

**PROTECTING THE ONE AND ONLY GOD:
A HUMAN RIGHTS ASSESSMENT ON INDONESIAN
BLASPHEMY LAW**



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1 Introduction

1.1 Background

Indonesia recognizes freedom of religion or belief as an important element of Human Rights. Such recognition is demonstrated by Indonesia having committed itself to regulating norms of freedom of religion or belief in its Constitution¹ and also in other positive legal sources². Such commitment has also been demonstrated by Indonesian ratifications of relevant treaties of international law pertaining to freedom of religion or belief.³ The adoption of these various set of laws basically proves that Indonesia already has an extensive legal framework securing freedom of religion or belief in its territory.

Along with its commitments on freedom of religion or belief, Indonesia also has enacted Law Number 1 of 1965 on Prevention of Misusing and or Defamation towards Religions, shortened as “Law No. 1/PNPS 1965” and usually referred to as the Law on Religious Defamation. This law addresses certain acts or conducts that could be considered as blasphemy and their respective sanctions and punishments. Its Article 1 prohibits anyone from indulging in interpretations and activities that deviate from any established or recognized religion.⁴ Article 2 elaborates the process on how to deal with breach of the provisions of this law such as: issuance of a warning through Joint Ministerial Decrees⁵ and dissolution of organizations through Presidential Decree⁶. Article 3 renders as criminal act any recurring deviant acts if conducted after the issuance of a warning or dissolution of the organization. Finally, Article 4 provides that a new blasphemy article be introduced in the

¹ Articles 28E (1)(2), 28I and 29 (2) of the 1945 Constitution of Indonesia.

² Article 22 (1) and (2) of Law Number 39 Year 1999 on Human Rights.

³ Law Number 12 Year 2005 on The Ratification of International Covenant Civil and Political Rights and Law Number 29 Year 1999 on The Ratification of International Convention on the Elimination of All Forms of Racial Discrimination 1965.

⁴ Article 1 of Law No. 1/PNPS/1965.

⁵ Article 2 (1) of Law No. 1/PNPS/1965.

⁶ Article 2 (2) of Law No. 1/PNPS/1965.

Indonesia Criminal Code (*Kitab Undang Undang Hukum Pidana/KUHP*). Consequently, article 156a of the Indonesian Criminal Code was later introduced stipulating the following:

“By a maximum imprisonment of five year shall be punished anyone who deliberately, in public, expresses or conducts any act:

a) which in essence is hostile, abusive or defamatory toward a religion adhered in Indonesia;

b) with the intention of making a person not adhering to any religion that is based on the notion of the One and Only God.”

In one perspective, Law No. 1/PNPS 1965 can be seen as an honorable measure undertaken to protect harmony between adherents of different religions in Indonesia so they could peacefully enjoy and manifest their own belief without any hindrance or offence. But as time passes by, Law No. 1/PNPS 1965 has become an obstacle for full realization of the right to freedom of religion or belief in Indonesia, or so I shall argue. The government uses Law No. 1/PNPS 1965 as a legitimating tool to ‘secure’ “recognized” religions in Indonesia (Islam, Protestant Christianity, Catholicism, Hinduism, Buddhism and Confucianism)⁷ against deviant acts or blasphemy by adherents of any other religious or belief group.⁸

Article 156a Indonesian Criminal Code has dragged many persons to courts and they have easily been punished as “blasphemers” or “deviants” from officially authorized doctrines or practices of each of the “recognized” religions. Furthermore, Joint Ministerial Decree, with legal basis in Article 2 Law No. 1/PNPS 1965, has been used by the Indonesian

⁷ Article 1 of the Elucidation of Law No. 1/PNPS 1965.

⁸ Siti Musdah Mulia. *'Potret Kebebasan Beragama dan Berkeyakinan di Era Reformasi'*. Presented during the National Workshop of the National Commission of Human Rights (Komnas HAM). Jakarta, July 8 – 11, 2008. See: www.komnasham.go.id/.../Musdah%20Mulia_Potret%20Kebebasan%20Beragama%20di%20Era%20Reformasi.rtf, last accessed 14 March 2010. p.1.

government to oppress religious sects which were deemed to ‘deviate’ from the main teachings or doctrines of recognized religions. The case of Ahmadiyah is a clear example of such a practice.

Ahmadiyah case is a complicated case in the context of human rights. Ahmadiyah is recognized in most liberal countries as a religion but considered as “deviants” in countries with a Muslim majority, including Indonesia. For adherents of Ahmadiyah belief, Mirza Ghulam Ahmad is the prophet after Muhammad. This belief is contrary to the main Islam doctrine that Muhammad is the last prophet.⁹ The government of Indonesia passed a Joint Ministerial Decree containing a warning for the adherents Ahmadiyah belief to terminate their “deviating” interpretations and activities.¹⁰

1.2 Problem Statement

There are conflicting understandings as to the impacts of the Blasphemy Law on religious freedom in Indonesia. The government of Indonesia views this law as legitimate in the sense that it provides a limitation based on the recognition and respect of the rights and freedoms of others and satisfying just demands based upon considerations of morality and religious values in a democratic society. A decision on the Ahmadiyah case has to be seen, according to the Minister of Religious Affairs, as a measure to protect adherents of Islam in Indonesia from blasphemy made by Ahmadiyah.¹¹ According to this opinion, a faith or belief which contradicts or “deviates” from fundamental religious teaching is considered defamation, thus does not fall within the ambit of freedom of religion or belief as protected by the human rights legal framework of Indonesia.

Contradictory to the above governmental view, many people regard the Blasphemy Law as a form of arbitrary intervention from the state. Accordingly, this law has been seen as a

⁹ ‘Ahmadiyah Tetap Akui Mirza Ghulam Ahmad Sebagai Nabi’, Detiknews, 16 April 2008, See: <http://www.detiknews.com/index.php/detik.read/tahun/2008/bulan/04/tgl/16/time/145652/idnews/924426/idk-anal/10>, last accessed on 17 February 2010.

¹⁰ Joint Decision number 3/2008, number KEP-033/A/JA/6/2008, number 199/2008 by Minister of Religious Affairs, Attorney General, Minister of Internal Affairs on The Warning and Instruction for the adherents, members and/or member of organization of Jemaat Ahmadiyah Indonesia (JAI) and citizens.

¹¹ ‘Menag: SKB Bukan Intervensi terhadap Kebebasan Beragama’. Kompas, 9 June 2008.

root cause for violation of religious freedom in Indonesia. This opinion is among other based on the fact that implementation on this law eventually has become more like a justification for discrimination against people on the ground of their religion, thus clearly contradicting the Indonesian Constitution and the International Covenant of Civil and Political Rights (ICCPR).

In a historical perspective, people would argue that the law was adopted through a process that was not democratic since it did not involve the House of Representatives. It originated in a 1965 presidential decree which was then subsequently upgraded to a statute of law. As later elaborated in this thesis, this process does not satisfy the procedure of the law making in Indonesia, in which a law can be passed only by the House of Representatives with consent from President.¹²

On the international level, this law is seen as one of the major problems for implementing freedom of religion and belief in Indonesia. This was demonstrated during the hearing session of the submission of Indonesian Universal Periodic Review to the Human Right Council. The Council asked for legal grounds of the issuance by the Indonesian government action of the Joint Ministerial Decrees on Ahmadiyah. Indonesia's delegation replied that that the Decree violated neither the Indonesian Constitution nor ICCPR, because it was meant as a measure to maintain order in religious matters and to ensure protection of religion as stated in the Indonesia Constitution and relevant laws.¹³ Despite the Indonesian government's argument, Summary Stakeholders Information for the Universal Periodic Review on Indonesia 2008 prepared by Office of the High Commissioner for Human Rights (OHCHR) point 26 stated that the Law No. 1/PNPS 1965 is in conflict with the Indonesian Constitution and ICCPR article 18 since it gives a

¹² Uli Parulian Shimbong, et al. 'Menggugat BAKOR PAKEM: Kajian Hukum terhadap Pengawasan Agama dan Kepercayaan di Indonesia', Jakarta: The Indonesian Legal Resource Center, 2008, p. 30.

¹³ Permanent Mission of The Republic of Indonesia to United Nation, *Dewan Ham PBB Terima Penjelasan Delri Mengenai SKB Saat Sahkan Laporan Akhir Universal Periodic Review Indonesia*. See: <http://www.mission-indonesia.org/modules/news.php?lang=en&newsid=215&preview=1>, last accessed on 6 October 2009.

preferential treatment to the officially “recognized” religion while ‘other non-recognized religion’ face discrimination and restrictions.¹⁴

In the latest development, an alliance of NGOs in Indonesia has submitted this law to the Constitutional Court for a Judicial Review.¹⁵ In the Judicial Review application, the Constitutional Court is requested to declare Articles 1, 2 (1)(2), 3 and 4 of the Law No. 1/PNPS 1965 not legally binding and in contradiction to the Indonesian Constitution guaranteeing the freedom of religion or belief. At the time of writing, the process of judicial review is still on-going in the Constitutional Court of Indonesia.

1.3 Objective

The thesis has two objectives:

First, to assess the Law No 1/PNPS/1965 in a historical and a legal point of view:

- In a historical perspective, the thesis shall discuss social and political backgrounds at the time the law was adopted as positive law.
- In the perspective of legal analysis, the thesis shall focused on two issues:
 - o Legal substance: the core elements of positive law that have been established by this law, its scopes and limits.
 - o Legal implementation: the changes brought by this law to the system of governmental administration and policy and its impacts on society.

Second, to analyze the Law No. 1/PNPS 1965 in terms of the legal framework of freedom of religion or belief recognized by the Indonesian government as part of its commitment to human rights.

¹⁴ Summary Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1. Country Indonesia, 6 March 2008, A/HRC/WG.6/1/IDN/3, paragraph 26.

¹⁵ The Case Number 140/PUU-VII/2009 was pleaded by seven Petitioners coming from private legal entities, People Initiative for Transitional Justice (IMPARSIAL), People Study and Advocating Institution (ELSAM), United Groups of Legal and Human Rights Aid (PBHI), United Study Centers for Human Rights and Democracy (Demos), Setara People Union, Desantara Foundation, Indonesian Legal Aid Foundation (YLBHI) and three individual Petitioners, K.H. Abdurahman Wahid, Prof. DR. Musdah Mulia, Prof. M. Dawam Rahardjo, KH. Maman Imanul Haq. Article: ‘*Human Rights Activists demanded Court to Annul Act on Disgracing Religion*’. Indonesian Constitutional Court, available on http://www.mahkamahkonstitusi.go.id/index.php?page=website_eng.BeritaInternalLengkap&id=3479, last accessed on 18 February 2010.

1.4 Legal Question

- Does the adoption and implementation of the Law No. 1/PNPS 1965 violate the guarantee for freedom of religion or belief as protected and provided for by the Indonesian legal framework?
- Could the adoption of the Law No. 1/PNPS 1965 arguably be seen as a necessary and legitimate limitation on freedom of religion or belief, given the socio-cultural conditions prevailing in Indonesia?

1.5 Previous Studies

A number of books and articles have been published on the issue of freedom of religion and belief in Indonesia, but none of them have specifically discussed the Law No. 1/PNPS 1965. Nevertheless, those previous studies will be used in this thesis in so far they can provide general foundations for this research.

1.6 Methodology

The research will be conducted using traditional legal methods, i.e. focusing primarily on laws, regulations, *travaux préparatoires* and other sources. The research will rely on the normative framework regulating freedom of religion or belief in Indonesia which is based on national legislation and on the relevant international human rights instruments that have been ratified and adopted in the national legal system of Indonesia. Non-binding instruments such as the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and the 1992 General Comment on Freedom of Religion by the Human Rights Committee will become important sources. All of these documents will be useful in analyzing freedom of religion and belief in connection with the Law No. 1/PNPS 1965. Moreover, other relevant knowledge presently available will be gathered and examined including relevant case law at the national level.

Since the writing of thesis is conducted during the process of judicial review of the Law No. 1/PNPS 1965 in the Indonesian Constitutional Court, legal materials prepared in court will be use as the additional sources. Such legal materials are explanations by the

government officials and also relevant explanations by experts or testimonies from alleged victims of this law.

2 INDONESIAN BLAPSEMY LAW: THE HISTORY AND THE SUBSTANCE

2.1 Normative Framework of Freedom of Religion or Belief in Indonesia

Religion is highly significant to Indonesian people and it has become an integral part of Indonesia's national identity. We can trace this back to the very beginning of the establishment of this nation. The founding fathers of the nation had a heated debate before they came to the point of deciding the foundation of the state (*dasar negara*) of Indonesia in 1945. Religious factions wanted the state to be based on religion and have *Syariah* as its law, while the nationalist factions demanded a secular nation. At the end, it was decided that *Pancasila* would serve as the foundation of the state.

In essence, Pancasila consists five (“*Panca*”) principles (“*sila*”) or five basic tenets that are the foundations for all aspects of Indonesian society. The most relevant to this thesis is the first tenet, a religious tenet formulated in the notion of “*Ketuhanan Yang Maha Esa*” or belief in the One and Only God. This tenet serves as the foundation of and determines the worldview and practice of religion and belief in Indonesia. Interestingly, this tenet is expressed in the preamble of the 1945 Constitution of Indonesia as follows:

*... the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on a belief in the One and Only God....*¹⁶

¹⁶ Preamble of the 1945 Constitution.

Such formulation is meant to reflect that Indonesia is neither a secular nor a religious state. Indonesia recognizes religion as important element of nation-building but Indonesia is not a religious state. This foundational excerpt also marks the importance of religion for the nation and shows its commitment in maintaining the religion as an integral part of political and social life.

The legal framework for freedom of religion or belief in Indonesia consists of four different legal instruments. The first one is the 1945 Constitution. The 1945 Constitution recognizes the rights of every person to freedom of religion and belief which includes freedom to choose, his/her faith (*Kepercayaan*) and to manifest his/her views and thoughts, in accordance with his/her conscience.¹⁷ In a separate chapter about religion, the 1945 Constitution also reaffirms that the state guarantees all persons the freedom of worship, each according to his/her own religion or belief.¹⁸ The right to freedom of religion or belief is a human right that cannot be limited under any circumstances (non-derogable).¹⁹

The 1945 Constitution also guarantees that every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.²⁰ It is further provided that the state, especially the government, holds the responsibility for the protection, advancement, upholding and fulfillment of freedom of religion and belief in Indonesia.²¹

The enjoyment of the rights as guaranteed by the 1945 Constitution comes with the obligation to respect the human rights of others in the orderly life of the community, nation and state.²² The enjoyment of right to freedom of religion or belief is therefore limited by the restrictions of the law.²³ The Indonesian Constitution provides that restrictions on the

¹⁷ Article 28E (1) and (2) of the 1945 Constitution.

¹⁸ Article 29 (2) of the 1945 Constitution.

¹⁹ Article 28I (1) of the 1945 Constitution.

²⁰ Article 28I (2) of the 1945 Constitution.

²¹ Article 28I (4) of the 1945 Constitution.

²² Article 28J (1) of the 1945 Constitution.

²³ Article 28J (2) of the 1945 Constitution.

freedom of religion or belief may be established for the purpose of recognition and respect of the rights and freedoms of others, morality, religious values, security and public order.

The second legal instrument securing the right to freedom of religion or belief in Indonesia is Law Number 39 Year 1999 on Human Rights (“Law No. 39 Year 1999”). The protection provided by this law is more or less the same as that of the 1945 Constitution. This law reaffirms that everyone has the right and freedom to choose his religion and to worship according to the teachings of his religion and beliefs.²⁴ Such freedom of religion/belief is considered as a human right that cannot be derogated under any circumstances whatsoever.²⁵ The enjoyment of that freedom is guaranteed by the state, which has a duty to respect, protect, uphold, and promote human rights.²⁶

Just like the 1945 Constitution, Law No. 39 Year 1999 provides that every human right gives rise to the basic obligation and responsibility to uphold the human rights of others and social, national, and state morals, ethics and order.²⁷ This law provides certain limitations on the enjoyment of rights secured under this law in order to ensure that the rights and freedoms of others are respected and in the interests of justice, taking into account the moral, security, and public order considerations of a democratic society.²⁸

Pursuant to the Law No. 39 Year 1999 everyone within the territory of the Republic of Indonesia is required to comply with Indonesian legislation and Indonesian law including unwritten law and international law concerning human rights ratified by Indonesia.²⁹ As a result, two international legal instruments in the field of human right are integrated into the legal framework for freedom of religion or belief in Indonesia upon their ratifications namely the International Covenant Civil and Political Rights of 1966 and International Convention on the Elimination of All Forms of Racial Discrimination of 1965.

