

**To:** Prof. Dr. Mohammad Mahfud MD

*Chief of the Constitutional Court of the Republic of Indonesia*

Jalan Medan Merdeka Barat No. 6

Jakarta Pusat 10110

CASE NO. 140/PUU-VII/2009

RE: Request for Judicial Review of Act No. 1/PNPS/1965 on the  
Prevention of Mistreatment of Religion and/or Blasphemy  
under the 1945 Constitution of the Republic of Indonesia

**AMICUS BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY**

(A NON-GOVERNMENTAL ORGANISATION IN CONSULTATIVE STATUS  
WITH THE ECONOMIC AND SOCIAL COUNCIL (ECOSOC)  
OF THE UNITED NATIONS)

WASHINGTON, DC USA

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## INTRODUCTION

The Becket Fund for Religious Liberty herewith respectfully submits this brief to the Indonesian Constitutional Court in order to assist as a “friend of the court” in the petition filed by 11 petitioners, including the recently deceased Former President Abdurrahman Wahid; KH Maman Imanul Haq; Dawam Rahardjo; and Dr. Musdah Mulia, with the Constitutional Court of Indonesia on October 20, 2009, requesting that this Court review Act No. 1/PNPS/1965 on The Prevention of Mistreatment of Religion and/or Blasphemy (“Blasphemy Act”).<sup>1</sup> The Becket Fund submits the foregoing brief to supplement the Court’s analysis of Indonesia’s obligations to guarantee each of its citizens the religious liberty, freedom of expression, and equal protection of the laws as pledged in the 1945 Constitution and in Indonesia’s international treaty obligations.<sup>2</sup>

### **Interest and Expertise of the Becket Fund for Religious Liberty**

The Becket Fund for Religious Liberty is an international public interest law firm dedicated to defending the religious freedom of people of all faiths. The Becket Fund has represented Amish, Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and other religious adherents in American domestic courts, in the domestic courts of foreign countries such as Sweden and Australia, and before international tribunals such as the European Court of Human Rights (“ECHR”) and the United Nations Human Rights Committee. As a Non-Governmental Organisation (“NGO”) in consultative status with the Economic and Social Council (“ECOSOC”) of the United Nations, of which Indonesia is a member, the Becket Fund’s global interest in protecting religious exercise and expression of people of all faiths is implicated in the Constitutional Court’s review of the Indonesian Blasphemy Act. The Becket Fund believes that this case is significant to the development of human rights law, particularly with regard to the rights of individuals who adhere to minority religions.

The Becket Fund, therefore, respectfully requests this honourable Constitutional Court to consider its comments and arguments below as an international expert on matters related to the advancement of religious freedom for people of all faiths.

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<sup>1</sup> The Prevention of Misuse of Religion and/or Blasphemy Act No. 1/PNPS/1965 art. 1 [hereinafter “Blasphemy Act”].

<sup>2</sup> Additional briefs, filed by non-party foreign or domestic groups with interests in advancing human rights are customarily accepted for review in countries with common law systems and in international courts, including the Europe Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights.

## I. Factual Background

### A. Overview of the Blasphemy Act

The Blasphemy Act makes it unlawful “to, intentionally, in public, communicate, counsel, or solicit public support for an interpretation of a religion or a form of religious activity that is similar to the interpretations or activities of an Indonesian religion but deviates from the tenets of that religion.”<sup>3</sup> According to the Elucidation of the Blasphemy Act (the “Elucidation”), one of the purposes of the Act is to “channel... religiosity”<sup>4</sup> toward six approved religions: Islam, [Protestant] Christianity, Catholicism, Hinduism, Buddhism, and Confucianism.<sup>5</sup> The Blasphemy Act establishes that the government will protect its official religions by punishing those who insult approved religions and those who attempt to persuade others to adhere to unofficial religions.<sup>6</sup> The Blasphemy Act moreover places restrictions on those *within* each approved religion, making it illegal to advocate “deviations from teachings of religion considered fundamental by scholars of the relevant religion.”<sup>7</sup>

The Blasphemy Act establishes civil and criminal penalties for violators. First and second offences are punished by a civil penalty. On a first offence, the offender “shall be instructed and be warned severely to cease his/her actions” by a minister of the federal government.<sup>8</sup> For a second offence, if the infraction is committed by an organisation or an “*aliran kepercayaan*” (traditional religious practices of indigenous Indonesians), the President of Indonesia may dissolve the organisation and declare it to be banned.<sup>9</sup> Banned or dissolved organisations have no legal personality, and therefore, may not own property or legally practice their beliefs or exercise their convictions in public.

Another product of the Blasphemy Act is Article 156(a) of the Criminal Code, which attaches a maximum penalty of five years’ imprisonment for intentionally criticising or otherwise attempting to undermine the government’s officially recognised religions.<sup>10</sup> The article prohibits the “deviant interpretation” of religious doctrine. Furthermore, under Article 157 of the Criminal Code, the media is forbidden from publishing anything that might be deemed offensive to a religion.<sup>11</sup>

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<sup>3</sup> Blasphemy Act art 1.

<sup>4</sup> Elucidation of the Blasphemy Act, § I(3) [hereinafter *Elucidation*].

<sup>5</sup> *Id.* § II, art. 1.

<sup>6</sup> *See id.* I(4).

<sup>7</sup> *Id.*

<sup>8</sup> *See* Blasphemy Act art. 2(1).

<sup>9</sup> *See* Blasphemy Act art 2(2).

<sup>10</sup> *See* Criminal Code of Indonesia art. 156(a). Article 4 of the Blasphemy Act adds Article 156(a) to the Criminal Code. The penalty applies to any expression or act “which principally ha[s] the character of being at enmity with, abusing or staining a religion adhered to in Indonesia” or has “the intention to prevent a person to adhere to any religion based on the belief of the almighty God.” *See id.*

<sup>11</sup> *See id.* art. 157.

To enforce the Blasphemy Act, the Indonesian government has created a system to monitor and investigate religions in Indonesia. In 2004, the government gave the Attorney General the authority to maintain public order and safety through “supervising version[s] of belief that potentially endanger people and country” and “prevent[ing] [the] misuse[] and /or contamination of religion.”<sup>12</sup> The Attorney General is assisted in this effort by teams of local officials and community members dispatched to monitor sects and beliefs (*Tim Koordinasi Pengawasan Aliran Kepercayaan Masyarakat*, or PAKEM) in every province and municipality or district.<sup>13</sup>

## **B. The Act’s Historical Context**

Originally, the Blasphemy Act was not a law at all, but a “Presidential Enactment” issued by President Soekarno on 27 January 1965.<sup>14</sup> This law was part of Soekarno’s “Nasakom” initiative, designed to mobilise the cultural forces of nationalism, religion, and communism to advance his political power.<sup>15</sup> According to the Elucidation, the Act “was passed in response to an increase in minority religions that were perceived by the government as ‘exceedingly detrimental to existing Religions,’ ‘fracturing National unity,’ and ‘blasphem[ing] religion.’”<sup>16</sup>

After the nation’s violent purge of communism and the fall of President Soekarno’s regime, President Soeharto came to power in 1967. As part of a policy to suppress atheism, which was associated with communism, Soeharto’s government advanced a law requiring all Indonesians to choose a religion.<sup>17</sup> Then, in 1969, President Soeharto elevated the Blasphemy Act to “Law” status.<sup>18</sup>

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<sup>12</sup> See Law No. 16/2004 art. 30(3). Article 30(3) states that the Attorney General maintains public order and safety by “(c.) Supervising the distribution of printed material; (d.) supervising forms of belief that potentially endanger people and the nation; (e.) preventing the mistreatment and /or contamination of religion.”

