

# *Human Rights and Constitutionality Issues of Blasphemy Law in Indonesia*

## **Persoalan Hak Asasi Manusia dan Konstitusionalitas Hukum Penodaan Agama di Indonesia**

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### **Abstrak**

Artikel ini menganalisis persoalan HAM dan konstitusionalitas dalam UU Penodaan Agama. Studi ini urgen dalam studi konstitusi sebab konstitusionalisme mempersyaratkan penghormatan terhadap HAM dan demokrasi mengharuskan tegaknya supremasi konstitusi. Artikel ini merupakan hasil penelitian melalui *desk-study* menggunakan pendekatan deskriptif-kualitatif. Pengumpulan data dilakukan dengan studi dokumen dan *Internal Focus Group Discussion*. Analisis data dilakukan dengan teknik analisis data kualitatif, sedangkan pengujian keabsahannya dilakukan dengan teknik *cross-check*. Hukum penodaan agama di Indonesia secara inheren melanggar hak asasi manusia serta rawan politisasi yang meletakkan minoritas agama dalam kerentanan. Namun ketentuan-ketentuan pokok hukum yang memidanakan penodaan agama ini telah diuji dimensi konstitusionalitasnya oleh Mahkamah Konstitusi. MK menolak permohonan para pemohon. Namun demikian, persoalan konstitusionalitas dalam putusan tersebut tetap ada, sebab MK mengafirmasi konstitusi religius padahal Indonesia adalah negara Pancasila. Selain itu, MK mengabaikan HAM, khususnya hak atas Kebebasan Beragama/Berkeyakinan yang dijamin oleh UUD NRI 1945.

**Kata Kunci:** Hukum penodaan agama; Mahkamah Konstitusi; Pengujian Undang-Undang.

### **Abstract**

*This article analyzes human rights and constitutionality issues in the Indonesian Blasphemy Law. It contributes urgently to constitutional studies since constitutionalism requires respect for human rights and democracy obliges to uphold the supremacy of the constitution. This article was written as the results of research through the desk-study using descriptive-qualitative approach. Data were collected through document study and Internal Focus Group Discussion. Indonesia's blasphemy laws inherently violate human rights and are prone to politicization which places religious minorities in vulnerability, while the main legal provisions that criminalize blasphemy have been tested for their constitutionality dimensions by the Constitutional Court. However, the constitutionality issue remains, partly because the Constitutional Court affirmed a religious constitution whereas the Republic of Indonesia is a Pancasila based state. In addition, the Constitutional Court ignores human rights, particularly the right to freedom of religion/belief as guaranteed by the constitution.*

**Keywords:** *Blasphemy Law; Constitutional Court; Judicial Review.*

## **A. INTRODUCTION**

### **1. Background**

Indonesia is a constitutional democratic country with the biggest Muslim population in the world<sup>1</sup> consisting of hundreds of ethnic groups in addition to a number of state-recognized mainstream beliefs<sup>2</sup> and other religions/faiths. However, despite being the biggest Muslim country in the world with over 87% of Muslim population, unlike the majority of its fellow Muslim countries that applies Islamization in the state administration system,<sup>3</sup> Indonesia is known as pluralist and moderate.<sup>4</sup> According to

<sup>1</sup> Noorhaidi Hasan, "Salafism in Indonesia: Transnational Islam, Violent Activism, and Cultural Resistance," in *Routledge Handbook of Contemporary Indonesia*, ed. Robert W. Hefner (London: Routledge, 2018), 246.

<sup>2</sup> Robert W. Hefner, "Indonesia at the Crossroads: Imbrolios of Religion, State, and Society in an Asian Muslim Nation," in *Routledge Handbook of Contemporary Indonesia* (London: Routledge, 2018), 3–30.

<sup>3</sup> Simon Butt affirms the notion that Indonesia is not an Islamic state and is in no way turning into one. Other proofs can be seen from not only the elimination of Article 1 of Jakarta Charter, but also in the amendment process of the 1945 Constitution, in which the People's Consultative Assembly refused to amend Article 29 of the Constitution and made it mandatory for all Muslim citizens to comply to Islamic law (sharia) (Simon Butt, "Islam, The State and the Constitutional Court in Indonesia," *Pacific Rim Law & Policy Journal Association* 19, no. 2 (2010): 279; Tim Lindsey, "Indonesian Constitutional Reform: Muddling Towards Democracy," *Singapore Journal of International and Comparative Law* 6 (2002): 270).

<sup>4</sup> Freedom House, "Policing Belief: The Impact of Blasphemy Laws on Human Rights – Indonesia," 2010, 43.

the Islamic Constitution Index, Indonesia leans toward secularism with zero Islamic values and guarantees 31 constitutional rights of the citizens.<sup>5</sup>

Indonesia is a state based on the rule of law (not a religion-based state) with Pancasila as the state ideology that recognizes diversity and is united in the unitary state design as stated in the 1945 Constitution of the Unitary State of the Republic of Indonesia.<sup>6</sup> Although the Indonesian kapital -> Constitution explicitly declares that “the state is based on a belief in the One and Only God,”<sup>7</sup> Indonesia does not determine to what extent Islamic values can be recognized, applied, and stipulated by the state institution.<sup>8</sup> Jeremy Menchik describes the relationship between religion and nationalism in Indonesia as “godly nationalism,”<sup>9</sup> which means that orthodox religious views have a special privilege, eradicating the reality of diversity (pluralism) in Indonesia.<sup>10</sup> In addition, Menchik views Indonesia as an *imagined community* bound

<sup>5</sup> A study by Dawood I. Ahmed & Moamen Gouda found that there is zero Islamism in the Indonesian constitution. The study finds that the Islamic values in a constitution of a country has a negative correlation to the development of democracy, gender, equality, and political stability. Dawood I. Ahmed & Moamen Gouda elaborate that the recognition of the word “god” in the Indonesian Constitution does not specifically refer to the Islamic god. See, Dawood I. Ahmed and Moamen Gouda, “Measuring Constitutional Islamization: The Islamic Constitutions Index,” *Hastings International & Comparative Law Review* 38, no. 1 (2014): 2, 44, 54, and 62.

<sup>6</sup> Article 1 verse (3) of the 1945 Constitution, as well as the Preamble of the Constitution that contains the Pancasila, and other provisions of the constitution establish that the state design of the Unitary State of the Republic of Indonesia shall not be changed (“Undang-Undang Dasar Negara Republik Indonesia Tahun 1945”). See also O. Notohamidjojo, *Makna Negara Hukum Bagi Pembaharuan Negara Dan Wibawa Hukum Bagi Pembaharuan Masyarakat Di Indonesia* (Jakarta: Badan Penerbit Kristen, 1970), 27. Constitutional Court also states that Pancasila, as contained in the Preamble of the Constitution shall not be changed either (“Putusan Mahkamah Konstitusi Nomor 140/PUU-VII/2009” (2009), 305).

<sup>7</sup> Article 29 verse (2) of the 1945 Constitution of Indonesia.

<sup>8</sup> Butt, “Islam, The State and the Constitutional Court in Indonesia,” 279. This notion is supported by Tim Lindsey who points out that while all stakeholders agree with democracy in the amendment of the Constitution, there is no consensus on the ideal design of democracy in Indonesia (Lindsey, “Indonesian Constitutional Reform: Muddling Towards Democracy,” 276).

