

Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis

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Abstract

The right to religious freedom is included in arts 28E and 29 of the Constitution of the Republic of Indonesia 1945 (*Undang-Undang Dasar Republik Indonesia 1945*, 'the Constitution'). This right is under threat, however, for religious minorities such as Ahmadiyah, an Islamic sect which has existed in Indonesia for over 80 years. Since 2005 and the renewal of a fatwa (Islamic legal decision) by the Indonesian Ulama Council (*Majelis Ulama Indonesia*) against Ahmadiyah, this group has experienced increasing attacks from radical Islamic groups. This article analyses the implications of the controversy over Ahmadiyah for religious freedom and tolerance in Indonesia. It begins by highlighting the origins and formation of Ahmadiyah in Indonesia, and then examines several regional regulations (*peraturan daerah*) and administrative decisions that ban the activities of Ahmadiyah. This article demonstrates why it is unlikely that an application for judicial review of these regional regulations will succeed in the Supreme Court (*Mahkamah Agung*). If this is the case, it means that local governments remain free to restrict the rights of religious minorities such as Ahmadis.

I Introduction

On 6 February 2011, three Ahmadi followers were killed and at least five were injured in a brutal attack on Ahmadiyah, an Islamic sect,¹ in the subdistrict of Cikeusik in the province of Banten.² Graphic footage of the attack circulated

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¹ This article is not concerned with whether Ahmadiyah is or is not within the teachings of Islam. Given the focus in this article on the Indonesian context, the term 'Ahmadiyah' will be used as it is the common word for the group in Indonesia.

² 'Police Arrive to Secure Site of Ahmadiyah Conflict in Umbulan', *The Jakarta Globe* (online), 6 February 2011 <<http://www.thejakartaglobe.com/home/police-arrive-to-secure-site-of-ahmadiyah->

widely on the internet, showing a crowd of men attacking Ahmadis with clubs and sticks, and continually beating the corpse of one Ahmadi in particular, as well as vandalising and setting fire to property. This footage brought the plight of Ahmadis in Indonesia to the attention of the international media.

This incident drew strong criticism from other governments and international organisations. On 15 March 2011, 27 US Senators condemned the violence and called on the Indonesian government to revoke the Ministerial Regulation³ and all regional regulations (*peraturan daerah*) that have attempted to ban the activities of Ahmadiyah.⁴ In April 2011, Human Rights Watch condemned the violence, calling for a fair trial and full protection for victims, witnesses, and court officials.⁵ It later wrote a letter to the Indonesian President calling for the Ministerial Regulation against Ahmadiyah to be cancelled.⁶ Then, in July 2011, the European Parliament released a resolution expressing its grave concern at the recent spate of violent incidents against Ahmadis in Indonesia, among other religious minorities.⁷ Despite the mounting criticisms, the Indonesian government has shown little sign of responding to these complaints.

The rights of Ahmadis remain an ongoing issue of concern in Indonesia, with the Cikeusik incident prompting renewed debate about the legal rights of Ahmadis. It was not only the incident itself that drew attention, but also the relatively light sentences of between one and six months prison that were handed down. Just 12 perpetrators were convicted for the criminal offence of inciting hatred,⁸ while one Ahmadi was also convicted for assault.⁹ There has been

conflict-in-umbulan/421066>. In terms of the location of the incident, prior to 2000, the area now known as the province of Banten was part of the province of West Java.

³ *Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri Dalam Negeri Republik Indonesia No 3/2008; No KEP-033/A/JA/6/2008; No 199/2008; tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat* [Joint Decree of the Minister of Religion, the Attorney-General and the Minister of Home Affairs No 3/2008; No KEP033/A/JA/6/2008; No 199/2008 issuing a Warning and Order to the Followers, Members, and/or Leaders of the Jemaat Ahmadiyah Indonesian (JAI) and to the General Public].

⁴ 'Twenty-seven US Congressmen Urge RI to Annul Bans on Ahmadiyah Sect', *The Jakarta Post* (online), 17 March 2011 <<http://www.thejakartapost.com/news/2011/03/17/27-us-congressmen-urge-ri-annul-bans-ahmadiyah-sect.html>>.

⁵ Human Rights Watch, 'Indonesia: Ensure Security in Religious Killings Trial' (Press Release, 19 April 2011) <<http://www.hrw.org/news/2011/04/19/indonesia-ensure-security-religious-killings-trial>>.

⁶ Human Rights Watch, 'Letter to President Yudhoyono on Indonesia's Human Rights Commitments', 8 July 2011 <<http://www.hrw.org/news/2011/06/08/letter-president-yudhoyono-indonesias-human-rights-commitments>>.

⁷ 'European Parliament Voices "Grave Concern" over Religious Violence in Indonesia', *The Jakarta Globe* (online), 8 July 2011 <<http://www.thejakartaglobe.com/home/european-parliament-voices-grave-concern-over-religious-violence-in-indonesia/451745>>.

⁸ See Serang District Court (Banten): Putusan No 317/PID.B/2011/PN.SRG in the case of KH Muhamad Munir; Putusan No 311/PID.B/2011/PN.SRG in the case of Endang; Putusan No 308/Pid.B/2011/PN.SRG in the case of KH Ujang Muhamad Arif; Putusan No 318/PID.B/2011/PN.SRG in the case of Dani; Putusan No 313/PID.B/2011/PN.SRG in the case of Saad Baharudin; Putusan No 312/PID.B/2011/PN.SRG in the case of Adam Damini bin Armad; Putusan No 310/PID.B/2011/PN.SRG in the case of Yusuf Abidin alias Asmat bin Kamsa; and Putusan No 314/PID.B/2011/PN.SRG in the case of Yusri bin Bisri and Muhamad Rohidin bin Eman. All court decisions were handed down on 28 July 2011. For an analysis of these trials, see Melissa Crouch, 'Criminal (In)justice in Indonesia: The Cikeusik Trials' (2012) 37 *Alternative Law Journal* 54.

outspoken condemnation and criticism from Indonesian human rights organisations such as the Setara Institute, the Wahid Institute, KontraS and the Indonesian Legal Aid Institute. A particular issue of concern is that there has been a corresponding increase in the enactment of regional regulations and administrative decisions by local authorities to further restrict Ahmadi activities.

This article critically examines these regional regulations and the legal grounds on which they could be reviewed in court. I begin by outlining the right to religious freedom under Indonesian law, which has been reinforced as part of the constitutional amendments and democratic law reforms that have taken place in Indonesia since 1998. I briefly explain the origins and teachings of Ahmadiyah, and how it has been received in Indonesia. I then turn to analyse regional regulations and administrative decisions that seek to ban the activities of Ahmadiyah at both the provincial and city or regency level. While these are rarely enforced, I demonstrate how some administrative decisions have been challenged by way of judicial review in the Administrative Court (*Pengadilan Tata Usaha Negara*), although these cases have all been dismissed by the Court.

The more pressing issue which I then consider is the legality of these regional regulations and whether they could be successfully challenged in the Supreme Court (*Mahkamah Agung*). Finally, I examine the recent decision of the Constitutional Court (*Mahkamah Konstitusi*) that upheld the *Blasphemy Law*,¹⁰ and the implications of this decision for Ahmadis.¹¹ This court decision, combined with the powers of regional governments to maintain public order, and the willingness to be seen to uphold orthodox Islamic teachings to satisfy the demands of hardline (*garis keras*) Islamic groups, means that it is unlikely that the Supreme Court will invalidate regulations that ban the activities of Ahmadiyah. This leaves the rights of Ahmadis open to compromise by the legislative and administrative decisions of regional authorities.

⁹ Serang District Court Decision No 419/PID.B/2011/PN.SRG in the case of H Ir. Deden Dermawan Sudjana, 15 August 2011.

¹⁰ *Penetapan Presiden Republik Indonesia Nomor 1 Tahun 1965 Tentang Pencegahan Penyalahgunaan Dan/Atau Penodaan Agama* [Presidential Decree No 1 of 1965 on the Prevention of the Misuse and/or Disgracing of a Religion] (which was upgraded to a statute by [*Undang-Undang 5/1969 tentang Pernyataan Berbagai Penetapan Presiden dan Peraturan Presiden Sebagai Undang-Undang* [Law No 5 of 1969 Declaring Various Presidential Decrees and Presidential Regulations as Law) is commonly referred to in Indonesia as '*UU Penodaan Agama*', or the '*Blasphemy Law*'.

¹¹ *Pengujian Undang-Undang Nomor 1 PNPS Tahun 1965 Tentang Penyalahgunaan Dan/Atau Penodaan Agama Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* [Decision of the Constitutional Court No 140/PUU-VII/2009 concerning the Request for Judicial Review of the Blasphemy Law] 19 April 2010.

II Religious Freedom, the Constitution and the Constitutional Court

Since Independence in 1945, the legal foundations for religious freedom in Indonesia were laid out in the Constitution. The right to freedom of religion was included in art 29, as follows:¹²

- (1) The state shall be based upon the belief in the One and Only God.¹³
- (2) The state guarantees all persons the freedom of religion and worship, each according to his or her religion and belief.

Since 1998 and the transition to democracy, the right to freedom of religion has been reaffirmed by the state, primarily through the introduction of *Law 39/1999 on Human Rights*.¹⁴ Article 22 states that:

- (1) Each person is free to profess his/her religion and to worship according to his/her religion and belief.
- (2) The state guarantees all persons the freedom of religion, each according to his/her religion and belief.

This right to religious freedom is tempered by art 70 of the *Law 39/1999 on Human Rights*, which allows for permissible limitations on the right to religious freedom.¹⁵

In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil the requirements of justice and taking into consideration morality, security, and public order in a democratic community.

In 2001, this right was further reinforced in the Second Amendment to the Constitution,¹⁶ and art 28E was inserted as part of a new chapter on human rights, as follows:

¹² The following translations of the provisions of the original Constitution and the amended Constitution are taken from the complete English translation in Tim Lindsey, 'Indonesian Constitutional Reform: Muddling Towards Democracy' (2002) 6 *Singapore Journal of International and Comparative Law* 244, 278–301.

¹³ The term for 'God' used here is 'Tuhan', the Indonesian word for God used by all religions. For a discussion of the choice of this term over 'Allah', the Arabic term for God commonly used by Muslims, in the Pancasila, see Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society: A Cultural and Ethical Analysis* (Leiden, 1988) 153.

¹⁴ *Undang-Undang No 39 Tahun 1999 tentang Hak Asasi Manusia*.

¹⁵ *Law 39/1999* also contains further limitations in art 73, but the Elucidation to *Law 39/1999 (Penjelasan atas Undang-Undang 39/1999 tentang Hak Asasi Manusia)* states that art 73 does not apply to non-derogable human rights, which includes freedom of religion.

¹⁶ *Perubahan Kedua Undang-Undang Dasar Republik Indonesia 1945*. For an in-depth analysis of the four amendments to the Indonesian Constitution since 1998, see generally Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition* (Konrad Adenauer Stiftung, 2008); Tim Lindsey, 'Constitutional Reform in Indonesia: Muddling Towards Democracy' in Tim Lindsey (ed), *Indonesia: Law and Society* (Federation Press, 2nd ed, 2008) 23.

