

## The Application of the Principle of Judges' Independence in Blasphemy Cases in Indonesia's Post-Reform Era

**Bani Syarif Maula**

Institut Agama Islam Negeri (IAIN) Purwokerto  
banisyarifm@iainpurwokerto.ac.id

**Vivi Ariyanti**

Institut Agama Islam Negeri (IAIN) Purwokerto  
viviarisyanti@iainpurwokerto.ac.id

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### Abstract

This research departs from a paradigm that the freedom of judges is a form of court independence, which requires that decisions taken must consider objectivity without pressure from any party. This study focuses on the attitude of judges' independence from factors that can influence court decisions, both internal and external factors related to the interests of certain groups. Based on these problems, this study addresses the issue of the independence of judges in cases of blasphemy. This type of research is empirical normative with a qualitative descriptive approach. The data sought for this research is data that comes from the facts of the application of material and formal law by judges in court. In addition, this data is also strengthened by interviews. This study concludes that the analysis of the application of the blasphemy article proves that judges as law enforcers have difficulty translating the substance of blasphemy because of the unclear formulation of Article 156a letter 'a' of the Indonesian Criminal Code. The judge's decision in the blasphemy case does not reflect the independence values of the judges who decide the case. Judges in making decisions on cases handled must be based on their ability to think and will freely (independently) but within the limitations of responsibility and objectivity. The panel of judges in blasphemy cases tends to adopt a more general and situation-oriented attitudes.

**Keywords:** Blasphemy; article 156a of criminal code; independence of judges

### Abstrak

Penelitian ini berangkat dari satu paradigma bahwa kebebasan hakim merupakan bentuk independensi pengadilan, yang mensyaratkan bahwa keputusan yang diambil harus mempertimbangkan objektivitas tanpa tekanan dari pihak manapun. Kajian ini fokus pada sikap independensi hakim dari faktor-faktor yang dapat mempengaruhi putusan pengadilan, baik faktor internal maupun faktor eksternal yang terkait dengan kepentingan kelompok tertentu. Berdasarkan hal tersebut, kajian ini menjawab persoalan sikap independensi hakim dalam kasus penodaan agama. Jenis penelitian ini adalah normatif empiris dengan pendekatan deskriptif kualitatif. Data yang dicari untuk penelitian ini adalah data yang berasal dari fakta penerapan hukum materiil dan formil oleh hakim di pengadilan. Selain itu data ini juga diperkuat dengan wawancara. Penelitian ini berkesimpulan bahwa analisis terhadap penerapan pasal penodaan agama membuktikan bahwa hakim sebagai penegak hukum mengalami kesulitan menerjemahkan substansi penodaan agama karena ketidakjelasan perumusan Pasal 156a huruf a KUHP. Putusan hakim dalam perkara penodaan agama tidak mencerminkan nilai-nilai independensi dari para hakim yang memutus perkara tersebut. Hakim dalam membuat putusan atas perkara yang ditangani harus bersumber pada kemampuannya untuk berfikir dan berkehendak secara bebas (*independen*) namun dalam pembatasan tanggungjawab dan objektifitas. Majelis hakim kasus penodaan agama cenderung memanfaatkan sikap yang lebih menyeluruh dan lebih berorientasi pada situasi.

**Kata kunci:** Penodaan agama; pasal 156a KUHP; independensi hakim

### Introduction

Islam is a legalistic religion with a body of law covering many aspects of life. However, there are distinctions between Islamic teachings and Islamic law (*fiqh*). The former comprises only the injunctions of the Quran and Sunnah, while the latter is derived from analogy through *ijtihad* (independent or original interpretation of problems not precisely covered by the Quran dan Sunnah). Blasphemy law, in this regard, does not have any basis in Quran and Sunnah and thus it is an Islamic law (*fiqh*). This difference is very important, as the execution of blasphemers in Muslim states like Indonesia has led some to interpret Islam as being harsh and rigid. Rather, Islam is very lenient and would never approve of killing because of blasphemy.<sup>1</sup>

Blasphemy cases in Indonesia often cause widespread controversy in the community. Controversies related to blasphemy are always sensitive, and often build polarization in society that can lead to divisions. The application of

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<sup>1</sup> Sajid Hameed, "Blasphemy Law and Islam," Australian Institute of International Affairs, 2018, <https://www.internationalaffairs.org.au/australianoutlook/blasphemy-law-and-islam/>.

criminal articles on blasphemy by courts is often considered complex. On the one hand, judges must struggle with themselves to be free from their personal values and beliefs so that they can be neutral and give a fair decision, but on the other hand there are challenges from outside in the form of pressure from the majority group and the limited security facilities provided by the state. In this matter, we conduct an assessment of the independence of judges from factors that can influence court decisions, both internal factors from the judges themselves and external factors related to the interests of certain groups. The independence of judges in deciding court cases is the main principle demanded by the constitution, namely the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution).

The 1945 Constitution through Article 1 paragraph (3) stipulates that the state of Indonesia is a state of law. From this article it can be understood that the Indonesian state is based on law (*rechtstaat*), and not based on mere power (*machtstaat*). As a democratic legal state based on Pancasila and the 1945 Constitution, Indonesia upholds human rights, and guarantees that all citizens are equal before the law and government and are obliged to uphold the law without exception. The law stipulates what 'must' be done, what 'may' be done and what 'should not' be done. The legal targets to be addressed are not only people who are actually acting against the law, but also legal actions that may occur, and state equipment that acts according to the law. The working system of such a law is one form of law enforcement.<sup>2</sup>

The freedom of judges based on the independence of judicial power in Indonesia is also guaranteed in the 1945 Constitution as stated in Article 24 Paragraph 1 that "Judicial power is an independent power to administer judicial institutions to uphold law and justice". This provision is then implemented in Law Number 48 of 2009 concerning Judicial Power. Independent or free in this provision is defined in the Elucidation of Article 1 of Law Number 48 of 2009 which states that "This independent judicial power implies that judicial power is free from interference from other state powers, and is freedom from coercion, directives or recommendations that come from extra-judicial parties except in cases permitted by law".

On the other hand, freedom of religion is one of human rights, because freedom of religion is directly rooted in human dignity as creatures that need the existence of God. Thus, the state must guarantee freedom for everyone to embrace their own religion and to worship according to their religion and belief.<sup>3</sup> The guarantee of freedom of religion as a human right in Indonesia is regulated in the 1945 Constitution in Article 28E paragraph (1) and paragraph

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<sup>2</sup> Barda Nawawi Arief, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan* (Bandung: Citra Aditya Bakti, 2005), 3.

<sup>3</sup> Oemar Seno Adji, *Hukum Pidana Pengembangan* (Jakarta: Erlangga, 1985), 96.

(2).<sup>4</sup> However, the exercise of religious rights often intersects with beliefs between one group and another, so that this may lead to a clash that leads to disharmony.<sup>5</sup>

Law enforcement in cases of blasphemy is a must, because blasphemy is a societal problem that urgently needs to be addressed in order to achieve a harmonious, orderly and peaceful life as a manifestation of a peaceful society. Blasphemy cases often involve political aspects and ignore legal and justice aspects. Various records of cases of blasphemy were reported by the mass media, both printed and electronic.<sup>6</sup> This is illustrated by the increase and intensity of reporting on cases of blasphemy. The problem that often arises in cases of blasphemy is the difference in beliefs of different groups who belong to the same religion. An example is the case of the Ahmadiyya who believed that Mirza Ghulam Ahmad was a prophet who taught Islamic values. This belief intersects with the belief of other Muslims, namely the majority group, that there is no other Prophet after the Prophet Muhammad, so that if any Muslim group believes that there is another Prophet after the Prophet Muhammad, it means blasphemy against Islam. Other cases of blasphemy are also related to the political situation and religious sentiments, for example the case of Basuki Tjahaja Purnama (also known as Ahok), the then Governor of Jakarta.