<sup>9</sup> Jeremy Menchik’s notion on Indonesia’s godly nationalism can be understood by examining the Indonesian Constitution. Although factually the Indonesian Constitution does not refer to the god in Islam, nor does it Islamize the Constitution, elements of godliness are recognized in the Constitution, as seen in the Preamble of the 1945 Constitution, through the phrase “With the blessing of God Almighty...” as well as the Pancasila and Article 29 verse (1) which mention that “The state is based on a belief in the One and Only God,” and Article 28J verse (2) regarding restrictions based on religious values, in addition to other articles that include godliness values or explicitly recognizes divinity. As a result, in practice, it is challenging to negate the obligation to honor and the protection of “god” in the context of the religious Indonesian society.

<sup>10</sup> Jeremy Menchik, “Productive Intolerance: Godly Nationalism in Indonesia,” *Comparative Studies in Society and History* 56, no. 3 (2014): 594.

by a similarity, orthodox theism, and the mobilization by the state that cooperates with religious organizations in the society.<sup>11</sup>

Having transformed into a constitutional democratic state supported by a set of means for the protection of human rights and constitutional rights for the citizens, such progress in Indonesia is not necessarily followed by progress in the freedom of religion/belief for individuals.<sup>12</sup> Certain groups, especially religious minorities<sup>13</sup> are frequently discriminated against and marginalized.<sup>14</sup> In 2019, Wahid Foundation reported 184 incidents with 215 violation acts related to freedom of religion/belief committed by both state and non-state agents.<sup>15</sup> These numbers continue to increase from the previous years.<sup>16</sup>

Religious minorities are the groups that have the most losses and are most affected by violations of freedom of religion/belief<sup>17</sup> in various forms, such as discriminatory practices, hate speech, violence, rejection of places of worship, as well as continuous religious blasphemy persecution.<sup>18</sup>

<sup>11</sup> Menchik, 594. Orthodox is defined in a local and temporary manner (Talal Asad, *The Idea of an Anthropology of Islam* (Washington DC: Center for Contemporary Arab Studies, Georgetown University, 1986)).

<sup>12</sup> See Menchik, "Productive Intolerance: Godly Nationalism in Indonesia," 619.

<sup>13</sup> SETARA Institute divides religious minorities into several categories, namely: (1) mainstream religious minorities, (2) minorities in certain religious bodies, such as Shia and Ahmadiyah within Islam in Indonesia, (3) local religious minorities, namely religion groups inherited from the native ancestors of indigenous people of Indonesia, (4) local Islamic beliefs, and (5) new religious movements (Halili, *Supremasi Intoleransi: Laporan Kondisi Kebebasan Beragama/Berkeyakinan Dan Minoritas Keagamaan Di Indonesia Tahun 2016* (Jakarta: Pustaka Masyarakat Setara, 2017), 30–31).

<sup>14</sup> Sudarto, *Kondisi Pemenuhan Hak Konstitusional Penghayat Kepercayaan Terhadap Tuhan Yang Maha Esa* (Jakarta: Pustaka Masyarakat Setara, 2017), 19. See various marginalized and discriminated groups in Indonesia in The Asia Foundation, "Understanding Social Exclusion in Indonesia: A Meta-Analysis of Program Peduli's Theory of Change Documents," 2016, 1. Christian Solidarity Worldwide records that nearly all religious communities are affected by violations of freedom of religion/belief. These minority religious groups include Ahmadiyah, Shia and Sufi, Catholics, Protestants, Buddhists, Hindus, Confucians, Baha'i, local traditional religions and atheists (Christian Solidarity Worldwide, "Indonesia: Pluralism in Peril, the Rise of Religious Intolerance Across the Archipelago" (Surrey, 2014), 8). United States Commission on International Religious Freedom considers Indonesia as one of the countries that commits discrimination by recognizing the 6 official religions (United States Commission on International Religious Freedom, "Respecting Rights? Measuring The World's Blasphemy Laws" (Washington DC, 2017), 26).

<sup>15</sup> Wahid Foundation, "Mengikis Politik", 15.

<sup>16</sup> In 2016, Wahid Institute recorded 204 incidents of violations with 315 acts. This means that there was a 7% increase in the violations of freedom of religion/belief since 2015. This number further increased in 2017. See Wahid Foundation, "'Ringkasan Eksekutif' Laporan Tahunan Kemerdekaan Beragama Berkeyakinan (KBB) Di Indonesia Tahun 2016 Wahid Foundation" (Jakarta, 2016), 7. In general, Wahid Institute's findings on the number of violations of the right to freedom of religion/belief are in line with SETARA Institute's research related to the annual reports on freedom of religion/belief. See the Annual Reports of the Freedom of Religion/Belief by SETARA Institute.

<sup>17</sup> Wahid Foundation, "Mengikis Politik", 19.

<sup>18</sup> See United States Commission on International Religious Freedom, "Indonesia: USCIRF-Recommended

## 2. Research Questions

This paper specifically discusses the questions of human rights and religiosity surrounding the religious blasphemy law in Indonesia that contributes to the vulnerability of minority religious groups in enjoying the freedom of religion/belief as the constitutional right of all citizens. By prioritizing six mainstream religions through Law PNPS (Presidential Stipulation) 1/1965 on the Prevention of Abuse and/or Defamation of Religion that clearly gives differential treatment in the form of protection from abuse and/or defamation of religion for the six religions, the state has put other religions/beliefs other than the mainstream ones in a vulnerable or unprotected position.<sup>19</sup>

According to a study entitled "*Respecting Rights? Measuring The World's Blasphemy Law*" published by The US Commission on International Religious Freedom (USCIRF), Indonesia is one (1) of 71 countries in the world with a religious blasphemy law and applies the law. Indonesia is in the top 22 of 71 countries with religious blasphemy law and belongs in the "higher than average" category in violating international law principles.<sup>20</sup>

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for Special Watch List". See also the Annual Reports of the Freedom of Religion/Belief by SETARA Institute or Wahid Institute.

<sup>19</sup> See Elaboration of Article 1 Law Number 1/PNPS of 1965 ("Undang-Undang Nomor 1/PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama"). The logic of applying this different treatment can be seen in the example of a case tried by the Human Rights Committee in 1999 on how in addition to public schools, Roman Catholic private schools were the only private schools funded by the Canadian government. In contrast, Jewish private schools received no government funding. The Human Rights Committee consider this to be contrary to Article 26 of ICCPR as Catholic private schools are treated differently from schools with other religious denominations, in this case Judaism. This violation is against Article 26 ICCPR on equal and effective protection against discrimination. See "Communication No. 694/1996: Canada. 05/11/99. CCPR/C/67/D/694/1996". Similarly, this also happens in the recognition of 6 religions regulated in Law 1/PNPS 1965, in which the assurance of protection against religious blasphemy is given to the 6 official religions. See Ahmad Ubbe, "Laporan Pengakajian Dan Hukum Tentang Mekanisme Pananganan Konflik Sosial" (Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI, 2017), 77. See also Zahid Iqbal and Sumaira Lodhi, "Extremist and Religious Violence: An Economic Overview of Pakistan," *International Journal of Research in Applied, Natural and Social Sciences* 2, no. 11 (2014): 195–212. Such different treatments are against the international principles of human rights. As stated in the General Comment of the Human Rights Committee, "It would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers." See Human Rights Committee, "General Comment No. 34, Article 19 (Freedom of Opinion and Expression) U.N. Doc. CCPR/C/GC/34, 48," 2011.

<sup>20</sup> Joelle Fiss and Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring The World's Blasphemy Laws* (Washington DC: United States Commission on International Religious Freedom, 2017), 19. Compare this study to a study by Pew Research Center entitled *Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread* atau *Compendium of Blasphemy Laws oleh Human Rights First*.