- (1) Each person is free to profess his/her religion and to worship in accordance with his/her religion...
- (2) Each person has the freedom to possess convictions and beliefs, and to express his/her thoughts and attitudes;
- (3) Each person has the freedom to associate, gather and express his/her opinions.

Article 28I includes the right to freedom from discrimination, and it confers on the government the responsibility of protecting and guaranteeing these basic human rights. In October 2005, the Indonesian government's commitment to freedom of religion at international law was reinforced by the ratification of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).¹⁷ These two covenants became part of Indonesian law through *Law 11/2005* and *Law 12/2005* respectively.¹⁸ This was considered by human rights activists and non-government organisations to be a significant affirmation of the right to religious freedom. The Indonesian state is therefore bound by the Constitution, international law, and domestic laws on human rights to respect the right to freedom of religion of its citizens.¹⁹ There is no right, however, not to have a religion,²⁰ although since 2006 citizens may choose to leave the 'religion' section of their national identity card blank.²¹

Related to this right, it is equally important to note the constitutional limitations that have been placed on the right to freedom of religion in Indonesia. This limitation is referred to by the government to justify its policies that regulate religious affairs and set boundaries around activities and the rights of religious

¹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Although art 18 of the ICCPR relates to the right to religious freedom, Indonesia is not a signatory to the Second Optional Protocol to the ICCPR, which means that an individual does not have recourse to international dispute resolution mechanisms if his or her right to religious freedom has been infringed.

¹⁸ *Undang-Undang Nomor 11 Tahun 2005 Tentang Pengesahan Kovenan Internasional Tentang Hak-Hak Ekonomi, Sosial Dan Budaya* [Law No 11 of 2005 on the ICESCR] (Indonesia) ('*Law 11/2005 on the ICESCR*'); *Undang-Undang Nomor 12 Tahun 2005 Tentang Pengesahan Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik* [Law No 12 of 2005 on the ICCPR] (Indonesia) ('*Law 12/2005 on the ICCPR*'). See *Undang-Undang Nomor 24 Tahun 2000 Tentang Perjanjian Internasional* [Law No 24 of 2000 on International Treaties] (Indonesia) ('*Law 24/2000*') art 15(2).

¹⁹ For an overview of Indonesia's legal framework and institutions on human rights, see Jeff Herbert, 'The Legal Framework of Human Rights in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (Federation Press, 2nd ed, 2008) 456–514.

²⁰ The Constitutional Court declared that there is no possibility of a campaign for 'freedom not to have a religion' in Indonesia: see Decision of the Constitutional Court No 140/PUU-VII/2009 concerning the Request for Judicial Review of the Blasphemy Law, 19 April 2010, 295.

²¹ In Indonesia, every adult must have an identity card, known as 'KTP' (*kartu tanda penduduk*). According to *Undang-Undang Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan* [Law No 23 of 2006 on Civic Administration] (Indonesia), as implemented by *Peraturan Pemerintah Pelaksanaan Undang-Undang Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan* [Government Regulation No 37 of 2007] (Indonesia), a person must list one of the six recognised religions on his or her card, or they may leave the 'religion' section blank (Law No 23 of 2006, art 64(2)).

minorities in particular.²² This restriction is contained in art 28J(2) of the Constitution:

In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil the requirements of justice and taking into consideration morality, religious values, security, and public order in a democratic community.

This list of permissible limitations is similar to art 18 of the ICCPR at international law, with the main exception being that the Indonesian Constitution lists ‘religious values’ whereas the ICCPR does not. Further, although the right to religious freedom in theory also applies to religious minorities such as Ahmadis, in the Indonesian context it is often used to justify the protection of the rights of the religious majority. For example, in 2010, this provision formed part of the reasoning of the Indonesian Constitutional Court in its decision to uphold the constitutional validity of the *Blasphemy Law*.²³

This case was the first time the *Blasphemy Law* had ever been reviewed by a court. This is partly because it was only in 2003 that the Constitutional Court was established by *Law 24/2003 on the Constitutional Court*,²⁴ after provision was made for a Constitutional Court in the Fourth Amendment to the Indonesian Constitution.²⁵ The Constitutional Court is the only court in Indonesia that has the power to receive applications for judicial review of statutes (*undang-undang*) enacted by the legislature (*Dewan Perwakilan Rakyat*, ‘DPR’) that are considered to be unconstitutional.²⁶ The establishment of the Constitutional Court is significant because, in the past, the former authoritarian president, Suharto (1966–1998), ensured that the courts did not have the power to exercise judicial review.²⁷ There are, however, limitations on the power of the Constitutional Court, such as that its decisions are prospective, so they can only be considered in relevant cases that occur *after* the judgment is handed down.²⁸

²² For example, a large number of submissions to the Constitutional Court in the case of judicial review of the *Blasphemy Law* made this argument. For a detailed analysis of the submissions made in this case see Melissa Crouch, ‘Law and Religion in Indonesia: The Indonesian Constitutional Court and the Blasphemy Law’ (2012) 7(1) *Asian Journal of Comparative Law*.

²³ Decision of the Constitutional Court No 140/PUU-VII/2009, 19 April 2010.

²⁴ *Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi* [Law No 24 of 2003 on the Constitutional Court] (Indonesia) (‘*Law 24/2003 on the Constitutional Court*’). It has recently been amended by *Undang-Undang Nomor 8 Tahun 2011 Tentang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi* [Law No 8 of 2011 amending Law No 24 of 2003 on the Constitutional Court] (Indonesia).

²⁵ That is, art 24C that was inserted in 2002 by the Fourth Amendment to the Constitution of the Republic of Indonesia 1945 (*Perubahan Keempat Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*). For an in-depth analysis of the Indonesian Constitutional Court and the process of judicial review in its first two years of operation, see Simon Butt, *Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005* (PhD thesis, The University of Melbourne, 2006).

²⁶ *Law 24/2003 on the Constitutional Court*, arts 3A and 10(1)(A).

²⁷ According to *Undang-Undang Nomor 14 Tahun 1970 tentang Ketentuan-ketentuan Pokok Kekuasaan Kehakiman* [Law No 14 of 1970 on Judicial Power] (Indonesia): Lindsey, above n 12, 260–1.

²⁸ *Law 24/2003 on the Constitutional Court*, art 58.

In its consideration of the application to review the *Blasphemy Law*, the Constitutional Court emphasised that art 28J(2) of the Constitution is different from art 18 of the ICCPR and is an explicit and legitimate limitation on the right to religious freedom for the purpose of protecting the rights of the religious majority in the Indonesian context.²⁹ It reinforced the ‘Pancasila’, the state ideology which includes the belief in one God, as the basis of the state, and that the state is neither secular nor Islamic.³⁰ It went on to explain how the state formed the Ministry of Religion shortly after Independence in 1945 in order to ensure religious harmony and the right to religious freedom, as well as to regulate necessary restrictions on this right.³¹ The decision of the Constitutional Court therefore reinforced the legitimacy of state limitations on the right to religious freedom.

At international law, however, the general comments to the ICCPR on freedom of religion assert that state restrictions on the freedom of religion must be narrow.³² The Constitutional Court’s wide interpretation of the permissible limitations on this right is arguably in breach of this guideline, unless the *Blasphemy Law* can be classified on the basis of ‘religious values’ as a legitimate limitation. I will examine whether the Indonesian courts would consider regional regulations against Ahmadiyah to be a permissible limitation on the right to religious freedom. Before I do this, I will begin with an overview of the origins and teachings of Ahmadiyah more generally, and how they have created tension with the Muslim community.

III Origins, Teachings and Tensions

Ahmadiyah is a religious movement that originated from India in the mid-1880s. A man by the name of Mirza Ghulam Ahmad initiated a revival of Islam and of Islamic missionary efforts. He began disseminating his ideas through a publication, ‘Proofs of Ahmadiyah’, in 1880.³³ This led to the formation of the Ahmadiyah movement in 1889.³⁴ The group was established in response to Hindu religious reform movements at the time, and as a form of ‘protest against Christianity and the success of Christian proselytisation’.³⁵ Smith described Ahmadiyah as a ‘progressive and explicitly modernist movement’ that is ‘the most important Muslim missionary society to Christendom’.³⁶

²⁹ Decision of the Constitutional Court No 140/PUU-VII/2009, 19 April 2010, 276.

³⁰ Ibid 271.

³¹ Ibid 275.

³² UN Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion* (Article 18, ICCPR), UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

³³ For a concise analysis of how the Ahmadiyah movement spread through print media, see Iqbal Singh Sevea, ‘The Ahmadiyah Print Jihad in South and Southeast Asia’ in R Michael Feener and Terenjit Sevea (eds), *Islamic Connections: Muslim Societies in South and Southeast Asia* (Institute of Southeast Asian Studies, 2009) 134–48.

³⁴ See generally Spencer Lavan, *The Ahmadiyah Movement: Past and Present* (Guru Nanak Dev University, 1976); Iskandar Zulkarnain, *Gerakan Ahmadiyah di Indonesia* (LKIS, 2005); Yohanan Friedmann, *Prophecy Continuous: Aspects of Ahmadi Religious Thought and its Medieval Background* (University of California Press, 1989).

³⁵ W C Smith, *Modern Islam in India: A Social Analysis* (Russell & Russell, 1972) 298.

³⁶ Ibid 56.

From the beginning, Ahmad declared Ahmadiyah to be an Islamic movement. His teachings differ, however, from traditional Islamic doctrine, in several important ways. According to Smith, in 1899, Ahmad not only lost popularity but was openly criticised for declaring that he had received a revelation that he was the promised Messiah.³⁷ The greatest offence to orthodox Islam was Ahmad's claim that revelation did not cease with the Prophet Muhammad, but that Ahmad himself was the spirit of the Prophet incarnate³⁸ or the '*mahdi*', the Messiah expected by many Muslims to come before the end of the world to lead the faithful.

Since Ahmad's death in 1908, the primary issue within Ahmadiyah has been the leadership of the group, and the status and authority of the founder, Ahmad. As a consequence of internal disputes over these issues, Ahmadiyah split into two factions, Lahore and Qadiani. Ahmadiyah Lahore, first led by Muhammad Ali, is generally considered to be the more moderate of the two because it accepts Ahmad as a reformer, but not as a prophet. According to Smith, its original members were middle-class, and chose as their new leader Muhammad Ali, an intellectual and lawyer.³⁹ On the other hand, Ahmadiyah Qadiani, named after the birthplace of Ahmad, is considered to be the more radical faction because it accepts Ahmad's claims to prophethood, and has adopted more active proselytising tactics.⁴⁰

From Ahmad's initial proclamations in the late 1880s to the factional split in the early 1900s, the Ahmadiyah movement has always met with resistance from orthodox Islam. Even in its formative stages, a fatwa was issued against Ahmad by Islamic religious leaders in India.⁴¹ Since then, fatawas have been issued against Ahmadiyah by *ulama* (Islamic religious leaders) in countries such as Pakistan, Malaysia, Saudi Arabia, Brunei, and Singapore.⁴² Although a fatwa is generally not legally binding unless the state recognises it as such, fatwa may be considered by Muslims in their everyday lives. In Indonesia, these religious opinions have also at times been relied upon by radical Islamic groups to legitimate their actions, and have led to an intensification of attacks on Ahmadiyah.

