

## **PHYLOSOPHICAL AND CONSTITUSIONAL PROTECTION TOWARDS RELIGION IN INDONESIA**

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### **ABSTRACT**

*Legal protection on religion is certainty for a state with Pancasila principle. The first principle the Divinity of the Only God has been spirit of the following points, as living guidance for Indonesian country. The believing of the Divinity of the Only God shows that the Indonesian Republic is religious based country by protecting freedom to have religion for its people. This regulation has implication in governmental circle, that the country makes Religion Ministry as one of ministries that its existence has the same position to other state institutions. The implementation of legal protection toward religion needs legitimating in the field of civil law, showed in issuing President Decree No.1 of 1965 on the Preventing of Misuse and/or Religion Staining. The existence of this Decree in Old Order has been legitimated newly as a Law by issuing the Law No. 5 of 1969, thus the President Decree has been added to the Criminal Code, Act 156a.*

***Keys term: Legal Protection and Religion Staining***

### **I. INTRODUCTION**

The Legal Protection on Religion has close relation to freedom for choosing religion. The freedom to choose religion is one of Human Principle Right that the existence guaranteed by the Fundamental Constitution of 1945 legitimated by the Indonesian Freedom Preparation Committee in August 18 of 1945. The

history of Pancasila formulation as the State Fundamental and Jakarta Charter as the beginning formula of the preamble of the Indonesian Constitution of 1945 were full of debates from these country founders. The debates has influenced the formulation of Act 29 of the Indonesian Constitution of 1945 protecting the right to choose religion freely for the Indonesian people. Therefore, it is

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necessary to understand the historical series of formulation of state fundamental and constitution in Indonesia related to freedom to choose religion.

Legal Protection on religion does not appear by accident as stated in Pancasila, the Indonesian Constitution of 1945 and Act 156a of KUHP. However, it began with long history of Indonesia before the Nederland came. In the time of pre Nederland colonialism, Indonesia had known religion and followed its own religious lessons. It has been showed in the previous part, thus to cover the philosophical understanding, it need knowledge on the history of Republic Indonesia Founding as well as the born of Pancasila and The Indonesian Constitution of 1945.

Act 29 of the Indonesian Constitution of 1945 has been the Legal Base for the Country to intervene the living of religious people in Indonesia. Beginning from Jakarta Charter on June, 22 of 1945 as the basic of Constitutional formulation in Indonesia, the Act 29 of the Indonesian Constitution 1945 has great role in the living of Islamic people. The statement

appears in the President Soekarno mandate in front of Konstituante Meeting in 1959; the Speech has title “*Res Publica, sekali lagi Res Publica*” also included in the president consideration Decree on July, 5 of 1959. Thus, if there is statement that the Islamic Legal for Islamic People of Indonesian People has its own spirit to be applied based on the First point the Divinity of the Only God, Act 29 of the Indonesian Constitution of 1945, and President’s Decree.<sup>5</sup>

Oemar Seno Adji said the relation of Country, Religion and Criminal Law. State politic toward religion, whether it based on **unity** between state and religion, or it showed **separation** between state and religion, or it followed certain religious legal system, would bring reflection and impact toward the problem of religious offence. The freedom to choose religion and to devout do not mean that every one may give statements and do activities that violate the religious principle, contact sense of society religion or destroy peace among the religious groups.<sup>6</sup> Thus, the freedom to choose religion and devotion need

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<sup>5</sup> Jazim Hamidi, Husnu Abadi, *Intervensi Negara terhadap Agama*, (Yogyakarta: UII Press, 2001), p. 135

<sup>6</sup> Oemar Seno Adji, *Hukum (Acara) Pidana dalam Prospekti*, (Jakarta: Penerbit Erlangga, Anggota IKAPI, 1981), p. 105

limitations to protect the religion and sense of religion.

Based on the background, it needs to give question on the meaning of legal protection on the religion in Indonesian by showing its forms. By showing the form of legal protection, it concretely appears the relation between country and religion arranged in the Indonesian constitution of 1945 that then explained with penal and non penal policy.

## **II. RESEARCH METHOD**

This journal is result of normative legal research Journal using statute approach and historical approach to search the history behind issuing Act 156a of the Criminal Code and find out the philosophy development in line with appearing the 156a the Criminal Code.<sup>7</sup> From the appearing of the Statute No. 1/PNPS/ 1965 to the decision of Constitution Court Number 140/PUU-VII/2009 dated 19 April 2010 on the Statute No. 1/PNPS/ 1965 on the Prevention of Misuse and/or Religion Staining.

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<sup>7</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2013), p. 137.

<sup>8</sup> The Liang Gie dalam buku Pengantar Filsafat Ilmu, dikutip oleh Supardan Modeong,

## **III. RESULT AND ANALYSIS**

Based on the sayings of Marcus Tullius Cicero the Rome Philosophy's stating that *Ubi Societas Ubi Ius* (where there is society, there will be law), any nation in the world absolutely has law or at least simple rule to put in order between the individual and other. Other saying of M.T. Cicero is *Ars Vitae* or "the art of life, meaning knowledge of life."<sup>8</sup> This saying certainly was based on observation of the life of nations in that time. Philosophy or life principle of a nation of course based on good values then became source and guidance in implementing country and nation life.

