain Article 156a letter a of the Criminal Code or Article 28 paragraph (2) of the Law on Electronic Information and Transaction. The judgements are available on the Supreme Court website. In general, the description of the cases corresponds to Setara Institute's report, which shows that the accusation of blasphemy targets a broad range of acts and not solely blasphemous acts. The punishments imposed were also varied, from 4 months of imprisonment to the maximum penalty of 5 years. (See Attachment 1)

¹⁰¹ Melissa Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law*, 7 (1), 3, 2012, p. 16.

¹⁰² Amnesty International, *Prosecuting...* *op.cit.*, p. 17.

¹⁰³ Setara Institute, *op.cit.*, p. 2.

¹⁰⁴ *Ibid.*, p. 4.

¹⁰⁵ The Court Decision form 2011 to 2016 can be accessed at: <https://putusan.mahkamahagung.go.id/>

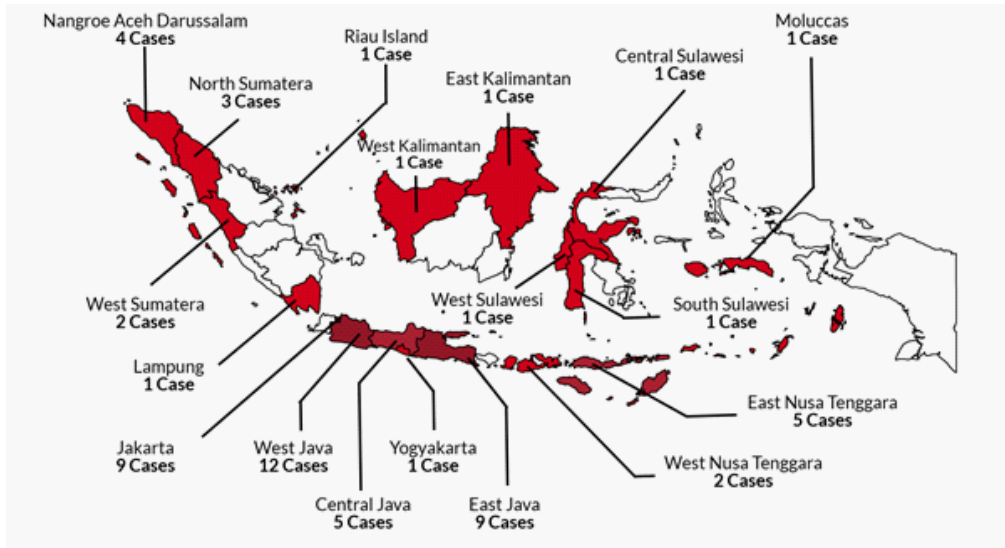
Table: Classification of Charges based on article 156a		
No	Classification	Case Example
1.	Act, spoken or written statement that are explicitly meant to offend or attack religious symbols considered sacred by a religion	Cases with defendants Alexander An, Agung Handoko, Muhammad Rokhisun, and Miftakhur Rosidin
2.	The act of degradedating or insulting a religion as a means for conversion to another religion.	Cases with the defendants Abraham Bentar, Pdt. W. Alegan Mosses, Antonius Richmond Bawengan, Charles Sitorus, and Makmur bin Amir
3.	The dissemination of an understanding different from the mainstream as blasphemy	Cases with the defendants Andreas Guntur, Khairuddin, T. Abdul Fattah, Bantil Al Syekh Muhammad Ganti, Tajul Muluk, Heidi Eugene, and Lia Eden
4.	The mistake in conducting religious ritual as blasphemy	Ronal Tambunan and Herison Yohannes Riwu
5.	Other acts interpreted as blasphemy	Cases with defendants Alfred Wang, Agus Santoso, and Basuki Tjahaja Purnama

The distribution of blasphemy cases covers almost half of all the provinces in Indonesia. Crouch noted that between 1965 until 2011, the cases with the charge of Article 156a of the Criminal Code are found in 14 provinces with a concentration mainly on the Island of Java.¹⁰⁶ Referring to the specific set of blasphemy cases that the study engages, three following graphs illustrate the distribution of blasphemy cases (which until 2017 covered 18 provinces in Indonesia), the comparison between cases where the “defamed” religions are the same or different from the defendant’s, and the comparison of the numbers of cases of each “defamed” religion with the defendant’s religion.¹⁰⁷

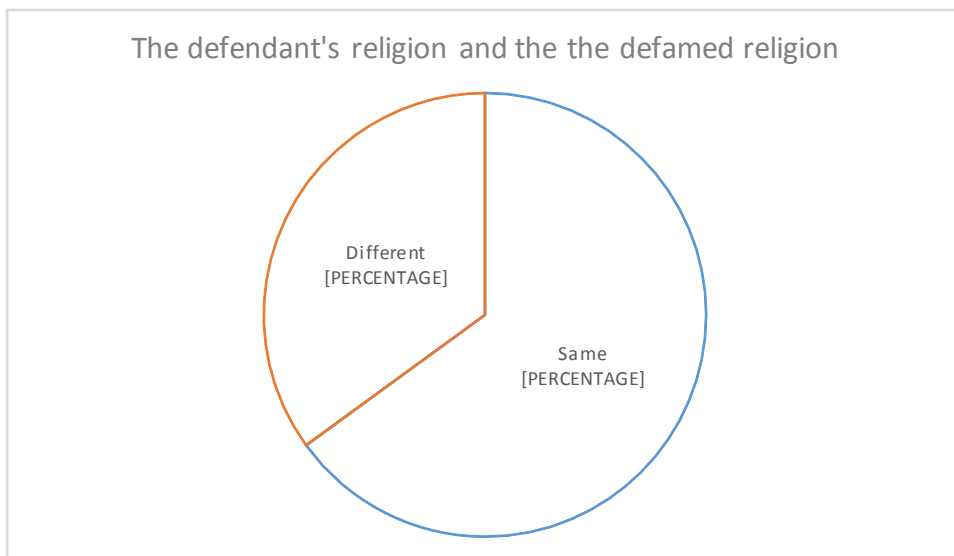
The first graph shows the distribution of blasphemy cases in Indonesia. From the graph, we can see that the West Java province is the province that has the highest number of blasphemy cases with 12 cases. The provinces of East Java and Jakarta are tied in second place with 9 cases. The third position is occupied by the provinces of Central Java and East Nusa Tenggara with 5 cases each. From this data, we can see that the cases with the allegation of blasphemy has mostly happened on the Island of Java because more than 50% of the blasphemy cases on record have occurred on the island of Java.

¹⁰⁶ Crouch, *Law and Religion...*, *op.cit.*, p. 12.

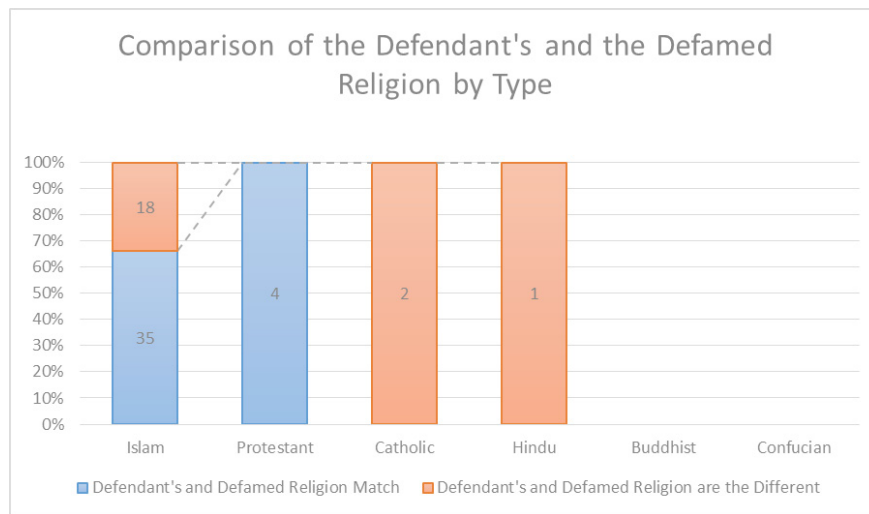
¹⁰⁷ This data is summarized from various sources including Court Judgments, Reports, and other Sources. The result of this review differs from the number of cases scrutinized by other research projects.



The second chart shows the comparison of the number of cases between the defamed religion being the same with the defendant's religion and those with the "defamed" religion being different from the religion of the defendant. From the following data, we can see that 65% of the blasphemy cases were committed by defendants of the same religion as the "defamed". In other words, the defendants were followers of the defamed religion. Meanwhile, 35% of the blasphemy cases were carried out by defendants who adhered to different religions from the defamed. In these cases, the defendants were not followers of the defamed religion.



The third chart breaks down the comparison of the defamed and the defendant's religion by type. From the following data, we can see that the defendants who defamed Islam were mostly followers of Islam. This means that the majority of the perpetrators of defamation against Islam were Muslim. For the cases of blasphemy against Christianity, all of the perpetrators are Christians. For cases of blasphemy against Catholicism and Hinduism, all of the perpetrators were not followers of those religions. This data demonstrates that the perpetrators of blasphemy often defame the religion they follow.



4.2. Classification of the Application of Blasphemy Articles

From 27 judgments studied, this research separates the acts that were indicted by the public prosecutor and the court judgments into several groups of acts, which include:¹⁰⁸

1) Acts, statements spoken or written that were explicitly meant to insult or attack religion or symbols considered sacred by a religion

In this category the judgments included are related to the actions by the defendants that were actions or statements that were explicitly meant to attack or insult a religious symbol, including symbols considered sacred by a particular religion. The problem with the cases in this category is whether they, the parties who are indicted, indeed committed defamation of religion, with their acts fulfilling the required

¹⁰⁸ The various decisions referred to in the explanation can be seen in Appendix 1.

elements, or alternatively, whether their actions are legitimate expressions based on the prevailing law.

A number of examples in this category are:

- The case of **Alexander Aan** – Indicted for posting his own writing titled “Muhammad was attracted to his own daughter-in-law” along with a cartoon of a person portrayed as the prophet Muhammad in an obscene act with a slave.
- The case of **Agung Handoko** – Indicted for the act of instructing others to spread a photograph of himself stepping on the Quran under his feet via his Facebook account.
- The case of **Muhammad Rokhisun** – indicted for committing acts, among others posting a cartoon of the prophet Muhammad through a Facebook account that was meant to appear to belong to another person's as well as posting writings among others the statements Islam a religion of dogs and Muhammad a lewd prophet.
- The case of **Miftakhur Rosyidin** – Indicted for the act of making a cross with his blood inside a musalla [prayer room].

All of the defendants were found to be proven guilty for the actions they were indicted with and to have met the elements of Article 156a with the punishment of 3-4 years, except for the case against Muhammad Rokhisun who was punished with 4 month imprisonment.

2) **The act of degrading or insulting a religion as a means for conversion to another religion.**

The second category is the act of spreading content that degrades or insults a religion with the purpose of influencing the followers of that religions to convert. This act is found in the cases against **Abraham Bentar, Pdt. W. Alegan Mosses, Antonius Richmond Bawengan, Charles Sitorus, and Makmur bin Amir**. This category raises forcefully the issues of freedom of expression and freedom of religion and belief because it involves writings where the authors are expressing their personal religious beliefs. The question is whether the intent to persuade readers to follow the author's beliefs outweighs the right to freely express religious beliefs under the Indonesian human rights law, the constitution, and applicable international human rights norms. These issues are not dealt with by the judges in these cases.

- The case against **Abraham Bentar** – Indicted for violating Article 156a letter a for his actions of inviting three witnesses on a porch of a house to convert. In his invitation to change religions he said among others that the religions

the three people followed was the religion of darkness, as well as the prophet Muhammad was a liar, liked to prostitute, and that the Muslim people are barbaric. For this act, the court declared the defendants to be proven guilty of violating Article 156a letter a.

- The case against **Rev. W. Alegan Mosses** - Indicted for violating Article 156a letter a with a subsidiary charge of Article 156 of the Criminal Code for his actions of translating a Hindu book, which was the Mani Dharmasastra from English to Indonesian, where the translation had contents which the Hindu community in Medan viewed to be denigrating Hinduism. For this indictment, the Medan District Court was upheld by the Supreme Court who stated that the actions of the defendant were basically only translating a book of another person, who was RV Ramasami, so that if there were materials that were viewed to be denigrating of Hinduism they would be the responsibility of the author. Therefore, the elements of defamation of religion, including the element of intentionally defaming religion, are not substantiated.
- The case against **Antonius Richmond Bawengan** – Indicted and convicted for violation of article 156a letter of the Criminal Code for his actions of distributing several books and pamphlets by placing these materials at residential houses at random. The books and pamphlets he distributed basically contain the invitation to follow a religion, however they contain materials that degrade the teachings and religious verses of other religions in a vulgar manner. An example of the writing contained in those books was stating that *hajar aswad*, an object considered holy by Muslims, as resembling a human genital.
- The case against **Charles Sitorus** - Indicted for actions of distributing books written anonymously that contain the invitation to follow a religion by disparaging the teaching of another religion, in this case Islam. In the distributed books labels as Arabian religion with degrading meanings, using the terms of Muslims as “the camel” and other materials that denigrate the Prophet Muhammad as a figure that is holy for Muslims. Different from the case against Antonius RB who carried out his actions independently, in this case Charles S carried out his actions of distributing those books for the compensation of a sum of money.
- The case against **Makmur bin Amir** – Indicted and convicted of blasphemy for spreading leaflets that has contents stating that Allah is a terrorist, and the prophet Muhammad is unworthy to bear prophet for his actions he took widows as wives is a filthy act.

3) **The spreading of teachings different from the mainstream doctrine as blasphemy**

The third category of cases indicted and convicted with the blasphemy article that have been found are cases where the actions committed were not actions or statements that were offensive or insulting against a religion but were the spreading of religious teachings or doctrines that were different from the mainstream teaching or thinking. The problem with this category is the debate or discourse on the religions or faith doctrine continuously exists in every religion. This diversity should be protected based on freedom of religion and the freedom expression, in order to ensure that there is guarantee for everyone to interpret and discuss their faith. These cases also exhibit the use of law on blasphemy or defamation of religion to implement strict religious dogma in order to protect majority religious teachings.

A number of case examples in this category are:

- Case against **Sayyid Fauzi Alaydrus** – Indicted for violating Article 156A letter a for his actions spreading a teaching that was viewed to have deviated from the teachings of Islam. Among others, he claimed to be able to take people to meet the Prophet Muhammad, he stated that the *salat* (prayer) can be replaced with *zikr* (devotional repetition of phrases), that reading and studying the Quran is unnecessary, as well as other teachings. These acts were declared by the Mempawah District Court, which was upheld to the Supreme Court, as proven to be blasphemy.
- The case against **Ondon Juhana** - Indicted for the actions of defaming the religion of Islam for claiming to be a successor to the Prophet Muhammad as well as teaching a different Islam from the mainstream. In addition, he was also indicted for fraud, for his actions of promising one follower healing from disease if the follower built a hut at his hermitage. Both charges were considered proven by the court.
- The case against **Andreas Guntur** – Indicted for propagating the teaching of Amanat Keagungan Ilahi/AKI (Divine Greatness Mandate). This AKI teaching was viewed as similar to the teachings within Islam but with some modifications such as Muhammad Syamsoe, who is the founder of this teaching, as the prophet or recipient of revelation from Allah. In spreading this teaching, the defendant extensively used symbols that resemble symbols of Islam as well as quoting several chapters of the Quran that he modified so that the meaning became unclear and different from the original.
- The case against **Khairuddin** – Indicted for violating Article 156a letter a of the Criminal Code for having spread a teaching that deviated from the Islamic doctrine as widely understood called Islam Kaffah [Total/Complete Islam] or

Islam Fattah [Open/Victorious Islam]. In this teaching he confessed to having received a revelation from Allah or a prophet and tried to convince the residents around him that it was the real Islamic teaching.

- The case against **T. Abdullah Fattah, Fuadi Mardhathilla, Ridha Hidayat** and **Althaf Mauliyul Islam** – The four were members of the Gerakan Fajar Nusantara/Gafatar (Nusantara Sunrise Movement) in the province of Nanggroe Aceh Darussalam. They were convicted of violating article 156a for being proven to propagate a teaching similar to Islam but by mixing it with Judaism and Christianity. This teaching is suspected to be an incarnation of the Milata Abraham Community (Komar) belief which was previously declared as heretical in 2011 by the Government of Aceh together with the Iskandar Muda Military Commander, the Provincial Police Chief, and the provincial office of the Ministry of Religious Affairs.
- The case against **Bantil Al Syekh Muhammad Ganti** – This case has a slight difference from the previous three cases because it has the element of fraud. The defendant propagated an Islam different from the mainstream where one of its teachings was the obligation of Zakat Diri [personal zakat], where the followers had to pay some money to the defendant for the incentive of absolution. This teaching was subsequently declared as misleading by the Ulama Council of the district of Kutai Timur because Zakat Diri is unrecognized in Islam. The actions of the defendant were then declared guilty by the court for violating Article 156a letter a of the Criminal Code and fraud.
- The case against **Tajul Muluk** – Indicted and convicted for spreading the Shia doctrine. The court viewed the teaching to be in contradiction to the Islamic teaching as understood by the Indonesian society in general. The defendant claimed the current Quran to be unoriginal and that the original Quran is being brought by Imam Al Imam Al Mahdiy Al Muntadhor. The court found these claims to have denigrated, defiled, and damaged the greatness of the Quran and in itself is a defamation against Islam. The MUI (Indonesian Ulama Council) issued a fatwa and the Sampang District Chapter of Nahdlatul Ulama issued a statement declaring the teaching of Tajul Muluk to be heretical.
- The case against **Heidi Eugene** – Indicted for defaming Christianity because her sermons were viewed as deviating from Christian doctrine and can diminish the faith of Christians. The District Court of Bandung did not agree with the prosecutors' opinion that they were blasphemous or in violation of article 156a letter a of the Criminal Code. Eugene was acquitted by the Bandung District Court. This decision was upheld by the Supreme Court at the cassation level.

4) “Incorrect” Conduct of Religious Rituals as Blasphemy

The fourth category is actions indicted as violating Article 156a for mistakes in religious ritual procession. The cases under this category invite the question on the protection of FORB as well as the authority of the state to prosecute those whose practice of religion is deemed to be different.

There were two cases within the same district court jurisdiction of Ende from different sub-districts and within a relatively close interval, only three months apart. The two cases were the cases against **Ronald Tambunan** and **Herison Yohanis Riwu**.

In both cases, the two were of Protestant faith attending mass in Catholic church. When participating in the ritual of receiving the *hostia* [sacramental bread] the two persons did not perform communion according to Catholic ritual where the bread is immediately placed in the mouth before the pastor. Instead, the two men held the bread in hand and took them back to the pew and ate the bread there.