IV The Establishment of Ahmadiyah in Indonesia

The Ahmadiyah movement has been present in Indonesia since the 1920s. The two factions in Indonesia are known as Gerakan Ahmadiyah Indonesia, the Lahore

³⁷ Smith, above n 35, 299.

³⁸ Ahmad's teachings are also offensive to some Christians, because he taught that Jesus Christ was not crucified, but taken down from the cross and resuscitated, and later died in Kashmir at the age of 120. See Lavan, above n 34, 18.

³⁹ Smith, above n 35, 300.

⁴⁰ For an explanation of the differences between Lahore and Qadiani, see Friedmann, above n 34, 147–62. For the teachings of Ahmadiyah Qadiani specifically, see S Abul Hasan Ali Nadwi, *Qadianism* (Zafar Ishaq Ansari trans, SH Muhammad Ashraf, 1965).

⁴¹ Lavan, above n 34, 20.

⁴² For an analysis of fatwa issued by Islamic religious leaders in Malaysia, Brunei and Singapore, see Tim Lindsey and Kerstin Steiner, *Islam and the Law in Southeast Asia: Singapore* (IB Taurus, 2001–) vol 2; Tim Lindsey and Kerstin Steiner, *Islam and the Law in Southeast Asia: Malaysia and Brunei* (IB Taurus, 2011–) vol 3.

branch, and Jemaah Ahmadiyah Indonesia (JAI),⁴³ the Qadiani branch. Estimates of their numbers today vary considerably. In total, Ahmadiyah claims to have established over 300 branches with 300 000 to 400 000 followers across Indonesia.⁴⁴ The Ministry of Religion, however, has estimated that Ahmadiyah has approximately 50 000 to 80 000 followers in Indonesia.⁴⁵ Some media reports have given a midway estimate of 200 000.⁴⁶

Even if Ahmadiyah has up to 400 000 members, this is a relatively small number in the context of the 240-million, majority-Muslim population of Indonesia. According to the Ministry of Religion, 88.8 per cent of the population are Muslim, 5.7 per cent Protestant, 3 per cent Catholic, 1.7 per cent Hindu, 0.06 per cent Buddhist, and 0.01 per cent Confucianist.⁴⁷ These six religions are recognised and supported by the state, although a diverse range of religions and beliefs outside these are permitted to exist.⁴⁸

When Ahmadiyah first came to Indonesia in the early 1920s, it enjoyed a very brief period of cooperation with mainstream Islamic groups that were already established in Indonesia, such as Muhammadiyah.⁴⁹ At that time, Ahmadiyah began to work together with Muhammadiyah to promote and develop Islamic education, and to support Islamic efforts to resist Christian missionary activities. This cooperation, however, was short-lived, and resulted in ‘estrangement’ between Muhammadiyah and Ahmadiyah.⁵⁰ By the late 1920s, relations had broken down between Muhammadiyah and Ahmadiyah,⁵¹ and with the Islamic community more broadly.⁵²

Ahmadiyah has faced ongoing resistance to its teachings from mainstream Islamic groups in Indonesia.⁵³ According to Benda, in 1926, some *ulama* from East

⁴³ For an account of the work of the first *mubaligh* to Indonesia, see Ny Hajjah Taslimah A Wahid (ed), *Mubaligh Markazi Pertama: Haji Abdul Wahid HA* (JAI, 1995).

⁴⁴ Ministry of Religion, *Education on the Joint Decision 3/2008* (Attorney-General and the Department of Home Affairs, 2008)

⁴⁵ Ibid.

⁴⁶ For example, ‘Government Told to Take Action Against Culprits in Ahmadiyah Attack’, *The Jakarta Post* (online), 6 February 2006 <<http://www.thejakartapost.com/news/2006/02/06/govt-told-take-action-against-culprits-ahmadiyah039s-attack.html>>.

⁴⁷ Ministry of Religion, ‘Table 1: Population by Religion 2008’, 2010 [copy on file with author].

⁴⁸ These are the six recognised religions according to the Elucidation to Presidential Decree 1/1965 on the Prevention of Misuse and/or Disrespect of Religion. This does not mean that other religions or beliefs, such as Judaism, are banned. As long as they do not disturb the community, adherents of other religions are also free to practise their religion in principle. As this article shows, however, this right is limited in practice.

⁴⁹ Muhammadiyah is the largest modernist Muslim organisation in Indonesia and claims 30 million followers. It is the second largest only to Nadhatul Ulama, a traditionalist Muslim organisation, which claims 40 million members in Indonesia.

⁵⁰ Harry Benda, *The Crescent and the Rising Sun: Indonesian Islam under the Japanese Occupation 1942–1945* (W Van Hoeve, 1958) 52.

⁵¹ See H L Beck, ‘The Rupture between the Muhammadiyah and the Ahmadiyah’ (2005) 161 *Bijdragen tot de Taal-, Land-en Volkenkunde* 210.

⁵² In 1927, the teachings of Ahmadiyah were denounced at a congress of Indonesian Islamic groups: Friedmann, above n 34, 25.

⁵³ JAI, *Officieel Verslag Debat antara Pembela Islam (Persatuan Islam) and Ahmadiyah Qadiani* (JAI, 1933).

Java worked to oppose the teachings of Ahmadiyah in that area.⁵⁴ He also records an incident in 1927 when Nadhatul Ulama and Muhammadiyah opposed the spread of Ahmadiyah teachings by agreeing to veto an Indonesian translation of the Qur'an by Tjokroaminoto (the founder of Sarekat Islam) which was based on the Ahmadiyah version.⁵⁵ This English translation was objected to because it was a commentary on the Qur'an by the first leader of Ahmadiyah Lahore, Muhammad Ali.⁵⁶

Therefore, since its arrival in Indonesia, some mainstream Islamic religious leaders have clearly denounced Ahmadiyah and its teachings as 'deviant' (*sesat*).⁵⁷ Despite ongoing tensions with existing Islamic groups, Ahmadiyah gained formal legal recognition from the Indonesian government as a religious group in 1953 by *Decree of the Minister for Justice*.⁵⁸ Sporadic incidents of tension continued, however.⁵⁹ Attacks against the group since 2000 have been well-documented by non-government organisations.⁶⁰ The leadership of JAI has also been forced to explain itself and its teachings on numerous occasions to various government bodies and departments, including the Ministry of Religion, the Coordinating Board for the Monitoring of Mystical Beliefs (*Bakor Pakem*),⁶¹ and the legislature.⁶²

Ahmadiyah, along with other religious minorities, remain vulnerable to threats and violence from radical Islamic groups, and these attacks are often carried out at places of worship.⁶³ Most prominent among its opponents is the Indonesian Ulama Council (Majelis Ulama Indonesia, 'MUI') which issued a fatwa against

⁵⁴ Benda, above n 50, 50.

⁵⁵ Ibid 54.

⁵⁶ Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900–1942* (Oxford University Press, 1973) 150.

⁵⁷ Some examples include Hasbiyallah and Syarifudin, *Pro Kontra Ahmadiyah* (Grafindo Litera Media, 2008); Ahmad Hariadi, *Mengapa Saya Keluar Dari Ahmadiyah Qadiani* (Irsyad Baitus Salam, 2008); A Yogaswara and Maulana Ahmad Jalidu, *Aliran Sesat dan Nabi-nabi Palsu: Riwayat Aliran Sesat dan Para Nabi Palsu di Indonesia* (Narasi, 2008).

⁵⁸ *Surat Keputusan Menteri Kehakiman RI No JA/23/13*, 1953.

⁵⁹ For examples see JAI, *Penjelasan Jemaah Ahmadiyah Indonesia* (JAI, 2001) 5–8.

⁶⁰ See, for example, M M Billah and C Setiawan, *Buku I: Laporan Sementara Pemantauan Kasus Ahmadiya* (Komnas HAM, 2006); M M Billah and C Setiawan, *Buku II: Laporan Organisasional Pemantauan Kasus Ahmadiyah* (Komnas HAM, 2006); Setara Institute, *Siding and Acting Intolerantly: Intolerance by Society and Restriction by the State in Freedom of Religion/Belief in Indonesia* (Setara Institute, 2009); Wahid Institute, *Annual Report on Religious Freedom and Tolerance* (Wahid Institute, 2010).

⁶¹ *Badan Koordinasi Pengawas Aliran Kepercayaan Masyarakat*, commonly known as *Bakor Pakem*, is a committee under the supervision of the Attorney-General with the task of monitoring 'deviant' religious groups.

⁶² For examples of submissions made to these bodies by JAI, see JAI, *Penjelasan Jemaat Ahmadiyah Indonesia: Terhadap Keberatan-keberatan Dari Pihak Lembaga Penelitian dan Pengkajian Islam* (1994); JAI, *Klarifikasi atas Tela'ah Buku Tadkirah* (2003); JAI, *Penjelasan Jemaat Ahmadiyah Indonesia* (2005); JAI, *Jawaban Jemaat Ahmadiyah Indonesia atas Pertanyaan Komisi VIII DPR RI Pada Temu Wicara Tanggal 31 Agustus 2005* (2005); Pengurus Besar JAI, *Kami Orang Islam* (2007); JAI, *Dasar-dasar Hukum dan Legalitas Jemaat Ahmadiyah Indonesia* (2008); JAI, *Beberapa Penjelasan Tentang Keyakinan Ahmadiyah* (2008); JAI, *Pengabdian Jemaat Ahmadiyah Indonesia dalam Bidang Kemasyarakatan* (2011).

⁶³ For an analysis of the regulation of, and conflict over, places of worship in Indonesia, see Melissa Crouch, 'Implementing the Regulation on Places of Worship in Indonesia: New Problems, Local Politics and Court Action' (2010) 34 *Asian Studies Review* 403.

Ahmadiyah in 1980 and again in 2005.⁶⁴ Radical Islamic groups continue to express their opposition to Ahmadiyah in the form of demonstrations and violent attacks.

Attacks have not only taken place in rural areas of Indonesia such as Cikeusik, but also in the capital city, Jakarta. On 1 June 2008, supporters of Ahmadiyah were attacked by radical Islamic groups at the National Monument in Jakarta.⁶⁵ On this day, a peaceful rally was held by activists of the National Alliance for Freedom of Religion and Faith, a coalition representing over 70 organisations, in support of the right to religious freedom. During this rally, around 400 members of radical Islamic groups, including the Islamic Defenders Front, Hizb ut-Tahrir Indonesia and the Islamic Community Forum, armed with clubs or sticks, violently attacked the National Alliance demonstrators. Around 70 people were injured, some were hospitalised, and others suffered trauma as a result of the attack. There have been an ongoing number of attacks at the mosques and property of Ahmadi communities since then.⁶⁶

Aside from vigilante actions and violent attacks, a more recent trend is for provincial and city/regency governments to issue legal bans on the activities of Ahmadiyah. All regulations discussed in this article relate to JAI, the Qadiani branch, unless otherwise stated.

V Legal Decrees and Decisions Banning the Activities of Ahmadiyah

A *Joint Ministerial Decision 'Warning' Ahmadiyah*

On 9 June 2008, the Minister of Religion, the Attorney-General and the Minister of Home Affairs issued *Joint Ministerial Decision 2008* as a 'warning' to followers of Ahmadiyah. These three government departments have the power to warn a group suspected of promoting 'deviant' religious teachings under the *Blasphemy Law* (art 2(1)). It was no coincidence that this warning was issued just eight days after the National Monument (*Monument Nasional*, also known as '*Monas*') incident. This decision made four key points.