²⁴ Article 22 (1) of the 1945 Constitution.

²⁵ Article 4 67 of the Law No. 39 Year 1999.

²⁶ Article 22 (2), Article 69 (2) and Article 67 and 70 of the Law No. 39 Year 1999.

²⁷ Article 69 (1) and (2) 67 of the Law No. 39 Year 1999.

²⁸ Article 70 and Article 73 and 67 of the Law No. 39 Year 1999.

²⁹ Article 67 of the Law No. 39 Year 1999.

Respectively, they become the third and the fourth legal instruments within the framework for freedom of religion and belief in Indonesia.

Indonesia ratified the ICCPR with the Law Number 12 Year 2005 on The Ratification of International Covenant Civil and Political Rights (“Law No. 12 Year 2005”). Article 18 of ICCPR stipulating the right to freedom of religion or belief is accordingly binding as positive law in Indonesia. Concomitantly, General Comment 22 on Article 18 ICCPR of Human Rights Committee, which contains the guidance and official interpretation of Article 18 should be respected and applicable in Indonesia.

Law Number 29 Year 1999 contains Indonesia’s ratification of International Convention on the Elimination of All Forms of Racial Discrimination 1965. By this ratification, Indonesia has an obligation to prohibit and to eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably, the enjoyment of the rights to freedom of thought, conscience and religion.³⁰ In the implementation of the said obligation, the Indonesian government passed the Law Number 40 Year 2008 on The Elimination of Racial and Ethnic Discrimination (Law No. 40 Year 2008). Prohibition of discrimination based on religion is not explicitly stated by this law however “ethnic” in this law is defined as the classification of human kind based on their *beliefs*, values, customs, cultures, languages, history, geography and family relation.³¹ The word “belief” in this law refers to religion or belief conviction which is also protected from any discriminatory acts.

The foregoing shows that Indonesia already has a strong framework for guaranteeing the protection of freedom of religion or belief. From the legal instruments listed in the framework it is clear that Indonesia has an obligation to protect freedom of religion and belief not only internally as instructed by its own Constitution but also externally to the UN

³⁰ Article 5(d) (vii) of the International Convention on the Elimination of All Forms of Racial Discrimination.

³¹ Article 1(3) of the Law No. 40 Year 2008.

Human Rights Committee in regards to the international obligation as facilitated by the Indonesian ratification of the ICCPR.

2.2 Historical Context of Law No. 1/PNPS 1965

In a historical context, the Law No. 1/PNPS 1965 can be seen from two different perspectives: (i) the political and state administrative perspective and (ii) the socio-cultural perspective, both seen in the time when this law was made namely in 1965. The political and state administration perspective relates to the political situation in 1965 and the placement of the Law No.1/PNPS 1965 within the hierarchy of the regulations in Indonesia. The socio-cultural perspective relates to the conditions of public life which were a main consideration in the passing of this law in 1965.

2.2.1 Legal System and State Administration of Indonesia in 1960s

When the Law No. 1/PNPS 1965 was passed in Indonesia, the political system of Indonesia was described as “Guided Democracy” (*Demokrasi Terpimpin*). Under this system the President holds almost absolute power in the state. Indonesia adopted this system through the Presidential Decree (*Dekret Presiden*) of 5 July 1959 as issued by President Sukarno. It was followed by the amendment of the hierarchy of the regulations in Indonesia to strengthen the function of executive power and to make it easier for the President to conduct state affairs.

With the Presidential Decree of 5 July 1959 as legal basis, President Soekarno introduced two legal structures in the executive power namely:

1. Presidential Stipulation (*Penetapan Presiden*), based on Presidential Letter No. 2262/HK/59, dated 20 August 1959; and
2. Presidential Directive (*Peraturan Presiden*), based on Presidential Letter No. 2775/HK/50, dated 22 September 1959.

Soekarno's purpose for installing these presidential orders was to counter the difficulties in maintaining order in the government since the legislative power was then still ineffective. It can therefore be seen as a necessary means to ensure the functioning of the state at that time. The problem arose because Soekarno used the presidential orders as instruments to take over the legislative power which in effect was contrary to the 1945 Constitution. An example is when Soekarno passed a Presidential Stipulation which regulates roles, functions, and powers of the legislative board³²

The above-mentioned presidential orders were only used by Soekarno administration. In 1966 the Indonesian Consultative Assembly adopted the Resolution No. XX/MPRS/1966 instating the hierarchy of the legal sources in Indonesia and the presidential orders were not included in the hierarchy. Pursuant to the Resolution, the hierarchy of regulations in the Republic of Indonesia is as follows:³³

1. Constitution of Republic of Indonesia 1945
2. Resolution of People's Consultative Assembly
3. Law / Governmental Regulation in lieu of Law
4. Governmental Regulation
5. Presidential Decree
6. Other executionary regulations such as

³² Examples of such stipulations are:

1. Penetapan Presiden No. 1 Year 1959 on the House of Representative, stating that "as the House of Representative according to article 19 (1) of the Constitution is not yet establish, House of Representative which established based in Law No. 7 Year 1953 will act as temporary House of Representative to conduct the roles as stipulated by Constitution."
2. Penetapan Presiden No. 2 Year 1959 on the Provisional People's Consultative Assembly, stated that "as People's Consultative Assembly according to article 2 (1) of the Constitution is not yet establish, People's Consultative Assembly will be consists of members of House of Representative as stipulated in PNPS 1 Year 1959 and also the delegates from the regions and groups according to PNPS 2 Year 1959."
3. Penetapan Presiden No. 3 Year 1959 on the Establishment of Provisional Supreme Advisory Council.

³³ The 1966 resolution was then perfected by People's Consultative Assembly Resolution/TAP MPR No.III/MPR/2000 on the Source of Law and Hierarchy of Regulations. The final amendments by Law No. 10 Year 2004 on the Formulation of Laws and Regulations stipulates that hierarchy of regulations is as follows:³³

1. 1945 Constitution UUD 1945
2. Laws/Governmental Regulation in Lieu of Law UU
3. Governmental Regulation
4. Presidential Regulation
5. Regional Regulation (provincial/municipal/village level).

- Ministerial Regulation
- Ministerial Instruction
- Others.

After Soekarno fell from power in 1968 and replaced by Soeharto, the above hierarchy of regulations were maintained. Soeharto regarded the blasphemy policy as drawn in the Presidential Stipulation No.1/PNPS 1965 useful to support his policy to suppress communism and atheism.³⁴ Given that presidential order was not included in the hierarchy of the regulations in Indonesia, Soeharto then passed Law Number 5 Year 1969 on the Elevation of the status of a number of Presidential Stipulations and Presidential Directives to the Statutes of law (“Law No. 5 Year 1969”). Presidential Stipulation No.1/PNPS/1965 was amongst the elevated legal instruments.³⁵ This Presidential Stipulation then gained a place within the hierarchy of regulations in Indonesia because it assumed the status of the statute of law. From then on, it was called the Law No.1/PNPS 1965.

2.2.2 Indonesian Socio-Cultural Context in the 1960s

Based on the socio-cultural conditions of Indonesian society in 1965, the Indonesian government enactment of Law No.1/PNPS 1965 were driven by the following motivations:

- (i) the need to monitor *Aliran Kepercayaan*,
- (ii) the need to introduce blasphemy act as a legal offence which can be punished under criminal code, and
- (iii) the increase of separatist movements on behalf of religion in many regions.

These motivations are closely related with each other and will be discussed in turn.

First, the need to monitor *Aliran Kepercayaan*. *Aliran kepercayaan* is a traditional belief systems and costumes of particular ethnic groups or indigenous people in Indonesia with an

³⁴ See Trisno S. Sutanto, *The Challenges of Religious Freedom: an Indonesian Experience* at 4, delivered to 56th General Assembly of EKUMINDO Germany (Sept. 14–16, 2006). available at <http://www.scribd.com/doc/20317516/The-Challenges-of-Religious-Freedom-in-Indonesia>, last accessed 24 March 2009.

³⁵ Article 1 of the Law No. 5 Year 1969.

animistic meditation-based spiritual path.³⁶ In the period of the early 1950s, *Aliran Kepercayaan* was at its highest stage of development. Many people publicly declared or acknowledged themselves as adherents of *Aliran Kepercayaan*.³⁷ As they grew in number, the government saw the importance of supervising movements of *Aliran Kepercayaan*. In 1953, the Department of Religious Affairs of Indonesia conducted a research on the development of religion and belief in Indonesia and announced that there were at least 360 new religions and *Aliran Kepercayaan* in Indonesia.³⁸ In 1961, the government passed the Law Number 15 Year 1961 on The Attorney General (Law No. 15 Year 1961) granting powers to the General Attorney Office to monitor *Aliran Kepercayaan* that potentially endangered people and the nation.³⁹

Second, the need and the importance of enforcing a blasphemy law. In the General Election of 1955, Nationalist Party of Indonesia (*Partai Nasional Indonesia/PNI*), Masyumi (a religious party), *Nahdatul Ulama* (also a religious party) and the Communist Party of Indonesia (*Partai Komunis Indonesia/PKI*) gained the largest vote.⁴⁰ The period after the general election was marked with an increased tension between *Nahdatul Ulama* against PKI. The conflict was mainly grounded on the fact that each of these parties conformed to a very different ideology in which PKI tended to be atheistic while *Nahdatul Ulama* was very religious. Conflicts between these parties got sharpened in the 1960s when the philosophy of atheism, which was supported by PKI, become really popular and had a strong influence in society.⁴¹

³⁶ U.S Department of State. International Religious Freedom Report 2003, country Indonesia. See <http://www.state.gov/g/drl/rls/irf/2003/23829.htm>, last accessed 2 May 2010.

³⁷ Arnold Panahal, as the concern party from Organization of *Kepercayaan* Coordinating Board (*Badan Kordinasi Organisasi Kepercayaan/BKOK*), Court Session 24 February 2010, case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2009,%2024%20Feb%202010.pdf, last accessed 26 February 2010. p. 77.

³⁸ Uli Parulian Sihombing, *supra* note 12, p. 27.

³⁹ Article 2 (3) of the Law No. 15 Year 1961 on the Attorney General of Republic of Indonesia.

⁴⁰ See Daniel S Lev. "*Hukum dan Politik Indonesia (Kesesambungan dan Perubahan)*". (Jakarta: LP3ES, 1990), p. 137.

⁴¹ Hasyim Muzadi, expert witness from Constitutional Court Side, Court Session 10 February 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII,%2010%20feb%202010.pdf, last accessed 26 February 2010. p. 35.

At the same time as the conflict between PKI and religious organizations intensified, the condition of the people who adhered to *Aliran Kepercayaan* was getting helpless. This was due to the strict monitoring conducted by the Indonesian government on the practice of *Aliran Kepercayaan*. As a result, many adherents of *Aliran Kepercayaan* felt unsecure about professing their beliefs. Knowing that *Aliran Kepercayaan* was at its weakest stage, the religious groups seized the moment and urged the government to pass a bill prohibiting the acts of blasphemy. It has been argued by Arnold Panahal, Chief of BKOK that the Law No.1/PNPS 1965 was originally meant to counter the communist group instead of the adherents of *Aliran Kepercayaan*. Adherents of *Aliran Kepercayaan* was only the scapegoats because at the time of issuance of Law No. 1/PNPS 1965, the communist ideology was popular and strongly influenced the society. In other words, *Aliran Kepercayaan* become like the scapegoats of the situation.⁴²

Third, the increase of separatist movements using religion as their ideology. The early period after the independence of Republic of Indonesia was marked with regional rebellions in almost every region of Indonesia. These movements were mostly triggered by dissatisfaction with the central government which was considered had been ignoring the well-being of the people. The common motivation of these movements is to establish a nationalist government or religious government to replace the existing government. One example of this movement is DI/TII (*Darul Islam/Tentara Islam Indonesia*) which was established in 1948 under the leadership of Soekarmadji Maridjan Kartosoewirjo.⁴³ The purpose of *Darul Islam* was to establish The Islamic State of Indonesia to replace the legitimate government and set *Syariah* Islam as the law of the state. Government finally eradicated this movement after succeeding in killing Soekormadji in 1962 and other DI/TII leaders in the following years.⁴⁴

⁴² Arnold Panahal, supra note 37, p. 78.

⁴³ See generally Paul J. Carnegie. *Political Islam and Democratic Changes in Indonesia*. (Asian Social Science Volume 4 No. 11, November 2008). Available at: <http://www.ccsenet.org/journal/index.php/ass/article/viewFile/779/753>, last accessed 27 February 2010.

⁴⁴ Ibid.

At this point, Indonesian government came to realize that Islam, or religion in general, could be used as a tool for people to rise up against the government. Such apprehension later became one of the main considerations when the government held the first Seminar of National Law on 11 March 1963.⁴⁵ This seminar was purported to improve Indonesian Criminal Code by introducing several new offences. One of the recommendations in this seminar was to introduce religious offences into criminal code.⁴⁶ It was later followed by the enactment of the President Stipulation No. 1/PNPS 1965 on 27 January 1965 which later, as explained above, become the Law No. 1/PNPS 1965.

The elucidation part of Law No. 1/PNPS 1965 describes the societal conditions when this law was about to be passed. It states that almost all over Indonesia organizations of faith/belief that contradict with the teachings and principles of religions were emerging.⁴⁷ Many of those teachings and principles have caused events/acts that violated the law, endangered national unity in Indonesia and contaminated religions.⁴⁸ Based on these facts, the government of Guided Democracy therefore deemed it necessary to make a regulation that enabled everyone to peacefully enjoy and manifest their religion without any unnecessary obstacles.⁴⁹

The drafters of the Law No. 1/PNPS 1965 view this law as a tool to regulate/control defamation of religion and act or acts of blasphemy in order to protect and maintain the purity of religions.⁵⁰ Religion needs to be protected from any action that could disgrace or insult religions and religious symbols such as god, the prophet, holy scripture, etc.⁵¹ Since the religion could not defend itself nor its adherent, the Law No. 1/PNPS 1965 was issued to

⁴⁵ Badan Pembinaan Hukum Nasional. Seminar Hukum Nasional I, 11 March 1963. Available at <http://www.bphn.go.id/index.php?action=activity&type=Seminar&id=2008032809351693>, last accessed 26 February 2010.

⁴⁶ Ibid.

⁴⁷ Paragraph 2 of the Elucidation of the Law No. 1/PNPS 1965.

⁴⁸ Ibid.

⁴⁹ Paragraph 3 of the Elucidation of the Law No. 1/PNPS 1965.

⁵⁰ Ifdal Kasim, *Perkembangan Delik Agama Dari Masa ke Masa*, Jakarta, 3-4 July 2007, Available at: http://reformasikuhp.org/wp-content/uploads/2007/08/perkembangan-delik-agama_ifdhal-kasim.pdf, last accessed 20 February 2009, p. 5.

⁵¹ Ibid.

protect the adherents of that religion.⁵² Prof. Umar Seno Adji, one of the drafters of this law, stated that this law emphasized the public order and the introduction of religious defamation as punishable offence was one way to maintain public order.⁵³

2.3 The Substance of Indonesian Blasphemy Law

2.3.1 Article 1 of Law No. 1/PNPS 1965

In Article 1 Law No. 1/PNPS 1965 states:

“Every one is prohibited from deliberately in public conveying, endorsing or attempting to gain public support, any interpretation of any religion adhered to in Indonesia, or from conducting religious activities resembling the religious activities of the said religion, the interpretation and activities of which are deviations from the fundamental teachings of the concerned religion.”

The essence of this Article is the prohibition of the interpretations or activities of religion that deviates from the fundamental teachings of the relevant religion as interpreted by a competent body. Concomitantly, the greatest portion of this Article emphasizes the prevention of deviation.

Three foremost important aspects of this Article are:

1. Requirements of *“intentionally acting”* and *“in public.”*

Requirement of intentional act requires that a premeditated aim has been manifested into action to achieve certain goal. Manifestation of intention was not explained in this Article, but we can refer to that oral or written action also concluded in this element.

⁵² Umar Seno Adji, *Hukum (acara) Pidana dalam Prospekti*, Jakarta: Erlangga, 1973, p. 89

⁵³ Ibid.

In the interpretation of phrase “*in public*” a reference is made to the Indonesian Criminal Code under which “*in public*” defined as “the place in which people could gather or the place where people could hear”.⁵⁴

2. The types of prohibited acts.

Two types of acts are prohibited under this Article: the act of interpretation and the act of imitation. The act of interpretation would normally fall within the ambit of freedom of thought which has a non-derogable nature however this Article stipulates that the act of interpretation is prohibited only when it is conducted in front of the public. Therefore, the State might put restrictions and still uphold the State obligation to protect freedom of thought or conscience.