The church administrators were suspicious and checked the identification of the defendants and found that they were Protestants. Both defendants were then reported to the police for defaming the Catholic religion.

In court, **Ronald Tambunan** said that Ende, where he was assigned for work, did not have many protestant churches, the nearest being 34 kilometers away. But, because it was Easter and it had been five months since he last went to church, he decided to attend mass in a Catholic church. That was when he made the mistake in performing the eucharist because he was unaware of the procedure in the Catholic religion.

Meanwhile, in the case against Herison Yohanis Riwu, unfortunately, there is insufficient information in the judgment as to why he who was a protestant attended mass at a Catholic church, so it is unable to be identified whether the actions were meant to insult the Catholic religion or merely due to ignorance.

5) Other Actions indicted as Blasphemy

In this fifth category are other actions that are “vague” to be considered as blasphemy based on Article 156a letter a of the Criminal Code. A number of examples in this category are:

- The case against **Alfred Waang** – Indicted and convicted for forcing a child to eat pork which is forbidden in Islam. The incident happened at a feast. **Alfred Waang** offered pork to a three-year old Muslim child. Knowing that her child had been offered pork, the mother then picked the child up to avoid her child

being offered pork again. When the child was being held in the mother's arms, AW then put a piece of pork into the child's mouth.

- The case against **Agus Santoso** – Indicted for the actions he committed while drunk of forcing a person in a mosque to stop reading the Quran. He grabbed the Quran from the person's hand and slammed it to floor. He was indicted by the public prosecutor with an alternative charge of blasphemy (156a letter a) and coercion (335 paragraph (1) of the Criminal Code). But, at the final stage of the proceeding, the prosecutor dropped the blasphemy charge. The District Court of Trenggalek agreed with the prosecutor and found Agus guilty only of coercion. According to the panel of judges, the defendant's actions were not blasphemy because he was targeting the victim not the religion.
- The case against **Basuki Tjahja Purnama** – Indicted with an alternative charge of blasphemy (Article 156a letter a) and hostility or insult against a group (Article 156 of the Criminal Code) for his speech before the residents of Kepulauan Seribu. He was in a public meeting, disseminating the Jakarta government's work plan, when he said "*... it's possible that in your heart of hearts, ladies and gentlemen, you cannot vote for me, well, because you have been lied to by the use of surah Al-Maidah 51 and the like. Well, that's your right. So, if you, ladies and gentlemen, feel like you cannot cast your vote like this because you are afraid of going to hell, being fooled that way, well that's okay...*".

The public prosecutor viewed the words 'have been lied to by the use of surah Al Maidah 51' as an insult to Islam or hostility/hatred against ulama. However, at the final stage of the proceeding, the prosecutor did not demand punishment under Article 156a letter a (blasphemy) but under Article 156 (hostility against a group) instead. The prosecutor was of the opinion that blasphemy was an inappropriate charge because during trial there was no evidence of Basuki Tjahja Purnama's intent to insult the Al Maidah chapter. According to the prosecutor, his remarks were aimed at some ulama who frequently used surah Al Maidah. Nonetheless, the District Court of North Jakarta had a different opinion. According to the panel of judges, Ahok's remarks sufficiently met the elements of blasphemy. This case will be examined in detail below.

CHAPTER V

THE APPLICATION OF THE BLASPHEMY ARTICLE IN INDONESIA

5.1. Analysis of the Application of the Elements of Article 156a letter a of the Criminal Code

Blasphehy cases in Indonesia have been presented in the previous chapter. Several cases were detailed, along with the judges' considerations. This section will analyze the application of blasphemy articles in those cases, especially the judges' reasoning used to decide those cases, from the perspective of criminal law and human rights.

A general overview of the studied cases shows an inconsistent application of the criminal elements of Article 156a of the Criminal Code, resulting in the indictment of various acts as religious defamation. This inconsistency is caused, among others, by a deficient formulation of Article 156a, allowing it to be interpreted broadly and subjectively, which not only encompasses deliberate vilification, insult or defamation of religion, but various other acts, including the deviation from religions main tenets.

5.1.1. Judicial interpretation of the Elements of Article 156a letter a of the Criminal Code in Judgment

The court judgments have elaborated on or defined the elements of Article 156a of the Criminal Code in several ways using various different references. This variation in the definition of the elements undercuts the certainty and predictability in the interpretation and application of the law that is required by basic principles of legality. The subjective nature of the diverse interpretation and application of elements also raises issues of judicial impartiality, calling into question whether judges are substituting their personal religious feelings for the objective requirements mandated by the statute.

In the judgment of the Tajul Muluk case, the court divided Article 156a letter a of the Criminal Code into two elements: (i) whoever; and (ii) intentionally in public expresses a sentiment or commits an act that essentially has nature of hostility, abuse or defamation against a religion that is adhered to in Indonesia, or with the purpose so that people not adhere to any religion, predicated upon the Belief in the One God.¹⁰⁹ Meanwhile, in the judgment of the Basuki Tjahaja Purnama case, the elements of Article 156a letter a were 3: (i) whoever; (ii) intentionally; (iii) in public expresses a sentiment or commits an act that essentially has nature of hostility, abuse or defamation against a religion that is adhered to in Indonesia.¹¹⁰ A different segmentation of Article 156a letter a into its elements was also found in the case of Alfred Waang: (i) whoever; (ii) intentionally in public; and (iii) expresses a sentiment or commits an act that essentially has nature of hostility, abuse or defamation against a religion that is adhered to in Indonesia.¹¹¹ Apart from these divergent constructions of the law, basic requirements of criminal law interpretation would indicate that there are actually at least eight distinct elements in this poorly drafted statute, as will be seen below.

In all of the judgments, the court determined that Article 156a of the Criminal Code had an alternative application. This means that if either one of the element of “hostility”, “abuse” or “defamation” has been met then it can be said that the indictment under Article 156a has been considered to be proven. As a note, “hostility”, “misuse” or “defamation” should be considered as separate elements because each of them has different evidentiary requirements and definitions. This, for example, is found in the case of Tajul Muluk. The court explicated this alternative character to Article 156a of the Criminal Court by dividing it into 4 categories:

- (1) Intentionally in public expresses a sentiment or commits an act that essentially has the nature of *hostility* against a religion that is adhered to in Indonesia;

¹⁰⁹ Court Decision No. 69/Pid.B/2012/PN.Spg, p. 86. See also Court Decision No. 73/Pid.B/2012/PN.DOM, p. 74.

¹¹⁰ Court Decision No. 1537/Pid.B/2016/PN.Jkt.Utr, p. 593.

¹¹¹ Court Decision No. 148/Pid.B/2012/PN.KLB, p. 12.

- (2) Intentionally in public expresses a sentiment or commits an act that essentially has the nature of abuse of a religion that is adhered to in Indonesia;
- (3) Intentionally in public expresses a sentiment or commits an act that essentially has the nature of defamation of a religion that is adhered to in Indonesia;
- (4) Intentionally in public expresses a sentiment or commits an act with the purpose so that people not adhere to any religion that is predicated upon the Believe in the One God.¹¹²

The judgment on the defendant Basuki Tjahaja Purnama also mentions that the third element of this article which is the phrase that essentially has the nature of hostility, abuse or defamation against a religion is **alternative in form**, so that if one of those phrases is met by the actions of the defendant, then that alone is sufficient and the other phrases need not be considered.¹¹³ The court's assertion that the elements "hostility, abuse or defamation against a religion has an alternative character is also found in a variety of decisions, among them in the case of Charles Sitorus¹¹⁴, Alfred Waang,¹¹⁵ and Ronald Tambunan.¹¹⁶

The following is an explanation of the elements in Article 156a letter a of the Criminal Code based on various court judgments mentioned above.

"Whoever"

The interpretation of the element "whoever" is construed as "every person". This refers to the Supreme Court Decision No. 1398 K/Pid/1994 of 30 June 1995. This decision states that "Whoever or *"Hij"* (Dutch) is as any person that should be made Defendant (*dader*) or every person as a legal subject (bearer of rights and obligations) that can be accountable for every action". The element of "Whoever" is also interpreted as anyone that can be a legal subject to sustain rights and obligations, and upon him responsibility can be applied for all his actions.¹¹⁷

"Intentionally"

In various judgments, the court has interpreted the element "intentionally" as intent in a broad sense. The element "intentionally" or *"opzet"* (Dutch) is *"willens en wetens"* (willingly and knowingly), which means that a person has committed an act intentionally, desiring as well as aware of the consequences of the actions.

¹¹² Court Decision No. 69/Pid.B/2012/PN.Spg., p. 86-78. See also Court Decision No. No. 33/Pid.B/2014/PN.DPU, p. 22.

¹¹³ Court Decision No. 1537/Pid.B/2

¹¹⁴ Court Decision No. 73/Pid.B/2012/PN.DOM, p. 76.

¹¹⁵ Court Decision No. 148/Pid.B/2012/PN.KLB, p. 14.

¹¹⁶ Court Decision No. 55/Pid.B/2012/PN.END, p. 24.

¹¹⁷ Court Decision No. 73/Pid.B/2012/PN.DOM, p. 75.

The court recognizes three forms of intent: (i) intention as purpose (*opzet als oogmerk*), which means that the perpetrator purposely mean to commit an act for the prohibited result; (ii) intention with awareness of certainty (*opzet met zekerheidsbewustzijn*), which means that the perpetrator with his actions did not purposely aim for the prohibited result, but he knew well that the result will follow; and (iii) intention with awareness of probability (*dolus eventualis* or *voorwaardelijk opzet*), which means that in attaining an intended result, the perpetrator is conscious that his actions are also likely to produce other results that are prohibited.¹¹⁸

Although the language of the statute makes quite clear that is the deliberate, purposive meaning of intent that is required for proof, the courts have used all three definitions of “intentionally” in different blasphemy cases. For example, in the case of Alexander An, it was apparent from the defendant’s actions that he was aware of the probable outcome. In other words, the “intentionally” element was defined as having awareness of probability (*dolus eventualis*).¹¹⁹ In the judgment for Tajul Muluk, “intentionally” was interpreted by using the theory of knowledge. According to the court, the element of intent in this criminal offence against “Public Order” lies in the defendant’s knowledge of their actions and consequences, whether they knew that if the act is committed it will disturb public order or peace amidst the religious people. To know this, it is enough to prove the level of knowledge or intellectuality of the perpetrator according to the standard of the public in general.¹²⁰

In the case of Basuki Tjahaja Purnama, the element of “intentionally” was linked with the other elements. The court stated that:

“... the element ‘intentionally’ in article 156 a. letter. A of the Criminal Code overlays all elements subsequent to it, or the rest of the words that follow ‘intentionally’ are affected by it, such that the perpetrator’s intent must be one directed at the actions or conduct that are prohibited which is expressing sentiment or committing an act that essentially has the nature of defamation against a religion that is adhered to Indonesia”¹²¹

While another explanations used by judges to prove the element of “intentionally” or the intentionality element, is by assessing and looking at the attendant circumstances when the Defendant committed the act.¹²²

¹¹⁸ Court Decision No. 73/Pid.B/2012/PN.DOM, p. 76. See also Court Decision No. 148/Pid.B/2012/PN.KLB, p. 13

¹¹⁹ Court Decision No. 45/Pid.B/2012/PN.MR, p. 42.

¹²⁰ Court Decision No. 69/Pid.B/2012/PN.Spg, p. 87.

¹²¹ Court Decision No. 1537/Pid.B/2016/PN.Jkt.Utr, p. 606-607.

¹²² *Ibid.*, p. 609.

What is missing in all of these interpretations is consideration of the meaning of the requirement of intentionality in the context in which it used in the statute. The statute does not just require that the expression be intentional in the general sense. Because the statute specifies that the act or utterance expresses a “sentiment” that in its “essential” “nature” expresses “hostility”, the proof of ‘intention’ requires proof that the utterance or act in its very essence aimed at directing that personal hostility against a protected dimension of religion in Indonesia. Although the inclusion of the words sentiment, essentially, nature, and so on reflect very vague and poor drafting they nonetheless must be interpreted as additional elements that go to establish the qualification of the required mental element of intentionality. In this light they indicate that the required intent is actually a “specific intent” or purposive action that deliberately aims at directing hostile words or actions against protected religion, rather than one of the weaker forms of intent adduced by the judges in the cases referenced above. What further supports such an interpretation is that the requirement of this stronger form of purposive conduct is required by applicable human rights norms protecting religious belief and freedom of expression. In other words, it is only where an actor goes beyond merely intentionally expressing their personal religious sentiments and does so with the specific intent or purpose to insult another religion through the direct expression of hostility that the law intervenes and draws the line between protected and unprotected expression and belief.

The element of “In Public”

Based on various judgments studied, the court views the Criminal Code to not provide the explanation on the definition of the element “in public”. In interpreting the element of “in public”, judges refer to the views of R. Soesilo, who said that an act can be said to be committed in public if that location can be seen and visited by many people (in a public place).¹²³ R. Soesilo’s opinion is frequently followed by the court, as in the case of Charles Sitorus, where “in public” is defined as a public place or one visible by people in general, not a place that is hidden, in a closed room where the general public cannot see.¹²⁴ In the case against Alfred Waang, the element of “in public” not only means in places visitable by the public such as on the side of the road, in the market, and so on, but also includes open places that can be seen or visible by the public.¹²⁵

The definition of “in public” that refers to in a public space is strengthened by the judgment of the Althaf Mauliyul Islam case. The court referred to the views of Simon and van Bemmelen-van Hattum who had similar opinions on what is meant by the words ‘in public’. Both experts said that, as referred to by the court, the meaning of ‘public’ is

¹²³ *Ibid.*, p. 594.

¹²⁴ Court Decision No. 73/Pid.B/2012/PN.DOM, p. 89.

¹²⁵ Court Decision No. 148/Pid.B/2012/PN.KLB, p.14.

merely what is performed in public or can be seen from a public place. A public place is a place that can be visited by every person, even though perhaps it is possible that the act of entering into that place is prohibited.¹²⁶

The court also referred to the view of PAF Lamintang on this. The element of “in public” in Article 156a of the Criminal Code does not mean that the sentiment expressed by the perpetrator, or the act committed by the perpetrator must always happen in public, but it is sufficient if the sentiment expressed by the perpetrator be audible by the public, or the act committed by the perpetrator be visible by the public.¹²⁷ A similar definition is also found in the judgement for Tajul Muluk, that the doctrine of “in public” can be construed as “publicly visible”, so that it is unnecessary that the act be performed in a public place but it is sufficiently public if there is a possibility that another person can see it.¹²⁸

An interesting parsing of the ‘in public’ element is by combining it with the element of “intentionally”. In the case of Althaf Mauliyul Islam, the court expounded that the ‘intent’ of the perpetrator in committing an illegal act in public is satisfied if the perpetrator had the intent of “awareness of the probability” (*opzet bij mogelijkheids-bewustzijn/voorwaardelijk opzet*), which is the awareness that what they are doing is probably visible by the public.¹²⁹ It should be noted that the awareness or knowledge to knowledge to support the element of intent is not adequately regulated in the law.

The element of “expressing a sentiment” or “committing an act”

In various judgments, the element of “expressing a sentiment” or “committing an act” is not explained by the court but are directly referred to the facts related to the views, remarks, and actions of the defendants. From various decisions, the element of “expressing sentiment” or “committing an act” covers spoken and written statements.

In the case against Basuki Tjahaja Purnama, the court referred to the views of experts on the element of “expressing a sentiment” and concluded that the remarks of the defendant were “an expression of the defendant’s thoughts and feelings”.¹³⁰ The definition of “sentiment” as personal thoughts or feelings raises even more forcefully the issue of protected religious belief and freedom of expression. The expression of thought is essential to a functioning democratic society as established under the constitution and protected by the human rights law.

¹²⁶ Court Decision No. 81/Pid.B/2015/PN Bna, p. 62.

¹²⁷ Court Decision No. 1537/Pid.B/2016/PN.Jkt.Utr, p. 594.

¹²⁸ Court Decision No. 69/Pid.B/2012/PN.Spg, p. 88.

¹²⁹ Court Decision No. 81/Pid.B/2015/PN Bna, p. 63.

¹³⁰ Court Decision No. 1537/Pid.B/2016/PN.Jkt.Utr, p. 602.

The element of “Defamation of religion”

The definition of the crucially important element of “defamation of religion” is unfortunately not found in many court judgments. The actions or conduct that are considered “defamation of religion” frequently were readings of the series of actions of the defendants, without breaking down what is meant by “defamation of religion”.¹³¹ When the court did try to provide an explanation to “defamation” they did so inadequately. In the case of Ronald Tambunan, for example, “defamation” was only defined as “damaging (sanctity, wholeness, etc)”.¹³²

Several court judgments formulated the element “defamation of religion” by referring to the opinions of experts presented, which ultimately referred to the Indonesian dictionary. This is apparent from the case of Basuki Tjahaja Purnama, where Indonesian word “*penodaan*” [defamation] was said to come from the root “*noda*” which is a stain, a smear or a smudge on a surface, but figuratively it means to mar, or it can be interpreted as to injure.¹³³ Needless to say, so called “expert” opinion should go beyond dictionary definition as a judge does not require an expert to read a dictionary. Further, this key term needs to be defined in its **legal** meaning as applicable in the criminal law, not in its ordinary usage as conveyed in a dictionary. Etymological interpretations by reference to linguistic roots are notoriously unreliable as usage develops over time and frequently has no relation to linguistic roots. This is even more the case with a word that is being used in a technical legal sense to qualify conduct as criminal.

The vagueness of what “defamation of religion” means has generated a number of court decisions that have made no clear distinction between of “defamation” and “abuse” of religion. In the case of Ronald Tambunan, the court categorized the actions of the defendant as “included in the definition of abuse or defamation of the Catholic Religion”.¹³⁴

The diverse definitions of “defamation” can be grouped into two sets of interpretations. The first is defamation as deviation from religious teaching. In this interpretation the judges refer to the opinion of religious experts or organizations. Second, defamation as insult. Here judges apply the opinions of language experts to the legal facts found during trial. One of the overriding shortcomings of judicial practice in blasphemy cases is the lack of rigorous standards for establishment of the specific proof of the qualifications required for the court to accept a person as an expert witness. Too frequently so called “experts” are just expressing their personal beliefs and opinions rather than setting out a scientific basis, using accepted scholarly and scientific methodologies, that alone qualify someone as an expert. The mere title of “professor” or “doctor/ Ph.D.” does not

¹³¹ See Court Decision No. 73/Pid.B/2012/PN.DOM and Court Decision No. 148/Pid.B/2012/PN.KLB

¹³² Court Decision No. 55/Pid.B/2012/PN.END, p. 24.

¹³³ Court Decision No. 1537/Pid.B/2016/PN.Jkt.Utr, p. 602.

