THE INFLUENCE OF CONSTITUTIONAL COURT DECISION NUMBER 140/PUU-VII/2009 AGAINTS LAW ENFORCEMENT OF BLASPHEMY LAW IN THE INDONESIAN CONTEXT

Somawijaya, Universitas Padjadjaran
Ajie Ramdan, Universitas Padjadjaran

ABSTRACT

The Constitutional Court Decision directly influences law enforcement and reform law. Because judges of the court make the interpretation of the law through legal considerations then decide whether the legal norms in the article of the law contradict the 1945 Constitution. This article will analyze an influence of the case for judicial review of the blasphemy law in the Indonesian Constitutional Court. It questions how the relationship between verdict and law enforcement was implemented and interpreted, and how should the concept of renewal of blasphemy law in the draft criminal code Post Constitutional Court Decision. It will analyze some cases in law enforcement by critically analyzing the criminal offence of insulting a religion in the Indonesian context and criticizing a draft criminal code. Blasphemy Law has to give a guarantee for all citizens who adhere to religion and faith in Indonesia. Non-penal in draft criminal code can be given by providing awareness to the person suspected of committing a crime of blasphemy so that the person realizes that what he did was wrong. The study of research is the study of documents. It is carried out by examining library materials or secondary data as the basic material to be examined.

Keywords: The Constitutional Court Decision, Blasphemy Law, Non-Penal

INTRODUCTION

The freedom of thought and the rights for holding religion, belief or conscience guard the individual morals of every human being. At the global level, the rights were first recognized in 1948 in a document called the 'Magna Charta of Human Rights', the Universal Declaration of Human Rights (UDHR). The protection and recognition of the rights is stipulated specifically under Article 18 UDHR. Since the UDHR is not a legally binding instrument, it was entered further restate under the 1976 International Covenant on Civil and Political Rights (Charleton & Friends, 2017).

In April 12, 2010 Constitutional Court made decision for a judicial review of Indonesian Blasphemy Act (Presidential Decree No 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion, made into a law by Law 5/1969). The case attracted so many attention from Indonesian religious leaders because at that point the positive law of Indonesia was *vis a vis* with religion/belief. The relationships among state and religious groups were at stake. Indonesian government so far recognizes six religions: Islam, Catholicism, Protestantism, Hinduism, Confucianism and Buddhism. Crouch defined it as state control over their community and teachings. The issues turn to be more extensive than State-Islam relations, even though the debate is not only about Muslim (Crouch, 2012).

This article provides an influence of the case for judicial review of the blasphemy law in the Indonesian Constitutional Court. It questions how the relationship between verdict and law

enforcement was implemented and interpreted, and how should the concept of renewal of blasphemy law in the draft criminal code Post Constitutional Court Decision.

The article analyzes some cases in law enforcement by critically analyzing the criminal offence of insulting a religion in the Indonesian context and criticizing a draft criminal code. It illustrates a brief description of the use of the blasphemy law as part of the necessary contextual background, and describes its controversial application through the case of Ahok, and some blasphemy law cases.

Moreover, the Constitutional Court's primary consideration in the Case No. 140/ PUU-VII/ 2019 was that the government have to protect all existing believes or religions from blasphemy. The Constitutional Court held that the government does not possess an authority or right to deny the existing religions due to the fact that the state has to protect and/or guarantee religions live and recognized among Indonesian people as a whole. Theoretically, the regime of Criminal Law stipulates three objects to be protected, which are: (1) The interest of individual; (2) The interest of community/ social interest; and (3) The interest of state. To this matter, the anti-blasphemy law fulfils the justice feeling of society in sense that religious-issue is a relatively very sensitive issue. However, the fact that society still needs defamation law and the existence of interest to be protected by criminal law. Is still relevant as a general deterrence. Under Paragraph 3.33, the Constitutional Court stipulated that society is still need the existence of Precedential Decree of 1965 about Defamation of Religion.

Finally, researchers can provide recommendations for reforming the Indonesian Blasphemy Law. The researchers argue that the Government should revise it as soon as possible because the court's decision and reason to enforce the Blasphemy Law is an obligation based on a court decision. The Defamation Law must provide guarantees for all citizens who adhere to religion and belief in Indonesia. Minority religions must be comfortable with the law because it is not a threat. Furthermore, strong arguments from the court's decision do show, however, that the interests of "public order" and "religious values" are the most relevant considerations in supporting the Law on the Blasphemy of Religion in this case.

A court decision is an order containing guidelines for the government and law enforcement officials to revise and enforce the law. Therefore, the new blasphemy law must be drafted individually based on a court decision (Somawijaya & Ramdan, 2018). Defamation regulations are considered important because they are the realization of the first principle of Pancasila. This means that religion is the main element of Indonesian people's life. Prohibited acts are disgraceful actions that do not respect religion or the religious community, which can cause unrest in the community, or religious community, including religious facilities.