3. The core elements of prohibited acts. This prohibition concerns only act of interpretations or activities of religion which deviate from the fundamental teachings of the concerned religion. Some observations can be made in this respect:

- In relation to the religion. According to the elucidation part of the Law No. 1/PNPS/1965, the recognized religions in Indonesia are: Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism.⁵⁵ The State recognition of only these religions was based on the history of religious development in Indonesia showing that most of the Indonesian people are adherents to one of these religions.⁵⁶ But this does not mean that other religions, such as Judaism, Zarathustratianism, Shintoism, and Taoism are prohibited; adherents to these religions can still profess their beliefs and shall be protected by law.⁵⁷ Meanwhile, *Aliran Kepercayaan* the Government will direct their adherents to the “well-behaved” views and toward the One and Only God.⁵⁸
- In relation to the main teaching of a religion. Law No. 1/PNPS/1965 does not give a clear definition of the meaning or the scope of the phrase “main teaching of religion.” The elucidation part explains that the main teachings of a religion can be

⁵⁴ Article 1 of the Elucidation of the Law No. 1/PNPS 1965.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

identified by Department of Religious Affairs that has the instruments/ mechanisms to investigate them.⁵⁹

- In relation to the religious activities. The elucidation of Article 1 states that The phrase of “religious activities” refers to all types of activities that are of religious nature, for example designating a belief as a religion, using [religious] terms in practicing or manifesting the teachings of a particular belief or conducting the rituals thereof and so forth.⁶⁰

2.3.2 Article 2 of Law No. 1/PNPS 1965

Article 2 of the Law No. 1/PNPS 1965 states:

(1) Anyone who violates the provision of article 1 shall be instructed and warned severely to cease the course of his/her actions which instruction and reprimand shall be included in a Joint Ministerial Decree made by the Minister of Religious Affair, Attorney General and Minister of Internal Affairs.

(2) In the event the breach mentioned in paragraph (1) is committed by an organization or Aliran Kepercayaan, the President of Indonesia may dissolve the said organization and declare such organization or aliran as prohibited organization or aliran, one after the other the President has duly received considerations from the Minister of Religious Affair, Attorney General and Minister of Internal Affairs.

Article 2, read in conjunction with Article 1, is meant to give protection to religions that are administratively recognized by the State.⁶¹ The State imposes a civil penalty against violators of this Article 2, which can be divided into:

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Mudzakkir, expert witness from the government side, court session 17 February 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. See: <http://www.mahkamahkonstitusi.go.id/Risalah/Perkara%20Nomor%20140.PUU-VII.2009,%2017%20FEB%202010%20FINAL.pdf>, last accessed 26 February 2010. p. 13.

- A severe warning on the individual. Elucidation of Law No. 1/PNPS explain that *Individual* is persons, adherents, members and/or members of the organisation board of the concerned *aliran*.⁶²
- The dissolution of organization or *Aliran Kepercayaan*. The President can take this action when the violation of the law it poses a seriously enough effect on the religious society.⁶³ There are no further explanations on the scope of serious effect in the Law No. 1/PNPS 1965.

2.3.3 Article 3 of Law No. 1/PNPS 1965

Article 3 states:

In case of, despite the action brought by the Minister of Religious Affair together with the Attorney General and Minister of Internal Affairs or by the President in accordance with article 2 against the persons, Organization or Aliran Kepercayaan, they still commit violations of article 1, hence the persons, adherents, members and/or members of the organisation board of the concerned aliran shall be punished with up to 5 years imprisonment.

This Article concerns with two elements of crime: deviation of interpretations or activities, and also recurring violations that previously have been severely warned or sanctioned with the dissolution of its organizations. The elucidation of this Article considers that 5 years imprisonment is just given the severity of the violation.⁶⁴ Article 3 of Law No. 1/PNPS 1965 is the first to introduce an act of blasphemy as something punishable under Indonesian criminal law.

2.3.4 Article 4 of Law No. 1/PNPS 1965

Finally, Article 4 states:

⁶² Article 2 of the Elucidation of the Law No. 1/PNPS 1965.

⁶³ Ibid.

⁶⁴ Article 3 of the Elucidation of the Law No. 1/PNPS 1965.

A new article will be added to Indonesian Criminal Code and reads as follows:

Article 156a

“By a maximum imprisonment of five year shall be punished anyone who deliberately, in public, expresses or conducts any act:

c) which in essence is hostile, abusive or defamatory toward a religion adhered in Indonesia;

d) with the intention of making a person not adhering to any religion that is based on the notion of the One and Only God.”

This Article is the implementation of Article 3, “deviation” from main teaching of religion, as prohibited by Article 1, has been interpreted as a punishable act under this article. Since the nature of blasphemy exists within the societal level, this Article was placed in the Indonesian Criminal Code under Chapter V concerning “Crime Against Public Order”. By placing Article 156a in the chapter related to public order, the act of disturbing public order became one of the elements of crime that needed to be proven.

The elucidation describes further elaboration of both paragraphs of Article 156a. In relation to Article 156a (a), it is stated that an act shall be deemed as criminal acts are those (in essence) directed toward the intention to be hostile or insulting.⁶⁵

Meanwhile, in relation to Article 156a (b) it is explained that people who commits the criminal act herein, in addition to disturbing the peaceful life of religious people also conducts treachery against the first notion of the state foundation, and consequently it is in its place, that such an act is properly punished.⁶⁶

⁶⁵ Article 4 of the Elucidation of the Law No. 1/PNPS 1965.

⁶⁶ Ibid.

3 The Implication of Indonesian Blasphemy Law to Religious Freedom in Indonesia

3.1 The Impact to the *Aliran Kepercayaan*

Law No. 15 Year 1961 on the Attorney General granted an authority for the Attorney General's Office to maintain public order and safety by supervising *Aliran Kepercayaan*.⁶⁷ To serve such a supervisory function, the Attorney General's Office subsequently formed the Team PAKEM (*Pengawas Aliran Kepercayaan Masyarakat*, or the Supervision of *Aliran Kepercayaan* in Society). When Law No. 1/PNPS 1965 was enacted four years later or in 1965, the Attorney General's Office, not surprisingly, positioned itself as the front guardian for supervising forms of belief in society.

In September 1965 the so-called September 30 Movement (*Gerakan 30 September*) occurred. It was marked with the assassination of 6 generals and one officer and was suspected to have been masterminded by the PKI or Indonesian Communist Party.⁶⁸ After the September 30 Movement, the Indonesian Communist Party was banned by the Indonesian government. At the same time, the PAKEM Team intensified their watch and supervision of *Aliran Kepercayaan* as many *Aliran Kepercayaan* were considered closely related to the PKI.⁶⁹ The *Aliran Kebatinan Perjalanan* was an example as a form of belief group stigmatized with involvement in the 1965 incident. This form of belief group was considered as a manifestation of the Indonesian Communist Party and consequently it was dissolved by the PAKEM Team.⁷⁰ As the legal basis for the dissolution of *Aliran Kebatinan Perjalanan* the PAKEM TEAM used Law No. 15 Year 1961 and Law No. 1/PNPS 1965. It was clear that such dissolution was contrary to the provisions in Law

⁶⁷ Article 2 (3) of the Law No. 15 Year 1961.

⁶⁸ See generally Hermawan Sulistyono. *Palu Arit di Ladang Tebu: Sejarah Pembantaian Massal yang Terlupakan (1965-1966)*. (Jakarta - Kepustakaan Populer Gramedia, 2000).

⁶⁹ Uli Parulian Sihombing, *supra* note 12, p. 32

⁷⁰ Dissolved by Decision of the PAKEM Team Number: SK-23/PAKEM/1967 dated May 23, 1967 regarding the Prohibition and Dissolution of Organization of *Aliran Kebatinan Perjalanan*.

Number 1/PNPS 1965 which expressly mentioned that only the President has the authorization to dissolve an organization or *Aliran Kepercayaan*.⁷¹

Subsequently during the period from 1971 to 1983 it was recorded that the Attorney General's Office banned six *Aliran Kepercayaan* and also sects of official religions, namely:⁷²

- a. *Aliran Darul Hadist, Islam Jemaah*;
- b. *Aliran Kepercayaan Manunggal*;
- c. *Agama Budha Jawi Wisnu*;
- d. Javanese Religious Teachings of *Sanyoto*;
- e. Jehova's Witnesses;⁷³
- f. *Aliran Inkarsunnah*.

The Law on the Attorney General has gone through several amendments. In the most recent amendment, namely through Law No. 16 Year 2004 on Public Prosecutor's Office, the Attorney General Office's authority of supervising forms of belief that potentially endanger people and the nation was still maintained.⁷⁴ This law also added the authority of the public prosecutor's office to prevent mistreatment and/or contamination of religion.⁷⁵

To determine whether or not it is feasible to dissolve a form of belief, the PAKEM Team relies on the considerations issued by the institutions on the recognized religions such as The Indonesian Council of Ulamas (*Majelis Ulama Indonesia/MUI*) for Islam, Communion of Churches in Indonesia (*Persekutuan Gereja-Gereja di Indonesia/PGI*) for Christianity, the Bishop's Conference of Indonesia (*Konferensi Waligereja Indonesia/KWI*) for

⁷¹ Article 2 (2) of the Law No.1/PNPS 1965.

⁷² Uli Parulian Sihombing, supra note 12, p. 33.

⁷³ Jehova's Witnesses was banned based on the Letter of Decision of the Attorney General's Office No. Kep-129/JA/12/1976 regarding the Prohibition of the Teachings of Bible Students / Jehova's Witnesses dated December 7, 1976. This Letter was issued through the recommendation of the PAKEM Team. The prohibition of Jehova's Witnesses was then revoked pursuant to Letter of Decision of the Attorney General's Office No. Kep-125/A/JA/06/2001. The basis for such revocation was declared because the prohibition of the Jehova's Witnesses was considered no longer in accordance with the principles of democracy.

⁷⁴ Article 30 (3) paragraph d of the Law No.16 Year 2004.

⁷⁵ Article 30 (3) paragraph e of the Law No. 16 Year 2004.

Catholicism, the Indonesian Buddhist Council Association (*Perwakilan Umat Buddha Indonesia/WALUBI*) for Buddhism as well as *Hindudharma* for Hinduism. These institutions are *not* official institutions established by the government for providing or protecting the interpretations of religious doctrines. The government, however, gives its indirect acknowledgement of the authority of these institutions through the Decree of the Minister of Religious Affairs No. 35 Year 1980 regarding the Formation of the Forum for Deliberations among Religious Adherents (*Wadah Musyawarah Antar Umat Beragama*) represented only by the abovementioned organizations.

These groups are granted the authority to control the forms of religious activities and interpretations in society.⁷⁶ They also issue some deliberations on whether there is any “deviation” from the fundamental religious teachings. There is no legal basis to the effect that the recommendations of these groups are to be used as the basis for declaring that a teaching or sect has “deviated” from the fundamental teachings. However, the Attorney General’s Office, or more precisely the PAKEM Team, always involve and ask for the opinions of these groups in investigating whether or not a teaching or belief in the community “deviates” from the principal teachings of a concerned religion.

Referring to the aforementioned explanation, it is noticeable that *Aliran Kepercayaan* might have been the first victim of the policies of the Indonesian government in religious affairs with the tendency to protect “recognized” religious as set forth in Law No. 1/PNPS 1965. If the PAKEM Team is considered as a unit implementing the policy of the government in the field of religious life, it also shows that the government has never considered *Aliran Kepercayaan* as an equal to the “recognized” religions. This point of view can be seen from the elucidation of Law No. 1/PNPS 1965 which stating that “The Government shall put in efforts to channel spiritual groups/beliefs towards “well-behaved” views and towards the Belief in the One and Only God.”⁷⁷ More over, this provision was then affirmed by the Stipulation of MPR No. II/MPR/1998 regarding the Broad Outlines of

⁷⁶ Siti Musdah Mulia, *supra* note 8, p. 3.

⁷⁷ Elucidation of Article 1 of the Law No. 1/PNPS 1965.

the Directions of the State or GBHN, namely in the elucidation part on Religions and Beliefs in the One and Only God stating:⁷⁸

“Adherents of Aliran Kepercayaan in the One and Only God shall be developed and directed to support well-maintained harmony of living in society. Through the harmony in the life of the adherents of religions and beliefs in the One and Only God, the understanding that Aliran Kepercayaan in the One and Only God is not a religion and therefore it must be developed in such a way that it will not lead to the establishment of a new religion...”

In continuing, the Indonesian government has developed a governmental administration system only for “recognized” religions pursuant to Law Number 1/PNPS Year 1965. This policy is reflected in the Department of Religious Affairs which only has directorates for five “recognized” religions namely: Islam, Christian-Protestantism, Catholicism, Hinduism and Buddhism.⁷⁹ The reason why the Department of Religious Affairs only has 5 directorates is that in 1978 Confucianism was no longer included as an officially “recognized” religion by the Government.⁸⁰ It was not until President Gus Dur administration that Confucianism was recognized again; however, until now there has not been any directorate for Confucianism within the Department of Religious Affairs.⁸¹

Aliran Kepercayaan is registered with the Department of Home Affairs and included in the inventory under the Directorate for the Development of the Adherents of *Aliran Kepercayaan* in the One and Only God which is a part of the Directorate General of Cultures, Arts and Films of the Department Cultural Affairs and Tourism. The government included *Aliran Kepercayaan* under this department because they were considered only as a part of the spiritual wealth of the indigenous people of Indonesia.⁸²

⁷⁸ Resolution 6 of MPR Resolution No. II/MPR/1998 regarding GBHN.

⁷⁹ See official website of the Department of Religious Affairs <http://www.depag.go.id/>.

⁸⁰ Circular Letter of the Minister of Home Affairs Number 477/74054 Dated November 18, 1978.

⁸¹ Presidential Decree No. 6 Year 2000 on the Revocation of Presidential Instruction No. 14 Year 1967 on Chinese Religion, Belief and Tradition.

⁸² Uli Parulian Sihombing, *supra* note 12, p. 50.

All the above mentioned government policies indicate that the State has committed a systemic violation of the freedom of religion and belief of the adherents of *Aliran Kepercayaan* as guaranteed by the Indonesian Constitution. Firstly, the State has denied the existence of *Aliran Kepercayaan* as a form of belief. In addition freedom of religion and belief is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.⁸³ The act of the PAKEM Team dissolving a number of *Aliran Kepercayaan* also constitutes a gross violation of the freedom of religion or belief because the State should have respected and protected every person's right to profess a religion or belief, regardless of whether such beliefs are theistic, non-theistic and atheistic beliefs or even the right not to profess any religion or belief.⁸⁴

Secondly, the State has also developed a government structure which does not acknowledge the existence of *Aliran Kepercayaan* as a religion. This act is clearly discriminatory and the government should have guaranteed non-discriminatory treatment of all religions or beliefs.⁸⁵ Furthermore, the Government has also sought to direct the adherents of *Aliran Kepercayaan* to profess any of the official religions, while it does not have the right to determine any religion for its citizens and also to force or direct them to follow a certain religion.⁸⁶ This act clearly constitutes an intervention in the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice, while this right should have been protected unconditionally.⁸⁷

This discriminatory policy has ultimately led to violations of civil and political rights of the adherents of *Aliran Kepercayaan*. The first consequence of the absence of recognition of *Aliran Kepercayaan* has been the rejection to provide National Identity

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ See article 3 (3) of the Law No. 39 Year 1999, General Comment 22 paragraph 2 and Article 2 (2) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

⁸⁶ Article 18 (2) of the ICCPR; General Comment 22 No. 5; Article 1 (2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

⁸⁷ See General Comment 22 no. 3.

Cards (*Kartu Tanda Penduduk/KTP*) and Family Register Card or (*Kartu Keluarga-KK*) for adherents of *Aliran Kepercayaan* by the Office of Population Affairs and Civil Registry. This rejection is based on the reason that the aforementioned KTP and KK contain a column for the religion of the holder of the identity card and that only official “religions” are allowed to be put into the KTP and KK.⁸⁸

This rejection to provide KTP in turn affects the political rights of the adherents of *Aliran Kepercayaan* because the General Election Law provides that an Indonesian Citizen has to be registered as a voter in order to exercise his/her voting right.⁸⁹ The requirement of qualification as a voter is proven among other things by KTP of the relevant person. This is clearly an indirect discrimination and clearly violates the principle of giving the citizens the political rights without unreasonable restriction.⁹⁰

Another consequence of the absence of recognition of *Aliran Kepercayaan* is related to the denial of marriage registration for adherents of *Aliran Kepercayaan*. The civil registry office rejects the registration of marriages of the adherents of *Aliran Kepercayaan* for the reason that *Aliran Kepercayaan* is not a “recognized” religion in Indonesia. Meanwhile, pursuant to the Law Number 1 Year 1974 on Marriages, a marriage is legal if conducted according to the religion and belief of each person and based on the consent of both parties.⁹¹

As the recognition and registration of the marriage are rejected, based on Indonesian private law, the child from such marriage will be considered as an extramarital child. The Marriage Law explains that “*A child born not from a marriage shall only have a private relationship with his/her mother and his/her mother’s family*”.⁹² Therefore, the aforementioned extramarital child has no right as the heir with respect to the fortune of his/her father and his/her father’s family.