After undergoing dozens of trials over several months, Jakarta Governor Basuki Tjahaja Purnama (Ahok) was found guilty by a panel of judges at the North Jakarta District Court in a case of alleged blasphemy. Ahok was sentenced to two years in prison because he was found guilty of violating Article 156a of the Criminal Code (KUHP), namely intentionally expressing feelings or acts of hostility or blasphemy against religion. The verdict handed down to Ahok is slightly different from previous cases. The blasphemy cases that have been sentenced to imprisonment by the court include the case of Lia Eden who was found guilty of blasphemy. Lia was sentenced to two and a half years of imprisonment. This decision was handed down by the Panel of Judges of the Central Jakarta District Court. In addition, there is the case of Tajul Muluk alias H. Ali Murtadha who was sentenced to four years in prison by the Sampang District Court in 2012. In addition, the heaviest sentence was the case of

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<sup>4</sup> Indonesian Constitution, "UUD 1945" (1945). Paragraph (1): "Everyone is free to embrace a religion and worship according to his religion, choose education and teaching, choose a job, choose a nationality, choose a place to live in the territory of the country and leave it, and has the right to return"; Paragraph (2): "Everyone has the right to freedom to believe in a religion, to express thoughts and attitudes according to one's conscience".

<sup>5</sup> The study of religious freedom can be seen at Bani Syarif Maula, "Religious Freedom in Indonesia and Malaysia in the Constitutional Comparative Perspective (The Cases of Judicial Review in Blasphemous Offences)," *Al-Manabij: Jurnal Kajian Hukum Islam* 6, no. 1 (2012): 55–70..

<sup>6</sup> Arif Alfani and Hasep Saputra, "Menghujat Dan Menista Di Media Sosial Perspektif Hukum Islam," *Al-Istinbath: Jurnal Hukum Islam* 4, no. 1 (2019): 35–50.

Antonius Richmond Bawengan who was sentenced to five years in prison by the Tumenggung District Court in 2011.

Blasphemy cases are not new in Indonesia. The results of research conducted by the Setara Institute show that during 1965-2017 there were 97 cases of blasphemy. Cases of alleged blasphemy have increased since the fall of the New Order regime, where before the reform there were only nine cases of blasphemy, but after the reform movement (reformation era) the number of cases swelled to eighty eight cases. Of the 97 cases of blasphemy, 76 cases were resolved through trial and the rest outside the court or non-judicial. Meanwhile, to see whether there was mass pressure or not, of the 97 cases recorded by the Setara Institute, 35 of them did not involve mass pressure, while the other 62 involved mass pressure. In these cases of blasphemy, Islam became the religion that most often became the object of this blasphemy case, namely 88 cases, while Christianity was 4 cases, Catholicism 3 cases and Hinduism 2 cases.<sup>7</sup>

Criminal acts as stipulated in articles 156 and 156a of the Criminal Code are categories of religious offenses, namely offenses related to religion prevailing in Indonesia, even though the judge's consideration in making decisions on cases of blasphemy is for reasons of public order. The consideration of the panel of judges in court decisions dealing with blasphemy cases often does not pay attention to the theory of causality to prove the link between the defendant's actions and the disruption of public order, so there are things that need to be investigated the relationship between legal considerations in court decisions and other factors outside the law.

Based on this background, this study explores the juridical aspects from the judge's point of view in imposing a criminal offense against the perpetrators of the crime of blasphemy. This study answers the question of how judges apply Article 156a of the Criminal Code on cases of blasphemy that occurred in the reform era. The judge as the party who mediates between the perpetrators of criminal acts and their victims should position themselves in a realm that is free from outside influences and political pressures that surround cases of blasphemy. This blasphemy offense is a problem because the measure of the fulfillment of the offense is not in the nature of the act. Judges' decisions in blasphemy cases are more often influenced by external factors, such as offence from the majority or religious groups. The offense of the majority being a legal issue that can be criminalized is the full interpretation of the judge. Apart from being subject to subjectivity, the pressure factor of the community or religious organizations can also be a consideration for judges in deciding the case.

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<sup>7</sup> Fathiyah Wardah, "97 Kasus Penodaan Agama Terjadi Di Indonesia," SETARA Institute for Democracy and Peace, 2019, <https://setara-institute.org/setara-institute-97-kasus-penistaan-agama-terjadi-di-indonesia/>.

There are many studies on cases of blasphemy in Indonesia, for example studies in scientific journals with the title “The Criminal Acts of Blasphemy in Indonesia: An Overview of Legislation and Concepts of Islamic Law”,<sup>8</sup> also another article with the title “Questioning the Freedom of Religion and Blasphemy of Religion in Indonesia (Review of the Constitutional Court Decision No. 140/PUU-VII/2009)”.<sup>9</sup> The results of a more in-depth research, in the form of a thesis at a university, include a thesis entitled “Criminal Law Formulation Policy on Combating Religious Offenses in the Context of Renewing Indonesian Criminal Law”.<sup>10</sup> Another thesis on blasphemy is entitled “Defamation of Religion (Comparative Study of Islamic Law and Criminal Law in Indonesia)”.<sup>11</sup>

The studies on blasphemy above are more focused on the aspect of the offense of blasphemy itself. The studies are more directed to the suitability of the rules (articles) in the Criminal Code regarding blasphemy of religion with freedom of religion, or the suitability of these rules with democratization conditions in contemporary Indonesia in relation to criminal law reform. Some studies even compare religious offenses in the Indonesian Criminal Code with the blasphemy provisions in Islamic law. In contrast to previous studies, this research focuses on the aspect of judge independence as a judicial principle and its application to cases of blasphemy in post-reform Indonesia.

The type of research is empirical normative with a qualitative descriptive method. The object of this research is the application of the principle of judge independence in blasphemy cases in post-reform period. The determination of the post-reform period is intended as a benchmark that Indonesia has experienced better democratization, openness, and tolerance. The data is obtained from laws and regulations, court decisions, legal journals, and interviews with several judges in district courts. Data analysis is carried out with descriptive and qualitative methods using a statutory approach, namely the basic principles of judge independence, a philosophical approach, namely democratic values, human rights and freedom of expression, and a sociological approach, namely the social analysis of the Indonesian Muslim society.

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<sup>8</sup> Muhammad Dahri, “Tindak Pidana Penodaan Agama Di Indonesia: Tinjauan Pengaturan Perundang-Undangan Dan Konsep Hukum Islam,” *At-Tafabum: Journal of Islamic Law* 1, no. 2 (2017).

<sup>9</sup> Yayan Sopyan, “Menyoal Kebebasan Beragama Dan Penodaan Agama Di Indonesia (Telaah Atas Putusan MK No. 140/PUU-VII/2009),” *Jurnal Cita Hukum* 2, no. 2 (2015).

<sup>10</sup> Idi Amin, “Kebijakan Formulasi Hukum Pidana Terhadap Penanggulangan Delik Agama Dalam Rangka Pembaharuan Hukum Pidana Indonesia” (Thesis. Law Faculty, Diponegoro University, 2007).

<sup>11</sup> Adnani, “Penodaan Agama (Studi Koparatif Hukum Islam Dan Hukum Pidana Di Indonesia)” (Thesis. Postgraduate Program, Universitas Islam Negeri Sumatera Utara, 2017).

## Socio-Political and Religious Conditions in Blasphemy Cases

Based on a sociological analysis of Muslim society, it is found that quite a number of Muslims in the world feel somehow alienated, humiliated, or persecuted by outside powers, not always but often by Western powers; and the result is anxiety that breeds reactivity. In other words, an insecure religious identity produces a reactionary political psychology. This blasphemous, even critical, treatment of Islam is, in this view, accepted as yet another attack on the oppressed people of the world that must be met with anger. Muslim obsession with punishing insults, real or perceived, about God and the Prophet Muhammad is a sign that identity politics is in play.<sup>12</sup> Indonesian Muslims cannot be separated from this situation. That's why they try to fortify their beliefs from people who insult Islam by using the law.

