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Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law

Melissa A. Crouch

Abstract

A growing number of religious minorities have been prosecuted for the criminal offence of ‘insulting a religion’, specifically Islam, in Indonesia. Both local and international human rights organisations have condemned the perceived misuse of what is widely referred to in Indonesia as the ‘Blasphemy Law’. This article will analyse the application for judicial review of the Blasphemy Law, which was submitted to the Indonesian Constitutional Court in 2009. It will critique the various submissions made to the court and analyse the historic decision of the judiciary, which upheld the validity of the Blasphemy Law. In doing this, it will explore how the relationship between law and religion, particularly Islam, has been debated, negotiated and articulated in democratic Indonesia

KEYWORDS: Constitutional Court, blasphemy, Indonesia, religion

Author Notes: Dr Melissa Crouch is a Research Fellow at the Melbourne Law School, the University of Melbourne. She would like to thank Professor Tim Lindsey for his comments on an earlier version of this article. All translations in this article, including court decisions and transcripts, are the author’s own unless otherwise stated. A copy of all Indonesian documents and laws cited in this article are held by the author.

I. INTRODUCTION

Between 1998 and 2011, over 120 people were taken to court on criminal charges of insulting a religion under the *Blasphemy Law*¹ in Indonesia.² The accused in these cases are leaders and followers of minority religious groups and sects that are considered to be “deviant” or “unorthodox”, as well as a large number of Christians. These cases have led to concerns that the *Blasphemy Law* is being applied and interpreted in a way that criminalises religious difference and violates the constitutional right to freedom of religion, which has prompted calls for review and reform of the law.

In 2010, a coalition of non-government organisations lodged an application for judicial review with the Indonesian Constitutional Court (*Mahkamah Konstitusi* or Constitutional Court), in which it argued that the *Blasphemy Law* contravened the right to religious freedom as set out in articles 28E and 29 of the Constitution. This case is significant because it is the first time the Constitutional Court has heard from such a wide range of religious leaders on the connection between law and religion in Indonesia.³ It addressed the relationship between the State and religious communities, and the extent to which the State allows the six recognised religions – Islam, Protestantism, Catholicism, Buddhism, Hinduism and Confucianism – to define and assert control over their community and teachings. In this respect, issues are broader than Islam and State, although disputes within Islam were one of the key issues at the heart of this debate.

This article provides an in-depth study of the case for judicial review of the *Blasphemy Law* in the Indonesian Constitutional Court. It questions how the relationship between State and religion was articulated and interpreted, and how the permissible limitations on religious freedom were framed and justified, by the wide range of parties involved in this case.

¹ *Presidential Decree No 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion*, made into a law by *Law 5/1969*.

² A list of court cases on blasphemy from 1965 to 2011 is held with the author. These cases do not include all accusations of blasphemy lodged with the police, but only those allegations that proceed to court.

³ There have only been two other cases in the Constitutional Court to date that specifically discuss matters of religion. One case considered whether religious freedom requires the State to remove restrictions on polygamy. The other case concerned whether to allow Indonesia’s Religious Courts to apply Islamic law in a broad sense. For an analysis of these cases, see Simon Butt, “Islam, the State and the Constitutional Court in Indonesia” (2010) 19(2) *Pac. Rim L. & Pol’y J.* 281. There were also some arguments based on religious concerns in the case concerning *Law 44/2008 on Pornography*, see Helen Pausacker, “Indonesia’s New Pornography Law: Reform Does Not Necessarily Lead to More Liberal Attitudes to Morality and Censorship” (2009) 34(2) *Alternative Law Journal* 121-123.

The article begins by critically analysing the criminal offence of insulting a religion in the Indonesian context and reflecting on its implementation through the Coordinating Board for the Monitoring of Mystical Beliefs⁴ (*Bakor Pakem*). It provides a brief overview of the use of the *Blasphemy Law* as part of the necessary contextual background, and illustrates its often controversial application through the case of Al-Qiyadah Al-Islamiyah, an Islamic sect.

It then highlights the key arguments of the applicants' who sought judicial review of the *Blasphemy Law* in 2009, which centred on the themes of religious freedom, permissible limits on that right and the rule of law. This leads into an analysis of the wide range of voices heard by the court, both oral and written submissions, made to the court by government officials, Islamic organisations, religious minorities and non-government organisations. I will demonstrate that those in favour characterised Indonesia as a religious country that protects the "orthodox" interpretations of the six religions by allowing the State to limit religious freedom in the interests of public order and religious values. Those against the *Blasphemy Law* focused more on the need for a separation of religion and State, and the need for the democratic state to facilitate religious diversity and protect religious minorities.

Finally, I turn to the decision and reasoning of the judiciary to uphold the *Blasphemy Law*. I argue that although the court emphasised a distinctive Indonesian approach, it failed to articulate a clear test to determine the grounds on which it is permissible for the State to restrict religious communities. The court decision does suggest, however, that the interests of "public order" and "religious values" were the most relevant considerations in support of the *Blasphemy Law* in this case.

The decision of the court ultimately reflects the State's preoccupation with the need to maintain social order, combined with the perceived need to appease the demands of conservative Islamic religious leaders who wish to maintain the authority to define Islam. This decision also maintains the characterisation of religious minorities as a potential threat to social stability, and therefore to political power. Further, although there was rigorous debate in the Constitutional Court, some religious minorities affected by the *Blasphemy Law* did not give testimony in court, namely Ahmadiyah.⁵ This suggests that those potentially most affected by the decision of the court did not participate in the court trial.

⁴ I will use the term "mystical belief" in this article to refer to the term "*aliran kepercayaan*", although they are in reality forms of local religions.

⁵ For further explanation of Ahmadiyah, see Melissa Crouch, "Ahmadiyah in Indonesia: A history of religious tolerance under threat?" (2011) 36(1) *Alternative Law Journal* 56-57.

II. THE INDONESIAN *BLASPHEMY LAW*: “INSULTING A RELIGION”

Indonesia is a multi-religious society with a long history of religious tolerance. It is the largest Muslim-majority country in the world. It is also the world’s third largest democracy. The Constitution is not based on Islamic law, but rather the state ideology of the Pancasila, which upholds “Belief in Almighty God”. This principle of “Belief in Almighty God” is protected by what is known in Indonesia as the “*Blasphemy Law*”.

In January 1965, the offence of “insulting a religion” was established through President Sukarno’s *Decree No 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion*. In Indonesia it is often referred to as “*UU Penodaan Agama*”, or the “*Blasphemy Law*”. This law was passed at the height of fears of Communism in Indonesia (which was home to the largest Communist party aside from China and Russia at that time) just prior to the alleged attempted Communist coup in 1965.⁶ The Elucidation⁷ also notes that “across Indonesia streams (*aliran*) and community mystical belief organisations (*kebatinan/kepercayaan*) have emerged that are opposed to the teachings of religious law (*hukum agama*).” It goes on to claim that these groups have grown rapidly and have misused religion, which is “very dangerous for existing religions”.

No distinction is made in the law between heresy and blasphemy in Indonesia.⁸ This article acknowledges that the terms “blasphemy” and “heresy” are somewhat problematic, and have a long history particularly within Christianity.⁹ The focus of this article, however, is on contemporary

⁶ Uli Parulian Sihombing, *Menggugat Bakor Pakem: Kajian Hukum Terhadap Pengawasan Agama dan Kepercayaan di Indonesia* (ILRC, 2008) at 28-30.

⁷ An Elucidation (*Penjelasan*) is a guide to the interpretation of a law that may be issued by the legislature at the time the law is passed. See the Elucidation to *Law 10/2004 on Law-making*.

⁸ Scholarship on the offence of blasphemy includes (but is by no means limited to) Leonard W. Levy, *Treason Against God: A History of the Offense of Blasphemy* (Schocken Books, 1981) (Levy, *Treason*); Leonard W. Levy, *Blasphemy: Verbal Offense Against the Sacred, from Moses to Salman Rushdie* (Knopf, 1983) (Levy, *Blasphemy*); on blasphemy in Islam, see Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society, 1998); and Abdullah Saeed & Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Ashgate, 2004); on attitudes towards blasphemy in modern societies, see Riaz Hassan, “Expressions of Religiosity and Blasphemy in Modern Societies” (2007) 35(1) *Asian Journal of Social Science* 111.

⁹ There is a large body of scholarship on the offence of heresy and blasphemy in Christianity, including Francisco Bethencourt, *The Inquisition: A Global History 1478-1834* (Cambridge University Press, 2009); G.R. Evans, *A Brief History of Heresy* (Blackwell Publishing, 2003); David Lawton, *Blasphemy* (Harvester, 1993); Levy, *Treason* and Levy, *Blasphemy*, *supra* note 8; William Monter, *Frontiers of Heresy: The Spanish Inquisition from the Basque Lands to Sicily* (Cambridge University Press, 1990), John Tedeschi, *The Prosecution of Heresy: Collected Studies on the Inquisition in Early Modern Italy* (Medieval & Renaissance Texts, 1991).

understandings of the offence of “insulting a religion”, particularly Islam, in the Indonesian context.

In 1969, four years after the *Blasphemy Law* was introduced in the form of a presidential decree, it was strengthened and upgraded to the status of a law (*undang-undang*) by President Suharto (1966-1998).¹⁰ The *Blasphemy Law* ensured religious leaders could protect the status and interpretation of the six religions from criticism through the legal system, and that religious practice could be monitored and controlled by the State. By doing so, it depicts “deviant” beliefs as a potential threat to social order and similar to an act of subversion.

The *Blasphemy Law* is very brief and yet wide in scope, with just four key provisions. The first three provisions are aimed at protecting the six recognised religions: Islam, Protestantism, Catholicism, Buddhism, Hinduism and Confucianism.¹¹ The only reason it provides for the choice of these six religions is the “historical development of religions in Indonesia” and it claims that these six religions are the most common in Indonesia. Religion has been a key feature and requirement of citizenship because, up until 2006, a citizen had to list one of the six religions on their identity card (KTP). Since 2006, a person may leave the “religion/belief” section of the identity card blank, although they are still required to register their religious affiliation with the relevant government department.¹²

The *Blasphemy Law* aims to prevent any “deviations” from the orthodox teachings of these religions. Article 1 contains a prohibition on publicly interpreting a religion or conducting religious activities which deviate from the tenets of one of the six religions. This effectively allows leaders of the six religions to set boundaries on what is “official” doctrine and to have the final, authoritative say on interpretations of their religion.

Article 2(1) provides that the Minister of Religion, the Attorney General and the Minister of Home Affairs can issue a joint decree to warn a person who has violated article 1 by promoting deviant teachings. If the violation is committed by an organisation or *aliran kepercayaan* (mystical belief), the president has the power to ban the group on the recommendation of the three authorities listed above.¹³

If the person or organisation continues to act in breach of article 1, then article 3 provides that they can be imprisoned for a maximum of five years.

¹⁰ *Law 5/1969 Declaring Several Decisions and Regulations of the President as Law.*

¹¹ These are the six recognised religions according to the Elucidation to *Presidential Decision 1/1965 on the Prevention of Misuse and/or Disrespect of Religion*. This does not mean that other religions or beliefs, such as Judaism, Zoroastrianism, Shintoism, and Taoism are banned. As long as they do not disturb the community, adherents of other religions are also free to practise their religion in principle. As this article shows, however, this right is limited in practise.

¹² *Law 23/2006 on Civic Administration*, arts. 58(2)(h), 61(1), 61(2), 64(1) and 64(2). See also Government Regulation 37/2007 implementing *Law 23/2006 on Civic Administration*.

¹³ *Blasphemy Law*, art. 2(2).

According to the Elucidation to the *Blasphemy Law*, if the followers or leaders of a group stop their activities, then they cannot be charged. The criminal offence of blasphemy contained in article 4 is also inserted as article 156a into the *Criminal Code*,¹⁴ as follows.

A person who deliberately and publicly expresses feelings or behaves in a manner that:

- a. involves hatred, misuse, or insulting of a religion followed in Indonesia, and
- b. has the intention that a person should not practise any religion at all that is based on Belief in Almighty God,

shall be sentenced to a maximum of five years jail.

The Indonesian phrase used in the *Blasphemy Law* is *penyalahgunaan dan/atau penodaan agama* which means “to misuse or disgrace a religion”. A person who is accused of blasphemy may be called *murtad* (apostate), *kafir* (non-Muslim/unbeliever), *aliran sesat* (deviant group), *sesat* (deviant), or *aliran kepercayaan* (mystical belief).¹⁵ The use of these terms shows concern for protecting the orthodox teachings of religion, and emphasises a distinction between mystical beliefs and religions, which I will explain shortly.

The Elucidation to the *Blasphemy Law* clarifies that the accused must have intentionally insulted or shown hostility towards a religion.¹⁶ Written or verbal statements that are objective and avoid the use of offensive words or phrases are not considered to be a criminal offence under this article. The Elucidation justifies the severity of the punishment by stating that offenders have disturbed a religious community and are considered to have betrayed the state ideology, Pancasila, and its first element, Belief in One God.

This provision reflects the fact that in Islam there is no general agreement on a definition of “blasphemy”.¹⁷ In Islam there are several relevant terms

¹⁴ Indonesia’s Criminal Code was compiled in the late 1800s in Netherlands. Although it was first used in 1918, it did not apply to the entire archipelago until 1958: Simon Butt, “Indonesia’s Draft Criminal Code: Can Legal Diversity Exist Within a Single National Law” (2003) 28(6) *Alternative Law Journal* 304. It has been described as a “colonial fossil” from the period of Dutch rule: Tim Lindsey, “When Words Fail: Syariah Law in Indonesia: Revival, Reform or Transplantation?” in Pip Nicholson & Sarah Biddulph, *Examining Practise, Integrating Theory: Comparative Legal Studies in Asia* (Nijhoff, 2008) at 196.

¹⁵ In a report on *aliran* in the 1970s, *aliran* is defined as a belief which identifies with an official religion, a sect, or a mazhab (school of law) of an official religion: see R.E. Djumali Kertorahardjo, *Materi Aliran-aliran Kebathinan di Indonesia* (Ministry of Religion, 1970) at 25.

¹⁶ Elucidation to the *Blasphemy Law*, art. 4.

¹⁷ Saeed & Saeed, *supra* note 8 at 50; Abdullahi Ahmed An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari’a* (Harvard University Press, 2008) at 122. For a detailed

including *riddah* (apostasy); *sabb Allah* and *sabb al-Rasul* (blasphemy); *zandaqah* (heresy); *nifaq* (hypocrisy); and *kufur* (unbelief), although little distinction is made between these terms in practise.¹⁸ Although the traditional Islamic penalty for apostasy is death, some scholars have argued that there is no Qur'anic authority for this penalty.¹⁹ Only hardline Islamic groups in Indonesia would agree with the traditional penalty.²⁰ These attitudes are partly reflected in the growing number of cases being taken to court, which I will analyse next.

