The Vulnerability of Religious Minority in Indonesia due to the Implementation of the Blasphemy Law

Muktiono
Moh. Bakri
Masruchin Ruba'i
Muchamad Ali Safa'at

Abstract

The establishment and application of blasphemy law in Indonesia is generally under the justification of maintaining public order, preventing violent-conflict, and protecting the enjoyment of the right to freedom of religion. However, when the blasphemy law should be applied to adjudicate an internal religious conflict among the sects then the debate arises on whose interpretation and how it will be referred by the State authorities as demarcation or exclusionary standard to distinguish between the deviant religion and legally valid ones. Issues on the fragility of fair and impartial trial as protection to the existence of religious minority group therefore becomes very central due to the implementation and application of blasphemy law will be always influenced by power relation among the involved parties. This paper is intended to explore Tajul Muluk case that has been exhaustively ruled by all level of Indonesian courts in order to reveal complex roles of judiciary in applying service-conception of blasphemy law into first-order reason of person's faith. Source-based legal reason of the court which merely refers to the historical or social facts as texted in the blasphemy law with prejudice to human rights' moral test has been paradoxically widen penumbra of legal rule to uncertainty that undermines access to justice for religious minority group especially when addressing social conflict.

Keywords: religious minority, blasphemy law, court.

I. Introduction

I.A. Background

Tajul Muluk was a Syiah Islamic teacher (ustadz) who provided voluntary religious education for adult, youths, and children near his home in a small madrasah while also organizing social life of his followers to be more orderly and prosperous. Along with the development of his community, Tajul Muluk faced social, economic, and religious conflict with his family and other local Sunni clerics of Madura. In general, the Sunni plays also major roles in the areas of politics, administration, judiciary, legislature, police, and security forces. Since the failure of settling the conflict then it was transformed into a violent conflict which associated to Syiah-Sunny conflict. The conflict then grew as a violent conflict that involved wider actor in local areas from district to province level which finally led to the burning of houses and madrasa, murder, and the expulsion of Tajul Muluk community outside the island of Madura. As the result of law

enforcement against such social chaos thus Tajul Muluk was sentenced for having violated article 156a of Indonesian Criminal Code on desecration against Islam and therefore he was jailed for four years[1].

The focus of this paper is to measure the dynamics of judicial practice in Indonesia in dealing with the case of religious blasphemy that involves internal contradiction among the sects in Islam which has interactional dimension between majority and minority groups. The inherent issue on the application of blasphemy law is the existence of the Act No.1/PNPS/1965 on the Prevention of Misuses and/or Blasphemy of Religion. The constitutional court has already recognized officially in its decision that the Act legally has weakness on its substances especially in relation to its application in the judicial process and therefore the constitutional court complemented its defense to the Act by providing *middle way* interpretation that balances the interests of conflict prevention and religious right protection. Even if the Act No. 1/PNPS/1965 is still valid legally as reference for law enforcement authorities in dealing with religious-blasphemy cases; however, potentially it has capacity to violate the rights to freedom of religion for the defendant who mostly is a member of religious minority group. Enforceability of the Act No. 1/PNPS/1965 *jo.* Article 156a thus has a provisional or emergency character so that requires extra cautiousness when applied by the judiciary or government.

The judicial process on Tajul Muluk case becomes *hard case*[2] for the judge because Article 156a is not easily to be applied but in addition it also requires understanding on its historical and teleological aspects. The existence of the article 156a post-constitutional examination cannot be separated from the Constitutional Court's interpretation on certain aspects of the article called as *middle way interpretation* which should be also included by the judge as legal rationality of the decision. The hard-case character in the application of Article 156a has increased the complexity of the judges to rule impartially and independently so that it becomes important to make criticism of the judicial process of blasphemy case. Moreover, the judges in the case of Tajul Muluk actually have ruled the administrative procedures out from the requirement to address blasphemy accusation as stressed in the middle way interpretation of the Constitutional Court and preferred more to apply article 156a per se as criminal procedure that disregard the *ultimum remedium* doctrine. The preference of the judges have shown the centrality of article 156 as legal text in adjudicating blasphemy case with less consideration to its external aspects based on deductive procedure to formulate the decision under the Indonesian civil law system.

In addition to the obligation to strictly follow the procedural law, the courts in the exercise of State power "*... in order to enforce the law and justice*"[3] also has a constitutional obligation to provide "*protection, promotion, enforcement, and fulfillment of human rights ...*"[4] which in the implementation process should guarantee "*everyone...free from discriminatory treatment on the basis of whatever and ... get protection against discriminatory treatment...*"[5]. The judge position as duty-bearer in the context of human rights protection make the criminal process is no longer a sterile area of issues outside the penal law especially related to the enforcement of human rights. Furthermore, human rights nowadays has strongly entered

[1] The court decisions: a) Decision of Sampang District Court No.69/Pid.B/2012/PN.Spg, dated on 11 July 2012; b) Decision of Surabaya High Court No.481/PID/2012/PT.SBY, dated on 10 September 2012, and c) Decision of Indonesia Supreme Court No.1787 K/PID/2012, dated on 3 January 2013.
[2] Meyerson, Denise, ***Essential Jurisprudence*****,** Routledge Cavendish, New South Wales, 2016, 65-66.
[3] Article 24 (1) of the 1945 Constitution.
[4] Article 28I (4) of the 1945 Constitution.
[5] Article 28I (2) of the 1945 Constitution.

Indonesian legal system and therefore it marks the trial of Tajul Muluk as indicator the degree of the judiciary has become strategic mechanism for human rights protection. Accordingly the judge on one side is attached to the criminal justice system and on the other position has a constitutional obligation to uphold human rights.

The fact that Indonesian law has not provided clear criteria on the principal teaching of Islam consequently the judge should elaborate and implement the criteria mostly based on contested evidences between defendant or lawyer and prosecutor. The independence and impartiality of the judge then becomes a critical issue because if it is not appropriate in addressing such situation, the court will discriminate religious minorities in favor of religious majority considered as public representation and based on justification to prevent public disorder which could lead to violent conflict.

Public examination on the first decision of Tajul Muluk case previously have been conducted by *the Center for Religious and Cross-Cultural Studies* (CRCS) University of Gadjah Mada[6] and the high court decision by *the Working Group of Alliance for Religious Freedom of the East Java* (Pokja HKBB Jawa Timur)[7] which concluded that the court to some extent have ruled inappropriately in concern of examining the evidences, formulating legal consideration and concluding final decision. The results of the examination became an important point of departure to develop further investigation on the whole court decisions comprehensively and its wider legal context such as constitution and human rights.

I.B. Research Question

How are the practices of judicial system of Indonesia in implementing the law in relation to the protection of the right to freedom of religion or belief? Do they have any concepts or perspectives on the minority rights as reflected in their decisions? And to what extent has the international human rights norms been taken into consideration into the judicial system?

I.C. Research Aim

This study is intended to explore the implementation of blasphemy law by Indonesian judicial system in addressing the case of Tajul Muluk as a dynamic part of social conflict which involves religious minority group. The aim of this study is not merely on examining the validity of legal arguments in judicial practices through its decision as formulated in the form of texts, but furthermore is also extended to the wider context of minority issues.

I.D. Research Methodology

As an effort to deconstruct the legal text of Tajul Muluk case then it will be traced firstly how the blasphemy law as a text written and read by the subjects (free play of text) through document of court decision. As objects of the trace will be used at least five court decisions related to Tajul Muluk case that are the Sampang district court decision No.69/Pid.B/2012/PN.Spg; the Surabaya High Court decision No.481/PID/2012/PT.SBY; the Supreme Court decision No.1787K/Pid/2012; and the Constitutional Court decisions of No.84/PUU-X/2012 and No.140/PUU-VII/2009. Based on the tracing it will be identified at

[6] The defense of Tajul Muluk, published as: *Quod Revelatum: Pledoi Ust. Tadjul Muluk Demi Mengungkap Kebohongan Fakta. CMARS (Center for Marginalized Communities Studies), Surabaya, 2013,* Page 98-102

[7] http://ylbhu.org/s1-program/c1-siaran-pers/28/hasil-eksaminasi-putusan-4-tahun-banding-tajul-muluk/ as accessed on 5 July 2016.

least: 1) The original intents of the authors (legislators and related subjects of the judicial system) in using the blasphemy law to settle a violent social conflict involving minorities; 2) How the subjects of judicial system share their meaning and interpretation on blasphemy law; 3) Historical development on blasphemy law; 4) Whether the subjects has shared any consensus on certain values; and 5) And how the current form of presence and meaning of blasphemy law in the frame of dynamic contexts.

II. Result

II.A. Conflict transformation from religious disagreement to religious exclusion

The violent conflict involving Tajul Muluk is generally known as Sampang case which occurred in the hamlet of Nangkernang, Karang Gayam Village, Omben Sub-district where is located remotely in the Southeast part of Sampang. Omben districts' population in 2011 is amounted to 77,396 people[8] who mostly embraces Sunni Muslim, while the Shi'a population is about 335 people (0.43%)[9] that concentrated in the surrounding area of Tajul Muluk. District of Sampang is the third level of Indonesian governmental system after the provincial and central government[10]. Religious affair is under the authority of central government[11]; however, practically there have been established local regulations on religious administration particularly related to the protection of public order.

Based on the scope of the parties involved, the conflict can be divided into inter-cleric conflict at the village level, inter-group conflict in the district level, and multi-actor conflict in the provincial level who interacted with stakeholders at the national level[12].

Conflict in the village level occurred since 2004 between Sunnis led by Ustadz Ali Kharar and of Syiah represented by Ustadz Ma'mun which both of them still have family ties[13]. At this level the conflict was limited to the disagreement on certain Islamic teaching among the clerics (ustadz) without manifested into an open violent conflict.

After Ustadz Ma'mun passed away and his leadership figure was succeeded by his son, Tadjul Muluk and Roeis al-Hukama, the conflict entered into the second phase in the period 2006 to 2011 which marked by any physical attempts to stop activities of Syiah group and push them to make statement publicly that they will abandon their deviant belief[14]. The resistance of Tajul Muluk community increase conflict escalation and widespread sentiment among the Sunnis so they started to collaborate with other components of religious organization or community affiliated to their teachings such as the Ulama Forum of Sampang, the Relationship Agency of Islamic Boarding School Ulama of Madura (Bassra)[15], The Ulama Council of Sampang (MUI)[16], and also using the justification of state institutions as formal oppressive instrument

[8] *Table* 3.1.2: *Year-End Population by Districts and Sex Ratio in the Sampang Regency 2011,Sampang in Numbers 2012, The Sampang Bureau of Statistics 2012*, 78.
[9] There is no official data on the number of sect division and adherent. The number of 335 Syiah adherents are based on the number of Syiah evacuees, the source: http://www.antaranews.com/berita/329742/pengungsi-syiah-di-sampang-terus-bertambah .
[10] Article 3 of the Act No. 32/2004 on Local Government.
[11] Article 10 (3) the Act No.32/2004 on Local Government, but the local regulation on the restriction of religion refers to other law in relation to authority to maintain public order.
[12] The division is made and used only for explanatory purpose.
[13] Report of the Finding and Recommendation Team (Laporan Tim Temuan dan Rekomendasi (LTTR)) on the Syiah Assault in Sampang, Madura (the LTTR Report), 2013, Page 36 (I.11). The team is established by National Commission on Human Rights, National Commission on Violence against Women, Commission for Indonesian Children Protection, and the Protection of Witness and Victim Agency.
[14] Ibid. Par.I.1.3-4.
[15] Ibid. the Bassra insists that Syiah teaching should be vanished from the Madura Island.
[16] Ibid. Par. I.2.14, 38, : on 28 May 2011, MUI of Sampang issued a recommendation to local government for suspending Syiah

such as police[17], public prosecutor as state monitoring agency to community belief (Badan Pakem)[18], and local government[19].

The third stage was marked and began with the occurrence of violent events such as the burning of schools, homes and places of worship belong to Shi'a group that can not be stopped by the police and causing huge losses and hence it has become a nationwide public concern[20]. The pattern of conflict began to change from the pressure on local Shi'a group in Sampang and Madura to the demand on legalization or formalization of Shi'a teaching as deviant sect widely in the East Java province by religious community outside Madura Island[21]. The Ulama Council of East Java finally grant such demand and in the same year the East Java Governor issued a governor regulation on the development of religious activities and supervision on deviant sect[22]. In addition, the district court of Sampang in the same year also sentenced Tajul Muluk, a riot victim, to imprisonment for two years for blasphemy act against Islam[23]. On the other, the Sampang district court only sentenced to imprisonment for 3 (three) months for Musikrah as one of the arsonists to the house or school of Tajul Muluk community[24]. The failure of conflict settlement peacefully has prolonged hostility to Shi'a community and reproduce misery when there was recurrent attack and arson toward Tajul Muluk community in 2012 which caused one casualty, four critical injured victim, and numerous houses burned[25].