Stipulation of law No. 1/PNPS of 1965, which later became Article 156a of the Criminal Code, was the legal basis for criminal acts against religion in Indonesia. This law was motivated by various situations and problems, including issues of nationalism, religion and communism, as well as many emerging mystical sects, which were considered to be contrary to religious values and are considered to cause law violations, break national unity, abuse and/or use religion, and tarnish the prevailing religion in Indonesia. Edward O.S. Hiariej, a legal expert from UGM Yogyakarta, states that Law No. 1/PNPS of 1965 was issued by President Soekarno on January 20, 1965. This coincided two weeks after the massacre of Muslims in Madiun by the communist party. At that time, there was a political constellation of three forces, on the one hand the Indonesian Communist Party (PKI) versus Islam, and on the other hand the PKI faced the army or the government.<sup>13</sup> There was an extraordinary political escalation so that President Soekarno issued Law No. 1/PNPS of 1965.<sup>14</sup> Meanwhile, Director of Amnesty International Indonesia Usman Hamid said that initially, President Soekarno issued Presidential Decree of the Republic of Indonesia Number 1 of 1965 to reduce social conflicts between conservative religious residents and non-religious citizens, believers and atheists. In addition, the presence of the PNPS law was also motivated by and influenced by the increasingly strong terrorist acts of the PKI, which wanted to seize the power of the Indonesian government. At that time the PKI carried out many acts of terror, among others, against Indonesian Islamic Students (PII) and *keiyai* (religious leaders) in several Islamic boarding schools. Finally, on January 27,

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<sup>12</sup> Mustafa Akyol, "Islam, Blasphemy, and the East-West Divide," CATO Institute, 2019, <https://www.cato.org/commentary/islam-blasphemy-east-west-divide>.

<sup>13</sup> Edward O.S. Hiariej, *Membangun Sarana Dan Prasarana Hukum Yang Berkeadilan* (Jakarta: Komisi Yudisial R.I., 2012), 46.

<sup>14</sup> Ilham Safutra, "Begini Awal Mulanya Pasal Penodaan Agama," *Jawa Pos*, March 14, 2017, <https://www.jawapos.com/nasional/hukum-kriminal/14/03/2017/begini-awal-mulanya-pasal-penodaan-agama/>.

1965 President Soekarno issued Presidential Decree No. 1/PNPS of 1965 regarding the prevention of religious abuse and/or blasphemy. In 1969 the PNPS was declared a law through Article 2 of Law Number 5 of 1969 by President Soeharto. The purpose of the issuance of the PNPS is so that all people in all regions of Indonesia can enjoy religious peace and guarantees to perform worship according to their respective religions. This Presidential stipulation firstly aims to prevent deviations from religious teachings that are considered as basic teachings by religious leaders of the religion concerned. So, from the outset this PNPS was deliberately created to protect the "purity" of religious teachings recognized in Indonesia, which are based on the doctrine/teachings of the One God.<sup>15</sup>

In the discourse on freedom of thought, conscience and religion in Indonesia, there are two concepts related to the "purity" of religious teachings that are often debated, namely: blasphemy against God (blasphemy) and blasphemy against religion (defamation of religion). Although it is often debated, these two concepts are actually similar, in the context that they protect the integrity of a particular religion or divine entity.

The initial concept of blasphemy law developed from the conception of each religion, for example: blasphemy is broadly defined as showing disrespect to God, doubting his power, and disobeying God's commands.<sup>16</sup> The concept of blasphemy derived from monotheistic religions such as Judaism, Christianity and Islam includes prohibitions against a person or group to slander God or sacred things, including the Prophets and holy people in these religions.<sup>17</sup> In Islamic thought, blasphemy involves insulting or hostile attacks (*sabb*) either against God (*Sabb Allah*) or Prophet Muhammad (*Sabb al-Rasul*) or on other sacred things.<sup>18</sup> According to Islamic teachings, insulting religion is against the Quran and the Sunnah. A Muslim is prohibited from insulting other religions so that it does not cause harm in the form of insulting followers of other religions against Islam.<sup>19</sup> The Quran condemns those who commit blasphemy and promises humiliation in the Hereafter for blasphemers--people who openly desecrate Islam's holy symbols, such as the Quran or the Prophet Muhammad. However, whether any Quranic verses prescribe worldly punishments is

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<sup>15</sup> Ahmad Mansur Suryanegara, *Api Sejarah 2* (Bandung: Salamadani, 2010), 413.

<sup>16</sup> L.W. Levy, *Blasphemy: Verbal Offences against the Sacred from Moses to Salman Rusdhi* (New York: Knopf, 1993), 3.

<sup>17</sup> Haidar Adam, "Blasphemy Law in Muslim-Majority Countries: Religion-State Relationship and Rights Based Approaches in Pakistan, Indonesia and Turkey," The Central European University, 2015, [http://www.etd.ceu.edu/2015/adam\\_haidar.pdf](http://www.etd.ceu.edu/2015/adam_haidar.pdf).

<sup>18</sup> R.E. Hassner, "Blasphemy and Violence," *International Studies Quarterly* 55, no. 1 (2011): 23–24, <https://www.constitution.ie/AttachmentDownload.ashx?mid=54533e30-c843-e311-8571-005056a32ee4>.

<sup>19</sup> Ahmad bin Muhammad bin Hāin Al-Qursyi, *Al-Istihzā'u Bi Al-Din: Abkamubu Wa Āsarubu* (Riyadh: Dār Ibn al-Jauzi lin-Nasyr wat-Tauzi', 2005), 75-77.

debated. Some Muslims believe that no worldly punishment is prescribed while others disagree. The interpretation of hadiths is similarly debated. Some have interpreted hadith as prescribing punishments for blasphemy, which may include death, while others argue that the death penalty applies only to cases where perpetrator commits treasonous crimes, especially during times of war. Different traditional schools of jurisprudence prescribe different punishment for blasphemy, depending on whether the blasphemer is Muslim or non-Muslim, a man or a woman.<sup>20</sup>

However, in practice, the application of several cases of blasphemy with the Criminal Code is only used for disliked figures, who coincidentally express criticisms of the practice of identity politics in the name of a particular religion. There are different perceptions that become a problem for someone to convey something with a different purpose and then translate it with another purpose and a certain perception, in order to lead public opinion that the figure has defiled religion. In the end, the law of blasphemy continued to be used to protect politically dominant religions from dissent, to challenge human rights violations in the name of religion. The blasphemy legal framework is also frequently used to free powerful religious institutions from scrutiny and criticism, and to prohibit critical evaluation and debate about religion and religious institutions, thereby limiting freedom to compare and choose between beliefs.<sup>21</sup>

Therefore, the courts have an obligation to enforce the law independently, which is not affected by public opinion and mass pressure. This principle is stated in Article 14 Paragraph 1 of the Covenant on Civil and Political Rights/ICCPR and has been guaranteed by the 1945 Constitution article 24 paragraph 2. In addition, international human rights norms that exist in international law accepted by Indonesia are recognized as binding, as stated in the Law No. 39 of 1999 concerning Human Rights. And finally, specifically regulated in Article 3 paragraphs (1) and (2) of Law no. 48 of 2009 concerning Judicial Power, which states that judges in carrying out their duties and functions are obliged to maintain the independence of the judiciary, all interference outside the judicial power is prohibited, and courts are prohibited from discriminating.

In an incident that is reported to the police as blasphemy, there is often a difference of opinion about whether what is reported can be classified as blasphemy or not. This means that the judicial process for blasphemy can only occur with the presence of experts. Because experts have different views, what

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<sup>20</sup> Abdullah Saeed and Hassan Saeed, *Freedom of Religion: Apostasy and Islam* (Burlington: Ashgate Publishing, 2004), 38-39.

<sup>21</sup> Matt Cherry and Roy Brown, "Speaking Freely about Religion: Religious Freedom, Defamation and Blasphemy," *International Humanist and Ethical Union*, Policy Paper, 2009, 7.

is prone to happen is discrimination—when one expert is chosen over another. The growing scope of blasphemy accepted by the courts shows that the principles of criminal law: *lex certa*, *lex scripta*, and *lex stricta* have been violated. This principle is the key in criminal law because it is realized that criminal law is taking people's human rights, therefore its application must be careful. The pattern of application of the article on blasphemy against a suspect is always the same, namely that the offended party is widespread. There is mass mobilization and attacks on the accused person, as well as pressure to the security forces to criminalize it.