First, it contained a broad warning to citizens not to support or conduct activities that 'deviate' from the teachings of the six state-sponsored religions (art 1). Second, it warned followers of Ahmadiyah not to promote 'deviant' teachings, namely the belief in a prophet after Muhammad (art 2). Third, it

⁶⁴ *Fatwa Majelis Ulama Indonesia No 5 Tahun 1980 tentang Jemaat Ahmadiyah Indonesia* [Fatwa of the Indonesian Ulama Council No 5 of 1980 concerning Jemaat Ahmadiyah Indonesia] 1 June 1980. For a copy see Ministry of Religion, *Himpunan Fatwa Majelis Ulama Indonesia* (2003) 96–8; *Fatwa Majelis Ulama Indonesia No 11/MUNAS VII/MUI/15/2005 tentang Aliran Ahmadiyah* [Fatwa of the Indonesian Ulama Council No 11/MUNAS VII/MUI/15/2005 concerning Ahmadiyah (28 July 2005)]. For a copy see MUI, *Fatwa Munas VII* (MUI, 2005) 92–8.

⁶⁵ See Achmad Setiyaji, *Tragedi Monas Berdarah* (Semesta Investigasi, 2009); Melissa Crouch, 'Indonesia, Militant Islam and Ahmadiyah: Origins and Implications' (ARC Federation Fellowship Islam, Syariah and Governance Background Paper Series No 4, Asian Law Centre, Melbourne Law School, the University of Melbourne, 2009).

⁶⁶ These attacks have again been well-documented by the organisations listed in note 60.

informed followers of Ahmadiyah that if they did not comply with this warning they would be liable to penalties under existing laws (art 3). Fourth, it prohibited vigilantism, presumably in response to the National Monument incident, by warning the public that vigilante action against Ahmadiyah would not be tolerated (art 4). This is in part directed to radical Islamic groups that were responsible for the National Monument incident.

In August 2008, a Joint Circular explained that this decision was sent from the three ministries involved to all governors, public prosecutors, and heads of the Ministry of Religion at the provincial level, and to all mayors and regents.⁶⁷ The circular stated that the *Joint Ministerial Decision 2008* is not ‘intervention by the Government in individual convictions’ but rather was an effort by the government to guard religious harmony against the spread of ‘deviant’ religious teachings. It explained that the reference to ‘penalties’ in art 3 of the Joint Decision may include convictions for blasphemy under art 156a of the Criminal Code (*Kitab Undang-Undang Hukum Pidana*), or the banning of an organisation according to the *Blasphemy Law*. In terms of the role of regional governments, however, it only specified that they should guide the teachings of the Ahmadiyah community, protect the followers as Indonesian citizens and support efforts to strengthen the teachings of Islam.

This warning, however, has failed to prevent further violent attacks against Ahmadis, such as the incident in Cikeusik. In addition, it is being used as justification by local government authorities to ban the activities of Ahmadiyah at the regional level. The number and severity of these regulations has increased since 2008, with ten regulations issued between February 2010 and February 2011. I will now turn to discuss these regulations in greater detail, beginning with provincial regulations.

Table 1: Bans against the Activities of Ahmadiyah since 2008⁶⁸

Date	Regulation
Oct 2011	Regulation of the Mayor of Bekasi banning the activities of Ahmadiyah
Mar 2011	Regulation of the Mayor of Depok (West Java) No 9/2011 banning Ahmadiyah

⁶⁷ *Surat Edaran Bersama Sekretaris Jenderal Departemen Agama, Jaksa Agung Muda Intelijen, dan Direktur Jenderal Kesatuan Bangsa dan Politik Departemen Dalam Negeri No SE/SJ/1322/2008; No SE/B-1065/D/Dsp.4/08/2008; No SE/119/921.D.III/2008 tentang Pedoman Pelaksanaan Keputusan Bersama Menteri Agama, Jaksa Agung, dan Menteri dalam Negeri Republik Indonesia No 3/2008; No KEP-033/A/JA/6/2008; No 199/2008 tentang Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat [Joint Circular of the Secretary General of the Department of Religion, the Attorney-General’s Office and the Department of Home Affairs No SE/SJ/1322/2008; No SE/B-1065/D/Dsp.4/08/2008; No SE/119/921.D.III/2008].*

⁶⁸ This table was compiled from the author’s own collection of regulations and decisions, as well as from the records of regulations and decisions compiled by various NGOs and Komnas HAM. For a table of decisions prior to 2008, see Crouch, above n 63, 7–8.

3 Mar 2011	Decision of the Mayor of Bogor (West Java) No 300.45-122/2011 banning the activities of Ahmadiyah in the city of Bogor
2 Mar 2011	Regulation of the Governor of West Java No 12/2011 banning the activities of JAI in West Java
1 Mar 2011	Regulation of the Governor of Banten No 5/2011 banning the activities of the followers, members and leaders of JAI in the province of Banten
28 Feb 2011	Regulation of the Governor of East Java No 188/94/KPTS/013/2011 banning the activities of JAI in East Java
25 Feb 2011	Decision of the Mayor of Samarinda (East Kalimantan) No 200/160/BPKPPM.I/II/2011 banning Ahmadiyah
21 Feb 2011	Regulation of the Regent of Pandeglang (Banten) No 5/2011 banning the activities of the followers, members and leaders of JAI in the regency of Pandeglang
16 Feb 2011	Regulation of the Regent of Kampar (Sulawesi) No 450/PUM/2011/68 stopping the activities of Ahmadiyah
10 Feb 2011	Circular of the Governor of South Sulawesi No 223.2/803/kesbang banning Ahmadiyah
16 Nov 2010	Decision of the Mayor of Pekanbaru (Riau) No 450/BKBPPM/749 banning Ahmadiyah
13 Nov 2008	Recommendation of Bakor Pakem Padang (West Sumatra) to the Mayor of Padang on the prohibition of Ahmadiyah and the removal of the Ahmadiyah Board in the City of Padang
1 Sept 2008	Decision of the Governor of the Province of South Sumatra No 563/KPTS/BAN.KESBANGPOL & LINMAS/2008 banning Ahmadiyah and the activities of its followers, members and leaders of Jemaat Ahmadiyah Indonesia (JAI) in the province of South Sumatra that are conducted in the name of Islam and are opposed to the teachings of the religion of Islam
9 Jun 2008	Joint Decision of the Minister of Religion, the Minister of Home Affairs and the Attorney-General 8 & 9/2008 issuing warning and order to the followers, members and/or leaders of JAI and to the general public
May 2008	The Mayor of Cimahi (West Java) issued an order to ban Ahmadiyah
Apr 2008	Recommendation of the national Bakor Pakem on banning the activities of Ahmadiyah in Indonesia

B *Provincial Regulations Banning Ahmadiyah Activities*

Regional regulations that seek to ban Ahmadiyah are not a new phenomenon in Indonesia. Over 40 city, regency or provincial governments have passed bans on the group's activities since the 1970s, although most of these were introduced since 1998 and the introduction of democracy. In particular, a number of the provincial regulations have been issued since the 2008 Monas tragedy. The first was issued in South Sumatra on 1 September 2008, one month after an agreement was reached between the provincial government and several local Islamic organisations in the area.⁶⁹

The *South Sumatra Regulation* bans Ahmadiyah and its activities and members from acting in the name of Islam. It only has four short provisions, with the first being the most important. Article 1 states the decision of the provincial government:

To ban Ahmadiyah and the activities of its followers, members and leaders of Ahmadiyah Qadiani (JAI) that are conducted in the name of Islam and are opposed to the teachings of the religion of Islam in the province of South Sumatra.

The responsibility to implement and supervise this ban is given to bodies including the military, the police and the public prosecutor (art 2). These bodies must report to the Governor via the assistant secretary of the local government (art 3).

In terms of the way the *South Sumatra Regulation* is justified, it claims that this regulation was issued at the united request of the Muslim community in the area, stating that 'the Islamic community in the area of South Sumatra urges the local government to immediately ban Ahmadiyah' (Consideration (b)). It emphasises the authority given to the Governor as the regional representative to implement the *Joint Ministerial Decision 2008* and monitor Ahmadiyah (Consideration (d)). It also claims it is justified based on limitations to religious freedom in the Constitution, as discussed in Section II above in this article, as well as on the *Blasphemy Law*.

The next provincial regulation against Ahmadiyah was not issued until 2011. This may be partly because the *South Sumatra Regulation* received negative media coverage and criticism from human rights groups. As a result the legitimacy of the *South Sumatra Regulation* appears to have been questioned by the national government. The Governor of South Sumatra was summoned to the Ministry of Home Affairs in Jakarta to explain his actions.⁷⁰ This did not, however, deter other regional governments from issuing such regulations.

⁶⁹ *Peraturan Gubernur Propinsi Sumatra Selatan No 563/KPTS/BAN.KESBANGPOL & LINMAS/2008 tentang Larangan Terhadap Aliran Ahmadiyah dan aktivitas penganut dan atau anggota Pengurus Jemaat ahmadiyah (JAI) dalam wilayah Sumatra Selatan yang mengatasnamakan Islam dan bertentangan dengan ajaran Islam* [Decision of the Governor of the Province of South Sumatra No 563/KPTS/BAN.KESBANGPOL & LINMAS/2008 banning Ahmadiyah and the Activities of its Followers, Members and Leaders of Jemaat Ahmadiyah Indonesia (JAI) in South Sumatra that are Conducted in the Name of Islam and are Opposed to the Teachings of the Religion of Islam] ('South Sumatra Regulation').

⁷⁰ Interview with Abdul Rahman Masud of the Ministry of Religion (Jakarta, 27 October 2009).

Only two weeks after the Cikeusik incident, on 28 February 2011, the Governor of East Java, Dr H Soekarwo, issued a ban on the activities of Ahmadiyah.⁷¹ The *East Java Regulation* blames Ahmadiyah for causing disturbances in the community. It refers to a letter of the provincial legislature citing the need for a decision of the Governor to ban the activities of Ahmadiyah in order to maintain social stability and safety in East Java.⁷² It is unclear why the legislature did not pass a regulation itself, although there may not have been sufficient support for such a regulation.

The *East Java Regulation* casts its scope wide in its attempt for justification and cites the same laws that should also protect the rights of Ahmadiis, including *Law 39/1999 on Human Rights*, *Law 11/2005 on the ICESCR*, and *Law 12/2005 on the ICCPR*, in addition to the *Joint Ministerial Decision 2008*, the *Blasphemy Law* and the Constitution. Article 1 bans the activities of JAI that might cause ‘disruption’ or ‘disturb’ public order and harmony in East Java. An explanation of exactly what ‘activities’ are banned is contained in art 2:

This ban as intended in article 1 above includes:

- (a) spreading the teachings of Ahmadiyah orally, in writing or via electronic media;
- (b) using a signboard with the name of the organisation ‘Jemaah Ahmadiyah Indonesia’ in public;
- (c) using a signboard for the name of a mosque, mushola [prayer room], educational institution or other building with the identity of JAI;
- (d) using the attributes of JAI in any form.

