INDONESIA HAS BAD BLASPHEMY LAW: HOW TO MAKE IT BETTER ACCORDING TO THE ICCPR

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Abstract

The Indonesian Constitutional Court made a fundamental and elementary mistake in assessing Indonesia's blasphemy law under the ICCPR framework in its 2010 judicial review decision, that much is evident. In face of this unfortunate yet unsurprising decision, the author aims to offer a more coherent reasoning on how blasphemy laws may retain a lawful and legitimate existence within the ICCPR framework. The article's analysis include discussion on the formal requirements necessary to ensure a law's quality, the grounds of public order the grounds of rights/reputations of others, and religious defamation. Ultimately, the article concludes by proposing four suggestions that the design of a blasphemy law must under the ICCPR.

Keywords: blasphemy, blasphemy law, Indonesian Constitution, judicial review, ICCPR.

Intisari

Mahkamah Konstitusi Indonesia melakukan kesalahan fundamental dan mendasar dalam menilai undang-undang penistaan agama di Indonesia berdasarkan kerangka ICCPR dalam putusan peninjauan kembali tahun 2010, itu sudah terbukti. Terkait keputusan yang tidak menguntungkan namun tidak mengejutkan ini, penulis bermaksud untuk mengajukan pertimbangan yang lebih koheren tentang bagaimana undang-undang penistaan agama dapat mempertahankan keberadaannya yang sah demi hukum dalam kerangka ICCPR. Artikel ini pada akhirnya mengusulkan bahwa undang-undang penistaan agama dapat eksis dalam kerangka ICCPR, mengingat bahwa, selain mematuhi Pasal 20 ICCPR, undang-undang penistaan agama tersebut memenuhi persyaratan mengenai kualitas formal yang memadai, dan alasan sah yang ditentukan dalam Pasal 18 (3) dan 19 (3) dari ICCPR.

***Kata kunci**: penistaan agama, undang-undang penistaan agama, Konstitusi Indonesia, peninjauan Kembali, ICCPR*

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A. Introduction

There is no question about the fact that the issue of blasphemy law is a serious one in Indonesia.[1] While the country *claims* to uphold the highest degree of religious tolerance by remaining faithful to religious morality,[2] yet in reality it has sanctioned the sentencing of individuals for criticizing or even unintentionally misspeaking about a religion.[3] Indonesia is of course not alone in this respect. As of the 18th of January 2020, 68 countries still maintain blasphemy laws in their legislation.[4] The effects in these countries are unsurprisingly similar: individuals often have their liberties taken away because of enforcement of blasphemy laws. For instance, there have been instances of individuals being dismissed from their offices or even sentenced to death for adhering to a different belief that is considered to be blasphemous towards the religious majority,[5] or for voicing critical opinions against the religion of the establishment, which sometimes leads to capital punishment.[6]

The justifications are also unsurprisingly similar. Blasphemy law countries often reason that the enforcement of blasphemy laws is necessary to punish an individual for their remarks or practices on the reasoning that such activities lead to public disorder or simply denigrates the beliefs of other individuals and therefore injures the enjoyment of another's right. Yet who or what decides what is or is not religiously offensive, if not the government and their imperative for political legitimacy?[7]

The underlying subjectivity behind this power explains why the enforcement of blasphemy laws often lead to arbitrary and even absurd situations. For instance, while such governments jail or sentence to death the blasphemers, they often turn a blind eye to the violent mobs persecuting the blasphemers. Its inherent subjectivity lends the government a wide and flexible authority—that which is more often than not abused to assert their political legitimacy. In Indonesia's case, its historically first enactment of blasphemy law certainly indicated this.

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[1] Karina M. Tehusijarana and Apriadi Gunawan, "The Meiliana Case: How a noise complaint resulted in an 18-month jail sentence," *The Jakarta Post*, last modified August 23, 2018, https://www.thejakartapost.com/news/2018/08/23/the-meiliana-case-how-a-noise-complaint-resulted-in-an-18-month-jail-sentence.html.

[2] Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas, dan Aktualitas Pancasila,* 5th ed., (PT. Gramedia Pustaka Utama: 2015), 19-20.

[3] Amnesty International, *Prosecuting Beliefs: Indonesia's Blasphemy Laws* (London: Peter Benenson House, 2014), 17.

[4] Humanists International, *The Freedom of Thought Report 2019: Key Countries Edition* (Humanists International, 2019).

[5] UN Human Rights Council: Report of the Special Rapporteur on freedom of religion or belief, UN Doc. A/HRC/40/58. (2019), 37.

[6] *Ibid*, 38.

[7] Joelle Fiss and Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring the World's Blasphemy Laws* (United States Commission on International Religious Freedom, 2017), 18.

