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JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate and graduate students from any major to contribute in scientific research and writing in regards to Business Law, Public International Law, Private International Law and Comparative Studies. The Editorial Board receives any research paper and conceptual article that has never been published in any other media. The submission requirement is available at the inside back cover of this journal.

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

Legal promoting awareness through scholarly work has always been one of the chief objectives of Universitas Gadjah Mada. As the Faculty of Law, we are given the exclusive mandate of providing high-quality journal articles aimed towards better understanding of the law.

The law faculty's Juris Gentium Law Review ("**JGLR**") has spearheaded progress by being the first student-run law review in Indonesia. Since its creation in 2012, JGLR has offered a unique opportunity for undergraduate students to be able to contribute towards the development of the legal world at both at the national and international level. Through JGLR, our students can foster their critical thinking and legal writing skills, while also collaborating with experts in order to produce outstanding articles. In addition, JGLR's blind-review process also ensures the quality of the articles which are to be published.

Throughout the years, JGLR has consistently provided the Faculty of Law with excellent student-written journal articles. I believe that JGLR has inspired our students to be more responsive to the problems the nation and the rest of the world face. I am proud to congratulate both JGLR and the Community of International Moot Court for publishing yet another exceptional edition. I am certain that this edition will be an inspiration to both the Faculty and the legal society.

Dahliana Hasan, S.H., M.Tax., Ph.D.

Dean
Faculty of Law, Universitas Gadjah Mada

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FOREWORD FROM THE PRESIDENT COMMUNITY OF INTERNATIONAL MOOT COURT FACULTY OF LAW, UNIVERSITAS GADJAH MADA

It is fascinating to observe how quickly the literature on the discipline of international law expand and gained ever more relevance in the modern age. Aside from the dynamic nature of international legal issues, this can also be attributed to the relentless efforts of academics in the field. As such, it is my view that law students should also partake in this effort of expanding their knowledge and even contribute to the legal field through their own writing and research. Accordingly, the Juris Gentium Law Review ("**JGLR**") has served as a platform for law students to disseminate their thoughts and research on various aspects of public and private international law.

As the President of the Community of International Moot Court ("**CIMC**"), it is with great honor that I present this year's edition of JGLR. Moreover, pertaining to the legacy of our predecessors, this year's edition of JGLR will also provide articles from a wide array of subjects, including comparative business law and violations of human rights instruments such as the ICCPR. It is my hope as the President of CIMC that this tradition of critical thinking and willingness to contribute to the public will carry on in the years to come.

On behalf of CIMC, I would also like to express my utmost gratitude for Universitas Gadjah Mada's Faculty of Law for facilitating our efforts and the support given. I would like to also express my gratitude for this year's Editorial Board and Technical Team, namely Balqis Fauziah, Mastin Annisa, Brian Sukianto, Stephanie Kristina, Adinda Persilka, Christina Abigail Zoe, Gabriela Eliana, Ershad Murtadho, and Hasna Mazia Alboneh for their collective effort in making this year's edition of JGLR possible.

Ariel Joy Suryawan

President of the Community of International Moot Court
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE EDITOR-IN-CHIEF JURIS GENTIUM LAW REVIEW FACULTY OF LAW, UNIVERSITAS GADJAH MADA

Since its establishment, Juris Gentium Law Review ("**JGLR**") aims to publish student-written pieces twice every year to achieve our goal in tackling specific issues that are not only recent within the areas of international law but are also considered urgent to be discussed in order to have them be addressed or for further reformation of a bigger system in the world order. I am excited to welcome the publication of the first issue on the eight volume of JGLR. All articles published in this issue have undergone a long review process conducted both by our Editorial Board and Executive Reviewers that are experts on the relevant fields related to the articles' topics. This was done in order to maintain the quality of articles published by JGLR.

For this specific publication, JGLR features articles ranging from Indonesia's current dilemma of vaccination programs and comparative business law between Indonesian and western legal systems to violations of international human rights frameworks. These are issues that are not only relevant, but also imperative to tackle from different perspectives and as a result, prompt further discussions, plant seeds of thought, and encourage positive action.

Lastly, I would like to take this opportunity to extend my deepest gratitude to the JGLR team for their dedication and hard work that made Volume 8(1) possible: Brian Sukianto, Christina Abigail Zoe, Stephanie Kristina, Gabriela Eliana, Ershad Murtadho, Hasna Mazia Alboneh, and to Mastin Annisa and Adinda Persilka who have co-written the editorial piece for this issue. I also am grateful to Universitas Gadjah Mada's Faculty of Law, Authors and Executive Reviewers. This current issue would not be possible without the support and help received from them.

Balqis Nazmi Fauziah

Editor in Chief of the *Juris Gentium Law Review 2020/2021*
Faculty of Law, Universitas Gadjah Mada

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Editorial

The Right to Liberty Versus the Right to Public Health: Administrative and Criminal Sanctions on Covid-19 Mandatory Vaccination Programs in Indonesia under International Human Rights Law

Adinda Persilka Chaerunisa[1] and Mastin Annisa Nur Fauziah[2]

Abstract

The mandatory vaccination programs triggered a heated public debate between Indonesian vaccine supporters and anti-vaxxers. The necessity and urgency of administrative and criminal sanction for vaccine refusal has been questioned, the criminal element of the sanction in COVID-19 mandatory vaccination has been seen as a threat to the right to liberty of a person protected under the Article 9 of International Covenant on Civil and Political Rights. Albeit, the argument of invoking personal liberty, there is an imminent threat on public health in the COVID-19 pandemic. In implementing policies and regulations, the Indonesian government shall adhere to international human rights law as a guidance especially when limiting certain rights prescribed in the Covenant. This editorial aims to assess the legitimacy of the limitation of the right to liberty on the grounds of public health under the Siracusa Principles.

Keywords: mandatory vaccination, ICCPR, Siracusa Principles, COVID-19, the right to liberty

Intisari

Program vaksinasi wajib memicu perdebatan publik yang panas antara pendukung vaksin Indonesia dan komunitas anti-vaksin. Keperluan dan urgensi sanksi administratif dan pidana penolakan vaksin dipertanyakan, unsur pidana sanksi dalam kewajiban vaksin COVID-19 dipandang sebagai ancaman terhadap hak kebebasan seseorang yang dilindungi Pasal 9 Kovenan Internasional tentang Hak Sipil dan Politik. Terlepas dari argumen yang menyerukan kebebasan pribadi, ada ancaman nyata terhadap kesehatan masyarakat dalam situasi COVID-19. Dalam melaksanakan kebijakan dan peraturan, pemerintah Indonesia harus berpegang pada hukum hak asasi manusia internasional sebagai pedoman terutama ketika membatasi hak-hak tertentu yang ditentukan dalam Kovenan. Editorial ini bertujuan untuk menilai legitimasi pembatasan hak atas kebebasan atas dasar kesehatan masyarakat di bawah Prinsip Siracusa.

Kata Kunci*: kewajiban vaksin, ICCPR, Prinsip Siracusa, COVID-19, hak atas kebebasan*

[1] Class of 2018, Bachelor of Law Candidate from Constitutional Law Department, Universitas Gadjah Mada's Faculty of Law

[2] Class of 2017, Bachelor of Law Candidate from Business Law Department, Universitas Gadjah Mada's Faculty of Law

A. Introduction

Widespread vaccination is one of the most important steps that must be taken to control and stop the spread of a pandemic, limiting the number of cases of new infections as well as protecting those most vulnerable against the disease such as the elderly, those with comorbidities and other health afflictions. However, in many countries, there is a push against government mandated vaccination programs stemming from a distrust against vaccines.[1] Such distrust and rejection towards vaccines are also seen in Indonesia during the COVID-19 pandemic.

The COVID-19 situation in Indonesia remains dire. As of writing this, there are 300,000 active cases and a total of 127,000 deaths in the country.[2] Globally, Indonesia sits at the fourteenth rank in terms of total number of cases—amounting to nearly four million total cases of COVID-19 in the region.[3] Experts and various studies have even expressed concerns of underreporting and the lack of sufficient testing and contract tracing, which means that these statistics may not fully show the amount of people which are actually infected, have been infected, or even died after contracting the virus.[4] Widespread vaccination is badly needed to control further spread and prevent the increase in casualties from the COVID-19 pandemic in Indonesia.

The Indonesian vaccination program commenced in January 2021. At the time of writing, more than 60 million people have obtained their first dose of vaccination and more than 34 million have obtained their second dose.[5] However, the percentage of the population who are fully vaccinated remains low, notably in regions outside of the capital of Jakarta.[6] Even medical personnel which have been given priority to get vaccinated first have not taken the opportunity.[7] This group's hesitance to get vaccinated can be described as vaccine hesitancy, where there is a delay in utilizing the vaccine despite its availability.[8] In this case, the delay is caused by legitimate concerns

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[1] Siladitya Ray, "European Nations–Among the Most Vaccine-Skeptical In The World–Are Hitting Key Inoculation Targets," *Forbes*, last modified June 2, 2021, https://www.forbes.com/sites/siladityaray/2021/06/02/european-nationsamong-the-most-vaccine-skeptical-in-the-worldare-hitting-key-inoculation-targets.

[2] "Indonesia: WHO Coronavirus Disease (COVID-19) Dashboard With Vaccination Data," *World Health Organization*, accessed August 27, 2021, https://covid19.who.int/region/searo/country/id.

[3] *Ibid.*

[4] Tom Allard, "EXCLUSIVE COVID-19 far more widespread in Indonesia than official data show: studies," *Reuters*, last modified June 3, 2021, https://www.reuters.com/world/asia-pacific/exclusive-covid-19-far-more-widespread-indonesia-than-official-data-show-studies-2021-06-03/.

[5] Ministry of Health of Indonesia, "Vaksinasi COVID-19 Nasional," accessed August 27, 2021 https://vaksin.kemkes.go.id/#/vaccines.

[6] *Ibid.*

[7] Anwar Siswadi, "Survei, 20 Persen Tenaga Medis di 4 Kota Ini Tolak Vaksinasi COVID-19," *Tempo*, last modified January 9, 2021, https://tekno.tempo.co/read/1421711/survei-20-persen-tenaga-medis-di-4-kota-ini-tolak-vaksinasi-covid-19.

[8] Michael Calnan and Tom Douglass, "Hopes, hesitancy, and the risky business of vaccine development," *Health, Risk & Society* 22(2020): 293, https://doi.org/10.1080/13698575.2020.1846687.

over the safety of the vaccine and its clinical trials. A portion of the significant Muslim population in Indonesia are also concerned about the compliance of the vaccine with the *halal* requirement, pushing the Indonesian Ulema Council to issue a fatwa validating its *halal* status.[9]

However, refusal to take part in vaccination programs may also take more malignant forms. The same religious sentiments behind concerns of the *halal* status of vaccines may take a more conservative form by refusing to get vaccinated despite assurances otherwise, even persuading other people to not vaccinate alongside them.[10] Some of this distrust goes beyond the religious sentiment but is fairly popular among the same segments of society—it is also fuelled by conspiracy theories about the involvement of immoral private actors and malicious business interests in the vaccines, even advocated by an Indonesian member of parliament.[11] Such fear mongering hurts efforts to increase the vaccination rate in Indonesia.

This refusal and movement against vaccination programs in Indonesia have spurred debate among academics and the public with regards to the law surrounding government mandated vaccination programs as well as society's reaction towards it. In a number of instances, the Vice Ministry on the Law and Human Rights have stated that, based on Law No. 6/2018 on Health Quarantine, getting vaccinated is part of a citizen's obligation. The statement is further affirmed by Article 69 of the Indonesian Law on Human rights which, under sub-article (1), provides that every person has the obligation to respect the human rights of other persons; and under sub-article (2), that a person's human rights gives rise to the basic obligation and responsibility to respect the human rights of other persons. This Article is relevant in that the respect a person must afford to the human rights of other persons includes their right to health.[12] What this means in the present context of COVID-19 vaccination programs is that one of the ways to respect the right to health of another person is to get vaccinated for the COVID-19 virus, thereby reducing the risk of spreading it to others.

