Judicial Protection for a Religious Minority in Indonesia under the Shadow of the Blasphemy Law

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Abstract

The main argument for maintaining the application of the controversial blasphemy law in Indonesia is to secure public order, to prevent violent conflict, and to protect the enjoyment of the right to freedom of religion. The instrument of law to support such legal policy is the principle of non-discrimination, which applies to everyone regardless of the existence of a religious minority. However, the blasphemy law, as an exclusionary standard, when it was used by the court to examine the validity of religion that belongs to a minority group, has factually undermined its equality to enjoy religious freedom. Therefore, the issue of non-discrimination principle and its problems to the protection of a religious minority in a judicial process becomes central. This article is intended to examine the feasibility of the non-discrimination principle to be upheld on the court under the rule of law framework when dealing with a blasphemy case of Tajul Muluk which involved a religious minority member. As a result, the application of the blasphemy law, when merely based on the principle of non-discrimination and without serious consideration to the existence of a minority group and its religious freedom, has widened legal uncertainty and also undermines human rights protection to everyone equally.

Key words: blasphemy law, non-discrimination principle, religious minority

Introduction

Since 1968, the courts of Indonesia have decided many blasphemy cases. Some of them involved religious minorities as the accused. Mass rallies and religious violence frequently accompany such judicial processes. As a result, several researchers have concluded that a judicial process which involves religious minorities often lose independence and impartiality. The situation is particularly true for blasphemy cases where the only legitimate institution of the state is the court.

Indonesia currently has adopted the main international human rights treaties. As a consequence, it is obligated to respect, protect and promote the rights of every minority members. However, the court only applies the national Penal Code when examining blasphemy cases without taking into consideration international treaties and agreements. Currently, one of the most significant

discussions on minority issues is how to improve the conduct of the courts. Therefore, protecting the rights of religious minorities under threat from the existing blasphemy law must inevitably include a discussion on judicial protection.

Recently, the Tajul Muluk case involves a religious minority dealing with the blasphemy law. Accordingly, the judicial processes have already exhausted all legal remedies that include a constitutional test of the Blasphemy Act No. 1/PNPS/1965. Mr. Muluk is a Shia Islamic teacher who provided voluntary religious education for the community around his home and organized their everyday life such as protecting the land and resources for his followers to become more orderly and prosperous. Shia is a religious minority in Indonesia with Sunni a majority. Also, Sunni believers and leaders play significant roles in the areas of politics, administration, judiciary, legislature, police, and security forces. Although Mr. Muluk achieved significant progress in developing his community from 2006 to 2011, he faced social, economic, and religious conflicts with his family and other local Sunni clerics on the island of Madura. As these conflicts remained unresolved, they transformed into a violent conflict which was presumed to be a religious conflict between Shias and Sunnis that involved wider actors from the local area, in the district, as well as the religious elite at the provincial level. Therefore, in 2012, the house and religious school belonging to the Tajul community were burnt down, some of his community members became casualties, and this led to expulsion of his group from the island. Also, Mr. Muluk was brought before the court and sentenced for having violated article 156a of the Indonesian Penal Code on religious blasphemy against Islam. As a result, he was sent to jail for four years.

In this study, all relevant decisions related to Tajul Muluk case are analyzed using a case study approach to investigate the problems of judicial protection for a religious minority when dealing with a blasphemy case. The long-term implications of this study will impact on the Indonesian judicial system and its application of international standards for the protection of minority rights. A considerable amount of literature has been published on minority issues in Indonesia. However, to the best of the author's knowledge, no report has been found which uses a case study approach to examine the courts' systemic problems.

This article consists of three main parts. The first is going to elaborate a literature review on the theories of religious freedom, minority rights, and equality and non-discrimination. Second, it will

investigate blasphemy law as an exclusionary standard for a religious minority. The final part focuses on the vulnerability of judicial protection for a religious minority.

Literature Review

A comprehensive review of the right to freedom of religion or belief has been conducted by the Oslo Coalition on Freedom of Religion or Belief (Lindholm, Cole Durham, & Tahzib-Lie, 2004). Furthermore, the review cites three models of political protection of religious liberty advocated by Evans (1997). These are (i) The *cuius regio, eius religio* model, (ii) The minority protection model, (iii) The human rights model. Most importantly, Lindholm (Lindholm et al., 2004, p. 28) concludes that the third model is the most suitable for international protection in religious plural societies. Therefore, this literature review explores the theory of religious freedom, followed by the approach to minority rights from an international law perspective. The literature review concludes with a discussion on the theory of equality and non-discrimination as a crucial component of judicial remedies.