Finally, the struggle over the protection of the rights to religious freedom by Syiah minority groups in Sampang reached anticlimax after the last attempt of Tajul Muluk through an appeal to the Supreme Court (cassation) was rejected. The reason why the Supreme Court justify the decision of the high court is that Tajul Muluk has spread deviant Islamic teaching, blasphemed Islam, and caused disharmony to internal-Muslim, disturbing people and massive house burning.[26]

II.B. The first level of criminal court mechanism as framework for blasphemy-law application

The police investigator will examine a criminal event based on preliminary evidence and witness to determine applicable offense to the accused. If the investigation has been completed then the police investigator deliver the dossier of the case to the public prosecutor who will draft a bill of indictment to be filled to the competent district court through junior clerk for criminal case. The head of district court afterwards will assign a judge panel which has authority to set the date of trial and detention status of the accused. On the first trial, the public prosecutor will read out the bill of indictment and the accused has the right to file an objection (exception) toward any matters other than the principal aspects of indictment such

organization and relocating Tajul out of Madura.

[17] Ibid. on 16 October 2009, forty peoples from Association of Karang Gayam Santri (student of Islamic boarding school) lead by Munik Sayuti and Muklis Iksam reported Tajul Muluk to Regional Police of Madura for allegation of delivering deviant Islamic teaching.

[18] A special agency of public prosecutor office which has competence to supervise religion or belief alleged as deviance.

[19] The government of Sampang District made a policy to relocate Syiah community that factually as victim of assault.

[20] CMARS' investigation on Sampang case, source: http://www.tribunnews.com/nasional/2012/01/12/hasil-investigasi-smars-atas-pembakaran-ponpes-di-sampang as accessed on 10 December 2015.

[21] Consideration and Decree of the Fatwa of East Java MUI No. Kep-01/SKF-MUI/JTM/I/2012, dated on 21 January 2012 on the Deviance of Syiah Teaching.

[22] The East Java Governor Regulation No.55/2012 on the Development of Religious Activities and Supervision Deviant Religious Sect in the East Java, dated on 23 July 2012.

[23] Decision of Sampang District Court No.69/Pid.B/2012/PN.Spg, dated on 11 July 2012.

[24] Decision of Sampang District Court No.34/Pid.B/2012/PN.Spg, dated on 05 April 2012.

[25] The accident was occurred on 26 August 2012, eight months after the first house burning accident on 29 December 2011. Source: http://www.tempo.co/read/news/2012/08/27/058425697/Kronologi-Penyerangan-Warga-Syiah-di-Sampang.

[26] Decision of Indonesian Supreme Court No.1787 K/PID/2012, dated on 3 January 2013.

as unclear and incomplete offense, expiration of the case, or incompetent court. The public prosecutor has the right to respond the exception or objection filed by the accused or the lawyer in a public prosecutor opinion. After that the judge panel will respond to these objections in an interlocutory judgment which has three possible results, that are: 1) the accused objection will be decided after the examination of evidences and the trial is proceeded, 2) the accused objection is rejected and the trial is proceeded, 3) the accuses objection is sustained therefore the trial terminated and the public prosecutor may submit challenge to the high court. [27]

If there is no objection to the indictment then the trial is going to examine the evidence both from the accused/lawyer and the public prosecutor. The evidence which may be submitted in process of verification includes witness testimony, expert testimony, accused testimony, an indication, and a document. After the judge stated that the examination of evidence is completed it will be continued by: 1) the reading of postponed interlocutory judgment as respond to the objection of the accused to the bill of indictment. If the accused objection is rejected then the trial is proceeded and the accused/lawyer may submit challenge to the high court. If the accused objection or exception is sustained, the trial is terminated and public prosecutor may submit a challenge to the high court, 2) if there is no obligation for a judge to decide an interlocutory judgment then public prosecutor read out the charge. The accused/lawyer will provide a defense toward the charge of public prosecutor (*pledoi*) and afterward the public prosecutor may submit a respond to the *pledoi* which called as *replik.* According to the *replik,* the accused/lawyer may file a respond named *duplik.* There is no limitation on the number of this *replik-duplik* interaction; however, the accused must have the last respond.

The judge panel after examining the evidences and responses from both parties then make a decision which may has three possibilities, that are: 1) *penalty*, if the court believes that an accused is guilty of having committed the offense of which he/she has been accused[28], 2) *acquittal*, if the court is of the opinion that from the results of examination at trial, the guilt of the accused for the acts of which she/he has been accused has not been legally and convincingly proven[29], and 3) *dismissal of all charge*, if the court is of the opinion that the act of which the accused has been accused has been proven, but such acts do not constitute an offense[30].

The parties either the accused/lawyer or the public prosecutor may submit an appeal to the high court over the final decision of the judge panel, and later against the decision of the high court the parties may also submit an appeal of cassation to the supreme court. If the parties have not submitted any appeals for the court decisions, therefore, it become final and binding (*inkracht van gewijsde*) and execution can be carried out by the public prosecutor. A convicted person or his heirs, but not for the public prosecutor, may submit a request to the supreme court for reconsideration with regard to a judgment which has become final and binding, except a judgment of acquittal or the dismissal of all charges[31]. The use of reconsideration mechanism does not preclude the execution of the court decision that has been final and legally binding.

II.C. The judicial logic on blasphemy-law application

[27] The Act No.8/1981 on the Criminal Procedure (KUHAP).
[28] Article 193 (1) of KUHAP.
[29] Article 191 (1) of KUHAP.
[30] Article 191 (2) of KUHAP.
[31] Article 263 (1) of KUHAP.

II.C.1. Judicial process of Tajul Muluk at the district court as the first-level court

On January 3, 2012 Tajul Muluk reported by his own younger brother[32], Roies al-Hukama, to Police Resort (Polres) of Sampang because suspected for doing blasphemy or sacrilege against Islam in the form of[33]:

a. *The addition on the Islamic confession with the phrase "wa-asyahadu anna aliyyan waliyullah, wa-asyahadu anna aliyyan hujatullah";*
b. *The Quran does not currently have original/authentic unless it is brought by the Al-Imam Al Mahdiy Al Muntadhor who are unseen;*[34]
c. *Obligations to consider as infidel to the companions of the Islamic prophet Muhammad, father-in-law, and his wife;*
d. *Mandatory lie or taqiyah;*
e. *Pillars of Islam consist of 8 (eight) elements, namely: As-Sholat, As-Shoum, Az-Zakat, Al-Khumus, Al-Hajj, Amar Ma'ruf Nahi Munkar, Jihad, and Al-Wilayah (obey to the priest (imam), , left hand on the Ahlus Sunnah Wal Jama'ah) ;*
f. *Pillars of faith there are 5 (five), namely: Tawhidullah/Ma'rifatullah, Annubuwah, Al-Imammah, Al-Adl, and Al Ma'aad;*
g. *Justification of suicide for the sake of obedience on the leadership or priests based on the principle of Al-Fidha ' (Liberation, which means to liberate all things owned such as property, soul, and life for adherence to the imam);*
h. *Ar-Roji'ah principle, which means that all people who die someday be revived by Imam Mahdiy before the arrival of the Day of Judgment, and Imam Mahdiy will prosecute or avenge the companions of the Prophet and his followers that Ahli Sunnah wal Jama'ah, just after it humans will die back casually waiting for doomsday arrives.*

Following up on the report and the police then conducted examination on the witnesses who totally in amount of 15 people came from the complainant (Roeis al-Hukama), academics, clergy, and some followers of Tajul Muluk and be complemented by 9 (nine) evidences such as: a letter on Fatwa of MUI of Sampang, a statement letter of PCNU (District Chair of Nahdlatul Ulama) of Sampang, a letter from the prosecutor district office of Sampang, a statement letter of Tajul Muluk, a book titled "have you Sholat?", Audio CD record on Tajul Muluk voice, a book on the understanding of Shi'a, and a book on Amman Message. Based on the report of Roeis al-Hukama and the examination of witnesses and the evidences then the investigator police made accused against Tajul Muluk for having conducted criminal act of "*"... Intentionally issuing sentiment in public sphere or principally conducting any hostile, abuse, or blasphemy activities to any of religion recognized in Indonesia"* as stipulated under Article 156a of the Penal Code or "*unpleasant act*" under Article 335 paragraph (1.1) of the Penal Code which was elaborated subsequently by the police investigator as follow:

[32] Police Report No. LP/03/I/2012, dated on 03 January 2012.
[33] Minutes of Police Investigation on Tajul Muluk by Sampang Police Office, dated on 28 March 2012, Question 18, 5-6.
[34] Ibid. Answer of question 20, 7.

a. *The Islamic teaching of Tajul Muluk which transferred to his followers have caused unrest, disunity and hostility in surrounding communities until an act of burning his house*[35]*;*
b. *Nicknamed "demon, apostate, traitor, devil, and infidel" for his followers when out of his group*[36]*;*
c. *Teaching to curse the companions of the Prophet Muhammad that Abubakar, Usman bin Affan, and Umar bin Khotob because they have betrayed the Prophet Muhammad*[37]*;*
d. *Denying implement the agreement that was made on October 26, 2009 with MUI of Sampang, the NU Chair of Sampang, The chair of Sampang parliament, the ministry of religious affairs of Sampang, the local government of Sampang (Bakesbangpol), and local ulama of Kamalik K. Madjid that contains his readiness to re-embrace the teachings of Sunnah wal Jama'ah and stop disseminating Shi'a teaching*[38]*;*
e. *Ordering for destruction and burning of houses*[39]*;*
f. *Threatening followers if out of the Shi'a teaching*[40]*;*
g. *Teaching to pray according Fafrudin book titled "Have You Sholat"?*[41]*;*
h. *Based on the fatwa of MUI of Sampang dated January 1, 2012 Tajul Muluk has been spreading blasphemy teaching of Islam*[42]*;*
i. *Still running a ritual and religious propagation despite already signing an affidavit not to do it since October 26, 2009, with the reason that it was preceded by the other party in the form of misdirection offense against Shi'a which part of Tajul Muluk requirement to have the commitment*[43]*;*
j. *Often making harsh statements against the community and religious leaders in Sampang*[44].

Tajul Muluk rejected all such supposition against him although he has admitted that he taught Shi'a Islamic teaching on non-formal education to his followers took place at home and small mosque (*mushola*) with overall number of student as many as 150 children[45]. He was also aware that the attacks and burning of his house on December 29, 2011 affected by misunderstanding rooted on the difference of Islamic teaching between him as Shi'a and the attacker as Sunni[46]. In the supposition of religious blasphemy reported by his young brother, Tajul Muluk also reject the truth of all accusations on the grounds that substantially as follows[47]:

a. The confession of Shi'a are the same as the Sunni, i.e. *Asshadualla illahillallah wa ashaduhanna muhammadarroswulallah*[48];
b. The tenets of pillars or of Islam consists of: Syahadat, Sholat, Zakat, Fasting, and Hajj[49]. On another answer Tajul Muluk explains the tenets of Islam consists of: Makrifatullah (two sentences confession),

[35] Ibid.
[36] Ibid. Question 21.
[37] Ibid. Question 22.
[38] Ibid. Question 23, 8.
[39] Ibid. Question 24.
[40] Ibid. Question 25.
[41] Ibid. Question 26.
[42] Ibid. Question 27, 9.
[43] Ibid. Question 28-30.
[44] Ibid. Question 31.
[45] Ibid. Answer of Question 13, 4.
[46] Ibid. Answer of question 8-9.
[47] Ibid. Answer of question 18, 6.
[48] Ibid. Question 16, 5.
[49] Ibid. Answer of question 15, 5.

Prayer/Sholat, Fasting of Ramadlan, Zakat, , Hajj and Jihad (defending religion with soul and treasure)[50];

c. Pillars of faith there are 6, that are :1) the faith in Allah, 2) the faith in angels, 3) the faith in the holy book of Allah, 4) the faith of the prophets, 5) the faith in the day of resurrection, and 6) the faith in fate and destiny. It also explained the faith which includes: 1) Makrifatullah: faith in God, Angels, and the holy book of God, 2) God's Justice (fate and destiny), 3) Prophetic, 4) Imamate (leadership), 5) the day of vengeance[51];

Entering the trial, based on the investigations conducted by the police and then the public prosecutor drafted a bill of indictment against Tajul Muluk as perpetrator of blasphemy and unpleasant act respectively in accordance with Article 156a and 335 of the Penal Code which can be described as below:[52]

a. The first indictment (based on article 156a of the Penal Code):

(i) On the days and dates that cannot be determined with certainty between the years 2003 until 29 January 2011, or at least at other times between the years 2003 until 2011 located in the village of Karang Gayam, Sub-district of Omben, Sampang District, and in the hamlet of Kampung Geding Laok, Blu'uran Village, Karang Penang Sub-district, Sampang District, or at the place under the jurisdiction of Sampang District Court, deliberately in public expressed a feeling or committed any act which principally have the character of hostility, abuse or blasphemy a religion adhered in Indonesia, with the intention to prevent a person to adhere any religion based on the belief of the almighty God.