Previous Studies

Researchers have researched and published in Padjadjaran Journal Law Review Volume 5 Number 3 Year 2018. The conclusion of research that the urgency to renew the concept of religious blasphemy in the Criminal Code is to answer the issues of blasphemy, which are increasingly prevalent in Indonesia. Article 156a of the Criminal Code that has been existed for the last 15 has been used in more than 50 cases. In 2016, Article 156a of the Criminal Code became more popular with the blasphemy case of Ahok. Arrangement of blasphemy crimes in Law Number 1/PNPS of 1965 must be refined in the new draft of Criminal Code with the basic principle of adhering to the first principle of Pancasila, namely Belief in the One and Only God. The state must view religion as a legal interest that must be protected. The basic paradigm used is Indonesia as a godly state and has a divine philosophy that originates from a very high religious feeling of Indonesian people. The renewal of the blasphemy crime concept must also bridge the fundamental needs in the problem of regulating religious offenses, amely pluralistic

administrative order, a sense of diversity, and religious interests. The issue of blasphemy is very sensitive in Indonesia. The problem of blasphemy that is increasingly prevalent in Indonesia is a very valuable lesson to be answered through the penal reform, especially by paying attention to the diversity of the Indonesian people and the Unitary State of the Republic of Indonesia which was built on the motto of *Bhinneka Tunggal Ika* (Somawijaya & Ramdan, 2018).

The renewal of the criteria and measures of blasphemy in the new draft of Criminal Code must be oriented to the approaches of criminal law policies and values. The form of re-conception and revitalization of blasphemy is to improve Article 1 of the Law Number 1/PNPS of 1965 should not ensnare cult believers in the Criminal Procedure Code. Adherents of these beliefs are beliefs that get recognition from the state so that they do not have the potential to tarnish religion in Indonesia. Article 2 and Article 3 of Law No. 1 PNPS in 1965 involving the government, namely the Minister of Religion together with the Minister/ Attorney General and Minister of Home Affairs or by the President of the Republic of Indonesia to control the flow of beliefs that did not receive recognition from the state must be adopted in the new Draft of the Criminal Code. Article 4 which becomes Article 156a of the Criminal Code needs to re-form the forms of hostility, abuse or desecration of a religion embraced in Indonesia, inviting other people not to adhere to any religion (Somawijaya & Ramdan, 2018).

In this research, researchers want to try giving an alternative solution to solve the criminal blasphemy which are increasingly happening in Indonesia. In draft criminal code (RKUHP) should also involve religious leaders in their formulation and must be in accordance with current legal politics of criminal law with the ultimate goal of peace. The law is in accordance with Pancasila as the life philosophy of the Indonesian people. The alternative ways are mediation and dialogue that should be the first way before the law enforcement process is carried out through the criminal justice system.

RESEARCH MATERIALS AND METHOD

In accordance with the problems studied, this research is a legal research (legal research). Morris L. Cohen said that legal research is the process of finding the law that governs activities in human community (Marzuki, 2005). Based on this, the reconception and revitalization of act of blasphemy in the draft criminal code (RKUHP) are examined using legal research to get an explanation of the law relating to government activities in drafting the concept of blasphemy in the Criminal Code Revision which is currently being discussed in Indonesia House Representative (DPR RI) together with the government.

The statute research approach (statute research) is used to examine, explore, and examine various laws and regulations that talk about blasphemy. Johny Ibrahim stated that statute research is needed to examine various legal rules that are the focus and central theme of a study (Ibrahim, 2006, p. 302). For this reason, because the focus and central theme of the research is regarding The Influence of Constitutional Court Decision Number 140/PUU-VII/2009 Against Law Enforcement of Blasphemy Law, various rules regarding it will be examined and evaluated such as the draft criminal code (RKUHP), criminal code (KUHP), including the Decision of the Constitutional Court No. 140/ PUU-VII/ 2009.

The conceptual approach is used to explore the influence of Constitutional Court Decision No. 140/ PUU-VII/ 2009 Against Law Enforcement of Law Defamation according to the theory of public law enforcement, prevention theory in criminal justice policies and criminal policy. Philosophical approach (philosophical approach) is used to see the Reconception and Revitalization of Blasphemy in Religion (Blasphemy) in Pancasila. In terms of form, this research is directed as an evaluative study with the aim of evaluating the content of the material in the laws related to blasphemy. The type of data used in this study is secondary data derived

from primary legal materials and secondary legal materials. The main legal material relating to this research topic is the 1945 Constitution of the Republic of Indonesia and the laws and regulations, especially Law Number 1/ PNPS 1965 concerning Prevention of Misuse and/ or Defamation of Religion, KUHP and RKHUP, and the Court Constitutional Decree No. 140/ PUU-VII/ 2009 concerning defamation. In addition, secondary legal material that includes various books and other scientific works that are closely related to the concept of blasphemy, punishment, and in general all libraries contain the concept of blasphemy, and tertiary legal materials such as the legal dictionary.

This study uses normative juridical research methods by conducting textual studies, articles in laws and policies can be critically analysed and explain the meaning and implications for legal subjects. In this case, it can be explained how the meaning contained in this article is detrimental or beneficial to certain groups and in what way.