According to Scolnicov (2011), religious freedom has an inherent internal contradiction. For instance, it provides a set of liberties for every individual. However, such privileges will be subject to the principle of equality. Additionally, religious freedom as an individual right also becomes an essential part of group identity, and that consequently restrains certain aspects of personal liberty. Furthermore, Sharma (2012) applies three approaches to explain religious freedom, which consists of degrees of religious freedom, types of religious freedom, and constraints on religious freedom.

Lindholm et al. (2004) propose eight core elements of religious freedom based on international human rights law. The features are internal freedom, external freedom, non-coercion, non-discrimination, rights of parents and guardians, corporate freedom and legal status, limits of permissible restrictions on external freedom, and non-derogability. As a result, such definitions of religious freedom make it easier for this research to identify the subjects of judicial protection for a religious minority.

O'Nions (2007) supports the view of Eide (1995) and identifies three main elements of minority protection: respect for the equality of all human beings, group diversity to guarantee dignity and identity of all, and stability and peace at the national and international levels. Furthermore, the

minority as the subject of protection has the criteria of a distinct non-dominant group, a specific homeland, numerical inferiority, excluded categories, and community unity. However, the development of the UN system has emphasized an individualistic approach towards human rights for a minority group. Therefore, individual rights of non-discrimination and equality are more prominent than collective identity.

Pejic (1997) has concluded that the effectiveness of international law on minority protection depends on the will of the state. For example, Castellino and Domínguez Redondo (2006) found that some Asian countries argue that domestic Asian values are reasons to limit the application of international minority rights law. Furthermore, Anam (2016) reports that the involvement of Indonesia in the principal international human rights treaties has less significance for the protection of minority groups. Therefore, further investigation of the conduct of the court as a specific state actor is an important and relevant point.

Jabareen (2007) argues that equality for all citizens in a multi-ethnic state requires participation. Furthermore, the involvement of religious institutions to achieve balance demands the transformation of the legal system, public space, social and economic structures, funding and space. However, such a transformation process faces a hierarchy of protection, as explained by Sargeant (2004), which provides religion with the least protection in both international and domestic anti-discrimination law, due to its sensitivity. As a result, the effectiveness of the international human rights regime for minority protection intertwines closely with the local political and legal system, including its justice system.

Blasphemy law as an exclusionary standard for a religious minority

All levels of the courts without any disputes have agreed to conclude that Tajul Muluk has violated blasphemy law by "*...committing the act of blasphemy against Islam...*" and sent him to the jail for 4 (four) years. Accordingly, the basis for such penalty is his actions that "…*intentionally in public: 1) expressing a sentiment*…and…2) *performing certain actions which principally characterized as blasphemy against Islam*". Interpretation on the meaning of "*in public*," "*expressing the sentiment*" and "*performing certain acts*" is less contentious in comparison to the phrase of "*blasphemy against Islam.*" Furthermore, the debate on the meaning of *"blasphemy against (religion)…*" comes from the absence of a clear definition of *blasphemy* and *religion* on the law, especially Article 156a of the Penal code and the Act No. 1/PNPS/1965. The

only explanation related to the term of blasphemy is on its intentional aspect of "*...merely intended to hostile or insult."* Limited explanation on "*blasphemy*" and *"religion*" as a common standard to classify *"expression"* or *"act"* has provided authority to the court to go behind the definition of religion. However, the judge will have to share such competence to other officials under the criminal justice system, that is the police and prosecutor.

The entry point of the case falls into the authority of the police, which may decide the admissibility of the case and its applicable charge. Furthermore, the police could require the applicant to provide initial or additional evidence and witnesses to support the charge. Accordingly, the charge of the police will be used by the prosecutor to become an indictment before the court. However, the judge may have the opportunity to ask the prosecutor to provide additional evidence or witnesses during the trial.