<sup>13</sup> See Letter of Instruction Issued by PAKEM Central Bureau, No.34/Pakem/S.E./61 (Apr. 7, 1961) (*cited in* Trisno S. Sutanto, *The Challenges of Religious Freedom: an Indonesian Experience* at 4, delivered to 56<sup>th</sup> General Assembly of EKUMINDO in Stuttgart, Germany (Sept. 14–16, 2006) [hereinafter *The Challenges of Religious Freedom*], available at <http://www.scribd.com/doc/20317516/The-Challenges-of-Religious-Freedom-in-Indonesia> (last visited Dec. 23, 2009)).

<sup>14</sup> President Soekarno installed the Presidential Enactment exactly one week after Indonesia had withdrawn from the United Nations. See *The Challenges of Religious Freedom*, *supra* note 13, at 5 (*citing* Presidential Stipulation No. 1/PNPS/1965).

<sup>15</sup> See ADRIAN VICKERS, *A HISTORY OF MODERN INDONESIA* 146 (2005). “Nasakom” is an acronym for nationalism (“nationalisme”), religion (“agama”), and communism (“komunisme”).

<sup>16</sup> See Elucidation, *supra* note 4, I(2).

<sup>17</sup> See *The Challenges of Religious Freedom*, *supra* note 13, at 5. The present-day citizen Identification Card regulations requiring a declaration of each person’s official religion, discussed *infra* Part II.A.2.

<sup>18</sup> See *id.* Law No. 1/PNPS/1965 was formalised as Law No. 5/1969.

## C. Religious Freedom Commitments in International and Domestic Law

### 1. Indonesia's Commitments under International Law and Regional Law

Indonesia has obligated itself to protect religious freedom under several different international instruments.

First, as a member of the United Nations, Indonesia has pledged to respect the principles set forth in the United Nations Charter.<sup>19</sup> The UN Charter commits Indonesia to “respect human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>20</sup> Indonesia has also pledged to uphold the Universal Declaration of Human Rights (“UDHR”).<sup>21</sup> The UDHR provides in Article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>22</sup>

In pledging to uphold the UDHR, a government thereby pledges to guarantee the rights of religious people to adhere to the religious doctrines of their individual choice, regardless of a majority's or a government's preferred interpretation of religious doctrine.

Second, Indonesia has pledged to protect religious freedom under the International Covenant on Civil and Political Rights (“ICCPR”),<sup>23</sup> which Indonesia acceded to in 2005.<sup>24</sup> The ICCPR is the legal expression of the principles outlined in the UDHR and unequivocally protects the individual's rights to freedom of thought, conscience and religion,<sup>25</sup> freedom of association,<sup>26</sup>

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<sup>19</sup> United Nations, *Charter of the United Nations*, 1 UNTS XVI (Oct. 24, 1945).

<sup>20</sup> *Id.* arts. 55–56.

<sup>21</sup> G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 12, 1948).

<sup>22</sup> *Id.* art. 18.

<sup>23</sup> G.A. Res. 2200A (XXI), art. 18, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>24</sup> See Law No. 12/2005 on Indonesia's ratification of the ICCPR on February 23, 2006.

<sup>25</sup> *Id.* art. 18 (“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).

<sup>26</sup> *Id.* art. 21 (“The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”).

and equal protection under the law.<sup>27</sup> The ICCPR further specifies that these protections extend to religious minorities.<sup>28</sup>

The three General Comments most directly affecting freedom of religion or belief and freedom of expression have all counselled that state restrictions of these freedoms must be very narrowly tailored.<sup>29</sup> The Human Rights Committee's General Comment no. 10 that interprets ICCPR Article 19 states in part:

[T]he exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, ***these may not put in jeopardy the right itself.***<sup>30</sup>

The United Nations reiterated this point in *General Comment no. 22 on ICCPR Article 18*:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is ***far-reaching and profound***; it encompasses freedom of thought ***on all matters***, personal conviction and the commitment to religion or belief, ***whether manifested individually or in community with others***. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. ***The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency***, as stated in article 4.2 of the Covenant.<sup>31</sup>

The General Comment further states that the right to freedom of religion in Article 18. . .

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<sup>27</sup> *Id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

<sup>28</sup> *Id.* art. 27 ("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.").

<sup>29</sup> See UN High Comm'r for Human Rights, HRC, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred*, art. 20 (July 29, 1983) [hereinafter *General Comment 11*]; HRC, *General Comment No. 22: The right to freedom of thought, conscience and religion*, art. 1, CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter *General Comment 22*].

<sup>30</sup> UN High Comm'r for Human Rights, HRC., *General Comment No. 10: Freedom of expression*, art. 19 (Jun. 26, 1983) (emphasis added). The Human Rights Committee that issues General Comments is a body of independent experts that monitors implementation of the ICCPR. The Committee is empowered to hear individual and inter-state complaints alleging violations of the ICCPR and to issue interpretative General Comments of the ICCPR.

<sup>31</sup> General Comment 22, ¶ 1 (emphasis added).

*... is not limited in its application to traditional religions* or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, *including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.*<sup>32</sup>

Finally, as a Member State of the Association of Southeast Asian Nations (“ASEAN”), Indonesia has agreed to uphold the principles set forth in the ASEAN Charter, which include:

- h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; and
- j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.<sup>33</sup>

Pursuant to the Vienna Convention<sup>34</sup> and the ASEAN Charter, Indonesia is therefore bound under international law to adhere to the terms of the Charter of the United Nations.

The Indonesian Human Rights Act of 1999 moreover stipulates that the UDHR and the ICCPR are part of the corpus of Indonesian law. The Preamble states: “as a member of the United Nations, the nation of Indonesia has a moral and legal responsibility to respect, execute, and uphold the Universal Declaration on Human Rights promulgated by the United Nations, and several other international instruments concerning human rights ratified by Indonesia.”<sup>35</sup> Article 7 further stipulates that international regulations on human rights that have been ratified by Indonesia shall be applicable and legally binding in Indonesia.<sup>36</sup>

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<sup>32</sup> *Id.* ¶ 2 (emphasis added). Amyebi Ligabo, Special Rapporteur on freedom of expression, has warned about the dangers of sacrificing free expression for the sake of religious feelings. In his 2008 report to the UNHRC, Mr. Ligabo states that “limitations are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements... they are not designed to protect belief systems from external or internal criticism.” See U.N. Doc. A/HRC/7/14 (2008).

<sup>33</sup> ASEAN Charter art. 2(h)-(j).

<sup>34</sup> Article 26 of the Vienna Convention on the Law of Treaties provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” See Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 33, entered into force Jan. 27, 1980. Article 27 further provides that adherence to domestic law is no justification for failure to perform the obligations of a particular agreement. See *id.* art. 27.

<sup>35</sup> Act No. 39 of 1999 Concerning Human Rights, Preamble (d).

<sup>36</sup> See *id.* art. 7(2).



## 2. Indonesia's Obligations Under the 1945 Constitution and Domestic Law

Alongside these international commitments, Indonesia has separate duties to protect religious freedom under its Constitution and domestic law. First, Chapter X-A, the Human Rights chapter added to the Constitution in 2001, includes the following guarantees:

Each person is free to worship and to practice the religion of his choice;

Each person has the right to be free in his convictions, to assert his thoughts and tenets, in accordance with his conscience;

Each person has the right to freely associate, assemble, and express his opinions.<sup>37</sup>

Second, freedom of religion and conscience is separately protected in Article 28 I(1) of the Constitution, which states that, among other fundamental rights, “the right to freedom of thought and conscience, [and] the right to embrace a religion ... are basic human rights that may not be derogated under any circumstances.”<sup>38</sup>

Third, the Indonesian Constitution protects an individual's rights to due process and equal protection of the law. Article 28 D(1) of the Constitution guarantees that “[e]very person shall have the right of recognitions, guarantees, protection, and certainty before a just law, and of equal treatment before the law.”<sup>39</sup>

Finally, the Indonesian Human Rights Act of 1999 provides statutory protections for religious freedom.<sup>40</sup> Article 22(1) states that “[e]veryone has the right to freedom to choose his religion and to worship according to the teachings of his religion and beliefs.”<sup>41</sup> Article 22(2) guarantees the freedom to profess one's religion and to practice one's convictions and beliefs.<sup>42</sup>

## II. Argument

Recently deceased President Abdurrahman Wahid believed that the government of Indonesia should not be in the position of determining what qualifies as a religion.<sup>43</sup> When asked, “How can we determine [whether] something' is a religion or not a religion?” he answered, “That is a very easy question. ‘Something’ is a religion if according to its followers it

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<sup>37</sup> Constitution of Indonesia (1945), Ch. X-A, art. 28 E(1)–(3) [hereinafter “1945 Constitution”].