Since the blasphemy article was enacted, many individuals have been charged with this article, ranging from HB Jassin in 1968,<sup>22</sup> Arswendo in 1990,<sup>23</sup> to the case of Basuki Tjahaja Purnama and the case of the alleged burning of the Bible in Papua by members of the TNI (Indonesian Military) who were tried at the Jayapura Military Court, Papua in 2017.<sup>24</sup> All of them were charged with blasphemy and were charged with using Article 156a letter 'a' of the Criminal Code. Other articles used to indict acts related to 'blasphemy of religion' are Article 156 of the Criminal Code, Article 157 of the Criminal Code, and Article 28 paragraph (2) of the ITE (electronic information and transactions) Law.

In many cases, accusations of blasphemy occur because of intimidation and mass pressure that influence law enforcement agencies to act neutrally and objectively, and affect the conduct of an independent and impartial judiciary (fair trial). There have been various violations of the principles of fair trial, including: inadequate laws that violate the principle of legality, violations of the presumption of innocence, violations of the principle of due process of law, violations of the principle of equality of arms, and fundamental guarantee of an independent and impartial judiciary. On the other hand, there is still a lack of security guarantees for law enforcement, especially for judges who try cases of blasphemy.<sup>25</sup>

Various groups who want to defend this article continue to advocate through various forums, for example through the Draft Criminal Law (RKUHP). They believe this article is still needed to deal with issues related to

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<sup>22</sup> Siti Aminah Pultoni and Uli Parulian Sihombing, *Panduan Pemantauan Tindak Pidana Penodaan Agama Dan Ujaran Kebencian Atas Nama Agama* (Jakarta: The Indonesian Legal Resource Center (ILRC), 2012), 51.

<sup>23</sup> Pultoni and Sihombing, 51.

<sup>24</sup> Muhammad Syadri, "Meski Tak Disengaja, Oknum TNI Pembakar Alkitab Terancam 5 Tahun Penjara," *Jawa Pos*, July 25, 2017, <https://www.jawapos.com/jpg-today/25/07/2017/meski-tak-disengaja-oknum-tni-pembakar-alkitab-terancam-5-tahun-penjara/>. Liza Indriani, "Oknum TNI Akhirnya Di Pecat Dari Kesatuannya," *Kabar Papua*, September 28, 2017, <https://kabarpapua.co/oknum-tni-ini-akhirnya-dipecat-dari-kesatuannya/>.

<sup>25</sup> Arsil et al., *Penafsiran Terhadap Pasal 156a Kitab Undang-Undang Hukum Pidana Tentang Penodaan Agama (Analisis Hukum Dan Hak Asasi Manusia)* (Jakarta: LeIP, 2018), 116.

religious life. In the discussion of the RKHUP at the end of September 2019, the article on blasphemy was increased to two chapters, consisting of six articles (Article 304-Article 309). Politically, the elimination of blasphemy offenses in Indonesia looks difficult, so a new approach is needed to ensure the protection of citizens' human rights, especially protection from the excessive snares of Article 156a of the Criminal Code. In fact, this article has multiple interpretations. It is not based on clear criteria for applying the law, and is discriminatory because it is only based on the understanding of certain religious experts, namely the experts from religion of the majority.<sup>26</sup>

### **Analysis of Court Decisions on Blasphemy Cases**

Blasphemy is not mentioned in detail in the Islamic legal literatures. However, Islam underlines that blasphemy is a forbidden act. The government can impose punishments on perpetrators of criminal acts of blasphemy. In Indonesia, the punishment for blasphemy is stipulated in Article 4 of Law No.1/PNPS/1965, which later became Article 156a of the Criminal Code. The elements of a crime contained in the article at least include: (i) anyone, which can be interpreted as any person; (ii) intentionally; (iii) in public; (iv) express feelings or perform actions; (v) which are essentially; (vi) hostility, abuse or blasphemy against a religion professed in Indonesia. Meanwhile, for Article 156a letter b of the Criminal Code, the criminal elements include: (i) anyone, which can be interpreted as any person; (ii) intentionally; (iii) publicly express feelings or perform actions; (iv) with intent; (v) so that people do not follow any religion, which is based on the belief in the One God. Meanwhile, for Article 156a letter b of the Criminal Code, the criminal elements include: (i) anyone, which can be interpreted as any person; (ii) intentionally; (iii) publicly express feelings or perform actions; (iv) with intent; (v) so that people do not follow any religion, which is based on the belief in the One God. Based on these criminal provisions, many people were accused of committing the crime of blasphemy. Their verdict is described below.

#### **1. Tajul Muluk's verdict**

Tajul Muluk was charged and found guilty based on the Sampang District Court Decision No. 69/Pid.B/2012/PN.Spg on behalf of the Defendant Tajul Muluk. He was accused of blasphemy for spreading Shia teachings. This teaching was considered by the court to be contrary to Islamic teachings, which were understood by the Indonesian people in general. The Indonesian Ulema Council (MUI) and the Nahdatul Ulama (NU) Branch of

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<sup>26</sup> Barita Lumbanbatu, "Criminalising the Mentally Ill: Schizophrenic Woman to Face Court for Blasphemy," Indonesia at Melbourne, 2020, <https://indonesiaatmelbourne.unimelb.edu.au/criminalising-the-mentally-ill-schizophrenic-woman-to-face-court-for-blasphemy/>.

Sampang Regency through their fatwas stated that the teachings of Tajul Muluk were heretical.

In the decision of the Tajul Muluk case, the court formulated the elements of Article 156a letter a of the Criminal Code with the element of intentionality in public expressing the feelings or committing acts that are essentially enmity, abusive or blasphemous against a religion professed in Indonesia, or with the intention that people do not adhere to any religion, which is based on Belief in the One Supreme God. In Tajul Muluk's decision, the element of "intentionality" is interpreted using the theory of knowledge. In this case, the court constructs that the intentionality in the offense against public order lies in the knowledge of the perpetrator regarding the act and its consequences, namely the perpetrator knows that the act if committed will result in disturbance of public order or the peace of the religious community, and to find out it is sufficient to prove it by the level of knowledge or intellectuality of the perpetrator according to the size of society in general. In addition, in the Tajul Muluk case, the panel of judges stated that Tajul Muluk should have known the consequences of his actions. The phrase "should know" is actually a characteristic of recklessness or negligence. The phrase "should have known" implies that there is a risk that the accused is aware and they should have known that his actions would have certain consequences. This is a mental element that is different from the element of intention, as intended in the blasphemy law.

In the case of Tajul Muluk, the court stated that the witnesses presented by the defendant were siblings, students and followers of the defendant who adhered to the Shia teachings of *taqiyah* (pretending) thus affecting the credibility of the witnesses and the statements of these witnesses could not be accepted. In fact, judges should be able to select from the indictments submitted, for example whether the indictment contains discrimination in selecting experts and how to examine the facts and prove that someone has actually committed an act that is considered to have committed blasphemy. This fact shows that what is clearly absent or missing in the handling of blasphemy cases is a specific and justifiable basis for determining whether a person has qualifications as an expert on blasphemy, and not just someone who has knowledge of a religion in general.

The panel of judges at the Sampang District Court was of the opinion that the defendant had been proven to have intentionally committed an act which was essentially blasphemy against a religion professed in Indonesia. The defendant was legally and convincingly proven to have committed a criminal act as regulated in Article 156a letter 'a' of the Criminal Code and sentenced to 2 years in prison. At the appeal level, the Surabaya Court of Appeal judges increased the prison sentence imposed by the Sampang District Court to 4 years through Decision No. 481/Pid/2012. In their consideration, the panel of judges

was of the opinion that Tajul Muluk was considered to have caused public unrest and disharmony among the people, the existence of teachings indicated that they were outside the teachings of Islam, caused riots and made some people homeless and died. At the cassation level, the panel of judges rejected the defendant's appeal. The court considered that the defendant was proven to have conveyed different teachings, in which there was a Fatwa from the MUI of Sampang Regency and the NU of Sampang Regency stating that the teachings spread by the defendant were heretical and misleading and tarnished religion, which could cause unrest in the community. The court also stated that the teachings broadcast by the defendant caused disharmony among Muslims, disturbed the community and caused mass house burnings.