In line with legal norm hierarchy, Hans Kelsen stated his theory on legal norm steps (*Stufentheorie*). This theory said that legal norms had hierarchy and layers in a governance hierarchy. In this case, the lower norm applied, sourced, and based on the higher norm. The higher norm applied, sourced and based on the higher and higher norm. It happens continuously till norm where there is no way to search more and has been hypothetic and fictive ones, or Basic Norm (*Grundnorm*).<sup>9</sup> The

*Teknik Perundang-undangan di Indonesia*, (Jakarta: Perca, 2003), p. 52

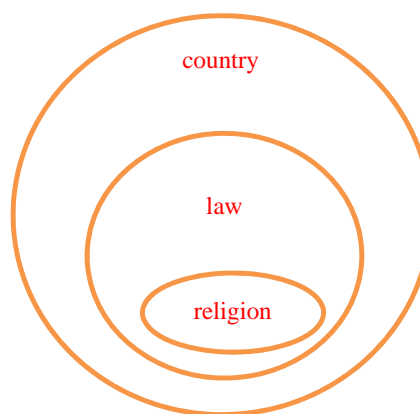
<sup>9</sup> Hans Kelsen cited by Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan: Dasar-*

searching of Basic Norm (*Grundnorm*) in the theory of Strata Legal Hierarchy (*Stufentheorie*) in Indonesia has been visualized in a consideration of regulation.

The First Phrase in a regulation refers to Transcendental Philosophy Fundamental (Vertical), and the Second Phrase refers to Society Philosophy fundamental (Horizontal).<sup>10</sup> Therefore, it needs Transcendental Philosophy Fundamental discussing religious norms (in this case Islamic Law) to analyze the applying of act 156a KUHP and Society Philosophy fundamental discussing the history of legal formulation in Indonesia.

Muhammad Tahir Azhary has explained in detail the relation of religion, law, and country as **Theory of Concentric Circle**. The three components—religion, law, and country—when they are put together will create concentric circle as a unit and connecting one and another. Religion as the first component has position of the deepest circle. Then, law places in the next circle. The effect of religion toward law is very big because religion is the

main source of the law besides the ratio as complementer source. Country is the third component and place in the last circle. The position shows that in the concentric circle, country covers the first two components, religion and law. The following is picture of the concentric circle theory as stated by Muhammad Tahir Azhary:<sup>11</sup>



In the Custom law of Bali, it has known as *Awig-Awig* structured and should be obeyed by *krama* (society) of the custom village/*pekraman* in Bali to achieve *Tri Sukerta*. *Tri Sukerta* covers *Sukerta tata Parahyangan* (harmony in relation between human and the God), *Sukerta tata Pawongan* (harmony in the relation among the human), and *Sukerta tata Palemahan* (harmony in relation between human and its environment), as

*dasar dan Pembentukannya*, (Yogyakarta: Kanisius, 1998), p. 25

<sup>10</sup> Supardan Modeong, *Teknik Perundang-undangan di Indonesia*, (Jakarta: Perca, 2003) p. 52

<sup>11</sup>Muhammad Tahir Azhary, *Negara Hukum: Suatu Studi tentang Prinsip-prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Madinah dan Masa Kini*, (Jakarta: Prenada Media, 2003), p. 67-68

the form of the lesson in *Tri Hita Karana*.<sup>12</sup> The existence of Custom Law in Bali is full of social life from the society, thus the cultural values kept before the independence day have existed in developing civilized society.

Moreover, in discussing philosophical fundamental of a regulation, it cannot be separated from historical approach as its background, because history is the living development of a country. The existence of Act 156a of the Criminal Code purposed to protect religion from any kinds of misuse and staining, of course get influence from the long history of Indonesia before the Nederland came to Indonesia. The existence of Custom Legal and Religious Legal have great role in formulating legal in Indonesia. Thus, the following part explains the legal history in Nusantara from before The Nederland Colonial to the time of freedom.

Pancasila is ideology of Indonesian country and philosophy of country and nation living. The first principle the Divinity of the Only God has been agreed as the First point and bases of the following points. It has been

stated in the Preamble of the Indonesian Constitution of 1945, and explained in the Body of Chapter XI on Religion Act 29. Thus, the living guidance placed in Pancasila is religious one. The first point refers to a joint in living the country and nation.

Pancasila as the fundamental for the nation has placed the Point of the Divinity of the Only God as its First Point. It becomes philosophical base for Indonesia to restate through Constitution namely the Fundamental Constitution of Indonesian Republic 1945, exactly in Act 29. From this hierarchy, it has known statement that Indonesia is not secular country that separates country from religion. However, Indonesia is not country based on certain religion, but Indonesia is unity country that gives freedom to its citizen to choose one certain religion. It also bases on the Indonesian Constitution 1945 Act 28E;

- (1) Anyone has freedom to believe religion and do praying based on the religion, to choose education and learning, to choose job, to choose nationality, to choose place to live in country area and leave it also right to comeback.

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<sup>12</sup>[http://www.kompasiana.com/dewa-semadi/awig-awig-sebagai-produk-hukum-adat-di-bali\\_55d4af69c022bd8711555fc4](http://www.kompasiana.com/dewa-semadi/awig-awig-sebagai-produk-hukum-adat-di-bali_55d4af69c022bd8711555fc4)

- (2) Anyone has right of freedom to believe in faith to give idea and behavior based on his conscience.

