



Policy Brief

Promotion of Judicial Protection to the Right of Religious Freedom or Belief for Minority Group

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1. Summary

Article 156a of the Penal Code on religious blasphemy has become a form of state legitimacy to categorize and recognize religion formally. Additionally, that article provides also a possibility for state authorities or religious groups to question the validity of a religion or belief held by a person or community even backed up by criminal sanctions. Consequently, the blasphemy law involves the criminal justice system, which has enormous potential to discriminate and marginalize a religious minority. The substance and procedure of the law have biased the rights of a member of a religious minority.

The national and international human rights law system has put a legal obligation on the Indonesian criminal justice system to protect the right to freedom of religion or belief. However, the Penal Code until now has not included those rights for protection against religious blasphemy. Therefore, equal judicial protection to the rights towards everyone has been minimal from the beginning. Furthermore, a practical strategy to avoid the discriminatory application of Article 156a is through the integration of human rights norms and principles, especially concerning the right to freedom of religion or belief, into the court decisions. The Supreme Court and the Constitutional Court can make any policies that encourage the sensitivity of the judges to the rights when examining and deciding a blasphemy case.

The police and prosecutor must consistently follow the objective evidence in determining the charge and indictment and also prevent interventions by mass pressure and irrelevant parties to the case. In the context of avoiding violent religious conflicts and the post-conflict recovery processes, the roles of the regional government are very significant. One of the primary functions of the local government is to facilitate a peaceful, genuine, and participatory inter-religion dialogue to reduce prejudice and conflict escalation, and also, to provide effective procedure or mechanism for reconciliation, rehabilitation and post-conflict reconstruction.

2. Urgency

The court has critical roles in maintaining Indonesian peace and integrity through its adjudication function. Furthermore, the effectiveness and significance of such tasks will depend on the credibility and legitimacy of the court. A morally justified decision and also respect for human rights will provide a strong foundation to build that kind of credibility and legitimacy of the court. Furthermore, the

respected court will contribute to increasing the effectiveness of the national law and its functions due to public trust in the rule of law.

One of the indicators to measure such effectiveness is related to the adjudication of blasphemy law on the Tajul Muluk case. The case has exhausted all legal remedies and also represents the problem of equality and justice for every citizen of a plural country. Accordingly, minority status could be given to any member of the religious group given the asymmetrical distribution of religious communities across the archipelago. Furthermore, the Tajul Muluk case could show and represent the vulnerable character of a religious minority in the context of their social structure in addition to their difference in the religious school of thought. Therefore, although the research departs from a specific case, however, it is likely that the results may be useful as a reference and comparison when dealing with another typical case of religious blasphemy involving a member of a minority group.

3. Problem

The starting point of Tajul Muluk's case is the social problems related to poverty, education, and culture. In the complexity of these social problems, there has been less effective state functions to deliver social development; therefore, this leads to uncontrolled social and religious conflicts among diverse local communities.

Entanglement between social and religious conflicts have formed a sharp disagreement among community leaders and their members, which weakens social cohesion. Additionally, dominant groups have taken advantage of the position of law enforcement officers by creating a collaboration to influence the application of the blasphemy law. Therefore, the involvement of the criminal justice system into a religious conflict has not been independent and impartial enough based on the principle of the rule of law and human rights.

4. Implication

The implication of the problem is the need to produce a policy which is capable of improving the capacity of the judiciary to protect the right to freedom of religion or belief, especially to a member of a minority group.

5. Evaluation

The application of article 156a has not been conducted in the appropriate ways in terms of:

1. The judge was reluctant to seek and elaborate material evidence during the trial as the manifestation of its independence and impartiality.
2. The police failed to include available facts and indications proportionally to become the basis of its criminal charge and preferred to consider the will of public pressure.
3. The prosecutor neglected to use its function to supervise the formulation of the charge by the police, and this situation has skipped the check and balance mechanism.

The background of evaluated problems:

1. In general, the application of Article 156a is intended to prevent religious blasphemy and protect the principle “*Ketuhanan Yang Maha Esa*” (*the Supreme Divine*).
2. There has been no clear legal definition on the religion under the Indonesian legal system which provides empty room for religious communities to dominate its interpretation according to their interests. However, the policy of state recognition toward the existence of religion or belief has limited the object and scope of rights protection. Therefore, there are only five to seven religions that are recognized and supported by the state such as Islam, Hindu, Buddha, Christian, Catholic, Confucianism¹ and Kepercayaan (*local religion*)². Therefore, there has been a shift on religious recognition from the area of private and independent religious communities as human rights into the state authority such as the judicature. However, the lack of a formal definition on religion has invited the religious majority to use any legal or non-legal means to pressure the judges to interpret the scope and meaning of religion in favour of their cultural, social, economic and political interests. Therefore, this situation has undermined the development of the judicial system according to the principle of the rule of law as stipulated under the constitution.
3. The police and public prosecutor experience also the dilemma of public pressure like the court even from the initial processes of the criminal justice system. The charge and indictment, therefore, has become the object of manipulation by the dominant group and influenced the decision of the court. Consequently, the weak rule of law has undermined the principle of non-discrimination and equality before the law. Furthermore, the lack of sensitivity to the issues of minority rights on the court has led to the denial of equal rights and protection to religious freedom for everyone without discrimination.

¹ Elucidation on the Act No. 1/PNPS/1965 on Religious Blasphemy

² Article 7 of the Act No. 24/2013 on the Amendmend of the Act No. 24/2013 on the Demographic Administration

6. Recommendation

The government both at the national and local level should fulfil the rights of every evacuee immediately as a victim of social and religious conflict, which consist of:

- 1) Legal status and citizenship administration should be available for every evacuee due to its importance to their access to public services and social and economic activities;
- 2) Returning the evacuee to their home village as part of their essential social and cultural identities;
- 3) Religious facilities for children and their parents in the settlement to conduct their worship and religious teaching;
- 4) The local authorities should protect abandoned properties of every evacuee from illegal occupation and seizure;
- 5) The government should provide a decent of living standard to every evacuee during the processes of resettlement;
- 6) Protection of the evacuee to have social, economic and cultural interaction with surrounding society at the settlement.

The Supreme Court, as the primary institution of judicial power, is required to make policies as below:

- 1) Strengthening human rights perspective, knowledge and competence of the judge through upgrading education or training to anticipate the trial of a blasphemy case or human rights case in general;
- 2) Strengthening cooperation with the relevant institution, especially under the criminal justice system, to provide a common understanding on the promotion and protection of the right to freedom of religion or belief and also the issues of a minority group.

The benefit from the fulfilment of such policies for the Supreme Court would be:

- 1) The increase of its credibility that will also help to recover its institutional legitimacy;
- 2) The meeting of its constitutional obligation to promote the principle of due process of law that finally will increase public trust and participation in the rule of law;
- 3) Access to justice would be possible to reach for the vulnerable group, especially a member of a religious minority.

The constitutional court that has to function to protect the fundamental rights of the people from unconstitutional law and regulation is required to consider the following approaches or policies:

- 1) Constitutional test to an Act should consider both its normative aspects and the impacts of its implementation and application. In the case of the blasphemy law, focusing only on its normative

elements of the Act toward the constitution has undermined the meaning and value of constitutional rights to religious freedom.

- 2) The court should provide extensive reading to the constitution which involve integrated human rights norms and principles, including the right to religious freedom, equality before the law, and non-discrimination based on religion.