According to USCIRF, countries with a higher than average score have a higher risk of violation in the form of abuse. The category is characterized by non-compliance toward human rights in the religious blasphemy law as it deviates from the standard of freedom of expression, the vague formulation of the religious blasphemy law that is difficult to interpret narrowly, and boundaries that are rarely described.<sup>21</sup>

This finding reflects the religious blasphemy law in Indonesia. In a paper entitled “*Antara ‘Penodaan’ dan ‘Kerukunan’: Makalah Posisi mengenai UU No. 1/PNPS/1965*”, Zainal Abidin Bagir et.al explain that in its implementation, the religious blasphemy law in Indonesia protects the stronger groups and put the vulnerable ones in a compromising position for the sake of harmony.<sup>22</sup> As the religious blasphemy law is written using vague terms,<sup>23</sup> the logic of legislation and implementation of religious blasphemy law places the victim groups, instead of the offending groups, as the cause of disharmony.

In that context, this paper aims to elaborate on the religious blasphemy law in Indonesia and the vulnerabilities of minority groups. Additionally, this article presents an academic discussion on the constitutional issues in the Constitutional Court decision on Religious Blasphemy Law.

### **3. Methods**

This is a desk-study with a descriptive qualitative approach. Data collection in the research was conducted in two techniques, namely 1) a document study and 2) an internal focus group discussion. Data analysis was carried out using a qualitative approach. Data were processed using the Microsoft Excel program. The data validity test was done using the cross-check method in which the data’s degree of validity was tested by rechecking the documents and comparinga them with other secondary data, such as news on the Constitutional Court Decision.

## **B. DISCUSSION/ ANALYSIS**

### **1. *Raison d’être* and the Legal Construction of Religious Blasphemy Law**

Although there is no single definition on what blasphemy is, there are several sources that can be referred to. The Committee of Culture, Knowledge and Education

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<sup>21</sup> Fiss and Kestenbaum, 4.

<sup>22</sup> Jeremy Menchik considers that the application of religious blasphemy law in Indonesia leads to other beliefs not receiving protection from the state (Menchik, “Productive Intolerance: Godly Nationalism in Indonesia,” 608).

<sup>23</sup> Gayle Manchin and Nadine Maenza, “Indonesia Should Prevent Religious Conflict, but Its Blasphemy Law Does More Harm Than Good,” 2019, <https://www.uscirf.gov/news-room/op-eds/globe-post-indonesia-should-prevent-religious-conflict-its-blasphemy-law-does-more>.

of Venice defines blasphemy as “the offense of insulting or showing contempt or lack of reverence for God and, by extension, towards anything considered sacred.” Meanwhile, the Irish Law Reform Commission defines religious blasphemy law 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.”<sup>24</sup> In addition, the US Commission on International Religious Freedom defines the term as “the act of expressing contempt or a lack of reverence for God or sacred things.”<sup>25</sup>

The notion of blasphemy originally comes from monotheist religions, such as Judaism, Christianity, and Islam that prohibit any individual (or group) from defiling God or sacred matters (including prophets and saints) in the religion.<sup>26</sup> Brian J. Grim gives two different meanings to differentiate between religious blasphemy and religious defamation in a study in 2012. Whereas blasphemy refers to insulting acts toward God or sacred matters, defamation refers to the criticism of religion in general,<sup>27</sup> including any utterances that criticize a religion, religious teachings or a religious figure.<sup>28</sup>

Frans Magnis Suseno defines religious blasphemy as opposition against the divine or matters that are considered sacred or should not be offended (taboo), which include religious symbols/religious leaders/the holy book, that is commonly done in speech or writing against the divinity of established religions.<sup>29</sup> The emergence of a religious blasphemy law is to protect the belief (faith) toward a religion and its followers from various forms of offences, whether opinions or expressions.<sup>30</sup>

In Indonesia, Religious Blasphemy Law is an effort to prevent the massive influence of the existence of the Indonesian Communist Party and to create harmonization among the nation’s components, namely the nationalists and the religious.<sup>31</sup> Moreover, legally, the establishment of the religious blasphemy law, as stated in Law 1/PNPS/1965 on the Prevention of Abuse and/or Defamation of Religion was based

<sup>24</sup> Venice Commission, *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society (Science and Technique of Democracy, No. 47)* (Strasbourg: Council of Europe Publishing, 2010), 19.

<sup>25</sup> Fiss and Kestenbaum, *Respecting Rights? Measuring The World’s Blasphemy Laws*, 1.

<sup>26</sup> David Robertson, *A Dictionary of Human Rights* (London: Europa Publication, 2004), 26.

<sup>27</sup> Brian J. Grim, “Laws Penalizing Blasphemy, Apostasy and Defamation of Religion Are Widespread,” 2020, <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/>.

<sup>28</sup> Grim.

<sup>29</sup> Franz Magnis-Suseno, “Sekitar Hal Penodaan Agama: Beberapa Catatan Keterangan Ahli Judicial Review UU No. 1/PNPS/1965” (Jakarta, 2010).

<sup>30</sup> Magnis-Suseno.

<sup>31</sup> Uli Parulian Sihombing, Fulthoni, and Renata Arianingtyas, *Menggugat BAKORPAKEM Kajian Hukum Terhadap Pengawasan Agama Dan Kepercayaan Di Indonesia* (Jakarta: The Indonesian Legal Resource Center (ILRC), 2008), 41.

on the government's concerns about the emergence of spiritual organizations or beliefs among the community that contradict religious teachings and laws.<sup>32</sup> Many of the teachings/actions of the followers of these beliefs have led to further actions or behaviors that violate the law, disrupt the national unity, and tarnish religion. These community spiritual organizations or beliefs have reached a considerable number, threatening the existing religions.<sup>33</sup>

Crimes against religion are not taken from the Dutch Criminal Code that applies in Indonesia, but the addition of Chapter V on Crimes Against Public Order, namely the addition of Article 156a of Criminal Code through Article 4 of Law 1/PNPS/1965 on the Prevention of Abuse and or Defamation of Religion (hereafter Religious Blasphemy Law).<sup>34</sup> Religious Blasphemy Law was issued through Presidential Stipulation dated January 27, 1965 which was then stipulated as Law 5/1969 on Statement of Various Presidential Stipulations and Presidential Regulations as Laws.<sup>35</sup>

The Religious Blasphemy Law consists of 2 components, namely the body, and the elaboration of the law. The body consists of 5 main articles, whereas the elaboration consists of the general section and elaboration for each article.<sup>36</sup> The five articles of the Religious Blasphemy Law and Article 156 of the Criminal Code are used against people suspected of committing religious blasphemy. Article 156 of the Criminal Code reads as follows:

*“Anyone who publicly expresses hostility, hatred or contempt for one or several groups of the Indonesian people shall be sentenced with a maximum imprisonment of four years or a maximum fine of four thousand five hundred rupiahs. The word “groups” in this article and in the following articles refers to every part of the Indonesian people that is different from one or several other parts because of*

<sup>32</sup> Elaboration of “Penetapan Presiden RI Nomor 1/PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama”.

<sup>33</sup> Indonesia, President Decree on Prevention of Abuse and/or Blasphemy of Religion, President Decree 1/PNPS Year 1965.