Participation in the COVID-19 vaccination as an obligation raises another question: what happens to citizens who violate this obligation by refusing to

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[9] BBC, "Gerakan tolak vaksin Covid-19, akankah berakhir lewat anjuran MUI dan tokoh agama? - BBC News Indonesia," last modified January 14, 2021, https://www.bbc.com/indonesia/indonesia-55644537; Muhammad Iqbal, "Fatwa MUI: Vaksin COVID-19 Sinopharm Haram Tapi Bisa Dipakai," *CNBC Indonesia*, last modified May 3 2021, https://www.cnbcindonesia.com/tech/20210503124519-37-242668/fatwa-mui-vaksin-covid-19-sinopharm-haram-tapi-bisa-dipakai.

[10] Adi Renaldi, "Indonesia's anti-vaxxers: Between religion and lack of information," *the Jakarta Post*, last modified February 4, 2021, https://www.thejakartapost.com/life/2021/02/04/indonesias-anti-vaxxers-between-religion-and-lack-of-information.html.

[11] Sukmawani Bela Pertiwi, "Why do people still reject COVID-19 vaccines in Indonesia? We need to solve structural problems behind the anti-vaccine movement", *the Conversation*, last modified 19 February, 2021, https://theconversation.com/why-do-people-still-reject-covid-19-vaccines-in-indonesia-we-need-to-solve-structural-problems-behind-the-anti-vaccine-movement-154568.

[12] Kompas.com, "Wamenkumham: Menolak Vaksinasi Covid-19 Bisa Dipidana," last modified 11 January, 2021, https://nasional.kompas.com/read/2021/01/11/08572481/wamenkumham-menolak-vaksinasi-covid-19-bisa-dipidana.

participate in the vaccination program? Again, on this issue, the Indonesian Vice Minister on Law and Human Rights said, in the same instance, that said people may be criminalized according to law. It is important to note here that such criminalization is a last resort. In the same law, there are other punishments which may be given to citizens who infringed their obligations under the law; which, when sanctioned, eliminates the possibility of punishment. Additionally, socialization and other approaches are done to encourage people to get vaccinated.

However, the issue of human rights with regards to the COVID-19 vaccination does not stop here. As established before, these people who refuse to get vaccinated—and therefore become subject to the possibility of administrative penalties or even criminalization due to their religious beliefs and hence having their right to liberty taken away when they are faced with criminal sanctions. The right to liberty is a human right protected under the International Covenant on Civil and Political Rights ("**ICCPR**"), specifically under Article 9, which Indonesia is bound to due to its ratification through Law No. 12/2005 on the Promulgation of the ICCPR. In other words, some groups' refusal to get vaccinated are rooted in the exercise of their own human rights as prescribed within the ICCPR.

The right to liberty is not the only human rights impacted by government mandated vaccination programs, requiring citizens to get vaccinated before they can partake in domestic travel, which have been implemented in a number of Indonesian provinces under Ministry of Internal Affairs Instruction No. 30/2021, also considerably limits the freedom of movement of citizens. Freedom of movement is also a human rights guaranteed under Article 12 of the ICCPR. The question, then, becomes: when different human rights clash—in this case, the right to health and the right to liberty and other rights such as freedom of liberty—which right prevails? Or more to the point: is the government justified in limiting the exercise of certain human rights to enforce its vaccination program?

In part, this question is answered by the text of the ICCPR itself. Under the respective Articles, it is provided that the freedom of liberty may only be limited by restrictions provided by the law and are necessary to protect national security, public order, health, morals, or the fundamental rights and freedoms of others. But these concepts are open-ended hence further clarification is needed to assess exactly whether such parameters are met. This is where the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ("**the Siracusa Principles**") become salient.

The Siracusa Principles were written to address uncertainty and prevent abuse concerning such derogative provisions that governments may do to unjustifiably limit

the fundamental rights and freedoms of its citizens.[13] Hence, in this article, it is important to assess whether the Indonesian government justifiably limits certain human rights of its citizens in light of its vaccination program.

B. The Rejection of COVID-19 Mandatory Vaccination in Indonesia

The severity of COVID-19 cases in Indonesia have reached its pinnacle in the last three months, starting from June to August 2021. On the 13th of July, Indonesia hit its third wave induced by the Delta variant which was known to be the most contagious one thus far.[14] The daily COVID-19 cases in Indonesia had never been under 10,000 cases per day consecutively and on its peak, Indonesia reported 350,273 weekly cases to the WHO, where the cases reached its breaking point in more than 40.000 cases per day.[15] In battling the COVID-19 pandemic, the government has initiated the vaccine rollouts since January 2021. The timeline schemes had been set by Indonesian government starting from January 2021. The vaccination programs will be run in 15 months in two phases, the first one is from January to April and the second phase is from April 2021 to March 2022 which will last for 11 months.[16]

Despite the government's effort in implementing this vaccination schedule, as has been established, various differing opinions on vaccines have emerged since the government released a statement upon the mandatory vaccine, particularly in imposing administrative and criminal provisions in the regulations. Many individuals and non-governmental organisations argue that criminalization for those refusing to get vaccinated is not necessary. Article 30 of the DKI Jakarta Provincial Regulation No. 2 of 2020 prescribes people who intentionally refuses or reject to be vaccinated or treated for COVID-19 can be fined up to Rp. 5,000,000.[17] People perceived this regulation as a form of a threat to their liberty for those who refuse the vaccination programs. Some actors such as NGOs argue that such threat is deemed as unnecessary and lacks urgency for immediate response.[18] These actors believe that putting forward

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[13] American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (New York: 1985).

[14] Febriana Firdaus, "Indonesia Can't Keep Up With Its COVID-19 Cases," *Foreign Policy*, last modified August 25, 2021, https://foreignpolicy.com/2021/08/25/indonesia-covid-pandemic-delta-variant-testing-data/.

[15] Abigail Ng, "Indonesia Reported the Highest New Covid Cases in the World Last Week, Says WHO," *CNBC*, last modified July 22, 2021, https://www.cnbc.com/2021/07/22/who-indonesia-reported-most-new-covid-cases-in-the-world-last-week.html.

[16] "COVID-19 Vaccination Schedule in Indonesia," *Fullerton Health*, last modified January 11, 2021, https://www.fullertonhealth.co.id/covid-19-vaccination-schedule-in-indonesia/.

[17] Provincial Regulation of DKI Jakarta No. 2 of 2020 Concerning Corona Virus 2019 Disease Management (2020).

[18] "ICJR Requests Central and Regional Governments to Review Criminal Provisions Refusing Vaccines," *Institute For Criminal Justice Reform*, last modified January 8, 2021, https://icjr.or.id/icjr-minta-agar-pemerintah-pusat-dan-daerah-tinjau-ulang-ketentuan-pidana-untuk-perbuatan-menolak-vaksin/.

such a criminal approach to ensure the implementation of vaccine programs is not essential for Indonesia.[19]

C. International Human Rights Law Perspective on Administrative and Criminal Sanction of the COVID-19 Mandatory Vaccination in Indonesia

a. The Right to Liberty under ICCPR in times of COVID-19

Article 9 of ICCPR states that:
"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Essentially, Article 9 of the ICCPR protects individuals from having their liberty and security infringed, thereby individuals shall not be a subject to arbitrary arrest or detention. The argument on being against criminal sanction of vaccine refusal is contingent on the particular article in ICCPR on individual freedom being recognised and protected under the regime of international human rights law.[20] Therefore, a State that has accessioned the instrument must adhere in enforcing articles contained in the ICCPR. Indonesia has accessioned to the ICCPR on the 23th of February 2006 which later entered into force on the 23th of May 2006, thereby as a State party, Indonesia should fulfil its obligations. Nevertheless, there needs to be further evaluation on whether the COVID-19 administrative and criminal sanctions violate Article 9 of ICCPR.[21]

In assessing such question, the Siracusa Principles must be taken into consideration when interpreting whether the action of Indonesian government in imposing administrative and criminal sanction in vaccine refusal is a violation of Article 9 of the ICCPR. The Siracusa Principles vow exemptions or restrictions to be made on certain civil rights to protect public health.[22] Under said Principles, public health emergencies can be made to justify limitations to articles provided in the ICCPR with several conditions in order to legitimize the limitation.

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[19] *Ibid.*

[20] Daniel Wei Liang Wang, Gabriela Moribe, and Ana Luiza Gajardoni De M Arruda, "Is Mandatory Vaccination for COVID-19 Constitutional under Brazilian Law ?," *Health and Human Rights Journal* 23(1) (2021): 163–74.

[21] International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) (16 December 1966).

[22] *Ibid.*

b. Compliance of the Administrative and Criminal Sanction for Vaccine Refusals with the Siracusa Principles

The Indonesian government may not allow administrative and criminal sanctions to be enacted when the Siracusa Principles are not fulfilled. There are four key elements or conditions in determining whether a situation may legitimize the limitation on the grounds of public emergencies. On its limitation clause, Siracusa Principles asserted that limitation under the principle shall be "necessary".[23] Article 10 of Siracusa Principles further defines on what "necessary" can be interpreted, these elements are cumulative and shall be applied strictly in an objective manner:[24]

> "...(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant; or in other words prescribed by law
> (b) responds to a pressing public or social need;
> (c) pursues a legitimate aim;
> (d) is proportionate to that aim."

The interpretation of implementation of Article 10 is discussed further by Lawrence Gostin, an American law professor who specialises in international law and public health law. He stated that the justification of the limitations should be made in accordance with the law for section a while section b can be interpreted that the limitations shall also have a legitimate objective and the limitations is strictly necessary in democratic society, meaning that it should be in accordance with the aim to protect people and suppress the virus. The limitations shall also have the least restrictive and intrusive means available in accordance with section c and the limitations shall not be arbitrary, unreasonable, or discriminatory as prescribed in section d in relation to proportionality.[25]

c. The Application of the Limitations of the Siracusa Principles for Vaccine Refusals in Indonesia

In assessing whether the limitation on Article 9 of the ICCPR on the criminal sanction for vaccine refusal falls under the Siracusa Principles, there needs to be fulfilment of all the four elements for necessity.[26] The first element is that the limitation is in accordance with the law or based one of the grounds of justifying the limitations under the article of Siracusa Principles. The central government of Indonesia enacted the administrative and criminal sanction based on several regulations, one of which is Presidential Regulation Number 14 of 2021 concerning the Amendment of Presidential Regulation Number 99 of 3030 concerning Vaccine

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[23] *Ibid.*

[24] American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (New York: 1985).

[25] *Ibid.*

[26] *Ibid.*

Procurement and Vaccine Procurement and Vaccination Implementation in relation to COVID-19 Countermeasures (hereinafter 'Presidential Regulation Number 14 of 2021'). Article 13A(2) of the Presidential Regulation Number 14 of 2021 prescribed administrative sanctions may be imposed for the those refusing to be vaccinated when they are listed as the target recipient of the vaccination.[27] The enactment of only legislation, however, is not enough, there needs to be an assessment whether the legislation have legitimate aims or grounds. In this case, the purpose of the enactment of the legislation by the Indonesian government is to maintain the public health of the people and to contain the virus, therefore, the aims for such legislation is legitimate and lawful.[28]

In addition to the administrative sanctions, the aforementioned regulation also provides for sanctions for those refusing the vaccination as provided in the relevant laws concerning infectious diseases outbreak, the relevant law contains criminal sanctions for those refusing to be vaccinated. Due to the existence of these regulations, the administrative and criminal sanctions have proven to be prescribed by law as required by the Siracusa Principles. To further strengthen the justifiable grounds on the limitation of Article 9 of ICCPR, the Indonesian President has announced that Indonesia has entered into public health emergency on the 31st of March 2020 after the surge of COVID-19 cases, directly applying a large-scale social restrictions to contain the spread of the virus after declaring the emergency. This aligns with the justifiable grounds prescribed by in Article 25 of Siracusa Principles where public health is stated as one of the legitimate grounds on limiting the articles in ICCPR.