Blasphemy law in Indonesia was first enacted during the turbulent year of 1965 by former President Soekarno, who was one of Indonesia's founding fathers, in the form of Presidential Decree No. 1/PNPS/1965 on the Prevention of Religious Abuse and/or Defamation.[8] One coup and four years later, that Presidential Decree was further validated by being promoted to the status of law in 1969[9] by former President Soeharto, who orchestrated Soekarno's coup and afterwards ran a dictatorship in the country until 1998. The enactment of the Decree led to the formal establishment of blasphemy as a crime through the insertion of a new article, Article 156a, into the national criminal code.

Soeharto employed the blasphemy law as part of his policy to firmly restrict and control religious activities in the public sphere, which naturally led to systemic abuses of human rights especially with regards to religious freedom.[10] The blasphemy law stood unchallenged throughout the remainder of Soeharto's regime and even afterwards. It is only in 2009 that seven non-governmental organizations ("**NGOs**") and four individuals, amongst which is the late former President K. H. Abdurrahman Wahid,[11] filed a request for the law's judicial review before the Indonesian Constitutional Court as a result of the increased exposure of the law's abuse towards the Ahmadiyyah community in that period.[12]

The Constitutional Court ultimately decided unfavorably towards the judicial review request in its Decision No. 140/PUU-VII/2009 of 19 April 2010 ("**JR 2010 Decision**"), thereby reaffirming the validity and legitimacy of the blasphemy law. Nevertheless, the JR 2010 Decision can be considered as a landmark case which represents how Indonesia officially views the constitutionality of its blasphemy law, as the Constitutional Court consistently revisited the same lines of reasoning and conclusions in three future blasphemy law judicial reviews.[13]

In that decision, the Court affirmed the constitutionality of Indonesia's blasphemy law in no small part based on its claim that the blasphemy law is in

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[8] The original title of this decree in Bahasa is: *Penetapan Presiden Republik Indonesia Nomor 1/PNPS Tahun 1965 tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama*.

[9] Undang-Undang Republik Indonesia Nomor 5 Tahun 1969 tentang Pernyataan Berbagai Penetapan Presiden dan Peraturan Presiden sebagai Undang-Undang (1969).

[10] Noorhaidi Hasan, "Religious Diversity and Blasphemy Law: Understanding Growing Religious Conflict and Intolerance in Post-Suharto Indonesia," *Al-Jāmi'ah: Journal of Islamic Studies* 55(1) (2017): 107-111.

[11] Wahid was the leader of the *Nahdatul Ulama* (NU), which is not only Indonesia's biggest Islamic organization, but also the world's. Wahid is widely renowned and respected for his stance against conservative Islam and for his advocacy in support of human rights and interfaith dialogue. See the entry on 'Abdurrahman Wahid' on Encyclopædia Britannica (2021).

[12] Human Rights Watch, "Reverse Ban on Ahmadiyah Sect," last modified June 10, 2008. https://www.thejakartapost.com/news/2018/08/23/the-meiliana-case-how-a-noise-complaint-resulted-in-an-18-month-jail-sentence.html; Jeffrey Jones, "Small Muslim community builds Canada's biggest mosque," last modified July 4, 2008. https://ca.reuters.com/article/domesticNews/idCAN0345582320080704.

[13] See Indonesian Constitutional Court Decision No. 84/PUU-X/2012 of 19 September 2013, Decision No. 56/PUU-XV/2017 of 19 July 2018 and Decision No. 76/PUU-XVI/2018 of 13 December 2018.

accordance with international human rights standard, namely the International Covenant on Civil and Political Rights ("**ICCPR**"). However, the Court's analysis, which was at times self-contradictory,[14] regarding the ICCPR human rights aspect of the blasphemy law's constitutionality cannot be taken seriously. For instance, the Court mistakenly conflated the rights and limitations prescribed under Articles 18, 19, and 20 and referred to each interchangeably.[15] This is however understandable, as the Court reads the ICCPR solely to the extent that it supports Indonesia's own human rights limitations as provided under Article 28 J(2) of its constitution.[16] With the Court's self-admission that its human rights analysis is not in accordance with the ICCPR,[17] uncertainty remains as to how a blasphemy law can be designed lawfully and legitimately in accordance with the ICCPR framework.

With that being said, the Human Rights Committee has explicitly noted that blasphemy laws are incompatible with the ICCPR, except if they can be designed in accordance with Article 18(3) and 19(3) of the ICCPR.[18] In light of this, the present article aims to offer a more thorough analysis on how blasphemy laws in general can exist under the ICCPR framework. To that end, the analysis will be divided into three sections. The first section will touch upon the issue of how to define blasphemy law and the formal requirements that it must fulfill. The second section will discuss the grounds of public order and the rights and freedoms/reputations of others on both of which blasphemy laws are often based. The third section will discuss religious defamation laws in relation to the concept of defamation and religion under the ICCPR. The article will conclude after the three abovementioned sections.