The *Blasphemy Law* therefore articulates the concerns of the government in 1965 about the need to respond to the threat of mystical beliefs and Communists (who were perceived to be atheists), and the ongoing need to appease the demands of conservative Islamic religious leaders. I will turn to the application of the *Blasphemy Law* shortly, but before I do it is necessary to analyse one of the key institutions that has developed to “monitor” and conduct surveillance of mystical beliefs, *Bakor Pakem*, also known as *Pakem*.

III. COORDINATING BOARD: CONTROLLING DEVIANT BELIEFS

As early as 1954, an Inter-Departmental Committee was established to monitor mystical beliefs (*kepercayaan*).²¹ In 1961, the Attorney General was given the power to monitor mystical beliefs as an aspect of social control.²² Then, in 1963,

discussion on freedom of expression in Islam, including apostasy, see Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society, 1998) at 212-235.

¹⁸ Saeed & Saeed, *supra* note 8 at 36-42.

¹⁹ *Ibid.* at 56, 69-87.

²⁰ For example, in 2002 a radical Islamic group, the Majelis Mujahidin Indonesia (Indonesian Mujahidin Council) proposed the “Criminal Code for the Republic of Indonesia adjusted to accord with Islamic Shari’a”. It included the offence of apostasy in art. 28, for which the penalty was execution unless the offender repented. This proposal has not been passed as law in Indonesia and is unlikely to be in the future: Tim Lindsey & Jeremy Kingsley, “Talking in Code: Legal Islamisation in Indonesia and the MMI Shari’a Criminal Code” in Peri Bearman, Wolfhart Heinrichs & Bernard Weiss, eds., *The Law Applied: Contextualizing the Islamic Shari’a* (IB Taurus, 2008) at 303, 312.

²¹ This Inter-Departmental Committee was established by the Decision of the Prime Minister No 167/PM/1954 dated 1 August 1954: see Kejaksaan Agung, *Penyajian Hasil Penelitian Peningkatan Wewenang Kejaksaan Dalam Pengawasan Aliran Kepercayaan* (Jakarta: Tim Peneliti Pusat Litbang, 1995) at x.

²² Decision of the Attorney General No 004/JA/01/1994 on the Creation of the Coordinating Team for the Monitoring of Mystical Beliefs, art. 2(3). This responsibility was conferred according to *Law 15/1961 on the Office of the Attorney General*. This law, and the provisions on mystical beliefs, was later replaced by *Law 5/1991* (art. 27(3)(d)), and then by *Law 16/2004* (art. 30(3)(d)).

in line with this power, the Inter-Departmental Committee was placed under the responsibility of the Attorney General.²³

In 1979, the Attorney General formed the national Coordinating Board for Monitoring Mystical Beliefs in Society.²⁴ This included representatives from three government departments: the Ministry of Religion, the Department of Home Affairs, and the Office of the Attorney General.²⁵ It was not until 1984 that the Coordinating Board was officially established by law,²⁶ replacing the former Inter-Departmental Committee. It was given wide powers to investigate religions or beliefs that were considered to be “deviant”. This can be seen as an effort to curb “unorthodox” religious proselytisation and to support the implementation of the *Blasphemy Law* by allowing this body to conduct the preliminary investigations that could be used by the prosecution in court.

The membership of the Coordinating Board reflects its focus on security and social order, similar to a secret intelligence organisation. It consists of a chairperson, vice-chairperson and two secretaries (all from the Office of the Attorney General) and general members from the Ministry of Religion; the police; the Department of Home Affairs; the National Intelligence Agency;²⁷ the National Armed Forces;²⁸ the Department of Education; and the Attorney General’s Office.²⁹ Its goal is to supervise and monitor the affairs of religious minorities that it considers to have “deviated” from the orthodox teachings of an established religion or that promote heresy.³⁰ In theory, the Coordinating Board exists at the national, provincial and city/regency level.³¹ In a concerted effort to establish this Board, on 4 April 1987, the Attorney General sent a letter to all chief public prosecutors in Indonesia instructing them to form Coordinating Boards in the

²³ At this time, the committee had 20 members and was chaired by the Attorney General, H. Sumrah, according to the Decision of the Prime Minister No 69/MP/1963: *Kejaksaan Agung, Peranan Kejaksaan Dalam Pencegahan Penyalahgunaan dan atau Penodaan Agama* (Jakarta: Tim Pengkaji Pusat Litbang, 2005) at 14.

²⁴ *Badan Koordinasi Pengawasan Aliran Kepercayaan, Bakor Pakem*.

²⁵ Kejaksaan Agung, *supra* note 23 at 17.

²⁶ It was established by the Decision of the Attorney General No Kep-108/J.A/5/1984. This decision was later revised by the Decision of the Attorney General No 004/JA/01/1994. For an English translation, see Appendix 12. For a recent report on the Coordinating Board by the Indonesian Legal Resource Centre, see Uli Parulian Sihombing, *Menggugat Bakor Pakem: Kajian Hukum Terhadap Pengawasan Agama dan Kepercayaan di Indonesia* (Jakarta: Indonesian Legal Resource Centre, 2008).

²⁷ Badan Inteligen Nasional, known as BIN.

²⁸ Tentara Nasional Indonesia, known as TNI.

²⁹ Decision of the Attorney General No 004/JA/01/1994, art. 2.

³⁰ For a more detailed explanation of the aims and outcomes of the Coordinating Board, see generally Kejaksaan Agung, *supra* note 21; Kejaksaan Agung, *supra* note 23.

³¹ Decision of the Attorney General No 004/JA/01/1994, art. 1.

provinces and cities or regencies.³² To date, however, the Coordinating Board has only been formed haphazardly across the provinces and cities or regencies.

The Coordinating Board was intended to meet both periodically or whenever issues concerning “deviant” groups or mystical beliefs arise.³³ In practice, it may often remain dormant for years at a time. As Surajinan, a member of the Coordinating Board of Yogyakarta, points out, the Coordinating Board only meets when the need arises, that is, when an issue over religious deviancy erupts within the community.³⁴ For example, according to another member, Bachri, the only case that the Coordinating Board of the province of Yogyakarta dealt with between 2006 and 2009 was the case of Al-Qiyadah Al-Islamiyah (which I explain in detail shortly).³⁵

The Coordinating Board has the power to arrange consultation meetings with government and non-government bodies and with religious groups or mystical beliefs.³⁶ It can also receive reports or information about mystical beliefs; conduct research to assess its influence on the community; and issue reports and recommendations. Its most concerning role is to take “preventative” and “repressive” steps against these groups.³⁷ The only guidelines on what “repressive action” includes appears to be in a publication produced by the Attorney General’s Office, which states that:

Preventative legal action taken against individuals or leaders of extreme *aliran kepercayaan* in order to uphold peace and public order, and to guard against any threat these groups present to the community and to the country.³⁸

In terms of accountability for “solving” the problem of mystical beliefs, the city/regency Coordinating Board must report to the city/regency Office of the Public Prosecutor; the provincial Coordinating Board is responsible to the provincial Public Prosecutor; and the national Coordinating Board is accountable to the Attorney General.³⁹ This structure of accountability is only active in practice if the national Coordinating Board orders the local Coordinating Board to

³² Kejaksaan Agung, *supra* note 23 at 17.

³³ Decision of the Attorney General No 004/JA/01/1994, art. 3.

³⁴ Interview with Surajinan, Member of Bakor Pakem Yogyakarta from the Yogyakarta provincial branch of the Ministry of Religion, 4 August 2009.

³⁵ Interview with Asep Saeful Bachri, Chairperson of the Department of Politics and Society, Office of the Attorney General Yogyakarta; Secretary General of Bakor Pakem, 15 September 2009.

³⁶ Decision of the Attorney General No 004/JA/01/1994, art. 3(1).

³⁷ Decision of the Attorney General No 004/JA/01/1994, art. 3(2).

³⁸ Kejaksaan Agung, *supra* note 23 at 36.

³⁹ Decision of the Attorney General No 004/JA/01/1994, art. 5.

investigate a group and report back on their findings to the national Coordinating Board, such as occurred in the case of Ahmadiyah, an Islamic sect.⁴⁰

Since its inception in the late 1980s, the Coordinating Board has investigated the beliefs and activities of numerous religious groups, “deviant” groups and mystical beliefs, particularly those accused of insulting Islam. Once a problem is identified, the Coordinating Board can request an opinion from the Ministry of Religion; from the relevant national religious councils;⁴¹ and from the Regional Executive Conference Forum.⁴² Based on its recommendations and investigations, the Coordinating Board then considers taking action against the group to prevent disturbances to the community.⁴³

One possible outcome of the investigation process is that the Coordinating Board can recommend that the Attorney General ban a particular group. Some guidelines have been issued to define when a group can be banned. For example, in 1969, the Attorney General stated that the activities of an *aliran* can be banned if it disturbs inter-religious harmony; is opposed to the law; disturbs public order and safety; contradicts government policy; or if there is evidence that it protects the activities or former members of the Indonesian Communist Party.⁴⁴ In the end, however, the decision to ban a group remains at the discretion of the Attorney General.

Under the New Order, at least 29 religious minorities were reportedly banned at the national level.⁴⁵ For example, in 1976, the teachings of the belief *Manunggal*, then led by Herucokro, located in the village of Sejiwan, Central Java, were banned by the Attorney General because followers of “Manunggal” claimed that there is no God, thus challenging the Pancasila tenet of Belief in Almighty God.⁴⁶ In the same year, the activities of Jehovah’s Witnesses were

⁴⁰ See generally Melissa Crouch, “Indonesia, Militant Islam and Ahmadiyah: Origins and Implications” in *ARC Federation Fellowship Islam, Syariah and Governance*, Background Paper Series No 4 (Melbourne, 2009) at 9-10.

⁴¹ That is, from the Indonesian Ulama Council (Majelis Ulama Indonesia), the national Protestant council known as the Indonesian Communion of Churches (Persekutuan Gereja-gereja Indonesia), the national Catholic council known as the Bishops Council of Indonesia (Kantor Waligereja Indonesia), the Perwakilan Umat Buddha Indonesia, the Supreme Council for Confucian Religion (Majelis Tinggi Agama Khonghucu Indonesia) and PHDI.

⁴² Muspida, the Regional Leadership Consultative Counsel (Musyawarah Pimpinan Daerah), consists of representatives from various government departments.

⁴³ Kejaksaan Agung, *supra* note 23 at 38.

⁴⁴ Kejaksaan Agung, *supra* note 23 at 34. Letter of the Attorney General No B-523/C/8/1969, dated 16 August 1969. Partai Komunis Indonesia, PKI.

⁴⁵ Darul Aqsha, Dick van der Meij & Johan Dendrik Meuleman, *Islam in Indonesia: A Survey of Events and Developments From 1988 to March 1993* (Jakarta: INIS, 1995) at 443-463.

⁴⁶ For a copy of the Decision of the Attorney General KEP 006/B.2/7/1976 on the Ban on the Manunggal Organisation, see Weinata Sairin, *Himpunan Peraturan di Bidang Keagamaan* (Jakarta: PT BPK Gunung Mulia, 1996) at 269-270.

banned, primarily because of their practise of door-to-door proselytisation, which was perceived as a threat by some Muslim religious leaders.⁴⁷ In 1984, a group considered “deviant” by mainstream Christianity, the Children of God sect, was banned, among other reasons, for allowing free relations between men and women.⁴⁸

Since 1998, some of these bans have been reversed.⁴⁹ Although over 50 bans have still been issued between 1998 and 2009, these have all been at the regional level.⁵⁰ This indicates that the national government is reluctant to ban a religious group post-1998, possibly because of the pressure to uphold its international and domestic obligations concerning religious freedom. The national government, however, has not prevented regional governments or local authorities and committees such as the regency/city level executive conference⁵¹ from issuing such bans.⁵² This has become an issue recently for Ahmadiyah, an Islamic sect that have had their activities banned by a number of regional governments.⁵³ According to Abdul Rahman Mas’ud, of the Ministry of Religion, the closest the national government has come to questioning the decision of regional authorities to ban a group is in 2008 when the Governor of North Sumatra was summoned to Jakarta about his decision to ban Ahmadiyah in the province.⁵⁴ He was questioned on the basis that regional authorities do not have the power to ban “deviant” groups.

⁴⁷ For a copy of Decision of Attorney General KEP-129/JA/12/1976 banning the teachings/gathering of bible students/Jehovah’s Witnesses, see Sairin, *supra* note 46 at 271-272. This was overturned in 2001.

⁴⁸ See the Decision of the Attorney General No KEP-058/JA/3/1984 banning the publication of printed materials that contain the teachings and beliefs of the Children of God in Sairin, *supra* note 46 at 273-274; Press Release of the Attorney General on the Children of God dated 12 March 1984, in Sairin, *supra* note 46 at 275-278; Response of the Directorate General of the Protestant Community No F/26/930/84, in Sairin, *supra* note 46 at 279-280.

⁴⁹ For example, in 1967, the President issued Instruction 14/1967 which banned the expression of Chinese culture and religion, and it was assumed this included Confucianism. In 2000, President Gus Dur issued Presidential Decision 6/2000 which cancelled the 1967 Instruction, effectively re-recognising Confucianism in Indonesia.

⁵⁰ A table of these bans is on file with the author.

⁵¹ Muspika is a consultative body that consists of the sub-district head, the local head of police and the local military commander.

⁵² This situation is very similar to the predicament of religious regulations issued by local governments, which the national government has not intervened in.

⁵³ See Melissa Crouch, “Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis” Sydney L. Rev. (forthcoming in September 2012).

⁵⁴ Interview with Abdul Rahman Masud, Head of the Division for Research and Development, Ministry of Religion, Jakarta, 27 October 2009.

Overall, although *Bakor Pakem* does not feature prominently in the *Blasphemy Law* case in the Constitutional Court,⁵⁵ it is a significant actor in investigations leading up to criminal allegations of blasphemy because it has the mandate of monitoring so-called “deviant” groups and can make recommendations to the Attorney General in this regard.

IV. THE MACRO AND MICRO VIEW OF BLASPHEMY CASES

The *Blasphemy Law* has raised concerns among non-government organisations concerned about human rights because it has increasingly been used by hardline Islamic groups and religious leaders to target and condemn religious sects or minorities. In this section I will first highlight the overall statistics on blasphemy court cases, particularly since 1998, and then focus on one particular case, that of Al-Qiyadah Al-Islamiyah, an Islamic sect.