<sup>38</sup> *See id.* art. 28 I(1).

<sup>39</sup> *Id.* art. 28 D(1).

<sup>40</sup> Law No. 39/1999 Concerning Human Rights. The Constitutional Court has stated that assessing the meaning of the Constitution involves not only examining its text, but also “including philosophy and viewpoint of the nation constituting the spirit of the 1945 Constitution.” Decision No. 006/PUU-IV/2006, 39 (Dec. 7, 2006).

<sup>41</sup> *Id.* art. 22(1).

<sup>42</sup> *See id.* art. 22(2).

<sup>43</sup> *See* Heriyanto Yang, *The History and Legal Position of Confucianism in Post Independence Indonesia*, 10 MARBURG J. OF RELIGION 1, 6 (Aug. 2005), available at <http://www.uni-marburg.de/fb03/ivk/mjr/pdfs/2005/articles/yang2005.pdf>.

is a religion.”<sup>44</sup> The human rights reforms that took place in the previous decade were adopted through democratic processes, according to the rule of law, reflect this vision of religious freedom for all Indonesians.

Indonesia’s Blasphemy Act is, however, irreconcilable with this vision of religious freedom and jeopardizes Indonesia’s advancement as a robust constitutional democracy. The Blasphemy Act should be repealed for the following reasons: 1) it is antithetical to Indonesia’s obligations under both international law and the 1945 Constitution; 2) it directly contradicts precedent from this Court interpreting the Constitution; and 3) it reflects an outmoded view of religious freedom that contravenes Indonesia’s public policy goals as a pluralistic, democratic society.

In keeping with its record of upholding Constitutional protections for human rights, the Constitutional Court should overturn the Blasphemy Act and declare it unconstitutional.

**A. The Blasphemy Act Violates Indonesia’s Obligations Under International Law**

**1. The Blasphemy Act Violates Indonesia’s International Treaty Obligations by Protecting Religious Ideas Instead of the Persons Who Adhere to Religious Ideas**

The Blasphemy Act restricts the expression and exercise of religious beliefs that “deviate from the tenets of [an approved] religion.”<sup>45</sup> This approach of protecting the tenets of approved religions undermines the foundations of human rights law by protecting ideas rather than the individuals who hold ideas. Such a radical understanding of human rights is incompatible with the United Nations’ founding and legal documents. Indeed, there is no basis in international or regulatory law for the protection of religious ideas.

The UDHR begins not with protection of a particular religion or set of ideas, but with the individual human beings it seeks to protect. Its Preamble states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience. . . .”<sup>46</sup> This grounding of human rights in the protection of people instead of in the protection of ideas or of group identities is well-established in treaty and custom, in general principles, and in academia.

The ICCPR likewise recognises the grounding of human rights in individual human beings, not in religions, ideologies, or governments. ICCPR Article 19(1) states, “Everyone shall have the right to hold opinions without interference.” ICCPR Article 19(2) begins analogously, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Meanwhile, ICCPR Article 18 ensures the “right to freedom of thought, conscience and religion” and

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<sup>44</sup> *Id.*

<sup>45</sup> See Blasphemy Act art. 1.

<sup>46</sup> UDHR art. 1.

freedom “to manifest . . . religion or belief in worship, observance, practice and teaching.” Thus, the primary ICCPR articles concerning freedom of religion explicitly protect *expression* of thought, conscience, and religion, but do not protect the *content* of the thought, conscience, or religion. This is a critical distinction. The ICCPR does not guarantee that particular ideas will be protected from distortion or challenge in the public square. Quite the contrary, it protects the individuals who express belief—particularly those who express minority or unpopular beliefs.

Regional authorities such as the Council of Europe, charged with the development of legal standards, rule of law, human rights, and democratic development in the European integration process, have likewise concluded, “While we have an acknowledged duty to respect others and must discourage gratuitous insults, *freedom of expression cannot, needless to say, be restricted out of deference to certain dogmas or the beliefs of a particular religious community.*”<sup>47</sup> The Council of Europe has noted that modern democratic societies, such as Indonesia, “are made up of individuals of different creeds and beliefs.”<sup>48</sup> Because the right to freedom of expression is fundamental, “blasphemy laws should not be used to curtail freedom of expression and thought.”<sup>49</sup>

## **2. The Blasphemy Act Violates Equal Protection and Freedom of Association by Excluding People with Disfavoured Religious Beliefs from Civil Society**

International human rights documents to which Indonesia is bound require that Indonesia grant its citizens equal protection under the law. The UDHR states in Article 7, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Likewise, the ICCPR states in Article 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status.”

Article 27 of the ICCPR states, “In those States in which . . . *religious* . . . *minorities* exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, . . . to profess and practice their own religion.” (emphasis added). Indonesia’s obligation to avoid discrimination based on religion is further clarified in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which states: “[T]he expression ‘intolerance and discrimination based on religion or belief’ means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition,

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<sup>47</sup> Eur. Parl. Assembly, *Recommendation 1804: State, Religion, Secularity and Human Rights*, ¶ 19 (2007) (emphasis added), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1804.htm>.

<sup>48</sup> Eur. Parl. Assembly, *Recommendation 1510: Freedom of Expression and Respect for Religious Beliefs*, ¶ 3 (2006) (emphasis added), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1510.htm>.

<sup>49</sup> *Id.*

enjoyment or exercise of human rights and fundamental freedom.”<sup>50</sup> The United Nations has clearly stated that member states such as Indonesia “shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs ....”<sup>51</sup>

In stark contrast to these commitments, Indonesia’s Blasphemy Act on its face restricts fundamental human rights based solely on whether a person adheres to one of the government’s sanctioned versions of the six official religions. By rejecting the legal personality of minority religions, the Blasphemy Act has served as the basis for numerous policies that exclude people from participation in civil society. Precisely because legal entities have become so significant and pervasive as mechanisms to carry out group activities in modern society, the restriction of the rights of certain religious groups to register and obtain legal personality constitutes a grave interference with the freedom of religion, freedom of association, and the right to equal protection.<sup>52</sup>

Specifically, Article 61 of Indonesia’s Civil Registry Administration Law requires that the Identity Card issued to all citizens provide a space where registrants indicate their religion.<sup>53</sup> Adherents of some unrecognised religions may leave blank the available space on their identity cards, while adherents to other religious faiths are often denied identity cards altogether. Adherents to non-recognised groups are moreover prohibited from mentioning their beliefs in any official act.<sup>54</sup> These examples of unfavourable treatment based on religion violate international commitments to treat all people as equal before the law.<sup>55</sup>

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<sup>50</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 2(2), U.N. Doc. A/RES/36/55 (Nov. 25, 1981), available at <http://www.un-documents.net/a36r55.htm>.

<sup>51</sup> *Id.* art. 4(2).