¹³⁴ Court Decision No. 55/Pid.B/2012/PN.END p. 25.

qualify someone as an expert, but rather scientific publications in leading journals in the relevant field or, in the case of forensics, years of practice in leading institutions, which publications or practice are directly relevant to the issue on which the expert has been called to testify.

5.1.2. Analysis on the Application of Elements

1) Interpretation of the element “defamation of religion” in blasphemy cases in Indonesia

As previously explained, court judgments do not present a clear definition of “defamation of a religion.” In several cases, the accusation of blasphemy often times placed against acts that are not blasphemous, for example an honest mistake in implementing a religious ritual due to genuine ignorance or lack of knowledge. An example of this is the case of Ronald Tambunan and Yohanis Riwu, who took the holy communion in a Catholic church when they are not Catholics. Similarly, in the case of Alfred Waang who served pork to a Moslem child. These cases show that there is a lack of definite parameters as to when an act fulfills the elements in the blasphemy/defamation of religion article and thus the perpetrator may be criminally prosecuted.

The absence of a demarcation is understandable since Law 1/PNPS/1965 does not provide a clear definition for “defamation of a religion”. The elucidation of its Article 4, however, states that it means those offenses that are “solely (in essence) directed at the purpose to be hostile or to insult.” While it omits a discussion regarding blasphemous acts, Article 4 does outline blasphemous intent. Moreover, the elucidation supports the interpretation of the intent requirement articulated above. It interprets “essence” as “solely,” and makes clear that the act must be specifically “directed at the purpose” of insulting or conveying hostility. Thus, expression of “thoughts” or feelings,” as defined in the Basuki Case, would only meet the requirement of the statute if those thoughts were expressed with the **sole purpose to deliberately** insult. The words quoted above from that case do not in themselves provide any evidence of such a sole and deliberate purpose, raising the issue of what evidence would have been required to establish these elements beyond a reasonable doubt. The judgment of the court was silent on these issues, as well as on other key definitional issues raised by the elements. Thus, in general, before determining whether there is the required sole and deliberate intent, it must be determined whether the actions themselves could be considered defamation.

This broad interpretation of blasphemy extends to infringements of religious feelings. In the case of Ronald Tambunan¹³⁵ and Herison Yohanis Riwu¹³⁶ were said to have caused a deep offense against the Catholic congregation. However, Article 156a letter a of the Criminal Code does not protect against subjective religious feelings. Indeed, Oemar Seno Adji, one of the parties who proposed this article, has said that the notion of “crime against religion” is intended to protect the sanctity of religion, not the religious freedom of its followers (individuals); while the clause’s placement in Chapter V makes it a crime against public order. In other words, the reason to preserve religious harmony is for the preservation of public order. Barda Nawawi Arief, a legal expert, shares the opinion that Article 156a of the Criminal Code is about “religion”, offending religious feelings or disturbing public order in general. Using his interpretation, an offense to religious feelings cannot be considered blasphemy. Moreover, the statute must be interpreted as written and, according to basic criminal law principles, in the light most favorable to the accused. There is plainly no element in the statute that permits blasphemy to be defined by whether or not an individual or group subjectively feels that they were insulted. To interpret it in this way would undermine the consistent application of the law because the criminality of the accused’s act would be dependent on the emotional reaction of a random individual or group, instead of the intent of the action.

This is clearly different from the legal framework in other countries, as explained in the previous section, that try to set up specific and determinate parameters on what acts can constitute blasphemy or defamation of religion. Under regulations in other countries, acts that can fall into this category include those that defame, attack, or disrespect God or other sacred or holy aspects of a religion or attack, defamation, or disrespect against religious feeling or attack of religious leaders. With no definition of conduct, actions that fundamentally are not “blasphemy” can be categorized as such. The basic principle of certainty (*Bestimmungsgrundsatz*) requires that laws specifically define key elements so that the application of the law can be predictable, enabling individuals to conform their conduct to the law so as to avoid criminal liability.

The allegation of blasphemy can be easily made by parties who simply feel offended by certain actions or statements, even if the actions or statements did not intend to insult or defame religion. For example, in the case of Joshua Suherman, an artist, who was accused of defaming Islam for saying that one of his friends was more popular because he was a Muslim.¹³⁷ Other examples also include Comedian Ge Pamungkas, who joked about how the escalating floods in Jakarta after Anies Baswedan took over the city’s governorship from Basuki Tjahja Purnama constituted a trial from God and was

¹³⁵ *Ibid.*, p. 25.

¹³⁶ Court Decision No. 84/Pid.B/2012/PN.END, p. 36.

¹³⁷ Alfian Hilmi, “Setara Institute Minta Kriminalisasi Joshua Suherman Dihentikan”, <https://metro.tempo.co/read/1049898/setara-institute-minta-kriminalisasi-joshua-suherman-dihentikan>, accessed 23 January 2018.

reported to the police for blasphemy.¹³⁸ Kaesang Pangareb, President Jokowi's son, was also accused of defaming Islam, although his case was never brought to legal process, because he commented disapprovingly on a video featuring children shouting "Kill Ahok right now".¹³⁹ These examples show that there is no legal structure for classifying actions as "defamation of religion" in Indonesia, and how the "blasphemy" article has been used to convict a wide range of acts.

This uncertainty and unclearness of law is in fact contradictory to human rights instruments. Article 15 paragraph (1) of the ICCPR says that a person cannot be found criminally guilty for an act if there are no provisions stipulating the act as criminal. This means that there has to be legal certainty and clarity to impose a criminal punishment on a person for their actions. Article 28D Paragraph (1) of the 1945 Constitution also reflects this provision, stating: "Every person has the right to just legal recognition, guarantee, protection, and certainty as well as equal treatment before the law." A similar provision is found in Article 3 Paragraph (2) Law No. 39 of 1999: "Every person has the right to just legal recognition guarantee, protection and treatment as well as to legal certainty and equal treatment before the law." These provisions articulate that legal certainty is a prescribed right, even one enshrined in the Indonesian constitution. When an act is punished using an uncertain and vague provision, the act of punishment can be said to be a violation of human rights.

Moreover, the lack of legal clarity and certainty violates the provision of "freedom of opinion" as prescribed in Article 19 of the ICCPR. Joshua Suherman, Ge Pamungkas, and Kaesang Pangareb, the defendants in the aforementioned blasphemy cases, were only expressing their opinion on current affairs; however, Article 156a's vague definition on blasphemy resulted in their freedom of speech to be compromised. The UN *Human Rights Committee*, in General Comment No. 10 has stated that even though the limitation on freedom of expression is justified based on Article 19 paragraph 3 of the ICCPR, "defamation of religion" is not a specific enough ground for allowing restriction.¹⁴⁰ States can only limit expression when the restriction is articulated by law and is necessary in order to respect of rights and the reputation of others.¹⁴¹ Limiting a person's freedom of speech through citing the blasphemy provision can be considered a human right violation.

Indonesia needs a clearer definition of "blasphemy" so that the blasphemy article can be more correctly applied. This will create legal certainty in the enforcement against actions regarded as "blasphemy" and make freedom of speech less easily impeded by the blasphemy article.

¹³⁸ *Ibid.*

¹³⁹ Fabian Kuwado, "Ini Kalimat dalam 'Vlog' Kaesang yang Dilaporkan ke Polisi", <http://nasional.kompas.com/read/2017/07/05/13010011/ini.kalimat.dalam.vlog.kaesang.yang.dilaporkan.ke.polisi>, accessed 23 January 2018.

¹⁴⁰ UN Human Rights Committee, *CCPR General Comment No. 10: Article 19 (Freedom of Opinion)*, 29 June 1983, para 3.

¹⁴¹ Cherry dan Brown, *loc.cit.*

With regard to religious feelings, although it is possible, in theory, to draft a “religious defamation” provision that includes actions that violate religious feelings, in the Indonesian context, it is best for “religious feelings” to not be protected by the “blasphemy” article. Indonesia is a democracy governed by its Constitution, and Indonesian society is composed of a diversity of state-recognized religions and belief systems. The religious feelings of the adherents of one religion or belief can be different from the religious feelings of the followers of another. This difference in religious feelings can potentially cause conflict between them. It is possible for the teaching of one religion or belief to contradict or “attack” the teaching of another. An example of this was given by Matt Cherry and Roy Brown in a previous section where a Christian fundamentalist’s claim that “Jesus is a son of God” might be blasphemous to Muslims, because Muslims claim that Jesus is a prophet, not a child of God, which is blasphemous to Christians. No follower of a religion or belief should be haunted by the fear of insulting another religion or belief because of inherent tensions between their convictions. If Indonesia wants to criminalize acts as “defamation of religion”, then such a provision must be formulated clearly so that all believers/followers of religions can worship without fear.

2) The distinction between “blasphemy” and “heresy”

The previous section described several cases where the definition of religious defamation has encompassed deviations from religious doctrine, such as in the cases of Gafatar, Tajul Muluk, and Andreas Guntur. Often times the labeling of a certain teaching as heretical is determined by non-judicial institutions such as Majelis Ulama Indonesia (MUI), whose judgment then adopted as ground for determining a blasphemy or heresy cases by law enforcement and the court. This can be found in the cases of Gafatar and Tajul Muluk. Sumardin Tapayya¹⁴² and Yusman Roy¹⁴³ adopted unorthodox teachings and were penalized under the blasphemy article. From several of these cases, the blasphemy article is used against acts or statements that deviate in religious teachings from the mainstream, instead of acts that attack or insult a religion. This points to a fundamental confusion in the interpretation and divergent application of the Law.

According to Law 1/PNPS/1965, the propagation of heretical/deviant sect/doctrine is not charged using Article 4 (Article 156a of the Criminal Code), but dealt with in Article 1, 2, and 3 on the spread of heresy/unorthodoxy. Article 2 Paragraph (1) of the law prescribes that a person who has disseminated a deviant or heretical offshoot will be given an

¹⁴² Sumardin Tappaya, a teacher at Polewali Mandar, West Sulawesi. By utilizing a book titled Kitab Laduni Sumardin, he and his followers engaged in worship activities that include practicing shallat (Muslim prayers) interspersed with whistling, a.k.a. whistling shallat. In response to this practice the Polewali Mandar branch of the Islamic Ulemma Assembly (MUI) issued fatwa No. 010/MUI-PM/1/2006 on January 13, 2016 stating that Sumardin teaching is deviant. See Isnur (ed), *op.cit.*, p. 22.

¹⁴³ Yusman Roy, founder of Taqwallah Pondok I'tikaf Ngaji Lelaku Foundation, taught shallat (Muslim prayers) in two languages. Malang District branch of MUI issued fatwa No. Kep.02/SKF/MUI-KAB/1/2004 on January 21, 2004 that deems Yusman Roy's teaching as deviant. *Ibid.*, p. 23.

instruction and a stern warning to discontinue their actions through a joint decree from the Minister of Religious Affairs, the Minister/Attorney General and the Minister for Home Affairs. If they continue to propagate that teaching, then, according to Article 3, that person will be prosecuted, facing a possible maximum imprisonment of five years. This criminalization of expressing unorthodox beliefs raises even more serious questions about the violation of the Indonesian human rights law and relevant provisions of the Constitution. Heresy laws are generally associated with theocratic states that create an official, state-sponsored orthodoxy of religious doctrine, rather than a secular democracy that guarantees freedom of religion, belief, conscience, and expression.

Based on the above, the defendants Tajul Muluk, Sumardin Tapayya, Yusman Roy, and others with similar predicament, should have first been given the order to not engage in the dissemination of their teaching via a joint ministerial decree, and only prosecuted for propagating heretical/deviant doctrine/sect. if they persisted. However, the joint decree was never given in all the aforementioned cases. The defendants were convicted for the propagation of heresy without receiving the warning beforehand. Furthermore, they were subsequently prosecuted for blasphemy instead, which did not require any warning to be served beforehand, on the grounds that their heretical doctrine has defamed the religion and has caused public unrest. The courts did not consider the vital issue of whether or not their utterances or acts were protected under the law and Constitution, or how a conviction could be justified in overriding those legal and constitutional guarantees of rights.

Even though heresy should be treated differently and dealt with using its own separate set of provisions, unclear definitions have made it possible for heresy to be prosecuted as blasphemy. Not only can the criminalization of belief be a violation of *forum internum*, a non-derogable right according to Article 18 of the ICCPR (which Indonesia has ratified and which it is obligated to recognize under Law No. 39 Year 1999), but the alternative prosecution of heresy as blasphemy makes it unclear for the defendant which criminal provision they actually violated. This is also an infringement of the constitutional rights to legal certainty enshrined in Article 28D Paragraph (1) of the 1945 Indonesian Constitution.

Additionally, heresy is often mistakenly prosecuted as blasphemy because blasphemy is erroneously interpreted and applied as a tool to suppress expression and alternative belief in the name of protecting religious feelings and deviation from orthodoxy, which could disturb the religious “feelings” of any individual or group that feels offended. Tajul Muluk, Sumardin Tapayya, and Yusman Roy propagated teachings/sects that were considered heretical/deviant. However, because some members of the public claimed to take offense to their teachings and became agitated, the Judge deemed that the element

of “defamation of religion” was fulfilled, and they were sentenced for blasphemy, not heresy. This decision is clearly not based upon the plain language of the statute and its constituent elements. It provides an example of how subjective reactions to the beliefs of other citizens has provided judges with a rationalization for going beyond the definitional elements of the offense based upon purely subjective factors that fall outside the scope of legitimate prosecution under the letter of the law.

If heresies continue to be prosecuted as blasphemy, then heresy provisions in the law will be ignored, and heresies will seldom be resolved accordingly. This, together with the fact that religious feelings are different from person to person and there is no objective standard by which disturbance can be measured, provides more reason to reconsider if “offense to religious feelings” should be included in the definition of blasphemy. Given the debates about doctrinal interpretation that are inherent in every religious tradition, any application of the current heresy law can never meet the requirements of legal certainty under the Indonesian Constitution and provide the predictability and certainty and provide the predicatability and certainty which fundamental principles of legality and justice require.

3) The application of the element “intentionally” in Article 156a of the Criminal Code

In Article 156a of the Criminal Code, the element of intent represented by the word “intentionally” has to be proven in trial. The Explanatory Memorandum (*Memorie van Toelechitng/MvT*) of the Criminal Code says that the “intentional commission of a crime “the bringing about of a forbidden act willingly and knowingly” (*het teweegbrengen van verboden handeling willens en wetens*).¹⁴⁴ According to the Memorandum of Reply (*Memorie van Antwoord/MvA*), intent is defined as, “the conscious direction of the will on a particular crime” (*de bewuste richting van de wil op een bepaald misdrijf*).¹⁴⁵ Satochid Kartanegara, as quoted by Mahrus Ali, interpreted “*willens en wetens*” as when a person commits an act intentionally because they have the will (*willen*) to do the act, as well as are conscious of or understand (*weten*) the consequence of the act.¹⁴⁶ A standard translation of *willens* is “deliberately.” Hence, a person can be found to have intent if they deliberately aimed to commit an act and the outcome brought about by the act. The phrase “*bewuste richting van de wil*” indicates that the act is specifically directed (*richting*) to accomplish an intended result. This goes beyond a mere consciousness that such a result will occur and distinguishes ordinary intent from purposive intent, which is aimed at a result, as the blasphemy law requires.

¹⁴⁴ P. A. F. Lamintang, *Dasar-dasar Hukum Pidana Indonesia*, Citra Aditya Bakti, 2003, p. 281.

¹⁴⁵ *Ibid.*

¹⁴⁶ Mahrus Ali, *Dasar-Dasar Hukum Pidana*, Sinar Grafika, 2012, p.174.

In the previous section on the dissection of cases and elements of the blasphemy article, fundamentally all of the Judges in the cases had used the requirement of “*willen en wetens*” or “willingly and knowingly” to determine if the Defendant had “intent.” This is in accordance with the MvT. However, the judges used different measures to assess whether the action was done “willingly/deliberately and knowingly.” This illustrates that this language requires the kind of careful statutory and doctrinal exegesis outlined in a previous section, rather than a simplistic application of the phrase “*willens en wettens*” -- which itself requires a systematic interpretation in its statutory context, rather than in an abstract dictionary sense. In the case against Tajul Muluk, the Panel of Judges said that Tajul Muluk should have known the outcome of his actions. The phrase “should have known” is a characteristic of recklessness or negligence, rather than an intentional action. “Should have known” implies that there was a risk of which the accused was aware and that they should have known that the act would involve certain consequences. This is a different mental element than the intent required by the blasphemy law. A “should have known” standard for the mental element is a lesser requirement than the “knowingly knowledge” requirement, which itself is a lesser requirement than general intentionality, which is again a lesser requirement than deliberative intent to achieve the required result of deliberate insult and hostility. Implicitly, the Panel of Judges was saying that “*willen en wetens*” was generated when the Defendant engaged in act which he didn’t know, but “**should have known**” would bring certain results. This does not meet the requirement of deliberate action **aimed at achieving a certain result** that the statute requires.

In the case against Ronald Tambunan and Herison Yohanis Riwu, the Panel of Judges stated that the intention was the desire of the perpetrator to perform an act and the perpetrator really knew and was aware of what was done. This means that “*willen en wetens*” was generated when the Defendant knew and willed the act itself, not as far as knowing and willing the outcome. There is a fundamental difference between intentionally speaking a word and intending that this word will insult, defame, or express hostility against a particular object. Differently, in the case against Charles Sitorus, the Panel of Judges stated that if a person committed an act intentionally, then that person must have willed to do the act as well as understood the result of that act. This means that “*willen*” was generated when the perpetrator willed to commit the act and “*wetens*” was generated when the perpetrator understood or knew the outcome of the act committed. Again, “understanding” that there will be a consequence of an act is fundamentally different than deliberately intending that act to accomplish a particular result, such as insult or hostility. The doctrinal divergences in these interpretations of the law indicate a lack of rigor in statutory interpretation and exegesis that produces inconsistent and unpredictable results, depriving individuals of their liberty without justification under the

law. This again leaves aside the crucial issue of whether their speech or act was in itself protected under the laws and Constitution.

From the three views, “*willen en wetens*” is generated when the offender willed to commit the act and knew the effect of the act, as it was in the case against Charles Sitorus. As seen above, the requirement of “knew the effect of the act” is not the only accurate interpretation of *willens en wettens*, because that phrase can imply both deliberate and knowing conduct. That is an ambiguity that must be resolved, and in the context of the blasphemy law it is clear that “deliberate” conduct is required. This should be the standard for “intentionally” in blasphemy: the defendant must will to commit the act that can be regarded as “blasphemy,” and **intend** the outcome of the act to insult, defame, or direct hostility against. This means that as long as the defendant is not proven to have willed to commit the act that is blasphemous and/or not proven to have not only known the consequence of the act but also **intended that outcome**, then the accused person cannot be found to have “intentionally” committed blasphemy.