<sup>34</sup> Uli Parulian Sihombing et al., *Ketidakadilan Dalam Beriman: Hasil Monitoring Kasus-Kasus Penodaan Agama Dan Ujaran Kebencian Atas Dasar Agama Di Indonesia* (Jakarta: The Indonesia Legal Resources Center (ILRC), 2012), 10. Oemar Seno Adji was the one who proposed inserting certain articles of the Religious Blasphemy Law into the Criminal Code to support the final clarification of the 1965 stipulation. The government approved this proposition in 1969 at the same time of the government's approval to stipulate the 1965 Presidential Stipulation as Law Number 1/PNPS/1965 based on the Decision of the People's Consultative Assembly. See Titik Suwariyati and Imam Syaukani, *Kompilasi Kebijakan Dan Peraturan Perundang-Undangan Kerukunan Umat Beragama* (Jakarta: Puslitbang Kehidupan Keagamaan, 2008), 182.

<sup>35</sup> Tore Lindholm, *Kebebasan Beragama Atau Berkeyakinan: Seberapa Jauh?: Sebuah Referensi Tentang Prinsip-Prinsip Dan Praktek* (Yogyakarta: Kanisius, 2010).

<sup>36</sup> President Decree Number 1/PNPS of 1965.



*race, country of origin, place, origin, descent, nationality or position according to constitutional law.”<sup>37</sup>*

Meanwhile, the addition to this provision through the Religious Blasphemy Law concerns the prohibition of publicly tell, recommend or seek public support, conduct an interpretation of a religion adhered to in Indonesia, carry out religious activities that resemble religious activities of a religion adhered to in Indonesia, conduct interpretations and activities that deviate from the main teachings of religions adhered to in Indonesia. In a complete sentence:<sup>38</sup>

*“Every person is prohibited from deliberately telling, suggesting or seeking public support in public to make interpretations of a religion adhered to in Indonesia or to carry out religious activities that resemble religious activities of that religion, as well as interpretations and activities that deviate from the main teachings of the religion.”*

The Law also regulates in case of violations of the above provisions in Article 2, as follows:<sup>39</sup>

- (1) *Whoever violates the provisions referred to in Article 1 shall given an order and a stern warning to stop their actions in a joint decision of the Minister of Religion, Minister/Attorney General, and the Minister of Home Affairs.*
- (2) *If the violation referred to in paragraph (1) is committed by an Organization or according to a belief system, the President of the Republic of Indonesia may dissolve the Organization and declare the Organization or sect as a prohibited organization/cult, one after the other after the President has received considerations from the Minister of Religion, Minister/Attorney General/Supreme Justice and Minister of Home Affairs.*

Next, the Religious Blasphemy Law mentions a sentence of imprisonment for a maximum of 5 years, as follows:<sup>40</sup>

*“If, after actions taken by the Minister of Religion together with the Minister/Attorney General and the Minister of Home Affairs or by the President of the Republic of Indonesia according to the provisions in Article 2 against a person, organization or belief, they still continue to violate the provisions in Article 1, then the person, follower, member, and/or member of the Organizational Management of that sect shall be sentenced to a maximum imprisonment of five years.”*

<sup>37</sup> Indonesian Civil Code, Chapter V Crimes Against Public Order, Article 156.

<sup>38</sup> Indonesia, Law on Prevention of Abuse and/or Blasphemy of Religion, Law Number 1/PNPS of 1965, Article 1.

<sup>39</sup> Law Number 1/PNPS of 1965, Article 2.

<sup>40</sup> Law Number 1/PNPS of 1965, Article 3.

Subsequently, the content of material of Religious Blasphemy Law was added to the Criminal Code through Article 4, as follows:<sup>41</sup>

In the Criminal Code, there is a new article that reads as follows:

*"Article 156a"*

*"Sentencing to a maximum imprisonment of five years applies to those who intentionally publicly express feelings or commit an act:*

- a. *that essentially contains hostility, abuse or blasphemy against a religion adhered to in Indonesia;*
- b. *with the intention to prevent people from not following any religion that is based on the belief in the One and Only God."*

According to the formulation of Article 4 of the Criminal Code, public demonstration of the following actions is punishable by law:<sup>42</sup>

- 1) Express feelings or commit acts that are hostile towards a religion adhered to in Indonesia;
- 2) Express feelings or commit acts that are abusive towards a religion adhered to in Indonesia;
- 3) Express feelings or commit blasphemy against a religion adhered to in Indonesia;
- 4) Actions with the intention to prevent people from not following any religion that is based on the belief in the One and Only God

## **2. Constitutional Issues in the Constitutional Court Decisions Religious Blasphemy Law**

The constitutional dimension of legal provisions that criminalizes actions suspected of religious blasphemy has been reviewed by the Constitutional Court in a number of decisions, namely Decisions Number 84/PUU-X/2012,<sup>43</sup> 140/PUU-II/2009,<sup>44</sup> 76/PUU-XVI/2018,<sup>45</sup> and 5/PUU-XVII/2019.<sup>46</sup> In all four decisions, Constitutional Court declares that they reject all petitions from the petitioners. In the petitions, experts and

<sup>41</sup> Law Number 1/PNPS of 1965, Article 4.

<sup>42</sup> Sihombing *et al.*, *Ketidakadilan Dalam Beriman: Hasil Monitoring Kasus-Kasus Penodaan Agama Dan Ujaran Kebencian Atas Dasar Agama Di Indonesia*, 10.

<sup>43</sup> This Decision was submitted by Shia Leaders from Madura Island, namely Tajul Muluk, Hasan Alaydrus, Drs. Ahmad Hidayat, Dr. Umar Shahab, and Sebastian Joe bin Abdul Hadi.

<sup>44</sup> This Decision was submitted by Participatory Society Initiatives for Just Transitions (IMPARSIAL), Institute for Community Studies and Advocacy (ELSAM), Association for Legal Aid and Human Rights (PBHI), Association for Center for Human Rights and Democracy Studies (DEMOS), Society for Equity, Desantara Foundation, Indonesian Legal Aid Foundation (YLBHI), K.H. Abdurrahman Wahid, Prof. Dr. Musdah Mulia, Prof. M. Dawam Rahardjo, and KH. Maman Imanul Haq.

<sup>45</sup> This Decision was submitted by law students from the University of Indonesia, namely Zico Leonard Djagardo Simanjuntak and Aisyah Sharifa.

<sup>46</sup> This Decision was submitted by Zico Leonard Djagardo Simanjuntak (student of the Faculty of Law, University of Indonesia).

stakeholders that support the constitutional review of the Law in the four decisions of the Constitutional Court argue that Religious Blasphemy Law:<sup>47</sup>

1. *The Law does not meet the formal requirements of legislation because it was formed during the Guided Democracy period, hence it must be declared invalid. This law was enacted during the revolutionary period and in the present condition, it is irrelevant to be maintained.*<sup>48</sup>
2. *The formulation of Article 1 of this Law regarding the phrases “deviant interpretation” or “the principles of religious teachings” is a multi-interpretation clause used to limit the religious freedom of others.*<sup>49</sup>
3. *This Law creates discrimination due to limitations on the number of religions recognized by the state.*<sup>50</sup>
4. *The state has no right to interfere in matters of religious belief in determining which interpretation is “right” or “wrong”, as allowed by the Religious Blasphemy Prevention Law.*<sup>51</sup>
5. *This Law does not guarantee religious freedom and is against human rights as it penalizes those with different beliefs from the religious interpretations recognized by the state despite religious freedom as human right.*<sup>52</sup>
6. *Restrictions imposed by the state may only be implemented to the extent of the behavior of the citizens and may not limit one’s religious freedom.*<sup>53</sup>

<sup>47</sup> One of the stakeholders that are in support of the review of the Law and declaring Article 1 of the Religious Blasphemy Law as unconstitutional is the Human Rights Commission as it is against the responsibility of the state to protect the right to religious freedom. Several elements in Article 1 are considered to enter the scope of *forum internum* which cannot be intervened by the state. However, the Human Rights Commission considers that in the case of committing hatred toward or insulting a religion, a state intervention can be justified in order to protect the rights and freedom of others. National Commission for Women, Bishops’ Conference of Indonesia (KWI), Fellowship of Indonesian Churches (PGI), Association of Spiritual Believers, and Belief Organization Cooperation Agency (BKOK).