A. Trends in Blasphemy Court Cases

Less than ten cases were brought before the courts under the *Blasphemy Law* during the New Order (1966-1998). Since 1998, there have been at least 47 cases, or 120 people convicted, under the *Blasphemy Law* since 1998. This is illustrated in Table 1 below.⁵⁶

⁵⁵ There only appears to have been two passing references to *Pakem* in this case. One was by a witness called by the court, Professor Andy Hamzah, who noted that *Pakem* was formed in the 1960s because “at that time the Attorney General feared the practise of black magic (*disantet*)”: Decision of the Constitutional Court No 140/PUU-VII/2009 concerning the Request for Judicial Review of the Blasphemy Law, dated 19 April 2010 (“Court Decision 2010”) at 212; Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Experts Called by the Constitutional Court, the Witnesses of the Applicant, Experts from the Government and Related Parties No (VII), 3 March 2010, at 20. The other reference was by one of the lawyers for the applicants, Uli Parulian Sihombing, who questioned one of the government representatives on how far the Ministry of Religion and *Bakor Pakem* will go to define the “true” teachings of a religion, and questioned how the Attorney General’s Office considers any recommendations made by *Bakor Pakem*: Court Transcript in Case No 140/PUU-VII/2009, Hearing of Evidence from the Witnesses/Experts of the Applicants, the Government and Related Parties, 17 February 2010, at 88.

⁵⁶ This does not include complaints to the police, but only cases that have proceeded to court. While some non-government organisations (NGOs) have reported a higher incident of cases of blasphemy, this is often based on cases reported to the police (or in the media), although many of these are resolved outside of the court.

Table 1: Number of Court Cases under Article 156a of the Criminal Code⁵⁷

Year	No of Cases
1965 to 2000	10
2000	1
2001	2
2002	-
2003	1
2004	1
2005	2
2006	5
2007	3
2008	7
2009	8
2010	3
2011	4
TOTAL	47

These cases have primarily been concentrated on the island of Java. The largest number of court cases has arisen in the province of West Java, followed by Jakarta, Central Java and then East Java. A small number of cases have occurred outside the island of Java, as demonstrated in Table 2 below.

Table 2: Location of Court Cases under Article 156a of the Criminal Code

Location/Province	No of Cases
West Java	12
Jakarta	9
Central Java	5
East Java	5
South Sulawesi	2
West Sumatra	2
West Nusa Tenggara	2
Central Sulawesi	1
Central Sumatra	1
East Nusa Tenggara	1
Maluku	1
North Sumatra	1
Riau	1
South Sumatra	1

⁵⁷ The data collated in the tables in this article are taken from the author's own collection of court documents, media reports, and the reports of NGOs such as Setara Institute, the Wahid Institute, and the Centre for the Study of Religion and Culture.

One of the reasons that the largest number of these cases occurred in the province of West Java, may be because it is the origin of Darul Islam (Domain of Islam), a radical Islamic group that promoted the ideology of an Indonesian Islamic state.⁵⁸ This is similar to the findings of Robin Bush on the emergence of Islamic-based religious regulations (*peraturan daerah syariah*) in Indonesia. Bush found that regional governments that have issued the largest number of Islamic-based regulations are located in areas that were former strongholds of Darul Islam.⁵⁹ This suggests that areas that have a history of hardline Islam are also more likely to see cases of blasphemy brought against religious minorities in the courts. The influence of hardline Islamic groups on cases of blasphemy requires further investigation. In the case study that follows this section, I will demonstrate how these groups are often responsible for the organisation of demonstrations and protests at court while trials for blasphemy are in process. This raises questions about how campaigns of intimidation and mobilisation by hardline Islamic groups may negatively influence the judiciary in such cases.

Aside from the location, the self-confessed religious identity of the accused is also significant. The majority of the accused have identified themselves as Christians, although this is partly because of one particular case in which 41 Christians were convicted.⁶⁰ On a case-by-case basis (in which some cases tried several individuals at once), most of the accusations concern insults to Islam by those who confess to be Muslims. The self-confessed religious identity of the accused can be seen from Table 3 below.

Table 3: Self-confessed Religious Identity of the Accused

Religion	No of Accused
Christianity	61
Islam	49
Mystical Beliefs/Other religions	4
Unknown	6
Total	120

⁵⁸ See C. van Dijk, *Rebellion Under the Banner of Islam: The Darul Islam in Indonesia* (M Nijhoff, 1981); Hiroko Horikoshi, "The Darul ul-Islam Movement in West Java (1948-62): An Experience in the Historical Process" (1975) 20(Oct) *Indonesia* 59-86.

⁵⁹ For a more detailed explanation of how Darul Islam is related to the promulgation of *perda syariah*, see Robin Bush, "Regional Sharia Regulations in Indonesia: Anomaly or Symptom?" in Greg Fealy & Sally White, eds., *Expressing Islam: Religious Life and Politics in Indonesia* (ISEAS, 2008) at 182-184. For an analysis of the trends in *perda syariah* more broadly, see Melissa Crouch, "Religious regulations in Indonesia: failing vulnerable groups?" (2009) 43(2) *Review of Indonesian and Malaysian Affairs* 53-103.

⁶⁰ For a detailed analysis of this case, see Melissa Crouch, *Opposition to Christian Proselytisation in Democratic Indonesia: Legal Disputes between Muslims and Christians in West Java (1998-2009)* (PhD Thesis, University of Melbourne, 2011) (unpublished) at Chapter 6.

Table 4: Duration of Jail Term for those Convicted under Article 156a⁶¹

Duration of sentence	No of convictions
Acquitted	2
Less than a year	10
1 year	2
2 years	5
2.5 years	3
3 years	3
3.5 years	9
4 years	2
4.5 years	2
5 years	13

In terms of sentencing for blasphemy, 13 people have been given the maximum penalty of five years. A similarly high number of people have been convicted for less than a year (10 accused), and for 3.5 years (9 accused). There does not appear to be a predictable pattern in terms of sentencing in these cases, although the number of acquittals is very low, as demonstrated in Table 4 above.

B. Case Study: Al-Qiyadah Al-Islamiyah

The practical application of the *Blasphemy Law* is best illustrated by an example. I will refer to the case of Al-Qiyadah Al-Islamiyah, which is an Indonesian-based religious organisation that claims to be based on the teachings of Islam. This group, officially formed in 2001, claimed to have 45,000 followers. There are several reasons why the teachings of this group have been opposed by some conservative religious leaders.

First, although the followers consider themselves to be Muslim, the group allegedly uses a different creed (*syahadat*). The creed adhered to by Muslims, “There is no God but God and Muhammad is the messenger of God” (*assyahadu alla ilaha illallaah wa asyhadu anna Muhammadah Rasullullah*), was changed to *assyaha alla illaallaah wa asyahadu anna masih al Ma’ud Rasulallah*, the second half of the phrase exchanging the reference to Muhammad to “the awaited messiah”.⁶² In this case it was alleged that “the awaited messiah” was a reference to the national leader, Ahmad Mushaddeq. Mushaddeq also taught that it is not

⁶¹ In 11 out of 120 cases the outcome is unknown. The author was unable to access the court documents and there appears to have been no follow up on the outcome of these cases in the media.

⁶² See Kontras, *Laporan Tim Investigasi Kebebasan Beragama: Kasus Al Qiyadah Siroj Jaziroh Padang* (LBJ Jakarta, 2008) at 10.

obligatory to pray five times per day, to pay *zakat* (tithe) or to make the pilgrimage to Mecca (*hajj*), contrary to Islamic beliefs.⁶³ In July 2006, after spending 40 days and nights in a mountain in Bogor, Mushaddeq claims he received a revelation from God and proclaimed himself “the Promised Saviour”.⁶⁴ This runs contrary to the orthodox belief that the Prophet Muhammad was the final prophet in Islam.

In October 2007, the group was banned in a fatwa, an opinion of an Islamic religious leader, issued by the Indonesian Ulama Council.⁶⁵ The fatwa of Majelis Ulama Indonesia (MUI) are not legally binding and therefore in theory do not have legal recognition or status. The fatwa alleged that the group was “deviant” because it used another creed, believed in a prophet after Muhammad, and did not pray, fast or pay *zakat*.⁶⁶ It urged the group to “repent” and “return to Islam”, and it called on the government to ban the group.

There were also fatwa issued by regional branches of the Indonesian Ulama Council in several areas, including in Yogyakarta⁶⁷ and West Sumatra,⁶⁸ as well as by the Islamic Association in Bandung.⁶⁹ The fatwa of Yogyakarta went further than the national fatwa and claimed, that the book “*Ruhul Qudus yang turun kepada Al-Masih Al-Maw’ud*” published on 10 February 2007 is their holy book, that the group taught that Muhammad is same as Jesus and that only “stupid people” pray facing Mecca. It called on the government to close their places of worship, ban the book, and convict followers under the *Blasphemy Law*.

In November 2007, after being investigated by the Ministry of Religion and the national Coordinating Board for Monitoring Mystical Beliefs,⁷⁰ the Attorney General banned the group, citing the fatwa of the Indonesian Ulama

⁶³ Decision of the District Court of South Jakarta No 227/Pid/B/2008/PN.Jkt Sel concerning the case of Ahmad Musaddeq, dated 23 April 2008, at 6-8.

⁶⁴ Interview with Muhammad Tubagus and Dahlia Abduh, lawyers for Ahmad Mushaddeq, Jakarta, 17 December 2009.

⁶⁵ Fatwa of the Indonesian Ulama Council No 4/2007 on Al Qiyadah Al Islamiyah.

⁶⁶ It did so with reference to several verses from the Qur’an, including Al Ahzab 33:40; Al An’am 6:153; Al Baqarah 2:217; an Nisa 2:115; and al-Imran 3:32.

⁶⁷ Fatwa of the Majelis Ulama Indonesia (MUI) of Yogyakarta No B-149/MUI-DIY/FATWA/IX/2007. See Majelis Ulama Indonesia, “Tugas Pokok dan Fungsi Serta Wawasan” (2008) I/No.1/VIII (August) *Jurnal Majelis Ulama Indonesia DIY*. Majelis Ulama Indonesia, “Merekonstruksi Ukhuwah dan Memahami Aliran Sesat” (2008) Vol I/No.2/XII (December) *Jurnal Majelis Ulama Indonesia DIY*.

⁶⁸ MUI West Sumatra No 1/Kpt.F/MUI/SB/IX/2007, in Kontras, *Laporan Investigasi: Kekerasan Di Tempat Ibadah* (Kontras, 2008) at 10.

⁶⁹ Persatuan Islam, known as PERSIS. Fatwa of PERSIS (Bandung) No 1120/E.20-C7/PP/2007 concerning Al Qiyadah Al Islamiyah, dated 24 October 2007.

⁷⁰ “Depag teliti Al-Qiyadah Al-Islamiyah” *Republika* (26 October 2007), online: <www.republika.co.id>.

Council and the report of a meeting by *Pakem*.⁷¹ The group was also banned by the Public Prosecutor at the regional level in provinces such as Yogyakarta⁷² and West Sumatra.⁷³

These bans and fatwa were partly prompted by, and continued to fuel, the campaigns of hardline Islamic groups. In Bandung, the Islamic Defenders Front (FPI) demonstrated at the legislature building demanding the death penalty.⁷⁴ Human rights organisations have documented the opposition and threats against the group by hardline Islamic leaders and organisations such as Hizbut Tahrir and KPSI.⁷⁵ It was these hardline groups and Islamic leaders who reported the group to the police for blasphemy.

Several leaders of the group across Indonesia were jailed for blaspheming Islam under article 156a of the Criminal Code, including six members in Makassar (South Sulawesi), two members in Padang (West Sumatra),⁷⁶ and Ahmad Mushaddeq in Jakarta.⁷⁷ The conviction in these cases rested in part on the fatwa and the bans mentioned above, which were submitted to the court as evidence of the “deviancy” of this group.

In addition, Ahmad Mushaddeq and his followers also faced intimidation and pressure to return to the “true” teachings of Islam, leading to reports they had “repented” and “returned” to Islam.⁷⁸ For example, in December 2007, K.H. Said Agil Sirdj of Nadhatul Ulama, the largest traditionalist Islamic organisation in Indonesia, was one of a group of religious leaders and government officials who held a discussion with Mushaddeq over a period of two days. According to Said Agil, after those two days Ahmad repented.⁷⁹ A similar incident took place with members of Al-Qiyadah Al-Islamiyah in other areas such as Gresik (West Java)

⁷¹ Decision of Attorney General No Ke-116/A/JA/11/2007 dated 9 October 2007 in Kontras, *supra* note 62 at 11.

⁷² Decision of the Attorney General of Yogyakarta No 129/O4/11/2007.

⁷³ Decision of the Coordinating Board of West Sumatra dated 5 October 2007, in Kontras, *supra* note 62 at 11.

⁷⁴ See Kontras, *supra* note 62 at 3.

⁷⁵ See generally Kontras, *supra* note 62.

⁷⁶ Defence in Criminal Case No 64/Pid/B/2008/PN.PDG of Dedi Priadi and Gerry Lutfhy Yudistira dated 29 April 2008.

⁷⁷ See “Moshaddeq dituntut empat tahun penjara” *Republika* (3 April 2008), online: <www.republika.co.id>; Setara Institute, *Siding and Acting Intolerantly: Intolerance by Society and Restriction by the State in Freedom of Religion/Belief in Indonesia* (Setara Institute, 2009); Interview with M. Tubagus Abduh and Dahlia Abduh, Jakarta, 17 December 2009; Decision of the District Court of South Jakarta No 227/Pid/B/2008/PN.Jkt Sel concerning the case of Ahmad Musaddeq dated 23 April 2008; Decision of the High District Court of Jakarta No 135/PiD/2008/PT.DKT concerning the case of Ahmad Musaddeq dated 29 May.

⁷⁸ “Umat Moshaddeq tobat karena terpaksa” *Republika* (28 February 2008), online: <www.republika.co.id>.

⁷⁹ Interview with K.H. Said Agil Sirdj, Jakarta, 8 November 2009.

and Makassar (South Sulawesi), who were reported to have signed statements of confession to confirm they had returned to the true teachings of Islam.⁸⁰

This group is just one of many whose leader and followers have been prosecuted for blasphemy. These cases are of concern to human rights organisations because of concerns over the restriction on the constitutional right to religious freedom (article 28E and 29), which includes the criminalisation of religious difference and other issues such as social pressure from some religious leaders to convert to Islam. This has prompted non-government organisations to search for ways to challenge and abolish the *Blasphemy Law*.