B. Blasphemy Law: Definition and Formal Requirements

a. Definition

When discussing blasphemy laws, the discussion may concern more than one type of law. To discuss blasphemy law is to discuss blasphemy, defamation of religion

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[14] Indonesian Constitutional Court Decision No. 140/PUU-VII/2009 of 19 April 2010, paras. [3.34.17], [3.58], in which the Court stated, "That the limitation related to religious values as communal values in the society is a limitation that is lawful according to the constitution", and two paragraphs later stated "That the Applicants have been mistaken in understanding Article 1 of the Blasphemy Law as a limitation over religious freedom"; Aksel Tømte, "Constitutional Review of the Indonesian Blasphemy Law," *Nordic Journal of Human Rights* 30(2) (2012): 201.

[15] Indonesian Constitutional Court Decision No. 140/PUU-VII/2009 of 19 April 2010, paras. [3.34.17], [3.52].

[16] Indonesian Constitutional Court Decision No. 140/PUU-VII/2009 of 19 April 2010, para. [3.34.11], in which the Court stated, "...the limitation of human rights on the basis of "religious values" as stipulated in Article 28J (2) of the Constitution is one of the considerations to limit the enforcement of human rights. Such is different from Article 18 of the ICCPR which does not stipulate religious values as a limitation...".

[17] Mellisa Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7(1) (2012): 42-43.

[18] UN Human Rights Committee (2011), *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, para. 48. Article 20 (2) of the ICCPR is also mentioned, however this will be not discussed due to its arguably different nature (i.e. prohibiting hate speech as opposed to prohibiting the offensive substance of the speech). See Section B (i).

or religious hate speech laws.[19] It is therefore important to assess whether the types of "blasphemy laws" introduced in the beginning of this section are distinguishable from one another. If it is, then it would not be impossible for one type of blasphemy law to be valid while the other is not.

In regards to that, it must be pointed out that only one of the mentioned types of blasphemy law is distinct, while the other two are indistinct from one another. General academic consensus treats blasphemy laws and religious defamation laws interchangeably and draw the distinction between blasphemy/religious defamation laws with religious hate speech laws.[20] The reason why religious hate speech law is singled out is because statements that would otherwise be prohibited for its blasphemous or defaming content would not necessarily be prohibited under religious hate speech law as long as the manner in which it is delivered is not overly offensive so as to lead to incitement of religious discrimination, hostility, or violence.[21] For the purposes of the present discussion, religious hate speech law will not be discussed in this article.[22]

The idea underlying the concept of blasphemy law is markedly different from that of religious hate speech. Historically, some of the earliest blasphemy laws outlaw the wounding of a deity's sanctity as such act is presumed to disturb the religious hegemony that upholds the peace of a society.[23] While over time in some parts of the world this remains, in some others the outlawing shifts focus from the wounding of the deity's sanctity to the wounding of "feelings of the general body of the community."[24]

As with religious defamation, the concept's definition has been noted as being unclear.[25] There are times when it was indicated as correlating to religious hatred (e.g.,

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[19] The general definition of each is as follows: blasphemy is to remark in contempt of the divine, defamation of religion is to injure the reputation of a religion, and religious hate speech concerns the commission of hateful remarks towards a member(s) of a religious group. See Grim (2012).

[20] Miriam van Schaik, "Religious Freedom and Blasphemy Law in a Global Context: The Concept of Religious Defamation" in *The Fall and Rise of Blasphemy Law* ed. Paul Cliteur, Tom Herrenberg (Leiden: Leiden University Press, 2016), 197-198; Matt Cherry and Roy Brown, *Speaking Freely About Religion: Religious Freedom, Defamation and Blasphemy* (International Humanist and Ethical Union: 2009), 11.

[21] John C. Knechtle, "Blasphemy, Defamation of Religion and Religious Hate Speech: Is There a Difference That Makes a Difference?" in *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* ed. Jeroen Temperman and András Koltay, (Cambridge: Cambridge University Press, 2017), 210-211.

[22] See Footnote 20.

[23] Leonard W. Levy, *Blasphemy and Verbal Offense Against the Sacred: From Moses to Salman Rushdie*, (Knopf Doubleday Publishing Group: 1995), 3-8; Leonard W. Levy, *Treason Against God: a History of the Offense of Blasphemy,* (New York: Schocken Books: 1981), 3-102.