<sup>52</sup> See, e.g., *Kimlya v. Russia*, ECHR, App. Nos. 76836/01 and 32782/03, § 84 (Oct. 1, 2009). The Organization for Security and Co-operation in Europe (“OSCE”) has accordingly acknowledged the importance of the right to acquire legal personality by including it among the commitments of OSCE nations. See Vienna Concluding Document, Principle 16.3.

<sup>53</sup> See Indonesian NGO Alternative Report on ICERD, *Breaking the Smoke-screen of Racial Discrimination and Impunity in Indonesia*, at 9-10 (June 1, 2007) [hereinafter Indonesian NGO Report], available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGO-Indonesia.pdf>.

<sup>54</sup> Additionally, the stigma associated with having no religion on one’s ID card dates back to the post Communist purge in the 1960s, when atheism was equated with communism. Atheists were thus labeled subversive, and subject to arrest without trial.

<sup>55</sup> See Indonesian NGO Report, *supra* note 53, at 9-10. Members of minority religions are also hindered from registering their marriages. For example, Article 2(1) of the Marriage Law (Law No. 23/2006) states that a married couple may register their marriage with the state as long as the ceremony is performed according to the rites of a religion with legal status. However, people who adhere to indigenous or traditional beliefs do not belong to an organization with legal personality; and therefore, cannot register their marriages. Such obstacles to marriage between people of disfavoured religions violate Article 16 of the UDHR, which guarantees a person’s right to marry without limitations based on religion. See *id.* at 24-25.

### 3. The Blasphemy Act Violates the Fundamental Freedoms of Religion and Expression by Criminalising Peaceful Expressions of Sincere Religious Belief

The Blasphemy Act makes criminals out of conscientious, peaceful religious adherents whose religious convictions and practices are seen by the government as “exceedingly detrimental to existing Religions.”<sup>56</sup> Enforcement of the Act is typically left to the unbridled discretion of local officials who are free to act on their own prejudices. Between 2003 and 2008, over 150 individuals were detained or arrested under Article 4 of the Blasphemy Act, which established Article 156(a) of the Criminal Code.<sup>57</sup> The alleged crime in these instances was a perceived injury to the government’s preferred interpretation of the state-approved religions.

The Blasphemy Act also has been used to impose criminal punishments on people who belong to religions that derive from recognised religions. A prime example is the Joint Decree on the Ahmadiyya (“Joint Decree”), issued in 2008 by the Indonesian Minister of Religious Affairs, the Attorney General, and the Minister of the Interior.<sup>58</sup> The majority of Muslims do not recognise the Ahmadiyya as Muslim because they follow “activities that deviate from mainstream Islamic teachings.”<sup>59</sup> The Joint Decree orders Ahmadiyya adherents, “as long as they consider themselves to hold to Islam, to discontinue the promulgation of interpretations and activities that are deviant from the principal teachings of Islam.”<sup>60</sup> Private citizens and religious communities should be free to dispute—even vigorously—the relationship between the Ahmadiyya and Islam; indeed, private citizens and religious groups even have the freedom of religion and freedom of speech to denounce what the Ahmadiyya believe is wrong or opposed to Islam. However, the Joint Decree improperly appoints the state, with all its police powers, as arbiters of what the Ahmadiyya believe and what they should be allowed to propagate as the “principal teachings of Islam.”

Another religious body related to Islam, the *Komunitas Eden (Kerajaan Tuhan Eden)* Group, has also been victim to the Blasphemy Act. In 2005, the Indonesian government sentenced the group’s leader, Lia Eden, to two years’ imprisonment for blaspheming against

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<sup>56</sup> *Elucidation*, *supra* note 4, § I(1). Blasphemy and “defamation of religion” laws have allowed prosecution for “unreasonable” and “offensive” speech. These standards have been read to include giving charitable aid, criticising a religious belief, or even telling someone that God would be happier if that person followed a different religion. There is *no* religious believer—including those who promote such laws—who does not value the ability to assert that his or her beliefs about religious truths are not only better, but true. Indeed, freedom of conscience and its expression is rooted in the *truth* of the inherent dignity of the human person, not in the fickle will of the state. See UDHR, Preamble (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

<sup>57</sup> See *International Religious Freedom Report 2008: Indonesia*, U.S. State Dep’t, available at <http://www.state.gov/g/drl/rls/irf/2008/108407.htm> (last viewed Dec. 30, 2009). Report details many examples of local enforcement of blasphemy laws.

<sup>58</sup> See 2008 Joint Decree on the Ahmadiyya, promulgated by the Indonesian Minister of Religious Affairs, the Attorney General, and the Minister of the Interior [hereinafter “Joint Decree”], available at <http://www.thepersecution.org/world/indonesia/docs/skb.html> (last visited Dec. 18, 2009).

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 2.

Islam. Her alleged crime was calling herself God's Messenger and interpreting Quranic teachings independently of customary Islamic methodology.<sup>61</sup> Since then, Lia Eden and at least two of her associates have received multiple prison sentences under the Blasphemy Act for various religious practices that courts have found to blaspheme against Islam.<sup>62</sup>

The Blasphemy Act has also been used to imprison devout Muslims for praying "incorrectly." For instance, in August 2005, Muhammad Yusman was sentenced to two years in prison under Article 157 for reciting Muslim prayers in the Indonesian language instead of in Arabic.<sup>63</sup> Similarly, in June 2006, Sumardi Tappaya, a Muslim and a high school religion teacher, was sentenced to six months in prison for deviancy after a relative accused him of whistling during prayers.<sup>64</sup>

The Blasphemy Act also makes criminals of those who subscribe to an approved religion, but hold to unorthodox practices or ideas. For example, police arrested the leader of the Sion City of Allah Christian sect and six of his followers under Article 156a for straying from "correct Christian teachings."<sup>65</sup> The Sion City of Allah Christian sect is considered an unacceptable branch of Christianity, since it is based on only one book of the Bible (the Book of Jeremiah), its liturgy is considered "deviant from Christianity," and its followers are forbidden from attending church until 2011.<sup>66</sup>

The rights of adherents to mainstream religions are also jeopardized by the Blasphemy Act, because the Act restricts the freedom to share one's beliefs, despite the fact that international human rights norms recognize proselytism—sharing one's religious beliefs with others—as an integral part of freedom of religion and freedom of speech.<sup>67</sup> For example, in 2007, forty-two Christians were sentenced to five years in prison for "insulting religion."<sup>68</sup> Their

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<sup>61</sup> See *Sect Leader Lia Jailed for Blasphemy*, THE JAKARTA POST (June 30, 2006), available at <http://www.mail-archive.com/osint@yahoo.com/msg22918.html> (last visited Dec. 22, 2009).

<sup>62</sup> See Andra Wisnu, *Lia Eden Sentenced to Prison, Again*, THE JAKARTA POST (June 3, 2009), available at <http://www.thejakartapost.com/news/2009/06/03/lia-eden-sentenced-prison-again.html> (last visited Dec. 22, 2009).

<sup>63</sup> See Richard C. Paddock, *Separation of Mosque, State Wanes in Indonesia*, L.A. TIMES, Mar. 20, 2006, at A1 ("The government and the council have been working together to suppress my ideas," Roy said during an interview in prison. "But this will not stop me from doing what I believe."); see also *International Religious Freedom Report 2007: Indonesia*, U.S. State Dept., available at <http://www.state.gov/g/drl/rls/irf/2007/90137.htm> (last viewed Dec. 29, 2009).

<sup>64</sup> See *id.*

<sup>65</sup> See Yemris Fointuna, *Seven Declared Suspects of Blasphemy*, THE JAKARTA POST (June 4, 2009), available at <http://www.thejakartapost.com/news/2009/06/04/seven-declared-suspects-blasphemy.html> (last visited Dec. 23, 2009).

<sup>66</sup> See *id.*

<sup>67</sup> See, e.g., Tad Stahnke, *The Right to Engage in Religious Persuasion*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 619-49 (Tore Lindholm et al. eds., 2004).