⁸⁸ Article 61 (2) and article 64 (2) of the Law No. 23 Year 2006 on Administration of Population Affairs.

⁸⁹ Article 20 of the Law No. 10 Year 2008 on General Elections.

⁹⁰ Article 23 (1) of the Human Rights Law; Article 25 of ICCPR.

⁹¹ Article 2 (1) and Article 6 (1) and (6) of the Law No. 1 Year 1974.

⁹² Article 43 (1) of the Law No. 1 Year 1974.

The rejection to record the marriages of the adherents of *Aliran Kepercayaan* means denial of their existence as persons before the law which is actually an integral part of a person's civil and political rights.⁹³ In addition to violating such right, the rejection of registration of the marriage also constitutes a violation of the right to establish a family and to procreate based upon a lawful marriage.⁹⁴ Meanwhile, the rejection to record the child from the marriage constitutes a violation of the principle of child registration immediately after birth.⁹⁵

The rejection of recording the marriage for the adherents of *Aliran Kepercayaan* will ultimately affect the right to education of the child born from such marriage. This is due to the policy of schools providing forms for the guardian of the student to fill in one of the existing religions, failing to do so will cause the student not to be allowed to continue his/her schooling.⁹⁶ This is clearly contradictory to Law No. 23 Year 2002 on Child Protection stating that there shall not be any discrimination against a child due to the marriage of his/her parents.⁹⁷ Hence, discrimination against a child from a marriage of the adherents of *Aliran Kepercayaan* is clearly contradictory to the child's right to education which should be fully guaranteed by law.⁹⁸

⁹³ Article 16 of the ICCPR.

⁹⁴ Article 28B paragraph (1) of the Indonesian Constitution, article 10 paragraph (1) of the Human Rights Law, article 23 paragraph (2) of the ICCPR.

⁹⁵ Article 24 paragraph (2) of the ICCPR.

⁹⁶ 'Sulistyo Tirtokusumo dan Hak asasi Penganut Kepercayaan'. Bataviase Nouvelles, 18 March 2008. See: <http://bataviase.wordpress.com/2008/03/18/sulistyo-tirtokusumo-dan-hak-asasi-penganut-kepercayaan/>, last accessed 14 March 2010.

⁹⁷ Article 28 (1) of the Law No. 23 Year 2002.

⁹⁸ See article 60 (1) of Law No. 39 Year 1999 ; article 13 of the ICESR; article 31 of the Indonesian Constitution.

3.2 The Ahmadiyah Case

Ahmadiyah is a legal entity which has been recognized by the government and registered as a social organization.⁹⁹ Ahmadiyah is opposed by the mainstream Islam as it is considered to deviate from and contradict the fundamental teachings of Islam. The main issue of the opposition began with the belief of Ahmadiyah adherents that after the crucifixion, the prophet *Isa* (Jesus to Christian) was not dead but he was awake and met his disciples.¹⁰⁰ As Jesus was only an ordinary human being, the messiah or *Al Masih* to be coming down to earth would be no other than Mirza Ghulam Ahmad.¹⁰¹ Therefore, for the adherents of Ahmadiyah, Mirza Ghulam Ahmad was the prophet who came after Prophet Muhammad. This is clearly contradictory to the teachings of Islam because according to the main teaching of Islam, *Isa* recognized as prophet before Muhammad and Muhammad himself was the last prophet after all the prophets sent by *Allah*.

In 1980, MUI issued a *fatwa* (Islamic Religious Decree) against Ahmadiyah but that time there was no follow-up to the *fatwa*.¹⁰² Subsequently in 2005, through a new *fatwa*, MUI reaffirmed that the teachings of Ahmadiyah were “misguided” and “deviating” from the main teachings of Islam.¹⁰³ Among civil society, especially on the side of opponents of Ahmadiyah, the aforementioned MUI *fatwa* was considered and treated as justification of direct action taken against the adherents of Ahmadiyah.

Following the *fatwa*, the first reaction was the mobilization of a group of people belonging to hard-line Islam attacking the headquarter of *Jamaah Ahmadiyah Indonesia* in Parung,

⁹⁹ Stipulation of the Minister of Justice of the Republic of Indonesia No.: JA.5/23/13 dated March 13, 1953 published in the Supplement to the State Gazette No.: 26 dated March 31, 1953 as well as Decree of the Minister of Home Affairs No.: 75/D.I/VI/2003 dated June 5, 2003.

¹⁰⁰ Asvi Warman Adam. ‘*Belajar dari Sejarah Ahmadiyah*’, The Wahid Institute, 25 April 2008. See: http://www.wahidinstitute.org/Opini/Detail/?id=134/hl=id/Belajar_Dari_Sejarah_Ahmadiyah, last accessed 14 March 2010.

¹⁰¹ Ibid.

¹⁰² Uli Parulian Sihombing, *supra* note 12, p. 67.

¹⁰³ Fatwa No. 11/Munas VII/MUI/15/2005 regarding Ahmadiyah Teaching being Misguided and Misleading.

Bogor on 15 July 2005.¹⁰⁴ This incident was then followed by a sequence of violent acts in other regions such as Lombok, West Nusa Tenggara, Cianjur, Kuningan and Tasikmalaya, West Java Province as well as in Gowa, Sulawesi.¹⁰⁵ The pattern of violent acts against Ahmadiyah adherents in such regions was in the form of eviction of persons from their residence followed by plundering of the properties ending with the burning of homes.¹⁰⁶ In several places, there were attacks and destruction of places of worship of Ahmadiyah.¹⁰⁷

Violent acts against the adherents of Ahmadiyah as mentioned above were clearly contradictory to the principles of human rights in general. In addition to being contradictory to all the principles of the right freedom of religion or belief as well as the guarantee of non-discrimination, other rights were also affected. The attacks to and the burning of homes of Ahmadiyah adherents violated the right to privacy and security.¹⁰⁸ Plundering was also clearly contradictory to the guarantee with respect to the assets and private property where every person had the right to personal property and that no one could be deprived of his/her property arbitrarily and in an unlawful manner.¹⁰⁹ Similarly, forcible eviction was a violation of the right to residence as well as the guarantee of residence which could not be disturbed unless it was prescribed by Law.¹¹⁰ In addition, the study conducted by the Ahmadiyah Case Investigation Team which establish by National Commission of Human Rights (*Komisi Nasional Hak Azasi Manusia/KOMNAS HAM*), indicated a preliminary evidence of the occurrence of crime against humanity because of

¹⁰⁴ Imam Ghazali Said. '*Membela Ahmadiyah yang Dizalimi*', The Wahid Institute 28 April 2008. See: http://www.wahidinstitute.org/Opini/Detail/?id=135/hl=id/Membela_Ahmadiyah_Yang_Dizalimi, last accessed 14 March 2010.

¹⁰⁵ Komnas HAM Indonesia. '*Ringkasan Eksekutif Pemantauan Kasus Ahmadiyah*' See: <http://www.komnasham.go.id/portal/files/laporan%20kajian%20ahmadiyah.pdf>, last accessed 10 March 2010. P. v-vii.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Article 30 (2) and Article 33 of the Law No. 29 Year 1999; Article 7, Article 12 (1) and Article 12 (3) and Article 17 (2) of the ICCPR.

¹⁰⁹ Article 36 (1) and (2) of the Law No. 39 Year 1999; Article 17 (2) of the UDHR.

¹¹⁰ Article 27 (1), Article 31 (1) and (2) of the Law No. 39 Year 1999; Article 17 (1) and Article 17 (3) of the ICCPR and Article 7 of General Comment 27.

deportation or forcible transfer of population as set forth in Article 7 (1) d of the Rome Statute.¹¹¹ This study also indicated genocide against Ahmadiyah adherents.¹¹²

After the issuance of the *fatwa* by MUI followed by violent acts against Ahmadiyah adherents, the PAKEM Team conducted monitoring and evaluation of the teachings of Ahmadiyah. The conclusion of the PAKEM Team followed the guidelines of the teachings considered “mislead” by MUI, and then the PAKEM Team planned to issue a Joint Ministerial Decree in accordance with the provision of Article 2 (1) of Law 1/PNPS 1965. Upon the recommendation result, then on April 16, 2008, the government finally passed the Joint Ministerial Decree No.: 3 Year 2008, No.: KEP-033/A/JA/6/2008 and No: 199 Year 2008 by the Minister of Religious Affairs, the Attorney General and the Minister of Home Affairs on The Warning and Instruction for the adherents, members and/or members of the organization of Jemaat Ahmadiyah Indonesia (JAI) and citizens. The Joint Ministerial Decree called for adherents of Ahmadiyah to stop all activities of disseminating the interpretations of and activities “deviating” from the main teachings of Islam, namely the dissemination of the belief acknowledging any prophet after Prophet Muhammad.¹¹³

This Joint Ministerial Decree is the culmination of all violations of human rights against the adherents of Ahmadiyah in Indonesia. This Ahmadiyah case indicates that the implementation of Law Number 1/PNPS 1965 favored the “recognized” religions and the law itself has become a means of control to prevent the development of renewal movements against mainstream religions.

3.3 Article 156a of Indonesia Criminal Code

Following the application of Article 156a, many have been brought before the court and punished under this article. The following part will discuss several cases directly related to the right to the freedom of religion or belief.

¹¹¹ KOMNAS HAM, *supra* note 105, p. xiv.

¹¹² *Ibid* p. xiii.

¹¹³ Point 1 of Joint Ministerial Decree 2008.

3.3.1 The case of Arswendo Atmowiloto

Early in September 1990, Arswendo as the Chief Editor and the Person In Charge of the Monitor Tabloid conducted a poll with the question “Who is the figure you admire and what is your reason for choosing the figure?”.¹¹⁴ The result of the poll positioned Prophet Mohammad in the eleventh position while Arswendo himself was positioned in the tenth position. The poll results reaped protests from Muslims and the mass staged a demonstration at the office of Monitor Tabloid. Arswendo was considered to have disgraced Islam by insulting Prophet Mohammad and considering himself better than the Prophet.

Following this incident Arswendo’s membership in the Indonesian Journalist Association (*Persatuan Wartawan Indonesia/PWI*) was revoked and he was dismissed from the position of Chief Editor and Person in Charge of Monitor Tabloid.¹¹⁵ Arswendo was then brought to court for an alleged violation of Article 156a of the Indonesian Criminal Code as well as violation of the provisions of the Press Law. The court found Arswendo guilty of insulting Islam in accordance to Article 156a of the Indonesian Criminal Code and it was reasoned that the poll was a disgrace to Prophet Muhammad as He was placed in the pool as an equal to, if not lower than, an ordinary human being. Arswendo was sentenced to 4 years and 6 months for such misconduct.¹¹⁶

The use of article 156a in the case of Arswendo can be subjected to a criticism. In deciding upon this case, the judges did not found the element of *mens rea* namely the intent of creating hostility or insulting Islam with the polling results. To his defence, Arswendo

¹¹⁴ The Indonesian Journalist Association. ‘*Ensiklopedia Pers Indonesia*’ 14 November 2008. See: <http://pwi.or.id/index.php/Pressedia/M-dari-Ensiklopedia-Pers-Indonesia-EPI.html>, last accessed 12 March 2010.

¹¹⁵ Ibid.

¹¹⁶ Arswendo Atmowiloto, witness, Court Session 10 February 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII,%2010%20feb%202010.pdf, last accessed 26 February 2010. p. 40.

stated that he did not know that comparing Prophet Muhammad with other human beings belonged to the category of defamation of religion.¹¹⁷ When publishing the polling results, Arswendo also did not have the intention of insulting Prophet Muhammad or degrading the teachings of Islam.

The case of Arswendo proved the interconnection between the application of Article 156a and the violations of various protected human rights. The first is concerned with the freedom of expression and opinion where Arswendo's act was clearly still within reasonable limits and was not aimed at insulting any party, therefore, it fell under the protection of the freedom of expression.¹¹⁸ The second is concerned with the revocation of press permit of Arswendo constituted a violation to his right to a proper job since such revocation was done arbitrarily.¹¹⁹

3.3.2 The case of Yusman Roy

Yusman Roy was the founder of *Taqwallah Pondok I'tikaf Ngaji Lelaku* Foundation.¹²⁰ He taught *shalat* (Islamic prayer) in two languages namely on Arabic and Bahasa Indonesia.¹²¹ He believed that in providing Indonesian translations of Arabic verses during prayers he was helping people to understand the meaning behind the Arabic verses.¹²²

On January 21, 2004, MUI of Malang Regency issued a *fatwa* No. Kep. 02/SKF/MUI.KAB/I/2004 regarding the dissemination of the "misguided" teachings of Yusman Roy. The basis for MUI's issuing the said *fatwa* was that Yusman Roy had

¹¹⁷ Ibid.

¹¹⁸ Article 4 (1), article 23 (1) of the Law No. 39 year 1999; Article 19 of the ICCPR.

¹¹⁹ Article 6 (1) of the International Covenant on Economic, Social Cultural Rights; article 38 (1) and (2) of the Law No. 39 Year 1999.

¹²⁰ Rumadi 'Suara Lirih Melawan Arabisme Fiqih' Official Abdurrahman Wahid site, 10 Mei 2005. See : http://www.gusdur.net/Opini/Email_page?id=39/hl=id/Suara_Lirih_Melawan_Arabisme_Fiqih, last accessed 9 March 2010.

¹²¹ Ibid.

¹²² 'Yusman Roy: *Inti Agama Adalah Akhlak Mulia*' Suara Merdeka, 9 Mei 2005.

committed acts of changing, adding and/or reducing the worship principles already established by the *Sharia*.¹²³

On June 7, 2005, Yusman Roy was brought to court with the primary charge of insulting a religion pursuant to Article 156a and subsidiary charged with interrupting public order pursuant to Article 157.¹²⁴ In their decision, the judges were of the opinion that Yusman Roy was not proven to have violated Article 156a but Article 157 of the Indonesian Criminal Code regulating the prohibition of incitement of hatred.

This case of Yusman Roy indicates several important points in relation to the implementation of Article 156a. The first is the indication of intervention into the *forum internum* of the right to freedom of religion or belief which is actually protected absolutely.¹²⁵ Since Yusman Roy only followed what he believes in which is praying in a language he understands and practiced it without the intention of creating hostility or insulting Islam. Furthermore, the activities of Yusman and his followers were not conducted in public, but were limited at the *Pondok I'tikaf Ngaji Lelaku*, which was a private place.

Although not proven to have violated Article 156a or insulting Islam, the judges still sentenced Yusman Roy based on Article 157 of the Indonesian Criminal Code. This Article 157 of the Indonesian Criminal Code requires that an act shall be committed in public and with the intention of creating hostility, hatred or insult. There was a strong indication that the judges passed the decision due to the pressure from the public.¹²⁶ This indicates that in

¹²³ Point 9 of the Guidelines on the acts which can be categorized as misguided acts according to MUI.

¹²⁴ See 'Data Kekerasan Atas Nama Agama Pasca Pemilu Presiden 2004.' The Wahid Institute, <http://www.wahidinstitute.org/download-article/Kekerasan.pdf>, last accessed 9 March 2010.

¹²⁵ Article 28E (1) and (2), Article 28I, Article 29 (2) of the Indonesian 1945 Constitution; Article 22 (1) and (2) of the Law No. 39/1999 on Human Rights; Article 18 (1) of the ICCPR.

¹²⁶ See Nicole Colbran 'Kebebasan Beragama atau berkeyakinan di Indonesia: Jaminan secara Normatif dan Pelaksanaannya Dalam Kehidupan Berbangsa dan Bernegara' dalam 'Kebebasan Beragama atau Berkeyakinan: Seberapa jauh?', Tore Lindholm, W. Cole Durham, Jr, Bahia G. Tahzib Lie (eds) (Yogyakarta: Published by Kanisius, 2010).

considering the act of defamation of religion, Article 157 could also be use as the back up if Article 156a is not effective.