(ii) *In essence, starting in 1998 the accused, Tajul Muluk, return from Islamic Boarding School of YAPI in Bangil then continued to study in Saudi Arabia for 6 (six) months, then in 2003 the accused began to apply his teachings in a way to recruit some students who previously had been already students at Islamic boarding school nearby, then the students who become followers of the accused and the public began to suspect the Islamic teachings delivered by the accused to his students, which the teachings delivered by the accused there existed principal deviation of which was able to generate pro-and-contra in Muslim society commonly, in delivering his teachings the accused used a vulgar method and harsh language and also challenging other Islamic groups outside his community, the accused's teachings that have been delivered to his students one of them considers that the holy Quran which is in the hands of the Muslims currently considered inauthentic or not original with termed "aqiedah tahrif Quran" and the original version is being carried by Al Imam Al Mahdiy Al Muntadhor invisibly. As well as other teachings which are considered as incompatible or in conflict with the teachings of Islam in general.*

b. The second indictment (based on article 335 (1.1) of the Penal Code)

(i) *On the days and dates that cannot be determined with certainty between the years 2003 until 29 January 2011, or at least at other times between the years 2003 until 2011 located in the village of Karang Gayam, Sub-district of Omben, Sampang District, and in the hamlet of Kampung Geding Laok, Blu'uran Village, Karang Penang Sub-district, Sampang District, or at the place under the jurisdiction*

[50] Ibid. Answer of question 34, 11.
[51] Ibid. Answer of question 35, 11.
[52] The Charge of Public Prosecutor, Sampang Public Prosecutor Office, No. Reg. Perk: PDM-34/SAMPG/04/2012, dated on 4 July 2012, 1-3.

of Sampang District Court,unlawfully forces another by force, by any other battery or by an offensive treatment or by threat of force, of any other battery, or also of an offensive treatment, aimed either against the other person or against a third party, to do, to omit or to tolerate something.

(ii) *In essence, starting in 1998 the accused, Tajul Muluk, return from Islamic Boarding School of YAPI in Bangil then continued to study in Saudi Arabia for 6 (six) months, then in 2003 the accused began to apply his teachings in a way to recruit some students who previously had been already students at Islamic boarding school nearby, then the students who become followers of the accused and the public began to suspect the Islamic teachings delivered by the accused to his students, which the teachings delivered by the accused there existed principal deviation of which was able to generate pro-and-contra in Muslim society commonly, in delivering his teachings the accused used a vulgar method and harsh language and also challenging other Islamic groups outside his community, the accused's teachings that have been delivered to his students one of them considers that the holy Quran which is in the hands of the Muslims currently considered inauthentic or not original with termed "aqiedah tahrif Quran" and the original version is being carried by Al Imam Al Mahdiy Al Muntadhor invisibly. As well as other teachings which are considered as incompatible or in conflict with the teachings of Islam in general.*

The second indictment arranged alternately and after the examination of evidences the public prosecutor eventually only make indictment based on article 156a of the Penal Code since it was considered to have a stronger evidentiary aspects. Finally, the indictment of the public

a. *The accused, Tajul Muluk, has been proven legally and convincingly guilty of committing criminal offense of blasphemy in Islam in accordance with the first indictment on violating Article 156a of the Penal Code;*
b. *Sentence the accused, Tajul Muluk, with imprisonment for 4 (four) years and to be reduced during the accused is in temporary detention, and order the accused remain in detention.*

The prosecution was enclosed by exactly the same evidences as used by the police investigator which consisted of: a letter on Fatwa of MUI of Sampang, a statement letter of PCNU (District Chair of Nahdlatul Ulama) of Sampang, a letter from the prosecutor district office of Sampang, a statement letter of Tajul Muluk, a book titled "have you Sholat?", Audio CD record on Tajul Muluk voice, a book on the understanding of Shi'a, and a book on Amman Message.[53]

In respond to the prosecution, Tajul Muluk read his own defense (*pledoi*) in the 13th session of trial on 9 July 2012 which substantially claimed that:[54]

a. The need for internal unity in Muslims by avoiding the excessive fanaticism;[55]
b. Acceptance of the community to his teaching is not instantly but through a long process of engagement in solving the social problems of the community;[56]

[53] Ibid. 52.
[54] The defense of Tajul Muluk against the charge of public prosecutor, published as a book of: *Quod Revelatum: Pledoi Ust. Tadjul Muluk Demi Mengungkap Kebohongan Fakta. CMARS (Center for Marginalized Communities Studies), Surabaya, 2013.*
[55] Ibid. 19-22.
[56] Ibid. 23-25.

c. The allegation of deviant Islamic teachings as he has taught which states that Imam Ali was the Prophet and the unauthenticity of current al-Quran was purposely spread by those who hate him and to influence and disturbing the public outside of his community;[57]
d. The insistence of people to Tajul Muluk for leaving the Shi'a and stop teaching activities was conducted in intimidated way included when signing the statement letter;[58]
e. The join of Roeis al Hukama in 2009 to the community who opposed Tajul Muluk was motivated by his failure to propose Halimah, daughter of Mat Badri, due to the role of Tajul Muluk who mediated in advance to propose Halimah in the name of Dulasit. Afterwards, Roeis al-Hukama increasingly was very active to discredit Tajul Muluk and Shi'a;[59]
f. On October 26, 2009 Tajul Muluk signed an agreement with the State Monitoring Agency to Community Belief (Bakorpakem), the Ulama Council of Sampang (MUI), the Branch Chairman of Nahdlatul Ulama of Sampang (PCNU), and NGO and witnessed by Resort Police of Sampang, district government of Sampang, and military officer about:

1) Termination on Tajul Muluk activities in relation to Shi'a's ritual and teaching propagation because of troubling the community;
2) Stop conducting ritual, preaching, and spreading Shi'a teaching in the area of Sampang District;
3) If keep conducting such ritual, preaching and spreading Shi'a teaching then ready to be processed according to applicable law;
4) The Pakem, MUI, NU, and NGO are ready to quell turmoil society which in the form of either anarchist or dialogic as far as Tajul Muluk obey the agreement on the points of (1) and (2).

Tajul Muluk, as additional point to the letter of statement and also as part of the willingness to sign, required the other group or community to stop also any statements on the deviance of Shi'a. Tajul Muluk was willing to sign the letter of statement but then he lamented that after the agreement there were still such statements that discredit Shi'a[60];

g. The three times takbir (Allah is Great) after the prayers in the Shiite doctrine is to follow the Sunnah of the Prophet Muhammad according to Sahih Bukhari on the Chapter of dzhikr after the prayer as oppose to what has been alleged by Roeis al-Hukama which the three times takbir are aimed to curse companions of the Prophet Muhammad who are Abu Bakr as-Siddiq, Umar, and Uthman bin Affan;[61]
h. The holy Qur'an used practically by Tajul Muluk in everyday life and teaching is no different from the holy Qur'an used by Sunni Muslims in Indonesia;[62]
i. The additional phrase on the Islamic confession (*syahadat*) which is formulated as "*Wa'asyhadu anna aliyan waliyullah, anna wasyhadu aliyan hujatullah*" is not a form of unification to the confession but remain separate and used only as an attempt to recall memory on the curse of Ali ibn Abi Thalib by Mu'aawiyah Ibn Abu Sufyan;[63]

[57] Ibid. 25-26.
[58] Ibid. 27-28.
[59] Ibid. 37-39.
[60] Ibid. 49-50, 82.
[61] Ibid. 49-50.
[62] Ibid. 51.
[63] Ibid. 51-54.

j. Taqiyah that is alleged as Shi'a or Tajul Muluk teachings which obliges to lie against Sunni Muslims is actually false and if exists just limited to be a strategy for justified self-defense or property protection based on the Qur'an: An-Nahl-106;[64]
k. The Shi'a teaching on the twelve imams (Imamate) is based on the stipulation of the Quran and Hadith;[65]
l. The fact that there has been pro-and-contra in relation to his Shi'a teaching, Tajul Muluk views as a consequence of truth principles which may collide with other values in society alike experienced by the prophet of Muhammad SAW.[66]

Based on the Article 184 (1.e.) of the Act of Criminal Procedure, the defense of the accused above is considered as one of the court evidences.

After the judge panel of Sampang district court having finished to examine 38 witnesses that consist of 10 incriminating witnesses, 18 exonerating witnesses, 6 experts from the public prosecutor, and 4 experts from the accused; then at the 14th hearing of the trial the court issued a decision as below:[67]

1. *The accused, Tajul Muluk alias H. Ali Murtadha, is proven legally and convincingly guilty of committing a criminal offence "committed the act of substantially blasphemy against Islam"*
2. *Imposing a penalty against the accused for 2 (two) years imprisonment;*
3. *Stipulating that a period of detention already served by the accused deducted entirely from the imprisonment imposed.*
4. *Stipulating that the accused remain under detention;*
5. *Ordered that the evidence remains attached to the dossier of the case;*
6. *Bearing the expense of the case to the accused in mount of IDR 5,000 (five thousand rupiah).*

II. C. 2. Judicial processes of Tajul Muluk at the high court as the second-level court

Against the ruling of the first-level court, Tajul Muluk filed appeal to the High Court of Surabaya based on the reasons as follow:[68]

a. The judge panel of the first-level court in applying Article 156a of the Penal Code disregarded the purposes, basic, and interpretation on the basis of the Act No.1/PNPS/1965 specifically about the administrative procedure as regulated through a joint ministerial decree (interior minister, religious affair minister, and attorney general) before applying criminal mechanism;
b. The judge panel of the first-level court was incorrect in judging the facts about:
1. *Incriminating witnesses were not credible and using opinion based on imagination;*
2. *Rejecting exonerating witnesses without clear and strong legal argument;*
3. *Rejecting accused evidence on the Qur'an without providing contrary evidence;*

c. Legal consideration of the judge panel of the first court was contradictory or conflicting;
d. The judge panel of the first court incorrectly applied the law, namely:
1. *The decision was inconsistent to the bill of indictment;*

[64] Ibid. 54-56.
[65] Ibid. 56-75.
[66] Ibid. 77-78.
[67] Decision of Sampang District Court, No: 69/Pid.B/2012/PN.Spg, dated on 12 July 2012, 93.
[68] Decision of Surabaya High Court, No: 481/PID/2012/PT.SBY, dated on 10 September 2012

2. *Applying inappropriately Article 1 Paragraph 26 jo. Article 185 Paragraph 4 of the Criminal Procedure Act;*
3. *Removing or changing testimony of the witnesses;*
4. *Applying inappropriately Article 185 (6.d) of the Criminal Procedure Act.*

The Surabaya High Court rejected the appeal of Tajul Muluk with by the following reasons:[69]

a. *Justifying the rule of the first instance court which disregard the application of a joint ministerial decree, and it has been in accordance with the Act No.1/PNPS/1965 due to the act of the accused has matched to the elements of the first indictment;*
b. *The judge panel of the first court has considered the valid testimony of the witnesses and disregard the invalid ones;*
c. *It is not true that the first court has removed or changed testimony of the witnesses. The lawyer of the accused has made argument merely based on their own witnesses meanwhile the judge panel of the first court make judgment based on the facts as heard in the trial comprehensively;*
d. *It is not true that true that the judge panel in the first court have not applied appropriately Article 185 (6.d) of the Criminal Procedure Act. The judge panel has considered witnesses testimony in accordance with the stipulation of Article 185 (6) of the Criminal Procedural Act as described in the page 89 of the decision.*

Due to the rejection of the appeal, the Surabaya High Court upheld the decision of the first court and imposed heavier penalty to become 4 (four) years imprisonment like concluded in the following decision:[70]

a. *The accused, Tajul Muluk alias H. Ali Murtadha, is proven legally and convincingly guilty of committing a criminal offence "committed the act of substantially blasphemy against Islam"*
b. *Imposing a penalty against the accused for 4 (four) years imprisonment;*
c. *Stipulating that a period of detention already served by the accused deducted entirely from the imprisonment imposed.*
d. *Stipulating that the accused remain under detention;*
e. *Ordered that the evidence remains attached to the dossier of the case;*
f. *Bearing the expense of the case to the accused in mount of IDR 5,000 (five thousand rupiah).*

The Surabaya High Court in imposing heavier penalty compared to the Sampang District Court was based on the following reasons:[71]

a. *The penalty imposed by the district court is trivial therefore it will be just if the high court over the appeal make heavier penalty;*
b. *A penalty imposed to an accused not only educate to themselves, but aslo as model for other people in order not to do the same crime;*
c. *Activities of the accused has caused disharmony among the Muslims and made trouble in society and sparked social turmoil which led to the house burning massively.*

[69] Ibid.
[70] Ibid.
[71] Ibid.

II. C. 3. The Supreme Court and Constitutional Court position on Tajul Muluk case

Tajul Muluk challenge the decisions of higher court by submitting appeal to the Supreme Court (*cassation*) based on the following arguments:[72]

a. *There exists contradictory legal consideration at the decisions of the first-level court and the second-level court in relation to the judgment of taqiyah where in one side it is considered to be justified lie; but on the other side taqiyah was applied by the judge as basis to disregard testimony of the exonerating witnesses;*[73]

b. *The judge panel applied the law inappropriately and incorrectly in concern of these issues:*[74]

1) Concluding the decision irrelevant to the indictment of the prosecutor in relation to the application of Article 156a which change the character of "in public" from cumulative to become alternative without explaining specifically "in public" as part of "committing blasphemy against a religion adhered to in Indonesia". Therefore, the judge has violated Article 1 Paragraph (26) Jo. Article 185 Paragraph (4) of the Criminal Procedural Act;

2) The court still considered unreliable testimonies coming from the witnesses of Roeis al-Hukama, Muhammad Nur Asmawi, Ummu Kulsum, and Munai as valid evidences to judge allegation that Tajul Muluk has taught that the Quran currently is not authentic. The testimonies are considered to be unreliable due to their source which based on opinion, assumption, and has been modified/engineered, hence, the judge has failed to apply Article 1 (26) Jo. Article 185 (4) of the Criminal Procedure Act.