<sup>68</sup> See United States Commission on International Religious Freedom, *USCIRF Annual Report 2009 - The Commission's Watch List: Indonesia* (May 1, 2009), available at <http://www.unhcr.org/refworld/docid/4a4f272d8.html> (last visited Dec. 30, 2009).

alleged crime was disseminating a video that instructed individuals to pray for the conversion of Indonesia's Muslim political leaders.<sup>69</sup>

Similarly, in September 2005 a court sentenced three Christian women who conducted a Christian youth program to three years imprisonment under a law forbidding causing a child to convert to another religion through "deception, lies, or enticement."<sup>70</sup> Even though the Muslim children in the program had parental permission to attend, and none of the children had converted to Christianity, the Christian women were found guilty.<sup>71</sup> This incident, in addition to violating the rights of the Christian women to propagate their religion, violates the right of parents to educate their children as they choose.<sup>72</sup>

None of these individuals charged under the Blasphemy Act committed any act that could be called a crime under either Indonesian or international law. Their speech was peaceful and did not involve language inciting their listeners to violence. This Court should find that the Blasphemy Act impels the local government to criminalise the peaceful, sincere exercise of the fundamental human rights of freedom of religion and expression.

## **B. The Blasphemy Act Violates the 1945 Constitution**

### **1. The Blasphemy Act Violates Article 28 I(1) of the Indonesian Constitution.**

The Blasphemy Act contradicts Article 28 I(1) of the 1945 Constitution, as interpreted by this Court. Article 28 I(1) states:

The right to life, the right not to be tortured, *the right to freedom of thought and conscience, the right to embrace a religion*, the right not to be enslaved, the right to be recognised as an individual before the law, and the right not to be prosecuted under retrospective laws *are basic human rights that may not be diminished under any circumstances*.<sup>73</sup> (emphasis added)

The Constitutional Court, in the seminal 2002 criminal case of *Masykur Abdul Kadir*, affirmed that Article 28 I(1) is to be taken at face value: these rights may not be diminished under any circumstances.<sup>74</sup> In this case, the defendant, Masykur Abdul Kadir, was sentenced to fifteen years' imprisonment for his role in the Bali bombings in October 2002. After his conviction,

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<sup>69</sup> See *id.*

<sup>70</sup> See PAUL MARSHALL, RELIGIOUS FREEDOM IN THE WORLD 204 (2008).

<sup>71</sup> See *id.*

<sup>72</sup> See, e.g., UDHR art. 26(3) ("Parents have a prior right to choose the kind of education that shall be given to their children."); see also UNESCO Convention against Discrimination in Education, art. 5.1(b) ("It is essential to respect the liberty of parents ... to ensure ... the religious and moral education of the 'children in conformity with their own convictions)."

<sup>73</sup> 1945 Constitution art. 28 I(1).

<sup>74</sup> See Decision No. 013/PUU-I/2003, Indonesian Constitutional Court (July 23, 2004), *available at* [http://www.mahkamahkonstitusi.go.id/putusan/putusan\\_sidang\\_eng\\_ConstitutionalCourtDecisionTerroristAct.pdf](http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_eng_ConstitutionalCourtDecisionTerroristAct.pdf).

lawyers for Masykur filed a petition with the Constitutional Court, claiming that the prosecution violated his right in Article 28 I(1) of the 1945 Constitution “not to be prosecuted under retrospective laws.”

One of the principal issues in the case was whether the guarantees in Article 28 I(1) are subject to restrictions based on “morality, religious values, security, and public order,” as set out in Article 28 J(2).<sup>75</sup> Masykur presented expert witnesses who testified that the rights guaranteed in Article 28 I(1) cannot be limited “in any circumstances,” and that the guarantees of Article 28 I(1) take precedence over the language in Article 28 J, which states that individual freedoms may be restricted in consideration of “the rights and freedoms of others” and “based upon considerations of morality, religious values, security, and public order.”<sup>76</sup>

In an important act of judicial independence, this Court agreed that Masykur’s rights under Article 28 I(1) were unjustly violated. Notwithstanding the government’s manifest interest in a conviction against someone allegedly responsible for the worst terrorist attack in the nation’s history, this Court ruled that the rights guaranteed in Article 28 I(1) indeed “may not be diminished under any circumstances.”<sup>77</sup>

In the present case, the Court cannot uphold the Blasphemy Act without overturning its ruling in *Masykur Abdul Kadir* and ignoring the unyielding language of Article 28 I(1). The Court’s application of the phrase “may not to be diminished under any circumstances” in *Masykur Abdul Kadir* applies with even greater force to the present Petition regarding the Blasphemy Act.

## **2. The Blasphemy Act Violates the Indonesian Constitution Because It Creates Legal Uncertainty and Undermines the Rule of Law**

The Blasphemy Act also violates the 1945 Constitution because its vague terminology undermines the rule of law by leaving fundamental human rights vulnerable to the biases of individual officials. The Act threatens citizens with reprimands, sanctions, and prison for associating with “religious activities [that] are similar” to those of approved government religions, and also for associating with “interpretations and activities thereof” that “deviate” from the “tenets of the religion.”<sup>78</sup> These terms are inherently vague and open to subjective interpretations. Consequently, they give virtually no instruction to law enforcement officials regarding what behaviour is prohibited.

This Court has repeatedly affirmed that Indonesia is committed to repealing laws that undermine “the principle of legal certainty.”<sup>79</sup> It has at least twice struck down hate speech laws

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<sup>75</sup> See 1945 Constitution art. 28 J(2). Article 28 J(2) states that every person, in exercising his or her freedoms, “shall have the duty to accept the restrictions established by law for the sole purpose of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security, and public order in a democratic society.”

<sup>76</sup> See Decision No. 013/PUU-I/2003, Indonesian Constitutional Court (July 23, 2004) at 14, 16–17.

<sup>77</sup> *Id.* at 31–32.

<sup>78</sup> See Blasphemy Act art. 1.

<sup>79</sup> *Id.* at 21 (quoting Decision No. 013/PUU-IV/2006 at 21).



for this very reason. On December 6, 2006, the Constitutional Court struck down provisions of the Criminal Code that criminalised “hate speech” against the President or Vice President of Indonesia.<sup>80</sup> The Court found that the hate speech laws violated Article 28 D(1) of the 1945 Constitution, which grants every person “the right to . . . security, protection and certainty under the law.” The Court’s decision emphasised that Indonesia is governed by the rule of law, which “highly respects human rights as stated in the 1945 Constitution.”<sup>81</sup>

The following year, the Constitutional Court again repealed hate speech laws that made it illegal to “declare[] feelings of hostility, hatred or contempt towards the Indonesian Government in public.”<sup>82</sup> The Court held that these hate speech laws violated Article 28 D(1) of the Indonesian Constitution, which guarantees that “[e]very person shall have the right of recognitions, guarantees, protection, and certainty before a just law.” In the words of Constitutional Justice Maruarar Siahaan, hate speech laws of this sort “may cause legal uncertainty (*rechtsonzekerheid*) because they are highly vulnerable to an interpretation whether a protest, statement of opinion, or expression is a [lawful] critic[ism] or [an unlawful] defamation of the President and/or Vice President.”<sup>83</sup>

Vague laws undermine the rule of law because they leave the door open to selective prosecution, based on caprice or prejudicial policies of a government official. Other courts have counselled that “[t]he more important aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections.”<sup>84</sup> As a matter of legal principle, statutory provisions that grant excessive or arbitrary governmental discretion over religious freedom, whether as a result of vague provisions or otherwise, should be carefully limited.<sup>85</sup>

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<sup>80</sup> See Decision No. 013/PUU-IV/2006, Indonesian Constitutional Court (Dec. 6, 2006).