V. APPLICATION FOR JUDICIAL REVIEW

On 20 October 2009, a case concerning the *Blasphemy Law* was lodged with the Constitutional Court.⁸¹ Such an application has been made possible since 2003, when the Constitutional Court became the sole court in Indonesia to have the power to receive applications for judicial review of laws (*undang-undang*) enacted by the legislature that are considered to be unconstitutional.⁸² This means that the Constitutional Court can consider applications that challenge the constitutionality of national laws with the Indonesian Constitution. The powers of the Constitutional Court were set out in 2002 pursuant to article 24C of the third amendment to the Indonesian Constitution.⁸³ In 2003, it was established by *Law 24/2003 on the Constitutional Court*.⁸⁴ The establishment of the Constitutional Court is significant because, in the past, the former authoritarian President Soeharto (who ruled from 1966-1998), ensured that the courts did not have the power to exercise judicial review.⁸⁵

⁸⁰ Amicus Brief of the Becket Fund for Religious Liberty in relation to the request for judicial review of Act No 1/PNPS/1965 on the Prevention of Mistreatment of Religion and/or Blasphemy under the 1945 Constitution of the Republic of Indonesia (2010) at 19.

⁸¹ See Request to the Constitutional Court to Conduct Judicial Review of the Blasphemy Law 1965, dated 20 October 2009; List of Evidence for the Plaintiff in the request for Judicial Review of the Blasphemy Law 1965, dated 20 October 2009; List of Experts for the Plaintiff in the request for Judicial Review of the Blasphemy Law 1965, dated 20 October 2009.

⁸² *Law 24/2003 on the Constitutional Court*, arts. 3A and 10(1)(A).

⁸³ For an in-depth analysis of the Indonesian Constitutional Court and the process of judicial review in its first two years of operation, see Simon Butt, *Judicial Review in Indonesia: Between Civil Law and Accountability: A Study of Constitutional Court Decisions 2003-2005* (PhD Thesis, University of Melbourne, 2007).

⁸⁴ This law was recently amended by *Law 8/2011 on the Amendments to Law 24/2003 on the Constitutional Court*.

⁸⁵ According to *Law 14/1970 on Judicial Power*: see Tim Lindsey, "Indonesian Constitutional Reform: Muddling Towards Democracy" (2002) 6 S.J.I.C.L.244 at 260-261.

The applicants in this case consisted of several legal aid and human rights groups, including Imparsial,⁸⁶ ELSAM,⁸⁷ PBHI,⁸⁸ DEMOS,⁸⁹ the Setara Institute, and Desantara Foundation, led by the Indonesian Legal Aid Institute. In addition to these organisations several prominent individuals were applicants, including Professor Musdah Mulia, lecturer at the State Islamic University Syarif Hidayatullah and Head of the Indonesian Conference on Religion and Peace, and M. Dawan Rahardjo, founder of the Foundation for the Study of Religion and Philosophy (Lembaga Studi Agama dan Filsafat, LSAF) and lecturer at University of Muhammadiyah, Malang.⁹⁰ The applicants were represented by a team of 54 lawyers, and called itself the Religious Freedom Advocacy Team. Not all lawyers appeared in court, partly because one of the judges told the applicants that they could only have ten to 12 representatives of the legal team in the court at the one time.⁹¹

The applicants structured their arguments around the four provisions of the *Blasphemy Law*. I will discuss three common arguments that can be discerned that relate to several key provisions of the Constitution.

A. Religious Freedom: Articles 28E and 29

First, the applicants argued that the provisions of the *Blasphemy Law* were against the right to freedom of religion.⁹² The applicants quoted article 29(2), which is the original provision on religious freedom as contained in the 1945 Constitution, which states that “[t]he State guarantees all persons the freedom of worship, each according to his/her own belief”.⁹³

The applicants then relied on several provisions in Chapter XA on Human Rights, added as part of the constitutional amendment process since 1998. This included article 28E, which complements article 29(2), as follows:⁹⁴

⁸⁶ Also known as the Indonesian Human Rights Monitor, Imparsial is a non-government organisation established in 2002 to investigate breaches of basic human rights.

⁸⁷ ELSAM is a Human Rights Institute for Policy Research and Advocacy established in 1993 with the aim of strengthening civil society by promoting human rights.

⁸⁸ The Association for Legal Aid and Human Rights (Perhimpunan Bantuan Hukum dan Hak Asasi Manusia) is an NGO that aims to promote and defend human rights.

⁸⁹ The Centre for Democracy and Human Rights Studies (Lembaga Kajian Demokrasi dan Hak Asasi).

⁹⁰ It also initially included Abdurrahman Wahid, who passed away on 18 December 2009. For a brief biography of the individual applicants, see Court Decision 2010, *supra* note 55 at 19-20.

⁹¹ Court Transcript in Case No 140/PUU-VII/2009, Hearing No (I), 17 November 2009 at 4.

⁹² Court Decision 2010, *supra* note 55 at 73-81.

⁹³ The following excerpts of the Constitution are taken from the translation in Lindsey, *supra* note 39.

⁹⁴ Court Decision 2010, *supra* note 55 at 20-59.

Article 28E

1. Each person is free to profess their religion and to worship in accordance with their religion, to choose their education and training, their occupation, their citizenship, their place of residence within the territory of the State and to leave it and to return to it.
2. Each person has the freedom to possess convictions and beliefs and to express their thoughts and attitudes in accordance with their conscience.

The application also referred to the right to be free from discrimination in article 28I(2) and the right to adhere to a religion, which is included in a list of other rights that must not be limited in article 28I(1).

In regards to the provisions on religious freedom, the applicants argued that the mention of only six religions as set out in the Elucidation to article 1 of the *Blasphemy Law* marginalised and discriminated against other religions and beliefs (as explained above).⁹⁵ They also contended that there are many streams (*aliran*) of Islam and many different *mazhab* (schools of law within Islam), yet these were not the concern of the *Blasphemy Law*.⁹⁶ As evidence of this, they described what they perceived to be some of the differences between the practises of the two main Islamic organisations in Indonesia, Muhammadiyah and Nadhatul Ulama (NU), on issues such as burial practises. The applicants argued that Muhammadiyah has never, and would never, take court action against all 60 million NU members because of their different interpretations of Islam.⁹⁷ In doing this, it referred to “Muhammadiyah or *Wahabis*”, appearing to equate the two.⁹⁸ I will discuss the response of Muhammadiyah and NU to these arguments later.

The applicants argued that the State should not intervene with the right to religious freedom. They asserted that the criminal offence of blasphemy, contained in article 4 of the *Blasphemy Law*, which inserted article 156a into the Criminal Code, was invalid because it constitutes unwarranted intervention by the State into the convictions or beliefs of a religious group. They also felt that it restricted the freedom to propagate one’s beliefs, and made reference to the interpretation of the right to religious freedom as set out by the European Court of

⁹⁵ *Ibid.* at 21.

⁹⁶ Court Decision 2010, *supra* note 55 at 22.

⁹⁷ Court Decision 2010, *supra* note 55 at 25.

⁹⁸ In the 18th century, “Wahabism” emerged from the Salafi movement (which upholds the *salaf*, the early generations of Muslims, as perfect models) as a response to Ottoman rule, named after Muhammad Ibn Abd al-Wahhab. It sought to restore Islamic purity by ridding Islam of the corrupting influences of mysticism and intellectualism. Saudi Arabia has since adopted Wahabism as its state ideology and sought to spread it throughout the Muslim world. See Anthony Bubalo & Greg Fealy, *Joining the Caravan? The Middle East, Islamism and Indonesia* (Lowy Institute, 2005) at 39.

Human Rights in the case of *Kokkinakis v Greece*.⁹⁹ This case held that the criminal conviction of a Jehovah's Witness for propagating his faith was not necessary for the protection of others in a democratic society.¹⁰⁰ Further, state restrictions on blasphemy, the applicants argued, amount to the criminalisation of freedom of thought, opinion and expression of religion and belief.¹⁰¹

The applicants supported their arguments concerning the right to religious freedom with reference to *General Comment No 22* (General Comment)¹⁰² of the United Nations Human Rights Committee, the body established to monitor the *International Covenant on Civil and Political Rights* (ICCPR).¹⁰³ This is the main, non-binding document that explains the international right to religious freedom as set out in the ICCPR. They also referred to the *United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief* (the Declaration),¹⁰⁴ which sets out a list of nine non-exhaustive features of the right to freedom of religion. While these documents are a crucial guide in terms of the scope and definition of religious freedom, neither of the documents are binding on States.

B. Narrow Limitations on Religious Freedom: Article 28J(2)

Following on from the right to religious freedom, the applicants argued that the State must uphold its obligations to international law by only allowing narrow limitations on religious freedom, as set out in article 28J(2) of the Constitution. According to them, the *Blasphemy Law* was not a permissible limitation on the right to religious freedom.

In their submission to the court, they discussed at some length the principles of *forum internum*, the internal freedom of religion and belief that

⁹⁹ *Kokkinakis v Greece* No 260-A (1993) ECtHR.

¹⁰⁰ *Ibid.*; Court Decision 2010, *supra* note 55 at 34.

¹⁰¹ The arguments of the applicants', as included in the court judgement, can be found at Court Decision 2010, *supra* note 55 at 5-81.

¹⁰² United Nations Human Rights Committee, *General Comment No 22 on Article 18*, ICCPR, UN Doc CCPR/C/48/CPR.2/Rev.1 (1993).

¹⁰³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976). For commentary on the ICCPR, see Manfred Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (Germany: NP Engel, 1993); Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2005); Scott N. Carlson & Gregory Gisvold, *Practical Guide to the ICCPR* (New York: Transnational Publishers, 2003); and Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers, 1996).

¹⁰⁴ *United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief*, 25 November 1981, A/RES/36/55.

cannot be limited, and the *forum externum*, the external manifestation of religion or belief that can be limited by the State on a narrow set of grounds. They emphasised that the *forum internum* is a non-derogable right, that is, the State is not allowed to limit *forum internum*, the private or internal freedom of thought, conscience, religion and belief.¹⁰⁸ In their opinion, the *Blasphemy Law* did cross the boundary into the *forum internum*.

Even if the court found that the *Blasphemy Law* did not limit the *forum internum*, they argued that it did not satisfy one of the grounds for limiting the *forum externum*. They noted that article 18(3) of the ICCPR allows the State to limit the right to religious freedom on the grounds of public safety, order, health or morals. They argued, however, that the *Blasphemy Law* was an impermissible limitation on the right because it limited freedom of religion to six religions.¹⁰⁹

They did not, however, acknowledge the difference in the wording of the limitation as contained in article 28(J)(2) of the Indonesian Constitution compared to article 18(3) of the ICCPR. While the ICCPR allows for limitations that “are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”, article 28(J)(2) of the Constitution adds to this list the ground of “religious values”. I will discuss this issue further in relation to the decision of the court. It is important to note, however, that the applicants did not explicitly explain why the *Blasphemy Law* did not fit within one of these permissible grounds. If they had done so, this would have considerably strengthened their case.

C. Certainty and the Rule of Law: Articles 1(3) and 28D(1)

Aside from religious freedom and its limits, the applicants argued that the *Blasphemy Law* was inconsistent with the rule of law (*negara hukum*) as set out in article 1(3) of the Constitution, which states that “The Indonesian State is a *negara hukum*”. They cited the seminal work of A.V. Dicey on the *Rule of Law*, and argued that the *Blasphemy Law* was vague, unclear and unfairly enforced. They argued that the *Blasphemy Law* created uncertainty about the law and was unconstitutional, contravening article 28D(1), which states that “[e]ach person has the right to the recognition, security, protection and certainty of just laws and equal treatment before the law.”

In their opinion, the *Blasphemy Law* did not ensure equal treatment, but rather differentiated between citizens depending on the interpretation of religious majorities.¹¹⁰ Referring to Lon Fuller’s *The Morality of the Law*, they argued that

¹⁰⁸ See Paul M. Taylor, *Freedom of Religion: UN and European Union Human Rights Law and Practise* (Cambridge University Press, 2005) at 115-202.

¹⁰⁹ Court Decision 2010, *supra* note 55 at 78.

¹¹⁰ *Ibid.* at 37.

the *Blasphemy Law* contravened the certainty of the law for religious minorities.¹¹¹ They then cited five cases of blasphemy to support their opinion that the *Blasphemy Law* has been applied in an unjust and discriminatory manner.¹¹²

The first was the case of Arswendo Atmowiloto, an editor who was convicted in 1990 under article 156a of the Criminal Code for publishing an article in the magazine he edited that was deemed to have insulted Islam. The article included the results of a survey of the most inspiring people that listed the Prophet Muhammad as 11th and this angered some Muslims who presumably thought that the Prophet should be listed 1st, or perhaps not listed in such a survey. Atmowiloto was the only one of the five accused mentioned by the applicants who appeared as a witness in court. In the evidence he gave in court, Atmowiloto implied that there were other reasons he was convicted, claiming that others have published similar rankings or comparisons with the Prophet Muhammad in the past and have not been prosecuted under the *Blasphemy Law*.¹¹³ In his opinion, the application of the *Blasphemy Law* to those in the media constitutes a restriction on freedom of the press, and he therefore likened the *Blasphemy Law* to “a loose tooth that needs to be knocked out”.¹¹⁴

The second case was Ardi Husain, the leader of a drug and cancer foundation known as YKNCA who was convicted, along with some of his followers, for his teachings and publications that were deemed to be insulting to Islam.¹¹⁵ The third case was Lia Eden (Aminuddin), who was convicted (twice) for claiming to be the Archangel Gabriel and for claiming that one of her followers, Muhammad Abdul Rachman, is the reincarnation of the Prophet Muhammad.¹¹⁶ The fourth case was Sumardin Tappayya, a Muslim who was

¹¹¹ *Ibid.* at 35.

¹¹² *Ibid.* at 59-69.

¹¹³ *Ibid.* at 86-88.

¹¹⁴ Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Witnesses/Experts, Government Experts and Related Parties No (IV), 10 February 2010 at 21-22.

¹¹⁵ Yayasan Kanker dan Narkoba Cahaya Alam, Drug and Cancer Foundation. See Decision of the District Court of Probolinggo (East Java) No 280/Pid.B/2005/PN.Kab.Prob concerning the case of Mohammad Ardi Husain, Syamsudin, Mohammad Thoha, Ansori, Rahmat Hidayat, Khris Ariyono, H.J. Mufidah Marhamah (members of YKNCA), dated 22 September 2005; Majelis Ulama Indonesia, *File 1: Kronologis Yayasan Kanker dan Narkoba “Cahaya Alam” (YKNCA) Desa Krampilan, Kecamatan Besuk, Kabupaten Probolinggo. Kasus Penyesahaan Buku Menembus Gelap Menuju Terang 2* (2006).