However, intent in blasphemy is not only based on “*willen en wetens*”, but also the reason or purpose the defendant had in committing the blasphemous act. In criminal law, this type of intent is commonly called “intention as purpose/deliberateness as intended” (*opzet als oogmerk*). According to van Hattum and Pompe, this intent necessitates a purpose/aim (*oogmerk*) of the perpetrator in committing a criminal act.¹⁴⁷

According to the Elucidation of Article 4 of Law 1/PNPS/1965, a person can be penalized under this article (i.e. Article 156a of the Criminal Code) only if the person has the **purpose** and intent to be hostile to or insult a religion. For this reason, a person cannot be found to have committed blasphemy as long as they are not proven to have had the purpose to direct hostility against, or to insult a religion, even though they willed to commit the act and knew the consequence of the act. That person must have the intent **and purpose** to insult or defame a religion by **deliberately** performing acts that can be deemed as constituting blasphemy by meeting all of the required elements of the statute.

Evaluating the blasphemy case judgments, the judges’ reasoning of “intent” in those cases never came to substantiating the defendants’ purpose, paying no consideration to whether the defendant even had any. All of the judges stopped at the fulfillment of *willen en wetens*, by interpreting it as “knowingly” or “should have known,” instead of inquiring whether the perpetrator had the required purpose or aim to publicly express hostility towards or to insult a religion.

¹⁴⁷ Lamintang, *op. cit.*, p. 293, 296.

In the cases against Ronald Tambunan and Herison Yohanis Riwu, for example, the Judge only proved the defendants' "intent" by stating that they knew with awareness when attending the Catholic church service that it was different from the Protestant Christian church service and should have foreseen the outcome of the act. This is a fundamental mistake in the application of the mental elements because doing an act knowingly is different from doing an act intentionally. As seen above, however, the blasphemy statute requires that the mental elements be constitutive of the strong sense of intention of purposive and deliberate action. In the case of Charles Sitorus, the Judge stated that the defendant did not have the purpose/objective in doing it, but because the criteria of *willem en wetens* had been met, there was still "intent." This again reveals a lack of rigor in doctrinal interpretation resulting in the conviction of the accused, even in instances when the Judge specifically finds that they do not have the mental element required by the statute and as elaborated in the official explication.

Based on the above elaboration, it can be concluded that the substantiation of "intent" in blasphemy cases was not done properly. The standard was only *willem en wetens* without establishing the purpose or deliberate intent to express hostility to or to insult a religion. As mentioned in the case against Ronald Tambunan and Herison Yohanis Riwu, meaning or purpose are hard to discern because it is the mental stance of the offender. However, it is visible from the tangible act committed, or according to the opinion of Mudzakir, perceptible from the attitude before, during, and after the commission of a criminal act.¹⁴⁸ For that reason, the purpose or meaning to be hostile to or insult a religion must still be proven to punish a person under the blasphemy article.

4) The application of the element "in public" in Article 156a of the Criminal Code

It was mentioned previously that in the Criminal Code there is no clear definition of the type of acts that can be regarded as being done "in public." That is why the Court often refers to the opinion of R. Soesilo to define "in public," which is a public place visible by the general population. Wirjono Prodjodikoro argued that an act committed "in public" is not necessarily done publicly (*in het openbaar*), but it is sufficient that it is done openly (*openlijk*) or not covertly or if the act is possibly visible by others.¹⁴⁹ This is in line with the reasoning of the Dutch Supreme Court (*Hoge Raad*) in their judgment NJ 1939, 861, dated 22 Mei 1939, where the *Hoge Raad* stated that "public" or "in public" does not mean that the inciting words were uttered in a public place, but rather that the act was done such that it could have been heard by the public.¹⁵⁰

¹⁴⁸ Mudzakir, *loc.cit.*

¹⁴⁹ Wirjono Prodjodikoro, *Tindak-Tindakan Pidana Tertentu di Indonesia*, Refika Aditama, 2003, p. 165.

¹⁵⁰ Putusan Hoge Raad No. 01699/04, NJ 2005, 287, 5 April 2005. In the Section "Conclusie" number 3.14. Decision can be accessed at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:PHR:2005:AS8465>.

From this definition, it can be concluded that an act committed “in public” need not be performed in a public place, but it is sufficient that it is in a location that allows others to be aware of said act. This is different from the element “to make public” (*ruchtbaarheid te geven*) in the article on simple insult in Article 310 paragraph (1) of the Criminal Code. According to R. Soesilo, the act need not be done in public, as long as it can be proven that the defendant had the intent to publicize the allegation.¹⁵¹ Even if the act is whispered, as long as others may hear, then the act can be classified as being done “in public.” This interpretation is rather questionable, for it would imply, for example, that whispering a belief in the ear of a friend or spouse would be public. It leaves open how many people would have to be able to hear, in what context (for example, in instances of eavesdropping or surveilling), in what kind of place, etc. Requiring an “intent to publicize” in the sense of making sentiments broadly known to the public would seem to be a sounder argument. It would be different if the act was done by whispering and not heard by others, but by the other person in the same conversation, even if it is done in a public place. Then the act cannot be considered to have been done “in public”.¹⁵²

In the cases we have analyzed previously, we can see that the Judges have already judged according to the above definition. In the case against Tajul Muluk, the Judge reasoned that “in public” can be defined as being seen by the public, so that it is sufficient if there is the possibility of another person to see it. In the case of Ronald Tambunan and Herison Yohanis Riwu, the Judge reasoned that “in public” means that it can be witnessed by the public, so whether the act was done in a public place or not, it does not matter, but in principle it is publicly visible. The acts that compose the basis of the fulfillment of the element were also proven to have been committed openly, visible and audible by people. Tajul Muluk carried out his actions in Sampang; Ronald Tambunan and Herison Yohanis Rigu performed theirs inside a Catholic Church filled with members of the congregation.

So, what if the act alleged to defame a religion was committed before people of the same group, or in a private setting, and subsequently made known to the public because of the publication by another person? Even if the speech was uttered in one’s own home, there is still “a possibility for another person” to hear it, because someone might be just outside, or in another room. Would that act be considered to have been committed “in public”? One example of this incident is the case against the leader of the the Islamic Defenders Front, Rizieq Shihab, who was reported to the police by the national leadership of the Union of Catholic University Students (Perhimpunan Mahasiswa Katolik Republik Indonesia/PMKRI) for allegedly denigrating the Christian religion for saying, “If God had brought forth a child, who was the midwife?”¹⁵³ This was done before his group, as part

¹⁵¹ Soesilo, *op. cit.*, p. 226.

¹⁵² Hoge Raad Decision No. 01699/04, *loc.cit.*

¹⁵³ Rizieq Shihab dilaporkan ke polisi, dituduh lecehkan umat Kristen”, <http://www.bbc.com/indonesia/indonesia-38435195>, accessed 26 January 2018.

of a sermon in Pondok Kelapa, East Jakarta, but was made known to the public by one person in the audience. This incident received a variety of reactions from the public, where some said that Habib Rizieq had blasphemed Christianity, while others said that he did not denigrate the Christian religion because he said it before his own group.¹⁵⁴ These differing reactions reveal the danger in allowing the standard for blasphemy to be whether or not some person's or group's religious "feelings" were hurt or offended.

In law, there is no provision of this. The court judgments that we have collected have not addressed this issue. However, the reasoning of *Hoge Raad* in judgment NJ 2001, 694, dated 29 Mei 2001 can perhaps serve as a reference. In that judgment, the defendant was proven to have made some insulting remarks during a speech at a political party meeting attended by journalists. The Hoge Raad ruled that even though the meeting was not accessible by everyone or, in other words, was conducted in a private setting and attended by those in the same group as the defendant, because he recognized a few journalists the moment he arrived at the location, it could be inferred that he knew the risk of his statements being published and publicly accessible. Therefore, the actions of the defendant can be considered to have been done "in public."¹⁵⁵

If we refer to this decision, then the actions that are suspected to have defamed a religion that were committed before those of the same group, or conducted in a private setting, can still be classified as being done "in public" if the perpetrator realized that there were people who could publish what they did. Consequently, with an *a contrario* interpretation, the act that is suspected to defame a religion that was done before those of the same group, or conducted in a private setting, cannot be deemed as being done "in public" as long as the perpetrator did not realize that there were people who could publicize what they did --even if there were people who could publicize it. This is in line with the opinion of Mudzakkir, who did not specify the element of "in public," but said that if the action that was suspected to have blasphemed a religion was carried out before those of the same group or in private, then that action is not blasphemy. If ultimately the act was spread and made publicly known, then those who spread it is to blame.¹⁵⁶

¹⁵⁴ "Habib Rizieq Dilaporkan, Netters Debat Apa Ceramah Didepan Umat Sendiri Dianggap Nistakan Agama", <https://chirpstory.com/li/341716> , accessed 27 January 2018.

¹⁵⁵ Hoge Raad Decision No. 01699/04, *loc. cit.*

¹⁵⁶ Mudzakkir, *loc. cit.*

5.1.3. Case Study

1) Tajul Muluk Case¹⁵⁷

On 12 April 2012, the Tajul Muluk Case was brought to the District Court of Sampang. Tajul Muluk was accused for committing a number of acts. He was suspected by the community that the Islamic teachings preached by the defendant contained principal deviations and he was recruiting a number of *santri* (disciples) in practicing his teachings. The Defendant was also considered to have preached his teachings in a vulgar manner, used harsh language, and challenged groups other than the defendant's. The teachings preached by the Defendants include, inter alia; (1) The Quran presently in circulation among Muslims is considered to be not authentic or not original; (ii) the two Islamic profession of faith sentences (*syahadat*) were added to; (iii) His Pillars of Islam (*Rukun Islam*) and Pillars of Faith (*Rukun Iman*) are different than the majority of Muslims; etc. The preaching delivered by the Defendant in a house in Nengkrenang, Karang Gayam Village, Sampang. The house was used to learn Quran recital and as a site for the defendant to present his ideas before his disciples/followers. Moreover, he also taught his teaching at Banyuarrum Mosque, Sampang.

The prosecutor explained in the indictment that due to the defendant's act, the surrounding community had become anxious -- including the *Ulama*, the *Kyais* (Islamic teachers/preachers) and community figures -- because of the differences in the religious teachings between the defendant and that of *Ahlu-Sunnah Waljamaah* (as adhered to by Sampang community). The *Ulamas*, *Kyais*, and community figures accused the defendant of offending the feelings of Muslims because his teachings deviated from Islam. This is expressed in the fatwa of the Semarang District MUI (*Majelis Ulama Indonesia* -- The Indonesian *Ulama* Assembly) No. A-035/MUI/Spg/I/2012 dated 1 January 2012, which regards the teachings propagated by the defendant as heretical and leading (people) astray, as well as blasphemous and defaming Islam. Based upon the above facts/allegations, the Prosecutors charged the Defendant with alternative counts, either his acts violate by Article 156a of the Criminal Code on blasphemy or by Article 335 paragraph (1) of The Criminal Code on unpleasant/disagreeable conduct.

In the judgment, the Panel of Judges from the Sampang District Court consider that the formulation of the five Pillars of Faith and 8 Pillars of Islam, taught by the Defendant, are substantively similar to the formulation of the six Pillars of Faith and five Pillars of Islam that are generally known by Muslims in Indonesia. The difference in number of pillars is due to different views and interpretations of the Quran and the Prophet's *Hadith* (the record on Prophet Muhammad SAW's conducts and words). Based on that consideration,

¹⁵⁷ This Analysis is based on the Judgment of The Sampang District Court No. 69/Pid.B/2012/PN.Spg, The Judgment of the Surabaya Appellate Court No. 481/Pid/2012/PT.Sby, The Judgment of the Supreme Court of the Republic of Indonesia No. 1787/K/Pid/2012.

the Panel of Judges stated that Tajul Muluk could not be blamed for that action. On the accusation that the Defendant had taught, in addition, the two *Syahadat* generally known by Muslims, the Panel of Judges found that there is insufficient evidence for that action, because it is only grounded on the testimonies of two unsworn witnesses, and thus do not fulfill the requirement of 2 (two) credible pieces of evidence.

The Prosecutor also stated that the Defendant was expressing or teaching that the existing Quran is not original. The Panel of Judges viewed that there are consistent witnesses' testimonies, which thus constitute legally admissible pieces of evidence. The Defendant denied the testimonies and presented other witnesses, who in essence testified that they had never known nor heard the Defendant teaching or stating that the existing Al Qur'an was not original. The Panel of Judges, in assessing the truthfulness of the witnesses, in accordance to Article 185 paragraph (6) of the Criminal Procedural Code, determined that the witnesses put forth by the Defendant were his siblings, disciples, and followers. Moreover, the Panel of judges considered that the teachings recognized *taqiyah*, which taught precautionary dissimulation or denial of religious belief and practice in the face of persecution. Therefore, they ruled that these factors may influence the trustworthiness of the witnesses' testimonies. The Panel of Judges deemed that the testimonies of the witnesses put forth by the Defendant were not credible and decided that the Defendant was guilty.

During the trial, the Prosecutor submitted evidence in the form of documents, namely: (i) Semarang District MUI Fatwa Number: A-035/MUI/Spg/1/2012; (ii) The Statement of PCNU (*Nadhatul Ulama* Branch Committee) of Sampang District Number: 255/EC/A.2/L-36/1/2012; (iii) The Statement of Tajul Muluk (26 October 2009), which, among others, recorded the agreement that the Defendant could no longer preach his sect because it had caused restlessness in the community; the Defendant could no longer conduct any ritual, preaching, or sect dissemination in accordance to his teaching in Sampang District; and, if he continued to conduct rituals and/or preach, the Defendant would be processed in accordance to the applicable law; and (iv) The Statement of Tajul Muluk (26 October 2009) stated that the Defendant would not hold proselytizing activities for the benefit of Muslims at large.

Based on the consistency between witnesses' accounts and documentary evidence, the Panel of Judges determined that the Defendant had deviated from mainstream teachings of Islam, and had enough evidence to show that the Defendant had expressed or taught that the existing al Qur'an was not original. The Panel of Judges also deemed the acts of the Defendant as belittling, besmirching, and damaging to the venerability of the Quran. These statements were made with the knowledge that the Qur'an is the holy book for Islam, the authenticity of which is already guaranteed by Allah SWT. Thus, acts that

belittle, besmirch, and damage the venerability of al Qoran are automatically acts that defame Islam, which is one of the religions protected by Presidential Decree No. 1/PNPS year 1965 on the Prevention of Misuse and/or Defamation of Religion.

In determining the element of intent, the Panel of Judges used the theory of knowledge: namely, an act is committed with intent if the act is known to the defendant and, if committed, will cause a result prohibited by the criminal code. Therefore, the intent in the crime against "Public Order" lies in the knowledge of the perpetrator about the act and its impact. In other words, if the perpetrator knows that the act, if committed, will resolutely disturb the public order or a religious congregation's peace. In order to substantiate this, one needs only to prove the perpetrator's level of knowledge or intellectuality as measured by the general public.

Using this argument, the Panel of Judges considered that the Defendant had the intent because, as a teacher or *Kyai*, he should have known that the act he committed -- namely, proselytizing or expressing teachings that differed from the teachings (adopted) by the society in general -- would result in the disturbance of the public order disturbance or the peace of the religious community (in this context the Islam adherents). This proselytizing, according to the Panel of Judges, was committed consciously by the Defendant, and the Defendant understood the consequences of his actions. The defendant had acknowledged his awareness of the emerging vulnerability (the pro and contra in response to the Defendant's preaching) since 2005, yet had continued to proselytize.

With regard to the substantiation of the element "in public," its interpretation as "can be seen by the public", means that beyond simply being in a public place, the condition of being "in public" is satisfied if there is a possibility for another person to witness the act. When considering the case of Tajul Muluk, Muluk was preaching to an audience of people who were receivers/listeners. Additionally, the legal fact above shows the Defendant preached in a public place as well as in a place that can be seen by others, and thus the sub-element "in public" has been fulfilled.

Based on the considerations enumerated above, the Panel of Judges ruled that the Defendant had intentionally and publicly committed an act that was defamatory in nature against a religion adhered to in Indonesia. Since all of the elements had been fulfilled, the Defendant was proven legally and convincingly as having "[committed] an act that is in essence defamatory in nature against Islam" based on Article 156a letter a of the Criminal Code and was sentenced to 2 (two) years imprisonment.

At the appellate level, the Panel of Judges of the Surabaya Appellate Court added to the sentence assigned by the Sampang District Court, from 2 (two) years imprisonment into 4 (four) years imprisonment. The Panel of Judges' considerations are (1) Tajul Muluk is considered to have caused anxiety in the community and disharmony amongst the community of Islam believers; (2) There are teachings with indications that they have veered outside the teachings of Islam; (3) Tajul Muluk has caused riots and rendered a number of people losing their residence and fatalities.¹⁵⁸

In the Supreme Court, the Panel of Justices rejected the Defendant's appeal; thus, he was still sentenced to 4 (four) years imprisonment. The Court considers that the Defendant had been proven to proselytize different (tenets) of the religion (namely that there are 5 (five) Pillars of Faith and 8 (eight) Pillars of Islam, and the existing Al Qur'an is not authentic) at Banyuarrum Mosque in Musholla in Sampang District, as well as in his own house. Aside from that, there was already the Sampang District MUI Fatwa No. A-035/MUI/Spg/I/2012 and PCNU Sampang District Statement of Position No. 255/EC/A.2/L-36/I/2012, which deemed that the teachings that the Defendant propagated were deviant and misleading, and constituted defamation of religion that could have caused anxiety within the community. The Court also stated that the teaching proselytized by the Defendant has resulted in disharmony among Islam community of believers, which caused anxiety within the community and triggered the mass arson of houses.

Analysis of the Judgments

The element of "with intent" is not fulfilled because the Judges should use "purposive intent" to fulfill this element, not the "theory of knowledge."

As expounded upon above, the Panel of Judges utilized the theory of knowledge where a certain act could be categorized as having been committed with intent if the act was known by the perpetrator and if its consequences would be prohibited by criminal law. Thus, the court deemed the element to be fulfilled because the defendant should have known that the act would have disturbed the peace of the Islamic community of believers; thus, the act was committed consciously, and its consequences were obvious and clearly disregarded.

This consideration shows that the Panel of Judges has incorrectly implemented Article 156a of the Criminal Code. Article 156a of the Criminal Code cannot be read separately from Article 4 of Law 1/PNPS/1965 because this article inserts the provision into the Criminal Code. Therefore, the elucidation for Article 4 Law No 1/PNPS/1965 is also binding and applicable for Article 156a of the Criminal Code. The Elucidation of Article 4 states that the crime as stipulated in Article 156a letter a of the Criminal Code is an act

¹⁵⁸ Hasil Eksaminasi Putusan 4 Tahun Banding Tajul Muluk", <http://ylbhu.org/index.php/hasil-eksaminasi-putusan-4-tahun-banding-tajul-muluk/> , accessed 16 July 2018

that has the intent to be hostile or to defame. Therefore, the form of intent in this article is “purposive intent” (*opzet als oogmerk*), which, according to van Hattum and Pompe, is the perpetrator’s purpose/objective (*oogmerk*) in committing a crime. [165] Based on this definition, someone cannot be deemed to have committed defamation of religion if it is not proven that they had the purposive intent to be hostile against or defame a religion, even when they intentionally committed an act and knew the consequences of their actions.