RESULT AND DISCUSSION

The Influence of the Constitutional Court Decision Number 140/ PUU-VII/2009 to the Enforcement of Blasphemy Law in Indonesia

In Indonesia, the Constitutional Court Decision directly influences law enforcement and reform law. Because judges of the court make the interpretation of the law through legal considerations then decide whether the legal norms in the article of the law contradict the 1945 Constitution. The court rejected the petitioner's request to cancel the blasphemy law so that law enforcement officers can still use the blasphemy law as a legal basis in the event of a crime of blasphemy.

The Constitutional Court upheld the Blasphemy Law. In doing so, it observed that Indonesia is neither a religious state nor a secular one. Instead, Indonesia is ‘a religious country’, and the meaning of this term is to be understood (and limited) by reference to a wide range of regulatory features of the state, principally the Constitution In other words, Indonesia’s religiosity is defined – and confined – by the Constitution and Laws made under it. The Court then found that the right to freedom of religion protected by the Constitution is only a private right to hold a religious belief (forum internal). By contrast, the state can place limitations on individuals’ rights to publicly express or manifest such a private belief (forum external). In making this distinction, the Court was borrowing from well-established American jurisprudence. Although this was not acknowledged. On this basis, it found that the rights to public expression of religious freedom (like all rights in arts. 28A–28I) are not absolute. Instead, they may be limited pursuant to art. 28J (2) to ensure (Linsey & But, 2016):

> *“…recognition and respect for the rights and freedoms of others in meeting fair demands in accordance with moral considerations, religious values, security and public order in a democratic community.”*

The Court also found that the state should use religious orthodoxy as a yardstick to determine appropriate moral, religious and security standards. It accepted that the nature of the constitutionally-required ‘belief in Almighty God’ is a personal matter and that the state could not interfere with it. After all, as the Court pointed out, the government can hardly control the religious beliefs of citizens; it can only control their actions. However, for any public expression of a belief to be protected by the state, it must, the Court held, be consistent with fundamental religious teachings that use ‘appropriate methodology’ based on ‘relevant holy books’. Otherwise, the belief may offend public ‘religious values’ and thus be liable to restriction under

art. 28J (2). The Blasphemy Law was therefore valid because, to the extent it prohibited deliberately and publicly speaking about, or seeking public support for, interpretations or activities that diverge from the fundamental teachings of a religion based on appropriate holy books and recognized by the state, it was a legitimate restriction of rights under art. 28J. In summary, then, the decision in the Blasphemy Law case confirmed that art. 28J (2) dilutes the effect of arts. 28(E) and 29 as restraints on the state's power to restrict public expressions of religious freedom. It upheld the state's largely unlimited right to deal with religious issues, including enforcing religious orthodoxy to ensure public order (Linsey & But, 2016).

According to the decision of the court, the government has an obligation to create security and order in the community so that the government must provide guarantees to the community to embrace religion and practice their respective religious services without interference from any party. To explain government obligations based on decisions, researchers use public law enforcement - the use of government agents to detect and sanction violators of the rule of law - is a clearly important subject. The police and prosecutors try to resolve crimes and punish criminals (Polinsky, 2007). One of the main obligations of the government is to protect its citizens from crime, but it prevents crime in various forms. The inability theory shows that holding certain people in prison or prison will prevent these people from committing new crimes. Rehabilitation theories suggest that directing the offender to a particular treatment or training program will change the individual and prevent him from committing new offenses. Retributive theory illustrates that someone who makes a deliberate decision to break the law must be punished for that decision so that the person can pay the debt to the public and then return it with blank paper. Denunciation theory combines several other theories and argues that punishing someone in public will prevent others from committing violations due to the stigma of violations, and will also function as a form of retaliation. Each of these theories can support criminal justice policies and serve as a valid lens for viewing policy. Prevention is the theory that criminal penalties not only penalize offenders, but also prevent others from committing similar violations. Many people pointed out the need to prevent criminal acts after high profile incidents in which the offender was deemed to have received a light sentence. Some people argue that harsher punishment will prevent tragedies and can prevent similar tragedies from occurring in the future (Johnson, 2019).

The researchers elaborate on several related cases that have a direct influence on the decision of the Constitutional Court in law enforcement. The first case is The Basuki Tjahha Purnama (Ahok) case of 27 September 2016 was very controversial. At that time, he in charge as the Jakarta Governor, the capital city of Indonesia. His speech recorded in a video tape was disseminated by a person named Buni Yani *via* social media. Ahok said in as the video recording can tell that he mentioned if not criticized surah Al-Maidah verse 51 of the Holy Qur'an as the barrier for citizens who will not choose him in the upcoming governor election. At that time Ahok was an incumbent candidate sparked reaction from public. His statement was considered offended the majority of Muslim community, especially Islamic scholars, who used to teach Islam (https://news.detik.com/berita/d-3496149/hakim-ahok-merendahkan-surat-al-maidah-51, accessed on August 2019).