The fundamental regulation in the Preamble of the Fundamental Constitution 1945 specifically involves right to have religion collaborated with the constitutional right and duty, for the country and its people as explained in the following points:

1. First, the regulation is general and fundamental, meaning that country bases on the Divinity of the Only God, and therefore the country constitutionally must guarantee freedom for its people to believe and do praying based on his religion.
2. Second, the regulation having force constitutionally that the President as the country implementer must swear based on his religion. In this case, Muslim has to begin with *Demi Allah* (By God).
3. Third, the regulation giving constitutional right/authority to Local Representative Committee (DPD) to give advice to Indonesian Legislative Assembly
- of the law plan, such as on religion and participate in supervising the legal implementation.
4. Fourth, the regulation requiring country to form adjudication forum in giving service to the Moslem society to resolve a problem on Islamic law in certain fields.
5. Fifth, the regulation giving constitutional right to anyone to freely choose religion and do praying based on the religion.
6. Sixth, the regulation categorizing religious right as human right that cannot be limited in any condition.
7. Seventh, the regulation making the religious values as constitutional requirement in implementing constitutional right/duty to the country in giving limitation in conducting someone's right and freedom. Together, it also gives order constitutionally to anyone to follow the limitation.
8. Eighth, the regulation requiring the government to effort and conduct National Education System in order to develop faith

and piety as well as good morals. Also, the government must advance the science and technology by giving priority to the religious values.<sup>13</sup>

9. Ninth, in the Preamble of the Fundamental Constitution of 1945, Indonesia expresses the feeling of thank God for the freedom obtained, “In the mercy of the Only God...”
10. Tenth, in the part of preamble before consideration of any regulation lies statement “In the mercy of the Only God”.
11. Eleventh, any Judge decision involves the beginning statement as “With based on justice based on The Divinity of the Only God”.

Religion has important role in the country and nation life, where the country focus in line with implementation of religious life as showed in any fields, especially in Education Field by putting Religion Education as Lesson Subject from Elementary Level to College. From this

Education Field, it has formed religious generation, thus the religious effect has widen in various fields, as show how the generation participate in their fields.

The relation between country and religion in Indonesia appears in existence of religious boards, regulation relating with religion or religious life, and other policies relating with religious life. This relation practically has appeared in activity of country implementation expressed by country executor, such as reading pray in ceremonial events and praying together for Moslem.

The morals of the principles in specific and the country in general have effected to the understanding, comprehension and implementation of Pancasila and the Fundamental Constitution 1945. Pancasila according to Mohammad Hatta, one of the religious Proclamer, has 2 layer fundamentals, namely: politic and moral (religious ethics) fundamentals. The Divinity of the Only God becomes base of guiding the Indonesian future, gives soul to obtain right, justice and good implementation.<sup>14</sup> Soekarno also stated

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<sup>13</sup> Ahmad Fadlil Sumadi, *Hak Konstitusional Beragama dan Mahkamah Konstitusi*, Harmoni Jurnal Multikultural dan Multireligius, Vol. 11 Nomor 2 April – Juni 2012, p. 9

<sup>14</sup> Mohammad Hatta dalam Ahmad Sukardja, p. 192

his opinion in July 1 of 1945 that it no needed to build a country based on religion base, but the religious values could be crystallized became law through struggle in the Indonesian Legislative Assembly.<sup>15</sup>

Indonesia with Pancasila as its base, according to Soeharto, is not theocratic country, it is not secular. The Pancasila society is religious social society. Religion has honor place in life of personal, family, society and country. The Country Guidance Patterns strictly state that religion is fundamental of ethics, morals, and spiritual for implementation of national development. Soeharto pointed that as religious country we do not want our religious consciousness disappear. For us, religion has important value in our country spiritual and mental defensive.<sup>16</sup>

Hazairin, a Professor of Custom Law and Islamic law, has disagreed to West Opinion separating Law and Religion.

“Law is not the only part of society life form that focuses only to existed elements in communication between human in the society. Besides, the

relation between human and society of human, anyone as society personnel has—willing or not—relation to the spirit or the Great Spirit, that the relation to his God, the Only God, to whom someone count on for his life and dead, as well as his safety in his society.”<sup>17</sup>

The conclusion of Hazairin’s idea, that legal affair is not the only human’s, but it also the God’s affair that has create the human. Hazairin also stated that even the law had been perfectly created, it could not yet able to create justice, but it only became the main guidance to achieve justice. Human is very weak and limited to be able to apply justice ideally.

The following part briefly explains the governmental afford in physical and non-physical development related with religion and continuity religion in Indonesia, especially Islamic Religion. It is form of country responsibility in giving protection to its people in conducting praying based on religious lesson in Indonesia.

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<sup>15</sup> Soekarno dalam Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, (Jakarta: Rajagrafindo Persada, 2010), p. 283

<sup>16</sup> Soeharto dalam Ahmad Sukardja, Op Cit, p. 196

<sup>17</sup> Hazairin dalam ThahirAzhari, p. 61-62



**a) Religion Institution**

**Religion Ministry**

Among the non secular country characteristics is the existence of religious institutions, officially created by the government and in the permission of the government. Some of religious institutions official created by the government involve: Religion Ministry, state religion educational institution and Religion Court. The Islamic religion Institution building with the governmental permission involve Indonesian Islamic Leader Committee (MUI), private Islamic educational institution, Qur'an Tilawah Development Institution (LPTQ) and Indonesian Muamalah Bank (BMI).

The Religion Ministry was build on January, 3, 1946, and part of the governmental institutions of Indonesian Republic. Based on the time of founding, about five months after Indonesian freedom, this Ministry considered old ones. Since its founding till now, this Ministry has existed to serve the people in religious field. Every parliament forming, the government always keeps the existence of Religion Ministry.<sup>18</sup>

From **Historical View**, it has known that Indonesia is religious country, meaning that it has strong belief to the God. The belief to the God is expressed by Indonesian people in their life behavior in line with their own religious lessons, and they have tolerant behavior toward different religious people. Religions of Hindu, Buddha, and Islamic have been believed by Indonesian country, long ago before the Nederland intervenes Indonesia. Catholic and Protestant have developed together with the coming and spreading of West nations in Indonesia.<sup>19</sup>

The idea of Religion Ministry founding appeared from Islamic leaders in the Committee of Indonesian Freedom Preparation Efforts Investigator (BPUPKI). After obtaining freedom, the idea was struggled through the Center Indonesian National Committee Worker Assembly (BPKNIP) in the purpose that in Indonesia the religion affair became responsibility of specific department. Finally, the effort succeed by being issued President Decree in 1946 Number 1/SD in January, 3, 1946 on Founding of Religion Department, after