Examining Tajul Muluk’s actions, there is a lack of evidence for Tajul Muluk’s purposive intent to be hostile towards or defame Islam. The Defendant only exercised and proselytized teachings that he believed to be the true teachings that differed from the teachings of Islam in general. However, the Panel of Judges only applied the measurement for intent as assessing the reasonability of the expectation of the Defendant knowing that the act would have caused a certain consequence; the consciousness with which the act was committed, and knowledge of the impact of the act. This substantiation approach seems to resemble the threshold of proof for ordinary “with intent” elements where the Explanatory Memorandum of the Criminal Code states that the “intent to commit a crime” fulfills the criteria of “*het teweegbrengen van verboden handeling willens en wetens*,” which translates to, “committing a prohibited act intentionally and knowingly.” [166] According to Satochid Kartanegara, as cited by Mahrus Ali, for a person to commit an action intentionally, they must will (*willen*) the act and must know (*weten*) the consequence of the act. [167] Whereas, the substantiation of the element of intent in the defamation of religion article requires more measures than just “knowingly and with intent”; namely, there is a requirement for the deliberate intent to defame a religion. Therefore, the element of “with intent” should have been found as having not been fulfilled with regards to Tajul Muluk’s action because he did not have the intent to defame Islam.

Based on the elaboration, Tajul Muluk should not have been found guilty based on Article 156a letter a of the Criminal Code because the element of “intent” was not substantiated. The substantiation of this element is still based on the ordinary element of intent, which is based on the existence of *willen en wetens*, in addition to being hostile towards or defaming a religion.

Deviant Sect is Different from Defamation of Religion

In the Court judgments summarized above, Tajul Muluk’s act that was found to be substantiated is proselytizing a teaching of Islam that has principal differences with the tenets of Islam. Therefore, the Panel of judges sentenced him with imprisonment based on Article 156a letter a of the Criminal Code, which forms a part of Article 4 of Law No. 1/PNPS/1965.

Referring to the provisions in Law No. 1/PNPS/1965, Tajul Muluk should not have been found guilty of the defamation of religion and sentenced based on the article. Law No. 1/PNPS/1965 essentially regulates 3 (three) types of acts: namely, propagating deviant teaching/sect (Article 1-3) and committing an act that is hostile in nature; misusing and defaming a religion; and acting with the intent to make another person not adhere to any religion (Article 4 of Law No. 1/PNPS/1965/Article 156 a of the Criminal Code). The legal mechanisms for these acts are also different, whereby for the propagation of deviant teachings or sects, a person can only be criminalized if they persist in doing the action after the issuance of an order and a stern warning to cease the propagation through a joint decree from the Minister of Religion, the Minister/Attorney General, and the Minister of Interior Affairs (Article 2 and 3). This mechanism is different from the legal mechanism for acts that are in nature are hostile to, misuse, and defame a religion as well as acts committed with the intent to make another person not to adhere to any religion. For these two categories of acts, there is no requirement for an order or a warning to precede the criminal prosecution of people who perpetrate them. Therefore, it is clear that proselytizing deviant teachings/sects is different from defamation of religion, and thus it cannot be prosecuted by using the article.

Based on this analysis, there is a miscarriage of justice in prosecuting and trying a Defendant with an incorrect legal basis. If the Defendant is deemed to have been propagating deviant teachings/sects, then they should be prosecuted using Article 1-3 1/PNPS/1965 on the propagation of deviant teachings/sects. They should not be prosecuted using Article 4 Law No. 1/PNPS/Article 156a KUHP, which regulates the defamation of religion. Consequently, the Defendant should not be criminally prosecuted directly, because the administrative procedures in Article 2 and 3 of Law No. 1/PNPS/1965 should be implemented first. Tajuk Muluk should have been given an order and stern warning to cease proselytizing his teachings through a joint decree from the Minister of Religion, the Minister/Attorney General, and the Minister of Interior Affairs. Only if, despite the joint decree, they continue to disseminate their teachings, should the Defendant be criminally prosecuted for the act. The misapplication of the article causes the miscarriage of the application of legal mechanisms against Tajul Muluk. This error would not have occurred if the law enforcement apparatus in this case was able to differentiate between proselytizing a deviant teaching/sect and defaming a religion as separately defined by the relevant legal provisions.

The Views or Decisions of Religious Institutions are Unbinding in A Criminal Legal Process

There are 2 (two) views or decisions from religious institutions pertaining Tajul Muluk's teachings; namely, the Sampang District MUI's fatwa No. A-035/MUI/Spg/I/2012 dated 1 January 2012 and the Statement of Position of the Sampang District PCNU No. 255/EC/A.2/L-36/I/2012 dated 2 January 2012. Both state that the teachings disseminated by Tajul Muluk were deviant and misleading, and constituted defamation of religion. However, in essence, these 2 (two) documents cannot be utilized as ground for starting a criminal legal process against Tajul Muluk, nor can they be the basis for finding him guilty of proselytizing deviant teachings/sects or for defaming religion.

As already elaborated previously, Article 2 of Law No 1/PNPS/1965 states that if a person propagates teachings/sects considered to be deviant, then there will be an order or stern warning to cease the proselytizing through a Joint Ministerial Decree of the Minister of Religion, the Minister/Attorney General, and the Minister of Interior Affairs. Therefore, the parties who have the authority to deem a teaching or sect as deviant are the three Ministries mentioned. In Law No. 1/PNPS/1965, there is no stipulation allowing the delegation of the authority to another party or institution. Consequently, the views or decisions of religious institutions deeming a teaching or sect as deviant are non-binding in a criminal legal process because they do not have the legal authority to make such a determination.

The same applies for the views or decisions of religious institutions on whether or not a person has committed defamation of religion. As explained previously, for a person to be found guilty of the act, there is a requirement to substantiate their specific purposive intent to defame a religion, as well as the other elements of the statute. The substantiation and determination of the existence of such intent should be in the hands of the Judges, not any religious institutions. Religious institutions can impart their opinion or views on whether or not a person has defamed or insulted a religion. However, a person's intent to defame a religion and the viability for legal prosecution can only be determined by the Judges.

Based on the above explanation, the views or decisions of religious institutions on whether or not a teaching/sect is deviant and/or a person has committed defamation of religion is non-binding and cannot be directly utilized as the basis for criminally sentencing a person. The determination of deviancy against a teaching or a sect should be determined by the Minister of Religion, the Minister/Attorney General, and the Minister of Interior Affairs. Whether or not a person has committed defamation of religion must be determined by the presiding Judges, who have to firstly determine whether there is sufficient evidence that the person had the purposive intent to defame the religion in question as well as whether the additional required elements are fulfilled according to the standard of proof.

2) Basuki Tjahaya Purnama (Ahok) Case

The case of the active Governor of the Special Region of the Capital of Indonesia (*Daerah Khusus Ibukota-DKI*) Jakarta, Basuki Tjahaja Purnama alias Ahok, began during his work visit in his capacity as the Governor to Pramuka Island, Thousand Island Archipelago, on September 27, 2016. In this work visit, he gave a speech to provide guidance on the programs of the DKI Jakarta Regional Government regarding the fishing community in the Thousand Island Archipelago. His speech became controversial after a lecturer/activist, Buni Yani, posted a recording of a portion of the speech on his Facebook with the comment, "is this blasphemy." The video clip of Ahok's speech had a subtext that did not match the words used by Ahok: by omitting the word "use," Ahok's statements were thus misrepresented and turned from "... lied to **by using** Surah Al-Maidah 51 ... etc"¹⁵⁹ into "... lied to (by) Surah Almaidah 51..."

The video clip posted by Buni Yani went viral. Many parties considered the speech as having blasphemed against/defamed a holy verse of Al Quran and subsequently submitted numerous reports until the case was brought before the North Jakarta District Court to be adjudicated.

On the basis of Ahok's words, the Prosecutor filed alternative indictments on the grounds of defamation of religion (Article 156a letter a KUHP) or for defaming a group (Article 156 KUHP), in this context against the *Ulamas* (Islamic preachers). The Prosecutors submitted the alternative indictments because they believed that it was not very clear whether Ahok's words meant that *Surah Al-Maidah verse 51* was untruthful or a lie, or if the *Ulamas* had been manipulating the interpretation of *Surah Al-Maidah verse 51* for their political gain.

After the evidentiary hearing, the Prosecutors concluded that what Ahok had done was not defamation of religion, but rather defamation against *Ulamas*. They pled to the Court to sentence him with one year imprisonment, with a probationary period of two years (suspended sentence)¹⁶⁰. However, the North Jakarta District Court deemed the words Ahok uttered as having fulfilled the elements of defamation of religion as stipulated in Article 156a letter a KUHP/Article 4 PNPS No. 1 year 1965.

¹⁵⁹ The complete citation of Ahok's speech as included in the decision of the court is as follows: "... this election has been brought forth so even if I don't get elected I will step down in October 2017 so if we run this program well (you) ladies and gentlemen can still (experience) harvest with me even if I do not get elected as the governor. (I) tell you this story so that (you) ladies and gentlemen are heartened, thus do (not have) the thought ah... if (he) does not get elected, Ahok's program will cease, no ... I (will still be Governor) until October 2017, do not trust people, it can happen that in (your) consciousness ladies and gentlemen you cannot vote for me, right, being lied to by using surah Al-Maidah 51, et cetera, that is the right of (you) ladies and gentlemen, so that if (you) ladies and gentlemen feel (he) cannot be voted for because I am afraid of going to hell because (you) are fooled like that well that is alright, because that is (your) personal calling ladies and gentlemen, but this program should just run, so you (ladies and gentlemen) do not have to feel uncomfortable, in (your) consciousness (I) cannot vote for Ahok, do not like Ahok, but if I accept his program (I) do not feel comfortable because (I) will owe the favor', do not have (such) feeling of discomfort ladies and gentlemen, (if you do) you will die slowly, get a stroke."

¹⁶⁰ In Indonesian: "*Pidana bersyarat*" or qualified sentence, i.e. a judicial punishment which is not enforced unless the defendant violates the requirements put forth by the court during the probationary period. Suspended sentence is regulated in Article 14A of the Criminal Code.

Analysis of the Court Decisions

In this case the basic legal question is whether or not the words uttered by Ahok were aimed to be hostile towards or defame Islam, or to defame *Surah Al-Maidah* verse 51. The existence of the intent to defame is the absolute requirement articulated by Article 156a letter a of the Criminal Code, bearing in mind that the elucidation clearly states that, “*The crime in this provision is solely (in essence) referring to the intent to be hostile or defame.*” In addition, the law requires the elements that the utterance is in its essence expressing a hostile or defamatory intent. However, in their consideration, the panel of judges adopted a different view: they opined that the element of intent in Article 156a letter a did not have to be a purposive intent (*opzet aals oogmerk*) -- which is the highest level of intent -- but could be a certainty intent (knowingly) or a possibility intent (recklessly) (*dolus eventualis*). This is evident in the consideration found in the Judgment, where the Panel of Judges explained the element of intent as follows:

Considering, that because the third element has been fulfilled, thus the Court will deliberate on the second element, namely with intent, as follows:

Considering, that what is meant by with intent according to *Memorie van Toelichting*¹⁶¹ is to will and know (*Willens en Wetens*). Whereas, according to S.R. Sianturi in his book *Asas-Asas Hukum Pidana Di Indonesia dan Penerapannya*¹⁶², the meaning of with intent is as desired and as realized (*Willens en Wetens*) and has to be interpreted expansively -- namely, with intent as purpose (Oogmerk), intent with the awareness of certainty or inevitability (Opzet bij zekerheids of nood Zakelijkheids bewustzijn), and intent with awareness of possibility (*dolus eventualis*) – and, thus, to will and/or to realize does not only mean what is indeed willed or realized by the perpetrator, but also others that lean towards or in proximity of the will or realization.

Considering the element with intent in Article 156a letter a, KUHP encompasses all elements behind the element of intent, or (that) all other elements behind the element of “with intent” are influenced by the element “with intent”; thus, the intent of the perpetration has to be directed towards the prohibited act, such as expressing feelings or committing acts that are in essence defamatory in nature against a religion adhered to in Indonesia”¹⁶³

¹⁶¹ The Explanatory Memorandum or Elucidation of the Criminal Code as inherited from the Dutch, given that the present day Indonesian Criminal Code adopted the Criminal Law in force during the Dutch Colonialization era.

¹⁶² Italics added, the English translation of the book's title is *The Principles of Criminal Law in Indonesia and Their Implementation*

¹⁶³ North Jakarta District Court, Decision No. 1537/Pid.B/2016/PN.Jkt Utr, 606-607.

In its implementation, it is also evident that the Panel of Judges did not apply the element of intent as elucidated in Article 156a. This can be seen from how the Panel of Judges, in their deliberations of the case, adopted the view that the element of intent to defame Islam could be fulfilled if the defendant was a public official, since they declared that he **should have known** that the issue of religion is sensitive. Additionally, the Defendant's use of the phrase "*Surah Al Maidah*," which is considered holy in Islam, together with "*dibodohi*" (fooled), a word with a negative connotation, was enough to show the existence of intent to defame. The following is the consideration of the Panel of Judges:

"Considering that the Defendant is a Public Official, the Governor of DKI Jakarta, and as a Public Official indeed the Defendant knew that issues related to religion have been sensitive, which easily cause skirmishes between religious communities, because the issue of religion is a matter of faith, a matter of feeling and belief, and thus if the Defendant wanted to discuss issues related to religion, the Defendant should have avoided the use of words or phrasing that in nature belittle, demean or defame a religion as regulated in the Elucidation for Article 4 letter a of the Presidential Decree No. 1 year 1965;

Considering that the Defendant knew and already understood that Surah Al Maidah 51 is an Islamic holy verse that should be appreciated and respected by anyone include the Defendant, but the Defendant still mentioned Surah Al Maidah 51 and even correlate (it) with words with negative connotation namely the word "*dibohongi*" (lied to) by stating that "lied to by using Surah Al Maidah 51 et cetera"" whereas in the video recording of when the Defendant uttered those words played during trial, the Court did not see the attempt of the Defendant to avoid the use of words or phrasing that in nature demean or defame the value of the holy verse Surah Al Maidah 51 as part of the Holy Book of Islam, even repeated it by uttering the word "*dibodohi*"(fooled) thus on this matter the Court is of the view that the Defendant when uttering the words "lied to by using surah Al Maidah 51 et cetera"" had the mens rea with intent to demean or belittle or defame the holiness of Surah Al Maidah 51 as part of the Holy Book of Islam"¹⁶⁴

From the above consideration, it is clear how the Panel of Judges deviated from the *original intent* and the plain language of the required elements of Article 156a letter a, as well as from the official elucidation. Their reasoning that because a public official should have known that religion is sensitive utterly fails to establish that the utterance was made with the deliberate intention of defaming or attacking religion. This is a basic category mistake that has no justification in legal doctrine or logic. Their decision also fails to explain how an accurate reference to a verse in the Quran can meet the required

¹⁶⁴ North Jakarta District Court, Decision No. 1537/Pid.B/2016/PN.Jkt Utr, 609-610.

element of in its essence/solely manifesting a hostile or defamatory intent. Expanding the meaning of the element of intent has caused ambiguity of the legal parameters as to when an opinion or statement related to a religion is part of the freedom of expression as protected by law and when it is considered to be blasphemous or defaming a religion.

5.2. Analysis on the Application of Procedural Law in the Proceedings of Blasphemy Cases

The right to a fair trial guarantees the protection of human rights and the upholding of the rule of law to every person involved in the justice process. The right to fair trial is intended to ensure that every person in the criminal justice process is tried fairly. Those rights have been prescribed in national law¹⁶⁵ and have been stated in various international conventions to which Indonesia has acceded.¹⁶⁶ The relevant aspects of fair trial in the context of blasphemy cases are: (i) the principle of legality; (ii) judicial independence and impartiality; (iii) the right to legal counsel; (iv) neutrality of investigators and prosecutors; dan (v) presumption of innocence.

Blasphemy cases are often problematic because of various violations of fair trial rights. This is true in various other countries as well. In Pakistan, for example, the accused in blasphemy cases are often intimidated and harassed, subjected to bias and prejudice from a number of judges, experience a lack of legal aid, prolonged detention, and an incompetent investigation.¹⁶⁷ There have been reports that judges often make partisan comments against the accused during the trial and act as though they are the parties offended by the actions of the defendants, despite the expectation of their impartiality.¹⁶⁸

In Indonesia, the application of Article 156a of the Criminal Code also faces problems of violating the principles of fair trial rights. The applications of the article have often been considered arbitrary, because they not only target acts prescribed in the scope of Article 156a of the Criminal Code, but also ensnare that acts that have no connection to blasphemy. Additionally, the application of Article 156a of the Criminal Code is also burdened with pressure from the masses and is often politicized to achieve non-legal targets and goals.¹⁶⁹ When judges are influenced by demonstrations or public outrage, or when they share the feelings of offense articulated at trial, they violate the most basic principles of judicial integrity: the duties of independence and impartiality.

¹⁶⁵ Indonesia, *Undang-Undang Dasar 1945*, Pasal 27 dan *Undang-Undang No. 8 Tahun 1981 tentang Hukum Acara Pidana*.

¹⁶⁶ UN, *International Covenant...*, *op.cit.*, Article 14 and 26.

¹⁶⁷ Rana Tanveer, "Blasphemy accused often denied right to fair trial", *The Tribune Express*, 6 November 2015, <https://tribune.com.pk/story/986072/blasphemy-accused-often-denied-right-to-fair-trial/>, accessed pada 6 November 2017.

¹⁶⁸ International Commission of Jurist, *On Trial: The Implementation of Pakistani's Blasphemy Law*, November 2015, p. 34.

¹⁶⁹ Interview, Uli Parulian, 11 November 2017.