In the Tajul case, the prosecutor formulates the indictment as follows:

> *"...the surrounding communities assume that Tajul has taught his followers with deviant religious principles. Therefore, such a view has triggered contention among the members of society. Furthermore, teaching and learning methodology used by Tajul is improper since practicing harsh language, impolite, and hostile. Other religious communities also argue that Tajul has accused other Muslim beliefs in an inauthentic holy book of Quran (aqiedah tahrif Quran) which differs from the original version carried by Al Iman Al Mahdiy Al Muntadhor. In general, the teaching of Tajul is incompatible and conflicts with the mainstream Islamic teaching."*[1]

Based on the indictment, the concept of religious blasphemy will include at least following elements:

1. Transfer of religious principles to others on the public area;
2. The religious principles as stated on the point (1) is different from the mainstream religions;
3. Controversial character of the teaching (transfer) methodology;
4. Contentious values and principles to other existing or mainstream religions.

Accordingly, the concept of religious blasphemy adopted by the court consists of elements which could undermine recognition and protection to a religious minority. The first element delivers repression for the minority to express their religious freedom in a public area. Second, the neglect on

[1] Simplified translation of the Charge of Public Prosecutor, Sampang Public Prosecutor Office, Loc. Cit.

religious diversity would lead to violent social conflict and in contradiction with the character and reality of Indonesian society. The third and fourth elements at least become obstacles to express religious freedom externally and to restrain the right to get religious education, especially for children.

Indonesia adopts the rule of law (*negara hukum*) in its constitution[2] by which both state and citizen are bound by common law. Also, the implementation and application of the law must fulfil the principle of non-discrimination[3] and equality before the law and administration[4]. However, the basic law makes no category of "minority" and "majority" among the citizens. Therefore, it would be constitutional for any delegated legislation and regulation to disregard minority terms as long as in line with the principle of non-discrimination and equality. Additionally, this development follows the character of international human rights law that prefers to use the individualistic approach rather than minority group right as stated by O'Nions (2007). As a consequence, the trial of Tajul from its very beginning does not include any question, argument, or debate on minority issues, but only focuses on the blasphemy law[5]. Following an explanation of Tamanaha on the rule of law (2007)[6], the trial of Tajul Muluk has reflected a practice of the thin rule of law, which mostly focuses on the formal aspects of the law (legalism) and little consideration to the basic rights, democracy, and other criteria of rights and justice.

Under the charge and indictment of article 156a[7], the court with its individualistic approach has neglected any issues of religious freedom belonging to a minority, although the elucidation of the criminal procedural law (the Act No. 8 of 1981) has described the significance of human rights promotion during the trial as below:

> *"The 1945 Constitution has explained clearly that the Indonesian state is based on the rule of law (rechtsstaat), not merely based on power (machtsstaat). It means that the Republic of Indonesia is a democratic state based on Pancasila and the 1945 Constitution, highly promoting human rights and guarantying that*

[2] Article 1 (1) of the 1945 Constitution
[3] Article 24I
[4] Article 27 (1), 28D (1) of the 1945 Constitution
[5] Tajul applied human rights argument when filed a constitutional review on the blasphemy law. However the review is not related or separated to his blasphemous criminal.
[6] Brian Tamanaha, ***A concise guide to the rule of law***, St. John's Legal Studies Research Paper No. 07-0082, School of Law, St. John's University, New York. Source: http://ssrn.com/abstract=1012051, as accessed on 5 April 2019
[7] KUHAP

every citizen is equal before the law and government with the obligation to obey the law and the government without exception. It is clear that the appreciation, implementation, and application of human rights or citizen right and duty to enforce the justice should not be abandoned by every citizen, state official, state institution both in the central or regional level, that should also be realized in-and-by this Act of Criminal Procedure."

Also, the judge, police and public persecutor as part of state administration and criminal justice institution have a constitutional responsibility to protect, promote, enforce and fulfil human rights[8]. Most importantly, the constitution has categorized the right to religion as one of non-derogable rights which must exist in any situation[9]. Since Indonesia has ratified the International Covenant on Civil and Political Rights, furthermore, the court should not deny any application of rights belong to a member of a religious minority[10]. However, the unavailability of legal criteria on a minority under the national law provides a pretext for the judge to exclude it from the decision.