The reaction was followed up by the filling up of police report under Article 16 (a) of the Indonesian Criminal Code. Ahok was considered slandering Islam as a religion in which the freedom of people of Indonesia to embrace their belief or religion is protected under Indonesian Constitution. At the end, because the country is under obligation to protect the religion, Ahok must face strict sanctions from the state. The former governor of Indonesia capital city convicted to spend his 2 years in prison under the decision of district court for the blasphemy case during the campaign visit to Pulau Pramuka, a nearby island of Jakarta. To this decision on February 2, 2018, Ahok submitted a judicial review to the Indonesian Supreme Court, yet a month later, the

Mahkamah Agung rejected or dismisses the case. Then Ahok in his capacity as a governor was remain considered to have injured Muslim. The defamation law still exists after the decision of the constitutional court. Therefore, law enforcement officials use Presidential Decree No. 1/ PNPS/ 1965 to name Ahok as a suspect until he is tried in court (Somawijaya & Ramdan, 2018).

The second case is blasphemy of religion in Bali. On Saturday, August 25, 2012 at around 3:30 pm Wita Rusgiani namely Yohana had come to Ni Ketut Surati's house on Puri Gading street II Gang Tresna Asih No. 101, Buana Gubug Environment, Jimbaran Village, south Kuta district, Badung Regency and said "God cannot come to this house because the canang is disgusted and dirty" but the defendant said: "according to the defendant's conviction that canang is unclean to God so that it inhibits the presence of God to come and that is an abomination to God ". Motivation of Wita Rusgiani namely Yohana expressed disgusted to Canang. Because Hindus in Bali feel insulted, they report blasphemy to the police Therefore law enforcement officers used Presidential Decree No 1/PNPS/1965 to name Yohana a suspect until tried in court.

The Panel of Judges in their consideration stated that what the defendant said was an insult or blasphemy against Religion, because according to the religious witness I Nyoman Kenak as the Head of KHDI Denpasar, according to the Book or Lontar Empu Knee referred to Canang is a manifestation of our representative to face God Almighty Esa (Ida Sang Hyang Widhi Wasa) as a sign of our devotion to the holy mind, so in essence Canang is an embodiment or means for Angga Sarira (ourselves) to face God, while the meaning of Canang for Hindus is the core of the means of upakara (ourselves) offerings) to God Almighty.

According to witness I Nyoman Kenak as the Chairperson of the PHDI (Association of Hindu Dharma Indonesia) Denpasar Branch and also concurrently Secretary of the Bali PHDI, according to the witness both the words spoken by the witness version of the witness Ni Nengah Suliati and the words spoken by the defendant's version the defendant himself is still said these things can offend Hindus and can disrupt harmony or harmony between religious communities and according to witnesses the defendant's actions have tarnished Hinduism.

The court is of the opinion that the defendant's actions have fulfilled the offense of the indictment which is article 156 letter a of the Criminal Code. Based on Article 44 of the Criminal Code the defendant apparently did not lose his senses, in the trial the defendant was able to dialogue and was able to answer all questions posed to him properly. Defendant Rusgiani Als Yohana was proven legally and convincingly guilty of committing a crime "intentionally publicly issued feelings or committed acts which are principally hostile, abuse or desecration of a Hindu religion". The defendant received a sentence of imprisonment for 1 (one) year and 2 (two) months.

The third case is blasphemy of religion in Aceh. M. Althaf Mauliyul Islam Bin Fuad Mardatillah on an uncertain day and date which is approximately October 2014 to January 2015 or at least sometime in 2014 and 2015 at the Gafatar Aceh Regional Representative Council office in the village Lamgapang, Krueng Barona Jaya District, Aceh Besar Regency. Deliberately publicly issuing feelings or carrying out actions that are principally hostile, misusing or blasphemy of religion held in Indonesia, the actions carried out by the defendant by means of the defendant joining GAFATAR is to participate and be a participant in carrying out GAFATAR actions including conveying the vision Millata Abraham's mission because in GAFATAR continue to use the understanding of Millata Abraham. Studying the contents of the holy Qur'an and the Bible, then we apply the contents of the holy Qur'an and the Bible in daily life while doing prayer in the Millata Abaraham school is not discussed, it is left to each other's beliefs (can or cannot be done).

In the practice and doctrine of Memorie van Toelichting followed so far, 'intentional' in the context of a criminal act has been interpreted as carrying out an act or act that is prohibited from being desired and known (willens en wetens). The provisions of the acts in the offense

Article 156a letter a of the Criminal Code are also alternative, namely: issuing feelings or performing acts that are hostile, abuse or issuing feelings or commit acts that are desecrating, against a religion that is held in Indonesia, namely: Buddhism, Hinduism, Islam, Protestant Christianity, Catholicism and Kong Chu (Confucius).