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<sup>18</sup> Department of Religion in Ahmad Sukardja, p. 198

<sup>19</sup> Aqib Suminto, *Politik Islam Hindia Belanda*, (Jakarta: LP3ES, 1985), p. 16-17

KNIP in acclamation achieved opinion of founding the Religion Department.<sup>20</sup>

From **Sociopolitical View**, the role of political movements based on religion in fighting for freedom cannot be ignored. The religious spirit has been background of the Indonesian struggle in defeating the colonial. Many religious leaders appeared to lead people's struggle and fight against the colonial. The Political Party based on Islamic principle also appeared. Thus, it came to appear idea of Islamic based Country and Jakarta Charter stating the First Principle Party "The Divinity by requiring doing Islamic Rules for its believers". Before the Preamble of the Indonesian Constitution of 1945 officially decided in August 8, 1945, because some parties stated objection with the above formula, some changes was made and the new statement agreed by PPKI, the statement "the Divinity of the Only God".

From **Juridical view**, the background of Religion Ministry founding can be found in the Preamble of Indonesian Constitution of 1945 containing philosophy of Pancasila and from the Body of Indonesian

Constitution of 1945. The Preamble of Indonesian Constitution of 1945 in third paragraph states "In the mercy of the Only Great God and supported by honest willingness to have free country life, the Indonesian people states its independence." In the fourth paragraph, it states formula of Pancasila with the first principle stating the Divinity of the Only God. It is supported in the Body Act 29 on Religion. The formula becomes constitutional fundamental of the religion position in the Indonesian republic and shows what firm the relation of religion and country in Indonesia. The West writers considered the fact to be unique in the modern governmental system.<sup>21</sup> Deliar Noer stated that the religion problem officially arranged by the government through religion department, a unique department in Indonesia. This department not only arranges one religion, but it covers all accepted religions; namely Islamic, Protestant, Catholic, Hindu and Buddha.<sup>22</sup>

### **Religious Educational Institution**

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<sup>20</sup> Departemen Agama, dalam Ahmad Sukardja, p. 199

<sup>21</sup> BJ Boland, *The Struggle Of Islam In Modern Indonesiadan* Daniel Lev, *Peradilan Agama*

*Islam di Indonesia* (terj. Zaini Ahmad Noeh) dalam Ahmad Sukardja, Op Cit, p. 201

<sup>22</sup> Deliar Noer, dalam Ahmad Sukardja, p 201

In the time Nederland and Japanese colonials, the Islamic education became responsibility of the society. Schools and learning place for Islamic was built by society. The colonial government had never built Islamic school with status of state school. The religion education covered by society/private called “*madrasah*” and “*pesantren*”. While the colonial government conducted secular and non religion education.

After Indonesia had been independent and officially built the Religion Department in 1946, many parties demanded that the Department also gave training and guidance to *madrasah* and other Islamic education institutions. This department also hopefully gave Islamic lesson in general schools. Then, in December 1946, the Educational, Learning and Culture Ministry and Religion Ministry together issued regulation deciding the existence religion lesson in lower schools, from IV Class. This regulation applied since January, 1, 1947, and became the first legal base to implement religion lesson in public schools by state institution.

The position of Religion Education became more stable with the Decision of Temporary Representative Assembly (MPRS) in 1960 – 1966 deciding religion lesson in curriculum given from Elementary School to College.<sup>23</sup> The development of Religion Education has advanced from time to time, with any policies decided by Central Government to the Local. In the law of National Educational System, it states: “the content of curriculum in any kind, path and level of education must includes: Pancasila, Religion and Nationality Educations.”<sup>24</sup> Also, the number of educational institutions below the Religion Ministry is getting increase, in other word; it shows that the interest of society to religion education is getting stronger.

### **Religious Court Institution**

The proof that Indonesia is not secular one is the founding of Religion Court as one of state institution since the colonial time. Nevertheless in that time, the authority of Religion Court was limited by separating authority of Court in Java and outside Java. Till the Japanese time, the position and authority

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<sup>23</sup> Ahmad Sukardja, hlm. 203-204

<sup>24</sup> Indonesian Act Number 2 Year 1989 on National Education System Article 39 par. (2). In

Act Number. 20 Year 2003 Pancasila Subject has been deleted.

of Religion Court had not changed.<sup>25</sup> Since 1830, the Religion Court was conducted by Muslim leader and had existed since 16 century below the Colonial Court supervision, namely *Landraad* or State Court through regulation that the decision of Religion court could not be applied before the Head of *Landraad* had agreed for the decision execution with *executoire verklaring* (statement to execution).<sup>26</sup> In 1882, the Colonial Government constructed the Religion Court through decision of Nederland King included in *Staatsblad* 1882 Number 152 arranging that in Java and Madura had been conducted Religion Court called *Presterraad* or Priest Board. The reason was because Nederland considered Muslim leader the same as priest. The similarity was criticized by Notosusanto, for in Islamic there was no clergy structure or *pandri*. The mistake also got claim from Snouck Hurgronje stated it was result of superficiality of Nederland Government.<sup>27</sup> Whereas the cases becoming the authority of Religion Court included; marriage, guardianship, matters of pertaining inheritance, grant, religious foundation, alms, and treasury.