¹¹⁶ Lembaga Bantuan Hukum, *Buku 1: Kasus Lia Eden* (LBH, 2006a); Lembaga Bantuan Hukum, *Buku II: Kasus Lia Eden. Berkas Perkara* (LBH, 2006b); Lembaga Bantuan Hukum, *Buku III: Kasus Lia Eden. Kronologi* (LBH, 2006c); Decision of the District Court of Central Jakarta No 677/PID.b2006/PN.JKT.PST concerning the case of Lia Eden; Decision of the District Court of Central Jakarta No PDM-577/JKT.PST.03/2009 in the case of Lia Eden and Wahyu Andito Putrowibison.

convicted for whistling during prayers. The final case put forward as evidence of the misuse of the *Blasphemy Law* was that of Yusman Roy, a Muslim accused of praying incorrectly for promoting bilingual prayer in Indonesian and Arabic.¹¹⁷ Of the accused, only Atmowiloto gave evidence in court, which perhaps suggests that the other accused may have been reluctant to testify in this case.

It is unclear, however, why these five cases were chosen out of all the cases that have gone to court since 1998, except for the fact that all the accused were represented by Indonesian Legal Aid.¹¹⁸ The applicants also called as a witness a member of a mystical belief who had experienced discrimination, although he had not been prosecuted under the *Blasphemy Law*. The witness, Sardy, explained that he had applied to become a member of the Indonesian National Armed Forces (then known as ABRI, now known as TNI) but was rejected because he was a member of a mystical belief and did not identify with one of the six official religions.¹¹⁹ It is unclear, however, how this example relates to the use or misuse of the *Blasphemy Law*, except to highlight the broader reality of discrimination in daily life against those who do not adhere to one of the six religions recognised by the State in Indonesia.

Aside from evidence of the five cases submitted by the applicants, they also gave examples of Islamic leaders, such as Hanafi and Hambal, who according to them were jailed for their beliefs in their time.¹²⁰ This was perhaps an attempt to appeal to Islamic leaders who oppose the *Blasphemy Law*, and to provide a historical perspective on the use of the offensive of blasphemy.

Overall, the applicants situated their arguments against the *Blasphemy Law* within Indonesia's broader tradition and history of religious diversity and tolerance. They articulated a vision of the relationship between law and religion that intersects with international discourses on religious freedom, human rights and ideas of a separation between the State and religion. I will now turn to submissions made by those for and against the *Blasphemy Law* and identify the competing ideas that were expressed about whether the State should regulate religion and, if so, how.

¹¹⁷ See Centre for the Study and Development of Culture, *Profil Yusman Roy: Penyesatan Ajaran Sholat Dua Bahasa KH Yusman Roy* (Pusat Studi dan Pengembangan Kebudayaan, 2005); Decision of the District Court of Malang (East Java) No 32/PDt.G/2005/PN.Kpj concerning the case of Moch Yusman Roy, dated 29 June 2005.

¹¹⁸ This may be more significant than it appears, as Indonesian Legal Aid has refused to represent some accused of blasphemy where the accused has suspected links to radical Islamic organisations, such as Ahmad Mushaddeq of Al-Qiyadah Al-Islamiyah. Interview with a member of LBH, October 2009.

¹¹⁹ Court Decision 2010, *supra* note 55 at 88.

¹²⁰ *Ibid.* at 59.

VI. SUBMISSIONS IN FAVOUR OF THE BLASPHEMY LAW

There were a wide range of submissions made to the court that were in full support of the *Blasphemy Law*. This included submissions and expert evidence given by the Minister of Religion, the Minister of Law and Human Rights, and the Director Generals of Islam, Protestantism and Catholicism, as well as other staff from the Ministry of Religion. These government representatives demonstrated a keen interest in defending the current position of the State, as set out in the *Blasphemy Law*.

A number of leaders from Islamic organisations such as the Indonesian Ulama Council, Muhammadiyah, and the Indonesian Islamic Preaching Council¹²¹ also expressed strong support for the *Blasphemy Law*.¹²² Submissions in favour of retaining the *Blasphemy Law* were also made by radical Islamists or hardliners, that is, those groups that support the use of violence to introduce Islamic law or the creation of an Islamic State. This included Hizbut Tahrir Indonesia and the Islamic Defenders Front.¹²³

The arguments made by those in favour of the *Blasphemy Law* can be identified and classified into five categories or positions on the relationship between the State and religion.

A. State Policies on Religion Must Uphold the Pancasila

The first theme that emerged from those in support of the *Blasphemy Law* is the need to uphold the nationalist rhetoric of the Pancasila, the state ideology. While this is not surprising coming from government officials, it was a shift to see radical Islamic groups in agreement when previously they may have advocated for an Islamic State in opposition to the idea of the Pancasila.

Frequent references were made by government officials to Indonesia as a country based on the Pancasila,¹²⁴ the first element being “Belief in Almighty God”. In addition, some radical Islamists appealed to the Pancasila. For example, in the opinion of the Indonesian Islamic Preaching Council, Indonesia is based on the Pancasila and is therefore:

not an Islamic country, not a Christian country, not a Hindu country, not a Buddhist country, not a Confucian country, and not a religious state (*negara*

¹²¹ Dewan Dakwah Islamiyah Indonesia, known as DDII.

¹²² Partai Persatuan Pembangunan, known as PPP.

¹²³ Front Pembela Islam, known as FPI.

¹²⁴ See for example Court Decision 2010, *supra* note 55 at 131-134.

agama)...not a secular country but a country that is religious (*negara beragama*) and a country that must protect those who follow a religion.¹²⁵

In the opinion of the Indonesian Islamic Preaching Council, the *Blasphemy Law* is one of the ways the State guarantees the protection of adherents of a religion. Other groups such as the Islamic Defenders Front also employed government rhetoric, arguing that the *Blasphemy Law* is necessary to maintain inter-religious harmony (*kerukunan umat beragama*).¹²⁶ This phrase has been commonly used by the Ministry of Religion since the 1970s to justify government policies on religion.

Another Islamic organisation, Persatuan Islam (Persis), emphasised that Indonesia is not a secular country and accused the applicants of not understanding the “spirit” of the Constitution.¹²⁷ Some submissions, such as that made by Adian Husaini of the Indonesian Ulama Council and the Indonesian Committee for Global Muslim Solidarity,¹²⁸ claimed that the *Blasphemy Law* was appropriate because the Indonesian State is not neutral on religion but rather issues laws according to Islamic *syariah*, evidenced by the law on the collection of *zakat* (alms), the *haji* (pilgrimage to Mecca) and so forth.¹²⁹ Although the national government does not have the specific power to implement Islamic *syariah*, it does have the power to regulate on matters of “religion”, which may presumably include Islamic *syariah*.¹³⁰

Those in favour of retaining the *Blasphemy Law* therefore built on the entrenched values of the first element of the Pancasila. They did this to support their position that Indonesia is a religious State and that its policies must therefore protect the adherents of the recognised religions.

B. The State Must Distinguish between Religions and Mystical Beliefs

The second key theme that emerged was the opinion that the State can and should differentiate between “religion” (*agama*) and “mystical belief” (*aliran kepercayaan*).¹³¹ The government put forward 17 witnesses to oppose the application heard by the court, many from the Ministry of Religion who argued for the need to differentiate between a “religion” and a “mystical belief”. In their

¹²⁵ *Ibid.* at 174.

¹²⁶ *Ibid.* at 204.

¹²⁷ *Ibid.* at 185-186.

¹²⁸ Komite Indonesia untuk Solidaritas Dunia Islam, known as KISDI.

¹²⁹ Court Decision 2010, *supra* note 55 at 151.

¹³⁰ *Law 32/2004 on Regional Autonomy*, art. 10(3)(f).

¹³¹ Stange credits the term *kepercayaan* to Wongsonegoro, the father and advocate of political mystical movements during the 1950s: Paul Stange “Legitimate mysticism in Indonesia” [1986] 20(2) *Review of Indonesian and Malaysian Affairs* 76-117 at 87.

opinion, the *Blasphemy Law* is a key instrument that must be used to protect the six official religions from so-called “deviant” beliefs. The debate and controversy over this distinction can be traced back to the development of the policies of the Ministry of Religion.

The Ministry of Religion has played a key role in limiting the right to religious freedom in Indonesia. The establishment of the Ministry in 1946 was largely a concession to Muslim leaders, but it also provided the government with the opportunity to control religious communities and beliefs. The Ministry of Religion has sought to distinguish between religion (*agama*) and mystical beliefs (*aliran kepercayaan*). For example, Islam and Christianity are both considered “religions” (*agama*) in Indonesia, as opposed to “mystical beliefs” (*aliran kepercayaan*). *Agama* comes from a Sanskrit term which refers to “a traditional precept, doctrine, body of precepts, or collection of such doctrines, anything handed down and fixed by tradition”.¹³² Some Indonesian Islamic leaders, however, teach that “*agama*” is Sanskrit for “*a*”, which means “no”, and “*gama*”, which means “chaos”, thus inferring that the role of the Ministry is one of preventing chaos and maintaining social order.¹³³

According to Monnig-Atkinson, *agama* has strong associations in Indonesia with both Islam and Christianity, and to notions of power, wealth, privilege, nationalism and literacy, due to the introduction of these religions through trade and colonialism.¹³⁴ A common phrase used is “*orang yang belum beragama*”, that is, a person who does not yet adhere to one of the official religions, which also implies that conversion to a “religion” is inevitable.¹³⁵ The Ministry therefore differentiates between religion (*agama*), which has been officially recognised, and mystical beliefs (*aliran kepercayaan*), which were sidelined under the New Order.¹³⁶

A proposal to include mystical beliefs as religions in the 1970s was met with fierce opposition from some Muslim leaders who saw it as an attempt by the government to weaken the position of Islam.¹³⁷ To appease Islamic leaders, in 1978, the Minister clarified that mystical beliefs are not considered by the

¹³² Jan Gonda, *Sanskrit in Indonesia* (International Academy of Indian Culture, 1973) at 499.

¹³³ K.H. Ahmad Dimiyathi Badruzzaman, *Panduan Kuliah Agama Islam* (Depok, 2004) at 1.

¹³⁴ Jane Monnig-Atkinson, “Religions in Dialogue the Construction of an Indonesian Minority Religion” (1983) 10(4) (Nov) *American Ethnologist* 683 at 687.

¹³⁵ Monnig-Atkinson, *supra* note 131 at 688-689.

¹³⁶ Karel Steenbrink, “The Pancasila Ideology and an Indonesian Muslim Theology of Religions” in Johan Waardenburg, ed., *Muslim Perceptions of Other Religions: A Historical Survey* (Oxford University Press, 1999) 280 at 282-83.

¹³⁷ C. van Dijk, *Rebellion under the Banner of Islam: The Darul Islam in Indonesia* (Martinus Nijhoff, 1981) at 51.

government to be religions.¹³⁸ This was perhaps at the insistence of Islamic religious leaders, who wished to maintain the authority to define and defend orthodox Islam. This affected those who practised mystical beliefs, as their organisations were not able to access funding from the government that was allocated to other religions, they had to identify as adherents of one of the six religions on their identity card (rather than as of a mystical belief), and to register their marriage.

The history of the debate over the distinction between religion and belief is also relevant to the issue of blasphemy because many of those accused under the *Blasphemy Law* are branded as “*aliran kepercayaan*” (mystical beliefs) or “*aliran sesat*” (deviant beliefs). This arbitrary distinction between religion and mystical beliefs, and between “true” and “deviant” teachings, continues to be reinforced by the Ministry of Religion, and remains a ground of discrimination in Indonesia.

Such a distinction requires religious leaders to determine whether a teaching is or is not deviant, and this is how the Indonesian Ulama Council depicted itself in this case.¹³⁹ The Council described its role in this way: “Ulama as inheritors (*pewaris*) of the Prophet have the role and important responsibility to guide the Muslim community” and play an “active role in guarding the principles of Islam and protecting the Muslim community from false teachings or deviant groups”.¹⁴⁰ This appears to be based on the presumption that the Indonesian Ulama Council has the power or mandate to do so through legal channels, although as a non-government organisation this is largely a self-appointed role.

Aside from the role of national religious councils in making these distinctions, those in favour of the *Blasphemy Law* argued that it is a necessary for the State to regulate religions in a way that maintains social order and national harmony.

C. The State Must Regulate Religion to Protect National Harmony

Another common argument expressed by those in support of the *Blasphemy Law* was that it was necessary to prevent religious conflict and preserve social harmony. K.H. Hasyim Muzadi, the current chairperson of Nahdlatul Ulama, a traditionalist Islamic organisation that is also the largest Islamic organisation in Indonesia, felt that the *Blasphemy Law* was needed in Indonesia to prevent social

¹³⁸ According to art. 1 of the Instruction of the Minister of Religion 4/1978 on the policy concerning Local Beliefs, “*kepercayaan*” (beliefs) are not religions: Ministry of Religion, *Kompilasi Peraturan Perundangan-undangan Kerukunan Hidup Umat Beragama*, 10th ed. (Ministry of Religion, 2008) at 238-239.

¹³⁹ Court Decision 2010, *supra* note 55 at 139-151.

¹⁴⁰ *Ibid.* at 139.

instability, inter-religious conflict and anarchy.¹⁴¹ The Minister of Law and Human Rights, Patrialis Akbar, also expressed concerns that the cancellation of the *Blasphemy Law* could lead to “horizontal conflict”, that is conflict between religious communities in Indonesia.¹⁴²

The Indonesian Ulama Council reiterated that it was “fearful that chaos would break out everywhere” if the law was cancelled.¹⁴³ The Islamic Defenders Front, a radical Islamic group known for its vigilante campaigns on issues such as religious minorities and pornography, similarly claimed that if the *Blasphemy Law* was cancelled, established religions would be threatened and it would damage national stability.¹⁴⁴

In its submission, Nahdlatul Ulama also emphasised the need to maintain public order.¹⁴⁵ Although it rejected the arguments of the applicants, it admitted that there may be an issue with the way the provisions of the *Blasphemy Law* were being interpreted in court and it asked the judiciary for clarification in this regard. This slight concession is perhaps a reflection of Nadhatul Ulama’s long-standing tolerance of mystical beliefs and the reality that many of its members also practise mystical beliefs. This was the most positive statement in favour of religious tolerance by any Islamic group at the court hearing, with most others taking a firm stance in support of the *Blasphemy Law*.