3) The judges has removed or changed testimonies of the witnesses concerning:

1. *The decision No. 96/Pid. B/2012/PN.Spg of the Sampang District Court includes testimony of Roeis al Hukama, namely "that the witness did not follow the teachings of the accused because it is not in accordance with the Quran and the Sunnah of the Prophet, and the Qur'an currently is not authentic or aqeedah tahrief, and the Qur'an has been already changed by the companion of the Prophet, while the original Qu'an is being kept already changed by the companions of the Prophet, the Quran while the original is being carried by Al Imam Al Mahdi Al Muntadhar invisibly". Such testimony has actually reduced the quality of fact used by the court due to the additional testimony of Roeis which stated that "...the explanation on the fact will come afterwards from the eyewitness on the field. Ustadz Nur as a deputy of Tajul Muluk was teaching at that time. The explanation could be found there and other witnesses". Such removed information actually was relevant to judge the credibility of the witness (Roeis al-Hukama).*
2. *The decision No. 96/Pid. B/2012/PN.Spg of the Sampang District Court includes testimony of Muhammad Nur Asmawi, namely "...when the witness quitting as follower the accused call him for 15 (fifteen) minutes and angrily nicknamed him as apostate and infidel which witnessed by Roeis". In fact, before the trial Muhammad Nur Asmawi explained that after quitting as follower the accused call him for 15 (fifteen) minutes and angrily nicknamed him as apostate and infidel which witnessed by Hozeri. Hozeri before the trial session have already rejected the testimony of Muhammad Nur Asmawi;*

[72] Decision of Indonesia Supreme Court, No: 1787 K/Pid/2012, dated on 3 January 2013.
[73] Ibid. 13-14.
[74] Ibid. 26.

3. *The decision No. 96/Pid. B/2012/PN.Spg of the Sampang District Court includes testimony of Ummu Kulsum, namely "The accused stated that the Sunni teaching was not valid, there have been modification on the Qur'an and prophet history by the companion". In fact, during the trial session Ummu Kulsum testified that she have heard through Bu Hani that the Qur'an currently was not authentic and the original Qur'an will be delivered by Imam Mahdi. The witness of Ummu Kulsum provide testimony based on testimony of Bu Hani and not directly coming from the accused.*
4. *The decision No. 96/Pid. B/2012/PN.Spg of the Sampang District Court includes testimony of Munai, namely "...the Accused on Monday night 16, the month of Rasul, said that the Qur'an currently is not authentic because the original one is still being kept inside a cave by Imam Mahdi". Munai before the trial session testified that he heard such statement in a religious speech by the accused from behind the fence of Sunadi's house. However, the Munai's testimony was in contradiction to the testimony of Sunadi and Mukaman which confirmed that there is no any fences in Sunadi's house.*

4) *The judge panel did not apply the Article 185 (6.d) of the Criminal Procedure Act which requires the judge in the examining of the witness to:*

1. *The consistency between the testimony of one witness with that of another;*
2. *The consistency between the testimony of a witness with another means of evidence;*
3. *The reason which could possibly have been used by a witness to testify in a certain way;*
4. *The way of life and the morality of a witness and any and all matters which normally may influence whether or not testimony can be trusted.*
5. *The description at point 3.1-4 shows that the judge still consider testimony coming from incredible witness which such incredibility based on trial session.*

e. *The judge panel of the high court did not consider the accused's appeal brief about inconsistency of the district court in concluding decision to the bill of indictment.*
f. *The high court has been inappropriately imposing additional imprisonment based on the argument that the accused's deeds have caused disharmony among the Muslims, troubling society especially Muslim community in Omben, Karang Penang, Sampang, and have also led to the house burning massively. Based on the facts, the burnt houses actually belonged to Tajul Muluk and his community members. That has been in contradictory to the principle of causality in criminal law and common logic.*

The Supreme Court in responding to the appeal of the accused provide arguments as below:

a. *The argument of the accused is invalid due to the high court has been appropriately applied the law and considered the evidences as the basis for imposing the penalty as follow: :*

1) *There has been activities of the accused in mushola and mosque in the area of Banyuarum, Sampang district for teaching different Islam in term of: (1). The 5 pillars of faith i.e. Tawhidullah/Ma'rifatullah, Annubuwwah (prophetic), Al-Immamah (leadership), Al-Adli (the God justice), Al-Ma'aad (judgment day); and the 8 pillars of Islam i.e. As-Sholat (praying), As-Shoum (fasting), Az-Zakat, Al-Khumus, Al-Hajj, Amar Ma'ruf Nahi Munkar, Jihad and Al-Wilayah; (2). The Qur-an currently is inauthentic; and*

the Fatwa of Ulama Council of Sampang No. A-035/MUI/Spg/I/2012, dated 1 January 2012 and the Statement Letter of the Sampang NU Chair (PCNU) No. 255/EC/A.2/L-36/I2012 dated 2 January 2012 have declared that the aforementioned Islamic teaching delivered by the accused is deviant and blasphemy which causes trouble in society;

2) *Factually the religious teaching spread by the accused has caused diharmony among the Muslims, troubling society and triggered house burning massively.*

b. *The examination on the factual evidence is not jurisdiction of the Supreme Court which only limited to the matters of: 1) Not applying the relevant law 2) Applying the law inappropriately, 3) The procedural law is not applied, and 4) whether the court has exceeded the limits of its competence. This argument is based on the Article 253 of the Act No.8/1981 on Criminal Procedure*

c. *Based on the aforementioned consideration then the decision of the high court is not in contradiction to the law and/or act, and therefore the appeal of cassation of the accused should be rejected.*

Finally the Supreme Court decided to reject the appeal of cassation of Tajul Muluk.

Tajul Muluk then concludes that the judicial application on blasphemy law has violated his constitutional right, therefore, he file a constitutional review on the Article 156a of the Penal Code jo. Article 4 of the Act No.1/PNPS/1965 to the Constitutional Court since the articles have been in contradiction to the Artice 28D (1) of the Indonesian Constitution which states that "*Everyone has the right to legal recognition, legal guarantee, legal protection, just legal-certainty and equal treatment before the law*". The deprivation of his constitutional rights could be specifically explained as follows:[75]

a. *There is no clear limitation and explanation on "in public";*

b. *There is no legal certainty on the meaning, parameter, and limitation on the phrases of "hostility", "misuse", or "blasphemy" to a certain religion;*

c. *There is no clear state institution or other body which has competence to asses or become reference in examining the belief or act of a person or group is deviant*

The constitutional court finally rules the case by rejecting the complaint of Tajul Muluk based on the argument that:[76]

a. *The Act No.1/PNPS/1965 is actually imperfect law; however, it is still demanded and valid unless the establishment of its successor. Revoking the Act currently seems very frightened for causing religious blasphemy which may trigger community conflict;*

b. *The phrase of "in public" has been explained in the elucidation of the Article 1 of the Act No.1/PNPS/1965 that is "By the phrase of "in public" means what have been generally understood by such phrase in the Penal Code...". The Penal Code defines the phrase of "in public" as of "a place that was visited by the public or where the public can hear", "in a public place and there are many people/public" and "in place of the public can see it";*

[75] Decision of Indonesia Constitutional Court, No: 84/PUU-X/2012, dated on 9 April 2012, Par. 2.1.C
[76] Ibid. Par. 3.12-3.17

c. *The competence in examining whether anyone's conduct has met the character of "hostility" or "blasphemy" is fallen into the authority of competent public-judicial-judge, and the imposed decision is realization of the judge's consideration in providing justice based on the characteristic of each case;*
d. *Every religion has its own principle teaching which applied generally to its internal religion, therefore, the only each religion internally could determine what should be the principle teaching of such religion. The ministry of religion will serves and protect the well development of religion and by its organization and other resources make it possible to compile various opinion or interpretation of each internal religion. The State is not autonomously determine the principle teaching of a religion but simply by virtue of agreement among such internal religion.*

III. Discussion

III.A. Structural collaboration in demarcating blasphemy as exclusionary standard for minority

All judicial levels without any contentious arguments have agreed to conclude that Tajul Muluk has violated the law in the form of "*...committing the act of substantially blasphemy against Islam..."* and sent him to the jail for 4 (four) years imprisonment. If the penalty is reconstructed and integrated to its legal basis which is the Article 156a of the Penal Code then then elaborative formula of crime against religion applied to Tajul Muluk could be described as below:

a. *Tajul Muluk is sentenced for 4 (four) years imprisonment for intentionally in public expressing sentiment which principally characterized as blasphemy against Islam; or*
b. *Tajul Muluk is sentenced for 4 (four) years imprisonment for intentionally in public performing certain acts which principally as blasphemy against Islam.*

In the all levels of judicial processes, the aspects of "*in public*", "*expressing sentiment*" and "*performing certain acts*" have become less contentious in comparison to the phrase of "*blasphemy against Islam*". The Penal Code and The Act No.1/PNPS/1965 don't provide further explanation or elucidation on the category of "*blasphemy*" and only classify its intentional aspect of "*...merely intended to hostile or insult."* The limited explanation on "*blasphemy*" which may become general category to classify *"expression"* or *"act"* whether as part of blasphemy or not to a certain religion has caused the determination of blasphemy fall into the authority of the judge based on the evidence contested by the parties before the trial.

Following the criminal procedure then the legal construction of a blasphemy case in the very beginning will be determined by the police investigator and public prosecutor. They are the first judicial apparatus who bear competence to investigate, qualify, and determine applicable law to a case including to collect initial evidences and witnesses. The conception or understanding of the police or prosecutor on blasphemy law at least will be reflected on the indictment as the result of investigation where in the case of Tajul Muluk such indictment conceptualized as follows: :

"...the public began to suspect Islamic teachings delivered by the accused to his students, which the teachings delivered by the accused there existed principal deviation of which was able to generate pro-and-contra in the Muslim society commonly, in delivering his teachings the accused used a vulgar method and harsh language and also challenging other Islamic groups outside his community, the accused's teachings that have been delivered to his students one of them considers that the holy Quran which is in

the hands of the Muslims currently considered inauthentic or not original with termed "aqiedah tahrif Quran" and the original version is being carried by Al Imam Al Mahdiy Al Muntadhor invisibly. As well as other teachings which are considered as incompatible or in conflict with the teachings of Islam in general."[77]

Referring to the structure of aforesaid indictment, the general criteria for any conduct considered as blasphemy against a religion could be conceptualized as follows:

1. There has been understanding and teaching on certain religious values which transferred publicly to other people more than just for self-understanding; Understanding on religious teaching;
2. The aforementioned religious teaching principally is different or deviant from general understanding on the same religion i.e. Islam in the case of Tajul Muluk;
3. The use of confrontational method in delivering religious teaching toward well established or mainstream religious teaching;
4. Proposing challenge, criticism or at least questioning the validity of sacred religious standard such as the holy book, etc.

The general criteria is very applicable and effective based on the fact that such indictment on the blasphemy against Islam practically is accepted, validated and upheld by the judge at the whole court levels. Consequently the case of Tajul Muluk will imprint the demarcation on blasphemy as result of judicial activities under criminal justice system which also to some extent involve community role and participation. The tracing on judicial interaction among the parties may contribute also to reveal the degree of independency and impartiality of the court in adjudicating a case that is related to a religious social-conflict which involves religious minority group.

Tracing on the judge references to draw the demarcation of religious blasphemy in relation to the general criteria could be read on the consideration of the first-level court decision that consists of bellow:[78]

1. Based on the evidences of witness' testimonies and documents the court concludes that the accused has delivered teaching in contradiction to the mainstream Islamic teaching. The referred documents as the basis for the court decision in relation to the deviant of the teaching are as follow[79]:

a. *The Fatwa of MUI of Sampang No.: A-035/MUI/Spg/ I/2012, dated on the 1st January 2012 on the deviance and blasphemy against Islam of the Islamic teaching delivered publicly by Tajul Muluk in Karang Gayam, Omben, Sampang. The one of the teaching is on the unauthenticity of current Qur'an;*
b. *The letter of statement issued by the Chief of Nahdlatul Ulama Sampang Branch (PCNU), No.:255/EC/A.2/L-36/I/2012, dated on the 2nd January 2012 which stated on on the deviance and blasphemy against Islam of the Islamic teaching delivered publicly by Tajul Muluk and caused public annoyance, and the organization supporting the Fatwa of MUI of Sampang dated on the 1st January 2012;*
c. *The letter of statement signed by the accused dated on 26 October 2009 which stated that the accused agreed to stop practicing, spreading and educating on Shi'a Islamic teaching in the area of Sampang*

[77] The Charge of Public Prosecutor, Sampang Public Prosecutor Office, Loc. Cit.
[78] Decision of Sampang District Court, Op. Cit. 93.
[79] Ibid. 90-91.

in order to address public annoyance. The failure to meet the agreement will cause the implementation of legal enforcement toward the accused.

d. *The additional item on the letter of statement dated on 26 October 2009 which confirmed that the obedience to the agreement by Tajul Muluk required also the absence of the statement on the deviance of Syiah.*

2. The judge convinces strongly to the evidence that there has been Islamic teaching delivered by the accused which claim on the inauthenticity of the current Quran as holly book for Muslim. The kind of activities are considered by the judge as degrading, defiling, and corrupting the great of Qur'an as holly book and symbol of Islam as important as the existence of the God and the Prophet. Therefor, the accused has committed blasphemy against Islam.