The existence of Religion Court was getting strong with the Law Number 7 of 1989 on Religion Court. The Religion Court was one of court having the same position as General Court, Military Court, and Administrative Court. The purpose of the law was to create legal unity arranging the Religion Court. Structurally, the institution of Religion Court was below the Religion Department control. Functionally, this court was below Constitutional Court, as other courts. In line with the change of time, the Religion Court has changed, that the law Number 50 of 2009 on the Second Change of the Law Number 7 of 1989 on the Religion Court. Act 49 verse (1) the Law of Religion Court stated that the authority of Religion Court covered to check, decide and solve cases among Moslem people in field of wedding, matters of pertaining inheritance, dying exhortation, grant, religious foundation, and alms. The authority then widen by appearing of economic problem, in which the authority of Religion Court was not only limited by problem of Islamic (Syari'ah) based bank, but it also covered field of islamic economy.

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<sup>25</sup> Ahmad Sukardja, p. 206

<sup>26</sup> Ija Suntana, *Politik Hukum Islam*, (Bandung: Pustaka Setia, 2014), p. 108

<sup>27</sup> Ibid, p. 109 - 113

Some of them included micro financial board with islamic law, islamic insurance, islamic reinsurance, reksa dana syari'ah, obligation and islamic middle term contract, islamic security, pension fund of islamic financial board and islamic business.

### **Indonesian Council of Ulama**

The Indonesian Council of Ulama had been built since the government of President Soekarno; previously it was the West Java Committee in July 1958. The Council in central level was built in 1962, and then continued by forming the same Committee in other provinces. In 1975, the new version of Islamic Leader Committee was formed called the Indonesian Council of Ulama (MUI). Like the old version, the idea of this new version was conducted by the government. By founding MUI, the government realized that development was not only related to material aspect, but it also covered spiritual aspect.<sup>28</sup> Thus, it needed to do the corporation between Islamic leaders and government to develop the country with dignity.

The principle guidance of MUI has formulated the function of MUI as follow:<sup>29</sup>

1. Issue rule and advice on religious and society problem to the government and Islamic people in general as *amar ma'ruf nahi munkar* in the effort to increase national defensive.
2. Strengthen *ukhuwah islamiyah* and conduct harmony between religious people in creating national unity and integrity.
3. Representation Islamic people in Consultant between Religious People.
4. Relation between Islamic leader and government and become interpreter feedback between government and the people in order to achieve national development.
5. The Indonesian Council of Ulama does not do politic and not operational ones.

The guidance of MUI shows the governmental need on MUI is bigger than the need of Islamic people. However it needs to add that in the need

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<sup>28</sup> Ahmad Sukardja, Op Cit, p. 209

<sup>29</sup> Majelis Ulama Seluruh Indonesia dalam Ahmad Sukardja, p. 209-210

of government containing the need of Islamic people, because the government arranges and guides its people, while majority of the people are Muslim. The second and third formulas place MUI opposite to other religion group. It states that MUI needs to keep living in harmony with group of other religion as the representative of Muslim.

## **b) The Regulation**

### **Marriage Law**

The Government of Nederland Colonial considered that family was form of the first political interest. The family forming began with marriage. In that time, Indonesia in conducting marriage followed its own religious lesson without any governmental intervene. Finally, in 1937, Nederland made Draft of Marriage Law (RUUP), in the purpose of being easier to control the people and the family. However, the Draft got reaction and claim from Nahdlatul Ulama and Muhammadiyah. Both organizations agreed to build Indonesian Islamic Committee of A'la (MIAI) 1937 to against the Draft.<sup>30</sup> Thus, the Nederland effort got no result.

After freedom in Period of Old Order in 1950, Indonesia tried to create

marriage law nationally by forming specific committee headed by Teuku Muhammad Hasan. There were two draft proposed, the first was draft proposed by the committee and the second was draft proposed by nationalist and discussed in Indonesian legislative Assembly in 1958. Both drafts could not be finished. The same condition happened in July 1973, the government proposed the new Draft of Marriage Law. However, the Draft got claim from Islamic people because it considered not appropriate to the Islamic lesson.<sup>31</sup>

In the time of New Order in 1974, big change and fundamental for the Marriage Law in Indonesia happened. In January, 2 of 1974, the Law number 1 of 1974 on Marriage was decided. Strictly, Act 66 stated: "To marry and anything relates to the marriage based on this law, thus by issuing this law, regulation arranged in the Civil Code (*Burgerlijk Wetbook*), Ordination of Christian Indonesian Marriage (*Huwelijks Ordonantie Christen Indonesiers*) S. 1933 No. 74, Mixed Marriage Regulation (*Regeling op de gemengde Huwelijken*) S. 1898 No. 158, and other regulations ruling on marriage

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<sup>30</sup> Ija Suntana, p. 111

<sup>31</sup> Ahmad Sukardja, p. 212

covered in this law **consider to be invalid.**”

The marriage Law No. 1 of 1974 has decided religion as key point of legitimating of a marriage, as formulated in Act 2. Thus, marriage in Indonesia follow *religious marriage* (religion based marriage). This regulation ends period of *civil marriage*, a secular marriage formulated in Act 26 of Civil Code (*Burgerlijk Wetbook*) stating that “The law considers a marriage is only civil relation”.<sup>32</sup> Hazairin pointed that based on the Law of Marriage the Islamic people have no possibility to marry by violate the Islamic lesson. It also happens to other people of Buddha, Hindu and Kristen that forbidden to marry by violate their religious lesson.<sup>33</sup>

### **Matters of Pertaining Inheritance**

Matters of pertaining inheritance are arranged in Islamic law Compilation structured in the second Book. The Law arranged based on Faraidl science, science of regulation in dividing matters of pertaining inheritance following Islamic Law.<sup>34</sup>