The *East Java Regulation* therefore prohibits the spread of the teachings of Ahmadiyah through public preaching, the distribution of pamphlets or via the internet. It also bans the use of signboards with the name ‘Jemaah Ahmadiyah Indonesia’, which reflects the concerns that a mosque should not be used by a group that is considered to be outside of Islam. Further provinces have followed the lead of East Java since then.

On 1 March 2011, the *Banten Regulation* was passed by the Governor of Banten, which is the province in which the Cikeusik incident took place.⁷³ The *Banten Regulation* specifically mentions the Cikeusik attack and therefore calls for the restoration of order to the community (Consideration (c)). It also mentions an agreement made on 25 February between religious leaders in the area to oppose the activities of Ahmadiyah (Consideration (d)). It specifically defines Ahmadiyah as a group that ‘deviates from the teachings of the religion of Islam and believes in a prophet after the Prophet Muhammad’ (art 6(1)). The *Banten Regulation* includes

⁷¹ *Peraturan Gubernur Jawa Timur No 188/94/KPTS/013/2011 tentang Larangan Aktifitas Jemaat Ahmadiyah Indonesia di Jawa Timur* [Regulation of the Governor of East Java No 188/94/KPTS/013/2011 Banning the Activities of Jemaat Ahmadiyah Indonesia in East Java] (*‘East Java Regulation’*).

⁷² Letter of the regional legislature of the province of East Java No 300/2043/060/2011, 23 February 2011.

⁷³ *Peraturan Gubernur Banten No 5/2011 tentang Larangan Aktivitas Penganut, Anggot dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) di Wilayah Provinsi Banten* [Regulation of the Governor of Banten 5/2011 Banning the Activities of the Followers, Members and/or Leaders of Jemaat Ahmadiyah Indonesia in the Province of Banten] (*‘Banten Regulation’*).

the same prohibition as the *East Java Regulation*, and gives the local government the task of supervising Ahmadiyah (art 5).

One day later, on 2 March, the Governor of West Java, Ahmad Heryawan, also issued a regulation banning the activities of Ahmadiyah.⁷⁴ The *West Java Regulation* borrowed some key provisions from the *East Java Regulation* and extended its scope further. This is one of the longest and detailed regulations on Ahmadiyah to date, with 15 provisions.

The *West Java Regulation* is careful to begin with the rhetoric of religious freedom:

The right to have a religion is a basic human right ... and the state guarantees the freedom of every citizen to practise their religion and worship according to their religion and beliefs. (Consideration (a))

It then goes on to quote the offence of insulting a religion from the *Blasphemy Law* (Consideration (3)), in essence asserting that the *Blasphemy Law* is a permissible limitation on the right to religious freedom. The *West Java Regulation* appeals to and relies on several letters issued by the Minister of Home Affairs between 2008 and 2011 that provide instructions to the provinces and cities/regencies on implementing the *Joint Ministerial Decision 2008* (Consideration (2-4)).⁷⁵ According to art 2:

The aim and goal of this regulation to manage Ahmadiyah in West Java is as follows:

- (1) to protect the safety and order of the community from any challenges that are caused by the spread of deviant religious teachings;
- (2) to control the activities of Ahmadiyah from activities that spread false interpretations and activities that deviate from the main principles of the teachings of Islam;
- (3) to solve criminal behaviour perpetrated by members of the community as a consequence of the spread of deviant religious teachings;
- (4) to monitor Ahmadiyah and invite Ahmadiyah to return to Islamic syariah;
- (5) to coordinate the military (TNI), the police, the public prosecutor's office, the local government and the national government in solving the problem of Ahmadiyah; and
- (6) to increase community awareness of the Joint Decision of the three Ministers.

⁷⁴ *Peraturan Daerah Nomor 12 Tahun 2011 Tentang Larangan Kegiatan Jemaat Ahmadiyah Indonesia Di Jawa Barat* [Regulation of the Governor of West Java No 12 of 2011 Banning the Activities of Jemaat Ahmadiyah Indonesia in West Java] ('*West Java Regulation*').

⁷⁵ Letter of the Minister of Home Affairs No 223/1107 D.III, 23 September 2008 on Guidelines for handling JAI; Letter of the Minister of Home Affairs No 450/3457/Sj, 24 August 2010 on addressing Jemaat Ahmadiyah and incidents of anarchy; Letter of the Minister of Home Affairs No 450/604/Sj, 28 February 2011 on educating the public on the SKB 3 Ministers on the warning and order to JAI and the community; Joint Circular of the Ministry of Religion, Kesbangpolimas and Attorney-General on implementing guidelines in relation to the SKB 2008.

The suggestion in art 2(4) that members of Ahmadiyah will be ‘invited’ to return to Islam raises concerns of forced conversions. There have already been reports of Ahmadis ‘returning’ to Islam, including reports of military involvement in such conversions.⁷⁶

Article 3(1) forbids Ahmadiyah from conducting activities that ‘deviate from the teachings of the religion of Islam’. Again, like other regulations, art 4 forbids ‘anarchy’, that is, attempts by radical Islamic groups to take the law into their own hands. The *West Java Regulation* calls on a wide range of authorities to assist in the implementation and education process, including local government, the police, the Public Prosecutor’s Office, the MUI and local community leaders (art 5(3)). It creates an investigative team with the specific task of monitoring the Ahmadiyah community in the province (art 6(1)), although there is no indication that such a team has been formed yet.

The *West Java Regulation* is clear on the function and role of this team. As explained in art 6(4), its role includes:

- (a) planning, coordinating and disseminating information concerning issues that arise over Ahmadiyah so that it does not disturb local stability;
- (b) implementation of the detection, warning and resolution of problems that emerge over Ahmadiyah;
- (c) giving recommendations on the creation of policies of the Governor to overcome the issues that arise concerning Ahmadiyah;
- (d) monitoring the followers, members and/or leaders of Ahmadiyah; and
- (e) reporting on the implementation of these activities to the Governor.

Breaches of the *West Java Regulation* must be reported to the police (art 7). The National Intelligence Agency (*Badan Intelijen Nasional*) can continue to investigate the activities of Ahmadiyah (art 8). The *West Java Regulation* therefore lays out a detailed plan for monitoring and enforcement to be conducted by several authorities.

Aside from provincial regulations, several of which I have discussed above, city/regency governments have also passed both regulations and administrative decisions to address the issue of Ahmadiyah in the area.

C City/Regency Regulations and Administrative Decisions

One regulation banning the activities of Ahmadiyah was issued in Depok, West Java, where Ahmadis came under investigation by the Ministry of Religion, the MUI and the National Intelligence Agency in November 2010. As a result of this

⁷⁶ ‘Police, Military Intimidate Bogor Ahmadis to Convert’, *The Jakarta Globe* (online), 14 March 2011 <<http://www.thejakartaglobe.com/home/police-military-intimidate-bogor-ahmadis-to-convert/428748>>; ‘Twenty-eight Ahmadis Set to Renounce Faith: MUI’, *The Jakarta Globe* (online), 15 March 2011 <<http://www.thejakartaglobe.com/home/28-ahmadis-set-to-renounce-faith-mui/429136>>.

investigation, on 9 March 2011 the mayor, Nurmahmudi Ismail, banned Ahmadiyah activities in the district.⁷⁷

Several regional regulations and administrative decisions were introduced in 2005, largely in response to the fatwa of the MUI in that year. One example is a decision issued in Tasikmalaya, West Java. On 2 August 2005, a joint decision was issued by several local authorities banning the activities of Ahmadiyah in the area.⁷⁸ The *Tasikmalaya Regulation* forbids the proselytising activities of Ahmadiyah both in and around the city and regency of Tasikmalaya (art 1). It exhorts the community not to stir up anarchy or to break the law (art 2).

In 2007, the question of whether the Ahmadiyah community was complying with this regulation arose. On 21–22 April 2007, a conference was held by Ahmadiyah at a mosque in Bogor. There were concerns that this event breached the *Tasikmalaya Regulation* and was the cause of tension in the community. As a result, a further joint decision was issued by several local authorities in 2007.⁷⁹

Aside from the *Tasikmalaya Regulation*, another regulation issued in 2005 was the *Cianjur Decision*. In early October 2005, a Joint Decree of Muspida and the District Military Command was issued to ban the teachings of Ahmadiyah.⁸⁰ Then, on 17 October 2005, it was followed by a Joint Decision of the Regent of Cianjur, the Public Prosecutor of Cianjur and the Head of the Ministry of Religion (*'Cianjur Decision'*),⁸¹ which stated that it is in response to 'community demands' and the 'need to take preventative action against the possibility of anarchy in the community' (Consideration (a)). This Joint Decision does not take a human rights approach to justify its action, but instead emphasises local support in the form of a

⁷⁷ *Peraturan Bupati Depok No 9/2011 tentang Larangan Jemaat Ahmadiyah Indonesia* [Regulation of the Mayor of Depok No 9/2011 Banning Jemaat Ahmadiyah Indonesia] March 2011.

⁷⁸ *Keputusan Bersama Walikota, Bupati, Kejaksaan Agung, dan Kepolisian No 450/Kep 387-Kesra.2005; No 450/1324/Kesra 2708/0.2.17/Dsp.5/08/2005; Nopol B/844/VII/2005/Polresta; Nopol B/417/VII/2005/Polresta tentang Larangan Aktifitas Dakwah Ahmadiyah di Kota dan Kabupaten Tasikmalaya* [Joint Decision of the Mayor, the Regent, the Public Prosecutor, and the Police No 450/Kep 387-Kesra.2005; No 450/1324/Kesra 2708/0.2.17/Dsp.5/08/2005; Nopol B/844/VII/2005/Polresta; Nopol B/417/VII/2005/Polresta banning dakwah activities of Ahmadiyah in the city and regency of Tasikmalaya] (*'Tasikmalaya Regulation'*).

⁷⁹ *Keputusan Bersama Bupati, Kejaksaan Agung, Dandim 0612, dan Kepolisian Tasikmalaya No 450/174/KBL/2007; No 23/0.2.17/Dsp.5/07/2007; No B/488/VII/2007; Nopol B/25/VII/2007/Polres; Nopol B/716/VII/2007/polresta* [Joint Decision of the Regent, the Public Prosecutor, Dandim 0612, and the police of Tasikmalaya (West Java) No 450/174/KBL/2007; No 23/0.2.17/Dsp.5/07/2007; No B/488/VII/2007; Nopol B/25/VII/2007/Polres; Nopol B/716/VII/2007/polresta, declaring that the Joint Decision and warning to Ahmadiyah has been breached].

⁸⁰ *Keputusan Bersama Muspida dan Komando Distrik Militer (Kodim) 0608 tentang Larangan Ajaran dan Kepercayaan Jemaat Ahmadiyah Indonesia* [Joint Decision of Muspida and the District Military Command 0608 of Cianjur (West Java) on the Prohibition on the Teachings and Beliefs of Ahmadiyah], October 2005.