<sup>48</sup> Argument of the Petitioner (Constitutional Court Decision Number 140/PUU-VII/2009, 231 and 271).

<sup>49</sup> The notion of argument of the Petitioner in Constitutional Court Decision Number 140/PUU-VII/2009, 286. This notion is one of the notions that are constantly expressed in the review of Religious Blasphemy Law. See argumentation of Tajul Muluk *et al.* in Constitutional Court Decision Number 84/PUU-X/2012” (2012), 139–40.

<sup>50</sup> Constitutional Court Decision Number 140/PUU-VII/2009, 271. Argumentation that the Religious Blasphemy Law is administrative in nature is one of the main issues discussed on Religious Blasphemy Law. See argumentation of Petitioners in “Constitutional Court Decision Number 76/PUU-XVI/2018” (2018); “Constitutional Court Decision Number 5/PUU-XVII/2019” (2019). The statement of one of the experts of the Government, namely Mudzakkir, suggests that Article 2 verse (1) of the Religious Blasphemy Law is meant to protect religions that administratively meet the requirements and are acknowledged by the state. It is the obligation of the state to protect religions that have been recognized by the state from the possibility of religious abuse. Expert Opinion of Government Mudzakkir in Constitutional Court Decision Number 140/PUU-VII/2009, 244.

<sup>51</sup> See argument of petitioner, 231, which confirms expert opinion of Petitioner in Decision 140/PUU-VII/2009 Franz Magnis Suseno, 236-237, Summary of legal opinions of petitioners and experts by Constitutional Court in Constitutional Court Decision 140/PUU-VII/2009, 270.

<sup>52</sup> See argument of petitioner, 231, Constitutional Court Decision 140/PUU-VII/2009, 270.

<sup>53</sup> Constitutional Court Decision 140/PUU-VII/2009, 270.

7. *This Law criminalizes religious freedom on the basis of abuse and defamation of religion offenses which can be used by the ruling regime to oppress people with minority religions. It is difficult to prove abuse or defamation of religion.*<sup>54</sup>

The Constitutional Court declared the Religious Blasphemy Law as constitutional. In this case, the Constitutional Court not only negates human rights that have been strongly/solidly reformulated in the amendments of the Constitution, but also decides to please the far-right wing that has long sought the adoption of Islamic values<sup>55</sup> in the Indonesian state administration system by turning a blind eye to various formal and substantial problems of the Religious Blasphemy Law which leads to the deprivation of constitutional rights of the citizens. It is no wonder that in deciding this law, the Constitutional Court uses arguments that at times clearly contradict each other.

The Constitutional Court begins their argumentation by comparing Indonesia with secular countries such as the United States that prohibits teaching religions at school.<sup>56</sup> This certainly does not go along with the context of the rule of law and the Indonesian people. In their considerations, the Constitutional Court argues that the Indonesian nation is a nation of faith in God, and not an atheist one.<sup>57</sup> They further emphasize that the Indonesian constitution does not allow for non-religious campaigns, freedom to promote non-religiousness, or insulting or defiling religious teachings or the holy books that become the sources of faith, or defaming the name of God.<sup>58</sup>

The Constitutional Court does not consider an important aspect that in the Constitution, there is no prohibition for Indonesian citizens to not have a belief or faith. There is no single constitutional provision that stipulates that every citizen must follow a religion. The constitution in fact stands in the opposite position, namely by recognizing the right of a person to have a religion or belief.<sup>59</sup> The Constitutional Court has narrowly interpreted the form of expression of religious freedom, which should include non-theism, as regulated in Article 18 of The International Covenant on Civil

<sup>54</sup> Argument of Petitioner, 230, Expert Opinion of Petitioner Decision 140/PUU-VII/2009 Soetandya Wignyosoebroto in the judicial review of Religious Blasphemmy Law in Decision Number 140/PUU-VII/2009, 239, Information of Relevant Party Belief Organization Cooperation Agency (BKOK) in Constitutional Court Decision 140/PUU-VII/2009, 252; Constitutional Court Decision 140/PUU-VII/2009, 271.

<sup>55</sup> Although the Religious Blasphemy Law does not specifically discuss Islam, however, Islam is one of the religions protected based on this Law. In its implementation, Islam is also the religion that benefits from the protection of the Law as a majority.

<sup>56</sup> Decision Number 140/PUU-VII/2009, 273.

<sup>57</sup> Decision Number 140/PUU-VII/2009, 272-273.

<sup>58</sup> Constitutional Court Decision Number 140/PUU-VII/2009, 275.

<sup>59</sup> See Article 29 verse (2) of the 1945 Constitution of the Republic of Indonesia

and Political Rights (ICCPR)<sup>60</sup> as well as the Constitution. While the essence of the state of Indonesia is a state of faith, this does not translate to the state being able to prohibit one's religious expression that does not believe in God. The Constitutional Court has institutionalized the violation of religious freedom regulated in ICCPR which is adopted in the Human Rights Law and the Constitution.<sup>61</sup>

The Constitutional Court further establishes once more that the principle of the rule of law in Indonesia is based on the principle of the Belief in The One and Only God.<sup>62</sup> Religious freedom in Indonesia is not in a position that is free of values and freedom *an sich*, but is accompanied with a social responsibility to realize human rights for every person. This means that the state must play a role as the one who balances the human rights and basic obligations to realize just human rights. It is the job of the state to ensure that one's religious freedom does not harm the religious freedom of others.<sup>63</sup>

Furthermore, the Constitutional Court considers that restrictions do not necessarily mean discrimination as long as they are carried out as a form of protection of the rights of others.<sup>64</sup> The Constitutional Court views that the Blasphemy Law does not stipulate restrictions on freedom of religion, but restrictions on expressing feelings of committing acts that contain hostility, abuse, or blasphemy against a religion, as well as restrictions on interpretation of activities that deviate from the main teachings of the religions adhered to in Indonesia.<sup>65</sup>

The Constitutional Court views that the Religious Blasphemy Law does not prohibit anyone to conduct an interpretation of a religious teaching or conducting religious activities that resemble a religion adhered to in Indonesia, but prohibits the acts of deliberately telling, suggesting or seeking public support, to make interpretations about a religion adhered to in Indonesia or doing religious activities that resemble the religious activities of a certain religion, as well as interpretations and activities

<sup>60</sup> See General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) of ICCPR. Violations of religious freedom/belief or human rights by the state, although the state has ratified the ICCPR are commonly found. See Beth Simmons, "Civil Rights in International Law: Compliance with Aspects of the 'International Bill of Rights,'" *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 19.

<sup>61</sup> See Article 4, Article 22, Article 55, as well as General Elaboration of "Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia" and Article 28E verse (1) and verse (2), Article 28I verse (1), and Article 29 verse (2) of the 1945 Constitution of the Republic of Indonesia.

<sup>62</sup> Decision Number 140/PUU-VII/2009, 275.

<sup>63</sup> Decision Number 140/PUU-VII/2009, 278.

<sup>64</sup> Decision Number 140/PUU-VII/2009, 279.