In consistent with the evidences used as the basis of decision, the determination of demarcation on "*...deviating to the mainstream of religious teaching...*"[80] substantively does not refer to a general law and regulation established by any state institution but to local religious organization *in case* the fatwa of MUI of Sampang which in its "*attention*" consideration consist of these points:[81]

"The Council of Indonesian Ulama of Sampang in its meeting on 8 Shafar 1433 H/ 1 January 2012 M, since:

In the attention of:

1. *The report on public annoyance as a result of teaching delivered by Tajul Muluk, a resident of Karang Gayam, Omben, Sampang;*
2. *The teaching delivered by Tajul Muluk theologically caused many peoples became adherent to deviant Islam;*
3. *Based on the testimonies of ex-followers of Tajul Muluk teaching which indicated that the teaching has deviated from Islam based on the facts as bellow:*

a. *Believing to 12 Imam and their utterance as revelation;*
b. *The current Al-Quran is not the original version;*
c. *Cursing the companion of the Prophet Muhammad SAW: Abu Bakar, Umar, and Usman;*
d. *The Friday prayer as not an obligation;*
e. *Pilgrimage (hajj) should not go to the Mecca, but Karbala;*
f. *The mut'ah marriage as a Sunnah (recommended);*
g. *The only obedient to 12 imam and in opposition to their adversaries;*
h. *The prayers are only in 3 times;*
i. *The aurat (the area of body should be covered) is only the genital;*
j. *The praying of taraweh, dluha, and asyuro are haram (forbidden/illegitimate).*

The content characteristic of the fatwa seems tend to proof that there has been a religious teaching (*Shi'a*) of a person (*Tajul Muluk*) which deviate to mainstream religious teaching (*Islam*) adhered by

[80] Article 1 of the Act No.1/PNPS/1965 on the Prevention of Misuse and/or Blasphemy of Religion.

[81] Fatwa of Sampang MUI No: A-035/MUI/Spg/ I/2012, dated on 1 January 2012 on the Islamic Teaching Delivered by Tajul Muluk in Omben, which declares that: 1. Islamic teaching delivered by Tajul Muluk is deviance and misleading; 2. Islamic teaching spread by Tajul Muluk is religious blasphemy against Islam; 3. Perpetrator of the teaching should be brought before the court based on applicable law.

majority (*Sunni*), and taught or delivered to other person (*follower or other community member*) which have caused controversy and annoyance in society (*Sunni*). The structure of the Fatwa's consideration is like to replicate the structure of religious blasphemy or deviant criteria under the Article 156a of the Penal Code. The availability of such criteria under the Fatwa of MUI complete the lack of state law in providing operative standard to adjudicate a blasphemy case.

Chronologically and substantially the involvement of social organization or non-state actor in the establishment of blasphemy criteria was reflected on the fact that two days after the issuance of the Fatwa then Tajul Muluk was reported to the police by his young brother, Roeis al-Hukama, for the allegation of committing blasphemy against Islam in forms of as follow:[82]

a. *The addition on the Islamic confession with the phrase "wa-asyahadu anna aliyyan waliyullah, wa-asyahadu anna aliyyan hujatullah";*
b. *The Quran does not currently have original/authentic unless it is brought by the Al-Imam Al Mahdiy Al Muntadhor who are unseen;*[83]
c. *Obligations to consider as infidel to the companions of the Islamic prophet Muhammad, father-in-law, and his wife;*
d. *Mandatory lie or taqiyah;*
e. *Pillars of Islam consist of 8 (eight) elements, namely: As-Sholat, As-Shoum, Az-Zakat, Al-Khumus, Al-Hajj, Amar Ma'ruf Nahi Munkar, Jihad, and Al-Wilayah (obey to the priest (imam), , left hand on the Ahlus Sunnah Wal Jama'ah) ;*
f. *Pillars of faith there are 5 (five), namely: Tawhidullah/Ma'rifatullah, Annubuwah, Al-Imammah, Al-Adl, and Al Ma'aad;*
g. *Justification of suicide for the sake of obedience on the leadership or priests based on the principle of Al-Fidha ' (Liberation, which means to liberate all things owned such as property, soul, and life for adherence to the imam);*
h. *Ar-Roji'ah principle, which means that all people who die someday be revived by Imam Mahdiy before the arrival of the Day of Judgment, and Imam Mahdiy will prosecute or avenge the companions of the Prophet and his followers that Ahli Sunnah wal Jama'ah, just after it humans will die back casually waiting for doomsday arrives.*

In the substance there has been mutually reinforcing relationship between the Fatwa and the Roeis' report to allegate Tajul Muluk for committing blasphemy against Islam.

It is clear that when the state implement criminal law on blasphemy by the reason of preventing social conflict and protecting the right to freedom of religion so that simultaneously there will arise a need the presence of general criteria on religious blasphemy. When the Indonesian law has not a specific official religion which already categorized general standard of religious teaching, therefore, the criminal justice system materially will experience the lack of norm that make the judge look for it in the living law on social practices. Thus, there is empty space on this situation for social institution or other non-state actors to involve in competition for determining general criteria on religious blasphemy which the process or

[82] Minutes of Police Investigation on Tajul Muluk by Sampang Police Office, dated on 28 March 2012
[83] Ibid. Answer of question 20, 7.

outcome could be discriminatory and bias to power relationship. The state in one hand should accommodate religious participation of society and not interfere deeply in the determination of religious standard which merely the domain of religious institution; however, on the other hand the inclusion of blasphemy as a crime in the criminal justice system requires the judicial institutions to take part in interfering religious life through legal application by the court.

The dilemma of state intervention in religious life has increased the chance of indirect discrimination to religious minority group which in social structure has least access to participate and influence the establishment of general standard on blasphemy against religion by social religious institution such as MUI which has strong recognition and support from the state. If the general standard application of judiciary has biased on social power-relation as consequence of state policy so that the output as a court rule automatically will strengthen the spirit of discriminatory majority-exceptionalism and oppressive to the interest of minority group.

The cessation of violent social hostility actually has been achieved after the imprisonment of Tajul Muluk. The protection of majority interests formulated as public order and religious right protection is the priority when dealing with a blasphemy against religion allegedly committed by a member of minority group as reflected on the consideration of the Surabaya High Court when enhanced the penalty of Tajul Muluk. The criteria and evidence used by the Fatwa of MUI are not also examined carefully and elaborately by the court to seek for the material truth under the framework of human rights and justice. The building of peace facilitated by the application of Article 156a of the Penal Code is preferred more than taking it balance to the aspect of human rights and justice and also as impact of the rigidity of the court in applying criminal law and excluding to consider the existence of administrative mechanism. This situation has become the biggest challenge and alert in addressing the case of religious blasphemy especially in relation to the involvement of judiciary which should be independent and impartial based on the rule of law principles[84] such as[85] supremacy of law, equality before the law, due process of law, independent administrative organ, independent and impartial court, the existence of administrative court and constitutional court, human rights protection, democracy, welfare of the state, and transparency and social control.

The establishment of the Act on Criminal Procedure actually is aimed to protect people rights when dealing with the application of criminal law by the state as explained on the its elucidation as follow:
"The 1945 Constitution has explained clearly that the Indonesian state is based on the rule of law (rechtsstaat), not merely based on power (machtsstaat). It means that the Republic of Indonesia is a democratic state based on Pancasila and the 1945 Constitution, highly promoting human rights and guarantying that every citizen is equal before the law and government with the obligation to obey the law and the government without exception. It is clear that the appreciation, implementation, and application of human rights or citizen right and duty to enforce the justice should not be abandoned by every citizen, state official, state institution both in central or regional level, that should be also realized in-and-by this Act of Criminal Procedure."

[84] Article 1 (3) of the 1945 Constitution
[85] Jimly Asshiddiqie, **Konstitusi & Konstitusionalisme Indonesia**, Revised Edition, , Konstitusi Press, Jakarta, 2005, 151-162.

Therefore, the application of the Article 156a of the Penal Code should be also framed under the intention of protecting human rights and achieving justice instead of using legal loophole to support personal, primordial, and religious-affiliation interests.

III.B. The dilemma of blasphemy-law application as a common standard for religious conflict settlement

III.B.1. The abandontment of administrative mechanism in favour of criminal procedure

The application of Article 156a of the Penal Code on Tajul Muluk case has disregarded the formal requirement on the issuance of a joint ministerial decree as the first step before applying criminal mechanism as stipulated under Article 3 of the Act No.1/PNPS/1965 which states that:

"If, after jointly the Minister of Religion, the General Attorney, and the Minister of Home Affairs have taken (administrative) action in regards to Article 2 for a person, organization or a belief, and they are still committing violation against Article 1, therefore, the person, follower, member and/or the leader of relevant organization will be convicted for maximally 5 years imprisonment."

When an activity assumed as religious blasphemy has already existed then the Article 3 prioritizes administrative mechanism rather than criminal justice processes through the issuance of a ministerial joint decree by the Minister of Religion, the General Attorney, and the Minister of Home Affairs, as a warning letter or stern warning in order to pause such activity for further investigation or changes according to the findings or settlement. If the alleged actor is an organization so the administrative sanction against disobedience maximally could be dissolution by a presidential decree. The application of Article 4 of the Act No.1/PNPS/1965 (as the Article 156a of the Penal Code) as part of criminal mechanism is kind of *ultimum remedium* as the last effort after the failure of administrative mechanism in addressing an alleged religious-blasphemy activity.

In Tajul Muluk case, there has been no kind of a joint ministerial decree in advance of the report to the police. However, the criminal justice process was still sustained based on the application of Article 156a of the Penal Code and the Act of Criminal Procedure which indeed do not require such a joint ministerial decree. The negligence of formal requirement to apply Article 156a is referred to the argument of the expert from the public prosecutor as follows:[86]

"*...the act of the accused, Tajul Muluk alias Haji Ali Murtadha has complied the elements of Article 156a of the Penal Code, however, if the case has not complied with the formal requirement which is a joint ministerial decree by the Minister of Religion, the General Attorney, and the Minister of Home Affairs, therefore the Article 156a could not be applied. Nevertheless, there have been some case law which the application of the Article 156a by neglecting the administrative or formal requirement such as the case of Arswendo (1990), Lia Eden (1997), etc. The Supreme Court has also made a rule on the violation of Article 156a without a previous presence of joint ministerial decree. Theoretically, the decision which has been followed or referred frequently in the later decision will become the law. It means that in the later similar-case there will no requirement of a joint ministerial decree as stipulated under the Act No.1/PNPS/1965."*

[86] Expert testimony of Prof. Nur Basuki Minarno, SH., M.Hum., the Bill of Indictment, No. Reg. Perk: PDM-34/SPG/04/2012, dated on 4 July 2012, 49-50.

The courts on the first and second level[87] have the same arguments to such expert testimony although there has been challenge by the accused to the argument. The reference cases used by the expert actually have various character themselves even though as the same case which is related to the violation of Article 156a. The Arswendo case was triggered by a reader polling of Monitor Tabloid about "*who is your favorite figure and what is the reason?"* which finally the result placed the Prophet of Muhammad SAW at the eleventh position out of 50 names. The result was published on 15 October 1990 at the tabloid and afterwards there were frequent and strong protest from Muslims supported by MUI to the polling result which alleged as blasphemy against Islam and Arswendo get penalty for 5 years imprisonment for his responsibility as the chief of editor[88]. The case of Lia Eden was related to a sect which disseminate treatises on the deletion of Islam and all other religion and also recommendation not to adhere any religion[89]. These two cases of religious blasphemy are not representation of religious social conflict which involve relationship between minority and majority but mostly about the freedom of expression and the freedom of religion or belief. The position of the judge are also different because in these cases there didn't existed requirement to settle a contentious general criteria on blasphemy among the sects in a religion. The judge therefore could strictly applied the Article 156a of the Penal Code without the need to make any compromise with certain religious social organization.