The defendant had joined and became a follower of the Millata Abraham Community (Komar) in Aceh Province from 2010 to 2011. Based on the Joint Decree of the Mayor of Banda Aceh, the Head of the Banda Aceh District Attorney's Office, and the Head of the Banda Aceh City Ministry of Religion Office Number: 114 of 2011, Number: KEP-515/ N.1.10/ DSP.5/ 03/2011, Number: 19 of 2011, March 30, 2011 concerning the Prohibition of Millata Abraham's Teaching Activities in the Banda Aceh City Region which was then followed up with a Joint Decree of the Governor of Aceh, Commander in Command Iskandar Muda Military Region, Aceh Regional Police Chief, Aceh High Prosecutor's Office, Head of the Aceh Ministry of Religion Regional Office, Number 450.1/ 165/2011, Number: KEP/ 216/ IV/ 2011, KEP/ 65/ IV/ 2011 Number, KEP Number -073/ N.1/ Dsp.5/ 04/2011, Number KW.01.1/ 4/ HM.00.1/ 766/2011 dated April 6, 2011 concerning the Prohibition of Millata Abraham Flow Activities in Aceh, therefore against adherents, members and/ administrators The Millata Abraham Community in Aceh Province has been granted warnings and orders to stop the spread, interpretation and activities that deviate from the aqeedah and the Islamic Shari'a and/ or religion. The court sentenced Defendant M. Althaf Mauliyul Islam Bin Fuad Mardatillah to have been proven legally and convincingly guilty of committing the crime of "Defamation of Islam" and sentenced him to imprisonment for 3 (three) years. Motivation of M. Althaf Mauliyul Islam Bin Fuad Mardatillah propagated the vision Millata Abraham's mission. Because there is an agreement by the regional government in Aceh to prohibit the distribution, interpretation and activities that deviate from the aqeedah and the Shari'a of Islam and/ or religion. Therefore law enforcement officers used Presidential Decree No 1/PNPS/1965 to name M. Althaf Mauliyul Islam Bin Fuad Mardatillah a suspect until tried in court.

The three cases above were charged with Article 156a of the Indonesian Criminal Code because of the direct influence of the constitutional court that was stating Law No. 1/ PNPS/ 1965 constitutional and does not conflict with the constitution. Therefore, the State is obliged to implement the decision of the Constitutional Court by enforcing the law in the case of blasphemy by using the legal basis of Law No. 1/ PNPS/ 1965. Researchers linked the government's obligation to uphold the law with the deterrence theory. The Deterrence is a theory that criminal penalties not only punish offenders, but also prevent others from committing similar violations (Johnson, 2019). Many people pointed out the need to prevent criminal acts after high profile incidents in which the offender was deemed to have received a light sentence. Some argue that harsher punishments will prevent tragedies and can prevent similar tragedies from occurring in the future. The insult of religion is very sensitive in Indonesia because Indonesia is based on Pancasila, the first principle of which is the Belief in One and Only God so that the government must be guaranteed by people in carrying out all religious activities. Refer to prevention theory; the government is obliged to prevent the blasphemy of religion from happening again in the future.

Based on consideration of the constitutional court decision of paragraph 3.61, the state is required to protect the existence of a recognized religion from possible misuse. Based on the Court, the state does not have the right or authority not to recognize the existence of a religion because the state is required to guarantee and protect the religions embraced by the people of Indonesia. Criminal Law regulates three things that must be protected: Individual interests, social/ community interests, and state interests. Because of that consideration, based on the theory of public law enforcement, one of the main obligations of the government is to protect its

citizens from crime, to prevent crime. Judicial legal considerations are in line with deterrence theory.

According to Beccaria, law exist to enable a united society, freedom from the threat of war, and chaos. He assumed that each individual member of this community would always try to take from the masses, not only their own part, but to violate the others. Therefore, law is needed, and violation of the law must result in punishment whose purpose is nothing but to prevent others from committing such violations. The punishment has to be proportionate to the crime committee. If two crimes have the same punishment, nothing prevents human from committing greater crimes. It was stressed by Beccaria that a punishment must be given as soon as possible the criminal action was committed (Johnson, 2019).

Punishment should prevent a rational agent from involving in crimes, punishment means will probably source in the form of negative experiences, not benefits or rewards. If we prevent rational agents from committing crimes, it has to be ensured that the results of violations tend to be not-good for them, or rational agents can continue their plans to commit crimes. Moreover, the punishment form that only causes minor damage to the offender; he will deem that the punishment is acceptable cost. When the punishment method is not severe enough, potential offenders might think that overall, the consequences of committing a crime are still better than not doing it. The second assumption focuses on the instrumental function of punishment - that is, to prevent crime, Lee calls this assumption a preventative assumption (Lee, 2017). Bentham's theories had a similarity. He started from the proposition that humans are governed by pain and pleasure, that actions are rational, people can be prevented from harming others by setting penalties for certain actions (Johnson, 2019). Beccaria and Bentham wanted to expect potential criminals to compare the expected benefits of committing a crime with the benefits of not committing a crime. In short, the theory states that if you increase the cost of committing crime, people will not commit crime. The roots of modern deterrence theory from Ceasare Beccaria and Jeremy Bentham depict obligations of state to protect its citizens from crime, to prevent crime. Criminal penalties do not just punish violators, but also discourage other people from committing similar offenses. Overall, the influence of court decision indicates that law enforcement officers must use the blasphemy law as a legal basis in the event of crimes of blasphemy. Crimes of blasphemy are very sensitive in Indonesia, so that law enforcement officers must be careful to implement the law. Meanwhile, the state has obligations to protect and to prevent Indonesia citizens from crimes of blasphemy. It is described by deterrence theory from Ceasare Beccaria & Jeremy Bentham.