Violations to the right to a fair trial are common to many blasphemy cases in Indonesia, which has caused the defendants in these cases to experience dual injustice. Yet, amidst the controversy and criticism against the application of Article 156a of the Criminal Code, the fulfillment of the right to fair trial is expected to be an important safeguard for people who are accused of blasphemy.¹⁷⁰

5.2.1. The Principle of Legality: A Deficient law

One internationally recognized initial requirement for the implementation of fair trial rights is the fulfillment of the principle of legality. This principle mandates that a criminal act, apart from being prescribed in formal regulation or law, be clearly formulated (not vague or ambiguous), in order to ensure that every person is able to clearly understand the law and take the appropriate measures to avoid criminal sanction.¹⁷¹

As was detailed in a previous section, the formulation of Article 156a of the Criminal Code is a broad formulation of an offense, and one that can be applied in almost every religiously-related action. Crouch said that one of the characteristics in blasphemy cases in Indonesia is the overbroad definition of Article 156a of the Criminal Code that is also interpreted overbroadly by the court.¹⁷² LBH Jakarta also states that Article 156a of the Criminal Code and Law No. 1/PNPS/1965 is unduly flexible due to its imprecision, which is used to criminalize a person's faith in interpretation and freedom of belief.¹⁷³ As was seen above in some detail, and referring to a substantial body of available examples, blasphemy is frequently applied subjectively to target different interpretations, and is used to prosecute individuals who allegedly offend the religious feelings of others. The criminal law requires concrete and clear regulations and the proof of facts¹⁷⁴; in contrast, the blasphemy law is applied and interpreted subjectively, so as to protect any feelings of offense by an individual or group. Evidence for the utilization of the blasphemy law in this manner has been affirmed by the research findings from the Setara Institute, which specifically showed the diversity of contexts in which the law was applied,¹⁷⁵ mainly related to differences in religious understanding. The accusation of blasphemy is thus often used to muzzle differences in diverse settings in relation to the way individuals or groups develop faith and belief. The accusation of blasphemy has also been used as a tool to build and maintain a status quo for major and established religious groups in society.¹⁷⁶ These uses, of course, put the application of the blasphemy law directly in

¹⁷⁰ *Ibid.*

¹⁷¹ International Commission of Jurist, *op.cit.*, p. 18-19.

¹⁷² Melissa Crouch, *Law and Religion in Indonesia, Conflict and the Court in West Java*, Routledge, 2014, p. 146.

¹⁷³ Nurkholis Hidayat, Muhammad Isnur and Febi Yonesta, *Peradilan Kasus-Kasus Kebebasan Beragama dan Berkeyakinan, Rangkuman 8 Studi Kasus: Dampak, Pencapaian, Hambatan dan Strategi*, LBH Jakarta, 2011, p. 8.

¹⁷⁴ Interview with Asfinawati, 17 November 2017.

¹⁷⁵ Setara Institute, *op.cit.*, p. 2.

¹⁷⁶ *Ibid.*, p. 4.

conflict with the legitimate exercise of freedom of expression and freedom of belief and conscience, as guaranteed by the Constitution and Law 39/1999.

The analysis of blasphemy cases reveals that the police and prosecutors often face difficulties in interpreting blasphemy law because of the vague formulation of Article 156a of the Criminal Code.¹⁷⁷ This situation is worsened by the law enforcement's poor understanding of the link between blasphemy and the right to freedom of religion or belief, freedom of speech and expression, and the scope of protection for these rights.¹⁷⁸ As a result, Article 156a of the Criminal Code is applied arbitrarily and broadly to acts that are not prescribed under the article.¹⁷⁹ It is also in some cases applied in a manner that violates the fundamental rights of Indonesian citizens under the Constitution and the law.¹⁸⁰

The arbitrary and inconsistent application of Article 156a of the Criminal Code represents a violation of the foundational principle of legality. This article, part of Law 1/PNPS/1965, is often applied inaccurately, without differentiating between blasphemy and a deviation from core religious tenets. This misapplication is exemplified in the case against Tajul Muluk; instead of being taken to court and charged with blasphemy under Article 156a, the case should not have gone to court and should have been handled administratively using Article 1 of the PNPS Law.¹⁸¹

5.2.2. Judicial Independence: Stigma, Impartiality and Massive Pressure

Based on universally recognized international standards, the court should be independent and impartial. This principle is enshrined in unequivocal language in the International Covenant on Civil and Political Rights (ICCPR) Article 14.1: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..." This guarantee is also included in the Indonesian Law, namely Article 24 paragraph (2) the 1945 Constitution, which states: "the judicial authority is an independent (one) in exercising the judiciary to enforce law and justice." This fundamental guarantee is also incorporated into Indonesian Law 39 Year 1999. Article 17 of Law 39/1999 also states that international human rights norms in international instruments ratified by Indonesia are recognized as binding under Law 39 Year 1999. The independence of the judiciary

¹⁷⁷ Sihombing, *loc.cit.*

¹⁷⁸ Interview with Febi Yonesta, 19 October 2017.

¹⁷⁹ Sihombing, *loc.cit.* See also Crouch, *Law...*, *op.cit.*, p. 164.

¹⁸⁰ See Article 1 paragraph 6 Law No. 39 Year 1999 which states "Human rights violation is an act of a person or group of persons including state apparatus, intentionally or unintentionally or (due to) negligence, limits and/or deprives the human right of a person or group of persons (as) guaranteed by this law, and does not attain or potentially will not attain just and correct legal resolution based on the applicable legal mechanism."

¹⁸¹ Interview with Papang Hidayat, 10 November 2018. See also Sumardin case and whistling shallat case, in Hidayat, Isnur and Yonesta, *op.cit.*, p. 81.

is also regulated in Article 3 paragraph 1 and 2 of Law No. 48 Year 2009 on the Judicial Authority, which states that judges, in exercising their duties and functions, are obliged to maintain the independence of the judiciary; all interference from outside of the judiciary is prohibited; and the judiciary is prohibited from exercising discrimination.¹⁸²

One aspect of judicial independence is the independence of the law enforcement and of judges. Judicial independence creates an absolute obligation for judges not to be influenced by external demands, pressure, or incentives, and to solely base all judicial decisions and final judgments on the evidence presented to them in court. The independence and impartiality of judges also requires the absence of any bias, hostility, or sympathy for any issue or party in the proceedings before them.¹⁸³ These upholders of the law have the obligation to remove themselves from a case examination if there is sufficient reason to question their independence or impartiality.¹⁸⁴ Additionally, judicial independence encompasses the independence of trial proceedings from other influences, including threats, political pressure, or the pressure exerted by mass demonstrations.¹⁸⁵ Impartiality is violated when a judge allows his or her personal feelings, opinions, sentiments, beliefs, or religious convictions to, in any way, influence their factual and legal findings on the evidence or arguments made by the parties.

The report from the Setara Institute noted that the high level of subjectivity and elasticity of the blasphemy articles have made the enforcement of the blasphemy law difficult for an impartial and independent court to achieve.¹⁸⁶ Statistically, the conviction rate for blasphemy is high.¹⁸⁷ In the period of 1965-2017, there were 76 cases that went to court, but only five acquittals.¹⁸⁸

The problem of judicial independence and impartiality in blasphemy cases has become apparent for a few reasons. First, many reports, studies, and testimonies have shown that law enforcement is biased: their objectivity and impartiality are often compromised, particularly because of their own religious beliefs and sentiments.¹⁸⁹ The law upholders face a psychological problem of religious bias, where they, as religious followers, are unable to distance themselves from the cases they handle, despite their legal obligation to be neutral, as the principle of impartiality requires.¹⁹⁰ Additionally, there is the suspicion that the upholders of the law have “radicalized” elements.¹⁹¹ Some judges are

¹⁸² Indonesia, *Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman*, Article 3 (1) dan (2) and Article 4 (1).

¹⁸³ UN Human Rights Committee, *Arvo. O Karttunen v. Finland*, Communication 387/198, 23 October 1992, CCPR/C/46/D/387/1989, para. 7.2. See also the *Bangalore Principles of Judicial Conduct*, Principle 2.5.

¹⁸⁴ International Commission of Jurist, *op.cit.*, p. 34.

¹⁸⁵ Indonesia, *Undang-Undang Dasar 1945*, Article 24 (1) and *Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman*, Article 1 paragraf 1 and 3 (2).

¹⁸⁶ Setara Institute, *op.cit.*, p. 4.

¹⁸⁷ Hidayat, *loc.cit.*

¹⁸⁸ Setara Institute, *op.cit.*, p. 2.

¹⁸⁹ Sihombing, *loc.cit.* Lihat juga Hidayat, Isnur and Yonesta, *op.cit.*, p. 76.

¹⁹⁰ Yonesta, *loc.cit.*

¹⁹¹ Hidayat, *loc.cit.*

considered to be notorious for not maintaining impartiality, and their subjectivity being more prominent than the evidentiary process, which translates into poor judgments.¹⁹² In the case of Al-Qiyadah, for example, the police, prosecutors and judges had stigmatized the defendants as guilty, which ultimately affected the outcome of the court decision and violated the principle of impartiality and the presumption of innocence.¹⁹³

Second, in many cases, the prosecutors have come under massive pressure. The objectivity of the upholders of law can be affected by many sources of external pressure, including from their families, their immediate environment, the media, and the public at large. The pressure came in two forms: the desire to maintain a personal image free from the label of heretic and a concern for security. Some judges have admitted that, in some cases, crowds of people were mobilized to the court without any response from the police or security forces to guarantee safety.¹⁹⁴ Amnesty International mentioned that in various cases, religious groups regularly fill the courtroom, creating an intimidating atmosphere for the defendant, their legal counsel, and the judges.¹⁹⁵ The lack of adequate courtroom security is a well-known problem that affects many cases brought before Indonesian courts, particularly at the trial level. Additionally, intolerant groups have threatened and intimidated the defense attorneys, accusing them of the heresy that the groups declared war against.¹⁹⁶ Under the Indonesian human rights law Art. 1.3, any actions that limit, degrade or detract from recognition or implementation of the rights guaranteed by Law 39/1999, specifically including limitations on those rights because of “grounds of religious difference,” constitute discrimination. In other words, when outside pressure or the personal feelings of judges or other legal officers influence a decision based on “differences in religion,” this is a discriminatory action and a violation of fundamental rights.

The trial of Basuki Tjahaya Purnama is the most current example of massive pressure. People were mobilized in enormous numbers and throughout all of the proceedings. This action was of a scale that represents a peak in applying massive pressure to affect judicial processes in blasphemy cases. Another case is the massive pressure during the trial of Tajul Muluk, a victim of an ambush of the Shia community in Sampang by intolerant groups.¹⁹⁷

The masses mobilized because of their subjective feeling of offense and their expectation for a conviction for every blasphemy case. As noted above, however, that subjective feeling of offense or insult is irrelevant to the elements of the blasphemy law. Yet, to seek

¹⁹² Hidayat, Isnur and Yonesta, *op.cit.*, p. 8.

¹⁹³ *Ibid.*, p. 69.

¹⁹⁴ Yonesta, *loc.cit.*

¹⁹⁵ Amnesty International, *op.cit.*, p. 27.

¹⁹⁶ Hidayat, Isnur dan Yonesta, *op.cit.*, p. 11.

¹⁹⁷ Setara Institute, *op.cit.*, p. 5.

conviction, prosecutors would employ multiple charges, expecting something to stick, and placating the masses if the blasphemy charge would not. Some judges would find the defendants not guilty of blasphemy but of other crimes. Rahman Eden, who was initially sentenced for 0 years, was finally sentenced for more after cassation.¹⁹⁸ Muhammad Abdurrahman, a follower of Lia Eden, escaped conviction in the first instance but not the next. Yusman Roi managed to avoid a blasphemy conviction but not the accusation of hatred against the MUI (Indonesia Ulama Council). Meanwhile, Alexander An escaped the allegation of atheism, but not of spreading materials containing defamation against/insulting Islam.¹⁹⁹

A different situation is found in low-profile blasphemy cases or in those that do not involve a major religion. Mosses, the minister who translated a book on Hinduism and who subsequently became the object of protest by Hindu groups, was sentenced for one year at the District Court. The decision was upheld at the appellate level but overturned by the Supreme Court, where he was acquitted. The Supreme Court reasoned rationally that translating had nothing to do with religious activity, so it was not blasphemy. Some assumed that Mosses was acquitted because the case involved a minority faith, allowing the Supreme Court to decide objectively because there was no massive pressure.²⁰⁰

Third, the application of Article 156a of the Criminal Code is also accompanied by rampant politicization. A blasphemy charge is often not about blasphemy itself, but the political motive behind it.²⁰¹ In the case that involved the incumbent Jakarta governor Basuki Tjahaja Purnama,²⁰² his blasphemy report mainly referred to the views of those filing the complaint. Yet, the use of blasphemy as a political tool was palpable during the Jakarta local election when different interests were at stake, including economic interests.²⁰³ This is not new. In the past, Permadi, a politician who went against the New Order, was penalized for blasphemy. This was seen as a way to silence criticism against the government. Any political dimension that influences the legal process or ultimate decision manifestly violates the principles of judicial independence and impartiality.

Fourth, blasphemy cases target minority or politically disadvantaged groups. According to Freedom House, blasphemy is often used to justify discrimination against religious minorities, which generates tension and religious-based hostility in society.²⁰⁴ Crouch concluded that there is a trend with blasphemy cases where the individuals or groups targeted for insult/defamation of Islam are small, local, and without an international

¹⁹⁸ Asfinawati, *loc.cit.*

¹⁹⁹ Yonesta, *loc.cit.*

²⁰⁰ Sihombing, *loc.cit.*

²⁰¹ Luthan, *loc.cit.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Freedom House, *op.cit.*, p. 56.

network,²⁰⁵ such as Lia Eden and her followers, the Gafatar group, the Cahaya Alam (YNKCA) group. Blasphemy cases involving suspects from strong political positions or the majority do not usually go on to trial.²⁰⁶ The situation is made worse by the Government's tendency to place the majority's sentiments as the priority over others, causing followers of minority religions to face discriminatory treatment in the exercise of their religious rights.²⁰⁷ As noted above, the plain language of Law 39/1999 classifies such limitations or infringements on the rights of religion and expression as discriminatory.

Fifth, the application of the blasphemy article is often influenced by the views and the fatwas of religious organizations, such as the Majelis Ulama Indonesia (MUI), in judicial proceedings.²⁰⁸ MUI fatwas have encouraged investigations of people for blasphemy, such as Al-Qiyadah,²⁰⁹ YNKCA in West Java, and Basuki Tjahaja Purnama in Jakarta. The fatwas of these religious organizations played a key role in the accusation of blasphemy, which affects judicial independence and impartiality, and also constitutes discrimination on the basis of religious differences under the human rights law. Yet it would also appear that such fatwas should be regarded as legally irrelevant to the required elements of the blasphemy law.

5.2.3. A Violation of *Presumption of Innocence Principle*

The principle of presumption of innocence is one of the basic and universal fair trial rights, as reflected in the ICCPR Article 14, Law 39 Year 1999 Article 18.1 and Law No. 8 Year 1981 on Criminal Procedural Law Article 66. This principle means that in the case that a person is indicted with a crime, they must be considered innocent until found guilty by the court. This principle is in line with the provision that every prosecution places the burden on the prosecution of proving every criminal element, including the substantiation of *mens rea*, to justify a finding of guilt, as reflected in a well-reasoned judgment.²¹⁰ If any single element is not proven, then the charges necessarily fail.

There is, however, a tendency for blasphemy suspects to be labeled guilty from the beginning.²¹¹ From the start, they are presumed guilty, due largely to the religious sentiments that led to the initiation of investigation and prosecution. This situation is made more challenging because of the negative public campaign against the accused

²⁰⁵ Crouch, *Law and Religion in Indonesia, Conflict ...*, *op.cit.*, p. 144.

²⁰⁶ Asfinawati, *loc.cit.*

²⁰⁷ Namira Puspandari, "The Increasing Tolerance Toward Religious Minorities in Indonesia: Have the Existing Law Been Protecting or Marginalizing Them, Master's Thesis, Tilburg Law School, p 52. .

²⁰⁸ Freedom House, *op.cit.*, p. 54.

²⁰⁹ West Sumatra MUI issued a fatwa that Al-Qiyadah Al Islamiyah is deviant and misleading. See Nurkholis Hidayat, Isnur and Yonesta, *op.cit.*, p. 53.

²¹⁰ Accessed from: <http://www.franswinarta.com/news/biarkan-hukum-berbicara-dalam-kasus-penodaan-agama/>, accessed 7 November 2018.

²¹¹ Yonesta, *loc.cit.*

that takes advantage of the psychology of the majority of religious Indonesians, making them biased in their opinion of blasphemy cases.²¹²

The police, prosecutors, and judges in blasphemy cases have the tendency to not be able to maintain impartiality because they have subjective feelings against the accused from the beginning.²¹³ As mentioned in a previous section, in the Al-Qiyadah case, the police, prosecutors, and judges attached a stigma that the defendants were guilty or heretical, which influenced the outcome of trial.²¹⁴ In the Lia Eden case, the defense attorneys walked out because they saw that the court was no longer impartial because they had a presumption of guilt that put the defendant at a disadvantage and violated his right to a fair trial under the law.²¹⁵

5.2.4. *Due Process of Law and Equality of Arms*

National and international laws have corresponding regulations that, in the judicial process, everyone should be treated the same before the law and guaranteed due process of law. These principles of individual recognition and equality before the law are enshrined in unequivocal terms in Articles 3, 4, and 5 of Law 39 Year 1999. The suspects or defendants have the right to cross examine the prosecution's witnesses as well as the right to present favorable witnesses for the defense who receive equal treatment by the court. The right to equal treatment, especially in equal presentation of witnesses or evidence, affirms the significance of the application of the equality of arms principle in criminal justice.²¹⁶

The evidentiary/trial process in blasphemy cases has often been criticized as inadequate and weak. This deficient process of the production of inculpatory evidence is a problem in upholding the rule of law in Indonesia, because a person's guilt should be proven by a valid process whereby all findings and decisions are based solely upon evidence before the court and objectively, fairly, and impartially weighed by the judges according to the required burden of proof upon the prosecution.²¹⁷ Human Rights Watch suggested that a trial can be considered unfair if the defendant faces hostility, there is more support shown towards one of the parties in the courtroom, or if violations of defendant's rights are unaddressed by the court. Law 39 Year 1999 makes clear, in the articles cited above, that the failure by judges and prosecutors to respect these fair trial rights constitutes a

²¹² Asfinawati, *loc.cit.*

²¹³ Hidayat, Isnur and Yonesta, *op.cit.*, p. 8.

²¹⁴ *Ibid.*, p. 69.

²¹⁵ *Ibid.*, p. 87, 89.

²¹⁶ This "Equality of Arms" concept is, for example, as can be found in the European COurt of Human Rights, namely a concept that requires all parties in a court proceeding has the same opportunity; for example each party can summon witnesses and examine as well as cross examine them. This concept also includes support for the party with limited resources to secure legal counsel to represent him or her. See Case of *Airey v Ireland*, App no 6289/73, 1981.