The second element is the existence of pressing public and social needs. Referring to the Law Number 4 of 1984 concerning Infectious Diseases Outbreak (hereinafter 'Law Number 4 of 1984') and the Presidential Regulation Number 14 of 2021,[29] the administrative and criminal sanctions are closely related to the objective of the regulations that aims to protect public health.[30] In determining the pressing public and social needs, there needs to be an assessment of whether or not there are other alternatives to overcome COVID-19.[31] As asserted by Dr. Anthony Fauci, the director of the U.S. National Institute of Allergy and Infectious Diseases, the only long term possible solutions to end COVID-19 is to get people vaccinated in order to break down the transmission.[32] He stated this as he made a suggestion to India's dire

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[27] Presidential Regulation Number 14 of 2021 Concerning The Amendment of Presidential Regulation Number 99 of 3030 Concerning Vaccine Procurement and Vaccine Procurement and Vaccination Implementation in Relation to COVID-19 Countermeasures (2021).

[28] *Ibid.*

[29] Law Number 4 of 1984 Concerning Infectious Diseases Outbreak (1984).

[30] Devita Kartika Putri, "Syracuse Principle in COVID-19 Vaccination in Indonesia" Law and Human Rights (class lecture, Universitas Gadjah Mada, Yogyakarta, 2021).

[31] *Ibid.*

[32] "Vaccination Is the Only Long-Term Solution to COVID-19 Crisis in India, Says Fauci," *The Hindu*, last modified May 10, 2021, https://www.thehindu.com/news/national/vaccination-is-the-only-long-term-solution-to-covid-19-crisis-in-india-says-fauci/article34522378.ece#.

situation, and Indonesia in many ways have become similar to India for the past three months with the third wave of COVID-19. Hence, vaccine is the sole long-term possible solution for the Indonesian government to tackle the COVID-19 public health emergencies. The third element is a legitimate aim for the limitation, which the ICCPR includes some in the following:

a. Public order
b. Public health
c. Public morals
d. National security
e. Public safety
f. Rights and freedoms of others, rights and reputations of others.[33]

As stipulated in the Article 2 of Law Number 4 of 1984, the object and purpose of the Act is to protect the Indonesian population from a further catastrophe caused by the infectious disease as early as possible in order to protect and improve public health.[34] This article falls under the category of public health and rights and freedoms of others. Through vaccination, an individual may not only protect themselves but also their community and the population as a whole. Those who refused to be vaccinated can be an imminent threat in society and may infringe other people's rights to live their life since COVID-19 has been known to be one of the deadliest viruses.

The fourth element of imposing the rights limitation under the Siracusa Principles is proportionality. In assessing proportionality, there needs to be an evaluation whether the result of the limitation is more beneficial rather than the disadvantage of limiting human rights. In this context, the disadvantage or the limited rights is the right to liberty protected under the Article 9 of ICCPR. When the administration and criminal sanctions are imposed, more individuals and lives are saved, thereby the administration and criminal sanctions delivers bigger benefits and prosperity for the people, thereby the limitation is justified to use under the COVID-19 situation which has been classified as public health emergency.

One of the example of public health emergencies is the case of Ebola Virus Disease in several countries in Africa, the restrictions or limitations of individual rights are justified under such circumstances as a means to curb the virus.[35] Furthermore, in other cases of virus outbreak such as TB and Marburg virus, Siracusa Principles have also been invoked as a legitimate grounds to create limitation on individual rights.[36]

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[33] American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (New York: 1985).

[34] Law Number 4 of 1984 concerning Infectious Diseases Outbreak (1984).

[35] Diego Steven Silva and Maxwell J Smith, "Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles," *Health and Human Rights Journal* 17(1) (2015): 52-57, https://doi.org/10.2307/healhumarigh.17.1.52.

[36] World Health Organization, *Ebola and Marburg Virus Disease Epidemics: Preparedness, Alert, Control, and Evaluation* (Geneva, 2014).

Due to the wider scope of COVID-19, there is bigger gravity since it travels beyond national borders and therefore exceeds the conditions that have been set as precedent for the fulfilment of the Siracusa Principles.

D. Conclusion

The Indonesian government has made an extensive effort in containing the spread of the virus and reducing the gravity of the COVID-19 situation in Indonesia. One of the which is to impose mandatory vaccinations to targeted individuals and imposing administrative and criminal sanctions for those refusing to get vaccinated. Despite the argument that the administrative and criminal sanctions are a breach to the right to liberty protected under Article 9 of ICCPR, such punishment is justified under these circumstances as it has fulfilled the elements provided under the Siracusa Principle by providing that the limitation is prescribed by law, having pressing social implications, provide a legitimate aim for the limitation, and proportionate.

Therefore, the right to public health prevails over the right to liberty protected under Article 9 of ICCPR. Nevertheless, the government should impose proportionate administrative and criminal sanctions on mandatory vaccinations program. The detention and other forms of criminal sanctions shall be the last resort for the government to impose after having done a thorough socialisations towards the targeted groups for vaccinations and ensuring that the criminal sanctions serve as *ultimum remedium*.

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International Investment of Sovereign Wealth Funds (SWFs): Concerns Raised by Western Countries

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Abstract

SWFs are long-term investment vehicles that are owned by a sovereign State. However, many perceive that being State-owned simply means being State-directed and that often also means being political and non-commercial. Such perceptions have been more prevalent in Western countries, given that many SWFs have been established by Middle Eastern and Asian States, which often target acquisitions in Western countries. Those concerns were further heightened by the fact that many Asian SWFs have been non-transparent with respect to the objectives of their investment activities. Based on such concerns, many Western countries have adopted more stringent domestic-based regulations to control investments by SWFs and protect their national security. This paper discusses what is defined as SWFs, why Western countries are concerned about such funds, and domestic policies of Western countries to address SWF investments. This paper argues that regulation of SWFs through international instruments is a better strategy to monitor SWF investments.

Keywords: SWF, investment, state-owned, concerns, issues, western countries.

Intisari

SWFs merupakan kendaraan investasi jangka panjang yang dimiliki oleh suatu negara. Namun, banyak anggapan bahwa menjadi milik negara berarti diarahkan oleh negara dan seringkali juga bersifat politis dan non-komersial. Kekhawatiran seperti itu cenderung lebih banyak dikemukan di negara Barat, mengingat bahwa SWF sebagian besar berasal dari negara Timur Tengah dan Asia yang seringkali menargetkan akuisisi di negara Barat. Kekhawatiran tersebut semakin diperparah oleh fakta bahwa banyak SWF Asia yang tidak bersifat transparan. Berdasarkan kekhawatiran tersebut, maka banyak negara Barat yang mengadopsi peraturan berbasis domestik yang lebih ketat untuk mengontrol investasi SWF dan melindungi keamanan nasional mereka. Penulisan ini membahas mengenai apa itu SWF, mengapa negara Barat mengkhawatirkan entitas tersebut dan kebijakan domestik negara Barat terhadap investasi SWF. Makalah ini berpendapat bahwa pengaturan SWF melalui instrumen internasional merupakan strategi yang lebih baik untuk memantau investasi SWF.

***Kata kunci**: SWFs, investasi, milik pemerintah, masalah, isu, negara barat*

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A. Introduction

Sovereign Wealth Funds ("**SWFs**") have only recently caught the public's attention due to their rapid growth both in number and assets. Put simply, an SWF is a long-term government-controlled investment vehicle whose investment strategy typically includes the acquisition of international assets.[1] SWFs are owned and funded by their respective home countries.[2] Designated for specific financial objectives, SWFs incorporate distinct strategies to fulfill its respective objectives accordingly. Estimates in 2020 indicated that more than 115 SWFs are in operation, representing more than 68 nations.[3] In 2020, the Sovereign Wealth Fund Institute ("**SWFI**"), an organization that tracks SWFs, estimated that total assets under management of SWFs was more than US$ 9,158 trillion.[4]

The fact that most of these SWFs are owned by non-Organization for Economic Co-operation and Development[5] ("**OECD**") countries (i.e., Asian countries) has further heightened public attention towards SWFs. In fact, Asian SWFs currently account for about a quarter of total global SWF assets.[6] The 2008 World Bank Report noted that, "the emergence of the SWFs in Asia is largely a by-product of the strong economic development in Asia."[7] As can be seen in the table below, of the six largest SWFs, only one SWF originated in a European country.

Table 1. Largest SWFs by Total Assets.[8]

RANK	SWFs	ESTIMATED TOTAL ASSETS	REGION
1	Government Pension Fund of Norway (Norway)	$1,289,460,000,000	Europe
2	China Investment Corporation (China)	$1,045,715,000,000	Asia
3	Kuwait Investment Authority	$692,900,000,000	Asia

1 International Monetary Fund, *Sovereign Wealth Funds Generally Accepted Principles and Practices,* (London: International Working Group of SWF, 2008), 1.

2 *Ibid*.

3 International Working Group of SWF, "Our Member," Accessed July 20, 2021. https://www.ifswf.org/our-members.

4 SWFI, "Sovereign Wealth Fund Rankings", Accessed July 20, 2021. https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund.

5 Members of OECD countries include: Australia, Azerbaijan, Bahrain, Botswana, Canada, Chile, China, Equatorial Guinea, Iran, Ireland, Korea, Kuwait, Libya, Mexico, New Zealand, Norway, Qatar, Russia, Singapore, Timor-Leste, Trinidad & Tobago, the United Arab Emirates, the United States.

6 Sudarshan Grooptu, *Sovereign Wealth Fund in East Asia*, (Timor Leste: World Bank, 2008), 6.

7 *Ibid*, 3.

8 International Working Group of SWF, "Our Member".

	(Kuwait)		
4	Abu Dhabi Investment Authority (UAE)	$649,175,654,400	Asia
5	Hong Kong Monetary Authority Investment Portfolio (Hongkong)	$580,535,000,000	Asia
6	Temasek Holdings (Singapore)	$484,441,000,000	Asia

Source: The Sovereign Wealth Fund Institute.

The emergence of these Asian SWFs has signalled a major reshaping of the world's economy, where Asian countries dominate the global economy.[9] As proof, Western countries are only now becoming the key recipients (host countries) of SWFs investments.[10] This is due to several reasons, not least because of Western countries' steady economies and low investment risks.[11] Specific examples include SWFs of China and South Korea investing in two of the biggest U.S. financial institutions, Morgan Stanley and Merrill Lynch, for $5 billion and $2 billion respectively.[12]

Despite the headlines, many Western countries are convinced that SWFs tend to be politically motivated, particularly Asian SWFs. These concerns were emboldened by the fact that many Asian SWFs are non-transparent and therefore it is hard for Western countries to assess whether or not their investment activities are based on non-commercial motives.[13] Western countries also perceived SWFs as destabilizing the investment market in situations where SWFs suddenly move their significant investments from any specific Western country.[14]

In response to those concerns, there has been a push by Western countries (e.g., the U.S., Canada, Australia) to regulate SWFs through their domestic laws as a form of regulatory control over the investments of SWFs in their countries. In the U.S., such concerns have led to the strengthening of the powers of the Committee on Foreign Investment in the United States ("**CFIUS**"), which is in

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9 OECD countries, which five decades ago concentrated 75% of world GDP, today only account for less than 55% of global wealth.

10 Javier Santiso, *OECD Emerging Markets Network Working Paper: Sovereign Development Funds: Financial Actors of the Shifting Wealth of Nations* (Paris: OECD, 2008), 6.

11 *Ibid.*

12 Donghyun Park, *ADB Briefs October 2008 No. 1: Developing Asia's New Sovereign Wealth Funds and Global Financial Stability*, (Asian Development Bank, 2008), 1.