3.3.3 The case of Lia Eden

Lia Eden or Lia Aminuddin was a housewife claiming to have received a revelation from Angel Jibril (Gabriel to Christians) on October 27, 1995.¹²⁷ In 1997, Lia declared that she was Angel Jibril herself.¹²⁸ Lia then formed a religious group named *Salamullah* (salvation from God) with approximately 100 followers.¹²⁹ *Salamullah* agrees Muhammad was the last prophet but also teaches that other holy figures, such as Gautama Buddha, Jesus Christ, and Kwan Im the Chinese goddess of mercy, will be reincarnated.¹³⁰

In 1997, MUI issued *Fatwa* No. Kep. 768/MUI/XII/1997 dated December 22, 1997, declaring that the teachings of Lia Eden were “misguided” and that it was impossible for Angel *Jibril* to come down again after the coming of Prophet Muhammad. The fatwa against such “misguided” teachings by MUI was followed-up only in 2005 by the police by arresting Lia Eden on December 29, 2005.¹³¹

Lia Eden was subsequently brought to court for an alleged violation of Article 156a. On April 19, 2006, the panel of judges decided that Lia Eden was proven guilty of committing blasphemy of Islam in the meaning of Article 156a of the Indonesian Criminal Code given that she had made a claim of being sent by God and having interpreted several verses of the Al-Quran which were not in accordance with the righteous interpretation principles.¹³² For such crime, Lia Eden was then sentenced to imprisonment for 2 years.

¹²⁷ ‘*Lia treads a hazardous path from dried flower arrangement to Eden*’ The Jakarta Post, 4 January 2005.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ ‘*Lia Eden Divonis Dua Tahun Penjara*’ Gatra.com, 29 June 2006.

¹³² Ibid.

Shortly after her release from prison, Lia Eden together with her 20 followers were once again arrested in December 2008 by the police for the same charge of violation of Article 156a of the Indonesian Criminal Code.¹³³ This time Lia Eden was guilty of declaring *fatwa* for dissolving “recognized” religions in Indonesia and replacing them with *Salamullah* religion. Lia Eden was once again brought to the court and the court found her guilty of once again violating Article 156a of the Indonesian Criminal Code and accordingly was sentenced to imprisonment for 2,5 years.¹³⁴

This case is important because it raised the question whether all acts as conducted by of Lia Eden are still within ambit of religious freedom or they have constituted an act of insulting a religion. In the Ahmadiyah case, the public is still divided into two opinions where some consider that Ahmadiyah is entitled to the freedom to profess a religion and it does not constitute an insult, while some others consider that it is an insult. This is different from the case of Lia Eden in which almost all elements of society agree that it constitutes an insult of Islam and Christian religions. These are the difficulties of implementing of Article 156a because it does not specify to what extent an act can be categorized as blasphemy to a religion.

It is important that in the case of Lia Eden there is an indication of violation of the right to fair trial. As explained above, Lia Eden was punished using Article 156a in 2006 with imprisonment of 2 years and then in 2009 with imprisonment of 2.5 years. Although the types of violation charged against Lia Eden were different in the two trials, the same Article 156a of Indonesian Criminal Code was used. Therefore, although Lia Eden has once been punished for insulting Islam, Article 156a can still be applied repeatedly against her insofar as she still commits violations in the future. It is clear that the case of punishing Lia Eden for the second time is a violation of right to fair trial because no one shall be

¹³³ 'Lia Eden Dihukum 2,5 Tahun Penjara' Tempo Interaktif, 2 June 2009.

¹³⁴ Ibid.

charged more than once for an action or omission concerning which a tribunal has previously made a legally binding decision.¹³⁵

All the example in the cases described above indicates that the court have failed to proved the element of Crimes against public order within a blasphemy act. As Article 156a is a part of Chapter V on Crimes against Public Order in the Indonesian Criminal Code, the consequence that new criminalization can be considered if the act disturbs the peace of the people to profess their religion and endangers public order. Therefore, if the right of the people to profess their religion is not disturbed, the relevant person cannot be criminalized. This is contradictory to almost all the cases filed under Article 156a which are not related to the crime against public order. Most of the cases brought to the court originated from religious decree or a *fatwa* by MUI or in the result of supervision conducted by the PAKEM Team. The judges also have not considered the element of disturbing public order as an element which must be met in order to pass a decision related to this Article 156a. What is meant by Crime against Public Order in the trial process becomes extremely unclear.

4 Indonesian Blasphemy Law in the Context of Framework of Freedom of Religion or Belief

4.1 Indonesia Blasphemy Law in International Opinion

Many voices and the international community identified Law No.1/PNPS 1965 as one of the biggest obstacles for the full realization of right to freedom of religion or belief in Indonesia. Lack of performance on the part of the Indonesian government to fulfill its obligation on the right to freedom of religion or belief due to the existence of the

¹³⁵ Article 18 (5) of the Law No. 39 Year 1999.

blasphemy law has made Indonesia a target for criticism in many different international forums. In December 2009, The Pew Research Center's Forum on Religion & Public Life, released a global survey on religious freedom with the title 2009 Global Restriction on Religion Report. In this research, Indonesia was rated as third place, after Iran and Egypt, as the country that has most restrictions on the freedom of religion or belief.¹³⁶ Furthermore, the International Religious Freedom Report 2009 for Indonesia, released by U.S Department of State, also concludes the lack of performance of the Indonesian Government on religious freedom due to the existence of Law No. 1/PNPS 1965.¹³⁷ The report finds that the Indonesian government generally respects religious freedom in practice; however, the ongoing government restrictions were significant exceptions to respect for religious freedom, an example of such restrictions is the practice to consider as “deviant” any “unrecognized” religions and sects of the “recognized” religions.¹³⁸

Law No. 1/PNPS 1965 also was among the issues discussed in the forum of Universal Periodic Review of Indonesia to Human Rights Council. In the Country Report, the Indonesian government acknowledged only one challenge that needs to be addressed in relation to the implementation of this Law namely the difficulty of adherents *Aliran Kepercayaan* to have their marriage formally registered.¹³⁹ The report pointed out that there are still cases where followers of certain beliefs in the country have not yet fully enjoyed this right and therefore, the government is committed to ensure that people from different religions and/or beliefs (*Aliran Kepercayaan*) are provided with government services, including the registration of their marriage, without discrimination.¹⁴⁰

¹³⁶ See: Pew Forum on Religion and Public Life, ‘*Global Restrictions on Religion 2009*’, <http://pewforum.org/newassets/images/reports/restrictions/restrictionsfullreport.pdf>, last accessed 19 March 2010.

¹³⁷ U.S Department of State. International Religious Freedom Report 2009, country Indonesia. See <http://www.State.gov/g/drl/rls/irf/2009/127271.htm>, last accessed 15 March 2010.

¹³⁸ Ibid.

¹³⁹ National Report Submitted In Accordance With Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, Country Indonesia, 11 March 2008, A/HRC/WG.6/1/IDN/1.

¹⁴⁰ Ibid paragraph 72.

The Indonesian country report is rather in contradiction with an alternative report submitted by NGO's. In its report, the AITPN (Asian Indigenous and Tribal Peoples Network) states that religious freedom remains a critical issue not only because of increased fundamentalism in Indonesia but also because of the preferential treatments given to the six officially "recognized" religions while "other non-recognized religions" face discrimination and restrictions.¹⁴¹

The Ahmadiyah case also became one of the main topics discussed in the Universal Periodic Review session. In this forum, Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, expressed her concern regarding the Ahmadiyah case and asked two questions. The first one was related to the alleged attacks and threats against Ahmadiyah families, following a *fatwa* banning the Jammah Ahmadiyah by MUI. The second question was regarding the government's considerations to pass the Joint Ministerial Decree on Ahmadiyah.¹⁴² The Indonesian government avoided replying to the first question about the alleged attacks and threats, but in response to the question regarding Joint Ministerial Decree, the Indonesian delegation replied that the measures were taken to keep the peace and guard the assets and activities of the Ahmadiyah.¹⁴³ With that statement the Indonesian government implicitly identified that Ahmadiyah teaching as "deviating" and therefore need to be address by passing the Joint Ministerial Decree.

In the final session of Universal Periodic Report, Asma Jahangir reminded the government about her wish to receive an invitation from the government to visit Indonesia to assess the situation of freedom of religion or belief in 2006.¹⁴⁴ This has been asked for several times

¹⁴¹ See A/HRC/WG.6/1/IDN/3, *supra* note 14, paragraph 26.

¹⁴² Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1, Country Indonesia, 31 March 2008, A/HRC/WG.6/1/IDN/2, paragraph 28.

¹⁴³ *Ibid.*

¹⁴⁴ Commission on Human Rights, Civil and Political Rights, Including the Question of Religious Intolerance, 27 March 2006, E/CN.4/2006/5/Add.1, paragraph 169.

starting in 1996, followed by in 1997 and also 2001-2005.¹⁴⁵ The government also didn't reply to this request without mentioning the reason.

The other forum of the United Nation, Committee on the Elimination of Racial Discrimination also expressed their concern regarding the discriminatory aspect of Law No. 1/PNPS 1965. The committee was of the opinion that the distinctions of "recognized" religion made by Law No. 1/PNPS 1965 have caused adverse impacts on the rights to freedom of thought, conscience and religion of persons belonging to ethnic groups and indigenous peoples.¹⁴⁶ The committee showed a deep concern with Law Number 23 Year 2006 on Administration of Population Affairs (Law No. 23 Year 2006) which has made individuals wishing either to leave the religion column blank or to register under one of the "non-recognized" religions face discrimination and harassment.¹⁴⁷ The Committee recommends that Indonesia treats equally all religions and beliefs, and ensure the enjoyment of freedom of thought, conscience and religion for ethnic minorities and indigenous peoples.¹⁴⁸ The Indonesian government has been given an early reprimand to reply to the issue addressed by the said Committee, including about the impacts of Law No. 23 Year 2006 to adherents of *Aliran Kepercayaan*.¹⁴⁹ In the reprimand, the government was given time until 30th November 2009 to response but up to the writing of this thesis the government has not given any reply or comment.

4.2 Fundamental Obligations of Indonesia in Respect of Religious Freedom

As we can see from the previous section, international organizations call on the Indonesian Government to reconsider the place of Law No. 1/PNPS 1965 within the sphere of freedom of religion or belief. Reconsideration of the position of this law will enable the Indonesian

¹⁴⁵ Report of the Special Rapporteur of the Commission on Human Rights on freedom of religion or belief, Asma Jahangir on the Elimination of all Forms of Religious Intolerance, 30 September 2005, A/60/399, p. 11.

¹⁴⁶ Committee on the Elimination of Racial Discrimination on the Concluding Observations, 15 August 2007, CERD/C/IDN/CO/3, paragraph 21.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ United Nation High Commissioner for Human Rights. Early Warning, Letter dated 28 September 2009. See: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia28092009.pdf, last accessed 10 March 2010.

Government to fulfill its obligation to respect, to protect and to fulfill the freedom of religion or belief.

4.2.1 Obligation to Respect

Obligation to respect means that States have the duty to refrain from discriminating against individuals or groups of individuals based on their religion and belief.¹⁵⁰ This obligation calls for States to recognize and to respect each single type of religion or belief and all form of its manifestation.

The consequence of this obligation is that the State must respect forms of theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.¹⁵¹ In other words, the State must remain neutral since it is not the right of the State to determine that the teaching of one religion is true and the other is deviating. In dealing with a conflict between two different interpretations or teachings of religion or belief, the State should therefore use the word “different” instead of “deviates”.¹⁵² Finally, this obligation goes against idea State’s role in guarding people's consciences and encourage, impose or censure any religious belief or conviction.¹⁵³

General Comment 22 also affirmed that the State must respect the existence of any form of religion or belief regardless the fact that they are newly established or represent religious minorities that may be the subject of hostility on the part of a predominant religious

¹⁵⁰ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 6 January 2009, A/HRC/10/8, paragraph 58 and 35.

¹⁵¹ Article 2 General Comment 22; as the European Human Rights Court stating that freedom of religion or belief is also “*a precious asset for atheists, agnostics, skeptics and the unconcerned.*” ECtHR, *Kokkanikis v. Greece*, paragraph 49.

¹⁵² Franz Magnis Suseno, expert from the petitioners’ side, court session 10 March 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.%2010%20feb%202010.pdf, last accessed 3 March 2010. P. 20.

¹⁵³ Report submitted by Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/23 on Implementation of The Declaration on The Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 30 December 1996, E/CN.4/1997/91, paragraph 99.

community.¹⁵⁴ On the basis of this obligation, Indonesia must also recognize and respect the existence of Ahmadiyah faith or any *Aliran Kepercayaan*. The State might be in a position that is against or opposes Lia Eden's teaching but the State also must remain in the position of respecting her and the truth she adopts no matter how much deviate it is from recognized religion. Since freedom to have or adopt a religion or belief of one's choice is protected unconditionally,¹⁵⁵ the State must understand that her belief is an integral part of her right to freedom of thought and conscience.

Law No. 1/PNPS 1965 is undoubtedly incompatible with the obligation to respect since this law has created segregation between the "recognized" and "non-recognized" religions. Furthermore this obligation also in opposition to Government policies that have reduced *Aliran Kepercayaan* as merely part of cultural heritage of indigenous people as explained in the previous chapter. The State must respect and recognize *Aliran Kepercayaan* as a belief falls within the ambit of respect for freedom of religion or belief and accordingly *Aliran Kepercayaan* must be placed on the same level of protection as other "recognized" religion.

4.2.2 Obligation to Protect

The obligation to protect calls on the State to ensure the free exercise of freedom of religion or belief and without discrimination including from non-State actors.¹⁵⁶ When abuses against members of religious minorities are committed by non-State actors, the States obligation is to bring the perpetrators of discriminatory or violent acts to justice.¹⁵⁷

A fundamental notion under the obligation to protect is non-discriminative protection which calls for States to abolish formal (*de jure*) and actual (*de facto*) discriminations. Formal (*de jure*) discrimination is discrimination enshrined in laws that threaten the

¹⁵⁴ Article 2 General Comment 22.

¹⁵⁵ Ibid.

¹⁵⁶ A/HRC/10/8, *supra* note 150, paragraph 58.

¹⁵⁷ Interim Report of the Special Rapporteur on Freedom of Religion or Belief on the Elimination of all Forms of Religious Intolerance, 17 July 2009, A/64/159, paragraph 30; see also article 2 (3) paragraph a of ICCPR.

manifestation of one's religious freedom. Actual (*de facto*) discrimination is related to the impacts or effects of laws, policies or practices which threaten enjoyment of freedom of religion or belief.¹⁵⁸

Furthermore, this obligation also calls on States to eliminate direct and indirect discrimination. A law, policy or practice creates direct discrimination when a difference in treatment, which cannot be justified objectively, is expressly based on a person's religion or belief.¹⁵⁹ Indirect discrimination stems from a law, policy or practice that does not appear at first sight to involve inequalities but which inevitably leads to inequalities when implemented.¹⁶⁰

This obligation also calls on States to encourage the function of State officials in helping the protection of religious freedom. This function could be manifested in the form of training of State officials to ensure that the principle of non-discrimination, including on the basis of religion or belief, is respected by the State.¹⁶¹ In line with that encouragement, this obligation also recognizes compensation for the violations in which the State must provide legal remedies to individuals in order to allow them to seek redress against discrimination based on religion or belief.¹⁶²

Indonesia failed to comply with obligation to protect because the adoption of Law No. 1/PNPS 1965 created a *de facto* discrimination as it clearly concedes the segregation between "recognized" and "non-recognized" religion.¹⁶³ Discrimination created by this law exists not only in the legislative level because its implementation also threatens the civil and political rights of adherents of religion from "non-recognized" religion (*de jure* discrimination).

¹⁵⁸ Ibid, A/64/159, paragraph 37.

¹⁵⁹ A/HRC/10/8, *supra* note 150, paragraph 38.

¹⁶⁰ Ibid.

¹⁶¹ Ibid, paragraph 59.

¹⁶² Ibid.

¹⁶³ Article 4 (a) Resolution 2005/40 on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

Indeed the Government might raise the argument that other religions are also “recognized” under Law No. 1/PNPS 1965.¹⁶⁴ But the Government has created preferential treatment by placing “recognized” religions under the jurisdiction of Ministry of Religious Affair while the *Aliran Kepercayaan* placed under the Ministry of Culture and Tourism. Such different treatment constitutes a form of direct discrimination. Direct discrimination is also manifested in many different levels of public administration practice, An example of this discrimination will Law No. 23 Year 2006 on Administration of Population Affairs which, as discussed earlier, creates difficulty for adherents of *Aliran Kepercayaan* to declare their belief in their National ID Card or the right to marry and right to form a family between the adherents of *Aliran Kepercayaan*.¹⁶⁵

Chain reactions of direct discrimination made by Law No. 1/PNPS 1965 have created institutionalized discrimination. This could be seen from the denial of the political rights of adherents of *Aliran Kepercayaan* to vote or participate in political matters simply because their beliefs are not recognized by the State. Another example is the denial of the right to education of children’s of *Aliran Kepercayaan* since the State didn’t recognize the belief of their parents as religion in the first place.