There have been debate on the Article 2 during the trial session of constitutional review on the Act No.1/PNPS/1965 in relation to its formal or administrative requirement before applying the criminal procedure under the Article 4 (inserted as Article 156a of the Penal Code). The applicant argued that as part of the whole Act then the Article 2 is also used by the state as part coercive and intervention tools to the right to freedom of religion or belief. It should be noted that the applicant examine the Act No.1/PNPS/1965 as a whole therefore such argument is not intended as preference to the criminal mechanism rather than administrative procedure but the rejection to all kind of state intervention to the right to freedom of religion or belief.[90]

Responding to the applicant, the Constitutional Court states that the existence of Article 2 is to implement the precautionary principle in the application of state authority to the alleged person or organization for committing a religious deviance or blasphemy. The issuance of a joint ministerial degree should not be assumed as a form of coercion which violate human rights but as part of a social control function that is derived from constitution and people's mandate to deal with a certain situation which causes conflict and public disorder. Based on this argument then the Constitutional Court ruled to uphold and confirm the constitutionality of the Act No.1/PNPS/1965.[91]

Although the constitutional court has asserted that the administrative measure is a priority when dealing with a religious social conflict in relation to blasphemy; however, the judge at the district court, the

[87] Decision of Surabaya High Court, No.: 481/PID/2012/PT.SBY, dated on 10 September 2012

[88] http://indonesiatoleran.or.id/2012/06/kasus-penodaan-agama-arswendo-atmowiloto-angket-tokoh-di-tabloid-mingguan-monitor-1990/ as accessed on 20 July 2016

[89] https://m.tempo.co/read/news/2009/06/02/064179493/lia-eden-dihukum-2-5-tahun-penjara as accessed on 25 Juli 2016

[90] Decision of Constitutional Court No.:140/PUU-VII/2009, Par. 1.2.
The Applicants: Imparsial, Elsam, PBHI, Demos, Perkumpulan Masyarakat Setara, Yayasan Desantara, YLBHI, KH. Abdurrahman Wahid, Prof. Dr. Musdah Mulia, Prof. M. Dawam Rahardjo, KH. Maman Imanul Haq, Indonesian Church Union (Persekutuan Gereja-Gereja di Indonesia (PGI)), Indonesian Bishop Conference (Konferensi Waligereja Indonesia (KWI)), Association of Local Belief Adherents (Himpunan Penghayat Kepercayaan (HPK)), Cooperation Agency of Organization of Belief in One God Almighty (Badan Kerjasama Organisasi Kepercayaan Kepada Tuhan Yang Maha Esa (BKOK)), Komnas HAM, dan Komnas Perempuan

[91] Ibid. Par. 3.58-60.

high court and the Supreme Court has dismissed the article 2 in applying the Article 4 of the Act No.1/PNPS/1965 *jo*. the Article 156a of the Penal Code and prefer merely "*...as the act of the accused has met the elements of indictment...*"[92]. Therefore, it will be very reasonable if there is a kind of conclusion that the administrative measure as primary step before applying the criminal procedure has been substituted by fatwa or other religious community actions. There is no need more for the court to understand widely on the philosophical and systematical aspects of law especially as stipulated by the Act No.1/PNPS/1965 and its interpretation by the Constitutional Court called "*the middle way interpretation*" when should apply the Article 156a of the Penal Code on a religious blasphemy case. The constricted perspective of the court to a blasphemy case which solely focused on reconstructing the case deductively refers to the general rule or normative structure of the Article 156a of the Penal Code without understanding further and deeper the character of each element of the case and article.

The establishment of Article 156a of the Penal Code derived from Article 4 of the Act No.1/PNPS/1965 is actually set up as the last option or *ultimum remedium* in a general mechanism to handle a religious blasphemy or deviance after any administrative approach was ineffective or fail. The repressive approach of criminal law therefore is limited, controlled, and implemented to only a very serious case which threat public interests and should be in conformity with legitimate limitation of human rights.

The separation of the Act No.1/PNPS/1965 from the application of the Article 156a of the Penal Code is potentially minimize the opportunity to use "*middle way interpretation*" provided by the constitutional court which rich of ideas and legal arguments coming from stakeholders. It is important to have very wide perspective in applying the blasphemy law due to its weakness in application level as stated by the constitutional court that:[93]

"...In consideration that the Court is agreed to the expert's arguments i.e. Andi Hamzah, Azyumardi Azra, Edy OS Hiariej, Emha Ainun Nadjib, Siti Zuhro, Jalaludin Rakhmat, Ahmad Fedyani Saifuddin, Taufik Ismail, and Yusril Ihza Mahendra, which state that it is urgent to revise the blasphemy law materially and formally in order to be clearer and not misinterpreted in its application. However, the Constitutional Court has no competence to revise both text and content scope of the law and only limited to examine its constitutionality, so that the competence to revise the law fall into the legislature through a law making processes as usually; and in response to the argument of Jalaludin Rahmat which suggest that the Court creates "middle way" by providing official interpretation to the Act of Religious Blasphemy Prevention (the Act No.1/PNPS/1965) without ruling it as unconstitutional or null and void, the Court agrees with such argument. The agreement has been pursued by the Court through its interpretation to certain aspects of the Act of Religious Blasphemy Prevention and put it in detail on the court's opinion paragraphs that could be considered as "middle way" suggested by the expert of Jalaludin Rahmat...;"

The "*middle way*" interpretation by the Constitutional Court is an authoritative legal document or case law to mean the spirit of Article 156a of the Penal Code which could enrich perspective on its elements so that preventing misinterpretation on application level.

---

[92] Decision of Surbaya High Court No.: 481/PID/2012/PT.SBY, The judge panel of the first-level court in applying Article 156a of the Penal Code disregarded the purposes, basic, and interpretation on the basis of the Act No.1/PNPS/1965 specifically about the administrative procedure as regulated through a joint ministerial decree (interior minister, religious affair minister, and attorney general) before applying criminal mechanism.

[93] Decision of the Indonesia Constitutional Court No.: 140/PUU-VII/2009, Par. 3.71.

III.B.2. *The vulnerability of religious minority group in the blasphemy-law application and the role of the court*

Article 4 of the Act No.1/PNPS/1965 *jo*. Article 156a of the Penal Code specifies the term of "*whosoever (barangsiapa)*" as perpetrator of religious blasphemy which is defined as "...*whosoever as competent legal person and in ability to take responsibility for every result of action*[94]". The scope of "*Whosoever"* includes everyone regardless their status whether as the member of religious minority or majority group in line with the principle of equality before the law as stated in Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) that "...*All persons shall be equal before the courts and tribunals.*".

Such relatively neutral term of "*whosoever*" then becoming bias to the issue of minority-majority relationship when systematically is connected to the normative construction of the Article 1 of the Act No.1/PNPS/1965 which consists the phrase of "...*interpretation and activity which are deviant to the principal religious teaching*". Based on this law therefore the activity of religious interpretation and its manifestation particularly committed by the member of religious minority group becomes vulnerable to be alleged criminally as religious deviance or blasphemy. The Constitutional Court for such presupposition argues that[95]:

"...*every religion has its own principal teaching which generally accepted by its internal religion, therefore the determination of principal religious teaching is authorized to each religion internally. Indonesia as a State which following the principle of inseparability between religion and State therefore has the Ministry of Religious Affairs which serve and protect the wholesome development of religion, and the Ministry has organizational capacity and instrument to compile various internal religious opinions. The State determines the principal religious teaching of certain religion dependently based on internal agreement of religion in concern, therefore, the Court argues that there will be no statism in determining the principal religious teaching on the Act of Religious Blasphemy Prevention".*

Based on the aforementioned explanation it is clear that the determination of "*principal religious teaching*" mainly in the domain of each internal religion while the state has support function to compile and synchronize religious teaching coming from diverse interpretation of the sects. Every religion factually consists of various sects which to some extent has differences and simultaneously also similarities on religious interpretation among them from which the principal religious teaching may be compile and concluded, and becoming standard of evaluation for blasphemy law. The state therefore is not the actor that determines the principal religious teaching but only as supporter due to its legal and financial competence in order to organize the drafting processes and formalize the output to be a legal document. If the output is finally formalized as a legal document therefore it should be a subject of legal complaint for any alleged violation to the right to freedom of religion or belief, otherwise, at least there should be a non-legal mechanism to discuss the complaint for any possible corrections.

[94] Decision of Sampang District Court No.. 69/Pid.B/2012/PN.Spg, 86.
[95] Decision of the Indonesian Constitutional Court No.: 140/PUU-VII/2009, Par. 3.53.

An internal agreement on the principal of religious teaching which has been recognized by the state becomes important element in the case of religious blasphemy due to its position as a general standard for government and judiciary to evaluate or adjudicate the validity of a sect (*exclusionary standard*). In an ideal condition where exists perfect representation from a whole sect members of religion who deliberately have concluded the agreement and followed by strong acceptance, commitment, and tolerance, consequently, such kind of "exclusionary standard" will be possibly applied and effective to protect public order and the right to freedom of religion or belief. If a conflict related to religious blasphemy is arisen which threaten public peace then will be easier to be settled since the availability of common standard.

In the context of Tajul Muluk case, there is no such ideal situation which facilitate the establishment of ideal exclusionary but on the contrary the Fatwa of MUI of Sampang and the recommendation of PCNU (The Branch Chief of Nahdlatul Ulama) were issued in line with the conflict escalation and served as repressive instrument to suspend religious activities of Tajul Muluk. The character of Fatwa is more to become judgmental instrument than as common standard of principal religious teaching where the data of investigation based on mostly to the subjective testimonies of the ex-followers of Tajul Muluk and not gathered from objective and deliberative processes[96]. The MUI at provincial level then echoed also the Fatwa and stated that "*...the decisions of local MUI which declared that the teaching of Syi'ah (particularly Imamiyah Itsna Asyariyah or under its pseudonym of Madzhab Ahlul Bait or alike) or other teaching which similar to the concept or principle of the Syi'ah Imamiyah Itsna Asyariyah is deviant and astray...*", and paradoxically the Fatwa also includes Article 73 of the Act No.39/1999 on Human Rights which actually stipulates that "*Rights and freedoms set forth in this Act are only subject to limitation through and based on an Act, merely aimed to guarantee the recognition and respect to human rights and fundamental freedom and basic freedom of others, morality, public order, and state interest.*[97]*"* The Article 73 requires that human rights limitation may be only implemented formally through an Act and it is not allowed to restrict non-derogable rights includes the right to freedom of religion or belief.

Due to the significant roles of MUI in the judicial processes of Tajul Muluk, it will be important also to understand how MUI internally draws demarcation on the principal religious teaching. Historically, the awareness of MUI on blasphemy challenges started from the era of democracy after the collapse of authoritarian regime in 1998 which provide wider space for disseminating Islamic values in one hand and also the intrusion of other destructive values to Islamic faith and sharia on the other hand. Therefore, on 6 November 2007 MUI held a National Congress (*Rapat Kerja Nasional (Rakernas)*) on the Guidance for Identification of Deviant Sect which its core output is as follows:[98]

It is classified as a deviant religious sect if meeting one of the criteria as bellow:

1. *Denying one of the six Islamic faith pillars i.e. believing in Allah the God, the Malaikat (Angel), the Holy Books, the Prophets, the Doomsday, the Fate and Destiny; and also denying one of the five Islamic principles, i.e. Syahadat (Islamic confession of faith), Shalat (praying), Zakat (alms), Ramadan Shaum (Ramadan fasting), and Hajj (pilgrimage);*

[96] Fatwa of MUI Sampang, No. A-035/MUI/Spg./I/2012, dated on 1 January 2012
[97] Fatwa of MUI East Java, No. Kep-01/SKF-MUI/JTM/I/2012, dated on 21 January 2012
[98] http://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi15fLalqLOAhXBq48KHYvID0wQFggfMAA&url=http%3A%2F%2Fwww.lppipusat.com%2Fwp-content%2Fuploads%2F2015%2F11%2FPEDOMAN-IDENTIFIKASI-ALIRAN-SESAT.docx&usg=AFQjCNGppKPlIgsn-cPk8IfyLhlaNoENaA, as accessed on 20 July 2016

2. *Believing and/or following a belief in contradiction to the Islamic law (al-Qur'an and al-Sunnah);*
3. *Believing on the revelation after the al-Qur'an;*
4. *Denying the authenticity and/or the truth of al-Qur'an;*
5. *Interpreting al-Qur'an in contradiction to its rules and principles;*
6. *Denying the Hadith as one of Islamic teaching;*
7. *Insulting, despising, and demeaning the Prophet;*
8. *Denying Muhammad SAW as the last Prophet;*
9. *Changing, adding, and/or reducing the main elements of religious ritual as stipulated by the Islamic law (syari'ah) such as the pilgrimage is not to the Baitullah, Shalat (ritual pray) is not in five times a day.*

In applying aforementioned standard MUI then also established a procedure which can be described as follows:

1. *There should be a research before making a decision on the deviance of a sect by collecting data, information, evidence, and witness in relation to the concept, thought, and activity by the Assessment Commission;*
2. *There should be initial assessment based on the opinion of Imam Madzab (Islamic school of thought) and Islamic scholars in relation to the idea and activity of the sect by the Assessment Commission;*
3. *There should be tahqiq (verification) and tabayyun (ascertaining the truth) to the sect leader or group and expert related to the data, information and evidence about the idea and activity of the sect or group, and the Assessment Commission may provide also counsel if the sect or group is proven deviance in order return to the correct religion;*
4. *The result of all activities at point 1,2, and 3 then submitted to the Council Committee;*
5. *If necessary the Council Committee may assign the Fatwa Committee to discuss and issues a fatwa.*

So, MUI before declaring the deviance of a sect have to meet the formal requirements which are initial research, verification, data analysis, and senior supervision. The competence to issue a fatwa actually belongs to the Central MUI; however, in certain emergency situation the local MUI may issue a fatwa after having consultation to the Central MUI.