### **Religious Foundation**

The rule of religious foundation covered in the Third Part of Islamic law Compilation. In specific related to religious foundation of privately own land in Indonesia, it has decided the Governmental Regulation Number 28 of 1977 on the religious foundation for privately own land. The regulation has constructed as implementation regulation of regulation Act 49 verse (3) of the Law Number 5 in 1960 on the Fundamental Regulation of Agrarian Principle stating: “The religious Foundation of privately own land has been protected and arranged by the Governmental Regulation”. In the Regulation, it focuses on The Statement Certificate Religious Foundation as written proof to guarantee the continuity of the donated land and avoid intersection from its position as donated land. In the Islamic Law Compilation, it constructs regulation of the religious foundation covering all goods accepted as donated ones.<sup>35</sup>

### **Tithe**

Tithe is Islamic Pillar containing social element, and any Muslim require

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<sup>32</sup> Ahmad Sukardja, p. 212

<sup>33</sup> Ibid, p. 213

<sup>34</sup> Ibid, p. 214

<sup>35</sup> Ahmad Sukardja, p. 214-215

giving part of his property to help the poor. Thus, duty to give tithe is a way to achieve harmony between human and the God also the relation between one people to another. Therefore, it achieve welfare society because one and another helping each other.

The purpose of the tithe has the same point as the state purpose included in the preamble of the Indonesian Constitution 1945, to develop general welfare. The first regulation of tithe in Indonesia was the Letter of Religion Ministry No.A/VII/17367 in 1951 following the regulation Nederland ordinance that state did not intervene the problem of getting and giving the tithe, but it only controlled.<sup>36</sup>

Again, the government gave attention in implementation of tithe since the government of president Soeharto preparing Regulation Draft of tithe to propose to the Indonesian Legislative Assembly to be agreed as the law, but it failed. Then in 1968, the government issued Board Construction of Amil Zakat and Religion Ministry Regulation Number 5 in 1968 on the construction of Baitul Mal (Board of Wealthy Property) in province and Regency/City.

In 1990s, the behavior of government changed. In 1991, the government issued Collective Decision Letter of Home affair Ministry and Religion Ministry of Indonesian Republic Number 29 and 47 in 1991 on Training for Board of Amil Tithe, Alms and Sadaqah and instruction of Home affair Ministry Number 7 in 1998 on the training of Board Amil Tithe and Sadaqah.<sup>37</sup> Finally, in 1999, the government issued the law Number 38 in 1999 on Management of Tithe recently revised in the Law Number 23 in 2011.

### **Conducting *Haji***

Previously, the Indonesian haji in doing devout haji individually departed using ship together with private party. It took months even 2 years in doing this devotion. Since 1970, by the President Decree Number 22 in 1969, the affair of journey haji was arranged by the government through the Religion Department) now called the Religion Ministry).

In the Reform Era, the conducting haji was arranged in the law Number 13 in 2008 on Conducting Haji stating that the policy and conducting

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<sup>36</sup>

<https://pujohari.wordpress.com/2009/09/15/sejarah-pengelolaan-zis-di-indonesia/>

<sup>37</sup>

<https://pujohari.wordpress.com/2009/09/15/sejarah-pengelolaan-zis-di-indonesia/>



haji became national task and responsibility of the government (act 8 verse 2). In this case, the government has duty to give training, service and protection by giving facilities, easiness, safety, and conformity needed by any citizen (Muslim) in doing haji.<sup>38</sup>

### **The Law No. 1 PNPS of 1965**

The Law of prevention on misuse and/or staining religion became small part among the criminal legal policy in general. Specifically, the law came to be safety key for succeeding religious life. The policy honestly was integral part of the social policy in general in a country. Meaning, the policy purposed as effort to create social welfare.<sup>39</sup> TAP MPR Number VII/MPR/2001 on the Future Indonesian Vision, act 2 Chapter IV point 1, stating that Indonesian Vision in 2020 covered:<sup>40</sup>

- a. Achievement of religious society, having obedience, and good morals that the religious lesson, specially the universal ones and cultural values in this case honesty, being interpreted and applied in daily behavior.

- b. Achievement of internal tolerant and among the religious people.
- c. Achievement of honor toward human dignity.

Beside to guarantee the freedom of any citizen to choose a certain religion, the country has to effort that there would not happen any staining toward certain religion. It appeared in applying the law number 5 in 1969 on the Statement of Various President Decision and Decree as the Law. This law decided the President Decision as the law, including the Indonesian President Decision Number 1 of 1965 on the Preventing Misuse and/or Staining Religion. In the law explanation, it stated that the reasons of issuing the President Decision as follow:

1. The President Decree in July 5 1959 deciding the Indonesian Constitution of 1945 applied for all the Indonesian people had stated that Jakarta Charter dated 22 June 1945 had been soul and a unity of the constitution. According to the Constitution, the Country based on:

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<sup>38</sup> <http://eprints.uns.ac.id/2748/>

<sup>39</sup> Barda Nawawi Arief, Op Cit, p. 4

<sup>40</sup> TAP MPR Nomor VII/MPR/2001 on Indonesian Future Vision

- 1) The Divinity of The Only God;
- 2) Justice and Honor Humanity;
- 3) The Indonesian Unity;
- 4) Democracy;
- 5) Social Welfare;

As the First base, the Divinity of The Only God does not only place morals above the country and the government, but also guarantee the national unity based on religion. The accepting of the First Principle cannot be separated from religion, because it refers to one of main pillar of the human life and for Indonesia refers to state life joint and absolute element in effort of nation *building*.

2. As fact, recently almost in all part of Indonesia appear many ideologies belief/faith organizations against the religious lesson and law. Among the lesson/behaviors of the ideology followers, many have resulted in action against the law; destroy the national integrity and staining the religion. From the fact, it is clear that the social belief/faith

ideology/organization misusing/and/or using the religion as main has been getting increase and has developed to the dangerous way for the available religions.