The consideration of the panel of judges shows that the panel of judges did not apply Article 156a of the Criminal Code properly. Whereas Article 156a of the Criminal Code cannot be separated from Article 4 of Law no. 1/PNPS/1965 because Article 4 is what basically incorporates these provisions into the Criminal Code. Therefore, the explanation of Article 4 of Law no. 1/PNPS/1965 is also binding and applies to Article 156a of the Criminal Code. Elucidation of Article 4 of Law no. 1/PNPS/1965 states that the criminal acts regulated in Article 156a letter 'a' of the Criminal Code are those that are solely (essentially) aimed at the intention of being hostile or insulting. Thus, the intentional form of this article is "intentional purpose", which according to van Hattum and Pompe, this intentionality requires that the perpetrator has an intention/objective in committing a crime. Based on this, a person cannot be said to have committed blasphemy as long as he is not proven to have the intention to be hostile or insulting to a religion, even though he wants to do the act and knows the consequences of his actions.<sup>27</sup>

By looking at Tajul Muluk's actions, in fact it is not proven that he intends to be hostile or insulting to Islam. The defendant only carried out and propagated the teachings that he believed to be the true teachings, which were different from the teachings of Islam in general. The panel of judges only used the measure that the defendant should know that his actions will have certain consequences, the actions were carried out with full awareness, and he can know the consequences of his actions to prove this element. In fact, proving the intentional element in the blasphemy article requires a measure that is more than just "knowing and willing," that is, it requires the intention or intention to intentionally insult a religion. Therefore, the element of "intentionality" should not be fulfilled from Tajul Muluk's actions, because he did not have the intention to insult Islam, so he did not deserve to be punished with the article on blasphemy.

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<sup>27</sup> Hwian Christianto, "Pembaharuan Makna Asas Legalitas," *Jurnal Hukum Dan Pembangunan* 38, no. 3 (2009).

## 2. Decision on Lia Eden's Case

Lia Eden was sentenced to 2 years and 6 months in prison under Article 156a of the Criminal Code. She was found guilty of blasphemy and blasphemy. This decision was read by the Chairman of the Panel of Judges of the Central Jakarta District Court with Decision No. 677/Pid.B/2006/PN.Jkt.Pst. This verdict is in accordance with the demands of the Public Prosecutor. She was considered blasphemy after distributing 4 treatises to various institutions.

The crime of blasphemy committed by Lia Eden began with Lia Eden's statement claiming to have received a revelation from the Angel Jibril. Based on the revelation she received, Lia tried to spread and invite others to uphold the God she believed in. In a court decision, Lia was found guilty of blasphemy because she had distributed 4 treatises to various institutions, including the President of the Republic of Indonesia, from November 23 to December 2, 2008. The statement called for the elimination of all religions, offending the feelings and beliefs of followers of other religions. Lia's actions were also followed by her followers. The thing aggravating, according to the court, is her actions that have damaged the faith and teachings of Islam and hurt the feelings of Muslims. In addition, Lia also, without feeling guilty, changed the meaning of Islamic verses. The mitigating thing is that he behaves politely during the court process.

The police, prosecutors and judges in this blasphemy case by Lia Eden are considered to have a tendency to not be able to maintain impartiality because from the start they had subjectivity to the suspects/defendant. This subjectivity was responded to by the defendant's legal counsel by walking out as a protest, because the court was considered no longer impartial through the prejudice of guilt that cornered the defendant, and violated the rights of a fair and impartial trial in accordance with the law.<sup>28</sup>

## 3. Court Decision on the Case of Ahmad Musadeq (*Al-Qiyadah Al-Islamiyah* and Gafatar)

Abdussalam alias Ahmad Musadeq is the leader of the teachings of *Al-Qiyadah Al-Islamiyah* and the person who gave birth to the Fajar Nusantara Movement (Gafatar). A number of circles and media branded *Al-Qiyadah* and Gafatar as heretical sects. Gafatar was then banned and muzzled without going through a trial. The ban against Gafatar was based on the Attorney General's decision numbered KEP-116/A/JA/11/2007 which prohibited the activities of *Al-Qiyadah Al-Islamiyah*. The teaching initiated by Musadeq is now said to be transformed into Milah Abraham which is channeled through Gafatar. In the

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<sup>28</sup> Nurkholis Hidayat, Muhammad Isnur, and Febi Yonesta, *Peradilan Kasus-Kasus Kebebasan Beragama Dan Berkeyakinan, Rangkuman 8 Studi Kasus: Dampak, Pencapaian, Hambatan Dan Strategi* (Jakarta: LBH Jakarta, 2011), 8.

same year, the MUI issued fatwa number 4 of 2007 declaring the sect deviant. The Ministry of Religion then followed up on the fatwa with a circular letter SJ/B.V/BA.01.2/2164/2007 to the chancellor of Islamic universities and all heads of regional offices and departments of religion to be aware of the teachings that Musadeq was running.

Although Gafatar was disbanded without going through a trial, some of its members faced blasphemy charges. The cases of T. Abdullah Fattah, Fuadi Mardhathilla, Ridha Hidayat and Althaf Mauliyul Islam, all four of whom were members of the Fajar Nusantara Movement (Gafatar) in Nanggroe Aceh Darussalam (NAD) show that Gafatar followers are facing criminal charges. They were found guilty of violating Article 156a of the Criminal Code because they were proven to spread a teaching that resembles Islam but by mixing it with Judaism and Christianity. The teachings that he propagates are thought to be the incarnation of the Millata Abraham Community sect, which had previously been declared a heresy by the government.

#### 4. Court Decision on Basuki Tjahaja Purnama (Ahok) Case

Basuki Tjahaja Purnama, who at that time was an incumbent in the election process for the governor of DKI Jakarta, was charged with blasphemy and sentenced to 2 years in prison by the North Jakarta District Court with Decision No. 1537/Pid.B/2016/PN.Jkt.Utr. He was charged with blasphemy (Article 156a letter a) or hostility or insult to a group (Article 156 of the Criminal Code) for his speech before the people of the Kepulauan Seribu while conducting socialization of the Jakarta Government's work program. The Public Prosecutor was of the view that the defendant's actions were inappropriate to be charged with blasphemy because based on the results of the evidence there was no evidence of Basuki Tjahaja Purnama's intention to insult Surah Al-Maidah of the Quran. The prosecutor is of the view that the words related to Al-Maidah are addressed to parties who often use Al-Maidah, in this case the Ulama (Islamic religious leaders). Therefore, in the trial the Public Prosecutor charged that Ahok's actions were not blasphemy, but insulting the Ulama. Ahok was sentenced to prison for 1 year with a probationary period of 2 years (conditional sentence). However, the North Jakarta District Court has a different view. According to the panel of judges, Basuki Tjahaja Purnama's words were sufficiently stated to meet the elements of blasphemy as regulated in Article 156a letter 'a' of the Criminal Code.

The fundamental legal question in Ahok's case lies in whether the words Ahok spoke were intended to be hostile or insulting to Islam, or at least to insult Surah Al-Maidah 51 or not. The existence or absence of the intention to insult is an absolute requirement as required in Article 156a letter 'a' of the Criminal Code, considering that in its explanation it is expressly stated that "the crime referred to here is solely (essentially) designated to the intention to be hostile or

insulting”. However, the judges took a different view. According to the panel of judges, the element of intent in Article 156a letter ‘a’ does not have to be intentional as a goal which is the highest form of intentionality, but also includes intentionality in the sense of intentional certainty and intentional possibility. The panel of judges applied the element of intentionality not as intended in Article 156a letter ‘a’ of the Criminal Code and solely because the use of words that are considered sacred side by side with words with negative connotations. This can be seen from the description of the consideration of the panel of judges who considered that the element of intentional desecration/insulting of Islam was fulfilled simply because the defendant was a public official and should have known that religious matters were sensitive issues.<sup>29</sup>

Based on these considerations, it is clear that how the panel of judges considers the element of intent is not in accordance with the original intent of Article 156a letter ‘a’ of the Criminal Code. The widening of the meaning of the intentional element results in unclear legal boundaries when an opinion or statement related to a religion is part of the right to freedom of opinion guaranteed by law and when it can be considered a blasphemy of religion.