MUI is a social or non-state religious organization which its membership and rule are established according to the agreement among certain Islamic leaders and scholars. As an exclusive institution, in term of Islamic organization, MUI has also critical problem on the possibility for committing internal repression to its community member which has different perspective or interpretation to certain aspects of Islam. To this situation, the state in one side should respect the existence of MUI as part of manifestation collectively the right to freedom of religion or belief by Indonesian Muslims[99]; however, on the other side the state have to protect everyone as a member of religious community from internal repression as stipulated in the Article 28I (4) of the Constitution which says that "*Protection, promotion, enforcement, and fulfillment of human rights is state responsibility, mainly the government".* Furthermore, MUI to some extent has recognized the applicability of human rights to a Muslim based on the Fatwa No. 6/MUNAS.VI/MUI/2000 on Human

[99] Article 18 (1) International Covenant on Civil and Political Rights (ICCPR)

Rights although there are certain exceptions especially to the right to freedom of religion or belief which can be described as follow:

1. *It is obligatory to accept, respect, and highly promote universal human rights under the conditions that:*

a. *Respect and honor to the differences on concept, interpretation and implementation which based on the differences of culture, morality, and applicable law on respective state;*

b. *Understanding and implementation of human rights should take into consideration of:*

1) *The balance between individual rights and individual duties;*

2) *The balance between individual rights and social rights;*

3) *The balance between freedom rights and responsibility.*

2. *In relation to the Article 16 (1-2) and Article 18 of the Universal Declaration of Human Rights, the Muslims should adhere to the Islamic teaching due to the freedom to manifest religious teaching is part of human rights.*

The urgency to protect a member of religious community from internal repression is based on the constitutional status of the right to freedom of religion or belief as "*...human rights which could not be derogated in all situation"*[100] and this status is also strengthened by the Article 4 (2) the ICCPR which states that "*No derogation from articles...18 may be made under this provision*."[101] Formally, MUI has not restricted its recognition to the status of the right to freedom of religion or belief in the constitution and ICCPR because the Fatwa only refers its exception clause to the Article 18 of UDHR. The fatwa of MUI is not also included or recognized under the Indonesian legislation system therefore has no legal binding and its applicability merely depends on the willingness of each Muslim. The judge may use the Fatwa in an adjudication processes, but not as obligation, since requiring legal interpretation based on the living law of society[102].

In the context of human rights enforcement when dealing with blasphemy case, the role of judge is very decisive due to its competence to evaluate and recheck the validity of Fatwa issued by religious organization such as MUI through evidence examination procedure during the trial session. The court is possible also to scrutinize the procedural correctness of the fatwa so that any manipulation which has prejudiced to the right of alleged person can be identified. The judge of Tajul Muluk case has also practiced such role which is reflected at the legal consideration of the decision as follow:

"Considering to the indictment on the accused who has delivered religious teaching: "The addition of two Islamic confession by waasyhadu anna aliyyan waliyyullah wa asyhadu anna aliyyan hujjatullah, obligation to consider as infidel to the companions of the Islamic prophet Muhammad, father-in-law, and his wife, al-Fidha, and ar-Roji'ah", The court argues that there has been no sufficient evidence, considering that such allegation is based only to the testimony of Roeis al-Hukama and his testimony was

[100] Article 28I (1) of the 1945 Constitution
[101] Indonesia has ratified ICCPR by the Act No12/2005
[102] Article 5 (1) of the Act No.48/2009 on the Judicial Power: "Judge and constitutional judge shall explore, follow, and understand living law and sense of justice in society"

not under the oath, therefore it does not meet the requirement on the minimum of 2 (two) valid evidences;"[103]*;*

"Considering that the teaching on Islamic faith-and-religious pillars, the Court agrees to the argument of accused's lawyer which based on the expert testimonies of Dr. Zaenal Abidin Bagir, MS., Dr. Umar Shahab, MS., and Prof. Dr. Zainun Kamal, MA., and other evidential documents/books of Amman Message, and Sunnah-Syiah, Hand in Hand! Possible?(by M. Quraish Shihab) which mainly says that there is similarity substantially between the formation of the 5 pillars of Islamic faith – the 8 pillars of Islamic religion and the formation of 6 pillars of Islamic faith – the 5 pillars of Islamic religion which generally recognized by Indonesia Muslims, and the quantity difference is merely as the difference on the perspective and interpretation to al-Qur'an and al-Hadith"[104]*.*

From the decision it is clear that the court rejected the validity of significant evidence in relation to the principal religious teaching that are Islamic faith-and-religious pillars. This fact shows that the judiciary has practically capacity to protect religious minority rights when experiencing discrimination or repression as impact of blasphemy law application. From such corrected indictment it confirms that the application of Article 156a of the Penal Code could lead to the violation of the right to freedom of religion or belief because an allegation or indictment may not be based on factual blasphemy but driven by other motive as part of power relation in social religious life.

All in all, the law enforcement on religious blasphemy is not simply the problem of legitimate limitation to the right to freedom of religion or belief so as to protect public order and right of others, but also how to sensitize the vulnerable character of alleged person belongs to religious minority group. The applicability of human rights perspective on the court will enhance possibility to balance legal protection between public interests which mostly as representation of religious majority group and the demand of minority group for affirmative action due to their vulnerability to have different religious interpretation.

III.C. The normative state's obligation to guarantee and to protect the right to freedom of religion or belief for religious minority group

Specific international law which obliges Indonesia to respect, to protect and to fulfil the right to freedom of religion or belief is Article 18 of the ICCPR,[105] and if the norm is combined to other international human rights agreements, as a result there will be formulation of core norms of the right to freedom of religion or belief, namely:[106]

1) *Internal Freedom*

   Everyone has the right to freedom of thought, conscience and religion; included in this right is to have, embrace, preserve or change religion or belief.

2) *External Freedom*

[103] Decision of Sampang District Court No. 69/Pid.B/2012/PN.Spg, p. 89.
[104] Ibid. 93.
[105] General Assembly resolution 2200A (XXI) of 16 December 1966, Article 18 of ICCPR is legally strengthen the substance of Article 18 of Universal Declaration of Human Rights (UDHR).
[106] Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib-Lie, eds., *Facilitating Freedom of Religion or Belief: A Deskbook,* Leiden 2004: Introduction by Editors with Nazila Ghanea, pp. xxxvi-xl.

Everyone has the freedom, either individually or in community with the others, either private or public, to manifest the values of religion or belief in the form of teaching/education, religious practices/beliefs, rituals of worship, and other forms of devotion.

3) *Non-Coercion*

No one shall be subject to coercion that would impair or worsen freedom of religion or belief by his or her own choice.

4) *Non-Discrimination*

The state is obliged to respect and ensure to all individuals within the territory and jurisdiction of the right to freedom of religion or belief without distinction based on any grounds such as race, color, sex, language, religion or belief, political affiliation, national origin, property, birth or other status.

5) *The Right of Parents/Guardians*

The state is obliged to respect the independence of the parents / guardians to ensure the religious and moral education for their children in accordance with their religion/belief, as well as the state provides protection of the rights to freedom of religion or belief for each child according to their capacity as a child.

6) *Corporate Freedom and Legal Status*

Religious communities themselves have freedom of religion or belief, including a right to autonomy in their own affairs. An aspect of this corporate aspect of freedom of religion or belief is for religious communities to have standing and institutional rights to assert their rights and interests as communities. Religious communities may not wish to avail themselves of formal legal entity status, but they have a right to acquire legal entity status as part of their right to freedom of religion or belief and in particular as an aspect of the freedom to manifest religious belief not only individually, but in community with others.

7) *Limits of permissible restrictions an external freedom*

Freedom to manifest one's religion or belief may be subject only to such restrictions as:

(a) are prescribed by law; and

(b) are applied by the state for the purpose of protecting (i) public safety, (ii) order, (iii) health, (iv) morals, or (v) the fundamental rights of others; and (c) are necessary − that is proportionate and not excessive − in order to achieve the purpose of the state when applying the restriction.

8) *Non-derogability*

States may make no derogation from the right to freedom of religion or belief, not even in times of public emergency.

The right to freedom of religion or belief normatively is an individual rights based on the Article 18 of ICCPR where everyone is entitled as right holder regardless their organizational or sect affiliation, social status, or religious group whether majority or minority which in line with the principle of non-discrimination.[107] If the characteristic of the right to freedom of religion or belief is basically individual right then how about the position of religious minority group as a collective community? Article 27 of ICCPR specifically stipulates the position of religious minority right in relation to the enjoyment to the

[107]Article 26 of ICCPR

right to freedom of religion or belief that "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*."

Article 27 of ICCPR formulates the right holder as "*persons belonging to such minorities*" which characterizes the right as individual right rather than group right; however, if the right is viewed from its applicability "*in community with the other members of their group*" then it will be inseparable from collective character. Another questionable phrase is "*...shall not be denied...*" which places the state in passive position than puts positive obligation to protect and to fulfil the right of religious minority group. The Human Rights Committee in responding the issue views that it is possible to claim the state to conduct positive measures of protection when the minority rights are violated both by state or non-state actors. The committee also says that the existence of minority group as rights holder is independent from formal state recognition, and there should be opportunity for them to participate effectively in every policy making processes which influence their interest.[108]

In wider context of international human rights law, every member of minority group or as a whole is entitled for[109]: the rights of self-determination[110], enjoyment of the rights without any discrimination[111], equal position of men and women[112], the right to move lawfully within and out of the country[113], protection against interference to privacy life, family, home, and correspondence as well as attacks on the honor and reputation[114], protection to the right to freedom of opinion and expression[115], legal protection against any attempts to support the emergence of religious hatred that lead to discrimination, hostility or violence[116], the right freedom of assembly such as the establishment of educational, cultural, and political organization[117], the right to democracy[118], and the right to equality before the law and equal protection for everyone[119]. Additionally, there have been also some international guidance on the promotion of the right to freedom of religion or belief for minority group such as: *the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[120]; the 1992 Declaration on the*

[108] Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 38 (1994).
[109] The Office of the United Nations High Commissioner for Human Rights (OHCHR), 2012, *Promoting and Protecting Minority Rights, A Guide for advocate, pp. 48-49*
[110] Article 1 of ICCPR
[111] Article 2 (1) of ICCPR, Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994). See also: CRC, CRD
[112] Article 3 of ICCPR, Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).
[113] Article 12 of ICCPR, Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).
[114] Article 17 of ICCPR, Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), and Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994).
[115] Article 19 of ICCPR, General Comment No. 10: Freedom of expression (Art. 19):.29/06/1983.
[116] Article 20 (2) of ICCPR, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20):.29/07/1983.
[117] Article 22 of ICCPR
[118] Article 25 of ICCPR, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 12/07/96.
[119] Article 14 of ICCPR
[120] General Assembly of the United Nations Resolution No. A/RES/36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted on 25 November 1981

Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[121]*; the 1984 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*[122]; and *Resolution on the Elimination of all Forms of Religious Intolerance*[123].

For Indonesia, it has taken about 30 years to be a state party of the ICCPR since its come into force[124] which marked by Indonesian accession in 2006[125] after intense human rights domestication post-militaristic regime started from 1998[126]. Such involvement of Indonesia is based on the consideration that the ICCPR is in line to the state ideology of Pancasila, the 1945 Constitution which follows the principle of rule of law, equality before the law, and also Indonesian continual spirit to promote human rights[127].

As state party of the ICCPR, based on Article 40 (1), normatively Indonesia should submit its initial state party report on 23 May 2007 which informs any kind of state measures which have been adopted to give effect to the rights[128]; nevertheless, the report was just submitted on 19 January 2012 or about five yeas later. On the other side, Indonesia have been a part of founding members of *the Human Rights Council* in 2006 and became under review state for the first session of the Universal Periodic Review (UPR) on 9 April 2008. From the UPR Working Group report[129], Indonesia seems has no specific and strong commitment for promotion and protection to the right to freedom of religion or belief especially in relation to religious minority group, but rather general and indirect such as: the use of research to identify the problems and challenges in monitoring the situation of the freedom of religion[130], improving involvement in the dialogue with Special Procedures[131], additional training on human rights for law enforcement officers i.e. police, prosecutor, and judge[132], commitment to ensure the promotion and protection of all components of Indonesian Peoples"[133], and willingness to make cooperation and dialogue with international communities related to the capacity improvement to follow up the results of UPR mechanism[134].

Indonesia on 8-9 April 2007 as state party of the International Convention on the Elimination All of Forms of Racial Discrimination (ICERD) has submitted State Report to the Committee on the Elimination of Racial Discrimination which one of its recommendations is to respect and to protect the right to religious

---

121 General Assembly of the United Nations Resolution 47/135, on Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted on 18 December 1992, which establishes an institutions called as *Forum on Minorities Issues*

122 Commission on Human Rights, UN Document No. E/CN.4/1985/428, September 1984

123 General Assembly of the United Nations Resolution No. A/RES/48/128 on Elimination of all forms of religious intolerance, adopted on 20 December 1993

124 Come into force on 23 Maret 1976, source: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf .

125 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=en .

126 Indonesia established the Act No.39/1999 on Human Rights on 23 September 1999, and Constitutional Amendment on the additional of Chapter XA on Human Rights since 2000.

127 Consideration (d) of the Act No.12/2005 on Ratification of ICCPR.

128 http://www.unhchr.ch/tbs/doc.nsf/5038ebdcb712174dc1256a2a002796da/80256404004ff315c125638c005dce14?OpenDocument .

129 General Assembly of the United Nations Document No. A/HRC/21/7, Report of the Working Group on the Universal Periodic Review, Indonesia, pp. 17-21, 5 July 2012.