²¹⁷ Yonesta, *loc.cit.*

human rights violation under Indonesian law. Yet, the principles of basing legal findings on all available evidence, affording the defense a full opportunity to present all relevant evidence, and impartially weighing the evidence by the judges are at times not adhered to in the practice of blasphemy cases. There is at least one case where the judges did not accept a witness' testimony because of the witness' faith.²¹⁸ The case of Abraham Bentar Rosadi lasted for only two expedited hearings. He was ultimately sentenced to 4,5 years in prison, which was reduced to 3 years and 6 months(?) by the Bandung Appellate Court, while his request for cassation was refused.²¹⁹

Lack of an equal and adequate opportunity to present witnesses or other evidence for the defence violates basic fair trial rights.²²⁰ The police, prosecutors, and judges are often seen as acting unfairly in determining witnesses or experts. This is an indication that from the beginning the trials were only meant to punish without much consideration of possible alternative facts presented by the suspects or defendants, let alone real respect for the presumption of innocence and burden of proof on the prosecution. This is particularly the case where witnesses favorable for the accused are not called to testify. It is especially problematic in the case when so called "experts" testify in a manner biased against the accused. In fact, in numerous cases, the experts were frequently those who had doctrinally opposing religious views as the Defendant's.²²¹ In such cases it is also not clear, as discussed above, what objective scientific qualifications justified their status as an expert or whether they demonstrated to the court their ability to testify objectively on the basis of scientific expertise. Testimony based upon one's own religious beliefs, convictions, or sentiments, or reflecting one's personal opinions about religious doctrine as dogma, do not in any justifiable manner qualify as "expert testimony." Too frequently judges have admitted "expert" testimony which is little more than the personal opinions, biases and prejudices of the witness based upon their own religious experience rather than scientific, evidence based opinions.

Therefore, from the time blasphemy cases became more frequent, the experts who were ultimately referred to were those who supported the blasphemy accusation, even if they had inadequate expert qualifications. The witnesses and experts for the defense were often neglected.²²² In a case exposé, the suspect is given the authority to present experts and compare the expert views objectively. In addition, as mentioned previously, there is often already a presumption that the accused is heretical. There are also instances where the police did not fully understand the case, so they deferred to the majority opinion and considered it as truth.²²³ Yet, under the law, the majority opinion is not an expert opinion and is legally irrelevant.

²¹⁸ Amnesty International, *op.cit.*, p. 27.

²¹⁹ Crouch, *Law and Religion in Indonesia, Conflict...*, *op.cit.*, p. 140.

²²⁰ Sihombing, *loc.cit.* See also Law No. 39 Year 1999, Article 17 and 18.

²²¹ Yonesta, *loc.cit.*

²²² Asfinawati, *loc.cit.*

²²³ *Ibid.*

In such cases prosecutors merely followed up on the police investigation without much concern.²²⁴ Often, the prosecutors did not study the cases in detail and were unprepared, as in the cases reported by LBH. As an exception, the prosecutor in the case against Tjahaja Basuki Purnama was bold enough to recommend a reduced sentence. But other factors might have influenced this decision, such as the defendant being a public figure and the prosecutor's own political leaning.²²⁵

The judges in blasphemy cases have said that they found evidence of blasphemy in the testimonies of the witnesses or the opinion of experts. The experts were mostly allegedly so-called experts on religion and not criminal law. It is far from clear, however, what qualifications are necessary for scientific expertise on religion that are relevant to a blasphemy prosecution as opposed to some general expertise about a particular religion because the witness has a position of knowledge or authority about that religion. In other words, the expertise required must be scientifically based and, above all, be **specifically relevant to elements of the offense** and to interpretation of evidence that bears directly upon those elements. LBH's experience, in fact, demonstrates that the opinions and qualifications of these religious experts were highly dubious. The defense attorneys have also tried to counter the opinion of the experts by presenting evidence, but these were often disregarded by the judge.²²⁶ In the case of Tajul Muluk, the court concluded that the witnesses presented by the defendants were their siblings, students, and followers who could be practicing *taqiyya* (precautionary denial in the face of persecution). The judges ruled them not persuasive because they deemed that this affected the credibility of their testimonies.²²⁷ The judges could have carefully selected the cases to examine based on the indictments, whether they showed any bias in the selection of experts, whether the facts were well-examined, and how the crime was to be proven.²²⁸ What is notably missing in these cases is thus a specific and justifiable basis for what qualifications are necessary for someone to be an expert on blasphemy, as opposed to someone who has knowledge about a religion in general and how that knowledge is scientifically based and relevant to the elements of the crime charged.

The courts frequently refer to MUI fatwa to justify their judgments.²²⁹ But the MUI have been known to issue fatwas/opinions without hearing from the accused and without considering other factors adequately. Moreover, any fatwa should be considered legally irrelevant to a judicial proceeding firstly on the basis of manifest self-interest, bias, and partiality, and secondly for the lack of scientific rigor. To again cite Law No. 39 Year 1999, the use of differences of religious belief that in any way limit the rights of others is

²²⁴ See Sumardin case and whistling shallat case, in Hidayat, Isnur and Yonesta, *op.cit.*, p. 74.

²²⁵ Asfinawati, *loc.cit.*

²²⁶ *Ibid.*

²²⁷ Court Decision No. 69/Pid.B/2012/PN.Spg, p. 92.

²²⁸ Asfinawati, *loc.cit.*

²²⁹ Crouch, *Law and Religion in Indonesia, Conflict ...*, *op.cit.*, p. 146. See also Hidayat, Isnur and Yonesta, *op.cit.*, p. 74.

inherently discriminatory. Clearly, fatwas are the product of a religious organization that are motivated to advance its own beliefs and interests against those of others. It is far from clear whether such fatwas are relevant, or should be received into evidence at all, let alone that they should be relied upon in decisions or influence the outcome of cases.

In fact, however, religious institutions like the MUI really affect blasphemy cases because law enforcement officials typically treat MUI fatwas as law and prosecutors consider MUI's opinion as dispositive evidence. The legal basis for doing so is far from clear. The MUI does have a right to their opinion, but it is only their opinion, nothing more. For that opinion to be introduced into court requires that it be relevant and qualify as evidence under applicable procedural rules. Police, prosecutors, and judges must be more selective in making references to the fatwas because they are not sources of law and only opinions or organizations with vested interests. Mistaking these opinions as law is a violation of human rights norms guaranteed by the law and Constitution. In addition, they unequally favor the views of the accusing party and majority/mainstream groups. The MUI opinion must, like any other, be presented and contested in court, be impartially weighed by the judges as to its relevance and credibility, and not automatically be treated as authoritative or given more weight than any other evidence.²³⁰

In addition to law enforcement, as indicated above, the witnesses and experts are also not free from religious bias.²³¹ There have been a number of inappropriate witness testimonies and expert opinions. In the case against Abraham Sujoko, there was an IT expert who presented his opinion not on information technology, but on the defendant's statements that he argued were socially divisive.²³²

This problem of the violation of the principle of "equality of arms" is exacerbated by the fact that experts and witnesses that are favorable to the defendants are difficult to find.²³³ Available and knowledgeable experts in criminal law are rare. Many experts doubt their own arguments even if they are supportive of the defense. Other experts are against defending blasphemy cases.²³⁴ Many experts do not understand blasphemy and make false statements such as equating blasphemy with heresy, two separate offenses addressed by different provisions in the blasphemy law.²³⁵ There should be clear guidelines on what scientific expertise and experience is required to qualify an expert in blasphemy cases.

²³⁰ Sihombing, *loc.cit.*

²³¹ Yonesta, *loc.cit.*

²³² Dompu District Court, Decision No. 33/Pid.B/2014/PN.DPU, p. 11

²³³ Sihombing, *loc.cit.*

²³⁴ Yonesta, *loc.cit.*

²³⁵ *Ibid.*

Another related aspect to “equality of arms” is effective defence and legal representation by a competent attorney. This is important to guarantee the rights of the suspects and defendants in blasphemy cases. The task of advocates is to conduct themselves independently and competently, in accordance with the law and recognized standards, to protect their clients’ interests, and to promote human rights and the rule of law. However, in a number of blasphemy cases, the lawyers have not sufficiently demonstrated their competence, their understanding of Article 156a of the Criminal Code, and their ability to protect their clients’ interests. Some lawyers have an incorrect understanding of the Law No. 1/PNPS/1965, inadequate knowledge of religious freedom, and have instead recommended punishment for the defendant.²³⁶

5.2.5. The violation of other rights

There is a long list of fair trial violations in Indonesian blasphemy cases. In addition to the violation of the aforementioned rights, violations also occur when the suspects were not informed of their rights and were not provided with an interpreter,²³⁷ which is a violation of Article 53 Law No. 8 year 1981 of the Criminal Procedural Code.²³⁸ Aside from that, in the case of Khaerudin, at the stage of inquiry, prosecution, and trial the accused did not receive legal representation and could only secure it at the expense of the State at the Supreme Court appeal. This is a violation of Article 54 and 55 of the Criminal Procedural Code, namely that the suspect or the defendant is entitled to legal aid.²³⁹ Whereas, in the case against Abdul Rahman, there was an acquittal at the cassation level before there was the Constitutional Court decision allowing for it; the defendant was sentenced higher than the main defendant; and the judgment was executed before the defense counsel received a copy of the judgment.²⁴⁰

²³⁶ Sihombing, *loc.cit.*

²³⁷ Amnesty International, *op.cit.*, p. 27.

²³⁸ Amnesty International, *op.cit.*, p. 27.

²³⁹ Supreme Court, Decision No. 639 K/PID/2014, Medan High Court, Decision No. 620/PID/2013/PT MDN, and Lubuk Pakam District Court, Decision No. 1192/PID.B/2013. See also Uli Parulian Sihombing, *Peradilan yang Adil (Fair Trial) di Dalam Kasus-Kasus Penodaan Agama*, Paper, July 2018, 2.

²⁴⁰ Hidayat, Isnur dan Yonesta, *op.cit.*, p. 91.

CHAPTER V

AN ATTEMPT TO LIMIT THE SCOPE OF BLASPHEMY: REINTERPRETA- TION OF THE ELEMENTS AND REFORMULATION OF ARTICLE 156a OF THE CRIMINAL CODE

6.1. An Attempt to Limit the Blasphemy Article

The controversy surrounding Article 156a persists.²⁴¹ There are those who support its use and there are others who are suggesting that the blasphemy article be amended or even repealed. Meanwhile, similar provisions have been introduced in new bills and laws.²⁴²

Article 156a of the Criminal Code found additional legitimacy when the Constitutional Court declared it constitutional.²⁴³ The majority of the judges considered the law No. 1/PNPS/1965, including 156a KUHP, still necessary to maintain public order among religious groups.²⁴⁴ The provision is considered sociologically crucial for the regulation of religious life between citizens in Indonesia's multicultural society. In a diverse religious setting, friction between denominations and offense between followers are inevitable.²⁴⁵

²⁴¹ Crouch, *Law and Religion in Indonesia, Conflict...*, *op.cit.*, p. 162.

²⁴² As a note, through the Emergency Government Law No. 2 Year 2017 on the Amendment of the Law No. 17 Year 2014 on Mass Organization, there is also a regulation against Mass Organizations conducting misuse, besmirching, or defamation against a religion adhered to in Indonesia. This crime is punishable by life imprisonment or at the least 5 year or at most 20 year imprisonment. See Law No. 2 Year 2017 on Mass Organization, Article 59 and 82A.

²⁴³ Constitutional Court, Decision No. 140/PUU-VII/2009 and Decision No. 84/PUU-X/2012.

²⁴⁴ *Ibid.*

²⁴⁵ Syahril Shiddik, *The Origin of Indonesian Blasphemy Law and Its Implication Towards Religious Freedom in Indonesia*, Working Paper, October 2016, p. 15.

Some circles continue to advocate for the retention of blasphemy law, including in its introduction in the draft bill of the new Criminal Code (Rancangan Hukum Pidana/RKUHP). They believe that a blasphemy law is still necessary to deal with problems and tensions arising in religious life.²⁴⁶ Repealing the blasphemy offense is politically very challenging. There needs to be a new approach to protecting citizens from the excessive reach of the blasphemy law.

Even if the blasphemy law is considered useful in preventing social conflict and violence, its application must adhere to clear criteria that prevents the state from taking the role of arbiter of religious interpretations and must prevent negative impact on the human rights of minorities.²⁴⁷

The blasphemy article is a product of the past; lacks clear conceptual basis;²⁴⁸ is overly broad and ambiguous; and has been applied arbitrarily, discriminatorily,²⁴⁹ and incorrectly against minorities.²⁵⁰ It often protects the “official” religions, placing the state in support of particular doctrines at the bidding of the majority.²⁵¹ Lastly, blasphemy has often been used as a political tool.²⁵² These statements are in line with the opinion of the Constitutional Court. While claiming it essential to maintain social order, the Court also stated that the blasphemy law should be revised to prevent it from going against Indonesia’s pluralism and becoming a discriminatory regulation.²⁵³ But far before this, Law No. 5 of 1969, which adopted this and other Presidential Stipulations into law, already stated that the stipulations ratified only provided that their contents are used to formulate new laws.

Article 2 of Law No. 5 of 1969 states:

“From the point of the adoption of the Law, declaring the presidential decrees and the presidential regulations included in Attachment IIA and II B of this Law as Law with the requirement that the materials in the presidential decrees and presidential regulations are accommodated in or utilized as material for the formulation of new Laws”.

²⁴⁶ Luthan, *loc.cit.*

²⁴⁷ Victor Immanuel W. Nelle, “Blasphemy Law and Public Neutrality in Indonesia”, *Mediterranean Journal of Social Science*, 8 (2), March 2017, p. 61.

²⁴⁸ Asfinawati, *loc.cit.*

²⁴⁹ Freedom House, *op.cit.*, p. 45-50.

²⁵⁰ See statement of Justice Maria Farida, Constitutional Court Decision No. 140/PUU-VII/2009.

²⁵¹ Al Khanif, “Indonesia doesn’t need to further blasphemy law”, the Jakarta Post, 16 January 2015, <http://www.thejakartapost.com/news/2015/01/16/indonesia-doesn-t-need-further-blasphemy-law.html>, accessed 7 November 2017.

²⁵² Setara Institute, *op.cit.*, p. 6.

²⁵³ Constitutional Court, Decision No. 140/PUU-VII/2009.

In the meantime, the police, prosecutors, and judges, as well as other legal practitioners, need clarity and guidance on Article 156a of the Criminal Code. CRCS, in their study, recommends that, if the blasphemy law is used, there needs to be a higher standard and a stricter definition of “blasphemy” that is applied more faithfully.²⁵⁴ Selain itu, there needs to be strict requirements for eligibility to file a blasphemy complaint to the authorities, and the processing of the application must pay close attention to fair trial rights.²⁵⁵

To bring its application closer to human rights norms, the blasphemy article must be reinterpreted in a manner that does not infringe upon citizen’s freedom of religion, belief, or thought, as well as of speech and expression. This entails strictly applying the elements of the statute to achieve a consistent narrowing down of the scope of acts that could legitimately be considered defamation of or an insult against religion. This will help the police filter out complaints of “blasphemous acts” as arbitrarily defined.²⁵⁶

The Supreme Court could, for instance, take this upon itself and publish an official guideline or policy on the correct interpretation of Article 156a of the Criminal Code.²⁵⁷ The next step would be for that guideline to be disseminated publicly and taught to law enforcement.²⁵⁸ At the same time, a statutory reworking -- a formal amendment -- of Article 156a of the Criminal Code can be carried out.²⁵⁹

6.2. Reinterpreting Article 156a letter a of the Criminal Code

This study recommends a reinterpretation of Article 156a letter a of the Criminal Code below that takes into account the official Elucidation of PNPS No. 1 of 1965, how the article has been parsed in court judgments, the permissible restrictions of human rights, and lessons drawn from blasphemy laws in other countries.

The suggested element-by-element reinterpretations are as follows:

1. **“Intentionally”**

The Elucidation is already quite clear on this part, particularly on the elements of “intentionally” to “insult” or “be hostile to” religion. The required type of intent to be proven is “intention as purpose” (*opzet als oogmerk*). This means that the defendant cannot be proven to have intentionally committed this act unless he had the sole

²⁵⁴ Bagir, *Kerukunan dan Penodaan...*, *op.cit.*, p. 15.

²⁵⁵ Sihombing, *loc.cit.*

²⁵⁶ Sihombing, *loc.cit.*

²⁵⁷ Yonesta., *loc.cit.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.* See also statement of Siti Zuhro, Decision of Constitutional Court No. 84/PUU-X/2011, p. 263.

purpose of insulting or expressing hostility to religion. Judges should objectively determine whether or not the accused's acts or utterances manifest the required purpose of insult or defame by inference of, among others, the suspect's actions and the surrounding context. Mere public suspicion or claim of the suspect's intent would be insufficient evidence.²⁶⁰ Moreover, the fact that someone felt insulted or offended by acts or utterances is only their subjective reaction and irrelevant to a finding of the purpose at which the acts were directed.

2. **"In Public"**

The explanation on this is not found in the Elucidation for Article 4 of PNPS No. 1 of 1965 (inserted as Article 156a into the Criminal Code) but for Article 1, which says:

The words "In Public" refers to the definition of the phrase in the Criminal Code.

In the Criminal Code, there are 3 (three) phrases containing the meaning "public," which are:

1. "In public" (*in het openbaar*) as found in, among others, Articles 136bis, 154, 156, 160, 162, 183, 207, 217, 219, 315, 492, 504 508bis, etc.;
2. "To make public/to publicize" (*ruchtbaarheid te geven*) as found in articles 137, 138 (1), 144 (1), 155 (1), 157 (1), 310 (1), and 321 (1).

In the Criminal Code, the phrase "in public" refers to a location -- a place accessible by the public -- while "to publicize" refers to the purpose of the act. Moreover, "in public" is typically found in articles involving physical or spoken acts, and "to publicize" is usually related to the act of writing. With this, we have a narrowed scope of acts covered by Article 156A: the spoken expressions of sentiments and the physical performance of acts.

Does this mean that the act of expressing the same sentiment but in written form is not criminalized? Not at all. The Presidential Stipulation inserted this Article 4 into the Criminal Code as Article 156a is placed between Articles 156 and 157. It could be because Article 157 addresses written publications. So, it can be interpreted that the written publications of the same sentiment will be charged with Article 157 instead.

3. **"Be hostile to"**

The words or acts of the suspect can only be found to meet this element if they are words or acts that demonstrate profound aversion, and which express not a difference of opinion or belief, but rather hatred and disparagement of the targeted religion.

²⁶⁰ Luthan, *loc.cit.*

4. “Defamation of religion”

Whereas with relation to the element to “defame,” “defamation of religion” should be understood as an act, remark, or writing that in nature is different from the mainstream teaching of a religion that explicitly contains objectively offensive expressions and that would objectively be considered as such using common sense and standard methods of textual interpretation, as well as words aimed at offending a religion’s adherents or congregation. In order to substantiate whether the act or remark committed by the perpetrator is defamatory, the standard should not be experts, but rather laypeople and their common sense. The question should be whether or not a layperson who sees or hears the act, hears the words and the intonation they are uttered in or read the writing alleged to be defaming (insulting) a religion would reasonably interpret them to deliberately offend. If not, then the element cannot be deemed as substantiated.