⁸¹ *Keputusan Bersama Bupati Cianjur, Kejaksaan Agung Cianjur dan Kepala Departemen Agama No 21/2005; No 51/02.19/CS.3/10/2005; No Kd.10.03/HM.01/147/2005 tentang Larangan Aktivitas Menyiarkan Ajaran/Kepercayaan Jemaat Ahmadiyah Indonesia di Wilayah Kabupaten Cianjur* [Joint Decision of the Regent of Cianjur, the Public Prosecutor of Cianjur and the Head of the Department of Religion No 21/2005; No 51/02.19/CS.3/10/2005; No Kd.10.03/HM.01/147/2005 banning Activities that Spread the Teachings/Beliefs of Ahmadiyah in the Regency of Cianjur], 17 October 2005.

letter from a local Islamic group in August and a letter of support from 41 Islamic organisations in September 2005.⁸²

The *Cianjur Regulation* is very short, with only five provisions. It implies that the national government is not doing enough to address this issue, so (art 2(1)):

While waiting for a decision from the national government on the organisation and activities of Jemaah Ahmadiyah, we ban activities that spread the teachings/beliefs of Ahmadiyah in any form in Cianjur.

It goes on to warn the community not to take the law into their own hands or to stir up anarchy (art 2(2)). It confers power on both the Ministry of Religion and the MUI to oversee this decision (art 4(2)). It also gives the police the responsibility for conducting investigations (art 4(4)).

Another city government that has issued a number of administrative decisions concerning Ahmadiyah is Bogor. The concerns of Islamic leaders in the area towards Ahmadiyah is evident in a publication by the Indonesian Ulama Council of Bogor, which laments a ‘lost generation’ of Muslims due to converts from Islam to Ahmadiyah after the latter’s arrival in Sukabumi and Bogor in 1975.⁸³ In this publication, the MUI discusses at length its interpretation of the differences between the teachings of Ahmadiyah and the teachings of Islam. It also highlights the official visit to Indonesia in 2000 from the head of Ahmadiyah in London. Amirul Mukminin Hazrat Thahir Ahmad is quoted as having said that: ‘I am convinced ... that Indonesia — at the start of this new century will become the largest Ahmadiyah country in the world — God willing...’⁸⁴ This is used to express the perceived concerns of MUI that Ahmadiis pose a threat to the Islamic community in Indonesia. There are no available statistics, however, to suggest that Ahmadiyah is growing by way of conversions from Islam.

On 10 July 2005, 160 religious leaders in Bogor met to discuss the issue of Ahmadiyah. Then, on 14 July 2005, the Indonesian Ulama Council of Bogor issued a fatwa against Ahmadiyah.⁸⁵ A Joint Decision to close the campus run by Ahmadiyah was also issued on the same day (*‘Bogor Joint Decision (No 1)’*).⁸⁶ This act was symbolic because the Bogor complex is the headquarters of JAI.⁸⁷ Several days later, on 20 July, another Joint Decision was issued banning the

⁸² Letter of Lembaga Pengkajian dan Penerapan Syari’at Islam Kab Cianjur No 03/LP/III/SY-I-VII/SEK/2005, 2 August 2005 concerning the investigation of the Muslim community regarding Jemaat Ahmadiyah which is an apostate community; Letter of Joint Support from 41 Islamic community organisations in Cianjur in support of the MUI fatwa against Ahmadiyah, 5 September 2005.

⁸³ The publication is Khaeral Yunus, *Berantas (Berjuang Hancurkan Terus Aliran Sesat) sampai Tuntas* (MUI Bogor, 2005) 2.

⁸⁴ Ibid 13.

⁸⁵ *Fatwa Majelis Ulama Indonesia Bogor No 01/X/KHF/MUI.KAB/VII/05 tentang Larangan Ahmadiyah Qadiyan di Wilayah Kabupaten Bogor* [Fatwa of MUI Bogor No 01/X/KHF/MUI.KAB/VII/05 banning Ahmadiyah Qadiyan in the Regency of Bogor], 14 July 2005.

⁸⁶ Joint Letter of the Regent of Bogor, the DPRD of Bogor, Dandim 0621 Bogor, the Bogor Police Force, the Attorney-General of Cibinong, Air Base Command (Komandan Pangkalan Udara, Danlanud), the Ministry of Religion and MUI Bogor on the agreement to close Mubarak (Ahmadiyah) campus in Pondok Udik village, Kemang sub-regency, Bogor, 14 July 2005.

⁸⁷ For a history of the Bogor complex, see JAI, *Sejarah Pembangunan Kampus Mubarak* (JAI, 2010).

activities of Ahmadiyah (*Bogor Joint Decision (No 2)*).⁸⁸ It referred to both the 1980 fatwa of MUI, and the 2005 fatwa of the Indonesian Ulama Council of Bogor on Ahmadiyah.⁸⁹ In light of these decisions, eight local authorities recommended that *Bakor Pakem* enforce a ban on Ahmadiyah and that the Ministry of Religion and MUI educate the Muslim community in this regard. Due to ongoing tensions in Bogor, the *Bogor Joint Decree 2005* was reiterated by the mayor in 2011.⁹⁰

None of the regional regulations banning the activities of Ahmadiyah have been the subject of judicial review in court, although there is one application waiting to be heard by the Supreme Court (discussed in Section VII below). There have, however, been cases of review of administrative decisions regarding Ahmadiyah in the Administrative Courts.

VI Review of Administrative Decisions in the Administrative Courts

The Administrative Courts provide an avenue for judicial review of administrative decisions in Indonesia. The concept of an administrative court in Indonesia was proposed as early as 1964, but it was not until 14 years later, in 1978, that the then President Suharto announced that the Administrative Courts would be established.⁹¹ It was another eight years before the draft law on the Administrative Court was adopted, and it did not come into effect until January 1991.⁹²

The introduction of *Law 5/1986 on the Administrative Court* was significant because, in addition to the establishment of these courts, it introduced the principle of judicial review of administrative action.⁹³ An administrative decision is defined

⁸⁸ *Keputusan Bersama Bupati Bogor, DPRD Bogor, Dandim 0621 Bogor, Kepolisian, Pengadilan Negeri Cibinong, Kementerian Agama dan MUI Bogor tentang Larangan Jemaat Ahmadiyah Indonesia* [Joint Decision of the Regent of Bogor, the DPRD of Bogor, Dandim 0621 Bogor, the Police, the District Court of Cibinong, the Ministry of Religion and the MUI Bogor (West Java) banning Jemaat Ahmadiyah Indonesia], 20 July 2005.

⁸⁹ Fatwa Majelis Ulama Indonesia Bogor Nomor 01/X/KHP/MUI-Kab/VII/05 [Fatwa of the Indonesian Ulama Council of Bogor Nomor 01/X/KHP/MUI-Kab/VII/05], 14 July 2005. This fatwa was issued just days before the national MUI issued a fatwa on Ahmadiyah on 28 July 2005.

⁹⁰ *Keputusan Bupati Bogor No 300.45-122/2011 tentang Larangan Aktifitas Ahmadiyah di Wilayah Kota Bogor* [Decision of the Mayor of Bogor No 300.45-122/2011 Banning the Activities of Ahmadiyah in the City of Bogor], March 2011.

⁹¹ *Undang-Undang No 19 Tahun 1964* [Law No 19 of 1964 on the Power of the Judiciary] (Indonesia) art 7(1)(d). See Stewart Fenwick, 'Administrative Law and Judicial Review in Indonesia: The Search for Accountability' in Tom Ginsburg and Albert H Y Chen (eds), *Administrative Law and Governance in Asia: Comparative Perspectives* (Routledge, 2009) 329, 332.

⁹² *Undang-Undang 5/1986 tentang Pengadilan Tata Usaha Negara* [Law 5/1986 on the Administrative Court] (Indonesia) was followed by *Peraturan Pemerintah 7/1991 tentang Peradilan Administrasi* [Government Regulation 7/1991 on Administrative Justice] (Indonesia).

⁹³ Bedner has conducted the most comprehensive study on the history of judicial review and the Administrative Courts in Indonesia: Adriaan Bedner, *Administrative Courts in Indonesia: A Socio-legal Study* (Kluwer Law International, 2001). See also Adriaan Bedner, 'Administrative Courts in an Executive-Dominated State: The Case of Indonesia' in Yong Zhang (ed), *Comparative Studies on the Judicial Review System in East and Southeast Asia* (Kluwer Law International, 1997) 183; Fenwick, above n 91; P M Hadjon, 'Judicial Review of Administrative Actions and Government Liability in Indonesia' in Yong Zhang (ed), *Comparative Studies on Governmental Liability in East and Southeast Asia* (Kluwer Law International, 1999) 117.

as a written decision by a body or administrative official based on laws that are 'concrete, individual and final, and that give rise to legal consequences for a person or legal body' (art 1(3)). Persons or legal entities affected by the decision may seek judicial review and must either show that an administrative decision is opposed to the law or opposed to general principles of good governance (art 53).⁹⁴ This model is largely based on the Dutch administrative court system.

There have only been three court cases, to the knowledge of the author, that have been brought by Ahmadiyah seeking judicial review of administrative decisions that restrict or ban its activities. The first two cases took place in the 1990s. In 1994, in the *Ahmadiyah Case (No 1)*, the applicants challenged the decision of Muspika,⁹⁵ the local coordinating board, to ban Ahmadiyah in Tanjungpura (North Sumatra). The case was dismissed on the grounds that the decision of Muspika was not an administrative decision.⁹⁶ In a separate case two years later, the *Ahmadiyah Case (No 2)*, the same court rejected an almost identical claim.⁹⁷

In 2005, the *Ahmadiyah Case (No 3)* took place. This case was filed in the Administrative Court of Bogor again by JAI. Initially, leaders from JAI had approached Adnan Buyung Nasution,⁹⁸ a prominent Indonesian human rights lawyer, to take on their case. He referred them to the Indonesian Legal Aid Institute, which represented them in their case challenging the decision of local authorities to ban Ahmadiyah in Bogor (discussed above).⁹⁹ The authorities included the Regent of Bogor, the head of the Bogor Police Force, the head of the Cibinong Public Prosecutor's Office, the head of the Bogor legislature, the head of the Cibinong District Court, MUI, and the Atang Sanjaya Air Base Command.¹⁰⁰

⁹⁴ As part of the democratic reform process, the law was revised in 2004 and 2009, although these changes largely relate to the appointment, role and authority of judges and court staff: *Undang-Undang Nomor 9 Tahun 2004 Tentang Perubahan Atas Undang-Undang Nomor 5 Tahun 1986 Tentang Peradilan Tata Usaha Negara* [Law No 9 of 2004 Revising Law No 5 of 1986 on the Administrative Courts] (Indonesia) and *Undang-Undang 51/2009 tentang Perubahan Kedua atas Pengadilan Tata Usaha Negara* [Law 51/2009 concerning the Second Revisions to Law 5/1986 on the Administrative Courts] (Indonesia).

⁹⁵ Muspika, or Musyawarah Pimpinan Kecamatan, is the Sub-regency Leadership Consultative Council. It was established by Keputusan Presiden 10/1986 tentang Musyawarah Pimpinan Daerah [*Presidential Decision 10/1986 on the Regional Leadership Consultative Council*] (Indonesia) and by the Letter of the Minister of Home Affairs 124/1926/PUOD: Bedner, *Administrative Courts in Indonesia: A Socio-legal Study*, above n 93, 57.

⁹⁶ Bedner *Administrative Courts in Indonesia: A Socio-legal Study*, above n 93, 173.