<sup>65</sup> Decision Number 140/PUU-VII/2009, 287.

that deviate from the main teachings of the religion. The Constitutional Court affirms that unless such matters are regulated, horizontal conflicts may emerge.<sup>66</sup>

According to the Constitutional Court, deviant interpretations are related to the aspect of freedom in believing a faith and expressing thoughts and attitudes according to one's conscience. In this case, according to the Constitutional Court, the freedom of belief is a type of freedom that cannot be forcefully restricted, and cannot even be tried, as the freedom exists in the mind and heart of the person that believes in the faith. This can be referred to as *forum internum*. On the other hand, the freedom to express thoughts or attitudes based on one's conscience (*forum externum*) shall be restricted if it concerns or is related to stakeholders in the society.<sup>67</sup>

The Constitutional Court argues that the main principles of religious teachings should be obtained through the appropriate methodology based on the teachings of said religion. They further argue that the freedom to make interpretations is not absolute. Interpretations that are not based on the methodology that are commonly recognized by the religion followers and not sourced from the holy book will create reactions that threaten public safety and order when expressed or done in public.<sup>68</sup> The interpretations recognized in this law are those that are based on the experts or scholars of the religion and involve experts on the relevant matter of discussion in the interpretation process.<sup>69</sup> The Constitutional Court views that this restriction is in line with Article 18 of ICCPR, the Constitution, and the applicable international standards.<sup>70</sup>

The Constitutional Court believes that it must be the religion itself that internally decides the principles of religious teachings. Indonesia has a Department of Religion that serves and protects the growth and development of religions in a healthy manner. The Department of Religion has organizations and a set of tools to collect various opinions from the internal of a religion. This means that the state does not autonomously decide the principles of religious teachings, as they are based on the agreement within the internal stakeholders of the religion.<sup>71</sup>

In response to the notion of differential treatment of the recognition of 6 religions mentioned in the Religious Blasphemy Law, the Constitutional Court argues that this law does not limit the recognition and protection only for the 6 religions (Islam,

<sup>66</sup> Decision Number 140/PUU-VII/2009, 287.

<sup>67</sup> Decision Number 140/PUU-VII/2009, 288.

<sup>68</sup> Decision Number 140/PUU-VII/2009, 289.

<sup>69</sup> Decision Number 140/PUU-VII/2009, 291.

<sup>70</sup> Decision Number 140/PUU-VII/2009, 289.

<sup>71</sup> Decision Number 140/PUU-VII/2009, 289.

Christianity, Catholicism, Buddhism, Hinduism, and Confucianism). The general elaboration of the law states that “This does not mean that other religions such as Judaism, Zoroastrian, Shinto, and Taoism are prohibited in Indonesia. They receive full assurance as mandated by Article 29 verse 2 of the Constitution, and their existence shall not be disrupted as long as they do not violate the provisions in this regulation or other regulations of the law.” The Constitutional Court states that the recognition of the six religions is merely factual and sociological mentions of the existence of religions in Indonesia during the time when the Religious Blasphemy Law was formulated.<sup>72</sup>

Until now, there has been no issues in the social and state life when interpretations or activities deemed as deviant create anxieties among the followers of the religion, disrupt the peace and disturb public order. The state has the interest to make regulations of the law to give assurance for the recognition and respect/honor of the rights and obligations of others, and to meet just demands based on moral considerations, religious values, and public safety and order.<sup>73</sup>

According to the Constitutional Court, substantially, Article 1 of the Religious Blasphemy Law should not immediately be interpreted as a form of restriction of *forum externum* against *forum internum* of one’s religious freedom.<sup>74</sup> The Constitutional Court adds that having a religion in the context of individual human rights cannot be separated from the right to religion in the communal human rights. The Constitutional Court considers keeping religious values as the society’s communal values are valid according to the constitution. Religious organizations with a historical foundation that are rooted in the country and serve as the mother organizations of the religions recognized in Indonesia eventually become the partners of the state in creating public order to respect each other and practice tolerance.<sup>75</sup>

The Constitutional Court believes that this law is still required as a general prevention. The notion on the coercion of religious freedom that leads to discrimination as expressed by Petitioners becomes irrelevant and inaccurate according to law.<sup>76</sup> According to the Constitutional Court, the less than ideal implementation of the Religious Blasphemy Law is due to errors in the implementation and does not refute the norms in the law.<sup>77</sup> Further, the Constitutional Court argues that the disparity

<sup>72</sup> Decision Number 140/PUU-VII/2009, 290.

<sup>73</sup> Decision Number 140/PUU-VII/2009, 292-293.

<sup>74</sup> Decision Number 140/PUU-VII/2009, 294.

<sup>75</sup> Decision Number 140/PUU-VII/2009, 295.

<sup>76</sup> Decision Number 140/PUU-VII/2009, 298.

<sup>77</sup> Decision Number 140/PUU-VII/2009, 302.

in sentencing the crimes stipulated in the court's decisions is essentially not a form of discrimination or inconsistency of the text, but the judge's authority to assess the level of violation according to each case. Therefore, the Petitioners are considered to be unable to prove the legal uncertainty in the addition of Article 156a of the Criminal Code.<sup>78</sup>

In addition to the rationale that supports the constitutionality of the Religious Blasphemy Law, the Constitutional Court also receives inputs from experts that view the formal or substantial weaknesses of the law. The Constitutional Court views that the scope of the law's substance must be clarified in order to prevent misinterpretation in practice. According to the Constitutional Court, it is the authority of the lawmakers to improve it.<sup>79</sup>

The Constitutional Court translates the phrase "in public" in the Religious Blasphemy Law as "a place visited by the public or where the public can hear," "a public place where the public or a crowd is present", and "a place where the public can see."<sup>80</sup> They view that Article 156a of the Criminal Code is the authority of the public court, not the constitutional court.<sup>81</sup>

The Decision of the Constitutional Court was made by nine constitutional judges, eight of whom are Muslims. It is then no wonder that the Decision of the Constitutional Court does not have the frequently marginalized minority perspective. One of the constitutional judges, who is a Catholic (Maria Farida Indrati) issued a dissenting opinion. According to her, there is a discriminatory treatment in Article 1 of the Law, between the six recognized religions and other religions, especially against schools or bodies of spiritual beliefs. According to her, even the state/government has entered the realm of spiritual existence which is inherent in every individual (in this case schools or bodies of spiritual beliefs) because the government is given the authority to try and channel it toward a healthy view and the direction of God Almighty.<sup>82</sup>

Maria Farida adds that although the Religious Blasphemy Law does not mention the six religions recognized by the state, in its implementation by the government, it is evident that the assurance and protection, as well as aids, are only available to the six religions. This can be seen in the issuance of a residence identification card, death certificates, or marriage license. The Law has become the reason of prohibition

<sup>78</sup> Decision Number 140/PUU-VII/2009, 302.

<sup>79</sup> Decision Number 140/PUU-VII/2009, 304-305.

<sup>80</sup> Decision Number 84/PUU-X/2012, 144.

<sup>81</sup> Decision Number 84/PUU-X/2012, 146-147.

<sup>82</sup> Dissenting Opinion of Maria Farida Indrati in Decision 140/PUU-VII/2009, 317.



against the followers of Confucianism, as there are only five Directorate Generals of Community Guidance at the Ministry of Religion, each for the religion of Islam, Christianity, Catholicism, Buddhism, Hinduism.<sup>83</sup> According to her, the addition of Article 156a in the Criminal Code is more frequently implemented arbitrarily in practice.<sup>84</sup>

In considering the constitutionality of the Religious Blasphemy Law, there are several things that the Constitutional Court has missed. First, the argument of the Constitutional Court shows their inability to clarify the relation between religion and the state. Constitutional interpretation that views the Religious Blasphemy Law as constitutional shows the religious front of the Indonesian Constitution which becomes the reference and consideration in deciding cases related to religion and the state.<sup>85</sup> Constitutional Court does not consider the rule of law aspect of Indonesia, which has been established in Article 1 verse (3) of the Constitution.