There is a criticism of Law No. 1/ PNPS/ 1965 of the National Alliance for Criminal Reform based on the results of the study stated that the contents and provisions in the law are very tendentious, over-criminalized and discrediting the religious community. The crisis of understanding about religion which considers the Community of Beliefs as a potential group to make blasphemy against religion has started since 1965. The construction of the existing article has placed the Community of Trustees as potential suspects. In practice, once a person can accuse another person or group of insulting religion, the police apply a double standard to win the majority group (Yuntho & Friends, 2007). Therefore the researchers propose a new concept in completing a new concept in resolving a criminal blasphemy case, namely the concept of non-penal.

The Concept of Renewal of Criminal Offenses in Draft Criminal Code Post the Constitutional Court Decision no. 140/ PUU-VII/ 2009

Melissa A. Crouch highlighted that the minorities' religious group view that the Defamation Act open opportunities for major religious group to criminalize minority religious

teachings. The supporter of Blasphemy Law abolition hold that the state has a vital role to give protection to minorities and hinder them from unjust criminalization. The appearance of majority *vis a vis* minority rights is the focus of task of state. It must be able to control and balance it (Crouch, 2012).

It can be seen that the minority religious groups were struggling to protest the Indonesian Government, insisting that criminalize religious difference will be a major step back to the past to 1950s or 1960s when the fear of separatist religious movements and communism were prominent. The group believe was that in the Darul Islam era, many of followers of mystical beliefs became victims because they were considered infidels and blasphemed religion. It was further explained how Kebatinan was formed by the Congress Organization in 1955, but that it was addressed by Darul Islam. This also happened in 1966-1998, when the followers of mystical beliefs suspected of being communists. They were homicide or jailed. It was confirmed by the Indonesian Bishops' Council that the Blasphemy Law of 1965 were made during a chaotic time, in the middle of the Darul Islam and the separatists. This is one of the reasons raised by The Congress to insist the abolition of Blasphemy law (Crouch, 2012).

Some legal non-governmental organizations, such as the Indonesian Legal Resources Center (ILRC), stated that members of the Islamic Defenders Front are terrifying and disturbing those who support the abolition of the Blasphemy Law during the trial. Several incidents of vandalism and property damage occurred, including bricks thrown into the window of the ILRC office. The incidents is viewed as intimidation tactics by these radical Islamic groups might influence the court's decision (Crouch, 2012).

Researchers try to give solution in Indonesia draft criminal code. The state must provide security for all citizens in practicing their religion with the law, both majority and minority religion. The government should develop non-penal in draft criminal code. It focuses more on the nature of prevention before crime occurs. The main goal is to deal with the factors that are conducive to causing crime. These conducive factors include, among others, social problems or conditions which can directly or indirectly lead to crime. Therefore, from the standpoint of criminal politics at a macro and global level, non-penal efforts occupy key and strategic positions in criminal political efforts (Arief, 2014). In journal of Study of Penal and Non-Penal Approach on Prevention of Corruption in Indonesia, Qurrotu Aini quote the opinion of hoefnagels that criminal policies in general can be grouped into two, namely (Aini, 2018):

1. Criminal policy using the means of criminal law (reasoning policy); and
2. Criminal policy by using facilities outside of criminal law (non-penal policy).

The two facilities (reason and non-penal) mentioned above are pairs which cannot be separated from each other, it can even be said that the two complement each other in an effort to deal with crime in the community. One of the non-penal channels for monitoring social problems is through social policy. According to G.P. Hoefnagels are categorized in the path of prevention without punishment. Social policy is basically a rational policy to achieve the welfare of the community. Identical to national development policies or planning that covers a wide range of aspects of development. One aspect of social policy that must receive attention is the handling of community mental health problems, both individually as members of the community and health/ family welfare (including child and adolescent welfare issues), and the wider community in general. Besides religious education is also an important and strategic policy in strengthening human belief and ability to follow the path of truth and goodness. Effective education and religious education are expected not only to foster a healthy human soul/ spirit but also to educate a healthy family and a healthy social environment.

The most strategic non-penal efforts are all efforts to make society as a social environment and healthy living environment from criminogen factors. This means, the community with all its potential must be used as a deterrent against crime or anti-criminogen

factors which are an integral part of overall criminal politics. The need for non-penal means as a solution. Because there is still doubt or question the effectiveness of the means of punishment in achieving criminal political objectives (Arief, 2014). In simple terms it can be distinguished, that efforts to tackle crime through the path of "penalties" are more focused on the nature of "repressive" (oppression) after the crime occurred, while the "non-penalties" pathway focuses more on the "preventive" nature (prevention) before the crime occurs. Crime of blasphemy should be socialized to community. The efforts of non-penal are making the community a healthy social and living environment in implementing religious teachings adhered by each individual.