13 *Ibid*

14 Evaritius Oshionebo. "Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries," *Asper Review of International Business and Trade Law* XV (2015), 248-250.

charge of reviewing foreign acquisitions.[15] U.S. laws further enable the CFIUS to reject investments deemed a threat to the U.S. national security.[16]. Australia and Canada also adopted new rules purporting to control the acquisition of domestic companies by foreign state investors.[17] This paper further discusses the general overview of SWFs and issues raised by Western countries as recipient countries of SWF investment. Finally, this article suggests that, contrary to the clamor for more domestic-based regulation of SWFs investment in the respective Western countries, a better strategy would be to regulate SWFs through international regulation. It is also worth noting that for the purposes of this paper, "western countries" refers to developed countries; that is, OECD member countries, such as the U.S., Canada, and Australia.

B. General Overview of SWFs

a. What are SWFs?

SWFs are *foreign-government-controlled investors* ("**FGCI**").[18] SWFs are owned and funded by the governments of their home countries. Sources of funding and objectives of SWFs vary widely from one country to another. Typically, they are established through funds raised from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.[19] In regards to their objectives, the International Monetary Fund ("**IMF**") has classified five types of SWFs, which will be elaborated in detail in the table below.

Table 2. Types of SWFs and Their Objectives.[20]

Types	Objectives	Example of SWFs
Fiscal Stabilization Funds	"Set up to insulate the budget and economy from commodity price volatility and external shocks. Their investment horizons and liquidity objectives resemble that of central banks' reserve managers, in view of their role in	Iran's Oil Stabilization Fund, Taiwan's National Stabilization Fund

15 *Ibid.*

16 Edwin M. Truman, "The Rise of Sovereign Wealth Funds: Impacts on US Foreign Policy and Economic Interest," accessed July 27, 2021. https://www.piie.com/sites/default/files/publications/testimony/truman0508.pdf.

17 Steffen Kern, "SWF and Foreign Investment Policies – an Update," *Deutsche Bank Research* October 22 (2008): 26-30.

18 Organisation for Economic Co-operation and Development. *Foreign Government-Controlled Investors and Recipient Country Investment Policies: A Scooping Paper* (Paris: Organisation for Economic Co-operation and Development, 2009), 6.

19 International Monetary Fund, "Sovereign Wealth Funds – A Work Agenda," *IMF*, accessed July 27, 2021. https://www.imf.org/external/np/pp/eng/2008/022908.pdf.

20 *Ibid.*

	countercyclical fiscal policies to smooth boom/bust cycles."	
Savings Funds	"Set up to share wealth across generations by transforming non-renewable assets into diversified financial assets. Their investment mandates typically reflect a higher tolerance for volatility and a focus on long-term returns."	Kuwait Investment Authority (KIA)
Development Funds	"Set up to allocate resources to priority socioeconomic projects, usually infrastructure"	India's National Investment Infrastructure Fund (NIIF), Nigeria Sovereign Investment Authority (NSIA)
Pension-Reserve Funds	"Set up to meet identified outflows in the future with respect to pension-related contingent-type liabilities on the government's balance sheet"	Japan's Government Pension Investment Fund (GPIF), Chile's Pension Reserve Fund
Reserve Investment Funds	"Set up to reduce the negative carry costs of holding reserves or to earn higher return on ample reserves, while the assets in the funds are still counted as reserves"	Russia's Reserve Fund, Kiribati's Revenue Equalization Fund, Oman's State General Reserve Fund.

Source: The International Monetary Fund (IMF).

In relation to their legal structure, SWFs are also a non-homogenous group. Their legal structure and governance vary significantly from country to country. The IFSWF has classified three types of legal structures of SWFs:

Table 3. The Legal Structures of SWFs.[21]

Legal Structures of SWFs	Example of SWFs
"SWFs established as independent legal entities governed by a specific constitutive law."	Kuwait Investment Authority (KIA), the Korea Investment Corporation (KIC) and the State Oil Fund of the Republic of Azerbaijan (SOFAZ)

[21] International Working Group of SWF, *Santiago Principles: 15 Case Studies*, (Doha: IFSWF's 6th Annual Meeting, 2014), 16.

"SWFs set up as state-owned corporations governed by company law"	China Investment Corporation (CIC), Government of Singapore Investment Corporation (GIC), National Investment Infrastructure Fund (NIIF), and Singapore's Temasek Holdings
"SWFs made up from a pool of assets owned by the state (national or sub-national governments) or the central bank"	Botswana Pula Fund (PF) and Chile's Economic and Social Stabilization Fund (ESSF)

Source: The International Forum for Sovereign Wealth Fund (IFSWF).

b. Significance of SWFs?

SWFs are significant due to the size of their asset holdings. Initially, most SWFs were passive investors,[22] but as time has gone by, SWFs have become active investors.[23] Significantly, SWFs have grown rapidly throughout the past decade, surpassing $9 trillion in assets.[24] In fact, SWFs headquartered in Asian economies are the most active investors.[25] Steffen Kern stated that "Asian SWFs is contributing 66% of the transactions of the funds."[26] Due to the size of their asset holdings, it is very likely that SWFs are able to affect market prices for the investments they target.[27] This is why SWFs are significant and must not be disregarded, particularly by Western countries, given that Western countries are now the primary host countries for SWF investments.

C. Issues Involving SWFs

The significant emergence of SWFs raises various policy issues and concerns for host countries, especially Western countries. Of these concerns, lack of transparency, non-commercial investment motives, and market distortions are at the forefront of the debate.

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22 Paul Rose, "Sovereign as Shareholder". *North Carolina Law Review* 87(1) (2008): 86.

23 *Ibid*, 87.

24 SWFI. "Sovereign Wealth Funds Surpass $9 Trillion in Assets," accessed October 21, 2021. https://www.swfinstitute.org/news/88265/sovereign-wealth-funds-surpass-9-trillion-in-assets.

25 Steffen Kern, "SWF and Foreign Investment Policies".

26 *Ibid*.

27 Kathryn Gordon, "Sovereign Wealth Funds and Recipient-Country Investment Policies: OECD Perspectives" in *Economic of Sovereign Wealth Funds: Issues for Policymakers* ed. Udaibir S. Das et. al. (Washington DC: Monetary Fund, 2010), 1-299.

a. Lack of Transparency

Currently, many western countries deem SWFs as non-transparent investment entities. This is also shown in the Linaburg-Maduell Transparency Index, a method of rating transparency of SWFs developed by Carl Linaburg and Michael Maduell, where many Asian SWFs (particularly those of the Middle East and China) are placed in the lowest rank.[28] The lack of transparency in SWFs happens because transparency for SWFs, as for any other large investor, is a dual-edged sword. On one side, it is perceived that excessive disclosure with respect to SWFs would negatively affect their investment performance and strategy. This concerns how disclosure over short-term performance metrics may ultimately harm long-term investment as the investments would be allocated towards short-term performance.[29] On the other hand, lack of disclosure has led to host countries perceiving SWFs as political investors. Fears were prevalent among western countries that SWFs may potentially be misused by authoritarian governments to weaken western economy. Nevertheless, limited evidence exists to support the presence of politically driven investments. The following is supported by a data by the IMF indicating that authoritarian governments were inclined to avoid investment prone to political influence.[30]

However, given the recent and projected growth of SWFs, the transparency of SWFs is a crucial factor. As stated by Steffen Kern, transparency of SWF is important due to two reasons: [31] "First, without insight into SWF activity, it is difficult to assess systemic risks or to determine whether SWFs are in fact pursuing strategic, non-commercial investment strategies (which will be discussed further below). Second, limited disclosure makes it difficult to assess the management and governance of the funds and, therefore, difficult to identify mismanagement or corruption by fund managers."

Unfortunately, there are no legally binding regulations or disclosure requirements for SWFs. The only current international instrument that calls for higher transparency of SWFs is the Santiago Principle—non-binding guidance

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[28] SWFI. "Linaburg-Maduell Transparency Index (LMTI)," accessed April 20, 2021. https://www.swfinstitute.org/research/linaburg-maduell-transparency-index.

[29] Adam D. Dixon, "Enhancing the Transparency Dialogue in the "Santiago Principles" for Sovereign Wealth Funds". *Seattle University Law Review* 37 No. 581, (2010): 584.

[30] Victoria Barbary, Bernado Bortolotti, "Sovereign Wealth Funds and Political Risk: New Challenges in the Regulation of Foreign Investment" World Scientific Book Chapters, in *Regulation of Foreign Investment Challenges to International Harmonization*, ed. Zdenek Drabek & Petros Mavroidis, (World Studies in International Economics: Volume 21, 2013), 317-318.

[31] Anthony Wong, "Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations," *Brooklyn Journal of International Law* 34(3) (2009): 1096.

established by IFSWF, which will be discussed in detail below.

b. Politically-Based Investment

This section explores the issue of the political versus commercial objectives of SWFs. The OECD differentiates between political and commercial objectives as follows:[32] "A political objective, in its broadest possible sense, refers to any goal related to the implementation of any aspect of public policy. Whereas a commercial objective refers to economic transactions motivated by the desire to earn money or reduce costs."

With that in mind, there are growing fears raised by western countries that SWFs will be used by their home countries' governments to achieve non-commercial (political) goals, in addition to commercial goals.[33] In other words, western countries fear that political relations may play a role in SWF decision-making. Such notion is heightened by the fact that SWFs usually have direct control from their home countries' governments. For example, the appointment and removal of an SWF's governing body typically requires the consent of the government controlling the relevant entity. In many cases, key positions are also conferred to individuals with close ties to the State, such as a present or former minister. The ruler of Abu Dhabi, for example, serves as chairman of the ADIA (Abu Dhabi's SWF), with other family members acting as managing directors.[34] The Chairman of the KIA (Kuwait's SWF), Mariam Al-Aqeel have previously served as the country's Minister of Finance.[35] In China, the Chairman and Chief Executive Officer of GIC, Lou Jiwei, had a ministerial position within the State Council.[36]

Due to those perceived political influences, many commentators are also concerned that home countries will use their SWFs to support what one analyst has called "state capitalism," using government-controlled assets to secure stakes around the world in strategic areas such as telecommunications, energy and mineral resources, and financial services, among other sectors.[37] Nevertheless, many countries enforce foreign investment laws to filter such concerns through rejecting investments in certain sectors deemed strategic or sensitive. Moreover,

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[32] Organisation for Economic Co-operation and Development, *Foreign Government-Controlled Investors*, 10.

[33] *Ibid.*

[34] ADIA, "Board of Director," accessed July 23, 2021. https://www.adia.ae/en/investments/governance/board-of-directors.

[35] New Kuwait Summit 2019, "H.E. MRS. MARIAM AL AQEEL," Accessed 22 October 2021, https://newkuwaitsummit.com/user-profile/he-mrs-mariam-al-aqeel.

[36] Martin A. Weiss, "Sovereign Wealth Funds: Background and Policy Issues for Congress," *Congressional Research Service* (2009).

[37] *Ibid.*

many fear that SWFs may use their influence through portfolio companies to gain access to natural resources, know-how, confidential information or to gain competitive advantage.[38] Relatedly, many also fear that such sensitive information so acquired would then be used by the SWFs (or their governments) for insider-trading purposes.[39]

In the end, although these political influences in investment may lead to poor financial performance and inefficiency in target firms (form a strictly economic perspective), as SWFs would have additional objectives besides return maximization, such as achieving political and social goals.

c. Market Distortion

SWFs investments in western countries are equally alleged to be capable of destabilizing the investment market in situations where SWFs might suddenly withdraw or divest (for economic or non-economic reasons) their large investments from any particular Western country. This can be so, because SWFs already hold a significant amount of assets and if they are carelessly managed, there will be broad consequences for the whole market.[40] Moreover, whether financial stability would be impacted is heavily dependent on the motives behind the investments. When driven by ulterior motives such as political motives, SWFs may potentially create market distortion. For example, particular SWFs are inclined to a sudden selling of assets which would ultimately lead to market volatility.[41]

As stated by Anthony Wong, "in addition to the risk of market shock and stability, the risk of sudden movement by SWFs will also cause a rise in interest rates because an interest rate is an aggregate of the real interest rate, inflation expectation, risk premium, and liquidity preference".[42] An increase in risk will require borrowers to offer additional risk premiums to compensate the investors. Altogether, an increase in risk will cause an increase in interest rates.[43] In the end, investment prices may be artificially inflated and misrepresent the true relative market value.