Secondly, the argumentation of the Constitutional Court which states that the interpretations that can be accepted are those with “acceptable methodology”<sup>86</sup> does not consider the fact that religion is not science, as it is based solely on faith which may not necessarily be proven scientifically. In the history of existing religions, there is no sole interpretation on religious texts or teachings.<sup>87</sup>

Thirdly, by establishing the authority of the Department of Religion to serve and protect the growth and development of a healthy religion with the internal party of the relevant religion,<sup>88</sup> the Constitutional Court in this case does not consider the reality of dispute among religious beliefs and even within the internal party of the religion. In spite of that, the diversity of religious people in the Indonesian context has placed certain religions and religious groups/beliefs as a majority and the others as minority. In cases where it is difficult to find the common ground and even contradict each other, the minorities inevitably have the disadvantage, and are often in the position that are deemed “incorrect.” As a result, certain religions/beliefs will be eliminated<sup>89</sup>

<sup>83</sup> Indrati in Decision 140/PUU-VII/2009, 320.

<sup>84</sup> Indrati in Decision 140/PUU-VII/2009, 321.

<sup>85</sup> Ismail Hasani and Bonar Tigor Naipospos, *Negara Menyangkal: Kondisi Kebebasan Beragama/Berkeyakinan Di Indonesia 2010* (Jakarta: Pustaka Masyarakat Setara, 2011), 3.

<sup>86</sup> Legal Opinion of the Constitutional Court in Decision 140/PUU-VII/2009, 289.

<sup>87</sup> Mudzakkir *et al.*, “Analisis Dan Evaluasi Undang-Undang No 1 PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama” (Jakarta, 2011), 40.

<sup>88</sup> Legal Opinion of the Constitutional Court in Decision 140/PUU-VII/2009, 289.

<sup>89</sup> Sihombing *et al.*, *Ketidakadilan Dalam Beriman: Hasil Monitoring Kasus-Kasus Penodaan Agama Dan Ujaran Kebencian Atas Dasar Agama Di Indonesia*, 11.

and even criminalized based on this Law.<sup>90</sup> When the state prefers an interpretation from certain groups, the state will discriminate against other groups.<sup>91</sup>

Fourth, the Constitutional Court states that in addition to the six religions mentioned, other religions also has the assurance of Article 29 verse (2) was allowed to exist as long as they do not violate the regulations of the law.<sup>92</sup> The mention of the names of religions adhered to equals to a recognition of the mentioned religions. The Constitutional Court in this case affirms Article 1 and the Elaboration of the Law which state that every person is prohibited to do the acts of deliberately telling, suggesting or seeking public support, to make interpretations about a religion adhered to or doing activities that resemble the religious activities of a certain religion, as well as interpretations and activities that deviate from the main teachings of the religion. The religions referred to in the Article include Islam, Christianity, Catholicism, Buddhism, Hinduism, and Confucianism.<sup>93</sup> The Constitutional Court has turned a blind eye on the protection provided by Article 1 on the mentioned religions, inevitably singling out other beliefs that are not mentioned and putting them out of the protection of the Law. Moreover, the Religious Blasphemy Law does not address the current condition<sup>94</sup> which indicates the emergence of the tyranny of the majority, the strong emergence of *conservatism turn*, and uncivil society in Indonesia.<sup>95</sup>

<sup>90</sup> Opinion of Relevant Party Bishops' Conference of Indonesia in Court Decision Number 140/PUU-VII/2009 on Religious Blasphemy Law, 251.

<sup>91</sup> Mudzakkir *et al.*, "Analisis Dan Evaluasi Undang-Undang No 1 PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama," 40. The United States Commission on International Religious Freedom (USCIRF) mentions the weakness in preferring one particular interpretation, namely inherent subjectivity (United States Commission on International Religious Freedom, "Respecting Rights? Measuring The World's Blasphemy Laws," 6).

<sup>92</sup> Decision Number 140/PUU-VII/2009, 290.

<sup>93</sup> See Article 1 dan Elaboration of Article 1 of Law Number 1 PNPS of 1965 on the Prevention of Abuse and/or Defamation of Religion.

<sup>94</sup> See Opinion of Relevant Party Fellowship of Indonesian Churches (PGI) in Court's Decision Number 140/PUU-VII/2009 on Religious Blasphemy Law, 251.

<sup>95</sup> See dissenting opinion of Constitutional Judge Maria Farida Indrati which explains how the Religious Blasphemy Law is against the assurance for the freedom of religion and belief in the highly powerful Indonesian law regime. Decision of the Constitutional Court Number 140/PUU-VII/2009, pp. 313-316. The opinion is supported by Mudzakkir in Mudzakkir *et al.*, "Analisis Dan Evaluasi Undang-Undang No 1 PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama," 29. Strengthening of uncivil society after the reformation also serves as a very strong variable in the religious blasphemy law enforcement that targets the minorities. See Amjad Mahmood Khan, "How Anti-Blasphemy Laws Engender Terrorism," *Harvard International Law Journal Online* 56 (2015): 8, which explains the growth of religious extremism that makes the Religious Blasphemy Law as a means to suppress the religious practices of minorities. See also Opinion of Uli Parulian Sihombing, et al. which argues that the Religious Blasphemy Law should be replaced, Sihombing et al., *Ketidakadilan Dalam Beriman: Hasil Monitoring Kasus-Kasus Penodaan Agama Dan Ujaran Kebencian Atas Dasar Agama Di Indonesia*, 89-90.

Fifth, the law reviewed by the Constitutional Court is not about religious freedom, but religious blasphemy.<sup>96</sup> The Constitutional Court in this case has overlooked another side of the implementation of law enforcement of the religious blasphemy law which has done more damage suppressing the minorities,<sup>97</sup> causing religious minority groups with different religious teachings to be criminalized. The cases of Shia and Ahmadiyah as the minority groups in Islam that are viewed as deviant are proofs that religious minorities become the target of religious blasphemy law enforcement. This suggests that the Constitutional Court does not consider protection of the minorities in the framework of the Religious Blasphemy Law. The Constitutional Court in this case fails to establish the scope of religious freedom that should be protected. The lack of scope of religious freedom means that society's rejection becomes the only indicator that determines the limitation of one's religious freedom. In such circumstance, the state becomes the oppressor and the minorities are the ones who are harmed. The state inevitably takes sides with the interpretation that benefits the interest of the established religion.<sup>98</sup>

Sixth, by making an interpretation of Indonesia as a state of faith, the Constitutional Court inevitably refuses to recognize non-theism in the scope of the State of the Republic of Indonesia. Hence, they have made a narrow interpretation of the form of expression of religious freedom as regulated in Article 18 of ICCPR<sup>99</sup> as well as the Constitution, within which there is an assurance for those who choose to not have a religion. While the essence of Indonesia is a state of godliness, it does not translate to the state being able to prohibit one's religious expression, including the notion of not believing in a god, especially as there is no single constitutional provision that prohibits non-theism.

Seventh, by declaring the Religious Blasphemy Law as constitutional, the Constitutional Court law does not recognize the acceptance of the diversification

<sup>96</sup> Decision Number 140/PUU-VII/2009, 287.

<sup>97</sup> Lindholm, *Kebebasan Beragama Atau Berkeyakinan: Seberapa Jauh?: Sebuah Referensi Tentang Prinsip-Prinsip Dan Praktek*, 28.