<sup>81</sup> *Id.* at 21. An expert testified before the Constitutional Court that the Indonesian Blasphemy Act was “no longer relevant” and had lost its “*raison d’être* in the reformed democracy era.” *Id.* at 17.

<sup>82</sup> Decision No. 06/PUU-V/2007, Indonesian Constitutional Court (July 17, 2007).

<sup>83</sup> Presentation by Constitutional Justice Maruarar Siahaan, Constitutional Court of the Republic of Indonesia, *Important Decisions of the Republic of Indonesia Dec. 2006–Sept. 2007*, Address at the Fifth Conference of Asian Constitutional Court Judges (Oct. 2007), 9, available at <http://www.court.go.kr/home/english/introduction/pdf/12.pdf>.

<sup>84</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citations omitted). Applying these principles, courts have struck down laws intended to protect even patriotism. In one case, the United States Supreme Court struck down a law that prohibited treating a flag “contemptuously” because the law “fail[ed] to draw reasonably clear lines between the kinds of . . . treatment that are criminal and those that are not.” *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

<sup>85</sup> See *Manoussakis v. Greece*, ECHR, App. no. 18748/91, § 47 (Sept. 26, 1996); see also *Religionsgemeinschaft der Zeugen Jehovas et al. v. Austria*, ECHR, App. no. 40825/98, § 71 (July 31, 2008).

### **3. The Blasphemy Act's Vagueness Also Has the Effect of Suppressing the Freedom of Expression**

In addition to violating the principle of “legal certainty,” the Constitutional Court has ruled that overbroad statutes restricting expression, such as the hate speech laws discussed in the previous section, undermine free speech. As noted previously, key terms in the Blasphemy Act, such as “religious activities,” “similar,” “deviate,” and “tenets of the religion” are open to many reasonable interpretations. The Act therefore fails to give adequate notice to citizens about what behaviour is prohibited. In this environment of uncertainty, citizens may be reluctant to exercise their human rights to religious liberty, freedom of expression, and free speech.

In the 2006 and 2007 hate speech cases, this Court found that laws criminalising the defamation of government officials “negate the principle of equality before the law and decrease the freedom to express ideas and opinions, [and] the freedom to obtain information.”<sup>86</sup> Other courts have noted this same threat to individual rights contained in overbroad restrictions on public expression by emphasizing that freedom of speech is “delicate and vulnerable, as well as supremely precious . . . [and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”<sup>87</sup>

For the same reasons this Court overturned hate speech laws in 2006 and 2007, this Court should now find that the blasphemy laws results in unconstitutional contraction of the freedom of expression.

### **4. Civil Courts Have a Constitutional Duty to Protect Religious Freedom Without Interfering in Matters of Religious Doctrine**

States, civil courts, and their administrative agencies should neither compel an individual’s religious participation nor interpret religious doctrine. Non-interference by the state safeguards both the rights of individuals to practice religion freely and the rights of religious institutions to determine their own doctrine and membership. An individual has the right to profess and practice the religion of his or her choosing without coercion from the government—regardless of whether his or her choice is a popular religion, or whether his or her interpretation of doctrine accords with what a government-chosen “expert” might conclude.

#### **a) Civil Courts Should Not Interpret Religious Doctrine**

Civil courts in constitutional democracies should not interpret religious doctrine. Even in countries that have had a history of formal alliance with a particular religion, constitutionalism has come to protect the freedom of citizens to follow the religion of their choice, without pressure or threats from the government. To preserve the individual’s right not to be coerced in matters of conscience, government officials and agencies dealing with religious groups have a “duty of neutrality and impartiality.”<sup>88</sup>

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<sup>86</sup> Decision No. 06/PUU-V/2007 at 21 (*quoting* Decision No. 013/PUU-IV/2006 at 21).

<sup>87</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>88</sup> *See, e.g., Moscow Branch of the Salvation Army v. Russia*, ECHR, App. no. 72881/01, §§ 92, 97 (Oct. 5, 2006).

Spain provides an example of a democratic nation that has made great progress toward achieving religious freedom despite an historic official bias toward one particular religious group. The Spanish government was formally aligned with the Catholic Church until 1978, when a new constitution was enacted that “effectuated a gradual transformation of the Spanish confessional state into a regime based on religious freedom without breaking abruptly with the nation’s historical tradition.”<sup>89</sup> The new Spanish Constitution required that the state’s relationship to the Catholic Church, as well as Islam and other religions, be guided by neutral principles set forth in the Constitution that would not allow the state to favour any particular religion.

Despite a prior record of mistreatment of Muslims and other minority groups, freedom of religion and belief has defined Spanish state policy on religious affairs since the new constitution was drafted. Spanish laws no longer preference any one religious group and allow registration of non-traditional religions. For example, in a recent child custody case involving a non-traditional religious group, the Spanish Constitutional Court interpreted Article 16 of the Spanish Constitution to hold that a father could not be denied visitation rights or the right to teach his children based only on unsupported claims that the father’s Gnostic religion (which departed from popularly accepted understandings of orthodox Christianity) was “dangerous.”<sup>90</sup>

The duty of neutrality mandates that civil courts refrain from interpreting religious doctrine and refrain from giving preference to certain religious beliefs. The European Court of Human Rights (“ECHR”) has reiterated in various cases that government intervention in religious affairs that involves evaluating religious beliefs is inconsistent with religious freedom.<sup>91</sup> The ECHR has also, on more than one occasion, spoken out against the non-neutral administration of a government’s registration system for religions. For example, in the case *Hasan and Chaush v. Bulgaria*,<sup>92</sup> the ECHR held that the government must be strictly neutral in its administration of any religious registration process it elects to use:

[The Court] recalls that, but for very exceptional cases, the right to freedom of religion ... excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. State action favouring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion.<sup>93</sup>

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<sup>89</sup> Javier Martinez-Torron, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 715 (2001).

<sup>90</sup> See *id.* at 747 (citing *Sentencias del Tribunal Constitucional Sistematizadas y Comentadas* (S.T.C.) 141/2000 (May 29, 2000), FJ 4).

<sup>91</sup> See, e.g., *Svyato-Mykhaylivska Paragiya v. Ukraine*, ECHR, App. no. 77703/01, § 113 (Sept. 14, 2007); 97 *Members of the Gldani Congregation of Jehovah’s Witnesses v. Georgia*, ECHR, App. no. 71156/01, § 131 (May 3, 2007); *Cha’are Shalom Ve Tsedek v. France*, ECHR Grand Chamber, App. no. 27417/95, § 84 (June 27, 2000).

<sup>92</sup> *Hasan and Chaush v. Bulgaria* [GC], ECHR, App. no. 30985/96, (Nov. 2000).

<sup>93</sup> See *id.* ¶ 78 (citing *Serif v. Greece*, ECHR App. no. 38178/97, ¶ 49 (Sept. 1999)).

The ECHR further stated that in democratic societies, it is not the role of the State to undertake efforts to unify the leadership of religious communities.<sup>94</sup>

The Blasphemy Act undoubtedly violates the principle of neutrality. Under the authority of this Act, the government has chosen six religions to receive preferential treatment. What is more, the Blasphemy Act not only discriminates among religions, but it does so arbitrarily and inconsistently. The law penalises emerging or minority interpretations of existing religions, while failing to recognise that many of its favoured religions were once not only minority religious perspectives, but viewed as heretical by the religion or religions out of which they emerged.