Public pressure by the majority plays the victim role to justify the application of blasphemy law. Therefore, every social movement aims to produce relevant evidence to support the trial, such as public rally and unrest, fatwa on a deviant sect, insistence on the ban of religious activities, and expulsion. As a result, the judge recognizes the validity of the following evidence to justify the application of blasphemy law as below:[11]

a. *The fatwa of Sampang ulama council on the deviant of Tajul Muluk's teaching;*
b. *A letter of Muslim community organization of Nahlatul Ulama of Sampang on the deviant of Tajul Muluk teaching and its negative impact on public peace;*
c. *A letter of a statement by Tajul as required by the majority on an agreement to break his public religious activities.*

Although this may be true that such public pressure seems to interfere with the court, however, the judge will get advantage from the presence of that evidence to examine the validity of a religion. It may become a case due to the lack of a clear, neutral, and universal definition of religion on the blasphemy law as a legal reference for the judge. Therefore, the blasphemy law has created systemic demand on a structural collaboration between the judge and religious majority to determine the

[8] Article 28I (4) of the 1945 Constitution
[9] Article 28I (1) of the 1945 Constitution
[10] Article 27 of the International Covenant on Civil and Political Rights
[11] Decision of Sampang District Court , pp. 90-91.

boundaries and criteria of a valid or deviant religion. On the other hand, this fact has also proved that it is impossible to formulate a uniform and general definition of religion that all members of plural religious communities accept. Furthermore, power relations become a decisive factor to apply the blasphemy law to its victims.

The courts generally rely on the inclusion of equal and non-discrimination principles in the term of a "*barang siapa* (*whosoever*)" as one of the elements in the definition of the perpetrator of the blasphemy law, i.e. "*...whosoever as a competent legal person and the enable to take responsibility for every result of action*" [12]. The scope of "*whosoever"* includes everyone regardless their status whether as the member of a religious minority or majority group in line with the principle of equality before the law as stated in the Article 27 (1), 28D (1), 28I (2) of the 1945 Constitution and Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR)[13] that "*...All persons shall be equal before the courts and tribunals.*" However, the term *"whosoever*" is not neutral when it applies to qualify conduct of blasphemy as "*...interpretation and activity which are deviant to the main religious teaching*". It is clear that such stipulation provides a policy of majority favouritism. Therefore, any religious interpretation and activities committed by a member of a minority group could become the subject of alleged blasphemy easily.

The constitutional court legitimizes the dualistic classification on a religion based on the following argument[14]:

> "*...every religion has its principal teaching which has been accepted by all its members internally. Therefore, the determination on the standard of main religious teaching is authorized to religion itself internally. However, Indonesia principally makes no separation between religion and state. Therefore, it establishes a ministry of religious affairs which serve and protect all aspects of religious development includes helping to manage each diverse internal religion to agree on a standard of valid and general main religious teaching. The state will refer to such agreement to determine the validity of a religion. Therefore, the court argues that there will be no kind of state-centred approach to decide a standard of main religious teaching for the blasphemy law."*

[12] Decision of Sampang District Court No.. 69/Pid.B/2012/PN.Spg, 86.
[13] Indonesia ratifies the ICCPR by the Act No.12 of 2005
[14] Simplified translation on the decision of the Indonesian Constitutional Court No.: 140/PUU-VII/2009, Par. 3.53.

As stated above, the determination on the standard of main religious teaching is mainly in the domain of each internal religion. At the same time, the state has a function to support every religious community to compile and synchronize diverse religious teachings coming from their internal plural sects or denominations to established a common standard of religious teaching. Furthermore, the state will recognize and administrate the standard, so that it becomes a public legal document. Following the argument of the constitutional court, when the standard is finally formalized as a legal document, therefore, it would be a subject of a legal complaint about any alleged violations especially to the right to freedom of religion or belief.

As an idealized general standard of exclusion, the main religious teaching could be used by any government units and the court to evaluate or adjudicate a religious blasphemy case. However, the efficacy of the standard will depend on its deliberative processes of formulation and its genuine and meaningful participation by all the member sects of a religion. Accordingly, such an effective and respectful standard may be able to protect public order and religious freedom. However, in the Tajul Muluk case, any ideal exclusionary standards are not available; on the contrary, the fatwa and recommendation issued by local religious communities (local ulama council (MUI) and Nahdlatul Ulama (NU)) provide only modified standards according to their interests to suspend the activities of Tajul's communities. Accordingly, those local standards just become repressive legitimation due to the lack of meaningful participation by a minority on its establishment and application. For instance, investigation or identification on the Tajul teaching[15] is mostly gathered from subjective testimonies of the ex-followers of Tajul Muluk then by objective and deliberative processes. Nevertheless, the fatwa of MUI at the provincial level paradoxically argues its limitation on Tajul's religious rights based on the pretext of the article 73 of the Human Rights Act No. 39 of 1999 which stipulates that, "*Rights and freedoms set forth in this Act are only subject to limitation through and based on a law, merely aimed to guarantee the recognition and respect to human rights and fundamental freedom and basic freedom of others, morality, public order, and state interest.*[16]" The fatwa has neglected the elucidation of the article 73 which requires that human rights limitation may be only implemented formally through an Act, and it is not allowed to restrict non-derogable rights that include the right to freedom of religion or belief.