[24] David Nash, "Blasphemy and the Law: The Fall and Rise of a Legal Non Sequitur" in *The Fall and Rise of Blasphemy Law* ed. Paul Cliteur, Tom Herrenberg (Leiden: Leiden University Press, 2016), 65; Asma T. Uddin, "Blasphemy Laws in Muslim-Majority Countries," *The Review of Faith & International Affairs* 9(2) (2011): 48-51

[25] Miriam van Schaik, "Religious Freedom and Blasphemy Law", 198.

in UN General Assembly Resolution 60/150). However, scholars have noted its many similarities with blasphemy law and even considered it as the successor of blasphemy law.[26] This naturally leads to the question: is there any distinction to be made between the application of blasphemy laws and religious defamation laws? I propose the answer to be both no and yes.

There is no distinction in the terms of the law itself, as both punishes essentially the same subject-matter. However, there is a distinction to be made in the application of the law based on the rights concerned in a given case. Both the right to manifest one's religion or beliefs under Article 18 and the right to freedom of expression under Article 19 may be limited by blasphemy law or religious defamation laws. However, the limitation criteria of Article 18 rights are not entirely the same with relating to Article 19 rights. The danger lies in applying a more relaxed limitation criteria belonging to Article 19 to limit the exercise of the more stringent rights of Article 18. For instance, justifying the limitation of a religious manifestation under Article 18 on the grounds of national security under Article 19. Many blasphemy laws serve as catch-all limitations that fail to identify exactly what right it is designed to limit,[27] resulting in laws that are imprecise to the point an individual cannot reasonably foresee the legal consequences of their conduct.

b. Formal Requirements

The imprecision that characterizes many blasphemy laws is an issue because as a formal requirement, all laws imposing limitations on any human rights under ICCPR must be, in the words of the UN Human Rights Committee in their General Comment No. 34, sufficiently precise and accessible, or in another word, clear. This is so to ensure the 'quality' of laws that limit human rights to prevent an unjust law from occurring.[28]

But when can one tell when a law is precise and accessible to a "sufficient" degree? The jurisprudence of the Human Rights Committee rarely fleshes out what "sufficient" exactly entails, and even if it did, its assessment seems to be 'indirect and constructed'.[29] In regards to this, it is noteworthy that the same requirement is also stipulated under the European Convention of Human Rights ("**ECHR**") and implemented by the European Court of Human Rights ("**ECtHR**"). In fact, arguably ECtHR jurisprudence has made better progress in developing and fleshing out the

[26] Heiner Bielefeldt, "Misperceptions of Freedom of Religion or Belief," *Human Rights Quarterly* 35," (2013): 69.

[27] Asma T. Uddin, "Blasphemy Laws in Muslim-Majority", 48-51.

[28] Oscar M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality," *Harvard International Law Journal* 17(3) (1976): 555-556; Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, (Cambridge: Cambridge University Press, 2005), 293.

[29] Paul M. Taylor, *Freedom of Religion*, 300-301.

standard of sufficient precision and clarity. As can be seen from its judgment on the seminal 1979 *Sunday Times* case:[30]

> "Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

While the arguably higher-than-average human right standards of the ECtHR is certainly not binding upon States that are not party to the ECHR, it does provide a good idea on what is formally required of a law for it to be sufficiently precise and clear under the ICCPR.[31] Yet, let us not forget that the abovementioned ECtHR standard on the quality of law is rooted in the same widely-accepted general principle that is taught to all students of the law regardless of cultural difference, including in Indonesia: *nullum crimen sine lege*, or in other words, the principle of legality.[32] Transcending all cultural jurisdictions is one fundamental legal principle that protects individuals from committing crimes that they could not have known about (as opposed to should have known but did not know about).[33]

But in a society where one could widely worship one presumably holy prophet and jailed for worshipping another presumably equally holy prophet, how could one really know? In line with this analogy, thus follows the first suggestion to make a blasphemy law better: blasphemy laws must be precise and clear about which prophet is right and which prophet is wrong.

C. Blasphemy Law: The Grounds of Public Order and the Rights and Freedoms/Reputations of Others

a. Public Order

Presuming that blasphemy/religious defamation laws survive the previously discussed formal requirement, as a form of limitation it still must be based on the legitimate grounds provided by the third paragraph of Articles 18 or 19, depending on the right it intends to limit. In this regard, UN Special Rapporteur Ahmed Shaheed

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[30] *Sunday Times v United Kingdom* (1972) 2 EHRR 245, para. 49.

[31] Assuming that the ECtHR-established *Sunday Times* standard does not contradict the ICCPR's 'sufficiently precise and accessible' standard.

[32] Talita de Souza Dias, "Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?" *Human Rights Law Review* 19," (2019): 654-655.