Based on interviews with the government draft RKUHP team on September 10, 2019, the government and the legislature agreed to continue to use the term blasphemy after getting input from religious leaders and also based on searches from a large Indonesian dictionary. Blasphemy in Indonesia is a very sensitive issue, so that the use of the term and its regulation must be very careful with regard to religion, culture, customs adopted by the Indonesian people, and various kinds of factors that must be considered by lawmakers.

The renewal of criminal law regarding blasphemy offenses in the 2015 draft of the Criminal Code should follow the views expressed by Hoefnagels. First, the concept places the act of blasphemy in a separate chapter, Chapter VII (Crimes Against Religion and Religious Life). In the present Criminal Code, defamation is included in Chapter V (Crimes against Public Order). In the first part of the draft, three (3) articles formulate Crimes Against Religion. The three articles regulate the prohibition of insulting religions in Indonesia and incite, in whatever form, with a view to eradicating belief in religion adopted in Indonesia. The threat of imprisonment ranging from two (2) to five (5) years, revocation of certain rights, and sentences with categories III (Rp150.000.000,00) and IV (Rp500.000.000,00).

In the second part of Chapter VII, at least there are three articles that formulate the Criminal Acts of Religious Life and Worship Facilities. The threat of imprisonment ranging from two (2) years to five (5) years, and criminal fines with category II, category III, and category IV. The new draft of criminal code does not include the non-penal concept for resolving the blasphemy crime, yet the concept can be a contingency solution for blasphemy case. In order to improve the regulation, the new draft of Indonesian Criminal Code has to include this concept under Chapter VII referring to Pancasila as an ideology of Indonesian People and unity in diversity. According to it Indonesian motto '*Bhinneka Tunggal Ika'* require mutual respect among every religious group (Jazuli, 2017, p. 329-350). In this sense, the philosophy of Indonesia as state derived from religious believe and Indoneisan people is still pay attention to the issues of religion, that not separates the domains of the state as an organization and the religion (Yuntho & Friends, 2007, p. 22-23). Supomo (1945) justified that the newly Indonesian state should not be an Islamic state, instead, the state uses the moral values recommended by Islam (Anshari, 1983, p. 136).

In a historical perspective, The Law No. 1/PNPS/1965 was intended to keep the relation between the state and society harmonizes. The religion blasphemy was considered threatening the revolution. The emergence of various new mystical or religious beliefs and/or organizations were considered contrary to the teachings and laws of religion, violate the law, separate national unity, and tarnish the religion. All of it was manifested in The Law No. 1/PNPS/1965, in which this rule was relevant to prevent religious-mainstream teachings misuse. This rule protects the religious peace from desecration and from the teachings harming the first principle of Pancasila. The Law No. 1/PNPS/1965 restricts religious cults outside the official religions, so the guarantee of freedom of religious life in Indonesia was strong. But, there was problem in the implementation when the citizens of Indonesia being restricted to adhere to other religions that does not included in the Law. It was considered as the derogation of the civil rights. Those who

have unrecognized beliefs, face the accusation for blasphemy law, because Law No. 1/PNPS/1965 on the Prevention of Abuse and/or Blasphemy of Religion was published to accommodate requests from Islamic organizations who wanted to ban the cults (Widhana, 2019).

The Article 156 and 156 (a) regulates that a particular group or individual have to obey strict warning, prohibition or dissolution from 'Bakorpakem', an Indonesian coordination body for believes and religion. The body included the Indonesian Ministry of Religion, the Ministry of Domestic Affairs, Indonesian Police Force, Intelligence Agency, and religious organizations, for example the 'MUI'. It will hold an examination and investigation and prosecutions in court (Widhana, 2019).

According to theory of Hoefnagels & Pancasila principles, non-penal in draft criminal code can be given by providing awareness to the person suspected of committing a crime of blasphemy so that the person realizes that what he did was wrong. Religious leaders from the religious community must be involved to provide an understanding of the importance of tolerance between religious communities. The religious leaders act as mediators to reconcile the perpetrators and victims. If there is no meeting point between the perpetrators and victims, the police can proceed according to the applicable law.

Formulation of formal offense and material offense, in journal of mimbar hukum Anton Hendrik S quoted the opinion of Eddy Hiariej (Hendrik, 2019) explained by simplifying that formal offense is offense that emphasizes action, while material offense is offense that emphasizes effect. This is the result of losses also indicates that this regulation includes material offenses. It should also be understood that there must be a causal relationship between consequences and actions. Blasphemy law is currently categorized as formal offense, so that the actions of the offense are prohibited. By initiating the concept of non-penal in draft criminal code, it is better to change formal offense into material offense. Because of worries religious minorities will be criminalized by the blasphemy law. In addition, the existence of the concept of mediators between perpetrators and victims by religious leaders is the main reason for converting blasphemy law into material offenses.

Based on interviews with the government draft RKUHP team on September 10, 2019, the concept of non-penal in the resolution of criminal defamation cases has been attempted in the RKUHP, but based on input from various parties, including religious groups; it is still difficult to use the concept of non-penal. Because blasphemy is very sensitive to religious groups, one religious group may forgive the perpetrators of blasphemy, but other religious groups may not necessarily forgive.