[15] Fatwa of MUI Sampang, No. A-035/MUI/Spg./I/2012, dated on 1 January 2012
[16] Fatwa of MUI East Java, No. Kep-01/SKF-MUI/JTM/I/2012, dated on 21 January 2012

The Indonesia Ulama Council (MUI) has a significant role in the judicial processes of Tajul Muluk and other blasphemy cases generally. In the historical context, the role and awareness of MUI on religious blasphemy started from its national congress (*Rapat kerja nasional (Rakernas)*), 6th November 2007, on *the Guidance for Identification of Deviant Sect* which classifies a deviant Islam as below:[17]

1. *Denial on the one of the six principles of Islamic faith, i.e. the faith on Allah the God, the Malaikat (Angel), Quran the holy book, Muhammad the prophets, the doomsday, the fate and destiny; or denial on the one of five principles of Muslim, i.e. confession of Islamic faith (syahadat), shalat (worship), Zakat (*alms), fasting (*Ramadhan Shaum*), and *Hajj* (pilgrimage);
2. *Belief on faith as in contradiction to the Islamic law (al-Qur' an and al-Sunnah);*
3. *Belief on the revelation after the al-Qur' an;*
4. *Denial on the authenticity and the truth of al-Qur' an;*
5. *Interpretation of the al-Qur' an in contradiction to its rules and principles;*
6. *Denial on the Hadith as one of Islamic teaching;*
7. *Insult, despising, and demeaning on the recognized Prophets;*
8. *Denial on Muhammad SAW as the last Prophet;*
9. *Changing, adding, and reducing the main elements of religious ritual as stipulated by the Islamic law (sharia) such as the pilgrimage is not to the Baitullah, Shalat (ritual pray) is not in five times a day.*

In applying the standard above, MUI has established a set of procedures as follows:

1. *Initial research by the assessment commission as the basis for a decision on the deviance of an Islamic sect through the collection of relevant data and information, evidence, and witness about the concept, thought, and activities of the sect;*
2. *Initial assessment by the assessment commission on the ideas and activities of the sect based on the view of the Islamic school of thoughts (imam madzab);*
3. *Verification (tahqiq) and clarification on the evidence (tabayyun) to the sect leader. The commission may also provide a counsel to a deviant sect so that adopting a correct religion;*
4. *All results from the above processes then submitted to the council committee;*
5. *If necessary, the council committee may assign the fatwa committee to discuss and issues a fatwa.*

[17]http://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi15fLalqLOAhXBq48KHYvID0wQFggfMAA&url=http%3A%2F%2Fwww.lppipusat.com%2Fwp-content%2Fuploads%2F2015%2F11%2FPEDOMAN-IDENTIFIKASI-ALIRAN-SESAT.docx&usg=AFQjCNGppKPlIgsn-cPk8IfyLhlaNoENaA, as accessed on 20 July 2016

Consequently, the MUI has to meet a set of formal or procedural requirements before issuing a fatwa on the deviant of a religious sect, i.e. initial research, verification, data analysis, and senior supervision. Also, the competence to issue a fatwa belongs to the central office; however, the local office may issue a fatwa after getting a consultation with the central office based on an emergency.

During the trial of a blasphemy case, however, the judge has the opportunity to scrutinize the procedural correctness of the fatwa. As a consequence, any manipulation which may have prejudiced the rights of the accused can be identified to make an appropriate and fair decision. As an example, the judge in the Tajul case has practiced such a role through the following arguments on the decision:

> *"…in consideration to the indictment that the accused has delivered a religious teaching which consists of: 'The addition of two Islamic confessions by waasyhadu anna aliyyan waliyyullah wa asyhadu anna aliyyan hujjatullah, obligation to consider as infidel to the companions of the Islamic prophet of Muhammad, father-in-law, and his wife, al-Fidha, and ar-Roji'ah', The court argues that the allegation has no sufficient evidence and be based only to the testimony of Roeis al-Hukama without taking oath. Therefore, the allegation has no met the requirement on the minimum of two sets of valid evidence[18];*
>
> *"…in consideration to the teaching of the Islamic faith and Muslim principles (rukun iman dan Islam), the court agrees to the argument of the expert's opinions of the accused, i.e. Dr. Zaenal Abidin Bagir, MS., Dr. Umar Shahab, MS., and Prof. Dr. Zainun Kamal, MA. Also, the judges also agree to the arguments which refer to the documents of Amman Message and a book titled "Sunnah-Syiah, Hand in Hand! Possible? By M. Quraish Shihab. Accordingly, the evidence supports the view that there exist substantive similarities between 5-and-6 pillars of the Islamic faith and 8-and-5 pillars of Muslim principles which generally recognized by Indonesian Muslim. On the other hand, the quantitative difference of the principles is mere as the consequent on perspective and interpretation to the al-Quran and al-Hadith.[19]"*

As shown above, the application of Article 156a could lead to the violation of the right to freedom of religion or belief because the allegation or indictment may have no factual basis on a blasphemy action, but refers only to any interests as a result of conflicting power relations in social or religious life.

[18] Simplified translation to the decision of Sampang district court No. 69/Pid.B/2012/PN.Spg, p. 89.
[19] Ibid. 93.

Likewise, MUI has a structural problem due to the possibility of committing internal repression to the unrepresented Islamic community, which has a different perspective or interpretation to certain aspects of religious teaching or principles. Therefore, implementation of corporate freedom as part of the right to freedom of religion must consider the impact on the internal repression, especially toward the member of a minority group. Also, MUI by its fatwa No. 6/MUNAS.VI/MUI/2000 on Human Rights has proposed the need to recognize and respect the plural interpretation and implementation of religion as follows:

1. *It is obligatory to accept, respect, and highly promote universal human rights under the conditions that:*
    a. *Respect and honour to the differences in concept, interpretation and implementation which based on the differences of culture, morality, and applicable law on the respective state;*
    b. *Understanding and implementation of human rights should take into consideration:*
        1) *The balance between individual rights and individual duties;*
        2) *The balance between individual rights and social rights;*
        3) *The balance between freedom rights and responsibility.*
2. *About the Article 16 (1-2) and Article 18 of the Universal Declaration of Human Rights, the Muslims should adhere to the Islamic teaching due to the freedom to manifest religious teaching is part of human rights.*

Furthermore, the urgency to protect a member of the religious community from internal repression is based on the constitutional status of religious freedom as "*...human rights which could not be derogated in all situation"*[20]. Accordingly, article 4 (2) of the ICCPR states also that "*No derogation from articles (...) 18 may be made under this provision*."[21] Formally, by the fatwa, MUI has made no limitation on its recognition to the status of the right to freedom of religion or belief in the constitution and ICCPR. In this case, MUI even emphasizes the freedom to manifest religious teaching as part of human rights. However, the fatwa of MUI is not a legal regulation under the Indonesian legislation system. Therefore, it has no legal binding, and its applicability merely depends on the willingness of each Muslim. In a trial, the judge may use the fatwa to examine a case due to the need of any living law values in the complement of state law[22].

[20] Article 28I (1) of the 1945 Constitution
[21] Indonesia has ratified ICCPR by the Act No12/2005
[22] Article 5 (1) of the Act No.48/2009 on the Judicial Power: "Judge and constitutional judge shall explore, follow, and understand living law and sense of justice in society"

Enforcement of the blasphemy law is not only about the legitimate limitation to religious freedom to protect public order, but it also covers a problem from the vulnerability of an alleged person belonging to a religious minority. The applicability of a human rights perspective on the court will enhance the possibility to balance legal protection between public interests, which is mostly a representation of the religious majority group, and the demands of minority groups for affirmative action due to their vulnerability from holding different religious interpretations.

The vulnerability of judicial protection for a religious minority

State intervention in matters of religious freedom has increased the chance of indirect discrimination to a member of a minority group. Accordingly, the main instrument of such policy is the blasphemy law, although the establishment of the law formally aims to protect the right to religious freedom of every citizen. Like the case discussed above, the roles of a state-sponsored religious institution like MUI has biased the public and the court against the interests of a religious minority. Therefore, the policy to preserve the application of the blasphemy law in the human rights era has undermined the meaning of religious freedom.