3. To prevent the problem in order not to destroy the state and national integrity, in line with the national awareness and Leadership Democracy, it needs to issue President Decision as realization of the President decree in July 5 1959 referring one way to implement Governance and religion, that all people in Indonesia could feel conformity in having religion and guarantee to do devotion based on the religion.
4. In line with the purpose of developing conformity to have religion, the president decision firstly purposes to prevent the possibility of any misuse of religious lesson considered as main lesson by the leader of certain religion (act 1-3); secondly, the rule protect the religious conformity of staining/contemptible also from lesson to not choose religion

based on the Divinity of The Only God.

5. The religious misuses<sup>41</sup> clearly became criminal action considered not to be arranged in this rule. Therefore, it is enough to arrange them in any available criminal rule. Using the president decision, it does not purpose to influence the life of religions accepted by the government before the president decision issued.<sup>42</sup>

Based on the above explanation on the forms of state protection toward religion, it proves that Indonesia realize that religion refers to human guidance. Religion make Indonesian people become more honor and religion become source of searching life legal norm of Indonesian state. The Indonesian confession, that freedom has obtained in the mercy of the Only God. It is clearly to step and fill the freedom in living the state and nation to always hoping the God willingness.

Various kinds of state protections toward religion result in consequence for the country to make criminal rule, in the Act 156a of the criminal Code as

additional of the Law PNPS No. 1 of 1965. Thus, the existence of Act 156a of the criminal code for 51 years have given protection toward religious life in Indonesia. Although its existence has resulted in pro-contra, it is able to give solution to minimize appearing of religion staining in Indonesia.

Thus, to keep the state and nation integrity based on Pancasila with The Divinity of The Only God as the first principle, with any background covering, in 1965 it had decided the Law number 1 PNPS on the prevention of Misuse and/or Staining of Religion including in State Paper Number 3 in 1965. Act 4 of the law a-quo decided additional Act 156a in the Criminal Code.

The purpose of issuing the Law; first, to prevent deviation of religious ideology considered to be main ideology of the leader from certain religion, as stated in Act 1-3 of the law a-quo. Second, to protect religious tranquility from staining/contemptible also to protect from ideology to not choose religion based on the Divinity of the Only God, as stated in Act 4 of the law a-quo.<sup>43</sup>

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<sup>41</sup> See further Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana, Op Cit*, p. 325

<sup>42</sup> General Explanation Act PNPS No. 1 Year 1965

<sup>43</sup> Considerant Act PNPS No. 1 Year 1965

The guarantee from the state on the existence of religion and the freedom to belief in a religion is no need to hesitate anymore. The long journey to the independence followed with nationalism and religious interest for all religious people in Indonesia. The speech of Muh. Yamin, Soetomo and Ir. Soekarno on the state fundamental referred to religious morals, especially Islamic. As the consequence, it is fair if there is any preventive and repressive affords to cope with all staining problem on religion and freedom to belief it.

The discussion of Act 156a the Criminal Code cannot be separated from history of the appearance act 156 the Criminal Code. This act 156 the Criminal Code is close related to history of Criminal law. Before talking about the history, here is the content of Act 156 the Criminal Code;

“Anyone in front of public who states feeling of hostility, anger or contemptible toward one or more group of Indonesian people, he is punished for maximum 4 years in prison or fine maximum four thousands five hundreds rupiah”.

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<sup>44</sup> R. Soesilo, *Kitab Undang-undang Hukum Pidana*, (Bogor: Politeia, 1969), p. 61

Jurisprudential of the Indonesian Supreme Court issued in 1977<sup>44</sup> stated that in line with the history Act 154 and 156 the Criminal Code together with their additional acts, including criminal action such as hostility, anger, and underestimate (*uiting gaven van gevoelens van wijandschap, haat of minachting*), purposed to Indonesian government (*tegen de meet groepender bevolking van Indonesia*), Act 154 the Criminal Code. On one or more group of Indonesian people (*tegen en meet groepender bevolking van Indonesia*), taken from acts 124A and 153A British Indian Penal Code and making criminal based on acts or in its explanation of the actions “*brings or attempts to bring into hatred or contempts or excites or attempts to excite disaffection towards*” the government. The term/statement of “*disaffection*” means all feeling of hostility, that there is an identity of criminal action as in act 154 and 156 the Criminal Code, that express hostility statement, anger and underestimate or *to bring into hatred contempts of feelings of enmity*” in acts 124A and 153A British Indian Penal Code.<sup>45</sup>

<sup>45</sup> Indonesian Constitutional Court Jurisprudence RI, I-II, 1977, p. 16 cited by Juhaya S. Prajadan Ahmad Syihabudin, *Delik Agama dalam Hukum*

The existence of act 156 the Criminal Code, before freedom, had full of political element. Oemar Seno Adji in his book the Criminal Legal (process) in prospection stated that act 156 the Criminal Code not separated from Act 154 the Criminal Code both of them categorized as “*haatzaai-artikelen*”, created to certain purpose, to interest of “*colonial administration*”. However, the acts actually could not be applied in Nederland. These acts purposed to fill the need of *koloniale samenleving* as stated by “*Commissie voor Privaat-en Strafrecht*” Nederland.<sup>46</sup> This act was additional “*haatzaai artikelen*”, object of action in this act was action made into criminal case by group of people such as different group like religious group.

Apart from history of implementing act 154 and 156 the Criminal Code, Act 156a in its development in Indonesia, materially still necessary indeed. The religion problem closed related to State Base Pancasila and the Fundamental Constitution 1945. The principle of the divinity of the Only God is accepted by all religion in Indonesia, thus in its

implementation, the state and nation life has to be able to be responsible to the Only God.