#### 5. Meliana Case Verdict

The Medan High Court tried Meliana's criminal case at the appeals court and handed down a decision number 784/Pid/2018/PT.Mdn, which upheld the decision of the Medan District Court Number 1612/Pid.B/2018/PN.Mdn. The Panel of Judges at the Appellate Level agrees with the consideration of the District-level Panel of Judges who have proven the guilt of the defendant in committing the crime of "deliberately publicly blaspheming a religion professed in Indonesia" and the sentence that has been imposed as stated in its ruling. At that time, Meliana said that the call to prayer echoed by the mosque near her house was 'too loud and 'hurts her ears.

The panel of judges is of the view that the remarks delivered by Meliana on the sound of the call to prayer that came from the Al-Maksum Mosque, Karya Street, Tanjungbalai City, on July 29, 2016 were a form of humiliation and blasphemy against an Islamic religion. The decision of the Medan High Court upheld the decision of the district court, namely the Medan District Court, whose ruling reads, among others: (1) To declare that the defendant Meliana has been legally and convincingly proven guilty of committing a criminal act intentionally in public of blaspheming a religion adhered to in Indonesia as stated in the Public Prosecutor's Primary indictment; (2) Sentencing the defendant with a sentence of imprisonment for 1 (one) year and 6 (six) months.<sup>30</sup>

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<sup>29</sup> District Court Jakarta Utara, Case No. 1537/Pid.B/2016/PN.Jkt.Utr (2016).

<sup>30</sup> District Court Medan, Case No. 784/Pid/2018/PT.Mdn (2018).

The element of “intentionality” is an element that represents the *mens rea*/evil intention of the perpetrator. In order for this element to be fulfilled, the perpetrator must be proven to want hostility, blasphemy against a religion professed in Indonesia, as referred to in the element of Article 156a letter 'a' of the Criminal Code. In the Meliana case, the Public Prosecutor and the Medan District Court Judge proved and stated that the element of “intentionality” was met by considering the fact that Meliana had lived in the area for 8 years, whose house was only 10 meters from the mosque. Testimonies from several local people in the Al-Maksum Mosque environment, the defendant complained about the loud volume of the call to prayer. With that incident, the defendant Meliana around July 2016 was accused in his neighborhood of deliberately publicly expressing feelings or committing an act which was essentially hostile, abused or blasphemed against a religion professed in Indonesia.

The judge in the criminal examination seeks to find and prove the material truth based on the facts revealed in the trial and adhere to the indictment formulated by the Public Prosecutor. The indictment of the Public Prosecutor against Meliana is a primary indictment. The indictment submitted by the defendants was to sue Meliana who basically stated that Meliana was legally and convincingly proven guilty of committing the crime of “blasphemy of religion” Article 156 of the Criminal Code; sentenced Meliana to imprisonment for 2 (two) years reduced as long as Meliana is in detention; determined that Meliana remains in custody. The prosecutor's demands are contained in the Indictment Number: PDM-05/TBALAI/05/2018 and by the panel of judges the Medan District Court the primary charge was declared proven and sentenced the defendant to prison for 1 (one) year and 6 (six) months based on Decision Number : 784/Pid/2018/Pt.Mdn.

### **Analysis of the Judges' Independence on Blasphemy Cases**

According to Islamic law, criminal acts of blasphemy are acts to defame (*tadnis*), insult (*istihzā*), ridicule (*syatama*), offend (*sabb*) and curse (*ta'n*) Allah and His Messenger, the Holy Quran, attacking the Islamic faith, and committing acts that deviate from the guidance of Islamic teachings. Islamic law (*fiqh*) passes a verdict on blasphemy. In all five major schools of Islamic jurisprudence—the Sunni Hanafi, Maliki, Shafii, and Hanbali schools, along with the Shi'a Jafari School—blasphemy against God or prophet (*sabb Allah* or *sabb al-Rasul*) is a capital crime, when blasphemy is interpreted as apostasy. The only dispute is about whether the blasphemer ought to be saved from execution if he or she repents. Hanafis, Shafii, and Jafaris pardon the blasphemers who repent; the others don't.<sup>31</sup>

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<sup>31</sup> Taha Jabir Alalwani, *Apostasy in Islam: A Historical and Scriptural Analysis* (London: IIIT, 2012), 15.

Because blasphemy in Islam included rejection of fundamental doctrines, blasphemy has historically been seen as an evidence of rejection of Islam, that is, the religious crime of apostasy.<sup>32</sup> Blasphemy cases are generally very complicated, so the judges who handle this case must be extra careful and look at it openly without any pressure from any party. The position of judges in adjudicating cases of blasphemy must be neutral and impartial without privileging a certain religion that is considered by its people as victims.<sup>33</sup> Likewise, the authorities/government must also be fair and impartial to any group in the case of blasphemy.

Justice is an Islamic teaching. Many verses of the Quran instruct Muslims to act justly even to those they hate. The Quran itself does not literally contain any express provision on the independence of the judiciary; nevertheless, there are a number of contemporary statements of Islamic law that stress the importance of the independence of the judiciary based on the values of justice in the Quran.

The position of courts and of legal procedure in Islamic law is closely related to the historical development of Islam. The function of a judge was regarded as a religious duty. The judge was obliged to follow certain basic principles of procedure. The most important was to consider all people equally and to act impartially. The judge was supposed to listen carefully to the evidence given by the witnesses, to encourage compromise between parties as long as the agreement did not violate principles of Islam or was otherwise illegal, and to give judgment.<sup>34</sup>

Judges have an important position and role for the establishment of the rule of law. In accordance with the system adopted in Indonesia, examinations in court are presided over by judges. Judges must be active in asking questions and provide opportunities for the defendant, represented by his legal advisor, to ask witnesses, as well as the public prosecutor. All of it was meant to find the truth. The judge is responsible for everything that is decided. Thus, interference from other parties is not expected to the judges when handling cases.<sup>35</sup>

In examining and deciding a case, judges should refer to and apply the principles of respect for human dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty. In adjudicating cases of blasphemy, judges should be able to identify the social and political situation

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<sup>32</sup> Jane McAuliffe, "What Does the Quran Say about Blasphemy?," in *The Quran: What Everyone Needs to Know* (Oxford: Oxford University Press, 2020), 51.

<sup>33</sup> Al-Qursyi, *Al-Istibzā'u Bi Al-Dīn: Abkāmuhu Wa Āsāruhu*, 77.

<sup>34</sup> Martin Lau, "The Independence of Judges Under Islamic Law, International Law, and the New Afghan Constitution," *ZaōRV* 64 (2004): 917–27, <https://biblioteca.cejamerica.org/handle/2015/3557?show=full>.