[33] As reflected, for instance, in the principle of *ignorantia juris non excusat*: the ignorance of law does not excuse.

wrote in his 2019 report that the legitimization of blasphemy law typically relies on the grounds of public order and rights and freedoms of others:[34]

> "It is important to note, however, that anti-blasphemy laws remain in force in many countries, and that governments throughout the world are resorting to laws to protect people's feelings or indeed religious doctrine, or are attempting to legislate civility."

With regards to the public order ground, the Special Rapporteur also noted that "some States rely on public order laws to limit the expression of views that may offend the beliefs of majority populations".[35] While the ground of public order exists under both Articles 18 and 19 of the ICCPR, this should not lead to the assumption that its application under the two articles must be similar.

Such mistaken assumption is for instance exhibited by the Indonesian Constitutional Court in its JR 2010 Decision, in which the Court reasoned that blasphemy law acts as a legitimate limitation on the right to manifest one's religion (as prescribed under Article 18) because public order is a legitimate ground to invoke in limiting Article 19 rights and the blasphemy law in discussion prevents horizontal conflicts within the society.[36] This is fundamentally wrong because the public order limitations prescribed under Articles 18 and 19 are each designed to be distinct from one another in terms of their scope.

The public order limitation under Article 18(3) is, in fact, not a public order limitation at all. Instead, it is a "protection of order" limitation. The deliberate phrasing of such aims to "limit the limitation" narrowly to only the prevention of foreseeable public disorder.[37] To determine whether the public disorder is foreseeable or not, it must be determined whether a conduct would create a "concrete risk". A hypothetical case of a conduct that creates a concrete risk would be building a place of worship in the vicinity of rival places of worship, or the provocative establishment of a Carmelite Convent at the historically sensitive Auschwitz.[38] This is the test that the Human Rights Committee employed in, for instance, the 2013 *Bikramjit* case.[39]

The public order limitation under Article 19(3) is broader. As can be seen in the *travaux preparatoires* of the ICCPR, "public order" under Article 19(3) must be read

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[34] UN Human Rights Council: Report of the Special Rapporteur on freedom of religion or belief, UN Doc. A/HRC/40/58. (2019), 37.

[35] *Ibid*., 27.

[36] Indonesian Constitutional Court Decision No. 140/PUU-VII/2009 of 19 April 2010, paras. [3.52], [3.34.17].

[37] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., (Kehl am Rhein: Engel, 2005), 426.

[38] Paul M. Taylor, *Freedom of Religion*, 242.

[39] UN Human Rights Committee, Communication No. 1852/2008, Bikramjit Singh v. France (2013) UN. Doc. CCPR/C/106/D/1852/2008, para. 8.7.

in accordance with the French expression of *l'ordre public*, which is more of a "public policy" matter than a "public order" in its literal sense.[40] This would be more akin to the meaning given by the phrase "public interest", which in application allows governments to limit certain rights on the basis of sufficient public interest. In a hypothetical context provided by General Comment No. 34,[41] a government would then be permitted "in certain circumstances to regulate speech-making in a particular public place." In courtrooms, for instance, proceedings require the application of such limitation to maintain orderly proceedings. This means that according to the Article 19(3) public order limitation, a government may restrict the freedom of expression notwithstanding, as opposed to Article 18's "protection of order", the absence of a concrete risk of public disorder.

The clear discrepancy between the two makes it all the more important for a blasphemy law/religious defamation law to clearly identify which right it intends to limit. In light of this, thus comes the second suggestion to make a blasphemy law better: blasphemy laws must be clear about what kinds of expressions it intends to limit. As a start, the legislator must keep in mind that Article 18 is a *lex specialis* that specifically concerns *religious* expressions.[42]

b. Rights and Freedoms/Reputations of Others

The rights and freedoms or reputations of others is another ground that may be invoked to limit Articles 18 and 19 rights. The Human Rights Committee jurisprudence has not yet elaborated on grounds under Article 18 and limited its elaboration under Article 19 to matters largely concerning defamation of government officials.[43] Even when it was invoked by the Committee in deciding a case brought before them, the reasoning of the Committee is often criticized for its lack of clarity.[44]

Rights and freedoms/reputations of others are distinct in phrasing, but similar in application. The term "fundamental" in Article 18(3)'s phrasing of the grounds bears no significant meaning and does not give a hierarchical primacy to a certain right over another.[45] Moreover, as can be seen in the 2000 *Malcolm Ross* case,[46] the Human

[40] Marc Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights,* (Springer, 1987), 365-366.

[41] UN Human Rights Committee (2011), *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, para. 31.