To complicate matters further, the Blasphemy Act commits the Indonesian government to determining the “true” position on “central” tenets of “approved” religions.<sup>95</sup> This prescription implicates the State in deciding questions that are the exclusive domain of religious bodies.<sup>96</sup>

The arrest of the Sion City of Allah sect leaders mentioned earlier aptly illustrates the folly of a government attempting to determine true religious doctrine. The sect leaders were charged under Article 156a for allegedly blaspheming the Timor Evangelical Church by renouncing the Church’s holy communion and wedding ceremonies.<sup>97</sup> Nonetheless, the leaders of the Timor Evangelical Church stated that they had not filed a complaint against Sion City of Allah; indeed, they said they did not believe Sion City of Allah had blasphemed their congregation.<sup>98</sup> “If it is the Protestant Christian [religion] that is blasphemed, then who has reported them to the police for arrests?” one Timor Evangelical Church leader asked.<sup>99</sup> The police, however, were undeterred. A spokesman from the police said, “We hope the church will not interfere in[] the case.”<sup>100</sup> In other words, the government took offence at “blasphemy”

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<sup>94</sup> See *id.* “In democratic societies the State does not need to take measures to ensure that religious communities are brought under unified leadership[.]” The ECHR declined to reach the question of whether registration of a religious organisation is per se impermissible in a democratic society.

<sup>95</sup> See *Elucidation, supra* note 4, § II, art. 1 (“The tenets of a religion can be made known by the Department of Religious Affairs which for that purpose has the instruments/means to investigate.”).

<sup>96</sup> See, e.g., *Hasan and Chaush v. Bulgaria*, ¶ 82; *Supreme Holy Council of the Muslim Community v. Bulgaria*, ECHR, App. no. 39023/97, ¶ 77 (Dec. 16, 2004). To say that the State should not meddle in the internal decision-making and doctrinal interpretations of a religious group does not entail that activities of a religious group are beyond state scrutiny. Rather, a State may be justified in inquiring into a religious group’s activities, for example, to determine whether or not the group is appropriately categorized as a religion or to satisfy itself that the religious group’s activities are not criminal enterprises. See, e.g., *Moscow Branch of the Salvation Army v. Russia*, ECHR, App. no. 72881/01, ¶ 94 (Nov. 2006).

<sup>97</sup> See Yemris Fointuna, *Seven Declared Suspects of Blasphemy*, THE JAKARTA POST (June 4, 2009), available at <http://www.thejakartapost.com/news/2009/06/04/seven-declared-suspects-blasphemy.html> (last visited Dec. 23, 2009).

<sup>98</sup> See Yemris Fointuna, *Religious Leaders Regret Police Arrests of ‘Deviant’ Sect Figures*, THE JAKARTA POST, (June 9, 2009), available at <http://www.thejakartapost.com/news/2009/06/06/religious-leaders-regret-police-arrests-defiant039-sect-figures.html> (last visited Dec. 23, 2009).

<sup>99</sup> See *id.*

<sup>100</sup> *Id.*

against Christianity, even when the Christians who were allegedly harmed did not claim any injury.

The rights to freedom of association and freedom of worship contained in Article 28 of the 1945 Constitution guarantee that religious institutions are free to accept as members those who abide by their teachings, and to exclude those who do not. Article 28 equally guarantees that religious individuals and institutions are free to discuss and articulate what is and what is not an orthodox interpretation of their religion. In other words, the existing constitutional guarantees protect the right of the MUI to profess that a group such as the Ahmadiyya are not true Muslims, and the right of mainline Christians to declare that the doctrines of a group such as the Sion City of Allah are heterodox. The Blasphemy Act adds nothing to this freedom of religious groups to determine their membership and to preserve their doctrine from the influence of dissenters.

### **b) Civil Courts Should Not Compel an Individual's Religious Participation**

Civil courts likewise should not compel individuals to participate in religious activity. Government coercion in matters of religious faith is properly characterized as an incursion into the sphere of conscience of each individual—what is called in some contexts the “forum internum.” The “forum internum” has been defined as “the private, inner-life of religious belief.”<sup>101</sup> If a state does not regard as inviolate the most personal deliberations and judgments that take place in the conscience of each person, there can be no true religious freedom.

The Blasphemy Act violates the sanctity of the individual conscience. In the fall of 2007, police in Gresik, East Java, and Makassar, South Sulawesi, conducted raids and arrested members of al-Qiyadah al-Islamiyah on blasphemy charges.<sup>102</sup> In each instance, the police released the believers only after they repented and agreed to return to the government's approved understanding of Islam.<sup>103</sup> In Masassar, the city's Chief of Police oversaw the proceedings, wherein seven detained adherents of al-Qiyadah al-Islamiyah recited the Muslim confession of faith and signed statements renouncing al-Qiyadah al-Islamiyah and promising never to re-join it.<sup>104</sup>

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<sup>101</sup> See M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of The ICCPR and the ECHR*, 17 DUKE J. OF COMP. & INT'L LAW 91, 94 (2006). It is “subject to unqualified protection in all the key human rights instruments \* \* \*. PAUL M. TAYLOR, FREEDOM OF RELIGION AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 115 (2005). The concept has its origins in medieval European legal thought, *see, e.g.*, James Q. Whitman, *The Moral Menace of Roman Law and the Making of Conscience: Some Dutch Evidence*, 105 YALE L.J. 1841, 1861 (1996) (“In the medieval theological tradition, Roman law, whatever its authority, did not govern the *forum internum*, the internal court of conscience, presided over by the confessor.”).

<sup>102</sup> See *International Religious Freedom Report 2008: Indonesia*, U.S. State Dep't, available at <http://www.state.gov/g/drl/rls/irf/2009/127271.htm> (last visited Dec. 29, 2009).

<sup>103</sup> See *id.*

<sup>104</sup> See *Majelis Ulama*, INDONESIA MATTERS (Nov. 8, 2007), available at <http://www.indonesiamatters.com/1434/ulama> (last visited Dec. 30, 2009).

On its face, the Elucidation states that the government “tries to channel [spiritual traditions/bodies] towards a healthy outlook and toward the Belief of the One and Only God.”<sup>105</sup> In practice, although the government stops short of forcing people to join an approved religion, “the government’s messages about religion surely do encourage conversion . . . the official endorsements of agama make those persons without agama appear to be disloyal national citizens, uncommitted to the values of the Pancasila, not to mention intellectually and morally backward. . . .”<sup>106</sup> The government refuses to allow adherents to “aliran kepercayaan” to declare their religion on government identity cards, refuses to recognise their marriages, and refuses to allow them to conduct funeral services in accordance with their beliefs.<sup>107</sup> Such policies, created under the authority of the Blasphemy Act, impermissibly condition access to important government programs or government benefits on whether people will abandon their religious convictions and traditions in favour of the government’s preferred religions.

This Court should repeal the Blasphemy Act because it allows for lower courts and local officials to compel religious practice, which violates the Constitutional guarantee of individual autonomy in the areas of religious belief and practice.<sup>108</sup>

### c) Civil Courts Should Not Enforce Religious Law

This Court should also follow other civil governments in refusing to enforce religious laws, where doing so would require a court to interpret religious doctrine or require individuals to act in violation of conscience. For example, civil courts may enforce contracts with religious content to the extent that they comply with civil contract standards. However, a civil court may not enforce a religious contract if doing so would implicate the government in violating a party’s constitutional or civil protections.

One case dealing with this issue was *In re Marriage of Dajani*, where an American civil court would not enforce a *Mahr* (part of an Islamic marriage contract), because its terms violated existing state law regarding “profiteering by divorce.”<sup>109</sup> By contrast, in *Aziz v. Aziz* another civil court enforced a *Mahr* since it conformed to existing civil statutory requirements.<sup>110</sup>

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<sup>105</sup> See *Elucidation*, *supra* note 4, § II, art. 1.

<sup>106</sup> Kipp & Rogers, “Introduction: Indonesian Religions in Society” in *INDONESIAN RELIGIONS IN TRANSITION* 645-57 (R.S. Kipp & S. Rodgers, eds. 1987).

<sup>107</sup> See Al Alfriti, *Religions Liberty in Indonesia and the Rights of ‘Deviant’ Sects*, 3 *ASIAN JOURNAL OF COMPARATIVE LAW* 1, 16 (2008).