5. “Abuse of religion”

This element is not explained in the Elucidation. It is also the least used, let alone analyzed, element in blasphemy cases. How then should this element be defined? Since the elucidation of Article 156a letter a states that the article is meant to catch actions that are solely meant to insult or be hostile to religion, then this element should also be interpreted within this framework.

Based on the element-by-element breakdown, Article 156a letter a of the Criminal Code should only be applied to spoken or physical acts whose plain and obvious purpose is to insult or denigrate a religion, or express hostility or hatred against a religion. If the insult, hostility, or hatred is expressed in written form, then the act is not charged with Article 156a, but with Article 157 of the Criminal Code.

6.3. Reformulating Article 156a of the Criminal Code

In addition to the effort to produce a provisional guideline on Article 156a of the Criminal Code, there is also the recommendation, even the need, to rework it. One such reformulation has been included in the Draft Bill of the Interreligious Harmony Law in the section on blasphemy. Civil society groups have put forward an alternative draft which places greater emphasis on the protection of freedom of religion or belief.²⁶¹

The Constitutional Court agrees that there should be a re-legislation of the blasphemy law, with different wording, and based on sound legal principles.²⁶² The Court stresses the need for the amendment to meet formal and substantial legislative requirements. This means that it should incorporate clearer material elements that avoid interpretative mistakes in practice, and that it should be produced by the legislature through the normal legislative process.²⁶³

Any reformulation of the blasphemy article must be oriented in order to protect the human rights of all citizens. Therefore, it must refer to the human rights standards found in the Constitution (Chapter XA on Human Rights, Article 28A to Article 28J)²⁶⁴, as well as the national human rights legislation and international law. The formulation must take into account the scope of rights: mainly, freedom of religion or belief, freedom of thought and conscience, and freedom of opinion and expression, as well as their permissible restrictions.

From a criminal law perspective, the reformulation must first establish what acts are appropriately criminal. The application of Article 156a of the Criminal Code to date has been too broad, criminalizing people for having different thoughts or beliefs. Not only the expression of opinions or beliefs are not necessarily crimes, but also they mostly should instead be protected.

The legality principle is known in Latin as *nullum crimen sine lege*.²⁶⁵ This principle can be broken down into three provisions: first, criminal provisions must be written down and no penalty can be imposed based on any customary provision (*nullum crimen poena sine lege scripta*); second, criminal provisions must be well-defined (*nullum crimen nulla poena sine lege certa*); and third, criminal provisions must be strictly interpreted without any application of analogy (*nullum crimen poena sine lege stricta*). Therefore, the

²⁶¹ Crouch, *Law and Religion in Indonesia, Conflict...*, *op.cit.*, p.163.

²⁶² Constitutional Court, Decision No. 140/PUU-VII/2009, p. 298.

²⁶³ *Ibid.*, p. 304-305.

²⁶⁴ Maria Farida, see Decision of Constitutional Court No. 140/PUU-VII/2009, p. 316.

²⁶⁵ *Nullum crimen sine lege* principle is recognized and adopted in various international human rights legal instruments, which provides implementation standard for each state party. See Bineet Kedia, *Nullum Crimen Sine Lege in International Law: Myth or Fact?*, *International Journal of International Law*, 1(2), Universal Multidisciplinary Institute Pvt Ltd, p. 2395. Accessed from: http://www.ijoil.com/wp-content/uploads/2015/04/nullum-crimen-sine-lege-_1_.pdf, accessed 5 January 2018.

reformulation of the blasphemy article must also provide clear scope, elements, and intent, limitatively and unambiguously.²⁶⁶

In particular, the problematic elements to be clarified from the current formulation are: (i) intentionally; (ii) hostility; (iii) abuse; and (iv) defamation of religion. The intention must strictly be "intention as purpose" (*opzet als oogmerk*). Other types of intention, including recklessness and negligence, should be inadequate. Also, a clear standard should be defined (perhaps in time or intensity) for which a person's actions can be said to be criminally hostile.²⁶⁷

There several words that are used in relation to the blasphemy offense, both in the law and in the media: "insult," "denigration," "smear," "defamation," etc. It is unclear whether these words apply to religion, God, prophets, holy books, rituals, and so on.²⁶⁸ The targeting of heresy as blasphemy is often a matter of religious politics.²⁶⁹

Also, what does it mean when a person "abuses" religion? Is it the misuse or religion, using it to justify misconduct? If a person commits a crime, such as robbing a bank, in the name of religion, then the charge can just be the crime of robbery and not any religious offense. If "abuse of religion" is to be retained without definition, it can be used as an entry point to claim doctrinal superiority. This is a personal and subjective matter that the court, which is required to be objective, is not meant to deal with.²⁷⁰

Furthermore, as the reformulation is meant to bring greater protection of human rights, permissible limitation to religious freedom can only be imposed on the public manifestation of belief, not on thought or faith itself -- even if it is different from the majority. For freedom of expression, restriction can only be made if the speech assaults the reputation of others, or is used for propaganda to incite conflict or hostility.

More broadly, the regulation (including the restriction) of human rights must:

- (1) Be prescribed by law: the law must be adequately accessible, as well as precisely and specifically formulated as to be clear to the citizens what the prohibited acts are.
- (2) To achieve a particular objective: the restriction of human rights must be proportionate to, and not unnecessarily exceed, the objective.
- (3) Not violate the rights that have been guaranteed in various legislations, including the principles of equality and non-discrimination.

²⁶⁶ Sihombing, *loc.cit.*

²⁶⁷ Asfinawati, *loc.cit.*

²⁶⁸ Sihombing, *loc.cit.*

²⁶⁹ Luthan, *loc.cit.*

²⁷⁰ Asfinawati, *loc.cit.*

CHAPTER VII

CONCLUSION AND RECOMMENDATIONS

The study has yielded the following findings:

1. The concept and definition of *blasphemy* continues to evolve, from one that initially refers to acts considered to vilify or blaspheme divine entities, to covering acts deemed to offend religious feelings. Blasphemy statutes in various countries also present a variety of definitional coverage, elements, and penalties. Many countries still retain blasphemy laws. In some, primarily European, countries however, the case has been made for abolition of blasphemy laws, as they are considered inconsistent with the values of democracy and human rights protection.
2. Blasphemy laws and definitions are often at odds with the concepts that underlie international human rights norms and regulations, especially related to the right to freedom of religion or belief, the right to freedom of opinion and expression, and the protection of minority groups. In the human rights discourse, there is a trend to repeal blasphemy laws and to promote the legislation of norms that seek to overcome intolerance,

discrimination, and hate. Ultimately, the judicial process must clarify the balance between protected expression and belief, and the types of conduct that can be justly criminalized in compliance with human rights norms, the constitutional requirements of a secular and democratic society, and basic principles of legality.

3. As is the issue with blasphemy statutes in other countries, the legislation on religious defamation in Indonesia found in Article 4 of the Presidential Enactment are inadequate because they do not explain the meaning of the elements of the crime. The formulation has led to broad interpretation of the law that targets many acts related to religion. This analysis of the text shows that the provisions potentially violate human rights, particularly the right to freedom of religion or belief, as well as the freedom of opinion and expression. It establishes a prohibition and a penalty for a religious beliefs or interpretations that is different from the mainstream, and does not set a clear and sufficient delineation of what constitutes opinions or expressions so offensive or blasphemous to religion that they should be made the subject of criminal sanction.
4. Since the adoption of blasphemy laws in 1965 up until 2017, there have been blasphemy cases in 18 provinces, with 50 percent of them occurring on the island of Java. The province of West Java has highest number of cases at 12, followed by East Java and the Special Capital Region of Jakarta tied at 9 cases each. Tied at third position are the provinces of Central Jakarta and East Nusa Tenggara at 5 cases each.
5. The analysis shows that Article 156a of the Criminal Code has been applied inconsistently and unpredictably. The elements have been interpreted in many different ways and most charges that have made under the blasphemy laws do not meet the requirement of being a blasphemy offense. Referring to various studies of those cases, the provision has been used to target differences in religious understanding, to form and preserve mainstream or recognized beliefs in society.
6. From the 27 cases analyzed, we found several categories of acts considered as blasphemy charged with Article 156a letter a of the Criminal Code, which are: (i) statements made verbally or in writing that are explicitly intended to insult a religion or its sacred symbols; (ii) dissemination of proselytizing content that denigrates another religion; (iii) the dissemination of unorthodox teachings; (iv) incorrectly practiced religious rituals; and (v) other acts charged as blasphemous. The categories demonstrate the court's expansive interpretation as to what acts can be found as blasphemous, some of which (category (ii) - (iv)) are lacking sufficient ground to be classified as blasphemy.

7. There is clear difficulty and error on the part of law enforcement in interpreting the elements of blasphemy. This is apparent, for example, from the broad range of acts encompassed and the unclear distinction between “religious defamation” and “deviant group/teaching”. The court also often makes mistakes in interpreting the elements of “with intent” and “in public”, substantive elements in a blasphemy offense. As a result, various decisions have blatantly violated the right to freedom of religion or belief, as well as the right to freedom of opinion and of expression.
8. In many cases, the charge of blasphemy has been brought about by public pressure and intimidation that has kept judicial institutions from acting in a neutral and objective manner. This is a violation of fair trial principles. The fair trial principles infringed upon are, among others; (i) deficient laws that contravene the Legality Principle; (ii) Presumption of Innocence; (iii) Due Process of Law; (iv) Equality of Arms; (v) the fundamental guarantee of judicial independence and impartiality; (vi) the breach of a number of other rights. There is still minimal protection given by law enforcement more broadly, and it is provided primarily to judges who preside over blasphemy cases.

Aside from the above findings, this study also found that the provisions in Law No. 1/ PNPS/1965, including its criminal stipulation that was inserted in the Criminal Code as Article 156a, was meant to be temporary. In the present time it has become increasingly pertinent to amend it. Law No. 5 Year 1969 elevated the status of Presidential Decree (PNPS) No. 1 year 1965 into Law, but with a caveat that the Law should be revised in order to prevent it from being arbitrarily implemented. This mandate was never implemented by the parliament. Similarly, the Constitutional Court has also deemed that the law needs to be revised in order to ensure that it will not go against the pluralistic nature of Indonesia and become a discriminatory regulation. The Constitutional Court also stated that the Law must be improved in terms of what it regulates, how it is worded, the legal principles involved, how it meets formal legislative requirements, as well as substantive requirements to clarify the material elements to avoid practical misinterpretations.

Based on the above findings, the study recommends a reinterpretation and reformulation of Article 156a of the Criminal Code. The reinterpretation is conducted to provide greater firmness to how to understand the purpose of 156a letter a, as well as to clarify the elements of the article. The reformulation or revision, as well as the subsequent application by the courts, of the blasphemy provision must be based on human rights principles, such as with due consideration of the rights of freedom of religion or belief, the freedom of thought, of opinion, and of expression, as well as principles that govern how a criminal offense is formulated to ensure legality through providing clarity as to what the proscribed acts and its elements really mean. It should be considered as an essential

component of any judgment in a blasphemy case to explain through a reasoned opinion how the proper balancing of human rights principles and legitimate public interests, as defined in the Constitution and human rights law, has been achieved in reaching the decision of guilt or innocence in the particular case at hand.

When the blasphemy article is applied, the principles of fair trial rights must be adhered to. These principles are found in the 1945 Constitution, Law No. 8 of 1981 on Criminal Procedures and are also articulated in Law 39/1999. Witnesses and experts must meet certain qualifications. Judges must strictly adhere to the ethical code of conduct and the principle of independence and impartiality. And they must be given adequate protection while presiding over blasphemy cases.

This study has found a variety of fundamental issues with the judiciary that has contributed to the current level of quality and objectiveness of the handing of blasphemy cases. These issues include consistency of judgment, quality of judges, procedural rules, courtroom safety, and legal aid. In the end, the problem is traceable to judicial independence and impartiality. The attempt to settle differing interpretations will not be enough if not supplemented with a comprehensive effort of judicial reform.

APPENDIX 1: COURT DECISIONS

No.	Court Decision No. /Name of Defendant	Indictment (Article)			Article for Criminal Sentence	Criminal Sentence
		1	2	3		
1.	No. 06/Pid.B/2011/PN.TMG on behalf of Defendant Antonius Richmond Bawengan	156a letter a Criminal Code			156a letter a Criminal Code	5 year imprisonment
2.	No. 197/Pid.B/2011/PN.Bit on behalf of Defendant Miftakhur Rosyidin	156a Criminal Code	335 (1) ke-1 Criminal Code		156a Criminal Code	4 month imprisonment
3.	No. 295/ PID.B/2012/PN.BDG on behalf of Defendant Heidi Eugine	156a Criminal Code			Acquittal	-
4.	No. 03/Pid.B/2012/PN.KLT on behalf of Defendant Andreas Guntur Wisnu Sarsono	156a letter a Criminal Code			156a letter a Criminal Code	4 year imprisonment
5.	No. 45/Pid.B/2012/PN.MR on behalf of Defendant Alexander Aan	Ps 28 (2) jo 45 (2) Electronic Information and Transaction Law	156a letter a Criminal Code	156a letter b Criminal Code	Ps 28 ayat (2) jo 45 (2) Electronic Information and Transaction Law	2 year and 3 month imprisonment
6.	No. 55/Pid.B/2012/PN.END on behalf of Defendant Ronald Tambunan	156a Criminal Code			156a Criminal Code	1 year imprisonment
7.	No. 69/Pid.B/2012/PN.Spg on behalf of Defendant Tajul Muluk	156a Criminal Code	335 (1)-1 Criminal Code		156a Criminal Code	2 year imprisonment

No.	Court Decision No. /Name of Defendant	Indictment (Article)			Article for Criminal Sentence	Criminal Sentence
		1	2	3		
8.	No. 73/Pid.B/2012/PN.DOM on behalf of Defendant Charles Sitorus	156a letter a Criminal Code	157 (1) Criminal Code		156a letter a Criminal Code	1 year 2 month imprisonment
9.	No. 84/Pid.B/2012/PN.END on behalf of Defendant Herison Yohanis Riwu	156a Criminal Code			156a Criminal Code	1 tahun 6 bulan penjara
10.	No. 148/Pid.B/2012/PN.KLB on behalf of Defendant Alfred Waang	156a letter a Criminal Code	335 (1) ke-1 Criminal Code		156a letter a Criminal Code	1 year imprisonment
11.	No. 10/Pid.Sus/2013/PN.Pt on behalf of Defendant Muhamad Rokhisun	Ps. 45 jo Ps 28 ayat (2) UU ITE	Ps. 45 jo Ps 27 (1), (3) Electronic Information and Transaction Law	156a Criminal Code	Ps. 45 jo Ps 28 (2) Electronic Information and Transaction Law	4 year imprisonment
12.	No. 47/Pid.B/2013/PN.SGT on behalf of Defendant Bantil als Muhammad Ganti	156a Criminal Code	378 Criminal Code	372 Criminal Code	156a dan 378 Criminal Code	2 year 6 month imprisonment
13.	No. 155/Pid.B/2013/PN.TL on behalf of Defendant Agus Santoso	156a letter a Criminal Code	335 (1)-1 Criminal Code		335 (1)-1 Criminal Code	4 month imprisonment
14.	No. 1192/Pid.B/2013/PN.LP on behalf of Defendant Khairuddin	156a letter a Criminal Code			156a letter a Criminal Code	4 year imprisonment

No.	Court Decision No. /Name of Defendant	Indictment (Article)			Article for Criminal Sentence	Criminal Sentence
		1	2	3		
15.	No. 33/Pid.B/2014/PN.DPU on behalf of Defendant Abraham Sujoko	156a KUHP	27 (3) jo 45 (1) Electronic Information and Transaction Law		27 (3) jo 45 (1) Electronic Information and Transaction Law	2 year imprisonment
16.	No. 80/Pid.B/2015/PN.Bna on behalf of Defendant T. Abdul Fatah	156a letter a Criminal Code			156a letter a Criminal Code	4 year imprisonment
17.	No. 83/Pid.B/2015/PN.Bna on behalf of Defendant Fuadi Mardhatillah	156a letter a Criminal Code			156a letter a Criminal Code	3 year imprisonment
18.	No. 85/Pid.B/2015/PN.Bna atas nama terdakwa Ridha Hidayat	156a letter a Criminal Code			156a letter a Criminal Code	3 year imprisonment
19.	No. 31/Pid.B/2016/PN.Skg on behalf of Defendant Makmur bin Amir	156a letter a Criminal Code	156a letter b Criminal Code		156a letter a Criminal Code	1 year 6 month imprisonment
20.	No. 391/Pid.Sus/2016/PN.Kla on behalf of Defendant Agung Handoko	Ps 45 (2) UU ITE	156a Criminal Code		Terbukti Ps 45 (2) Electronic Information and Transaction Law and 156a	3 year imprisonment
21.	No. 787 K/Pid/2006 on behalf of Defendant Sayyid Fauzi Alaydrus	156a letter a Criminal Code			156a letter a Criminal Code	3 year imprisonment

No.	Court Decision No. /Name of Defendant	Indictment (Article)			Article for Criminal Sentence	Criminal Sentence
		1	2	3		
22.	No. atas nama 1839 K/Pid/2011 on behalf of Defendant Ondon Juhana	156a letter a Criminal Code	378 Criminal Code		156a letter a and 378 Criminal Code	5 year imprisonment
23.	No. 117/Pid.B/2006/PN.Tsm jo. No. 2529 K/Pid/2006 on behalf of Defendant Abraham Bentar	156a letter a Criminal Code			156a letter a Criminal Code	3 year 6 month imprisonment
24.	No. 744/Pid.B/2009/PN.Mdn Jo. 1334 K/Pid/2010 on behalf of Defendant Pdt. W. Alegan Mosses	156a letter a Criminal Code	156 Criminal Code		Not Proven	Aquittal
25.	No. 1537/Pid.B/2016/PN.Jkt.Utr on behalf of Defendant Basuki Tjahaja Purnama alias Ahok	156a letter a Criminal Code	156 Criminal Code		156a letter a Criminal Code	2 year imprisonment
26.	No. 81/Pid.B/2015/PN Bna on behalf of Defendant M. Althaf Mauliyul Islam	156a letter a Criminal Code			156a letter a Criminal Code	3 year imprisonment
27	No. 677/Pid.B/2006.PN.JKT.PST on behalf of Defendant Lia Eden	156a letter a jo. Article 155 (1) -1 Criminal Code	157 (1) jo. 55 (1)-1 Criminal Code	335 (1) jo. 65 (1) Criminal Code	156a letter a jo. 55 (1)-1 and 335 (1) jo. 65 (1) Criminal Code	2 year imprisonment

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