Some religious minorities also expressed cautious support for the *Blasphemy Law* on the grounds of national security. Representatives from the national Confucian council¹⁴⁶ argued that all religions and beliefs must be protected without discrimination,¹⁴⁷ and that all should follow the golden rule “do to others what you want them to do to you”. They expressed fears that if the *Blasphemy Law* was cancelled there would be anarchy because “[f]reedom without limits will cause conflict and...extremism”.¹⁴⁸

Similarly, Hindu representatives characterised the *Blasphemy Law* as a principle of “anti-discrimination”, and were concerned that the emergence of “deviant” groups would threaten the unity of the nation.¹⁴⁹ They emphasised the need for the *Blasphemy Law*, because without it there will be anarchy.¹⁵⁰ A Buddhist representative from the Ministry of Religion also supported the need for

¹⁴¹ *Ibid.* at 121.

¹⁴² Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Government, the Legislature and Related Parties No (III), 4 February 2010 at 25.

¹⁴³ Court Decision 2010, *supra* note 55 at 150.

¹⁴⁴ *Ibid.* at 205.

¹⁴⁵ *Ibid.* at 170.

¹⁴⁶ Majelis Tinggi Agama Khonghucu, known as Matakini.

¹⁴⁷ Court Decision 2010, *supra* note 55 at 171.

¹⁴⁸ *Ibid.* at 172.

¹⁴⁹ *Ibid.* at 177.

¹⁵⁰ *Ibid.* at 179.

the law, noting in particular the Buddha Bar controversy. This was a reference to the 2010 case in which a Buddhist coalition took the owners of the restaurant “The Buddha Bar” to court on the grounds that the use of the word “Buddha” and the use of religious icons in the restaurant were offensive to Buddhists.¹⁵¹

Some government officials claimed that by protecting national harmony, the *Blasphemy Law* was in the interests of religious minorities. For example, Atho Mudzhar, the chairperson of the Office of Research of the Ministry of Religion, cited the example of the Joint Ministerial Decision of 2008 (Joint Decision) warning Ahmadiyah, an Islamic sect, which in his opinion was issued for the protection of the Ahmadi community.¹⁵² Whether the real intention of the Joint Decision was to protect Ahmadiyah is questionable given the increase in attacks against Ahmadiyah since then.¹⁵³ Other submissions were clear that groups considered to be “deviant”, such as Ahmadiyah, should not be protected by claims of human rights or religious freedom. For example, the Indonesian Ulama Council referred to the head of Nahdlatul Ulama, Kyai Hasyim Muzadi, who was quoted in a newspaper as stating, “Don’t talk about religious freedom, don’t talk about human rights in the case of Ahmadiyah, because Ahmadiyah is not actually a religion.”¹⁵⁴

Other witnesses called by the government, such as Professor Mahdini Sani Kursani, Dean of the Law Faculty at the State Islamic University Sultan Syarif Kasim of Riau, emphasised that the *Blasphemy Law* had existed since 1965 and that there had not been any cases challenging the validity of the *Blasphemy Law* in the past.¹⁵⁵ By doing this, he questioned the intentions of the applicants in bringing the case now, although he appears to have ignored the reality that judicial review of laws against the Constitution was not a possibility until the Constitutional Court was established in 2003, as explained above. The Indonesian Ulama Council¹⁵⁶ also made a similar point, questioning why the applicants had waited over 45 years to take the case to court, suggesting that they were potentially disturbing public order now by doing so.

¹⁵¹ Court Decision 2010, *supra* note 55 at 129. In 2010, the Central Jakarta District Court found in favour of the applicants and ordered that the restaurant be closed: “Court orders closure of Buddha Bar” *The Jakarta Post* (2 September 2010), online: <www.thejakartapost.co.id>.

¹⁵² Court Decision 2010, *supra* note 55 at 126. For an explanation of the 2008 warning and the controversy behind it, see Melissa Crouch, “Indonesia, militant Islam and Ahmadiyah: Origins and implications” in *ARC Federation Fellowship Islam, Shariah and Governance*, Background Paper Series No 4 (Melbourne, 2009).

¹⁵³ The most shocking occurred in February 2011, when several Ahmadis were brutally killed in conflict in Cikeusik. See “Six Ahmadiyah Followers Killed in Clash in Banten: Witness” *The Jakarta Globe* (6 February 2011), online: <www.thejakartaglobe.co.id>.

¹⁵⁴ Court Decision 2010, *supra* note 55 at 139.

¹⁵⁵ *Ibid.* at 130.

¹⁵⁶ *Ibid.* at 144.

Finally, the Islamic-based United Development Party,¹⁵⁷ the only Islamic-based political party that was allowed under the New Order, stated that “the government...has the right and responsibility to evaluate or interpret religion and/or...religious activities”.¹⁵⁸ It appeared to advocate for full powers for the State to oversee and regulate religious affairs, leaving no room for separation between law and religion.

D. The State May Limit Religious Freedom

Another key theme that followed on from the need to prevent social chaos is that the State has the authority to limit the right to religious freedom. This argument appears to have been based on the grounds of “public order” in article 28(J)(2) of the Constitution. During the case, government officials conjured up images of “instability”, “anarchy” and “communal conflict” if the *Blasphemy Law* was abolished.¹⁵⁹ In contrast to the applicants, however, those in favour of the *Blasphemy Law* characterised the State’s power to restrict religious freedom in the interests of social order very broadly.

The overall theme from the evidence presented by the government, many of whom are also leaders in the Islamic community, was encapsulated by the current Minister of Religion, Suryadharma Ali, who said that “[f]reedom (of religion) is a constitutional right for everyone, but it cannot be exercised without limits...as intended in art 28J(2) [of the Constitution]”.¹⁶⁰ When the Minister of Religion made his statement in court, he was affirmed with shouts of “*Allahu Akbar*” (God is Great) from radical Islamic groups seated in the court room.¹⁶¹ The ability of the State to limit the right to religious freedom is recognised in international law¹⁶² but it allows only narrow limitations.¹⁶³ This raises questions about how the limitations on religious freedom are interpreted in Indonesia, and

¹⁵⁷ Partai Persatuan Pembangunan, known as PPP.

¹⁵⁸ Court Decision 2010, *supra* note 55 at 196.

¹⁵⁹ *Ibid.* at 121, 124.

¹⁶⁰ *Ibid.* at 241. From the court transcript, it appears that the Minister of Religion was invited to give his oral submission from the judicial bench which, while no doubt done out of respect for the Minister, raises questions about the independence of the judiciary: see Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Government, the Legislature and Related Parties No (III), 4 February 2010 at 15.

¹⁶¹ The Chief Justice responded to this commotion by saying “don’t shout, it is forbidden to shout in the court room. I also cry ‘*Allahu Akbar*’ but in my heart, if you want to shout aloud go outside”: Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Government, the Legislature and Related Parties No (III), 4 February 2010 at 21; see also “Raucous Crowd Churns Court at Hearing on Blasphemy Law” *The Jakarta Globe* (11 March 2010), online: <www.thejakartaglobe.com>.

¹⁶² ICCPR, art. 18(3).

¹⁶³ General Comment No 22 on the ICCPR, CCPR/C/21/Rev.1/Add.4, 1993 at para 8.

when a limitation imposed by the State on a person's right to freedom of religion would be considered to be outside of the power of the State.

The interpretation of religious freedom and its limits in Indonesia was contrasted with international understandings of this right. The Indonesian Ulama Council emphasised what it saw as the difference between conceptions of human rights in Islam compared to "the West". It stated that:

[a]ccording to the West, the concept of human rights is often unlimited and is only about rights, while according to Islam human rights cannot be separated from responsibilities, like the two sides of a coin.¹⁶⁴

It also argued that Muslims have a "right" not to have their religion blasphemed and that the *Blasphemy Law* was therefore a permissible limitation on the right to religious freedom, referring to article 28J(2) of the Constitution.¹⁶⁵ Muhammadiyah, the largest modernist Islamic organisation in Indonesia, also opposed the applicants' arguments on the grounds that "religious freedom is not freedom without limits".¹⁶⁶

The Indonesian Ulama Council was also quick to emphasise the risk of chaos breaking out if religious freedom was not limited.¹⁶⁷ Another submission highlighted the Danish cartoon case in which the *Jyllands-Posten* published a cartoon of the Prophet Muhammad with a Qur'an in one hand and a bomb in the other, among other characterisations.¹⁶⁸ This example was presumably referred to in order to draw attention to the potential for violence and social disorder if incidents of blasphemy are allowed to arise.

One Islamic group even argued that limitations on religious freedom were necessary to prevent religious conversions, particularly conversions out of Islam. The Irena Centre, an Islamic organisation established by a convert from Catholicism to Islam, complained about the "evils" of groups such as Ahmadiyah and Lia Eden.¹⁶⁹ True to its cause of denouncing converts from Islam to Christianity, the submission by the Irena Centre noted several high profile cases of conversions from Islam to Christianity. This included the case of a former leader of the Islamic Defenders Front from Surabaya who converted to Christianity; the case of Ali Makhrus, a Muslim who also converted to Christianity; and the case of 41 Christians convicted for blaspheming Islam in

¹⁶⁴ Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Government, the Legislature and Related Parties No (III), 4 February 2010 at 34; Court Decision 2010, *supra* note 55 at 140.

¹⁶⁵ Court Decision 2010, *supra* note 55 at 146.

¹⁶⁶ *Ibid.* at 153.

¹⁶⁷ *Ibid.* at 149.

¹⁶⁸ *Ibid.* at 152.

¹⁶⁹ *Ibid.* at 199.

Malang.¹⁷⁰ These cases were cited in support of the need for the State to convict and punish such people for their actions through the *Blasphemy Law*.

E. The State Must Distinguish Between Deviancy and Schools of Law

Finally, many of the submissions were at pains to distinguish between deviancy and the different schools of Islamic law (*mazhab*). The Indonesian Ulama Council emphasised that the *Blasphemy Law* has never been used to convict Shia Muslims (the majority of Indonesian Muslims being Sunni Muslims) or Muslims who adhere to other Islamic schools of law (*mazhab*), but only against deviant beliefs that insult Islam.¹⁷¹ It therefore attempted to distinguish between differences within the different schools of Islamic law, which are not subject to allegations of deviancy, and the teachings of sects outside of these schools of law, which are considered to be deviant. It also openly chastised the applicants for their arguments, which in its opinion promoted a false interpretation of Islam, and recommended that they needed to study the teachings of Islam further.

Groups such as Ahmadiyah, a sect that claims to be within Islam, were considered by these submissions to be a clear example of deviancy. Dr. H. Amidhan, Board Member of MUI and Chairperson of its Inter-religious Harmony Division, suspected that “the request for judicial review cannot be separated from the struggle of the applicants in the case of Ahmadiyah”.¹⁷² He was referring to the support some of the applicants, including the Indonesian Legal Aid Institute and other non-government organisations, have given to Ahmadiyah in the past. This was despite the fact that the applicants’ submission to the court did not refer to Ahmadiyah. This suggests that conservative Islamic leaders feared that the hidden agenda in this case was to legitimise the rights of Ahmadis, which are hotly disputed in Indonesia, even though the applicants’ case was obviously much broader than this.

The Indonesian Ulama Council was also vehement that the *Blasphemy Law* should not be cancelled, because “we do not want a situation where *aliran* or *kebatinan* flourish”.¹⁷³ This appears to be based on its somewhat speculative claim that few mystical beliefs have emerged since the introduction of the *Blasphemy Law*, although they offer no evidence in support of this claim. Contrary to the Indonesian Ulama Council, one radical Islamist, Amien

¹⁷⁰ *Ibid.* at 199.

¹⁷¹ *Ibid.* at 148.

¹⁷² Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Government, the Legislature and Related Parties No (III), 4 February 2010 at 34.

¹⁷³ Court Decision 2010, *supra* note 55 at 150.

Djamaluddin of the Indonesian Islamic Preaching Council,¹⁷⁴ asserted that many mystical beliefs and sects have emerged, implying that the *Blasphemy Law* is still needed to control and contain them.¹⁷⁵ Regardless of whether they have grown or not, the only reason these groups felt the need for such a distinction is the threat that they may pose to the beliefs and teachings of the six recognised religions.

There are obvious concerns with a law that requires a distinction to be made between deviancy and orthodoxy, particularly in regards to the role that the State plays in determining such a divide. The submission by Muhammadiyah, however, claimed that the issue of who has the right to interpret which teachings are deviant and how, is straightforward. In its opinion, one example is the belief that Muhammad was the final prophet. If a group believes in a prophet after Muhammad, as some complain that Ahmadiyah does, then they must have “deviated” from the teachings of Islam and they need to be punished to ensure others do not follow this interpretation.¹⁷⁶ No attempt was made to explain how the definition of deviancy could be simplified by reference to a more objective set of criteria that might also apply to religions other than Islam.

In relation to these arguments, as discussed earlier, the applicants also made reference to the differences between Muhammadiyah and NU, and in doing so appeared to equate Muhammadiyah with Wahabism.¹⁷⁷ This was perhaps one of the reasons for such a hostile response from Muhammadiyah. Muhammadiyah is generally regarded as a modernist organisation whose members seek to purify the faith by returning to the Qur’an and *hadith* to discern God’s will for society.¹⁷⁸ Muhammadiyah appeared anxious to defend its teachings and distance it from Wahabbism, stating clearly that “Muhammadiyah is not Wahabi”.¹⁷⁹

Submissions made by other Islamic groups also focused on the need to prevent people from blaspheming Islam, although this was usually justified along religious rather than legal grounds or rights. For example, Persis claimed that the *Blasphemy Law* was necessary because of the need to prevent groups plagiarising or misusing verses of the Qur’an or hadith. Such allegations have been made against groups including Ahmadiyah, Lia Eden and Ahmad Mushaddeq,¹⁸⁰ as discussed earlier.

¹⁷⁴ Dewan Dakwah Islamiyah Indonesia, known as DDII.

¹⁷⁵ Court Decision 2010, *supra* note 55 at 152.

¹⁷⁶ Court Decision 2010, *supra* note 55 at 154.

¹⁷⁷ Wahabism emerged in the 18th century as a response to Ottoman rule. It sought to restore Islamic purity by ridding Islam of the corrupting influences of mysticism and intellectualism. Saudi Arabia has since adopted Wahabism as its state ideology and sought to spread it throughout the Muslim world. See Anthony Bubalo & Greg Fealy, *Joining the Caravan? The Middle East, Islamism and Indonesia* (Lowy Institute, 2005) at 39.

¹⁷⁸ Hooker, *Indonesian Islam: Social Change through Contemporary Fatwa* (ASAA, 2003) at 230.

¹⁷⁹ Court Decision 2010, *supra* note 55 at 156.