⁹⁷ *Ibid.*

⁹⁸ Professor Dr Iur Adnan Buyung Nasution is widely regarded as Indonesia's leading advocate and trial lawyer. He was a pioneer of legal aid and law reform, and is a central figure in advocacy for human rights and constitutionalism in Indonesia. In 2010, he was appointed as Honorary Professorial Fellow of the Melbourne Law School, the University of Melbourne.

⁹⁹ Keputusan Pengadilan Tata Usaha Negara Bandung No 80/G.TUN/2005/PTUN-BDG [Decision of the Administrative Court of Bandung No 80/G.TUN/2005/PTUN-BDG, between JAI and the regent of Bogor; the head of the Bogor Police Force; the head of the Cibinong Attorney-General's Office; the head of the DPRD Bogor; the head of the Cibinong District Court; and the Atang Sanjayadated Air Base Command (Komandan Pangkalan Udara, Danlanud)], 17 January 2006.

¹⁰⁰ Atang Sanjaya Air Base Command, or Komandan Pangkalan Udara, is commonly referred to by the acronym 'Danlanud'.

In its decision, the Administrative Court of Bandung noted the negative impact this ban had had on the Ahmadi community in Bogor.¹⁰¹ The entire complex had to be evacuated, including the students studying at the madrasah. It prevented Ahmadi from attending the mosque to pray; it had stopped all Ahmadi social and religious activities; and it hindered the education of children because their school had been closed.¹⁰²

The Indonesian Legal Aid Institute, as legal representatives for JAI, argued that the *Bogor Joint Decision (No 2)* was invalid because only the President of Indonesia has the authority to ban a group.¹⁰³ It also argued that the ban was against human rights,¹⁰⁴ particularly the right to freedom of religion in the Constitution (arts 28E, 29). These arguments were never considered by the Court, however, because the case was dismissed on a technicality. The Court found that the Joint Statement was outside its authority to consider because two of the authorities that signed the ban against Ahmadiyah — MUI and the District Court — were not ‘government agencies’ and could not make administrative decisions.¹⁰⁵

In 2007, the applicants made a request for cassation to the Supreme Court, but in 2009 the Supreme Court confirmed the administrative decision and the decision of the Court at first instance on the grounds that the Joint Statement could not be an administrative decision if it was also made by non-administrative bodies.¹⁰⁶ Given the length of time the court case had taken, the Ahmadi have since been able to move back into the complex, although at the time his article was written, they used the back gate to the property (the front gate remains closed, *disegel*). They have erected a second solid fence around the perimeter of the premises, in addition to the see-through wire fencing that already surrounded the property. They have also refrained from holding an annual gathering since 2005, for fears that a large crowd of Ahmadi from across Indonesia would attract unwanted attention.

A pressing concern in many regions in Indonesia now, as outlined earlier, is the proliferation of regional regulations banning the activities of Ahmadiyah. Even if these regulations are rarely enforced by local governments, they still have symbolic value. To challenge a regional regulation, which is a form of law recognised in the legal hierarchy,¹⁰⁷ a case for judicial review must be filed in the Supreme Court.

¹⁰¹ Decision of the Administrative Court of Bandung No 80/G.TUN/2005/PTUN-BDG, 11.

¹⁰² *Ibid* 11.

¹⁰³ According to the *Blasphemy Law*, art 2(2).

¹⁰⁴ *Law 39/1999 on Human Rights*, arts 9(2), 22(1)–(2), 30, 35, 69(1)–(2), 71.

¹⁰⁵ Decision of the Administrative Court of Bandung No 80/G.TUN/2005/PTUN-BDG, 46–8.

¹⁰⁶ See Putusan Mahkamah Agung [Decision of the Supreme Court] No 182K/TUN/2007, 20 February 2009, 26.

¹⁰⁷ *Undang-Undang Nomor 10 Tahun 2004 Tentang Pembentukan Peraturan Perundang-Undangan* [Law No 10 of 2004 on Law-making] (Indonesia) (*‘Law 10/2004 on Law-making’*) art 7(1) sets out the Indonesian legal hierarchy as follows: (a) The Constitution; (b) Laws, that is, *undang-undang* created by the People’s Representative Council and approved by the President, or Interim Laws, that is, temporary laws enacted in a crisis; (c) Government Regulations; (d) Presidential Regulations; and, (e) Regional Regulations, that is, a law made by the Regional People’s Representative Council at either the provincial, regency/city or village level.

VII Judicial Review in the Supreme Court

The Supreme Court is the second highest court in the Indonesian court hierarchy.¹⁰⁸ Under art 24A(1) of the Constitution, the Supreme Court is granted the power to review legal instruments¹⁰⁹ below laws (*undang-undang*). This means that an applicant could seek judicial review of a local regulation in the Supreme Court with a request to strike it out because, for example, it contravenes national laws.¹¹⁰ This would provide the courts with an opportunity to review the legitimacy of the regulation and determine whether it is *ultra vires*, or beyond power. The Supreme Court has the power to cancel a regulation if it is found to be in conflict with a higher law.

On 20 April 2011, a case for judicial review of five regulations — issued in West Java, Banten, West Sumatra, Depok and Pandeglang — was filed with the Supreme Court.¹¹¹ There are 13 applicants in the case, the primary one being the *Amir* of JAI, Abdul Basir, along with representatives from prominent non-government organisations such as the Asian Muslim Action Network, the Wahid Institute and the Setara Institute. The team of lawyers representing Ahmadiyah in this case are primarily from the Indonesian Legal Aid Institute. In October 2011, the applicants were informed by a letter from the Court that the hearing of this case has been postponed to await the outcome of another case in the Constitutional Court.¹¹² It could take a long time for the Court to hear the case and make its decision because, unlike in the Constitutional Court, decisions of the Supreme Court do not have to be handed down within a certain time frame.

In their submission, the applicants put forward a wide range of creative arguments as to why these regional regulations banning the activities of Ahmadiyah are against the law. Given that these arguments have not yet been heard by the Court, I will examine the strength of three of the primary arguments that might be considered if and when this case is heard by the Court.

¹⁰⁸ *Undang-Undang Nomor 4 Tahun 2004 Tentang Kekuasaan Kehakiman* [Law No 4 of 2004 on the Powers of the Courts] (Indonesia) art 10(1). For a detailed study of the Supreme Court, see Sebastian Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Southeast Asian Program, Cornell University, 2005).

¹⁰⁹ *Undang-Undang No 14 Tahun 1985 tentang Mahkamah Agung* [Law No 14 of 1985 on the Supreme Court] (Indonesia) art 31(1).

¹¹⁰ The Supreme Court has the power to review regulations below statutes according to *Undang-undang No 48 Tahun 2009 tentang Kekuasaan Kehakiman* [Law No 48 of 2009 on the Power of the Judiciary] (Indonesia), art 20(2)(b).

¹¹¹ Application to the Supreme Court for Judicial Review concerning the Regulation of the Governor of West Java 12/2011 banning the activities of JAI; Regulation of the Governor of Banten 5/2011 banning the activities of the members of JAI; Regulation of the Governor of West Sumatra 17/2011 banning the activities of JAI; Regulation of the Regent of Pandeglang 5/2011 banning the activities of Ahmadiyah; Regulation of the Mayor of Depok 9/2011 banning the activities of JAI.

¹¹² This is because *Undang-Undang Nomor 32 Tahun 2004 Tentang Pemerintahan Daerah* [Law No 32 of 2004 on Regional Governance] (Indonesia) ('*Law 32/3004 on Regional Governance*'), which is relied on by the applicants in their submission, is currently the subject of judicial review in the Constitutional Court. See Letter of the Supreme Court No MA/PANMUD.TUN/97/X/2011 to Erna Ratna of LBH concerning in case No 23/P/HUM/2011, 14 October 2011.

One issue is the delegation of powers between the national and local governments. Under *Law 32/2004 on Regional Governance*, the national government has the exclusive right to legislate on several key matters of national concern, including 'religion' (art 10(3)(f)). To prove regional governments are acting outside these powers, the applicants would need to show that these regulations on Ahmadiyah specifically attempt to address matters of religion.

Regional authorities would be likely to argue that these regulations are not about religion, but more broadly about public order and social harmony. *Law 32/2004 on Regional Governance* grants provincial and local governments the power to make regulations in the interests of public order and social harmony.¹¹³ Some regional governments claim that this gives them authority to issue regulations against Ahmadiyah. Human rights groups argue that if this is the case, governments should ban the radical Islamic groups who perpetrate violent attacks on Ahmadiyah rather than their victims.

If these regulations are not about public order but religious affairs, regional governments may still legally be able to regulate the activities of Ahmadiyah in this way if this power has been delegated to them by the national government. Some regional governments claim that the national *Joint Ministerial Decision 2008* on Ahmadiyah delegates this power to regional authorities. A Joint Circular issued in August 2008 by the Ministry of Religion and the Ministry of Home Affairs, however, clarified that regional governments are only permitted to take necessary steps to ensure compliance with the national warning to Ahmadiyah, such as monitoring the Ahmadiyah community to ensure that they do not 'deviate' from the teachings of Islam.¹¹⁴ In explaining the sixth point of the *Joint Ministerial Decision 2008*, the circular set out the actions regional governments are permitted to take to ensure compliance with this decree. First, it encouraged Ahmadiyah and the public to obey the law and maintain unity.¹¹⁵ Second, it warned Ahmadiyah not to conduct:

speeches, lecturing, preaching, organising religious discussions, taking an oath of allegiance, seminars, workshops or other ... activities either in oral or written form ... which ... are aimed at disseminating the belief ... that there is a prophet ... after Prophet Muhammad PBUH.¹¹⁶

Third, it stated that efforts must be made to educate Ahmadis about Islamic teachings so that they do not 'deviate' from the principles of Islam.¹¹⁷ This, perhaps falsely, assumes that it is simply a matter of informing Ahmadis about the teachings of Islam, when they may already know. Finally, it recommended that Ahmadis must interact with other Muslims in the community when performing their religious duties and activities.¹¹⁸ This is because one of the complaints made

¹¹³ *Law 32/2004 on Regional Governance*, arts 13(1)(c), 14(1)(c).

¹¹⁴ Joint Circular of the Secretary General of the Ministry of Religion, the Deputy Attorney-General for intelligence, and Director General for National Unity and Political Affairs of the Ministry of Home Affairs No SE/SJ/1322/2008, 6 August 2008.

¹¹⁵ Ministry of Religion, *The Policy of the Government on the Issue of Ahmadiyya in Indonesia* (Office of Research, 2008) 28.

¹¹⁶ *Ibid* 29.

¹¹⁷ *Ibid* 30.

¹¹⁸ *Ibid* 31.

against Ahmadiyah is that they are perceived to be a group that remains separate from the broader Muslim community in Indonesia, meeting at their own mosques and conducting separate religious gatherings. The Joint Decree does not specifically permit regional authorities to issue a regulation that bans the activities of Ahmadiyah in the area.

As mentioned earlier, some regional authorities also claim that the legitimacy for their actions comes from the *Blasphemy Law*. Under the *Blasphemy Law*, however, only the Minister of Religion, the Attorney-General and the Minister of Home Affairs have the power to issue a warning to a religious group (art 2(1)). If the religious group does not comply with the warning, the President then has the authority under this law to ban the group (art 2(2)). The *Blasphemy Law*, however, does not specifically grant regional governments the right to warn or ban a group. This means that these regional regulations may be in breach of the statute that they purportedly derive their authority from.