<sup>98</sup> Sihombing *et al.*, *Ketidakadilan Dalam Beriman: Hasil Monitoring Kasus-Kasus Penodaan Agama Dan Ujaran Kebencian Atas Dasar Agama Di Indonesia*, 11. See also Mudzakkir *et al.*, "Analisis Dan Evaluasi Undang-Undang No 1 PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama," 37. Similar concerns are expressed in Margiyono, *Bukan Jalan Tengah: Eksaminasi Publik Putusan Mahkamah Konstitusi Perihal Pengujian Undang-Undang Nomor 1 PNPS Tahun 1965 Tentang Penyalahgunaan Dan/Atau Penodaan Agama* (Jakarta: The Indonesian Legal Resource Center (ILRC), 2010).

<sup>99</sup> See General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) of ICCPR. The violations of religious freedom or human rights by the state are common, although the country has ratified the ICCPR. See Simmons, "Civil Rights in International Law: Compliance with Aspects of the 'International Bill of Rights,'" 19.

concept in beliefs/faiths. Consequently, religious actions, statements, or interpretations that are different are assumed as deviant.<sup>100</sup> Further, Constitutional Court negates the fact that the development of Religious Blasphemy Law was issued during an emergency and has a repressive nature.<sup>101</sup> This can be seen in cases which had no elements of deliberation to cause offenses toward others. Such cases are brought to trial despite delivered apologies.<sup>102</sup>

Eighth, religious freedom and freedom of expression depend on each other and strengthen each other. In other words, there is no respect for religious freedom when freedom of expression is not respected.<sup>103</sup> Constitutional Court in this case, does not consider the scope of freedom of expression (opinions) as part of religious freedom. Religious freedom in ICCPR does not include the right to have a religion that is free of criticism or mockery.<sup>104</sup> Freedom of expression allows the public to investigate, openly debate, and criticize a belief system, as well as opinions and institutions, including religious institutions, as long as they do not advocate hatred that incites violence, hostility or discrimination against certain individuals or groups.<sup>105</sup> Constitutional Court in this case does not consider the counterproductive nature of Religious Blasphemy Law in general, as it condemns dialogues, debates and criticisms within and among religions/beliefs, while giving protection toward certain religions and being implemented in a discriminatory way.<sup>106</sup>

Ninth, Constitutional Court does not take into account the side of Religious Blasphemy Law that does not guarantee religious freedom and is against human rights as it can be used to persecute people with beliefs that are different from the

<sup>100</sup> See Mudzakkir *et al.*, "Analisis Dan Evaluasi Undang-Undang No 1 PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama," 24. Similar things are also mentioned in Hasani and Naipospos, *Negara Menyangkal: Kondisi Kebebasan Beragama/Berkeyakinan Di Indonesia 2010*, 3.

<sup>101</sup> Hasani and Naipospos, *Negara Menyangkal: Kondisi Kebebasan Beragama/Berkeyakinan Di Indonesia 2010*, 33 and Expert Opinion of Petitioner Soetandya Wignyosoebroto in the judicial review of the Religious Blasphemy Law in Decision Number 140/PUU-VII/2009, 239.

<sup>102</sup> Zainal Abidin Bagir *et al.*, "Antara 'Penodaan' Dan 'Kerukunan' Makalah Posisi Mengenai UU No. 1 / PNPS / 1965" (Yogyakarta: Program Studi Agama dan Lintas Budaya, Sekolah Pascasarjana, Universitas Gadjah Mada, 2010), 13.

<sup>103</sup> United Nations Human Rights Council, "Annual Report of the United Nations High Commissioner for Human Rights Addendum Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred," 2013, 7.

<sup>104</sup> United Nations Human Rights Council, 9.

<sup>105</sup> United Nations Human Rights Council, 4.

<sup>106</sup> This reflects the nature of the characteristics of Religious Blasphemy Law in general. The same thing applies in the Indonesian context. See United Nations Human Rights Council, 9.

religious interpretation that is recognized by the state, whereas indeed religious freedom is the right of every person.<sup>107</sup>

Tenth, Constitutional Court negates that the restrictions enforced by the state only applies to the behaviors of the citizens, and does not concern the religious faith of an individual (*forum internum*).<sup>108</sup>

Eleventh. Constitutional Court does not consider that there is a lack of clarity in the formulation of the Religious Blasphemy Law<sup>109</sup> and that it is prone to multiple interpretations<sup>110</sup> as stated in the concurring opinion of Constitutional Judge Harjono.

Oemar Senoadji presents an example on how Article 156a of the Criminal Code can be used as a basis to prosecute someone despite them not disrupting the peace among people of faith nor disrupting/harming public order. Each statement that contains any element of hostility, abuse or defamation against religion is a criminal act. Therefore, there is a divergence between “the status and description of criminal acts” and “the text and formulation of the offense.” The formulation is aimed at “religion”, not the disruption of religious feeling or public order in general.<sup>111</sup>

Twelfth, Constitutional Court does not consider the circumstance of how Religious Blasphemy Prevention Law may create tension and violate justice instead of creating interfaith harmony.<sup>112</sup>

### C. CONCLUSION

Based on the previous chapter, there are two conclusions that can be drawn. First, the religious blasphemy law in Indonesia inherently violates human rights and is prone to politicization for certain political interests, and therefore puts the religious minorities in a vulnerable position. The religious blasphemy law is the antithesis to human rights, particularly due to the freedom of expression and opinion within the context of the Indonesian state administration as a state based on the rule of law and founded on Pancasila, and not just one particular religion.

<sup>107</sup> Mudzakkir *et al.*, “Analisis Dan Evaluasi Undang-Undang No 1 PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama,” 37.

<sup>108</sup> Information of Relevant Party The National Commission of Human Rights in the Constitutional Court Decision 140/PUU-VII/2009 p. 252. See also Mudzakkir *et al.*, 37.

<sup>109</sup> Concurring Opinion of Constitutional Judge Harjono in the Constitutional Court Decision Number 140/PUU-VII/2009, 311-312.

<sup>110</sup> See Opinion of Relevant Party Bishops’ Conference of Indonesia in Court Decision Number 140/PUU-VII/2009 on Religious Blasphemy Law, 250.

<sup>111</sup> Sihombing *et al.*, *Ketidakadilan Dalam Beriman: Hasil Monitoring Kasus-Kasus Penodaan Agama Dan Ujaran Kebencian Atas Dasar Agama Di Indonesia*, 10-11.

<sup>112</sup> Opinion of Expert Luthfi Assyaukanie in the judicial review of Religious Blasphemy Law in Decision Number 140/PUU-VII/2009, 237.

Secondly, the constitutionality dimension of the basic legal provisions that criminalize religious blasphemy has been reviewed by the Constitutional Court in several decisions, namely Decisions Number 140/PUU-VII/2009, 84/PUU-X/2012, 76/PUU-XVI/2018, and 5/PUU-XVII/2019. In the four decisions, Constitutional Court decided to reject all petitions. Nevertheless, the constitutionality issues in the decisions remain as the Constitutional Court establishes a religious constitution, whereas according to the 1945 Constitution of the State of the Republic of Indonesia, the state is based on the rule of law founded on Pancasila, not a religious state. Moreover, the Constitutional Court has disregarded human rights, especially the right to freedom/belief as assured in Article 28E and Article 29 verse (2) of the 1945 Constitution of the State of the Republic of Indonesia. Constitutional Court also fails to consider the scope of freedom of expression (opinions) as a part of religious freedom.

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