Act 156a the Criminal Code, applied based on the law PNPS No. 1 in 1965 on the Preventing of Misuse and/or religion staining, State Paper No. 3 in 1965, dated 27 January 1965. In consideration, it stated that consideration of issuing PNPS referred to protect state and society, National Revolution future and Universe National development to achieve justice and welfare society.<sup>47</sup> After the freedom together with constitutional changes for three times, from the Fundamental Constitution of 1945, RIS constitution, Temporary Fundamental 1950, and finally back to the Fundamental Constitution of 1945 through President Decree in July, 5 1959, it showed instability of state in that time. The decree supported the applying the Fundamental Constitution of 1945 and Jakarta Charter in June, 22 of 1945 became soul and a unity to the constitution.

The President Decision became one forms of regulation created based on the Letter of Indonesian President

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*Pidana Indonesia*, (Bandung: Angkasa, 1982), p. 39

<sup>46</sup> Schepper, *Het Gevaarvoor de Vrijheid van Godsdienstige Belijdeniste Duchten van Het in*

*Arrtkel 156 N.I. Sw. Omschreven Haatzaai Delict*. Dikutip oleh Oemar Seno Adji dalam *Hukum (Acara) Pidana dalam Prospeksi*, p. 74

<sup>47</sup> Considerant Act PNPS No. 1 Year 1965

number 2262/HK/59 on the Form of State Regulation, dated 20 August 1959, sent by President Soekarno to the Head of Indonesian Legislative Assembly. The letter stated that three state regulation clearly written in the Fundamental Constitution of 1945, namely the Law, the Governmental regulation as the Law Substitution, and the Governmental regulation, and also decided some state regulations, such as:<sup>48</sup>

“Besides, the Government need to conduct several other State Regulation, such as: **President Decision**, to conduct President Decree/the Highest Commandant of War Force dated 5 July 1959 on “Return to the Fundamental Constitution of 1945”

Since the president letter had been sent and accepted, 129 President Decision and Regulation were created in the time from 1959 to 1966. These President Decision and Regulation in the range of that period substantially considered being inappropriate. Then, the Committee of Temporary Representative required conducting

review based on the Committee Decision number XIX/MPRS/1966 on the Review of State Legislative products outside MPRS product that inappropriate to the Fundamental Constitution of 1945 and the Decision of MPRS number XIX/MPRS/1966. Based on both decision of MPRS, it created the Law number 5 in 1969 on the Statement of Various President Decision and Regulation as Law (Indonesian Republic Paper in 1969 Number 36, Additional Indonesian Republic Paper 2900).<sup>49</sup>

The General Explanation of the Law number 5 1969 on the Statement of Various President Decision and Regulation as Law, formulated as follow:

“The President Decisions and regulations as stated in Paper IIA and IIB were stated as the Law, with regulation that **must be conducted revision/completion**, meaning that material of the decisions and Regulation were collected or used as material for formulating the new Law.”

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<sup>48</sup> Opinion of Maria Farida Indrati in decision MK No. 140/PUU-VII/2009, p. 313

<sup>49</sup> Ibid, p. 313

Act 2 of the Law number 5 in 1969 on the Statement of Various President Decision and Regulation as Law stated:

“Counted since it legitimated of the Law, it stated that the President Decision and Regulation as explained in the Draft IIA and IIB of this law became the Law with regulation, that the material of the President Decision and Regulation were collected or used as material of Formulation the new Law”.

Explanation of Act 2 *a quo*, stated:

“the President Decision and Regulation as explained in the Draft IIA stated as the Law using regulation that the material of the President Decision and Regulation were collected and included in new Law as completion, change or addition from material arranged in the previous Law”.

On the applying of the law number 5 in 1969 on the Statement of

Various president Decision and Regulation as the Law, it decided PNPS Number 1 of 1965 on the Preventing Misuse and/or Religion staining as a Law. As a regulation created by authorized officer, in this case the president, the president decision was decided as the law number 1/PNPS/1965 on the Preventing Misuse and/or Religion staining as legitimate rule and having general bounding validity. It related to the Act I of the Changing Rule of the Fundamental Constitution 1945 (change) stated;

“Any existed regulation still applies as long as there are no new ones according to this Fundamental Constitution”.

Recently in the society condition, many belief ideologies or organization appear against the religious.<sup>50</sup> The ideologies give serious effect to state life, result in separation among the religious people and also treat unity and integrity of the nation in general. In specific, this new ideology also treats the prior religions. Today, the condition reappeared, like or not, that the democracy and safety also give effect to

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<sup>50</sup> Explanation Act PNPS No. 1 Year 1965, point I par. 2.

the continuity of religious life. However, the discipline to do devotion increases the discipline and orderings of country and nation.

#### **IV. CONCLUSION**

1. The Philosophical Fundamental of Religion Protection in Indonesia is form of the first principle the Divinity of the Only God. Act 156a of the Criminal Code is realization of penal policy from the first principle. With background of long history begun before the colonialism till the Indonesian Independence. Pancasila as philosophical fundamental of Indonesia places the Divinity of the Only God in the first principle. Thus, the existence of religion becomes spirit of nation to fill the freedom and keep strong the justice. Therefore, protection to the religion from any kinds of misuse and/or staining must be minimized. The effort must synergize the relation between country and the people through society leader and religion ones.
2. The forms of legal protection toward religion and its

implementation in Indonesia have been proved by history of Indonesia. From forming the religion institution or Religion Department before independence to the Religion Court Institution. The protection needs support of penal effort created by Act 156a of the Criminal Code and consider being not maximum in protecting religion from staining. It proves by many cases happening in Indonesia related to religion staining and these cases give suffer to all national elements. Therefore, there must be any change in renewal the National Criminal law in viewing the religion staining and tolerant of religious people.

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