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38 European Economy, "The so-called 'Sovereign Wealth Funds': Regulatory Issues, Financial Stability and Prudential Supervision," *European Economy Economic Papers* 378 April, (2009), 30.

39 Richard A. Epstien and Amanda M. Rose, "The Regulation of Sovereign Wealth Funds: The Virtue of Going Slow," *The University of Chicago Law Review* 76(1) (2018), 123.

40 Anthony Wong, "Sovereign Wealth Funds", 1094.

41 Roland Beck, Michael Fidora, "The Impact of Sovereign Wealth Funds on Global Financial Markets", *European Central Bank*, Occasional Paper Series No. 91, July 2008, 24.

42 Anthony Wong, "Sovereign Wealth Funds", 1101.

43 *Ibid.*

D. Response of Western Countries

Based on the several issues mentioned, SWFs are presumed to be offenders until proven innocent.[44] Therefore, to protect their national security interest from such investment, many Western countries have enacted laws that restrict or prevent sovereign investment funds from purchasing or acquiring a controlling stake in their respective countries. Below, we will see the regulatory measures taken by Canada, the U.S., and Australia over government-owned investments, including SWFs, in their countries.

a. Canada

In Canada, for example, the Investment Canada Act empowers the Canadian government to review state foreign investments that are potentially injurious to national security.[45] The Act also empowers the government to prevent the acquisition of a controlling stake in Canadian companies by foreign state investors. Pursuant to section 14 of the Act, the Canadian government has the authority to review any investment by foreign investors that acquire control of a Canadian business where the assets of the Canadian business exceed the prescribed threshold.[46] For the government-controlled investors, including SWFs, the threshold for review is C$369 million (Canadian dollars) in asset value.[47] As a result, investment by an SWF to acquire control of a Canadian company whose asset value is at least C$369 million is subject to review by the government of Canada. A notable instance is the acquisition of Aecon Group Inc. (Canadian construction company) by China Communications Construction Company Ltd. (Chinese state-owned engineering and construction company) valued to be C$1.5 billion. This was subject to review by the government of Canada in accordance with the *Act* which subsequently was blocked to safeguard Canada's national security.[48]

b. The U.S.

Different from Canada that authorizes its government to review potentially injurious transactions of an SWF, in the U.S. the authority to review such transactions is conferred on a specific institution, which is the Committee on Foreign Investments in the United States ("**CFIUS**"). In the U.S., the Foreign Investment and National Security Act of 2007 ("**FINSA**") empowers the CFIUS

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44 Investment Canada Act (R.S.C., 1985, c. 28 (1st Supp.)), Justice Laws § 25.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 CBC News, "Federal government blocks sale of construction giant Aecon to Chinese interests", *CBC News*, Accessed 23 October 2021, https://www.cbc.ca/news/politics/canada-blocks-aecon-sale-china-1.4675353.

to review any state foreign acquisition transactions and make recommendations to the President regarding whether or not the President should veto the foreign acquisition transactions.[49] Therefore, the President of the U.S. has the power to veto or block any proposed or pending acquisition of a U.S. company by foreign state investors if the President considers that the acquisition transaction is a threat to national security.[50]. In 1990, for example, the CFIUS's review of the acquisition of MAMCO Manufacturing, a U.S. company engaged in the manufacturing of airplane components and parts, by the China National Aero-Technology Import & Export Corporation led President George H.W. Bush to veto the acquisition.[51] More recently, on 2017, following a review by the CFIUS of the potential threat to the U.S. national security, President Trump have ordered the blockage of $1.3 billion acquisition of Lattice Semiconductor Corporation, a U.S. company engaged in semiconductor manufacturing by Canyon Bridge Capital, a Chinese private equity firm backed by its government.[52]

Unlike Canada that sets a threshold for a transaction subject to review, the CFIUS review process can be applied whenever control of a U.S. business is acquired, without any specific threshold. As stipulated under FINSA, reviewable transactions include a "covered transaction", defined as "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States."[53] By this extensive review authority, many experts deem CFIUS as "one of the most demanding foreign investment processes among the industrialized economies—not least for sovereign investors."[54]

c. Australia

Foreign state investment control in Australia is regulated under the Foreign Acquisitions and Take-overs Act, Act No. 92 of 1975. foreign state investment control aims to ensure that foreign state investment does not run against Australia's national interest.[55] The control process requires a foreign

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49 Evaritius Oshionebo. "Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries," *Asper Review of International Business and Trade Law* 217 (2015): 253.

50 Anthony Wong. "Sovereign Wealth Funds", 1088.

51 Jared T. Brown and Daniel H. Else, "The Defense Production Act of 1950: History, Authorities, and Reauthorization," *Congressional Research Service* (2014): 21.

52 Liana B. Baker, "Trump bars Chinese-backed firm from buying U.S. chipmaker Lattice", *Reuters*, September 14, 2017. Accessed October 24, 2021, https://www.reuters.com/article/us-lattice-m-a-canyonbridge-trump-idUSKCN1BO2ME.

53 Foreign Investment and National Security Act of 2007, H.R. 556 (110th) (2007).

54 Steffen Kern, "Control Mechanism for Sovereign Wealth Funds in Selected Countries," *CESifo DICE Report* 06 (4) (2008): 44.

55 Steffen Kern, "SWF and Foreign Investment", 26.

government investment to identify itself to the government and the Foreign Investment Review Board ("**FIRB**") will examine the investment.[56] The FIRB plays an advisory role in this process while final authority rests with the federal Treasurer, who can reject proposals deemed contrary to the national interest or impose conditions on them to address national interest concerns.[57]

The FIRB is mandated to ensure that investments are consistent with any specific legislation in areas such as transport and telecommunications.[58] It also examines whether proposals have implications for other government policies, competition, or the operation of Australian businesses.[59] This intervention mandate clearly sets the tone that Australia was, and still is, particularly concerned about the entry of foreign State investors.

D. Criticism Toward Western Countries' Responses

Prominently, regulations enacted by Western countries are deemed insufficient to address the concerns about national security and control of Western companies by SWFs.[60] Rather, those investment measures targeted at state investors often have negative spill-over effects for a commercially motivated foreign state investors,[61] and it is therefore also likely that it will harm the country's competitive position in terms of market openness by international standards.

Moreover, such stringent regulatory measures enacted by Western countries are also likely to run counter to the free market principles promulgated by the OECD in 2009.[62] Even though the OECD acknowledges the host countries' rights to take such actions as they consider necessary to protect national security, such restrictions, however, should be guided by the principles of proportionality, regulatory transparency, and predictability.[63] Unfortunately, there is no clear

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56 *Ibid.*

57 *Ibid.*

58 Steffen Kern, "Control Mechanism for Sovereign Wealth Funds in Selected Countries", 44.

59 *Ibid.*

60 Joel Slawotsky, "Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulation Should Respond," *Georgetown Journal of International Law* 4(40) (2009): 1249.

61 Edward F. Greene and Brian A. Yeager, "Sovereign Wealth Fund- A Measured Assessment," *Capital Market Law Journal* 3 (3) (2008): 247.

62 Organisation for Economic Co-operation and Development, "International Investment of Sovereign Wealth Fund: Are New Rules Needed," accessed July 26, 2021. https://www.oecd.org/daf/inv/investment-policy/39979894.pdf.

63 Organisation for Economic Co-operation and Development, "Sovereign Wealth Fund and Recipient Countries – Working Together to Maintain and expand Freedom of Investment," accessed July 26, 2021. https://search.oecd.org/daf/inv/investment-policy/41456730.pdf.

guidance on constituting "transparent, proportional, and predictable". In addition, security and commercial interests may conflict one another since if investments are rejected for reasons of security, transparency as to why the investment was rejected may not always be feasible. Therefore, the applications of such principles vary widely from one country to another.[64] With such a lack of guidance, it is very likely that restrictions on foreign state investment performed by Western countries would undermine the Western countries' commitment to open investment. As stated by Jeffrey Garten (2008), professor of finance at Yale School of Management, "while prudent regulation in selected areas can be justified, the current Western counties' governments action is likely to produce too much government intervention."[65]

E. The Ways Forward

As stated by Anthony Wong: "international regulation and monitoring of SWFs is preferable to domestic regulations and monitoring".[66] In particular, such a forum is attractive because of its ability to alleviate many of the concerns discussed above. Moreover, there are also several additional benefits of international regulation compared to domestic-based regulations as follows:[67]

a. The first benefit is that international regulations would protect the host and recipient countries' interests equally, create a level playing field, and avoid over-regulation due to nationalist and protectionist pressures. This can be so, because the drafting of international regulations creates an opportunity for both the home country and host country to have a meaningful dialog over how SWFs should be regulated. If left solely to domestic regulations, there is a risk that only recipient countries' concerns will be addressed, as SWFs and their host countries will not have an opportunity to voice their concerns.

b. The second benefit is that international regulations will create uniform regulations governing SWFs. A uniform or even a mostly uniform regulatory system will have the additional benefit of lower compliance cost and redundancy. This approach also discharges the problem and possibility of conflicting regulations. However, it is important to consider that creating a uniform regulation on SWFs may pose difficulties in its negotiation process for particular governments to give up discretion, particularly on matters concerning security or are

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64 *Ibid.*

65 T.T. Ram Moham, "Sovereign Wealth Funds: Western Fears," *Economic and Political Weekly* 43(15) (2018): 8-12.

66 Anthony Wong, "Sovereign Wealth Funds", 1099.

67 *Ibid*, 1100.

strategically sensitive.

Unfortunately, currently, specific international legal instruments governing SWFs are very limited in quality and quantity. In terms of quality and quantity, only Generally Accepted Principle and Practice (GAPP) of SWFs (known as Santiago Principles) provide meaningful guidance for the organization and implementation of SWFs internationally. The Santiago Principles were drafted by the International Working Group of SWF (IWG).[68] They are comprised of 24 principles that call for more transparency of SWF activities and offer important guidelines for the structure, governance, and management of SWFs, which aim to allay all the concerns brought by host countries.[69]

Even though the Santiago Principles offer a guidance for SWFs, they have several flaws that constrain their effectiveness in achieving their stated objectives, most notably because of their non-binding nature as a set of voluntary principles. As a result, even if the Santiago Principles are enacted, such principles will be no more than just that, principles, effectively leaving political application to national governments, so that the degrees of commitment and the ways of implementation and enforcement are likely to vary.[70] Therefore, to alleviate all issues raised by Western countries mentioned above, it is advisable for the IWG to create an expanded and binding list of guiding principles, or regulations, of SWF investment.

While waiting for a more stringent international regulation of SWF, to fulfill such a legal vacuum, bilateral options through Bilateral Investment Treaties (BITs) could also be explored. BITs have their own advantages in regulating SWFs, one of which is flexibility to tailor their standards to the unique concerns raised by each potential investor. For example, more non-transparent SWFs may be subjected to more stringent transparency regulation, but already transparent SWFs may be subjected to less stringent transparency regulation through BITs. Moreover, BITs also contain dispute resolution provisions that will provide a mechanism to enhance effective enforcement of the agreements.

F. Conclusion

SWFs have raised concerns, triggered in part due to their rapid growth in both size and number. These concerns have especially been raised by Western countries, given that they are now the target of SWFs investment, as follows: (i)

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68 International Monetary Fund, *Generally Accepted Principles and Practices,* 5.

69 Udaibir. S. Das, Adnan Mazarei, and Alison Stuart, "Sovereign Wealth Fund and the Santiago Principles" in *Economic of Sovereign Wealth Funds: Issues for Policymakers* ed. Udaibir S. Das et. al. (Washington DC: Monetary Fund, 2010).