Public peace and order as a legitimate aim to limit religious freedom have become a legal pretext in the blasphemy case. For example, the public amok initiated by the members of the majority will legitimize the act of bringing a member of the minority before the criminal court. Paradoxically, the judge refers to such public unrest to provide a higher criminal sanction to the Tajul who is the victim[23]. Therefore, a peaceful society in that context means the toleration or silencing of a minority against any structural and cultural violence which has eliminated the minority's religious freedom. Furthermore, the independence and impartiality of the court have become the biggest challenge when dealing with a blasphemy case, according to the principle of the rule of law[24] such as supremacy of law, equality before the law, due process of law, independent administrative organ, independent and impartial court, the existence of administrative court and constitutional court, human rights protection, democracy, welfare of the state, and transparency and social control[25].

[23] Decision of Surabaya High Court No.481/PID/2012/PT.SBY, dated on 10 September 2012.
[24] Article 1 (3) of the 1945 Constitution
[25] Jimly Asshiddiqie, **Konstitusi & Konstitusionalisme Indonesia**, Revised Edition, , Konstitusi Press, Jakarta, 2005, 151-162.

The judicial practice on a blasphemy trial has also violated the right of the accused of equality before the law and administration. The application of article 156a on the Muluk case has omitted the initial administrative requirement before implementing the criminal procedure as outlined in article 3 of the blasphemy law:

> *"If following a joint administrative action taken by the minister of religion, general attorney, and home affairs based on the article two, but there are still any violations against the article one (blasphemy) conducted by a person, followers, members, and/or the leader of alleged organization, therefore, the person in concern will be convicted for maximally five years imprisonment.[26]"*

Under the above legal procedure, the blasphemy law, in fact, prioritizes the administrative mechanism rather than criminal procedure. Therefore, a comprehensive administrative measure by three relevant ministries seems to be a more effective, peaceful, and inclusive way to prevent a blasphemy or religious conflict. Accordingly, the administrative procedures firstly will provide a warning and initial investigation to settle any conflicting religious activities. The maximum administrative sanction should be the closure or dissolution of the related religious organization through a presidential decree after getting relevant inputs from the three ministers. The application of article four of the blasphemy law as a criminal procedure would be the *ultimum remedium,* or the last effort following the failure of the administrative mechanism.

The legal policy to bypass the administrative procedure by the court in the Tajul Muluk case relies on the argument below:[27]

> *"...the act of the accused, Tajul Muluk alias Haji Ali Murtadha has complied to the requirement of the article 156a although it has not complied to the formal requirement of a joint ministerial decree issued by the minister of religion, the general attorney, and the minister of home affairs. Accordingly, there has been some case law on which the application of the Article 156a could ignore the administrative procedure or formal requirement, for instances, the case of Arswendo (1990), Lia Eden (1997), etc. Furthermore, the supreme court has also decided that a legal process on the violation of Article 156a could be independent of the presence of a joint ministerial decree. Theoretically, the decision which has been followed or referred frequently in the later decision will become the law. It means that in the later similar-case, there will be no requirement of a joint ministerial decree as stipulated under the Act No.1/PNPS/1965."*

[26] Simplified translation to article 3 of the Blasphemy Law (the Act No. 1/PNPS/1965).
[27] Expert testimony of Prof. Nur Basuki Minarno, SH., M.Hum., the Bill of Indictment, No. Reg. Perk: PDM-34/SPG/04/2012, dated on 4 July 2012, 49-50.

The courts on the first and second level[28] follow the argument and disregard the challenging opinions provided by the accused. As evidence, the cases referred by the expert have diverse characters and backgrounds, although they are examined under the same law. For more detail, the Arswendo case was triggered by a reader polling of a Monitor tabloid about "*who is your favourite figure and what is the reason?"* which finally placed the Prophet of Muhammad SAW in the eleventh position out of 50 names. Following the publication of the result on 15 October 1990, there were frequent and strong protests from the Muslims and supported by the MUI for the allegation of a blasphemy against Islam conducted by the tabloid. As a result, the court decided that Arswendo, as the chief editor, had committed blasphemy against Islam and received a criminal sanction of five years imprisonment for his responsibility as the chief of the editor[29]. On the other hand, the case of Lia Eden was related to a sect which disseminates treatises on the deletion of Islam and all other religions which are accompanied by a recommendation not to adhere for any religion[30]. Additionally, these two cases are unable to represent any blasphemy cases which have features of a majority-minority conflict and their requirement for an exclusionary standard.