[42] H. Victor Condé, "Human rights and the protection of religious expression" in *Religion, Pluralism, and Reconciling Difference* ed. W. Cole Durham, Donlu D. Thayer (London: Routledge, 2019), 26-28.

[43] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (Oxford: Oxford University Press, 2013), 573.

[44] Peter Radan, "International Law and Religion" in *Law and Religion* ed. Peter Radan, Denise Meyerson, Rosalind F. Atherton (London: Routledge, 2004), 21.

[45] In the 1985 Siracusa Principles, it was noted that the rights and freedoms under the ICCPR seeks to protect those considered to be most fundamental, implying that all the ICCPR rights and freedoms are equally fundamental, see UN Human Rights Committee (1984, para. 36).

[46] UN Human Rights Committee (2000). *Malcolm Ross v. Canada*. Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997, para 11.7.

Rights Committee explicitly affirmed that Article 18's "fundamental rights and freedoms of others" are in essence the same with Article 19's "rights and reputations of others". Therefore, unlike the "public order" limitation of Articles 18 and 19, the rights and freedoms/reputations of others under both articles have the same general implication: that other ICCPR rights may act as a limitation towards the right to manifest one's religion or beliefs under Article 18 or the right to freedom of expression under Article 19.[47]

These grounds have seen quite some development in the jurisprudence of ECtHR. Before the ECtHR, the invocation of such basis often leads to the difficult discussion regarding the government's duty to protect the rights and freedoms of others, and whether a right to respect for one's religious feelings exists and may therefore limit Articles 18 and 19 rights. With regards to the former, the ECtHR has affirmed in the 1994 *Kokkinakis* case that the right to manifest one's religion or beliefs may be legitimately limited on the grounds of the government's duty to protect the rights and freedoms of others.[48] However, it is later clarified in the 1999 *Larissis* case that such duty to protect the right to not be coerced, which is to be determined on a case-by-case basis.[49]

Nevertheless, the duty to protect individuals from coercion is also occasionally liberally applied to also protect individuals from feeling offended. One landmark ECtHR case that demonstrated this is the 1994 *Otto-Preminger-Institut* case, in which the ECtHR stated that "...expressions that are gratuitously offensive to others [are] infringement of their rights...".[50] Here, the Court has created a completely novel right to not be "gratuitously" offended.[51] At face value, "gratuitous" might seem to be the perfect adjective to describe the offence generated by a film that portrays the Abrahamic God "...as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend...".[52] Be that as it may, the ECtHR never explained the leap that it made from the *Kokkinakis* "respect"—which primarily refers to the *right to not be coerced*—to a right to not be offended.[53] Later on, the ECtHR attempted to rectify this mistake in its 1994 *Wingrove* judgment,

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[47] Special Rapporteur Asma Jahangir, however, has noted that the "[T]he right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule." See UN Human Rights Committee (2006, para. 38).

[48] *Kokkinakis v Greece* (1994) 17 EHRR 397, para. 44.

[49] *Larissis and others v Greece* (1999) 27 EHRR 329, para. 51.

[50] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para. 49.

[51] Michiel Bot, "The Right to Offend? Contested Speech Acts and Critical Democratic Practice" *Law & Literature* 24, (2012): 244.

[52] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para. 22.

[53] Michiel Bot, "The Right to Offend? Contested Speech Acts and Critical Democratic Practice" *Law & Literature* 24, (2012): 246-247.

which shifted the issue of from that concerning the non-existent right to not be offended into that concerning religious hate speech.[54]

Yet, the *Otto-Preminger* right to not be gratuitously offended was "resurrected" in the 2018 *E.S. v. Austria* case. That case concerns a speaker, E.S., who gave seminars on Islam at two far-right seminars held by the Freedom Party of Austria. E.S. was found guilty of "…accus[ing] Muhammad of having paedophilic tendencies" from her statement saying that "a 56-year old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?"[55] While this statement may be shocking enough to justify the Court's invocation of the *Otto-Preminger* "right to not be gratuitously offended", controversially the Court instead treated the case as a defamation against Muhammad, and upheld the E.S. conviction as declared by the Austrian courts. This means, in the words of human rights scholar Marko Milanovic, "…the [ECtHR] does not find—except perhaps implicitly—that [E.S.]'s statement was gratuitously offensive."[56]

While relatively inconclusive, the cases above did demonstrate the debate central to the issue of the rights and freedoms or reputations of others as a limit to Articles 18 and 19 rights. There is no doubt that a government must not let an individual abuse their rights by coercing and therefore impairing another individual's exercise of their own rights. But must a government assume the duty to also protect their subjects from being offended?