<sup>35</sup> Lilik Mulyadi, *Hukum Acara Pidana Dan Permasalahannya* (Bandung: Alumni, 2007), 234.

behind the emergence of the case, so that they can place each party equally, which does not result in discrimination and injustice, and guarantees the rights to freedom of religion as part of human rights in accordance with the provisions of the Indonesian laws.<sup>36</sup>

Article 183 of the Criminal Procedure Code (KUHAP) states that there are 2 (two) aspects in criminal evidence, namely: (1) the guilt of the accused must be proven by at least two valid pieces of evidence; and (2) Whereas on the two valid pieces of evidence, the judge obtained the conviction that the criminal act had indeed occurred and that the defendant was guilty of committing it. After the judge obtains two pieces of evidence in a manner and provision that is legal according to the law, the judge will gain confidence in the guilt of the defendant. In accordance with the evidentiary system adopted by Indonesia, namely the negative statutory proof system, the two components above, namely the evidence that is the objective element of proof and the judge's belief that is the subjective element of the proof, both are mutually integrated.<sup>37</sup>

The cases of blasphemy in this study focus on 5 court decisions sourced from the decisions of the District Court, the Court of Appeal and the Supreme Court. In general, the description of these cases is in line with the Setara Institute Report, which shows that accusations of blasphemy were imposed on a fairly wide range of acts, and were not merely acts of 'blasphemy of religion.' The sentences handed down to defendants also varied, ranging from 4 months in prison, up to a maximum sentence of 5 years in prison. The general description of the various cases of blasphemy studied shows that there are inconsistencies in the application of the elements of criminal acts in Article 156a of the Criminal Code, which are targeted at indicting various acts that are considered to be 'desecrating' religion. This inconsistency, in terms of legal analysis, is partly due to the weakness in the formulation of Article 156a of the Criminal Code, which opens the possibility of broad and subjective interpretation. It does not only cover various acts related to intentionally committing blasphemy, humiliation or blasphemy of religion, but also includes various other acts, including the problem of deviation from the main religious teachings. Various court decisions have defined the elements of Article 156a of the Criminal Code differently using various references. This difference will weaken legal certainty, whereas predictability in the interpretation and application of law is a basic prerequisite for the principle of legality. The subjectivity of different interpretations and applications of the elements of a criminal offense also affects the impartiality of the court (judicial), and raises the question: did judges abandon their religious feelings to fulfill the requirements of objectivity set out in the legislation.

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<sup>36</sup> Bani Syarif Maula, "Perlindungan Hukum Atas Hak-Hak Kelompok Agama Minoritas Di Indonesia," *Mabkamah: Jurnal Kajian Hukum Islam* 5, no. 2 (2020): 248–69.

<sup>37</sup> Yusti Probawati Rahayu, *Di Balik Putusan Hakim* (Yogyakarta: Citramedia, 2005), 4.

In the decision of the Tajul Muluk case, the court formulated the elements of Article 156a letter a of the Criminal Code with two elements, namely: (i) whoever; and (ii) intentionally in public express feelings or commit acts which are essentially enmity, abuse or blasphemy against a religion professed in Indonesia, or with the intention that people do not adhere to any religion, which is based on Belief in the One Supreme God.<sup>38</sup> Meanwhile, in the decision of the Basuki Tjahaja Purnama case, the elements of Article 156a letter a of the Criminal Code are formulated with 3 elements, namely: (i) whoever; (ii) intentionally; (iii) in public express feelings or commit acts which are essentially hostile, abuse or desecrate a religion adhered to in Indonesia.<sup>39</sup> Apart from the different legal constructions, the basic requirements of the interpretation of criminal law will determine whether there really are at least eight different elements of this inadequate article. In addition, it should be understood that the elements of “hostility”, “abuse” or “blasphemy” must be considered as different elements, because each of these elements has different evidentiary requirements that need to be defined firmly. This is for example found in the Tajul Muluk case, where the court explained the alternative nature in Article 156a of the Criminal Code with the division of 4 categories, namely: (1) Deliberately expressing feelings in public or committing acts that are essentially hostile to a religion adhered to in the Indonesian community; (2) Deliberately expressing feelings in public or committing an act which is essentially an abuse of a religion professed in Indonesia; (3) Deliberately in public expressing feelings or committing acts which are essentially blasphemy against a religion professed in Indonesia; (4) Deliberately expressing feelings in public or doing actions with the intention that people do not adhere to any religion, which is based on the belief in the One Supreme God.<sup>40</sup>

In Basuki Tjahaja Purnama's decision<sup>41</sup> the 3rd element of this article, namely phrases that are basically hostile, abuse or blasphemy of religion are alternative forms, so that if one of these phrases has been fulfilled in the defendant's actions, then it is sufficient and other phrases do not need to be considered. The court's confirmation that the elements of “hostility or abuse or blasphemy of a religion adhered to in Indonesia are alternative” are also found in several other decisions, such as the Lia Eden case<sup>42</sup> and the Meliana case.<sup>43</sup>

The element "intentionality" is interpreted as an intentional act. The court formulates the element of intentionality in 3 forms, namely: (i)

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<sup>38</sup> District Court Sampang, Case No. 69/Pid.B/2012/PN.Spg (2012).

<sup>39</sup> District Court Jakarta Utara, Case No. 1537/Pid.B/2016/PN.Jkt.Utr.

<sup>40</sup> Arsil et al., *Penafsiran Terhadap Pasal 156a Kitab Undang-Undang Hukum Pidana Tentang Penodaan Agama (Analisis Hukum Dan Hak Asasi Manusia)*, 120.

<sup>41</sup> District Court Jakarta Utara, Case No. 1537/Pid.B/2016/PN.Jkt.Utr.

<sup>42</sup> District Court Jakarta Pusat, Case No. 677/Pid.B/2006/PN.Jkt.Pst (2006).

<sup>43</sup> District Court Medan, Case No. 784/Pid/2018/PT.Mdn.

intentionality as an intention (*opzettalsoogmerke*), which means that the perpetrator really wants to carry out an action or result that is prohibited; (ii) intentional and conscious certainty (*opzet net zekerheidsbewustzijn*), which means that the perpetrator with his actions does not aim to achieve the prohibited result, but he knows very well that the result will follow the action; and (iii) intentional and conscious possibility (*doluseventualis or voorwaardelijkopzet*), which means that in achieving an intention, the perpetrator realizes that his intention may lead to other consequences which are also prohibited.

Various court decisions construct the meaning of the "intentionality" element in the three categories. For example, in the case of Lia Eden, the defendant's actions are considered to have contained awareness in the defendant of the possibility that occurred or had fulfilled the awareness of the possibility that occurred, and factually the defendant had fulfilled the intentional formulation as awareness of the possibility (*dolus eventualis*).<sup>44</sup> In Tajul Muluk's decision, the element of "intentionality" is interpreted using the theory of knowledge. In this case, the court constructs that the intentionality in the offense against public order lies in the knowledge of the perpetrator regarding the act and its consequences, namely the perpetrator knows that the act if committed will result in disturbance of public order or the peace of the religious community, and to find out it is sufficient to prove it by the level of knowledge or intellectuality of the perpetrator according to the size of society in general.<sup>45</sup> In the case of Basuki Tjahaja Purnama, the description of the element "intentionality" is also associated with other elements, that is to express feelings or do actions that are basically blasphemy against a religion adhered to in Indonesia.<sup>46</sup>

Regarding the "public" element, from the various decisions that are reviewed, the court views that the Criminal Code does not provide an explanation of the meaning of the "public" element. Therefore, in interpreting the element "in public", the panel of judges refers to the views of legal experts, for example the views of P.A.F. Lamintang interpreting the element "in public" Article 156a letter 'a' of the Criminal Code does not mean that the feelings expressed by the perpetrator or the actions carried out by the perpetrator must always occur in a public place, but it is sufficient if the feelings expressed by the perpetrator can be heard by the public or the actions carried out by the perpetrator can be seen by the public. Such an understanding is found in the verdict with the defendant Tajul Muluk, where "in public" can be interpreted as being visible to the public, so that an act is carried out in public it is not necessary that the act must be done in a public place, but it is sufficient if there

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<sup>44</sup> District Court Muaro, Case No. 45/Pid.B/2012/PN.MR (2012).

<sup>45</sup> District Court Sampang, Case No. 69/Pid.B/2012/PN.Spg.