70 *Ibid*, 60.

SWF lack of transparency; (ii) SWF politically-based investment; and (iii) SWF potential to distort the market.

Because of such concerns, many Western countries have adopted a more stringent domestic-based regulation to control SWF investment in their respective countries. For instance, in Canada, state foreign investments are subject to government review. In the U.S., any state foreign acquisition transactions are subject to CFIUS review. Moreover, the president of the U.S. also has power to veto state foreign acquisition transactions. In Australia, any state foreign government investment is to be notified to the government and examined by the FIRB.

Some scholars have stressed that the laws and regulation thus far enacted by Western countries do not adequately address concerns about national security and control of Western companies or investment targets by SWFs. Rather, it is argued that those investment measures targeted at foreign State-investors might have negative spill-over effects for the commercially-motivated foreign state investors who have not been assessed as such. Therefore, some scholars argue that international regulation of SWFs is more beneficial and preferable to domestic regulations. However, currently, specific international legal instruments governing SWFs are very limited in quality and quantity. Therefore, while waiting for a more stringent international regulation of SWF, to fulfill such a legal vacuum, bilateral action option through BITs could be explored.

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Constitutional Provisions About Indigenous People in Indonesia and Brazil: Lessons Learned

C. Clarissa Intania[1]

Abstract

Due to the indigenous peoples' condition of being prone to conflict and discrimination, it is important for the law, especially the constitution, to protect indigenous peoples. In this article, the author discusses the recognition and protection of indigenous peoples under the Indonesian and Brazilian constitutions. This research is a normative research. Based on the comparison, the approach used by the 1988 Brazilian Constitution on regulating the indigenous peoples' recognition and protection are more specific than the approach used by the Amended 1945 Indonesian Constitution. The 1988 Brazilian Constitution regulates the indigenous rights which is a direct result from the constitutional recognition and protection. These include the right to be different, the ability to file a lawsuit, and provision on land rights, which are not included in the Amended 1945 Indonesian Constitution.

Keywords: indigenous people, rights, recognition, protection, constitution.

Intisari

Berdasarkan keadaan masyarakat adat yang rentan terhadap konflik dan diskriminasi, sangat penting untuk masyarakat adat untik dilndungi oleh hukum, terutama konstitusi. Dalam artikel ini, penulis akan membahas pengakuan dan perlindungan dari masyarakat adat di bawah konstituti Indonesia dan Brazil. Penelitian ini adalah penelitian normative. Berdasarkan perbandingan, pendekatan yang digunakan Konstitusi Brazil Tahun 1988 dalam mengatur pengakuan dan perlindungan dari masyarakat adat, lebih spesifik dibandingkan pendekatan yang digunakan oleh UUD NRI Tahun 1945. Ini termasuk hak untuk menjadi berbeda, kemampuan untuk mengajukan gugatan, dan pengaturan hak tanah, yang tidak termasuk dalam UUD NRI Tahun 1945.

Kata kunci: *masyarakat adat, hak-hak, pengakuan, perlindungan, konstitusi.*

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A. Introduction

Indigenous peoples consist of 176.6 million people from 5,000 groups spread across 90 different countries.[1] Among them, 70% of all indigenous peoples live in the Asia-Pacific, 16.3% in Africa, 11.5% in Latin America, and 0.1% in Europe and Central Asia.[2] Indigenous peoples currently occupy about 22% of the land area worldwide and contribute to a large part of the world's cultural diversity, including speaking most of the world's 7000 languages.[3] There is no universally accepted definition of indigenous peoples. However, they generally possess these common characters:

a. Occupation of ancestral lands, or at least of part of them;
b. Common ancestry with the original occupants of these lands;
c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
e. Residence in certain parts of the country, or in certain regions of the world;
f. Other relevant factors.[4]

Indigenous peoples have a special connection with the land they have lived in for generations and possess the knowledge on the sustainable management and protection of the natural resources around them.[5]

Indigenous peoples, as one of the most marginalized and discriminated groups in the State, often face conflicts that threaten their territory, way of living, and their existence as a whole. In 2019, there were 15 cases of arrests of, violence towards, evictions of, and land grabs from indigenous peoples groups.[6] For example, with traditional farmers were criminally penalized in Central and West Kalimantan.[7] Maulidin and Sarwani, farmers who practice the traditional "cut and burn framework" when working the fields[8] to develop rice in a region less than one hectare were both

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1 International Labour Organization, *Implementing The ILO Indigenous And Tribal Peoples Convention No. 169: Towards An Inclusive, Sustainable And Just Future* (Switzerland: ILO Publications, 2019), 13.

2 *Ibid.*

3 "No Indigenous Peoples", *UNESCO*, accessed 12 December, 2020, https://en.unesco.org/indigenous-peoples.

4 Benedict Kingsbury and William S. Grodinsky, "Self-Determination and "Indigenous Peoples", Proceedings of the Annual Meeting (American Society of International Law) 86 (1992): 386.

5 *Ibid.*

6 "Indigenous Peoples in Indonesia", *International Work Group for Indigenous Affairs*, last modified 2020, accessed 12 December, 2020, https://www.iwgia.org/en/indonesia/3602-iw-2020-indonesia.html

7 *Ibid.*

8 Andre Barahamin, "Menyasar dan Memenjarakan Para Peladang", accessed 10 December, 2020, https://www.mongabay.co.id/2019/12/10/menyasar-dan-memenjarakan-para-peladang/

accused of burning the forest.[9] The criminalisation of traditional farmers in Kalimantan was massive that some of the few cases that made it to trial.[10]

Brazil also faces problems regarding their indigenous people's protection. According to Amnesty International, in 2020, Brazil's indigenous land right and natural environment were threatened by people or parties who commit wildfires, Illegal mining, and land grabbing for illegal farming and agribusiness.[11] According to the data collected by National Institute for Space Research, there was an increase of 9.5% forest destruction consisting of more than 11,000km^2 area between August 2019 and July 2020 compared to the previous period.[12]

Due to the indigenous peoples' conditions of being prone to conflict and discrimination, it is important for the law, especially the constitution, to protect indigenous peoples. As the supreme law of the State, the constitution defines the governmental structure, institutions, political power distribution, recognition and protection of fundamental rights, and the relationship between the government and the citizens.[13] By having indigenous peoples recognized within the constitution, it would provide indigenous peoples with the enhanced protection they need to exercise their rights. These provisions should encompass:[14]

a. Clear and enforceable provisions regarding the protection of indigenous people through fundamental rights;
b. Recognition of indigenous peoples' right and equality;
c. Consistent protection of indigenous peoples since the constitution is harder to change that that of statutory law;
d. Prioritize indigenous peoples' protection when making legislations and policies;
e. Recognition of more than one sources of law, especially customary law;
f. Establishment of institutions relating to indigenous peoples' protection;
g. Establishment of indigenous peoples' right to self-determination, autonomy, and self-government;
h. Recognition of indigenous peoples' identity, specialized rights and processes, and constitutional commitments to equality and non-discrimination.

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9 International Work Group for Indigenous Affairs, *International Work Group for Indigenous Affairs.*

10 According to *Ibid,* those cases are:
   a. Gusti Mauludin and Sarwani (Central Kalimantan);
   b. Saprudin part of Lebu Juking Pajang (Central Kalimantan);
   c. Nadirin and Akhmad Taufiq (Central Kalimantan);
   d. Layur (West Kalimantan);
   e. Reto, Petrus Sabut's son and Hero, Reto's son (Central Kalimantan);
   f. Antonius (passed away) (Central Kalimantan).

11 Amnesty International, "Brazil 2020", accessed 26 October 2021, https://www.amnesty.org/en/location/americas/south-america/brazil/report-brazil/

12 *Ibid.*

13 Amanda Cats-Baril, *Indigenous Peoples' Rights in Constitutions Assessment Tool* (Stockholm: International Institute for Democracy and Electoral Assistance, 2020), 9.

14 *Ibid*, 9-10.

In this paper, the recognition and protection of indigenous peoples under the Indonesian Constitution and Brazilian Constitution are discussed. Indonesia is an archipelagic country with strong indigenous diversity[15] and Indonesia recognizes indigenous peoples within its constitution. Similarly, Brazil has numerous matters of the State and traditions that involve its indigenous peoples.[16] Brazil also recognizes indigenous peoples in its constitution. However, there remains different approaches in each constitutions when it comes to recognizing and protecting their indigenous peoples. The author used Brazil's Constitution as a model on how more specific provisions in Indonesian Constitution can accommodate indigenous rights better.

B. Indigenous Peoples' Recognition and Protection Under Indonesian Constitution

Indonesian regulations recognize numerous terms referring to indigenous people, such as:

a. "*masyarakat hukum adat*" (*adat* law community) in Law No. 5 of 1960 regarding Basic Agrarian Law, Law No. 39 of 1999 regarding Human Rights, Law No. 41 of 1999 regarding Forestry, Law No. 21 of 2001 regarding Special Autonomy Papua, Law No. 7 of 2004 regarding Water Sources, Law No. 18 of 2004 regarding Plantation, Law No. 32 of 2009 regarding Environmental Protection and Utilisation, Agrarian Minister/Head of National Land Agency No. 5 of 1999 regarding Guidance on *Adat* Law Community's *Ulayat* Right Dispute Resolution;
b. "*masyarakat tradisional*" (traditional community) in Article 28I (3) of the Amended Indonesian 1945 Constitution and Law No. 27 of 2007 regarding Coastal Area and Small Islands Management;
c. "*masyarakat adat*" (*adat* community) in Law No. 21 of 2001 regarding Special Autonomy Papua and Law No. 27 of 2007 regarding Coastal Area and Small Islands Management;
d. "*masyarakat adat yang terpencil*" (marginalized adat community) in Law No. 30 of 2003 regarding National Education System;
e. "*kesatuan masyarakat hukum adat*" (adat law community unit)" in Law No. 32 of 2004 regarding Regional Government.
f. "*masyarakat lokal*" (local community) in Law No. 27 of 2007 regarding Coastal Area and Small Islands Management.

The term of *adat* law community was first introduced by Van Vollenhoven, which referred to the native people of Indonesia.[17] This term was introduced in relation to the enactment of a policy made by the Dutch Government in 1939, which was the

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15 Until 2018, Indonesia approximately has 2371 indigenous community registered under *Aliansi Masyarkat Adat Nusantara* with ± 70 million indigenous people in Melati Kristina Andriarsi, "Sebaran Masyarakat Adat", last modified 2020, accessed 12 December, 2020, https://katadata.co.id/padjar/infografik/5f8030631f92a/sebaran-masyarakat-adat.

16 "Indigenous Peoples in Brazil", *International Work Group for Indigenous Affairs*, last modified 2019, accessed 12 December, 2020, https://www.iwgia.org/en/brazil.html.

17 J.F. Holleman (ed.), *Van Vollenhoven on Indonesian Adat Law*, (The Hague: Springer-Science+Business Media, 1981), 5.

Indische Staatregeling (Indies Constitution).[18] Due to the more common use of "adat law community" in regulations,[19] the term "*adat* law community" will be used when talking about indigenous peoples in the Indonesian context.

Indonesia has gone through changes in form of state and government since its independence, which has resulted in the drafting of four versions of the Indonesian Constitutions:

a. Indonesian 1945 Constitution (*Undang-Undang Dasar 1945*), the first Indonesian Constitution established in 1945;
b. Indonesian Federal Constitution (*Undang-Undang Dasar Republik Indonesia Serikat*), the Constitution established when Indonesia was a Federal State in 1949-1950;
c. Indonesian 1950 Temporary Constitution or Law No. 7 of 1950 (Undang-Undang Dasar Sementara Republik Indonesia), the temporary Constitution established in 1950 as the result of the Indonesian Federation termination;
d. Amended Indonesian 1945 Constitution ("*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945"*), the amended 1945 Constitution or the present Constitution.