<sup>108</sup> See 1945 Constitution, Ch. X-A, art. 28 E(1)-(3).

<sup>109</sup> See *In re Marriage of Dajani*, 251 Cal Rptr. 871, 872 (Cal. Ct. App. 1988).

<sup>110</sup> See *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (“The document at issue conforms to the requirements of section 5-701(a)(3) of General Obligations Law and its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony.”); *cf. Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. 1995) (holding that a *Sadaq*, and Islamic antenuptial agreement, was not enforceable based on its failure to comply with the Statute of Frauds where “this SADAQ fails on three different points of law”—“materiality, specificity, and insufficiency.”). See also *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (*Sadaq* was valid and enforceable because it fulfilled Florida contract law, which “applies to the secular terms of the sadaq”).

Another important example, *Ran Dav's County Kosher, Inc. v. State*, involved the regulation of kosher foods in keeping with principles of Orthodox Judaism.<sup>111</sup> Local government officials had implemented regulations to monitor merchants and ensure that they would keep kosher according to a particular school of Judaism. However, the state court held that the government would take on an impermissible role of setting standards that were based on religious, not civil, law. The court reasoned that the government's active role in enforcing religious law by monitoring the handling of food in cooperation with a rabbi, a religious leader, would result in "excessive entanglement between government and religion, and political divisiveness incited by the government's favouritism of a particular religious faith."<sup>112</sup>

In *Ran Dav's County Kosher*, the court declined to use the civil law to enforce religious standards. The court did, however, suggest constitutionally appropriate way to prevent kosher-fraud by requiring "those who advertise food products as 'kosher' to disclose the basis on which use of that characterisation rests."<sup>113</sup> Such regulations would be permissible because the courts could enforce a civil contract between two parties without deciding on any questions of religious doctrine or requiring an individual to conform to a religious law.<sup>114</sup>

The courts in these cases did not deny enforcement of contract provisions simply on the basis of their religious origin; instead, they left religious questions to the side and focused exclusively on applying protections contemplated in civil law.

In contrast, under the Blasphemy Act local officials frequently heed, or even help enforce, decrees from religious bodies. The raids against Al-Qiyadah Al-Islamiyah members mentioned in the previous section began days after the MUI, the Indonesia Ulema Council,<sup>115</sup> issued a fatwa declaring the group heretical and relaying their conclusion to the police, "in the hope that Ahmad Moshaddeq would be prosecuted for blasphemy against Islam."<sup>116</sup> The 2008 Joint Declaration against the Ahmadiyya likewise came five months after a government-appointed team began monitoring the Ahmadiyya at the request of MUI.<sup>117</sup> This type of

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<sup>111</sup> See *Ran-Dav's County Kosher, Inc. v. New Jersey*, 129 N.J. 141 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993).

<sup>112</sup> *Id.* at 152.

<sup>113</sup> *Id.* at 167.

<sup>114</sup> See *id.* at 168 (quoting *Avitzur v. Avitzur*, 459 N.Y.S.2d 572, 575 (N.Y. 1983)).

<sup>115</sup> The MUI, a council of Muslim leaders, was created by General Suharto "as a means of mobilising Muslim support for the government's development policies." The Indonesian minister of religion in 1985 stated that its function was "to translate government policy into language that the ummah [Muslim community] understands," issuing fatwas to give legitimacy to these policies. See TIM KELL, *THE ROOTS OF ACEHNESE REBELLION, 1989–1992* 50 (1995). The MUI was not envisioned to restrict the speech of others but as an organization for community outreach, which is a legitimate and commendable form of government interaction with religious groups.

<sup>116</sup> See *Al-Qiyadah Al-Islamiyah*, INDONESIA MATTERS (Oct. 10, 2007), available at <http://www.indonesiamatters.com/1435/theocracy> (last visited Dec. 30, 2009).

<sup>117</sup> See *International Religious Freedom Report 2008: Indonesia*, U.S. State Dep't, available at <http://www.state.gov/g/drl/rls/irf/2009/127271.htm> (last visited Dec. 29, 2009).

government collaboration with a particular religious organization that is likely to be biased compromises the government's "duty of neutrality and impartiality."<sup>118</sup>

### **C. The Blasphemy Act Frustrates Indonesia's Policy Objectives**

The importance of repealing the Blasphemy Act is not limited to rectifying unconformities with the 1945 Constitution and international treaties. Above all, the Blasphemy Act militates against important Indonesian policy goals. By restricting the free "marketplace of ideas," the Blasphemy Act places obstacles in the path of Indonesia's flourishing as a democratic society.

The Blasphemy Act essentially gives the government the power to suppress speech it deems inappropriate. This type of top-down control of discourse limits the free-flowing "marketplace of ideas," where viewpoints are distinguished on the basis of their substance, persuasive power, and/or utility. Ultimately, this atmosphere empowers majorities against dissenters and the state against individuals. Once the state is empowered to restrict expression in one sphere, more oppressive restrictions are easily imposed.

Other courts have repeatedly affirmed the paramount importance of the freedom of expression to democracy. In a 1986 decision, *Lingens v. Austria*, the ECHR identified the freedom of expression as "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment." The Court's decision further stated that laws governing freedom of expression should apply "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance, and broadmindedness, without which there is no "democratic society."<sup>119</sup> The ECHR thereby expounded on the principle that, however controversial or unpopular, protecting "bad" speech – peacefully expressed – is a safeguard for protecting all "good" speech.

When it comes to religious discourse in particular, broad government control silences dialogue among people of different faiths. Such individuals fear that by sharing elements of their belief system that may be contrary to the official interpretation of their religion, they may be prosecuted under the Blasphemy Act. This fear of sharing religious ideas is even more acute for adherents of religions that are not officially recognised. When individuals of varying religious backgrounds are unable to share faith-based ideas with each other, the larger culture of social harmony and unity are sacrificed. Groups are segregated along lines of religion, and minority groups or groups less favoured by the government are routinely persecuted. The Blasphemy Act counteracts efforts to remove such barriers to creating a peaceful society.

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<sup>118</sup> See, e.g., *Moscow Branch of the Salvation Army v. Russia*, ECHR App. No. 72881/01, §§ 92, 97 (Oct. 5, 2006).

<sup>119</sup> *Lingens v. Austria*, App. No. 9815/82, 103 ECHR (ser. A) at 11, ¶ 41 (1986); see also *Kokkinakis v. Greece*, 260-A ECHR (ser. A) ¶ 31 (May 25, 1993). ("... freedom of thought, conscience and religion is one of the foundations of 'democratic society' .... The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.").



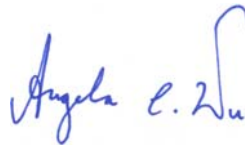
The Blasphemy Act suppresses not only interfaith dialogue but also *intra*-faith dialogue. That is, if individuals within a given religion are afraid to share varied insights regarding transcendent truths, religious exploration is necessarily stifled. Without religious exploration, Indonesian society also loses the type of renewal that keeps a religion invigorated and relevant to a changing society. The Blasphemy Act thus limits not only social, cultural, and political progress, but spiritual progress as well.

An alternative approach to dealing with religious conflict is to regulate it when it either leads to physical violence or when it results in members of one religion physically or tortiously oppressing members of another religion. The law should address criminal or tortious behaviour with religious motivations in the same manner that it addresses criminal or tortious behaviour based on any other motive. If, however, religious conflict is confined to speech or other non-violent behaviour, then the government should refrain from interference. If individuals and organisations are free to work out their differences without government control, they are far more likely to find lasting solutions.

## CONCLUSION

For the foregoing reasons, in compliance with the international obligations to which Indonesia is bound, the Constitutional Court should find the Blasphemy Act unconstitutional.

Respectfully submitted by:



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