130 Ibid. Par. 17.

131 Ibid. Par. 76.

132 Ibid. Par. 77 (1).

133 Ibid. Par. 77 (5).

134 Ibid. Par. 77 (7.b).

freedom for minority group and to review discriminatory legislations based on the Article 5 of the ICERD, that is: [135]

(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular:
(i) The right to freedom of movement and residence within the border of the State;
(ii) The right to leave any country, including one's own, and to return to one's country;
(iii) The right to nationality;
(iv) The right to marriage and choice of spouse;
(v) The right to own property alone as well as in association with others;
(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;

For the children as part of minority group, Indonesia has received recommendation since 2004 from the Committee on the Rights of the Child that legal recognition to the right to freedom of religion and worship should also be available to the children from groups or ethnic minorities as well as the right to adequate access to education, health and social services[136]. The Committee Against Torture in its concluding observation to the state report of Indonesia on 15 May 2008 has recommended also that: [137]:
"*...ensure the protection of members of groups especially at risk of ill-treatment, by prosecuting and punishing all acts of violence and abuses against those individuals and ensuring implementation of positive measures of prevention and protection; ensure prompt, impartial and effective investigations into all ethnically motivated violence and discrimination, including acts directed against persons belonging to ethnic and religious minorities, and prosecute and punish perpetrators with penalties appropriate to the nature of those acts; publicly condemn hate speech and crimes and other violent acts of racial discrimination and related violence and should work to eradicate incitement and any role public officials or law enforcement personnel might have in consenting or acquiescing in such violence; ensure that officials are held accountable for action or inaction that breaches the Convention; give prompt consideration to expanding the recruitment of persons belonging to ethnic and religious minorities into law enforcement; and to respond favourably to the request of the Special Rapporteur on freedom of religion to visit the country*."

At non-conventional mechanism, Indonesia on 5 April 2011 ran for second time for the membership of Human Rights Council and finally selected for the period of 2011-2014, and for such candidacy Indonesia

[135] Committee on the Elimination of Racial Discrimination Document No. CERD/C/IDN/CO/3, 15 August 2007, Par. 14.
[136] Committee on the Rights of the Child Document No. CRC/C/15/Add.223, Par. 90, 26 February 2004.
[137] Committee against Torture Document No. CAT/C/IDN/CO/2, Par. 19, 2 July 2008.

has made pledges and voluntary commitments on human rights promotion and protection in national level as follow[138]:

(a) As part of the national agenda for the promotion and protection of human rights in Indonesia, the Government of Indonesia will continue to implement its national plan of action on human rights.

(b) Indonesia will continue to strengthen the human rights machineries at national, provincial, district and municipal levels.

(c) Indonesia continues to make progress in implementing its human rights laws and regulations, improving the level of coordination and synergy between Government authorities and mechanisms and in strengthening human rights mainstreaming in the policymaking mechanisms at all levels.

(d) Indonesia continues to strengthen its partnerships with various stakeholders, including national human rights institutions and civil society groups in the promotion and protection of human rights in the country.

(e) Indonesia will continue to step up its national effort and internal coordination towards ratification of some remaining key international human rights treaties.

During the UPR Second Session of 2012, there have been 26 (twenty six) reviews on Indonesian report in relation to the protection to the right to freedom of religion or belief for minority group and to which Indonesia rejected only four reviews and supported the rest reviews. Indonesia supports the review which asking the state to protect vulnerable group, putting an end to discrimination and violence to religious minority group, enforcing rule of law and policy to guarantee fully the right to freedom or religion or belief, protecting religious minority group, prosecuting and punishing the perpetrator of religious violence and hate speech to religious minority group, reviewing law and policy which discriminate religious minority group, and improving capacity and effectiveness of law enforcement official related to the promotion of the right to freedom of religion or belief[139]. The four rejected reviews are related to issues of the invitation for country visit by special rapporteur on freedom of religion or belief, providing standing invitation for special procedures, and reviewing legislation which restricted the right to freedom of religion or belief such as blasphemy law, worship place regulation, and restriction to the religious minority group[140]. The main reason for such rejection is that the issues have not been priority and the blasphemy law is still upheld by the constitutional court although it has been complained through constitutional review mechanism by civil society[141].

Furthermore, concluding observation of the Committee of Human Rights on Indonesia state party report on 23-24 July 2013 has made recommendation on the following issues:

a. Capacity improvement of law enforcement official in promoting and protecting human rights;
b. Affirmation on the scope of all state institution as duty-bearer on human rights;
c. Unambiguous legislation on the state of emergency;

[138] General Assembly of the United Nations Document No. A/65/807, Par. 12, 6 April 2011.
[139] General Assembly of the United Nations Document No. A/HRC/21/7, pp. 17-21, 5 Juli 2012.
[140] GC Document No. A/HRC/21/7/Add., Report of the Working Group on the Universal Periodic Review, Indonesia, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, pp. 3-4, 5 September 2012.
[141] Ibid.

d. Protection to religious minority group from any assaults motivated by religious hatred and there should be prosecution and penalty to the perpetrator;
e. Review on the compatibility of mass organization law to any conventions related to the rights to freedom of religion, opinion, and expression;
f. Nullification of the Act No.1/PNPS/1965 on the Prevention of Religious Blasphemy;
g. Curriculum reformation to ensure that education will strengthen respect to religious plurality and accommodate interests of all religion or belief; and
h. Revising the content of the Act No.11/2008 on Information and Electronic Transaction in relation to religious blasphemy.[142]

IV. Conclusion

The involvement of judicial mechanism in religious social conflict transformation practically has deteriorated vulnerability of religious minority group which causes discrimination due to the application of blasphemy law which requires non-state standard on religious principal teaching. Social and structural setting on majority exceptionalism has distorted state neutrality and hampered systematically any opportunities of religious minority member to participate fairly in determination of general standard on religious principal teaching as the core element of blasphemy law application. Normative justification that the examination on the deviance of a religious sect by religious social organization has been conducted scientifically and objectively with take into consideration every argument of all stakeholders, but in fact the examination is very fragile and vulnerable for manipulation and conflict of interest which finally marginalizes the role of alleged person coming from religious minority group.

Preference on the use of criminal mechanism in dealing with religious blasphemy case in one hand indicates the negligence or pessimistic on the role of administrative mechanism, and on the other hand reflects ineffectiveness of the government in managing conflict transformation peacefully without involving repressive and illegitimate criminal law which to some extent has also demonstrated the weakness of the rule of law. There has been state ambiguity to uphold the applicability of blasphemy law in term of its implementation which legitimize state interference to religious freedom for conflict prevention even by means of criminal justice system, whereas the core element of its interference that is standard on principal religious teaching is handed over fully to social religious organization. When a blasphemy case is politicized for non-religious purposes then such state ambiguity would be transformed into structural discrimination as a result of collaborative and mutual collusion between state actor and religious majority group which sacrifice the rights of religious minority group on behalf of social peace.

When character and normative structure of the blasphemy law is bias against religious minority group because of power relation therefore the minimum role of the court is ascertaining the validity of evidence provided by the prosecutor both materially and formally by crosschecking, reexamining, and comparing it to that of the accused side impartially. The court may be also play its roles maximally by strengthening human rights perspective in the decision in line with the normative obligation of state to guarantee and to

[142] Human Rights Committee Document No. CCPR/C/IDN/CO/1 on Concluding observations on the initial report of Indonesia, pp. 2-8, 21 August 2013

protect the right to freedom of religion or belief for religious minority group according to Indonesia commitment both nationally and internationally. When the main role of the court is to apply the law for approaching the justice then the principle of impartiality and independency of the judge becomes basic element to affirm the rights of religious minority group.

Acknowledgment

This project has been supported by the SHAPE-SEA Programme funded by SIDA.

Bibliography

Books and Reports,

Meyerson, Denise, ***Essential Jurisprudence,*** Routledge Cavendish, New South Wales, 2016.

Jimly Asshiddiqie, **Konstitusi & Konstitusionalisme Indonesia**, Revised Edition, , Konstitusi Press, Jakarta, 2005.

Tore Lindholm, W. Cole Durham, Jr., Bahia G. Tahzib-Lie, eds., *Facilitating Freedom of Religion or Belief: A Deskbook,* Martinus Nijhoff Publishers, Leiden 2004.

The defense of Tajul Muluk, published as: *Quod Revelatum: Pledoi Ust. Tadjul Muluk Demi Mengungkap Kebohongan Fakta. CMARS (Center for Marginalized Communities Studies), Surabaya, 2013*

Year-End Population by Districts and Sex Ratio in the Sampang Regency 2011,Sampang in Numbers 2012, The Sampang Bureau of Statistics 2012

Report of the Finding and Recommendation Team (Laporan Tim Temuan dan Rekomendasi (LTTR)) on the Syiah Assault in Sampang, Madura (the LTTR Report), 2013, Page 36 (I.11). The team is established by National Commission on Human Rights, National Commission on Violence against Women, Commission for Indonesian Children Protection, and the Protection of Witness and Victim Agency.

The Office of the United Nations High Commissioner for Human Rights (OHCHR), 2012, *Promoting and Protecting Minority Rights, A Guide for advocate*

Fatwa of East Java MUI No. Kep-01/SKF-MUI/JTM/I/2012, dated on 21 January 2012 on the Deviance of Syiah Teaching.

Fatwa of Sampang MUI , No. A-035/MUI/Spg./I/2012, dated on 1 January 2012

Court Decisions,

Decision of Sampang District Court No.69/Pid.B/2012/PN.Spg, dated on 11 July 2012.

Decision of Surabaya High Court No.481/PID/2012/PT.SBY, dated on 10 September 2012.

Decision of Indonesia Supreme Court No.1787 K/PID/2012, dated on 3 January 2013.

Decision of Indonesia Constitutional Court, No.: 84/PUU-X/2012, 9 April 2013

Decision of Indonesia Constitutional Court No.:140/PUU-VII/2009, 19 April 2010

Law and Legislation,

The 1945 Constitution.

The Act No. 32/2004 on Local Government.

The Act No.8/1981 on the Criminal Procedure

The Act of Penal Code

The Act No.1/PNPS/1965 on the Prevention of Misuse and/or Blasphemy of Religion

The Act No.48/2009 on the Judicial Power

The Act No.39/1999 on Human Rights on 23 September 1999,

The Act No.12/2005 on Ratification of ICCPR.

The East Java Governor Regulation No.55/2012 on the Development of Religious Activities and Supervision Deviant Religious Sect in the East Java, dated on 23 July 2012.

Police Report No. LP/03/I/2012, dated on 03 January 2012.

Minutes of Police Investigation on Tajul Muluk by Sampang Police Office, dated on 28 March 2012, Question

The Charge of Public Prosecutor, Sampang Public Prosecutor Office, No. Reg. Perk: PDM-34/SAMPG/04/2012, dated on 4 July 2012.

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200A (XXI) of 16 December 1966

Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994),

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI/GEN/1/Rev.1 at 38 (1994).

Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994). See also: CRC, CRD

Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999).

Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994)

Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994).

General Comment No. 10: Freedom of expression (Art. 19):.29/06/1983.

General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20):.29/07/1983.

General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 12/07/96.

General Assembly of the United Nations Resolution No. A/RES/36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted on 25 November 1981

General Assembly of the United Nations Resolution 47/135, on Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted on 18 December 1992

Commission on Human Rights, UN Document No. E/CN.4/1985/428, September 1984

General Assembly of the United Nations Resolution No. A/RES/48/128 on Elimination of all forms of religious intolerance, adopted on 20 December 1993

General Assembly of the United Nations Document No. A/HRC/21/7, Report of the Working Group on the Universal Periodic Review, Indonesia, 5 July 2012.

Committee on the Elimination of Racial Discrimination Document No. CERD/C/IDN/CO/3, 15 August 2007,

Committee on the Rights of the Child Document No. CRC/C/15/Add.223, 26 February 2004.

Committee against Torture Document No. CAT/C/IDN/CO/2, 2 July 2008.

General Assembly of the United Nations Document No. A/65/807, 6 April 2011.

General Assembly of the United Nations Document No. A/HRC/21/7, 5 July 2012.

GC Document No. A/HRC/21/7/Add., Report of the Working Group on the Universal Periodic Review, Indonesia, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 5 September 2012.

Human Rights Committee Document No. CCPR/C/IDN/CO/1 on concluding observations on the initial report of Indonesia, 21 August 2013

Websites,

http://ylbhu.org/s1-program/c1-siaran-pers/28/hasil-eksaminasi-putusan-4-tahun-banding-tajul-muluk/

http://www.antaranews.com/berita/329742/pengungsi-syiah-di-sampang-terus-bertambah .

http://www.tribunnews.com/nasional/2012/01/12/hasil-investigasi-smars-atas-pembakaran-ponpes-di-sampang

http://www.tempo.co/read/news/2012/08/27/058425697/Kronologi-Penyerangan-Warga-Syiah-di-Sampang.

http://indonesiatoleran.or.id/2012/06/kasus-penodaan-agama-arswendo-atmowiloto-angket-tokoh-di-tabloid-mingguan-monitor-1990/

https://m.tempo.co/read/news/2009/06/02/064179493/lia-eden-dihukum-2-5-tahun-penjara

http://www.google.co.id/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi15fLalqLOAhXBq48KHYvID0wQFggfMAA&url=http%3A%2F%2Fwww.lppipusat.com%2Fwp-content%2Fuploads%2F2015%2F11%2FPEDOMAN-IDENTIFIKASI-ALIRAN-SESAT.docx&usg=AFQjCNGppKPlIgsn-cPk8IfyLhlaNoENaA,

https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf .

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=en .

http://www.unhchr.ch/tbs/doc.nsf/5038ebdcb712174dc1256a2a002796da/80256404004ff315c125638c005dce14?OpenDocument .