During the discussion of the Indonesian 1945 Constitution ("**1945 Constitution**"), the main focus was to consolidate political power and to have that Constitution only as a temporary Constitution.[20] However, during this discussion, two founding fathers, Yamin and Soepomo initiated a discussion on territorial *adat* law society in Indonesia, where there were *zelfbes turendelandshappen* and *volkgemeenshappen* consisted of 21,000 villages in Java, 700 *nagari* Minangkabau, and many more.[21]

Even though *adat* law society was not explicitly mentioned, that discussion resulted to the Article 18 of the 1945, stated:

> "The division of the area of Indonesia into large and small regional territories together with the structure of their administration, shall be prescribed by statute, with regard for and in observance of the principle of deliberation in the

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[18] Jawahir Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", *Jurnal Hukum Ius Quia Iustum* 20(1), (2013): 22.

[19] Kementerian Perencanaan Pembangunan Nasional/Badan Perencanaan Pembangunan Nasional, *Masyarakat Adat di Indonesia: Menuju Perlindungan Sosial yang Inklusif* (Jakarta: Direktorat Perlindungan dan Kesejahteraan Masyarakat Kementeriaan PPN/Bappenas, 2013)*,* 2-7.

[20] Herlambang P Wiratraman, *Laporan Akhir Tim Pengkajian Konstitusi tentang Perlindungan Hukum Terhadap Masyarakat Hukum Adat* (Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nassional Kementerian Hukum Dan Hak Asasi Manusia RI, 2014), 14-15.

[21] Syafruddin Bahar, *et. al.* (edt*), Risalah Sidang BPUPKI dan PPKI*, 3rd Ed., (Jakarta: Sekretariat Negara Republik Indonesia, 1995), 18.

governmental system of the State, and the traditional rights in the regional territories which have a special character."[22]

This article recognizes the uniqueness of regions and their natives along with their origin rights in order to support the central government.[23] In the Indonesian Federal Constitution (*Undang-Undang Dasar Republik Indonesia Serikat*), the closest article related to *adat* law community and their indigenous rights is Article 47. However, issues related to civil rights and the relations between people and natural resources had not been considered urgent and topic of the adat law community has not been thoroughly discussed since this Constitution was mostly about regulating political power.[24]

The Indonesian 1950 Temporary Constitution (1950 Temporary Constitution) also did not regulate *adat* law societies. It regulated regions and autonomous regions known as *swapraja*, which was closer in meaning to *zelfbesturende landschappen* than *adat* law society that is currently being discussed.

Indonesia returned to use the 1945 Constitution after reverting to being a unitary State once again. Since Article 18 of the 1945 Constitution did not explicitly mention *adat* law societies, the lower laws would be the ones expected to provide more explicit regulations. One of these lower laws is Law No. 5 of 1960 regarding Basic Agrarian Law,[25] which still applies as of the writing of this paper. The Basic Agrarian Law covers the provisions regarding the *adat* law community and their land rights (*hak ulayat).*

The law and society in Indonesia has progressed alongside social, economic, and political conditions. Instead, the freedom of the *adat* law community has increasingly gotten more marginalized.[26] The *adat* law community has often been viewed as or associated with primitive societies that isolate themselves from the development of technology and science.[27] They are oftentimes called "illegal cultivator (*peladang liar),* "illegal loggers" (*penebang liar),* "alienated tribe" (*suku terasing),* "alienated society" (*masyarakat terasing),* and other labels which refer to their marginalized conditions.[28]

Since 1998, the Reformation era marked a new beginning for the *adat* societies' effort to have their basic rights legally accommodated.[29] The Congress of Association of the *Adat* Community of the Archipelago (*Kongres Asosiasi Masyarakat Adat*

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22 Indonesian 1945 Constitution (1945) [hereinafter 1945 Constitution], Article 18.

23 Herlambang P Wiratraman, *Laporan Akhir Tim Pengkajian Konstitusi tentang Perlindungan Hukum Terhadap Masyarakat Hukum Adat*, 15.

24 *Ibid.*

25 *Ibid, 12.*

26 Tania Murray Li, "Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone", *Modern Asian Studies 35,* no. 3 (July, 2001): 655.

27 *Ibid.*

28 Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", 23 and Tania Murray Li, "Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone", 655.

29 *Ibid*, 27.

*Nusantara/*KAMAN*)* voiced their disagreement in identifying the *adat* law community as alienated groups or illegal loggers.[30] According to KAMAN, the *adat* law community is a community with a specific geographical origin that has its own values, ideologies, economy, politics, territory, and culture.[31] The government, which as a result of Reform leaned more towards the decentralisation of powers, was receptive to the idea of supporting the adat societies in taking care of their own territories as regional government units.[32]

KAMAN's statement was later acknowledged by the *Ad Hoc* Committee I of the People Consultative Assembly (*Majelis Permusyawaratan Rakyat*/MPR) of the Republic of Indonesia and realised in the amendment process of the 1945 Constitution. The expected amendment was presented in Article 18B (2) of the Amended Indonesian 1945 Constitution (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*/Amended 1945 Constitution) provides that:

> "The State shall recognize and respect entities of the *adat* law societies along with their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws."[33]

This recognition is also manifested in Article 28I(3) of Amended 1945 Constitution, which states that "the cultural identity and the right of traditional societies shall be respected in harmony with the development of the age and civilization."[34] It is clear that Article 18B(2) and Article 28I(3) of the Amended 1945 Indonesian Constitution use different terms to describe indigenous peoples. Article 18B(2) uses "*adat* law community" while Article 28I(3) uses "traditional communities". These terms, however, do not bear significant difference. According to the translation of Indigenous and Tribal Peoples Convention of 1989, indigenous and tribal peoples are translated to "*adat* law community", in accordance with the term used by the National Commission of Human Rights and the Constitutional Court, while other common translations are *adat* community and traditional community.[35]

Article 18B(2) of the Amended 1945 Constitution also provides the criteria for indigenous peoples to be included as the *adat* law society, which requires that they: a) still exist; b) are in line with societal development; c) in line with the ideology of Indonesia; and d) regulated further by law.[36] Rahardjo mentioned these criteria as a form of hegemonic State power to determine the existence of the *adat* law community

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30 Gregory L. Acciaioli, "Memberdayakan Kembali Kesenian Totua: Revitalisasi Adat Masyarakat To Lindu di Sulawesi Tengah", *Antropologi Indonesia 25,* no. 65 (2001): 61.

31 *Ibid.*

32 Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", 27.

33 Amended Indonesian 1945 Constitution (2002) [hereinafter Amended 1945 Constitution], Article 18B (2).

34 Amended 1945 Constitution, Article 28I (3).

35 International Labor Organization, *Konvensi Masyarakat Hukum Adat 1989* (Jakarta, International Labor Organization, 2007), 5.

36 Herlambang P Wiratraman, *Laporan Akhir Tim Pengkajian Konstitusi tentang Perlindungan Hukum Terhadap Masyarakat Hukum Adat,* 21.

because the State always intends to interfere, regulate, define, share, and classify things.[37] Wignjosoebroto mentioned that these criteria, in theory and in practice, are interpreted as a petition-based recognition (*pengakuan yang dimohonkan*), where the *adat* law community should prove their own existence in order to be recognized by the State.[38]

In Article 18B(2) and 28I(3), the *adat* law community is recognized and respected. By recognising means giving acknowledgement and respect by the State to the *adat* legal systems and their indigenous rights.[39] The acknowledgement in Article 18B(2) emphasizes that the *adat* law community has the right to live and said right accorded to them is as important as is given to other administrative units, e.g., city and municipality.[40] Therefore, the Amended 1945 Indonesian Constitution has provided more explicit provisions on *adat* law community.

There are two phrases which needs to be carefully observed, which are "[..] in harmony with the development of the age and civilization"[41] in Article 28I(3) and "in accordance with [...] and the principle of the Unitary State of the Republic of Indonesia"[42] in Article 18B(2). For the first phrase, it was made to respond to the future challenges of globalization.[43] It is done in hopes that when the locals face the difficulty of facing globalization and exploitation in the future, the State, as the stronger institution, would be there to support them.[44] For the second phrase, Syafrudin and Na'a note that the recognition on traditional customary rights should be based on the principle or ideology of Indonesia[45] which may refer to Pancasila as the *staatfundamentalnorm.* This is similar with one of the four conditions previously mentioned by Rahardjo. These criteria, however, show that the recognition of the *adat* law community is conditional.[46] This recognition can only can be given if the four requirements are fulfilled.

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37 Satjipto Raharjo, "Hukum Adat Dalam Negara Kesatuan Republik Indonesia (Perspektif Sosiologi Hukum)", in *Inventarisasi Dan Perlindungan Hak Masyarakat Hukum Adat*, ed. Hilmi Rosyida and Bisariyadi (Jakarta: Komisi Nasional Hak Asasi Manusia, Mahkamah Agung Republik Indonesia, dan Departemen Dalam Negeri, 2005), 7.

38 Soetandyo Wignjosoebroto, "Pokok-Pokok Pikiran Tentang Empat Syarat Pengakuan Eksistensi Masyarakat Adat", in *Inventarisasi Dan Perlindungan Hak Masyarakat Hukum Adat*, ed. by Hilmi Rosyida and Bisariyadi (Jakarta: Komisi Nasional Hak Asasi Manusia, Mahkamah Agung Republik Indonesia, dan Departemen Dalam Negeri, 2005), 39.

39 Amended 1945 Constitution, Article 18B (2).

40 Ni'matul Huda, "Otonomi Daerah; Filosofi, Sejarah Perkembangan Dan Problematika", in *Republik Desa, Pergulatan Hukum Tradisional Dan Hukum Modern Dalam Desain Otonomi Desa* ed. Ateng Syarifudin & Suprin Naa (Bandung: PT Alumni, 2010), 45.

41 Amended 1945 Constitution, Article 28I (3).

42 Amended 1945 Constitution, Article 18B (2).

43 Thontowi, "Perlindungan Dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia", 27.

44 *Ibid.*

45 Ateng Syafrudin and Suprin Na'a in Rosyada, Warassih, and Herawati, "Perlindungan Konstitusional Terhadap Kesatuan Masyarakat Hukum Adat Dalam Mewujudkan Keadilan Sosial", 2.

46 Sartika Intaning Pradhani, "Dynamics of Adat Law Community Recognition: Struggle to Strengthen Legal Capacity", 284.

The requirements for *adat* law society recognition then further elaborated and regulated in the Constitutional Court Decision No. 31/PUU V/2007 (Decision) and Law No. 6 of 2014 regarding Village (Village Law). According to the Decision:[47]

a. *Adat* law societies exist when:
    i. they share an in-group feeling (*perasaan kelompok)*,
    ii. have customary governmental body (*pranata pemerintahan adat),*
    iii. have assets and/or customary objects,
    iv. have customary norm, and
    v. have certain areas (especially for *adat* law societies who are territorial in nature);[48]
b. They are in line with societal development when:
    i. their existence has been recognized by the law and regulations as a reflection of development values that are being considered ideal in today's society, and
    ii. their traditional rights are recognized and respected by the concerned and wider members of community and do not conflict with human rights;[49]
c. They are in line with the ideology of Indonesia when they are not threatening the existence of the Unitary States Republic of Indonesia as a political and legal entity by:
    i. Not threatening the sovereignty and integrity of the Unitary State Republic of Indonesia, and
    ii. Has appropriate customary norms substance that do not conflict with the laws and regulations.[50]

The Village Law created a significant development in *adat* law society recognition by having the principle of recognition in Article 3.[51] The principle of recognition means recognition on origin rights (*hak asal usul*).[52] Recognition principle is the state's acknowledgement and respect for *adat* law societies and their traditional rights.[53] Since traditional rights are innate rights, any *adat* law society's authority arising from those rights is not accountable to the government.[54]

If compared to Article 18 of the 1945 Indonesian Constitution before the amendment, there were no requirements at all for the *adat* law community to be

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47 The Constitutional Court Decision No. 31/PUU-V/2007 only elaborates further the first, second and third requirement. However, it still mentions all four requirements. This does not mean the fourth requirement ceased to exist.