Attacks and threats are clearly criminal offence under Indonesian Criminal Code,¹⁶⁶ but the State failed to bring the attackers of Ahmadiyah to the court. This constitutes negligence on the part of the Government in relation to its obligation to protect State and bring the perpetrators of discriminatory or violent acts to justice.

¹⁶⁴ Explanatory Part of Article 1 Law No. 1/PNPS 1965.

¹⁶⁵ Comment of Committee of Elimination of Racial Discrimination in National Report. A/HRC/WG.6/1/IDN/1, *supra* note 139, paragraph 72.

¹⁶⁶ Article 351 (1), article 353 (1) and article 406 Indonesian Criminal Code.

4.2.3 Obligation to Fulfill

Obligation to fulfill calls on States to take steps to ensure that, in practice, every person in their territory enjoys all human rights without discrimination of any kind.¹⁶⁷ This obligation can be fulfilled by providing favorable space to enable persons from different religions or beliefs to freely express and manifest their religious ideas. In doing so, the State must create a normative framework as well as an adequate legal framework based on the principle of non discrimination. These legal frameworks must be able to give an effective and maximum protection of religious freedom as part of the obligation to fulfill.

The obligation to fulfill can also be seen as a positive obligation to ensure the enjoyment of human rights not only in respect of unlawful interferences by its own representatives, but also against certain interferences by non-State actors.¹⁶⁸ In connection with religious minorities, State should also take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs.¹⁶⁹

Indonesia fails to fulfill obligation to fulfill in the sense that Law No. 1/PNPS 1965 only takes into account some concepts of morals from recognized religions only, which makes this law become aggressive towards the difference on the fundamental teaching from those recognized religions. The implementation of this law also does not create a favorable space and condition for persons outside the “recognized” religions to adopt and to manifest their belief. Clearly this law is violating the State obligation to ensure that, in accordance with appropriate national legislation and in conformity with international human rights law, the freedom for all persons and members of groups to establish and maintain religious.¹⁷⁰

¹⁶⁷ A/HRC/10/8, *supra* note 150, paragraph 58.

¹⁶⁸ See Dennis De Jong. *The Legal Obligations of State and Non-State Actors in Respect of the Protection of Freedom of Thought, Conscience and Religion or Belief*. Martinus Nijhoff publishers - Journal Religion and Human Rights 3 (2008) 1–13, p. 1.

¹⁶⁹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 4 (2) and Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, on Civil and Political Rights, Including the Question of Religious Intolerance, 20 December 2004, E/CN.4/2005/61, paragraph 42.

¹⁷⁰ Article 4 (e) Resolution 2005/40.

Creating favorable conditions to enable adherents of *Aliran Kepercayaan* to develop their culture, language, religion, traditions and customs is obviously part of the State obligation to preserve *Aliran Kepercayaan* which is also part of a religious minority. But instead of fulfilling this obligation, the State has even obliterated and caused the death of hundreds of *Aliran Kepercayaan* in Indonesia merely because the Government is of the opinion that *Aliran Kepercayaan* is part of culture of indigenous people and therefore is not eligible to be addressed on the same level as “recognized” religions.

4.3 Identifying the Obstacles

Indonesia has a strong normative framework pertaining to freedom of religion or belief. To Indonesian people, freedom of religion or belief has become national identity. History has shown that Indonesia has set religious freedom as a constitutional right in the 1945 Constitution, which was three years earlier before religious freedom, become universal human rights as states in UDHR. The reason Indonesian Government ratified the ICCPR in 2005 was because Indonesia realized that the rights set forth in this convention are in line with the character of the nation which is to protect and promote human rights including right to freedom of religion or belief.

Given the foregoing, some questions can be raised. Why is religious freedom not effective in Indonesia despite the strong normative framework? If the religious freedom is really important for Indonesia then why does the Government fail in meeting its obligation to respect, to protect and to fulfill as set for the freedom of religion or belief?

These questions need to be addressed in order to understand the root cause faced by Indonesia in relation with its blasphemy law and its impact to religious freedom. Identification of the obstacles faced by the Indonesia Government will accordingly answer the question whether the adoption of the Law No. 1/PNPS 1965 is a necessary and legitimate restriction of freedom of religion or beliefs bearing in mind the socio-cultural conditions of Indonesia.

4.3.1 Law No. 1/PNPS 1965 as Mean of Legitimate Restriction?

Restrictions on the freedom to manifest religion or belief are permitted only if limitations are prescribed by law, are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, and are applied in a manner that does not violate the right to freedom of thought, conscience and religion.¹⁷¹

4.3.1.1 Prescribed by law

The first requirement prescribe by law involves two things. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequence which a given action may entail.¹⁷² So the notion of provided by law means that the law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.¹⁷³

By reading Law No. 1/PNPS 1965 one might understand to what degree a given action will be considered as “deviation” that is when an action is contradicting with main teachings of “recognized” religions. But the problem is there are so many religions such as Ahmadiyah or *Aliran Kepercayaan* that embraced their conviction without any intention to insult. They simply profess their religion or belief just because they believe that the truth lies within.

In addition, Law No. 1/PNPS 1965 tends to be ambiguous since it only “recognizes” several teaching of religions. This is clearly on contrary with restrictions that are permitted by General Comment 22 in which the concept of morals should derive from many social, philosophical and religious traditions. Therefore, limitations on the freedom to manifest a

¹⁷¹ Resolution 2005/40, paragraph 12.

¹⁷² ECtHR, *Sunday Times v. United Kingdom*, paragraph 49.

¹⁷³ Johannesburg Principles, Principle 1.1 (a).

religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.¹⁷⁴

4.3.1.2 Restrictions Must Address One of the Aims

Law No. 1/PNPS 1965 arguably is a restriction with the aim to protect the fundamental rights and freedoms of others. Based on the international human rights norm, in imposing a restriction, the State must take into account the right to equality and non discrimination on any grounds and must be directly related and proportionate to the specific need on which they are predicated.¹⁷⁵ Therefore the State must also take into account the principle of proportionality. This principle obliges the State to justify that interference in the relevant rights was 'proportionate to the legitimate aims pursued' and the reasons adduced to justify such interference are 'relevant and sufficient'.¹⁷⁶ Thus, there has to be a reasonable relationship between the means employed and the aims sought to be achieved.¹⁷⁷

The legitimate aim pursued in Law No. 1/PNPS 1965 is the protection of rights and freedoms of religious people in Indonesia. Nevertheless, the means employed to pursue that legitimate aim is to sacrifice the rights and freedoms of the people from outside recognized religions. Therefore, the restrictions made by this law become irrelevant and insufficient since it creates a discrimination which is contrary to the principle from General Comment 22 that stated restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.¹⁷⁸

¹⁷⁴ General Comment 22 paragraph 8.

¹⁷⁵ See Manfred Nowak. *UN Covenant on Civil and Political Rights: ICCPR Commentary*. 2nd edition. Rev. ed. Kehl Am Rhein. Germany (N.P. Engel Publisher) 2005, page 425-427.

¹⁷⁶ ECtHR, *Barford v. Denmark*, paragraph 49.

¹⁷⁷ ECtHR, *the Stubbings and Others v. the United Kingdom*, paragraph 50 .

¹⁷⁸ *Ibid.*

4.3.1.3 The Application Must Not Violate the Relevant Rights

It is stated that the restriction can be applied provided that it is done in a manner that does not violate the right to freedom of thought, conscience and religion.¹⁷⁹ Law No. 1/PNPS protects only the interest of people that are of a “recognized” religion to be free from any defamation or blasphemy and thus it is a discrimination against people from “non recognized” religions. This law is applied in a discriminatory manner which violates the right of people from “non-recognised” religion or belief to freedom of religion or belief and even worse also violates other relevant civil and political rights.

In essence, the Law No. 1/PNPS 1965 draws a distinction between religions which in itself constitute a basis for an act of discrimination and as such, can not serve as legitimate restrictions for freedom of religion of belief. Law No. 1/PNPS 1965 also failed to comply with all the guidelines in imposing a restriction on freedom of religion or belief as provided by General Comment 22. Therefore Law No. 1/PNPS 1965 has become the first obstacle faced by the Indonesian Government in guaranteeing the right to freedom of religion or belief.

4.3.2 Relation Between State and Religion

The second obstacle faced by the Government is the fact that the position of religion has deep roots in the character of the nation. These roots can be tracked down until the very moment of the establishment of the nation. The long debates between religious groups and nationalists on the most appropriate foundation of the State (*Dasar Negara*) for Indonesia gave a clear picture how that religious groups are a political power that need to be take into account in calculating the national political scale.

The State foundation that is based on One and Only God is the first path of Islam Ideology in the nation life of Republic of Indonesia. Although Muslim failed in the effort of making Indonesia as Islamic State, the long struggle of Islamic organizations to ensure the life of

¹⁷⁹ Resolution 2005/40, paragraph 12.

the nation be based on Islamic law has finally triumphed at many different levels of society life. A research on religious freedom released by The Wahid Institute proved that there are at least five levels of implementation of Islamic law or tradition in Indonesia:¹⁸⁰

- The first level, the implementation of Islamic Law in the field of family life such as law of marriage, divorce and also inheritance law. An example of this level is Law No. 1 Year 1974 on Marriage and also Presidential Instruction No. 1 Year 1991 on the Islamic law Compilation. Another sample of this is the existences of Islamic Court based on Law No. 3 Year 2006.
- The second level, economics and finance. This level is indicated by the penetration of religious aspects on regulations that have connections with economics and finance such as *Syariah* Banking Law, *Wakaf* (giving a property in charity for purpose of acquiring merit in the eyes of *Allah*) and *Zakat* (the sharing of wealth).
- The third level, religious practice and morality that have been introduced into Governmental regulations, such as the obligation to wear a headscarf for Muslim women or *Takwa* clothes for men. This level can also be traced to other laws that have connection with religious values such as Law No. 23 Year 2002 on Child Protection, Law No. 20 Year 2003 on National Education System.
- The fourth level, implementation of *Jinâyat* (Islamic Criminal Code) especially that have connections with types of sanctions on the act of breaches of Islamic Law. Tendency of this level can be seen from the existence of so many municipal regulations having a religious nature and impose a penal sanction.
- The fifth level, the movements that demand Islam as the foundation of the State. This is the highest level from Islamic ideology. This level has not happened yet in Indonesia but we can point to the province of The Nanggroe Aceh Darussalam with its special autonomy to enforce *Syariah* law on its jurisdiction as the tendency toward this level.

Islam is clearly not a State religion in Indonesia, but the above research proves that Islam has significantly deep influence in the State affairs and the life of the nation. The

¹⁸⁰ The WAHID Institute, Annual Report 2008 on Belief and Religious Pluralism in Indonesia. Available at: http://www.wahidinstitute.org/files/_docs/Laporan%20Pluralisme%202008%20WahidInstitute.pdf, last accessed 30 March 2010, p. 26.

involvement of Islam and the State could be understood in the philosophy of Islam that states Islam not only involves with the *Ukhrawi* (related with religious life) but also *Duniawi* (related with daily life such as politic and economic). This could be seen from the infamous adagi stating *Islam dîn wa daulah* (Islam is religion and State).¹⁸¹

Islam as a religion, which is adhered to by most Indonesian citizens, is a religion with a high sensitivity against defamation.¹⁸² According to Habib Riziek Shiyab, leader of fundamentalist group Islamic Defender Front (*Front Pembela Islam/FPI*), Islam is a religion with a clear structure consisting of *Akidah* (faith), *Syariat* (Islamic Law), and *Akhlak* (behavior). This structure is rigid in the sense it was set in right order by using a clear methodology. Not everyone is allowed to make arbitrary interpretation without following the system and methodology in the level of *Ushuluddin* (main teaching of Islam that very principle and fundamental in the field of *Akidah*, *Syariat* or *Akhlak*) or in the level of *Furuuddin* (the branch of main Islamic teaching that are important but not fundamental in the field of *Akidah*, *Syariat* or *Akhlak*).¹⁸³ Therefore a Muslim has obligations to save and to guard the prophetic quality of Prophet Muhammad and also Holy Quran from any attempts to disgrace or insult made by anyone on this earth.¹⁸⁴ Furthermore there is a profound belief in Muslims that Islam is the most perfect religion. The foundation for this belief can be seen in Al Quran namely in the verse of Al-Ma'idah 5:3 which States: "*This day have I perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion.*"

¹⁸¹ Ibid p. 24.

¹⁸² See Siti Zuroh, expert presented by the Constitutional Court, court session 17 March 2010, Case Number: 140/PUU-VII/2009, Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2009,%2017%20Maret%202010.pdf, last accessed 19 March 2010. p. 20.

¹⁸³ See Habib Riziek Shiyab, as the representation of concern party FPI, court session 10 March 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2010,%2010%20Maret%202010.pdf, last accessed 12 March 2010. p. 31.

¹⁸⁴ Abu Yamin Rahman, expert from MUI, court session 10 March 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2010,%2010%20Maret%202010.pdf, last accessed 11 March 2010. p. 65.

In Muslims' point of view, blasphemy law served as a guardian to foster the sacredness of Islam. The sensitive character of Islamic teaching favors the implementation of the Law No. 1/PNPS 1965 that wants to prevent and punish any attempt to disgrace or insult religion. Clearly none of the "recognized" religions under Law No. 1/PNPS 1965 wants to be insulted or ridiculed; all these religions have their own limits on tolerating "deviate" interpretations or activities on their tenets of religion. However, as a matter of comparison, most of the cases deals with the implementation of Law No. 1/PNPS 1965 have almost always involved blasphemy and heresy against Islam.¹⁸⁵

In addition to the fact that Islam is the religion with the largest adherents in Indonesia, it is also a fact that Indonesia is a very pluralist country. The State has been able to accommodate those differences to some extent, but fails to recognize and accommodate such plurality in Law No. 1/PNPS 1965. As mentioned earlier, the history of Law No. 1/PNPS 1965 shows that this law was the agenda of the Government to protect the "recognized" religions in Indonesia especially Islam. In other words, the Law No. 1/PNPS 1965 does not have any harmony with the reality of plurality of Indonesia society as it was passed without taking to account the social cultural condition of Indonesia.

The ratification of the ICCPR in 2005 called on Indonesia to give protections that are much broader than before. While Law No. 1/PNPS 1965 accommodated the Indonesian view on religious freedom that only protects mainstream religions, the ICCPR introduced a new type of ideal for religious freedom where plurality, non-discrimination and mutual respect become its main character. According to the ICCPR, the State must offer maximum protection and as far as possible even to the conviction that clearly on opposite with mainstream religions in Indonesia and this would include New Religion Movement such as Ahmadiyah. This is difficult to be accepted by Indonesian culture that is characterized by different perspectives on religious freedom especially when it comes to tolerate "deviating" teachings or New Religions Movements. Ahmadiyah might be well known to western civilization and internationally well recognized as New Religious Movement, but a country

¹⁸⁵ The WAHID Institute, *supra* note 180. p. 29; see also U.S. Department of State, *supra* note 137.

with Islam as the state ground or a country with a great majority Islam will always regard Ahmadiyah as defamation of Islam.

On the latest development of international view on the right to freedom of religion or belief, Asma Jahangir emphasised that “the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule”.¹⁸⁶ Furthermore, defamation of religions may offend people and hurt their feelings but it does not directly result in a violation of their rights to freedom of religion.¹⁸⁷ These broad interpretations of freedom of religion will never find any favor in Indonesia where the State considers a right to be free from criticism or ridicule as an integral part of the right to freedom of religion or belief. The practical implementation of Law No. 1/PNPS 1965 has been based on such a narrow understanding of freedom of religion or belief.

On the other hand, one might consider that Law No. 1/PNPS 1965 is a manifestation of cultural relativism. This statement is true if Indonesia never got involved in the international society and therefore didn't have any obligation to recognize very complicated obligations such in General Comment 22. Indonesia would then have to base its obligation merely on the freedom of religion or belief as understood under the 1945 Constitution, the interpretation of which must be done according to the Indonesian culture and societal conditions. According to traditional view of freedom of religion or belief that has been recognized by Indonesia, religious freedom only applies to the adherents of religions that have been recognized before and long established, thus the act of modifying

¹⁸⁶ Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, on the Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 21 December 2009, A/HRC/13/40, paragraph 39, see also Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance on the Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”. A/HRC/2/3. 20 September 2006.