In any case, the cases in favour of the extensive interpretation (Otto-Preminger and E.S.) also demonstrate that the offenses cannot be argued independently of coercion. Furthermore, for the sake of consistency (particularly with the standard of coercion established in *Kokkinakis and Larissis*), such offenses certainly cannot be less than what passes as coercion. In light of this, thus comes the third suggestion to make a blasphemy law better: blasphemy laws must be clear about whether and when an individual's hurt feelings can prevent them from exercising their human rights.

D. Religious Defamation Laws: Defamation and Religion under the ICCPR

Although it was noted that the concept of religious defamation itself is unclear, it is still worth looking into from the lenses of how defamation laws in general may be used to limit human rights under the ICCPR framework. The discussion of religious

[54] *Wingrove v United Kingdom* (1994) 24 EHRR 1.

[55] *E.S. v Austria* (2018) no. 38450/12, paras. 14, 17.

[56] Marko Milanovic, "Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in E.S. v. Austria" EJIL:Talk! 29 October 2018, https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria.

defamation laws under the ICCPR becomes even more important if we consider its relatively recent increase of presence within the international community.[57]

The general concept of defamation typically refers to a false and malicious statement that injures the reputation of a person.[58] Under the ICCPR, defamation laws must include the defence of truth, which will allow a person to free themselves from the allegation of defamation if they successfully proves the truthfulness of the statement. Defamation laws in several jurisdictions have been observed as being misused when the truthfulness of a statement is ruled out as a defence. Such is the case in the 2012 *Adonis* case,[59] in which a radio broadcaster is imprisoned for defamation after his defence of truth is rejected by the Filipino government, and in the 2005 *Morais* case,[60] in which the author's criticism of the President landed him a prison sentence after having his defence of truth ruled out by the Angolan courts.

There are several issues which fit religious defamation laws into the ICCPR's concept of defamation laws. First and foremost, there are serious doubts as to whether "religions or beliefs" can have their reputations "injured" in the same way as, for instance, an actor whose career is put in jeopardy by a false allegation of sexual misconduct.[61] There are also doubts towards the possibility of ascertaining the truth of a statement if the subject concerns a religion or belief. In the words of John Knecthle, a blasphemy law scholar:

> "Is there any objective way to determine what constitutes a false statement about a religion…? Is calling a religion "false" or "ignorant" a statement of fact or opinion, and should it matter?"[62]

Indeed, it seems rather impossible to ascertain the truthfulness of a religious statement when "every religion by its nature [is] the defamation of other religions".[63]

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[57] Mirjam van Schaik, "Religious Freedom and Blasphemy Law in a Global Context: The Concept of Religious Defamation," in *The Fall and Rise of Blasphemy Law*, eds. Paul Cliteur and Tom Herrenberg (Leiden: Leiden University Press, 2016), 177-204.

[58] John C. Knecthle, "Blasphemy, Defamation of Religion and Religious Hate Speech," in *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the* Charlie Hebdo *Massacre*, eds. Jeroen Temperman and András Koltay (Cambridge: Cambridge University Press, 2017), 207.

[59] UN Human Rights Committee, Communication no. 1815/2008, Alexander Adonis v. The Philippines (2012) UN Doc. CCPR/C/103/D/1815/2008, para. 6.8.

[60] UN Human Rights Committee, Communication no. 1128/2002, Rafael Marques de Morais v. Angola (2005) UN Doc. CCPR/C/83/D/1128/2002, para. 7.7.

[61] Clarissa Sebag-Montefiore, "Geoffrey Rush Awarded $2 Million in Defamation Case, a Record for Australia," The New York Times, 23 May 2019, https://www.nytimes.com/2019/05/23/world/australia/geoffrey-rush-defamation.html.

[62] Knechtle, "Defamation of Religion", 207.

[63] Miriam van Schaik, "Concept of Religious Defamation", 198; the *E.S. v. Austria* ECtHR case discussed in the previous section also shows why the exercise of verifying truths in a discourse related to religion can prove to be difficult. In that case, which concerns E.S.'s statement that the Prophet Muhammad is a paedophile because he had sex with one of his wives, Aisha, when she was nine years

This is also why many scholars fail to see why religious defamation laws should be distinguished from blasphemy laws, as both ultimately limit fundamental human rights based on religious truths. The difference only lies in the different manner through which each are justified. While blasphemy law is typically justified either on the basis of public order or the right to one's religious feelings, religious defamation is typically justified on the basis that it is possible to defame a religion or belief.