<sup>46</sup> District Court Jakarta Utara, Case No. 1537/Pid.B/2016/PN.Jkt.Utr.

is a possibility others can see it.<sup>47</sup> In contrast to that, in Lia Eden's decision, the court explained that the perpetrator's intention to commit an act that violates the law in public is sufficient if the perpetrator has an intentional and conscious possibility, namely the awareness that what he did was may be visible to the public.<sup>48</sup>

As far as the element of "letting out feelings" or "performing actions" is concerned, in various decisions the elements of "letting out feelings" or "doing actions" were not explained by the court, but directly referred to facts related to the views, words, and actions of the defendants. Of the various decisions, the element of "letting out feelings" or "doing an action" includes oral and written statements. In the case of Basuki Tjahaja Purnama, the court referred to the views of relevant experts in interpreting the element of "expressing feelings," in which the court concluded that the remarks made by the defendant were "an expression of the thoughts and feelings of the defendant".<sup>49</sup>

The cases related to blasphemy are often problematic due to various violations of the rights of a fair and impartial trial. The accused of blasphemy cases are often intimidated and harassed, experience bias and prejudice from judges, do not receive sufficient legal assistance, prolonged detention, and incompetent investigation processes.<sup>50</sup> There are reports that judges often make partisan statements to defendants during the judicial process and position themselves as offended by the defendants' actions where they as the adjudicating parties should be impartial or neutral.<sup>51</sup>

In fact, the application of Article 156a of the Criminal Code faces the problem of violating the principles of a fair and impartial trial. The application of this article is often considered to be carried out arbitrarily, because it not only targets acts regulated in the scope of Article 156a of the Criminal Code, but also ensnares acts that have nothing to do with blasphemy. The handling of cases of blasphemy is also often influenced by mass pressure, and is politicized for certain targets and purposes other than legal issues. When law enforcement officers are affected by demonstrations or public outrage, or when they express their feelings of impartiality before the courts, they are actually violating a basic

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<sup>47</sup> District Court Sampang, Case No. 69/Pid.B/2012/PN.Spg.

<sup>48</sup> District Court Jakarta Pusat, Case No. 677/Pid.B/2006/PN.Jkt.Pst.

<sup>49</sup> District Court Jakarta Utara, Case No. 1537/Pid.B/2016/PN.Jkt.Utr.

<sup>50</sup> Rana Tanveer, "Blasphemy Accused Often Denied Right to Fair Trial," *The Tribune Express*, November 6, 2015, <https://tribune.com.pk/story/986072/blasphemy-accused-often-denied-right-to-fair-trial/>.

<sup>51</sup> International Commission of Jurist, "On Trial: The Implementation of Pakistan's Blasphemy Laws" (Geneva, 2015), 34, <http://www.icj.org/wp-content/uploads/2015/12/Pakistan-On-Trial-Blasphemy-Laws-Publications-Thematic-Reports-2015-ENG.pdf>.

principle of judicial integrity, namely obligations to act independently and impartially.<sup>52</sup>

An analysis of the practice of applying the blasphemy article proves that law enforcers have difficulty translating the substance of blasphemy because of the unclear formulation of Article 156a letter 'a' of the Criminal Code. This situation is exacerbated by the fact that law enforcers often do not adequately understand the relationship between blasphemy issues and the protection of other rights, such as the right to freedom of religion or belief, freedom of opinion and expression, and the scope of protection of these rights. As a result, often the application of Article 156a of the Criminal Code is carried out arbitrarily and widely, which is applied to acts that are not regulated under that article. This also happened in a number of cases where the methods of implementation violated the basic rights of citizens based on the law and the 1945 Constitution. The arbitrary and inconsistent application of Article 156a of the Criminal Code indicates a violation of the basic legality principle. Article 156a of the Criminal Code, which is part of the regulation in Law no. 1/PNPS/1965, is often not applied properly without distinguishing between blasphemy and accusations of deviation from the basic teachings of religion.<sup>53</sup>

In the case of *al-Qiyadah al-Islamiyah* (Ahmad Musadeq), for example, the police, prosecutors and judges violated the principle of impartiality because they had stigmatized that the defendants were in the wrong, and that in the end influenced the outcome of court decisions. In addition, in many cases, the judicial process received a lot of pressure from the masses. The objectivity of law enforcement can be influenced by external pressure, both from outside the court, family, environment, media, and the wider public. Likewise, the judicial process against Basuki Tjahaja Purnama is another example of mass pressure mobilized in very large numbers in each trial to influence the judicial process. Another case is mass pressure during the trial of Tajul Muluk, the victim of the attack on the Shia community in Sampang by intolerant groups, which completes the real examples of mass pressure that are still embedded in the public's memory. In addition, some cases of blasphemy are even targeted at different individuals or groups and are considered insulting/desecrating Islam, where they are small and local groups, and have no international network. These groups include Lia Eden, *al-Qiyadah al-Islamiyah* and the Gafatar group.<sup>54</sup>

Moreover, the application of the blasphemy law is often influenced by the views or fatwas of religious institutions such as the MUI in the judicial

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<sup>52</sup> Arsil et al., *Penafsiran Terhadap Pasal 156a Kitab Undang-Undang Hukum Pidana Tentang Penodaan Agama (Analisis Hukum Dan Hak Asasi Manusia)*, 90.

<sup>53</sup> Uli Parulian Sihombing, *Mengugat Bakor Pakem: Kajian Hukum Terhadap Pengawasan Agama Dan Kepercayaan Di Indonesia* (Jakarta: Indonesian Legal Resource Center, 2008), 12.

<sup>54</sup> Arsil et al., *Penafsiran Terhadap Pasal 156a Kitab Undang-Undang Hukum Pidana Tentang Penodaan Agama (Analisis Hukum Dan Hak Asasi Manusia)*, 96.

process. This can be seen from the appearance of MUI fatwas in various cases that encourage legal proceedings against people accused of praying religiously. A number of cases with this situation include the case of Lia Eden, the case of Al-Qiyadah, the case of Ahok in Jakarta, and the case of Meliana in Medan. The fatwas of these religious institutions play a key role in allegations of blasphemy, which affects the independence and impartiality of the judiciary, and also constitutes discrimination on the basis of differences in belief under Law No. 39 of 1999 on human rights. With the fatwas of religious institutions, in cases of blasphemy there was a tendency from the start that the accused/suspects were stigmatized as guilty parties, because of religious sentiments that led to investigations and prosecutions. This situation is made more difficult because of the negative campaign in the public sphere against the suspects, who play the psychology of the Indonesian people, so that they are biased in viewing cases of religious blasphemy.

Cases of blasphemy in Indonesia show that law on blasphemy can be cynically used to persecute non-Muslims over personal conflicts or differences of opinion. Such was the case of Ahok and Meiliana. More often the perpetrators of blasphemy are people who have no intention of disrespecting Islam but whose unorthodox opinions or faiths are labeled blasphemous. Such was the case of Tajul Muluk, Lia Eden, and Gafatar.

## **Conclusion**

There is a lack of consensus concerning the existence of a legally prescribed punishment, set down in the Quran and clarified in the Sunnah, for blasphemy in the sense this term is used. Regarding Indonesian law, an analysis of the application of the blasphemy law proves that judges as law enforcers have difficulty translating the substance of blasphemy because of the unclear formulation of Article 156a letter 'a' of the Criminal Code. This situation is exacerbated by the fact that judges often do not adequately understand the relationship between blasphemy issues and the protection of other rights, such as the right to freedom of religion or belief, freedom of opinion and expression, and the scope of protection of these rights. As a result, often the application of Article 156a of the Criminal Code is carried out arbitrarily and widely, which is applied to acts that are not regulated under that article. This happened in a number of cases where the methods of implementation violated the basic rights of citizens based on the law and the 1945 Constitution. The arbitrary and inconsistent application of Article 156a of the Criminal Code indicates a violation of the basic legality principle. Article 156a of the Criminal Code is often not applied properly, without distinguishing between blasphemy and accusations of deviation from the basic teachings of religion. In Islam, the function of a judge is regarded as a religious duty. A judge is obliged to follow certain basic principles of procedure. The most important is to consider all

people equally and to act impartially. The judiciary decisions in the Indonesian blasphemy cases do not reflect the independence values of the judges. A judge in making a decision on the case being handled must be based on his ability to think and will freely (independently) but within the limitations of responsibility and objectivity. Decision making based on intuition or feelings has a subjective nature, so it is easily influenced. The discussion of court decisions emphasizes that judges' decisions in several cases of blasphemy are more influenced by elements outside the court, both in the form of mass pressure and fatwas of religious institutions that do not have legal force.

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