¹⁸⁷ UN Working Group on Arbitrary Detention on the Communication Addressed to the Government, Opinion No 35/2008, 6 December 2008, paragraph 3.

or imitating one religion or combined a religious teaching with local cultures is considered as not an act of religious freedom, but an act of blasphemy.¹⁸⁸

So it is obvious that Indonesia is not ready for this type of obligation to respect, to protect and to fulfill in freedom of religious or belief as introduced by ICCPR. The main reason because Law No. 1/PNPS 1965 was not compatible to serve as a legitimate restriction of freedom of religion or belief in Indonesia. Another factor is Islam, a religion that highly sensitive to acts of defamation, already strongly attached to the character of Indonesia as a nation. The Government position is squeezed between two different interests that contradict each other: on one hand, government must fulfill the obligations as introduced by ICCPR and on the other hand, government must also accommodate the interests of mainstream religions, especially Islam, that will never tolerate blasphemy. That position finally affects the fulfillment of the obligations on freedom of religion or belief in Indonesia.

Unfortunately Indonesia has never made any declaration or reservation to clarify the meaning and scope of article 18 when ratifying the ICCPR. Under this mechanism, Indonesia should be able to declare that article 18 is subject to the compliance obligations with certain laws, for example Islamic law. Indonesia can also identify the social cultural factors and also the limits of State tolerance on freedom of religion or belief. A declaration on article 18 will enable Indonesia to fulfill its obligations under the ICCPR without causing conflicts with the character of the nation that wants to protect the religions. Nonetheless, it should be noted that a declaration on article 18 ICCPR does not mean that afterwards Indonesia will be able to discriminate religions or beliefs and justify it as the manifestation of the character of the nation. This declaration should have been able to serve as the guidance for international community in judging the position of deviate teachings of religion within the context of State obligations to freedom of religion or belief.

¹⁸⁸ See generally opinion of Mahdini, expert from the Government's side, court session 10 March 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2010,%2010%20Maret%202010.pdf, last accessed 12 March 2010. p. 61 – 64.

4.4 Identifying the Solutions

4.4.1 Judicial Review in Constitutional Court

Many NGOs have repeatedly demanded the Government to revoke the Law No. 1/PNPS 1965 but to no avail. The NGO alliance finally decided to bring the law to the Constitutional Court for judicial review. The petition was submitted in September 2009 and registered under the case no. 140/PUU-VII/2009. Nine judges of Constitutional Court will examine this law to ascertain as to whether it contradicts the norms sets by the 1945 Constitution. Should they find this law contradictory, all provisions of this law, including article 4 which adds a new provision of article 156a into the Indonesian Criminal Code, will be declared as unconstitutional and will no longer have any binding force. If this is the case, the Government will not be able to use this law as instrument in punishing a blasphemy case in the future.

As the writing of this thesis was conducted, the Constitutional Court had finished hearing the arguments of concerned parties such as the religious community. The Court heard the opinions of almost 40 expert witnesses and examined the victims of the implementation of Law No. 1/PNPS 1965. The only session remaining is closing statements from the parties and after that the judges will retire to deliberate the case before rendering a verdict.

From the hearing sessions held by Constitutional Court so far, there are three groups of interest in this case and each of them represents a different opinion towards Law No. 1/PNPS 1965.

The first one is the group that wants the court to declare that Law No. 1/PNPS 1965 as unconstitutional. This group is consisted of small number of “Concerned Parties” such as The Bishop's Conference of Indonesia (*Konferensi Waligereja Indonesia/KWI*), Organization of Kepercayaan Coordinating Board (*Badan Kordinasi Organisasi Kepercayaan/BKOK*) and National Commission on Violence against Women (KOMNAS

PEREMPUAN). In addition, a small number of expert witnesses also support the revocation of this law such as Franz Magnis Suseno and Mudji Sutrisno (experts on the Catholic Philosophy), Ulil Abshar Abdalla and Luthfi Assyaukanie (experts on Islamic studies), Sutandyo (expert in the field of sociology), Subur Budhisantoso (expert in the field of anthropology), J.E. Sahetapy (expert in the field of legal science) and also M.M Billah (expert in the field of human rights studies). Cole Durham, the only foreign expert in the court, invited by petitioners, also stands in this group.

Arguments made by the first group mainly revolve on the following basis:

- the imbalance of this law with plurality in Indonesia,
 - the emphasis on the State neutrality requiring that the State should be neutral in pursuing the fulfillment of its obligation to secure freedom of religion or belief and the State should not take sides with some religions.
 - the extensive interpretation of the law. History of Islam is mainly a history of interpretation in which different interpretations are common. Therefore different interpretation cannot be criminalized. Similarly, having an opinion of a different faith is also not disgracing religion.
 - the injustice created by this law toward women and adherents of *Aliran Kepercayaan*
- Based on foregoing, Law No. 1/PNPS 1965 cannot serve as a legitimate restriction for freedom of religion or belief.

The second group is the group that wants the Constitutional Court to declare the Law No. 1/PNPS 1965 needs to be revised or that the Government could also adopt a new blasphemy law. This group is consisted of KOMNAS HAM and religious organizations such PGI and Hindudharma. Expert witnesses having the same lines of opinions with this group are: Siti Zuroh (expert in democracy and human rights), Emha Ainun Nadjib (expert in cultural studies) and also Azyumardi Azra (an expert in historical studies).

This group maintains that Indonesia still needs a blasphemy law but Law No. 1/PNPS 1965 could not serve as blasphemy law since the its provisions and containing notions are no

longer relevant to address the current situation. Law No. 1/PNPS 1965 was made during the Guided Democracy era which is very different with today's situations. Accordingly, the Government needs to make a new law which is appropriate for the current reformation era.

The third group is the group that opposes the nullification of Law No. 1/PNPS 1965. This group is consisted of the Government of the Republic of Indonesia, the House of Representatives, Islamic Political Parties such as United Development Party (*Partai Persatuan Pembangunan/PPP*), groups of moderate Islam such as *Nahdlatul Ulama*, *Muhammadiyah* and also Hizbut Tahrir Indonesia (HTI), groups of fundamentalist Islam such as The Islamic Defender Front (*Front Pembela Islam/FPI*), Indonesian Council for the Propagation of Islam (*Dewan Dakwah Islamiyah/DDI*), The Islamic Union (*Persatuan Islam/PERSIS*) and Union for Reformation and Guidance (*Al-Irsyad Al-Islamiyah*). In addition, some of religious organizations also stand in this group such as The Indonesian Council of Ulamas (*Majelis Ulama Indonesia/MUI*), The Indonesian Buddhist Council Association (*Perwakilan Umat Buddha Indonesia/WALUBI*) and also The Supreme Council for Confucian Religion in Indonesia (*Majelis Tinggi Agama Khonghucu Indonesia/MATAKIN*).

This group argued that Law No. 1/PNPS 1965 is needed in the context of fostering peace between adherents of different religions and to prevent chaos in society. According to this group, Law No. 1/PNPS 1965 serves as a legitimate restriction on freedom of religion or belief based on the 1945 Constitution. As from the religion point of view, this group argued that history of fundamental teaching of religion cannot be arbitrarily interpreted. This group also argued on the importance of stipulating the blasphemy act and also the significant position of article 156a in the context of criminal law of Indonesia.

In the course of their arguments, this group never mentioned the human rights violations as the result of the implementation of Law No. 1/PNPS 1965. Human rights was only mentioned when it comes to stating that this law serves as a legitimate restriction on freedom of religion or belief. None of the experts in human rights in this group discussed

the interconnection and interdependence of freedom of religion or belief to other civil and political rights. It was obvious that this group was avoiding any discussion around the implementation of Law No. 1/PNPS 1965 in the human rights perspective.

It is difficult to predict how the Constitutional Court will decide on the judicial review of Law No. 1/PNPS 1965. It may be interesting to see the previous decisions of Constitutional Court on the case relating to the context of defamation. One such decision is related to the petition for judicial review on the defamation articles of Indonesian Criminal Code on the basis that they are contrary to the right to freedom of expression as guaranteed by the 1945 Constitution.¹⁸⁹ The court rejected the petition and reasoned that reputation, dignity or honor of any person shall be recognized as legal interest protected by the criminal law because they are parts of the citizens' constitutional rights as guaranteed by the 1945 Constitution or international law and concomitantly, if there is a certain criminal sanction pursuant to the criminal law with respect to actions harming reputation, dignity or honor of any person, such sanction is not contradictory to the 1945 Constitution.¹⁹⁰

Obviously the judicial review on the sphere of freedom of expression is different with the judicial review on the freedom of religion or belief, but both of them have a similarity to the extent that they concern with the legitimacy of the State imposed restrictions on the freedoms granted by the 1945 Constitutions. If the Constitutional Court considers that the right of any person to be free from acts of blasphemy is a constitutional right and that Law No. 1/PNPS 1965 is a legitimate restriction based on the 1945 Constitution, the judges will reject the petition from petitioner. On the other hand, if the judges are able to see the correlation between the existence of Law No. 1/PNPS 1965 and the extent of occurring and potential violations of other civil and political rights as granted by the 1945 Constitution, the court will declare this law as unconstitutional and a non-legally binding legal

¹⁸⁹ The Constitutional Court of Republic of Indonesia. Decision on the Case No. 14/PUU-VI.2008 on the Judicial Review of Article 310, 311, 316 and 207 Indonesian Criminal Code under 1945 Constitution of Indonesia. available at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_14-PUU-VI-2008%20%28Eng%29.pdf, last accessed 2 April 2010.

¹⁹⁰ Ibid, paragraph 4.1.

instrument. So far the petitioners have been able to give strong arguments and evidence to support the revocation of this law.

4.4.2 A Call for National Identity Awareness

Regardless the content of the verdict of Constitutional Court on the judicial review of Law No. 1/PNPS 1965, the verdict will give a significant impact to the relationship between the State and the different religious groups in the future. Some questions remain: will this decision be enough to solve the current problems? Will the decision make any difference on the Government's point of view towards adherents of *Aliran Kepercayaan* or even further, toward adherents of deviates teachings such as Ahmadiyah or Lia Eden?

Most of the countries in Europe were established based on the culture that is relatively identical, which made it easier to build standard prescriptions for the single national life.¹⁹¹ There is a historical reality, sociological, political and religious differences between the western societies with the experiences of the Muslim societies, especially in States where Islam is the majority in the demographic position.¹⁹² Indonesia's position became more unique since the nation was established on the basis of the plural society. To this end, Indonesia must always accommodate all the values of plurality in designing a law, including a law in the nature of religious freedom. As long as the Government maintains the policy as reflected by Law No. 1/PNPS 1965, the differences and also the expression of cultural belief or spiritual conviction will always be considered as "deviation".¹⁹³

At the same time with the ongoing process of judicial review of Law No.1/PNPS 1965, the Government and House of Representatives are designing a new bill of criminal code in

¹⁹¹ Sutandyo, expert from the petitioners' side, court session 10 March 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2010,%2010%20Maret%202010.pdf, last accessed 12 March 2010. p. 11.

¹⁹² Azyumardi Azra, expert presented by Constitutional Court, court session 10 March 2010, Case Number: 140/PUU-VII/2009. Indonesian Constitutional Court. Available at http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_Perkara%20Nomor%20140.PUU-VII.2010,%2010%20Maret%202010.pdf, last accessed 12 March 2010. p. 15.

¹⁹³ Sutandyo, *supra* note 191, p. 12.

which the State still preserve the existence of article related with acts of blasphemy within this draft. This means that even if the Constitutional Court decides to nullify the Law No.1/PNPS 1965 and as a consequence thereof, article 156a of Indonesian Criminal Code will not be legally binding; the article pertaining to acts of blasphemy will reappear again in the new criminal code.

So far the criminal code draft which has been brought to House of Representatives for consideration is really poor and is still ignoring the plurality of Indonesian society.¹⁹⁴ This is the point where the Government is called to embrace the plurality within those draft articles. Therefore, if the Government continues with the mentality as prescribed in the Law No. 1/PNPS 1965, all the exhausting efforts and dialogues built in the Constitutional Court will be useless.

Indonesia obviously needs a blasphemy law. This could be seen from several factors that are connected to each other. Indonesia is the largest Muslim country in the world and Islam, which is adhered to by most of the citizens is a type of religion that is really sensitive to defamation of religion. Furthermore Indonesia as a State has a very complex relationship with religion ever since the establishment of this nation. At the same time, Indonesia is also a very diverse country with a rich multi-cultural, multi-ethnic and multi-religious history. Regulating the limits of religious freedom in order to avoid someone violating another person's right to freedom of religion or belief is therefore a must.

The Government must be able to design a blasphemy law that not only accommodates the interests of several religions but also the interests of the nation and all its components. This can only be done by taking into account the values of plurality and the implementation of blasphemy law without any discrimination. Obviously Ahmadiyah or Lia Eden or any prophet that will come after them will always be regarded as deviate blasphemy against the main teachings of Islam, but at least according to obligation to respect, the State could have

¹⁹⁴ See generally Ahmad Suaedy, '*Pasal-Pasal Agama Dalam Rancangan KUHP Cenderung Diskriminatif*', The Wahid Institute, Jakarta – 2007, http://www.wahidinstitute.org/Programs/Detail/?id=159/hl=id/Pasal-Pasal_Agama_Dalam_RKUHP_Cenderung_Diskriminatif, last accessed 21 March 2010.

been more objective in viewing their belief and therefore should respect their conviction as part of their right to freedom of thought and conscience.

Indonesia should not preserve a blasphemy law with the purpose to protect religion itself because the protection of religion is not part of the freedom of religion or belief. God is big enough to protect Himself and religion or belief is not a legal entity that needs to be protected as the State protects its citizens. As the Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance once emphasised “the right to freedom of religion protects primarily the individual and, to some extent, the collective rights of the community concerned, but it does not protect the religions or beliefs per se”.¹⁹⁵

A blasphemy law will be in conformity with the right to freedom of religion or belief provided that the following conditions are met:¹⁹⁶

- They should be formulated in such a way that they relate to the right of individual persons and not to abstract concepts like ‘God’ or ‘religion’;
- They have to protect adherents of all religions or beliefs in a non-discriminatory manner;
- They have to be applied restrictively, i.e., only if there are no other ways of reducing the harm brought to believers.

4.4.3 Providing Space for Dialogues

Along with the requirements mentioned above, redefining the values of religious freedom also calls on the State to provide the space for dialogue. In a society that is based on morality and democracy, a process into the new life order with the inclusive structure must be based on the interactive approaches which involve all the citizens in healthy dialogues within political and cultural spheres.¹⁹⁷

¹⁹⁵ See A/HRC/2/3, *supra* note 186, paragraph 38.

¹⁹⁶ Dennis De Jong, *supra* note 168, p. 10.

¹⁹⁷ Sutandyo, *supra* note 191, p. 10

The Government must also encourage initiatives of interreligious and intra-religious dialogue aiming at the promotion of respect for religious diversity within pluralist societies.¹⁹⁸ Participation in initiatives related to interreligious dialogue should not be limited to leaders of religious or belief communities, but be as inclusive as possible.¹⁹⁹ This means the dialogue should not be limited to only the mainstream religions but must also involve all the forms of belief in Indonesia including *Aliran Kepercayaan*.

These dialogues should be able to define new religious values that tolerate difference and plurality that could be accepted as truth by all the national elements. All participants of such dialogues are called upon to give a broader understanding of what and to be able to show some respect towards other peoples' convictions no matter how much it "deviates" from his/her own belief. This requires that serious adherents of each of the set of rival religious or life/stance traditions reasonably hold this universally applicable human right to be well supported by each of the separate normative traditions in the set, in other words they reasonably hold the right to be arguably well-grounded in each particular belief-system including their own.²⁰⁰

Based on those dialogues, the Government will have a clear picture on what should be taken into consideration in drafting a new blasphemy law which is appropriate with the pluralistic character of Indonesia and that it is able to accommodate all religions and beliefs in Indonesia.²⁰¹

¹⁹⁸ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muiga on the Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-up to and Implementation of the Durban Declaration and Programme of Action, 19 May 2009, A/HRC/11/36, paragraph 12

¹⁹⁹ Ibid, paragraph 19

²⁰⁰ Tore Lindholm, 'Philosophical and religious justification of freedom of religion or belief' on *Facilitating Freedom of Religion or Belief: A Deskbook*, Tore Lindholm, W. Cole Durham, Jr. Bahia G. Tahzib-Lie (ed), Netherland, Martinus Nijhoff Publishers, 2004, p. 51

²⁰¹ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène on the Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-Up to and Implementation of the Durban Declaration and Programme of Action, 21 August 2007, A/HRC/6/6, paragraph 78

From the foregoing it is clear that formulating a just and impartial blasphemy law in Indonesia is not an easy task. What's more, the difficulties do not stop there as Indonesia recognizes the notion of "One and Only God" as the foundation of the state. In essence, this is a theistic doctrine which obliges every citizen of Indonesia to have a religion or, at least, become an adherent to *Aliran Kepercayaan* on the One and Only God. Consequently, people whose basic conviction or life stance is non-religious, such as atheists, skeptics and agnostics, will never be acknowledged in Indonesia regardless of the fact that atheism, skepticism and agnosticism are also forms of belief. It follows that, although Indonesia may be able to define a blasphemy law which is accommodative for adherents of many different religions and *Aliran Kepercayaan*, such a law will always be discriminative against people who choose not to have a religion. The relationship between blasphemy law and the protection of those not having any religion is not explored in this thesis due to thesis' limited framework. A comprehensive study on such a relationship and on the impacts of the notion of One and Only God in Indonesia on people having atheist, skeptic or agnostic convictions would be an interesting project to conduct.