In a different manner, the constitutional court argues that the available administrative procedure on the blasphemy law is the implementation of the precautionary principle. Therefore, the issuance of a joint ministerial decree becomes a social control based on the constitution to deal with a certain situation which causes conflict and public disorder. Consistently, the constitutional court uses this argument as part of its reasons to uphold and confirm the constitutionality of the blasphemy law.[31] Although the constitutional court has asserted that the administrative measure is a priority when dealing with a blasphemy case in the context of social conflict, however, the judges at the district court, the high court and the Supreme Court has dismissed such argument and prefer to follow the slogan of "*...as the act of the accused has met the elements of indictment...*"[32]. Therefore, the fatwa of MUI may substitute for the administrative procedure through a criminal procedure in the court.

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[28] Decision of Surabaya High Court, No.: 481/PID/2012/PT.SBY, dated 10 September 2012.
[29] http://indonesiatoleran.or.id/2012/06/kasus-penodaan-agama-arswendo-atmowiloto-angket-tokoh-di-tabloid-mingguan-monitor-1990/ as accessed on 20 July 2016
[30] https://m.tempo.co/read/news/2009/06/02/064179493/lia-eden-dihukum-2-5-tahun-penjara as accessed on 25 July 2016
[31] Ibid. Par. 3.58-60.
[32] Decision of Surbaya High Court No.: 481/PID/2012/PT.SBY, The judge panel of the first court in applying Article 156a of the Penal Code disregarded the purposes, basic, and interpretation on the basis of the Act No.1/PNPS/1965 specifically about the administrative procedure as regulated through a joint ministerial decree (interior minister, religious affair minister, and attorney general) before applying criminal mechanism.

Consequently, the judge recently should not provide a deeper explanation and comprehensive argument on the decision about the philosophical and systematical aspects of the blasphemy law. Finally, the weakness of the blasphemy law as recognized by the constitutional court[33] would be difficult to cope with due to the objection of the judge under the criminal justice system to implement or review comprehensively the blasphemy law included its administrative procedures.

Conclusion

In the context of Indonesian plural societies, the principle of non-discrimination alone is not effective to protect the right to religious freedom belonging to a member of a religious minority when dealing with a blasphemy case. In this case, the judge perceived a member of a religious minority as equal to other fellow citizens before the court. At the same time, the court applied a general blasphemy law which had prejudiced the existence and the rights of a religious minority. Additionally, the recognition of the existence of a deviant religion by the blasphemy law automatically is in contradiction with the terminology of non-discrimination itself. On the other hand, the need for a standard of exclusion by the blasphemy law has strengthened majority exceptionalism by using its power relationship to dominate and manipulate legal remedies against the minority. Therefore, the application of the blasphemy law systematically will distort the credibility of the court as an important element of *negara hukum* (the rule of law).

An individualistic approach to promote the right to religious freedom requires the strong implementation of the non-discriminatory principle. Therefore, the existence of the blasphemy law, which inherently contains discriminatory legal norms, has deteriorated the promotion of this right. For this reason, the individualistic approach is not a proper method to protect the right to religious freedom, which always has a collective character. Furthermore, the need for a collective approach is consistent with the situation of Indonesian citizens who mostly adopt a religion and practice it communally.

The unavoidable existence of religious minorities across the archipelago insists the state to legally recognize and protect them. A national legal system that respects a minority, therefore, is a vital element to maintain the national unity and integrity of Indonesia due to its diverse religious community (*Bhinneka*). Furthermore, the blasphemy law which negates the existence of minority will endanger such national unity and integrity. In the judicial context, the lack of legal recognition to the

[33] Decision of the Indonesia Constitutional Court No.: 140/PUU-VII/2009, Par. 3.71.

minority has made it difficult for the judge to balance the negative impacts of the application of the non-discrimination principle to a blasphemy case. Accordingly, any affirmative action toward a vulnerable minority seems to be easier to apply when the legal framework is available.

Since the blasphemy law is still valid until today, therefore, the minimum role of the court is integrating the norms and principles of religious freedom and minority rights into its decision. However, the judge would face the difficulties to do so due to the obstacles of the legal tradition which put the issue of blasphemy strictly under criminal law. Consequently, the judicial institution should make an initial policy to mainstream and sensitize human rights law among the judges. As a result, there will be less resistance from the court to take into consideration any rights-based arguments during the trial. Additionally, the judiciary in the long-term should accommodate the development of human rights law into their junior judge training curriculum. The success of that kind of policy would make it easier for the court to focus on the protection of religious rights, and restrain it from involvement in the debate of the theological validity of a religion.

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