Non-penal is important as one of the solutions to the crime of blasphemy. Nowadays, it is thought that penal is not able to provide a solution to a crime of blasphemy and non-penal can be an alternative solution to a crime of blasphemy. In our opinion, researchers completely agree with the opinion that this is better way to solve the issue of blasphemy in Indonesia.

Firstly, researchers believe that non-penal emphasizes prevention before a crime occurs. Overcoming crime through the penalty line focuses more on the repressive nature after the crime occurred and does not guarantee the crime does not happen again. Non-penal try to make society create a healthy social environment and living environment from the factors of crime. For example, religious leaders of all religions can play a role in providing an understanding of the importance of tolerance or respecting the teachings of each religion to their respective followers and in particular the alleged perpetrators of the crime of blasphemy. Religious leaders should be given authority in the draft criminal code as a mediator between perpetrators and victims before law enforcement officials bring to the law enforcement process.

However, there is an opinion which says that non-penal does not provide strict sanctions to perpetrators of religious blasphemy. In other words, those must be given a prison sentence that revokes a person's freedom to live his life. For instance, the perpetrators of religious blasphemy

that receive prison sentences will be restricted by their freedom; therefore there are those who argue that the penalty is the best solution to overcome crime.

To conclude, researchers strongly believe that non-penal is more beneficial than penal because it makes religious people tolerate and respect each other.

CONCLUSION

The influence of court decision indicates that law enforcement officers must use the blasphemy law as a legal basis in the event of crimes of blasphemy. Crimes of blasphemy are very sensitive in Indonesia, so that law enforcement officers must be careful to implement the law. Meanwhile, the state has obligations to protect and to prevent Indonesia citizens from crimes of blasphemy. It is described by deterrence theory from Ceasare Beccaria & Jeremy Bentham.

According to theory of Hoefnagels & Pancasila principles, non-penal in draft criminal code can be given by providing awareness to the person suspected of committing a crime of blasphemy so that the person realizes that what he did was wrong. Religious leaders from the religious community must be involved to provide an understanding of the importance of tolerance between religious communities. The religious leaders act as mediators to reconcile the perpetrators and victims. If there is no meeting point between the perpetrators and victims, the police can proceed according to the applicable law. Blasphemy law is currently categorized as formal offense, so that the actions of the offense are prohibited. By initiating the concept of non-penal in draft criminal code, it is better to change formal offense into material offense. Because of worries religious minorities will be criminalized by the blasphemy law. In addition, the existence of the concept of mediators between perpetrators and victims by religious leaders is the main reason for converting blasphemy law into material offenses. Researchers strongly believe that non-penal is more beneficial than penal because it makes religious people tolerate and respect each other. Non-penal in draft criminal code can be given by providing awareness to the person suspected of committing a crime of blasphemy so that the person realizes that what he did was wrong.

REFERENCES

Aini, Q. (2018). Study of penal and non-penal approach on prevention of corruption in Indonesia. *Indonesian Journal of Criminal Law Studies*, *3*(2), 111-120.

Ansari, E. (1983). *Jakarta charter 22 june 1945 and the history of the national consensus.* Bandung: Salman ITB Library Publisher.

Charleton, P., & Friends. (2017). Blasphemy: Religion challenges freedom of speech. *Irish Judicial Studies Journal, 1*(1), 1.

Crouch, A. (2012). Law and religion in Indonesia: The constitutional court and the blasphemy law. *Asian Journal of Comparative Law*, *7*(1), 1-46.

Hendrik, A. (2019). Modus operandi and problems in combating online fraud. *Legal Pulpit Journal*, *31*(1), 60-73.

Ibrahim, J. (2006). *Normative legal research theory and methodology*. Malang: Bayumedia.

Jazuli, A. (2017). Settlement of blasphemy conflicts in indonesia's criminal law perspective. *Journal of De Jure, 17*(3), 329-350.

Johnson, B. (2019). *Do criminal laws deter crime? Deterrence theory in criminal justice policy: A primer*. Minnesota: Minnesota House Research.

Lee, H. (2017). Taking deterrence seriously: The wide-scope deterrence theory of punishment. *Journal Criminal Justice Ethics*, *36*(1), 3.

Lindsey, T., & But S. (2016). State power to restrict religious freedom an overview of legal freedom. *In Religion, Law and Intolerance in Indonesia.(Edition) Tim Lindsey and Helen Pausacker* (19-41). London & New York: Routledge.

Marzuki, P. (2005). *Legal research*. Jakarta: Kencana Prenada Media Group.

Nawawi, A. (2014). *Criminal law policy*. Jakarta: Kencana.
Polinsky, A. (2007). *The theory of public* enforcement of law. Standford: Elsevier B.V.
Somawijaya & Ramdan. (2018). The urgency of religious-*blasphemy case arrangement in the frame of diversity towards national criminal law reform*. *Padjadjaran Journal of Law, 5*(3), 464-484.
Widhana, D. (2019, July 25). The origins of blasphemy offenses. *Tirto*, 2.
Yuntho, Emerson, & Friends. (2007). *Dynamics of criminal code update and its problems*. Jakarta: Elsam & the National Alliance for Criminal Code Reform.