However, this by no means should put an end to making a better blasphemy law. After all, the above only calls into the question the possibility to ascertain truthfulness in a statement concerning a religion under the ICCPR human rights framework, not argue for it. What was certain, however, is that any law designed based on the ICCPR's defamation framework must allow for the defense of truth, including any blasphemy law. Thus comes the fourth suggestion: whatever is outlawed by such blasphemy law, its truth must be capable of being verified.[64]

E. Conclusion

The introduction to this article has made it clear that the discussion set out above aims to find out how to make Indonesia's "bad" blasphemy law into a "good" one; that is, consistent with the ICCPR. Four suggestions are proposed to that end:

First, blasphemy laws must be precise and clear about which religious doctrine is correct and therefore one ought to follow (e.g., which prophet is right and which prophet is wrong).

Second, blasphemy laws must be clear about what kinds of expressions they intend to limit.

Third, blasphemy laws must be clear about whether and when an individual's hurt feelings can prevent them from exercising their human rights.

Fourth, the truth of that which is considered as a religious defamation by a blasphemy law must be capable of being subjected to verification.

The words "bad" and "good" are put in between quotation marks for a reason. In this article, the "goodness" of blasphemy laws is decided strictly within the purview of the ICCPR. To that end, the provided analysis aims to only introduce the basic concepts and debates surrounding blasphemy laws in the ICCPR, nothing more. The strict scope of this article's discussions means that there are some other issues that might seem relevant but nevertheless not essential, as will be explained briefly in the following.

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old, the ECtHR has, in the words of Professor Stijn Smet, "…effectively reduced a complex case involving the difficulty of balancing free speech and the preservation of religious tolerance to a single factual question: does having sex with one child 1,400 years ago merit being labelled a paedophile today?" See Stijn Smet, "Free Speech versus Religious Feelings, the Sequel: Defamation of the Prophet Muhammad in *E.S.* v *Austria*" *European Constitutional Law Review* 15, (2019): 166.

[64] UN Human Rights Committee (2011), *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, para. 47.

First, the relevancy of the ICCPR itself. As an instrument of international human rights law, the ICCPR has had its legitimacy challenged on the basis that it is inherently "Eurocentric".[65] However, questioning the legitimacy of the ICCPR with the aim of reconstructing its system[66] is not essential to this article's discussion, because legitimacy is relevant insofar the questions of whether to adopt the ICCPR system in the first place and whether, once adopted, that system must be abandoned are concerned. The question presented in this article concerns neither. The problem is not that Indonesia should or should not accede to the ICCPR—that has been settled by the adoption of Law No. 12/2005–but that as a State Party to the ICCPR, Indonesia has failed, frivolously, to correctly apply that instrument's provisions.

Second, the issue of principled limits to law,[67] which if posed in the present discussion calls into question the role of law as excluding regulating religious truths. This issue is particularly relevant within the Indonesian context in no small part due to its "Pancasila" ideology,[68] which as it stands, arguably at the extreme, prohibits unjustified opposition towards the "Almighty God".[69] However, in my opinion, the merits and demerits of principled limits to law such as Mills' "harm theory" or Feinberg's "offense theory" in relation to Indonesian blasphemy law deserves its own separate discussion because (i) it is not exclusively relevant to an ICCPR analysis on blasphemy laws, and (ii) it is simply too extensive to discuss here.

Conclusively, if it is not yet made sufficiently clear, the suggestions proposed are more of a commentary on the impossibility of having a blasphemy law that is consistent with the ICCPR's human rights standards. Such impossibility is even more pronounced in a multicultural society like Indonesia. In such a multicultural society, any government's attempt to monopolize religious morality will have to first square all existing clashing religious doctrines. Anything short of that will force the government to come up with irrational interpretation of the ICCPR, just as the Indonesian Constitutional Court has done as pointed out in Section A. In face of this inescapable absurdity, Indonesia has a "bad" blasphemy law, and the only way to make it better, according to the ICCPR, is to simply get rid of it.

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[65] Ntina Tzouvala, "The Specter of Eurocentrism in International Legal History," *Yale Journal of Law & the Humanities* 31(2) (2021): 414-416.

[66] Makau W. Mutua, "What Is TWAIL?" *ASIL Proceedings* 94(31) (2000): 38.

[67] John Stanton-Ife, "The Limits of Law," *The Stanford Encyclopedia of Philosophy*, last modified February 27, 2016, https://plato.stanford.edu/entries/law-limits/.

[68] Nurizal Ismail, Fajri M. Muhammadin and Haninditio Danustya, "The Urgency to Incorporate Maqasid Shari'ah as an Elucidation of 'Benefit' as a Purpose of Law in Indonesia's Legal Education," *Proceedings of the 1st International Conference on Recent Innovations* (2018): 1088-1089.

[69] Yance Arizona, "Negara Hukum Bernurani: Gagasan Satjipto Rahardjo tentang Negara Hukum Indonesia," *1st International Indonesian Law Society Conference* (2010): 12.

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