Aside from these legal arguments, the Supreme Court has shown a tendency to decline to hear cases on regulations concerning religion.¹¹⁹ For example, in 2005, a challenge to the validity of a religious regulation on prostitution occurred in Tangerang, West Java. In this incident, Lilis Lindawati had been falsely arrested and accused of being a prostitute under the *Regulation of the Mayor of Tangerang 8/2005 Banning Prostitution*.¹²⁰ The ‘evidence’ was that she was out late at night (waiting at a bus stop), and had lipstick and foundation in her handbag (which is common for Indonesian women). On 27 February 2006, Lilis was sentenced to 80 days in prison and fined Rp300 000 (A\$33). She was released four days later after her husband paid the fine.¹²¹ This decision and the validity of the regulation concerned was challenged by a network of NGOs known as the Coalition Against Discriminatory Perda (*Koalisi Anti-Perda Diskriminatif*, KANTIF). On 21 April 2006, this coalition sought judicial review of the regulation in the Supreme Court.¹²² A year later, on 14 April 2007, the Supreme Court announced that it had rejected the application and refused to decide the question of whether this religious regulation is outside the powers of local governments because it believed this was a matter for the executive and legislature to decide.¹²³ No written decision has been published by the Court in this case.

Aside from that case, the Supreme Court has also rejected applications, or failed to issue a written decision, for judicial review in other religiously sensitive cases, such as applications for review of the *Joint Regulation 8 & 9/2006 on Places*

¹¹⁹ See Melissa Crouch, ‘Religious Regulations in Indonesia: Failing Vulnerable Groups?’ (2009) 43(2) *Review of Indonesian and Malaysian Affairs* 53.

¹²⁰ *Peraturan Daerah Walikota Tangerang Nomor 8 (seri E) Tahun 2005 tentang Pelarangan Pelacuran*, 23 November 2005.

¹²¹ ‘Coalition to Take Bylaw on Soliciting to Supreme Court’, *The Jakarta Post* (online), 18 March 2006 <<http://www.thejakartapost.com/news/2006/03/18/coalition-take-bylaw-soliciting-supreme-court.html>>.

¹²² Request to the Supreme Court for Judicial Review No 16P/HUM/Tahun 2006 of the Perda of Tangerang 8/2005 on Prostitution, 19 April 2005; Van Zorge Report on Indonesia, *Creeping Syariah: Commentary and Analysis on Indonesian Politics and Economics*, No 8 (2006) 6.

¹²³ Pelita, ‘MA: Perda Larangan Pelacuran Tak Bertentangan dengan UU’ (16 April 2007) Pelita <<http://www.pelita.or.id/baca.php?id=28579>>. For an analysis of regional regulations based on Islam more generally, see Crouch, above n 119, 53–103.

of *Worship*.¹²⁴ This suggests that the Supreme Court may also simply decline to hear the case or fail to issue a judgment.

In addition, there have been other attempts to seek judicial review of national laws that are considered to breach the right to religious freedom, such as the case for judicial review of the *Blasphemy Law* in the Constitutional Court.

VIII Review of the *Blasphemy Law* in the Constitutional Court

On 20 October 2009, a case for judicial review of the *Blasphemy Law* was lodged with the Constitutional Court by a coalition of non-government organisations. This coalition was concerned over the perceived misuse of the *Blasphemy Law* and the negative effect it was having on religious freedom in Indonesia, particularly for religious minorities or groups considered ‘deviant’ by orthodox Islam.¹²⁵ This case attracted the attention of the government, and was attended by the Minister of Religion and the Minister of Law and Human Rights. The Court called over 30 expert witnesses to give their opinion on the case. Never before in Indonesia has the Constitutional Court heard from such a wide range of the most well-known religious figures and experts on religion in Indonesia.

During the court proceedings, not one representative from Ahmadiyah gave evidence, even though evidence was given by members of other minority religious groups and beliefs.¹²⁶ This is concerning, as the initial submission prepared by the Indonesian Legal Aid Institute included evidence from one Ahmadi from Lombok,¹²⁷ which is where an Ahmadi community of about 100 people have been displaced since 2002.¹²⁸

Despite the absence of Ahmadiyah, several references were made by others to Ahmadiyah during court proceedings. A representative of the Ministry of Religion argued that the Joint Regulation issued in 2008 was necessary to ‘protect’ Ahmadiyah.¹²⁹ In the written submission of the MUI to the Court, it argued that religious freedom was not relevant to the situation of Ahmadiyah because it is not a ‘religion’, that is, one of the six religions recognised and sponsored by the government in Indonesia.¹³⁰ In another written submission, Persatuan Islam

¹²⁴ *Peraturan Bersama Menteri Agama dan Menteri Dalam Negeri Nomor 9 Tahun 2006; Nomor 8 Tahun 2006 Tentang Pedoman Pelaksanaan Tugas Kepala Daerah/Wakil Kepala Daerah Dalam Pemeliharaan Kerukunan Umat Beragama, Pemberdayaan Forum Kerukunan Umat Beragama, dan Pendirian Rumah Ibadat* [Joint Ministerial Regulation No 8 and 9 of 2006 on the Implementation of the Task of the District Head/Representative of the District Head to Maintain Religious Harmony, Equip the Religious Harmony Forum and Regulate the Building of Places of Worship. For more information see Crouch, above n 63, 413–14; see generally, Soefyanto, *Pendirian Rumah Ibadat dan Catatan Perkembangan Pembahasannya* (Universitas Islam, 2009).

¹²⁵ Decision of the Constitutional Court No 140/PUU-VII/2009 on the Blasphemy Law, 19 April 2010, 5–82.

¹²⁶ *Ibid* 64–7.

¹²⁷ A copy of the initial submission is held with the author.

¹²⁸ ‘Anti-Ahmadi Pogrom Alive and Well’, *The Jakarta Post* (online), 17 January 2011 <<http://www.thejakartapost.com/news/2011/01/17/antiahmadi-pogrom-alive-and-well.html>>.

¹²⁹ Decision of the Constitutional Court No 140/PUU-VII/2009, 126.

¹³⁰ *Ibid* 139.

(Persis) argued that Ahmadiyah is guilty of blasphemy against Islam and equated the Ahmadi community with members of other minority groups that have been convicted for the criminal offence of blasphemy, such as Lia Eden (also known as Lia Aminuddin) of Salamullah or the Eden community.¹³¹ These parties emphasised the permissible limitations on the right to freedom of religion, as contained in the Constitution, and how this right in Indonesia is different to international law, which does not contain any limits on this right.

On 19 April 2010, after lengthy hearings and submissions from a large number of government officials, religious leaders and community organisations, the Court upheld the validity of the *Blasphemy Law*. It ruled that the government has the power to ban groups it considers to be ‘deviant’ and that this power does not contravene the constitutional right to freedom of religion or belief.¹³² I will not conduct a detailed analysis of the decision here, but rather highlight the two major implications of this decision for Ahmadiyah.

First, by upholding the validity of the *Blasphemy Law*, it confirmed the *Joint Ministerial Decision 2008* that ‘warns’ Ahmadiyah, and has made it more difficult for a case of judicial review of the *Joint Ministerial Decision 2008* to be lodged with the Supreme Court. This is because the power to warn Ahmadiyah is derived from the *Blasphemy Law*, as explained earlier. Second, it leaves open the possibility that followers of Ahmadiyah could potentially be prosecuted for insulting Islam under the widely-defined *Blasphemy Law* in the future. To date, however, no followers or leaders of Ahmadiyah have ever been prosecuted for the offence of insulting Islam in Indonesia.

There are several possible explanations for this. Ahmadiyah is one of the largest groups that are considered to be ‘deviant’ in Indonesia. Most individuals convicted for blaspheming Islam in Indonesia have few followers, and the smaller a group, the easier it is to convict them for blasphemy due to lack of popular support. In addition, Ahmadiyah is a global movement with an international network. Most ‘deviant’ groups convicted for blasphemy only exist in Indonesia, such as Lia Eden and Al-Qiyadah Al-Islamiyah. The Indonesian government is aware of its need to be seen to meet standards such as the right to religious freedom. It recognises that if it attempts to restrict the rights of Ahmadis further, it may draw even greater international concern and condemnation, potentially damaging the reputation Indonesia has won as a newly-developed democratic state.

This means that, unlike many other individuals from minority religious groups convicted for blasphemy, followers of Ahmadiyah are not such easy targets. Although there have been no convictions to date, the fact that the *Blasphemy Law* was recently upheld leaves open the future possibility that followers of Ahmadiyah could be brought to court on criminal charges of blasphemy. It has also affirmed the *Joint Ministerial Decision 2008* that ‘warned’ Ahmadiyah.

¹³¹ Ibid 187.

¹³² For the complete reasoning of the court in this case, see Decision of the Constitutional Court No 140/PUU-VII/2009, 271–306.

IX Conclusion

In October 2010, the Minister of Religion, Suryadharma Ali, publically declared that the best solution to the problem was to ban Ahmadiyah in Indonesia.¹³³ This statement appeared to legitimise the actions of regional governments that have passed such regulations, despite the questions, yet to be considered by the Supreme Court, over whether they hold the legal power to do so.

This article has critically examined the interpretation of and limitations on the right to religious freedom in Indonesia for Ahmadiyah. Regional regulations and administrative decisions banning the activities of Ahmadiyah have not only increased in number since the introduction of the *Joint Ministerial Decision 2008*, but they have also grown in intensity and scope. Such regulations issued by regional authorities reflect the increasingly conservative positions of local governments on the issue of Ahmadiyah.

The leaders of Ahmadiyah, with the support of the Indonesian Legal Aid Institute, have attempted to assert their rights by taking their case to court. Of the three applications for administrative review of decisions to ban Ahmadiyah, all have been dismissed by the Administrative Courts. This shows the reluctance of the courts to hear and decide on these highly divisive disputes.

Aside from administrative decisions, some regional regulations are currently the subject of judicial review in an application before the Supreme Court. Even if the Court could be persuaded by legal arguments, such as the power to maintain public order under *Law 32/2004 on Regional Governance*, the Court will be under pressure from Islamic religious leaders and from the demands of radical Islamic groups that threaten violence if Ahmadiyah is not banned. It is therefore unlikely that the Supreme Court would find these regulations invalid. Like the 2005 Tangerang case, it may even decline to issue a decision in the case given the sensitive social and political issues it raises.

The situation for Ahmadis has deteriorated since the decision of the Constitutional Court in 2010 that upheld the *Blasphemy Law*, at least in terms of official legal regulations issued against them. The Court decision has only made it more difficult for Ahmadiyah to challenge the validity of regional regulations banning its activities. In the absence of initiatives from the national government to protect the rights of Ahmadis, local governments are free to restrict religious freedom, leaving Ahmadis without the protection of the legal system.

¹³³ 'Religious Affairs Minister to Ban Ahmadiyah', *The Jakarta Post* (online), 30 October 2010 <<http://www.thejakartapost.com/news/2010/10/30/religious-affairs-minister-ban-ahmadiyah.html>>.