¹⁸⁰ *Ibid.* at 187.

Overall, submissions made by those in favour of retaining the *Blasphemy Law* primarily focused on the Indonesian context and the history of state protection for the recognised religions. They only referred to international law to the extent that it supported their claim that religion can and should be regulated and limited by the State in the interests of national security.

VII. SUBMISSIONS AGAINST THE BLASPHEMY LAW

Most of the submissions against the *Blasphemy Law*, that is, to abolish the law, were made by religious minorities or those who would identify themselves as liberal or progressive Muslims. Religious minorities make up over ten percent of the population in Indonesia. According to the Ministry of Religion, in 2009, the population was 88.7% Muslim, 5.7% Protestant, 3.02% Catholic, 1.7% Hindu, 0.6% Buddhist, 0.09% Confucian and 0.11% “other”.¹⁸¹ I will identify several common arguments about how the State and religion should interact in Indonesia, although I note that not all religious minorities made submissions to the court. This is despite the fact that the coalition had initially intended to include a member of the displaced Ahmadiyah community in Lombok as one of their witnesses.

A. The State Must Allow Religious Diversity

First, religious minorities emphasised the value of religious pluralism and the diversity within their own traditions. They argued that such diversity does not amount to blasphemy nor is it a sufficient reason for the *Blasphemy Law*. For example, Father Frans Magnis-Suseno, a prominent Catholic scholar and witness for the applicants, opposed the *Blasphemy Law* on the grounds that difference of beliefs alone does not amount to the insult of another religion.¹⁸² Magnis-Suseno emphasised the need to be clear on what is not blasphemy, so that if necessary one can discern what it is.¹⁸³ He argued that the difference is whether there is the intent to insult. He gave the example of Jehovah’s Witnesses (JWs), whom he believed most Christians would consider to be outside of Christianity, even though JWs may consider themselves to be Christians. He claimed that this was not an instance of blasphemy, because JWs do not intend to insult Christianity.

This example is important because there has been a history of opposition to JWs in Indonesia, from both Muslims and Christians, because their proselytisation activities, such as delivering bibles door-to-door, have been perceived as

¹⁸¹ Ministry of Religion, “Table 1: Population by Religion 2009”, online: <kemenag.go.id>.

¹⁸² Court Decision 2010, *supra* note 55 at 89.

¹⁸³ *Ibid.* at 88.

aggressive. As a result, in 1976, JWs were banned by the Attorney General in 1976, although this ban was lifted in 2001.¹⁸⁴

The national Protestant Council¹⁸⁵ expressed a similar opinion regarding religious diversity and the difficulties of interpretation. It highlighted the fact that what amounts to “insulting a religion” is unclear and has been widely interpreted and abused.¹⁸⁶ The national Protestant Council also questioned whether the State has the right to determine religious teachings and urged the government to be more proactive against vigilante violence, that is, to prevent attacks on groups considered to be “deviant”.¹⁸⁷ It emphasised the different denominations and teachings within Christianity, which it claimed are not blasphemy. In its opinion, a Sunday service at a church may be the appropriate time to warn the Christian community about teachings that are considered to be incorrect or “deviant”, but taking violent action against a group because of differences in belief should never be an option.

The national Bishops Council also emphasised that there is no agreement on who has the right to determine whether a group is deviant or not¹⁸⁸ and therefore expressed strong disagreement with the *Blasphemy Law*. None of the submissions made by Christian organisations or leaders, however, mentioned the two court cases in which people who claim to be Christian have been convicted for insulting Christianity, presumably because they did not support these prosecutions. Surprisingly, none of the submissions made by Christians and Muslims mentioned the large number of Christians who have been convicted for insulting Islam in Indonesia (as illustrated in Table 3 above).

B. The State Must Protect, Not Criminalise, Minorities

Second, submissions made by religious minorities, such as the national Catholic council,¹⁸⁹ emphasised that the *Blasphemy Law* was a breach of the right to religious freedom because it allowed the religious majority to effectively criminalise the teachings of religious minorities.¹⁹⁰

¹⁸⁴ See Decision of Attorney General KEP-129/JA/12/1976 Banning the Teachings/Gathering of Bible Students/Jehovahs Witnesses. This ban was cancelled on 1 June 2001 by a further Decision of the Attorney General.

¹⁸⁵ Persekutuan Gereja-gereja Indonesia, known as PGI, the national council that represents Protestant churches in Indonesia.

¹⁸⁶ Court Decision 2010, *supra* note 55 at 160-162.

¹⁸⁷ *Ibid.* at 161-162.

¹⁸⁸ *Ibid.* at 167.

¹⁸⁹ Kantor Waligereja Indonesia, known as KWI, the national council that represents Catholic churches in Indonesia.

¹⁹⁰ Court Decision 2010, *supra* note 55 at 168.

Those in favour of abolishing the *Blasphemy Law* argued that the role of the State was to protect and not criminalise minorities. The issue of majority versus minority rights, and majority rights being exercised in a way that compromises the rights of minorities was also highlighted. The Organisation for the Belief in Almighty God,¹⁹¹ a national organisation that represents mystical beliefs, also described the issue as a majority-minority problem. It expressed the sentiment that mystical beliefs are a minority and that the law discriminates against them.¹⁹²

These submissions can be seen as part of an effort to warn the State that it must learn from past mistakes it had made in its efforts to criminalise religious difference. Some religious minorities put the debate over the *Blasphemy Law* in the context of separatist religious movements and fears of communism of the 1950s and 1960s. The Organisation for the Belief in Almighty God argued that in the era of Darul Islam,¹⁹³ “many [followers of mystical beliefs] became victims because they were considered to be infidels (*kafir*) and to besmirch a religion”.¹⁹⁴ It went on to explain how a Congress Organisation for Mysticism (*Kebatinan*) was formed in 1955, but that it was targeted by Darul Islam.¹⁹⁵ Then, under the New Order (1966-1998), many people who followed mystical beliefs were suspected as communists and members of the banned Indonesian Communist Party.¹⁹⁶ According to the Congress, many adherents of mystical beliefs were killed or put in jail because they were suspected as communists.¹⁹⁷ The Bishops Council of Indonesia also emphasised that the *Blasphemy Law* was introduced in 1965 at a volatile time, during the era of Darul Islam and separatist movements.¹⁹⁸ While not explicitly stated, the Congress appears to have raised this point to suggest that the *Blasphemy Law* should be abolished because it upholds the distinction between religions and mystical beliefs, which it inferred has led to the death of many adherents of mystical beliefs in the past.

It is important to note that the extent to which religious minorities and non-government organisations felt that they would receive protection from the

¹⁹¹ Badan Organisasi Kepercayaan terhadap Tuhan Yang Maha Esa.

¹⁹² Court Decision 2010, *supra* note 55 at 189.

¹⁹³ Darul Islam was a movement that emerged in West Java in the late 1940s that promoted the ideology of an Indonesian Islamic state (Negara Islam Indonesia, NII). See Greg Fealy, “Half a Century of Violent Jihad in Indonesia: A Historical and Ideological Comparison of Darul Islam and Jema’ah Islamiyah” in Marika Vicziany & David Wright-Neville, eds., *Islamic Terrorism in Indonesia: Myths and Realities*, Annual Indonesia Lecture Series 26 (Clayton: Monash University Press, 2005).

¹⁹⁴ *Ibid.* at 190.

¹⁹⁵ *Ibid.* at 192.

¹⁹⁶ Partai Komunis Indonesia, known as PKI.

¹⁹⁷ Court Decision 2010, *supra* note 55 at 193.

¹⁹⁸ *Ibid.* at 164.

State by voicing their concerns in this case is questionable. Some legal non-government organisations, such as the Indonesian Legal Resource Centre (ILRC), claimed that members of the Islamic Defenders Front intimidated and harassed those in support of the abolition of the *Blasphemy Law* during the trial. There is evidence in the court transcripts of continual interruptions by radical Islamic groups shouting “*Allahu Akbar*” (God is Great) in support of the government and Islamic leaders, and shouting in protest at those who testified in favour of abolishing the *Blasphemy Law*.¹⁹⁹ In addition, there were some incidents of vandalism and damage to property, including bricks being hurled through the office windows of the Indonesian Legal Aid Institute.²⁰⁰ The ILRC were concerned that these incidents and tactics of intimidation by radical Islamic groups may have influenced the decision of the judiciary.

C. Religion and State Must Be Separated

The third argument raised by some of those who were against the *Blasphemy Law* is that there should be a separation between religion and the State, although this was perhaps the most controversial argument. Submissions made by several religious minorities referred to the Pancasila and to the fact that Indonesia is not an Islamic State. It is unclear though how the Pancasila, which upholds “Belief in Almighty God”, could promote a strict separation of religion and State.

The representative of the Bishops Council, Father Benny Susetyo, emphasised the separation of church and State in Indonesia, “like in America”.²⁰¹ He highlighted the history and foundation of the Pancasila in Indonesia, and the concerns that Christian-majority areas of Indonesia have expressed over the failed Jakarta Charter, that is, the proposal to include an obligation for Muslims to follow *syariah* in the Constitution. The fact that proposals for the constitutional recognition of Islam have consistently been rejected in Indonesia was therefore used to support the idea that there is a separation of religion and State in Indonesia.

As a witness for the applicants, Dr. Luthfi Assyaukanie, of the Liberal Islamic Network,²⁰² characterised the *Blasphemy Law* as problematic because in his opinion it had allowed the government to meddle or interfere in matters of

¹⁹⁹ “Raucous Crowd Churns Court at Hearing on Blasphemy Law” *The Jakarta Globe* (11 March 2010), online: <www.thejakartaglobe.com>.

²⁰⁰ Muktiono Margiyono, Rumadi & Soelistyowati Irianto, *Bukan Jalan Tengah: Eksaminasi Publik Putusan Mahkamah Konstitusi Perihal Pengujian Undang-Undang Nomor 1 PNPS Tahun 1965 Tentang Penyalahgunaan dan/atau Penodaan Agama* (ILRC, 2010) at 25-33.

²⁰¹ Court Decision 2010, *supra* note 55 at 165; Court Transcript in Case No 140/PUU-VII/2009, Hearing of the Witnesses/Experts, Government Experts and Related Parties No (IV), 10 February 2010 at 13.

²⁰² Jaringan Islam Liberal, known as JIL.

religion.²⁰³ Like the Bishops Council, he emphasised that Indonesia is not a *Negara agama* (a religious State), implying that there is a separation between the two.²⁰⁴ This was in direct opposition to those in favour of retaining the *Blasphemy Law*, as discussed above, who were emphatic that Indonesia is a *negara agama*.

Luthfi went on to illustrate his argument with several examples. He noted that when the prophet Muhammad declared himself to be a prophet, the community in Mecca did not accept him and thought he was “crazy”.²⁰⁵ He likened Lia Eden to the Prophet Muhammad, that is, that she has proclaimed herself as a religious leader and yet is generally viewed as the leader of a sect because of her unconventional practises and teachings.²⁰⁶ He also mentioned Imam Ahmad bin Hambl who was jailed for his beliefs, although he is now recognised as the founder of the Hanbali school of law.²⁰⁷ This was an attempt to demonstrate that revered figures in Islam have been unfairly jailed in the past when States involve themselves in matters of religion, and that laws that allow this to continue should be cancelled.

Overall, the argument that the *Blasphemy Law* was unconstitutional because it contravened a separation of religion and state was a weak argument. This is particularly so because both the state ideology and the practises and policies of the Ministry of Religion have historically facilitated the interconnectedness of religion and State in Indonesia.

D. State Policies on Religion Must be Clear and Unambiguous

Another argument advanced by those against the *Blasphemy Law* is that it lacked clarity and was ambiguous. This was evident in the submission made by the National Commission for Human Rights.²⁰⁸ It acknowledged the Indonesian government’s obligation to uphold the right to religious freedom in the Constitution, in *Law 39/1999 on Human Rights*, and in the ICCPR.²⁰⁹ The Commission nevertheless concluded that the *Blasphemy Law* is necessary to allow the State to intervene “to protect against religious defamation”.²¹⁰ It did, however, express the opinion that the *Blasphemy Law* must be revised due to a lack of

²⁰³ Court Decision 2010, *supra* note 55 at 95.

²⁰⁴ *Ibid.* at 93.

²⁰⁵ *Ibid.* at 94.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* at 96.

²⁰⁸ Komisi Nasional Hak Asasi Manusia, known as Komnas HAM.

²⁰⁹ Court Decision 2010, *supra* note 55 at 179.

²¹⁰ Court Decision 2010, *supra* note 55 at 183. The words “religious defamation” in this quote were made in English, somewhat confusing the terms “defamation” and “blasphemy”.

clarity.²¹¹ The court dismissed this opinion, noting that it does not have the power to revise a law.²¹²

In addition to a lack of clarity and the ambiguous application of the law, there were some hints made to the high levels of state corruption and public distrust of state officials caused by recent scandals, such as the Bank Century case.²¹³ Although these comments only appear to have been made in passing, they indicate that one of the many contributing factors to the opposition to the *Blasphemy Law* and to state regulation of religion is the general public distrust of state officials in Indonesia.

All of the above arguments in favour of religious diversity and the protection of religious minorities were made by Indonesian-based organisations and religious leaders. There was, however, one submission made to the court by an international organisation, the Beckett Fund,²¹⁴ and expert evidence was given by a professor from America²¹⁵ in support of the applicants in this case. The Beckett Fund entitled its submission as an amicus brief, also known as *amicus curiae*, meaning “friend of the court”. Courts have taken different approaches on whether they will allow *amicus curiae* briefs, although there appears to be no tradition or history of such briefs in Indonesian courts. The focus of this article is on Indonesian conceptions of law and religion, and so I will not canvass the arguments of the Beckett Fund to the court here. Their contribution and involvement in this case was, however, possibly one of the reasons why the court went to some length in its judgment to address the issue of law and religion in America and condemn “interference” by the West, as I will note in the next section.

VIII. DECISION OF THE JUDICIARY

The judiciary exercised extreme caution in dealing with this sensitive case. Although it held that the *Blasphemy Law* was constitutional, it did acknowledge that there was a need to reform and clarify the *Blasphemy Law*, but emphasised that this was the role of the legislature not the courts.²¹⁶ I will discuss the

²¹¹ Court Decision 2010, *supra* note 55 at 283.

²¹² *Ibid.* at 304.

²¹³ Court Decision 2010, *supra* note 55 at 111. See generally S. Butt, “The Unravelling of Indonesia’s Anti-Corruption Framework Through Law and Legal Process” (2010) Australian Journal of Asian Law 302; S. Butt, *Corruption and the Law in Indonesia* (Routledge, 2012).