5 Conclusion

When placing the blasphemy law within the context of human rights, the international community generally is divided into two different opinions. First, the opinion that is usually held by states where religion serves as the foundation of the state/constitution or where most of the citizens are religious, a blasphemy law is a measure to protect the citizen's religious freedom. The second opinion argues that a blasphemy law poses a threat to one's religious freedom. The international regime of human rights allows the state to adopt a blasphemy law as a restrictions on freedom of religion or belief as long as the adoption will not be exercised in a discriminatory manner or put relevant rights in jeopardy.

Indonesia adopted a blasphemy law as stipulated in Law No. 1/PNPS 1965 on the Prevention of Misusing and/or Defamation toward Religion. This law can be seen as an attempt to manifest the State's margin of appreciation to impose a legitimate restriction on the nature of religious freedom as granted by the 1945 Constitution of Indonesia. The main consideration for the government to adopt this law in 1965 was the socio-cultural conditions that indicated an increasing in defamation toward religions. Although this law was made based on a Presidential Stipulation, which is not recognized under the Indonesian hierarchy of regulations, the Government decided to keep this Presidential Stipulation and elevated its status to become a "Law".

The major problem of Law No. 1/PNPS 1965 in regard with the protection of freedom of religion or belief is that Indonesia as a State recognizes several religions. The logical consequence of this recognition is that state policies only facilitate the interests of those recognized religions to be free from any defamation or blasphemy. Therefore a discriminative aspect of this law does not exist in terms of segregation of religions, but it advocates preferential treatment of one religion or belief over another.

The implementation of Law No. 1/PNPS 1965 brought an adverse impact to the enjoyment of people's right to freedom of religion or belief. This law became a repressive instrument to restrain the exercise of one's religious freedom and is also indifferent to the plurality and difference of the country. In the end, this law not only violates rights and freedoms of religions and beliefs, but many other relevant civil and political rights of people from outside the recognized religions.

At the international level, Law No. 1/PNPS 1965 has always been a controversial issue given the Indonesian government's obligation to guarantee freedom of religion or belief under the international human rights regime. This law became one of the indicators of the lack of performance of the Indonesian government in guaranteeing religious freedom for its people. Different committees in the United Nations also found that Indonesia has failed to

fulfill its obligations under the relevant UN conventions which have been ratified by Indonesia.

The state obligation to respect, to protect and to fulfill under CCPR calls on the state to provide a broader and more comprehensive protection of freedom of religion or belief. Indonesia failed to meet these obligations mainly because of two different factors. First, Law No. 1/PNPS 1965 is not compatible with the international guidelines in imposing a restriction on freedom of religion or belief. Second, the state has a strong and very complex connection with religions, especially Islam, in which the government tends to accommodate only the interests of accepted religions to be free from defamation and at the same time ignore other people's rights to freedom of religion or belief. These factors contribute to the dilemma in which Indonesia finds itself; on one hand Indonesia has ratified CCPR, and thus has an obligation to protect minority religions or New Religious Movements, while on the other hand Indonesia needs to accommodate the interests of the religions that are really sensitive to defamation.

The adverse impact of this law on society didn't make the Government take the initiative to reconsider the existence of this law as this law is considered necessary to maintain the balance of religious freedom in Indonesia. As a solution, an alliance of NGOs finally submitted this law for judicial review in the Constitutional Court. A decision from the Constitutional Court will surely change the pattern of relationships between the state and religions in the future. Nevertheless, the decision will clearly not make any significant difference on the fulfillment of freedom of religion or belief as long as the Government still has not taken into account the pluralism of Indonesia as a nation.

Indonesia is the home of hundreds of *Aliran Kepercayaan* which are integrated in the cultural life of hundreds of tribes and indigenous peoples. Many of the Indonesian people have also become adherents to the internationally recognized religions, mainly Islam. In the face of Indonesian plurality it is clear that in the future, Indonesia still needs a blasphemy

law as an instrument to maintain order for the enjoyment of religious freedom of all those different national elements.

In the adoption of a blasphemy law, the Government needs to redefine traditional values, including the official point of view of the Government towards the difference of religions and beliefs, the position of the State in its relationship with the religions, the State's obligations pertaining to the right to freedom of religion or belief on a domestic and an international level. Dialogues in the religious, political and cultural fields are the first important steps that should be taken to adopt a model of a blasphemy law which is appropriate for Indonesia.

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“All material referred to in this assignment is listed in the reference list”

Annex A

LIST OF ABBREVIATION

ABRI	Angkatan Bersenjata Republik Indonesia/ National Army of Republic Indonesia
AITPN	Asian Indigenous and Tribal Peoples Network
BKOK	Organization of Kepercayaan Coordinating Board/Badan Kordinasi Organisasi Kepercayaan
DDI	Dewan Dakwah Islamiyah/Indonesian Council for the Propagation of Islam
DI/TII	Darul Islam/Tentara Indonesia Islam - Islamic State/The Islamic Force of Indonesia
FPI	Front Pembela Islam/The Islamic Defender Front
GBHN	Garis Garis Besar Haluan Negara/Broad Outlines of the Directions of the State
HTI	Hizbut Tahrir Indonesia
ICCPR	International Covenant of Civil and Political Rights
KK	Kartu Keluarga/Family Register Card
KOMNAS HAM	Komisi Nasional Hak Azasi Manusia/National Commission of Human Rights
KOMNAS PEREMPUAN	Komisi Nasional Perempuan/National Commission on Violence against Women
KTP	Kartu Tanda Penduduk/National Identity Cards

KWI	Konferensi Waligereja Indonesia/The Bishop's Conference of Indonesia
KUHP	Kitab Undang Undang Hukum Pidana/Indonesian Criminal Code
MATAKIN	Majelis Tinggi Agama Khonghucu Indonesia/The Supreme Council for Confucian Religion in Indonesia
MPR	Majelis Permusyawaratan Rakyat/People's Consultative Assembly
MUI	Majelis Ulama Indonesia/The Indonesian Council of Ulamas
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
PAKEM	Pengawas Aliran Kepercayaan Masyarakat/ Supervision of Aliran Kepercayaan in Society
PERSIS	Persatuan Islam/The Islamic Union
PGI	Persekutuan Gereja-Gereja di Indonesia/Communion of Churches in Indonesia
PNI	Partai Nasional Indonesia/Nationalist Party of Indonesia
PKI	Partai Komunis Indonesia/Communist Party of Indonesia
PPP	Partai Persatuan Pembangunan/United Development Party
PRRI/PERMESTA	Pemerintahan Revolusioner Republik Indonesia/Perjuangan Rakyat Semesta - Revolutionary Government of the Republic of Indonesia
WALUBI	Perwakilan Umat Buddha Indonesia/The Indonesian Buddhist Council Association

UDHR

Universal Declaration of Human Rights

Annex B

PRESIDENTIAL STIPULATION NUMBER 1/PNPS YEAR 1965 REGARDING THE PREVENTION OF MISUSING AND/OR DEFAMATION TOWARD RELIGION

THE PRESIDENT OF REPUBLIK OF INDONESIA

- Considering:**
- a. whereas in the framework of protecting the State and Society, the objective of National Revolution and the National Development towards a just and prosper society, it is deemed necessary to adopt a legislation to prevent a misuse or defamation of religion;
 - b. whereas in order to secure the revolution and the societal norms, it is deemed necessary to adopt a President Stipulation;

- In view of:**
1. Article 29 of the 1945 Constitution;
 2. Article IV of transitional provisions of the 1945 Constitution;
 3. President Stipulation Number 2 Year 1962, State Gazette Year 1962 No. 4);
 4. Article 2 (1) of the Resolution M.P.R.S. No. II/MPRS/1960;

HAS DECIDED:

- To pass: PRESIDENTIAL STIPULATION ON THE PREVENTION OF
MISUSING AND/OR DEFAMATION TOWARD RELIGION**

Article 1

Every one is prohibited from deliberately in public conveying, endorsing or attempting to gain public support, any interpretation of any religion adhered to in Indonesia, or from conducting religious activities resembling the religious activities of the said religion, the interpretation and activities of which are deviations from the fundamental teachings of the concerned religion.

Article 2

- (2) Anyone who violates the provision of article 1 shall be instructed and reprimanded seriously to cease the course of his/her actions which instruction and warned severely shall be included in a Joint Ministerial Decree made by the Minister of Religious Affair, Attorney General and Minister of Internal Affairs.
- (3) In the event the breach mentioned in paragraph (1) is committed by an organization or *Aliran Kepercayaan*, the President of Indonesia may dissolve the said organization and declare such organization or *aliran* as prohibited organization or *aliran*, one after the other the President has duly received considerations from the Minister of Religious Affair, Attorney General and Minister of Internal Affairs.

Article 3

In case of, despite the action brought by the Minister of Religious Affair together with the Attorney General and Minister of Internal Affairs or by the President in accordance with article 2 against the persons, Organization or *Aliran Kepercayaan*, they still commit violations of article 1, hence the persons, adherents, members and/or members of the organisation board of the concerned *aliran* shall be punished with up to 5 years imprisonment.

Article 4

A new Article shall be added into the Indonesian Criminal Code and reads as follows:

“Article 156a

“By a maximum imprisonment of five year shall be punished anyone who deliberately, in public, expresses or conducts any act:

- a) which in essence is hostile, abusive or defamatory toward a religion adhered in Indonesia;
- b) with the intention of making a person not adhering to any religion that is based on the notion of the One and Only God.”

Article 5

This Presidential Regulation shall come into force on the day of its promulgation. In order that everyone may take cognizance of this, the promulgation of this law is herewith ordered by publication in the State Gazette of the Republic of Indonesia.

Ratified in Jakarta
On the date of January 27, 1965
The President of the Republic of Indonesia,
SUKARNO

Enacted in Jakarta
On the date of January 27, 1965
State Secretary of the Republic of Indonesia
MOHD. ICHSAN.

STATE GAZETTE YEAR 1965 NUMBER 3

**ELUCIDATION ON
PRESIDENTIAL STIPULATION NUMBER 1/PNPS YEAR 1965 ON
THE PREVENTION OF MISUSING
AND/OR DEFAMATION TOWARD RELIGION**

I. GENERAL

1. The Presidential Decree dated 5 July 1959 stipulating the re-enactment of 1945 Constitution for the entire nation of Indonesia, has stated that the Jakarta Charter dated 22 June 1945 shares the same spirit with the Constitution and forms an integral part of the said Constitution.

Pursuant to the 1945 Constitution our nation is based on:

1. Belief in One and Only God;
2. Just and civilized humanity;
3. The unity of Indonesia;
4. Civil society;
5. Social justice.

As the first principle, Belief in One and Only God not only lays the moral foundation of the state and the government, but also ensure the existence of a national unity based on a religion. The recognition of the first principle (Belief in One and Only God) is inseparable from a religion, as it is one of the pillars of the humanity, and for the nation of Indonesia it is also a pillar of the state and an absolute element in the nation-building efforts.

2. As shown, it has recently emerged in almost all over Indonesia not insignificant number of *aliran* or organizations of societal faith/belief contradictory to the teachings and principles of the religions. Many of the teachings/conducts of adherents of the said *aliran* have caused violations of the law, split the unity of the nation and defamed religions. From those facts is it clear that *aliran* or organizations of societal faith/belief misusing and/or using the religions as the main core, have recently increased and developed towards the direction extremely dangerous to the existing religions.
3. To prevent the continuous existence of the above mentioned problems which can pose danger to the unity of the nation and state, hence in the spirit of national awareness and in the Guided Democracy, it is deemed necessary to adopt a Presidential Stipulation as the realization of the President Decree dated 5 July 1959 which is also an instrument to implement administration of state and religious affairs, so that all citizens in the entire jurisdiction of Indonesia can enjoy the peace in professing the religion and the guarantee of freedom to worship in accordance to respective religions.

4. In relation to the purpose of fostering the peaceful life of religion, this Presidential Stipulation first and foremost shall prevent any deviation from the religious teachings considered fundamental by scholars of the concerned religion (Articles 1-3); and secondly this law shall protect the said peaceful life of religion from defamation/insult as well as from any teaching to not adhering to a religion based on the Belief in One and Only God (Article 4).
5. Deviations of religion which clearly are criminal offences are not considered necessary to be stipulated again in this law, due to the fact they have been sufficiently addressed in the different criminal provisions currently existing. This Presidential Stipulation is never intended to disturb the right of existence of religions already recognized by the government before the promulgation of this Presidential Stipulation.

II. ARTICLE BY ARTICLE

Article 1

The phrase ‘in public’ refers to the general meaning of that phrase as contained in the Indonesian Criminal Code. The religions adhered by the citizens of Indonesia are Islam, Protestantism, Catholicism, Hinduism, Buddhism and Kong Hu Cu (Confucianism). This can be proven from the history of development of religions in Indonesia.

Since this six religions are religions adhered to by most of the citizens of Indonesia, then in addition to the guarantee they get under Article 29 (2) of the 1945 Constitution, they also get assistance and protections as provided under this article.

This does not mean that other religions, such as Jewish, Zarathustratian, Shinto and Taoism are prohibited in Indonesia. They are fully secured the guarantee provided under Article 29 (2) and they shall be left as they are, as long as they do not violate provisions contained in this law or other regulations.

As for the organization/*Aliran Kepercayaan*, the government will direct them to a “well behave” view and toward the Belief in One and Only God. This effort is in conformity with the Resolution of M.P.R.S. No. II/MPRS/1960, Attachment A. Part I, paragraph 6.

The phrase of “religious activities” refers to all types of activities that are of religious nature, for example designating a belief as a religion, using [religious] terms in practicing or manifesting the teachings of a particular belief or conducting the rituals thereof and so forth. The main teachings of a religion can be identified by Department of Religious Affairs that has the instruments/ mechanisms to investigate them.

Article 2

Considering the character of Indonesia, to the persons or adherents of certain *Aliran Kepercayaan* also members or the members of organization board violating the prohibition of Article 1, it is sufficient to only give a proper advice at the early stage.

If the deviation was conducted by an organization or adherents of *Aliran Kepercayaan* and it poses a seriously enough effect on the religious society, then the President has the authority to dissolve that organization and to declare it as prohibited organization or *Aliran Kepercayaan* and the consequences thereof. (In conjunction with Article 169 Indonesian Criminal Code).

Article 3

The impose of criminal sanction stipulated in this article is a subsequent act against the elements of society following a constant ignorance of the warning given under Article 2. Since *Aliran Kepercayaan* does not usually have a structure like an organization/association, in which it is easy to differentiate the organization board from its common members, hence in relation to aliran kepercayaan, only its adherents who constantly commits a violation are punishable by law, whereas the leader of an aliran itself, who has stopped his/her deviating activities, can not be punished.

Considering the seriousness of the violation in this article, a criminal sanction of up to 5 years imprisonment is deemed appropriate.

Article 4

The purpose of this Article has been sufficiently described in the above general explanation. The method of expressing similarities or conducting acts can be done by way of oral, written or any other means.

Paragraph a, criminal acts referred to here, are those (in essence) directed toward the intention to be hostile or insulting.

Therefore, any written or oral descriptive account made in an objective, clear and scientific manner on a particular religion accompanied with efforts to avoid the use of hostile or insulting words or phrases is not a criminal offence pursuant to this Article.

Paragraph b. people who commits the criminal act herein, in addition to disturbing the peaceful life of religious people also conducts treachery against the first notion of the state foundation, and consequently it is in its place, that such an act is properly punished.

Article 5

Sufficiently clear.