²¹⁴ The Beckett Fund for Religious Liberty, based in the United States, describes itself as “a non-profit, public-interest legal and educational institute that protects the free expression of all faiths”, online: <<http://www.becketfund.org/>>.

²¹⁵ See Court Decision 2010, *supra* note 55 at 112-113.

²¹⁶ *Ibid.* at 298, 304.

reasoning of the judiciary here in relation to key themes that I have identified from the judgment. It should be kept in mind that the judgment was handed down after a series of court hearings that had been attended by a significant number of government officials, representatives from many Islamic organisations, and the often vocal and disruptive presence of radical Islamic groups.

A. Religion and the State: An Indonesian Response

The court decision portrayed the configuration of religion and the State in Indonesia as unique and distinctive. The court described religion as both a “sacred” and “sensitive”²¹⁷ matter and was at pains to emphasise the “Indonesianness” (*KeIndonesiaan*) of the interpretation of the right to religious freedom in Indonesia. It noted that “the practise of religion in Indonesia is different from that in other countries”.²¹⁸ It explained that “Indonesia is a country with a belief in God (*bertuhan*), not an atheist country”.²¹⁹ This, the court held, meant that Indonesia is a compromise between a secular State and an Islamic State. It also meant that “[i]t is not a country that separates the relationship between religion and state”.²²⁰ This implied that Indonesia allows for a mutual connection between State and religion that permits the State to regulate the activities of religious communities, while at the same time ensures that the recognised religions have the opportunity to influence state policies.

The message this decision sent to other countries, particularly “the West”, was clear – Indonesia has its own unique “religious tradition” (*tradisi keagamaan*) and “other countries should not intervene”.²²¹ As mentioned in the previous section, this statement is perhaps an indirect reference to the efforts of international non-government organisations in support of the applicants’ case, such as the Beckett Fund and the submission by a professor from America. This also demonstrates that debates about the public role of religion are not just domestic issues, but are influenced by broader international discourse on religious freedom.

Part of this Indonesian response, held the court, is that the State does not recognise atheism or the right not to have a religion. The court decision was therefore a step backwards for those who advocate for the right not to have a religion, with the court expressly declaring that there is no possibility of a campaign for “freedom not to have a religion” in Indonesia, and that this feature

²¹⁷ *Ibid.* at 279, 294.

²¹⁸ *Ibid.* at 274.

²¹⁹ *Ibid.* at 273.

²²⁰ *Ibid.* at 275.

²²¹ *Ibid.* at 295.

distinguishes the law of Indonesia from the law in the West.²²² This may already have implications for atheists in Indonesia. For example, in January 2012, a civil servant in West Sumatra was accused of insulting Islam after posting “God does not exist” on a Facebook page he moderated known as “*Ateis Minang*” (The Minang Atheist).²²³

In addition, part of this Indonesian response included the power of the State to regulate matters of religion, such as religious education in state schools. The court affirmed that every child in Indonesia has the right to religious education in both public and private schools. In its decision, the judges contrast the Indonesian religious education system with the situation in the United States. The court stated that since the 1960s, America has forbidden the teaching of religion in public schools because it is considered to be unconstitutional, and against the right to freedom of religion and the right to not have a religion.²²⁴ The court went on to emphasise that this is not the case in Indonesia but rather that in Indonesia every student has the right to religious education in his or her religion, as long as it is one of the six recognised religions, whether in a public or private school. This decision is therefore a significant affirmation of the government’s decision to enforce segregated religious education classes for the adherents of the six recognised religions in all schools through *Law 20/2003 on National Education*.

Finally, the communal nature of religion in Indonesia was also emphasised, the court stating that “the religion of the individual cannot be separated from the religion of the community”.²²⁵ It noted that “the government must make every effort to guide organisations and *aliran kebatinan* in a direction that is healthy and in the direction of God Almighty”.²²⁶ The communal right to religious freedom is of course recognised in international law, but this is not at the expense of individual rights.

The fact that the court reduced understandings of religion and State to specific Indonesian history and context left little room for the applicants’ to argue that there must be a separation of religion and State. While on one hand, it is essential that the courts reconcile local understandings and practises of religion and State, this should not be at the expense of retaining laws that discriminate against certain sections of society based on historical preferences.

²²² *Ibid.* at 295.

²²³ Camelia Pasandaran, “Dismay After Indonesian Atheist Charged With Blasphemy” *Jakarta Globe* (20 January 2012), online: <www.jakartaglobe.co.id>. His case had not yet been heard by a court at the time this article was written.

²²⁴ Court Decision 2010, *supra* note 55 at 273.

²²⁵ *Ibid.* at 295.

²²⁶ *Ibid.* at 290.

B. Legitimate Limitations on Religious Freedom

The second theme evident in the court decision is the primacy of a broader limitation on religious freedom, with little attempt to articulate the conditions on which the State may restrict the external aspect of this right. While acknowledging the State's international obligations, the court explained that article 28J(2) of the Constitution restricts the right to freedom of religion, and that this is different to article 18(3) of the International Convention on Civil and Political Rights.²²⁷ This statement is of critical importance, because it demonstrates the limits of a "human rights" approach based solely on international law in Indonesia. There were only two grounds, as expressed in article 28J(2) of the Constitution, that may have been the basis for the court's decision, although it was not explicitly discussed in this way.

The first is the ground of "public order". The limitation of "public order" was defined widely to include matters of national security. From early in the proceedings, the judges expressed concerns that "chaos" would erupt if the *Blasphemy Law* was cancelled.²²⁸ The court agreed that the State has the right to intervene in or interpret the convictions or beliefs of a group and prohibit the teachings of that religion in the interests of public order. The court argued that revoking the law would cause anarchy and endanger the community. This supported the idea expressed by many Islamic leaders and government officials throughout the hearing that religious "deviancy" leads to social chaos and disorder.

This notion that the *Blasphemy Law* was necessary to prevent national harmony appears to go beyond the accepted interpretation of "public order" at international law. "Public order" has been defined as measures to avoid disturbances to order in the narrow sense of the word, such as conscientious objection to military service or compliance with government regulations on changes to a person's name.²²⁹ It has also been distinguished from "national security", which is only a permissible ground to limit the right to liberty of movement, the right to freedom of expression, the right of peaceful assembly and the right to freedom of association.²³⁰ "National security" is not, however, one of the grounds listed in article 18(3) of the ICCPR, or the equivalent provision in the Indonesian Constitution. This suggests that religious freedom cannot be limited based on fears that it may cause civil conflict or violence.

²²⁷ Court Decision 2010, *supra* note 55 at 276.

²²⁸ Court Transcript in Case No 140/PUU-VII/2009, Hearing No (I), 17 November 2009 at 17.

²²⁹ Manfred Nowak & Tanja Vospernik, "Permissible Restrictions on Freedom of Religion or Belief" in Tore Lindholm, W. Cole Durham Jr. & Bahia G. Tahzib-Lie, eds., *Facilitating Freedom of Religion and Belief: A Deskbook* (The Hague: Martinus Nijhoff Publishers, 2004) at 152.

²³⁰ ICCPR arts. 12(3), 14(1), 19(3)(b), 21 and 22(2) respectively.

Nevertheless, the court justified its decision by arguing that blasphemy is a crime prohibited in many countries around the world.²³¹ It did not, however, make any distinction between laws on blasphemy or laws on defamation. It also failed to acknowledge that in some areas of the world, such as Europe, most States have abolished the offence of blasphemy and some have introduced the offence of defamation.²³²

The second ground that the court implicitly used to validate the *Blasphemy Law* is “religious values”, which is only found in article 28J(2) of the Constitution and not in article 18(3) of the ICCPR. The court stated that the “limitation on human rights based on the consideration of religious values as referred to in Article 28J(2) of the 1945 Constitution is one of the considerations to limit human rights”.²³³ The court highlighted that this ground does not appear in the limitations listed in the ICCPR, which suggests that it is different from the category of “moral values”.

Limitations based on “religious values” appear to have been central to the response of the court to the question of whether the recognition of six official religions was an unjustified limitation on the interpretation of a “religion” and therefore represented a breach of the rights of religious groups that were not one of the official religions. The court rejected the idea that the mention of only six religions as set out in the Elucidation to article 1 of the *Blasphemy Law* discriminated against other religions and beliefs. The court reasoned that although these six religions are officially supported by the State, this did not preclude or prohibit a person from practising another religion or belief, and therefore does not constitute discrimination.²³⁴ This implies that the “religious values” of the six recognised religions protected under the *Blasphemy Law* are justified by this limitation. This category is therefore distinct from “moral values” and, to the extent that this is the case, it is at odds with the permissible limitations on religious freedom recognised at international law.

C. Legal Validity of the *Blasphemy Law*

The court also had to address several technical matters concerning the legal validity of the *Blasphemy Law* in response to the applicants’ submission that the *Blasphemy Law* was not a valid form of law. In this regard, it noted that a law issued during Soekarno’s Guided Democracy (1945-1965) remains valid even after martial law had been lifted.²³⁵

²³¹ Court Decision 2010, *supra* note 55 at 294.

²³² Norman Doe, *Law and Religion in Europe* (Oxford University Press, 2011) at 141, 163.

²³³ Court Decision 2010, *supra* note 55 at 296.

²³⁴ *Ibid.* at 290.

²³⁵ *Ibid.* at 284-285.

It also examined the question of whether the power conferred under article 2 of the *Blasphemy Law* to the Minister of Religion, the Minister of Home Affairs and the Attorney General to issue a Joint Decision (*Surat Keputusan Bersama*) to warn a group is valid as a law in Indonesia.²³⁶ The court confirmed that even though a Joint Decision is not mentioned in the legal hierarchy of laws in Indonesia, as set out in article 7(1) of the *Law 10/2004 on Law-making*, this does not make it invalid but simply subordinate to higher laws.

The final question considered by the court related to the issue of freedom of speech. In considering whether the criminal offence of blasphemy allows for the criminalisation of freedom of thought, opinion and expression of religion and belief, the court held that this was not the case and reiterated that the aim of the *Blasphemy Law* is not to restrict rights, but rather to protect the rights of religious believers from being infringed.²³⁷ This protection, however, is inevitably at the expense of those deemed to be deviant.

D. Dissenting Opinion

There was one dissenting opinion in this case by the only female Christian judge on the bench, Justice Maria Farida.²³⁸ In a short nine-page judgment, Justice Farida dissented on the basis that the implementation of the *Blasphemy Law* had resulted in the violation of the right to religious freedom in some cases.²³⁹ She reached this conclusion by first tracing the history of the *Blasphemy Law*, and noting that it was a valid legal instrument that was made into law by *Law 5/1969*. She then set out the amendments to the Constitution on human rights, and the laws acknowledging religious freedom, as discussed above. She found that the mention of only six recognised religions in the Elucidation to the *Blasphemy Law* excluded *aliran* (mystical beliefs), which amounts to discrimination.²⁴⁰ She based this on the fact that, in practice, protection is only given to six religions and only followers of these religions can, for example, register their religion on their identity card, their marriage certificate and death certificate.

She also implied that the *Blasphemy Law* amounts to state interference (*ikut campur*) in religion.²⁴¹ She did not, however, discuss the specific grounds for limitations on the right to religious freedom and therefore her judgment does not

²³⁶ *Ibid.* at 281, 296-297.

²³⁷ *Ibid.* at 297.

²³⁸ *Ibid.* at 308-320.

²³⁹ “Judging by Her Record, Maria Farida is Not Afraid to Stand Out” *The Jakarta Globe* (21 April 2010), online: <www.thejakartaglobe.com>.

²⁴⁰ Court Decision 2010, *supra* note 55 at 317.

²⁴¹ *Ibid.* at 319.

provide any further reasoning to indicate why the *Blasphemy Law* may not be based on a legitimate limitation on this right.

IV. CONCLUSION

Since the Constitutional Court decision was handed down affirming the constitutional validity of the *Blasphemy Law*, there have been at least seven cases of blasphemy in the courts by the end of 2011. This includes the conviction of a 16-year-old Christian high school student from Bekasi (West Java) who was found guilty of insulting Islam after a picture of him stepping on a Qur'an circulated on the Internet.²⁴² Another case occurred in Temanggung (Central Java), where a Christian man was convicted for distributing books that insulted Islam.²⁴³ A concerning aspect of this case was that a crowd of hardline Muslims present at the trial expressed their dissatisfaction at the five-year jail sentence (despite the fact that this is the maximum sentence for this crime) by burning down several churches in the area. This highlights a connection between vigilante violence and cases of blasphemy.

A positive development from this case, according to witness Ulil Abshar-Abdullah of the Liberal Islamic Network is that, despite the affirmation of the *Blasphemy Law*, the case proved that a debate on politically sensitive issues such as religion can be argued in court by all sides without incidents of violence between religions.²⁴⁴ This is questionable, however, as vulnerable religious minorities with the most at stake (Ahmadiyah, for example) did not appear or give testimony in court.

The decision of the Constitutional Court is nevertheless important because it held that the *Blasphemy Law* is valid and that it does not contravene the constitutional right to freedom of religion. This means that the government retained its authority to ban groups it considers to be "deviant". It also affirmed the Ministry of Religion's policy of distinguishing between religions and mystical beliefs, and the provision it makes for religious leaders to monitor religious "deviancy".

The court decision went to great lengths to reframe the right to freedom of religion in the Indonesian social and historical context, and to justify limitations on this right. Of course all States assert the right to limit religious freedom to some extent, the question is how far. This remains unclear in Indonesia, because

²⁴² See International Crisis Group, *Indonesia: Christianisation and Intolerance*, Asia Briefing No 114 (24 November 2010).

²⁴³ Candra Malik, "17 Temanggung rioters get off lightly" *The Jakarta Globe* (9 June 2011).

²⁴⁴ Interview with Ulil Abshar Abdullah, Liberal Islamic Network, Jakarta, 26 August 2010.

the court did not articulate any clear principles to determine when action by the State to limit a person's freedom of religion would or would not be permissible.

The outcome of this case suggests that the court has allowed for a broad interpretation of the legitimate limitations on religious freedom. This has important implications for the configuration of the relationship between religion and the State. It suggests that the *Blasphemy Law* is a compromise between the State and religious leaders, allowing the State to restrict religious activities on the grounds of "public order" or "religious values", while also delegating some power to religious leaders to act as gatekeepers to define the "correct" interpretation of their religion. This case also reflects the struggle between competing visions of the relationship between law and religion in Indonesia. Given the religious diversity and pluralism of Indonesian society, this tension between law and religion is likely to remain a source of debate, negotiation and contestation in the future.