48 Constitutional Court Decision No. 31/PUU-V/2007, 165-166.

49 Constitutional Court Decision No. 31/PUU-V/2007, 166.

50 Constitutional Court Decision No. 31/PUU-V/2007, 166.

51 Mulyanto, "Penguatan Masyarakat Hukum Adat dalam Undang-Undang Nomor 6 Tahun 2014 tentang Desa dari Perspektif Kajian Yuridis", *Journal of Indonesian Adat Law* 2, no. 3 (December, 2018): 95.

52 Law No. 6 of 2014 regarding Village, Elucidation of Article 3.

53 Mulyanto, "Penguatan Masyarakat Hukum Adat dalam Undang-Undang Nomor 6 Tahun 2014 tentang Desa dari Perspektif Kajian Yuridis", 95.

54 *Ibid.*

legally recognized. Saafroedin Bahar, the Commissioner of the *Adat* Law Community Department in the National Committee of Human Rights has noted that the past Dutch colonial government recognized the *adat* law community without any requirements. [55] He stated that having formal requirements to be acknowledged was contradicting with the spirit of the constitution.[56]

C. Indigenous Peoples' Recognition and Protection under Brazil Constitution

The promulgation of the modern Brazilian Constitution started in the mid-1980s, at the end of Brazil's 20-year military dictatorship.[57] After losing support from the citizens and due to internal conflicts in the military, the urgency of restoring democracy increased.[58] In 1985, a National Constituent Assembly was assembled to discuss the new constitution.[59] After almost two years of discussion, Brazil's 1988 Constitution was promulgated on October 5th of 1988. The Constitution consisted of 245 articles and 70 transitory provisions with 77 listed fundamental rights and 34 social rights with an immediate application clause.[60]

The established rights of the indigenous peoples are mentioned in Article 231 Section II: Culture, Chapter VIII: Indians of Brazil's 1988 Constitution. This arrangement highlights two innovative and significant ideas comparable to earlier Constitutions and the purported Indian Statute:

a. The dismissal of the abandonment perspective, which consider the indigenous peoples as a brief social classification, bound to vanish; and
b. The indigenous peoples' territorial privileges are characterized in the idea of unique rights that existed before the formation of the State itself.[61]

This is a consequence of the accepted acknowledgment that the indigenous peoples are already inhabitants of Brazil before the creation of the State itself.[62]With the new provisions, the indigenous peoples are guaranteed their "social organization,

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55 Leo, "Pengakuan Terhadap Masyarakat Adat Tak Perlu Melalui Hukum Positif", last modified 20 June, 2005, accessed 12 December, 2020, https://www.hukumonline.com/berita/baca/hol13028/pengakuan-terhadap-masyarakat-adat-tak-perlu-melalui-hukum-positif?page=2.

56 *Ibid.*

57 Vanice Regina Lirio Do Valle, "The Brazilian Constitution: Context, Structure and Current Challenges." *British Journal of American Legal Studies* 9, no. 3 (2020), 425.

58 *Ibid*, 425-426.

59 "Constitutional History of Brazil", *Constitutionnet*, accessed 29 September 2021, https://constitutionnet.org/country/constitutional-history-brazil.

60 "Brazil, Constitution", *Encyclopaedia.com*, accessed 29 September 2021, https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/brazil-constitutions.

61 "Constitutional Rights of the Indigenous Peoples." *Provos Indigenas no Brasil.* Accessed 15 December, 2020. https://pib.socioambiental.org/en/Constitution.

62 *Ibid.*

customs, languages, beliefs and traditions."[63] This enables the indigenous peoples of Brazil to have the right to be different as indigenous peoples indefinitely.[64]

This is expressed in the head of Article 231 of Brazil's 1988 Constitution:

> "It is recognized that the indigenous peoples have the right to their social organization, customs, languages, beliefs and traditions, and their original rights over the lands that they have traditionally occupied, it being the duty of the federal government to demarcate these lands, protect them and ensure that all their properties and assets are respected."

In this article, the right to be different does not refer to fewer rights or privileges claimed by the indigenous peoples, but to use their own languages and way to process their education.[65] Brazil's 1988 Constitution also allows indigenous people to file a lawsuit in court to defend their rights and interests.[66] The demarcation is also a part of the indigenous peoples' rights, where any land which has been demarcated (established as the indigenous peoples' possession) is protected.[67] This right is also connected to the right to self-determination in Article 1 of International Covenant of Civil and Political Rights. In the context of indigenous right, it is inseparable with indigenous' right to lands, territories, and natural resources.[68] When the right to be different is applied well, then the right to self-determination may also be fulfilled.

Brazil's 1988 Constitution also regulates indigenous peoples' land rights under Article 231 (1), (2), (3) and (5).[69] In Article 231(2) of Brazil's 1988 Constitution, it stated that:

> "Lands traditionally occupied by the Indians are those that they have inhabited permanently, used for their productive activity, their welfare and necessary for their cultural and physical activity, their welfare and necessary for their cultural and physical reproduction, according to their uses, customs and traditions."

This paragraph defines the characteristics of what can be called indigenous land.[70] This characterisation and acknowledgement by the State are utilised to guarantee the total sufficiency of the constitutional ruling and the State has the obligation to ensure these indigenous lands.[71]

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63 Márcia Dieguez Leuzinger and Kylie Lyngard, " The land rights of indigenous and traditional peoples in Brazil and Australia", *Revista de Direito Internacional 13,* no. 1 (2016); 421.

64 *Ibid.*

65 1988 Constitution, Article 231.

66 1988 Constitution, Article 231.

67 "Demarcation", *Provos Indigenas no Brasil,* accessed 15 December, 2020, https://pib.socioambiental.org/en/Demarcation.

68 Erica-Irene A. Daes, "An overview of the history of indigenous peoples: self-determination and the United Nations". *Cambridge Review of International Affairs* 21, no. 1 (March, 2008): 8.

69 Cats-Baril, *Indigenous Peoples' Rights in Constitutions Assessment Tool*, 118-119.

70 "Demarcation", *Provos Indigenas no Brasil.*

71 *Ibid.*

Other points regarding indigenous lands that are regulated in Brazil's 1988 Constitution are regarding different aspects such as:[72] a) being a part of union assets; b) creating a permanent title for the indigenous peoples; c) the nullification of all juridical acts that affect the ownership and title, with the exemption of being related to public interest of the federal government;[73] d) limited utilization;[74] e) allowed utilization related to water power resources, energy potential, research, and mining with the authorization of the Congress after hearing with the affected community and if the community being involved; [75] f) mineral exploration and use of water resources need to be specified in laws and regulations;[76] g) the prohibition of selling or mortgaging indigenous land; and h) prohibited removal of Indians from their land, except under special circumstances as regulated under Article 231(6) of Brazil's 1988 Constitution.[77]

The land rights for indigenous peoples faced a major challenge since 2018 after the election of President Jair Bolsonaro.[78] At the time, President Jair Bolsonaro has an agenda that would have threatened the indigenous peoples, taking form through his unconstitutional revocation on the indigenous lands' demarcation legal process.[79] This revocation enabled the State to review and revoke any indigenous land permission, which used to be permanent.[80] The federal body, which manages demarcation, the National Foundation for Indians (FUNAI) was also dismantled as an extension to his policy.[81]

D. Comparison Between Indigenous Peoples' Recognition and Protection under the Indonesian and Brazil Constitution

Based on the description in the previous chapter, it can be concluded that the difference between the Indonesian and Brazil Constitutions in their approaches on indigenous peoples' recognition and protection are:

Table 1. Different Approach on Indigenous People Recognition and Protection Based on Amended 1945 Constitution and 1988 Constitution

Indicators	Indonesia (Amended 1945 Constitution)	Brazil (1988 Constitution)
Characteristic of protection	More general	More specific

72 Gabrielle Kissinger, *Federalism and the Recognition of Indigenous Rights to Land and Natural Resources in Myanmar: Case Studies from Canada, Ethoipia, and Brazil* (Washington: Forest Trends, 2020), 28.
73 1988 Constitution, Article 231(6).
74 1988 Constitution, Article 231(2)
75 1988 Constitution, Article 231(3).
76 1988 Constitution, Article 231(6).
77 "Demarcation", *Provos Indigenas no Brasil.*
78 International Work Group for Indigenous Affairs, "Indigenous Peoples in Brazil".
79 *Ibid.*
80 *Ibid.*
81 *Ibid.*

Coverage	1. State recognizes and respects the *adat* law community 2. Criteria to be recognized as the *adat* law community	1. State recognizes and respects indigenous people 2. Right to be different 3. Ability to file lawsuit 4. Land rights provisions

The Amended 1945 Constitution covers the *adat* law community's recognition and protection in a more general manner since there are only two articles consisting of one paragraph, each which directly regulate the *adat* law community. The main idea of the Amended 1945 Constitution is to define the *adat* law community, acknowledge them generally, and regulate more specific provisions in the statutory laws. However, those articles are too broad and vague and the *adat* community rights are not regulated therein.

The Amended 1945 Indonesian Constitution ended up having a broad and vague approach due to the shifting views of the Indonesian Government towards the *adat* law community. During Soeharto's era, the view of the *adat* law community's rights were "gifts" from the State to give conditionally.[82] This was caused by the wish of this Government to exploit the natural resource controlled by the *adat* law community.[83] It is reflected in Law No. 11 of 1967 on Mining, Law No. 14 of 1970 regarding Basic Power of Judiciary, and Law No. 5 on Village Government, where the land can be used as a mining area as long as they have a permit, not to mention *adat* law and court, and homogenises villages resulted to destroying the indigenous system.[84] This extends to the Amended 1945 Constitution, where the broad and vague articles were made to control the existence and influence of the *adat* law community over the natural resources.[85]

As a comparison, the 1988 Brazil Constitution has more detailed provisions in the concerning indigenous people. The drafting of the 1988 Brazilian Constitution was done by making 24 *ad hoc* committees that drafted their assigned part of the Constitution from scratch.[86] Each committee needed to sit in five to eight sessions of hearings with institutions that represent different parts of Brazil's society.[87] As a result, they were able to draft a very comprehensive Constitution, even draft provisions

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82 John Bamba, "Recognition In Kind Indonesia Indigenous Peoples and State Legislation" in Christian Erni (Ed.), *the Concept of Indigenous Peoples in Asia A Resource Book* (Copenhagen and Chiang Mai, International Work Group for Indigenous Affairs (IWGIA), 2008), 263.

83 *Ibid.*

84 *Ibid,* 246.

85 *Ibid,* 266

86 Javier Martinez-Lara, *The Politics of Constitutional Change, 1985-95* (London: Macmillan Press, 1996), 91.

87 Keith S. Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society", *The American Journal of Comparative Law* 38, (1990): 777.

that would be at the level of statutory law.[88] However, due to the many drafts, some articles became too long and became redundant.[89]

The Amended 1945 Indonesian Constitution also has not covered the fundamental traditional rights of the *adat* law community, such as land rights. In comparison, Brazil's 1988 Constitution covers more detailed provisions on traditional rights—not just the explicit statement of recognition and respect, but also rights which regulate the privileges of indigenous peoples. These include the right to be different, the ability to file a lawsuit, and provision on land rights. The right to be different is the direct manifestation of the State respecting the existence and uniqueness of indigenous peoples. The ability to file a lawsuit is a form of the State's recognition to indigenous people as citizens to defend themselves. Provisions related to land rights were also stipulated in the 1988 Constitution, such as demarcation, judicial acts related to indigenous land ownership, exploitation of natural resources in indigenous lands, and land procurement for public interest. These fundamental provisions leave more certainty on indigenous rights, especially on the enforcement and utilisation related to indigenous land that should pay attention to their rights.

Today, the *adat* law community still struggle to justify their land rights due to overlapping regulations.[90] As entities whose existence are recognised and respected by the Constitution, this should not be the case. This condition hinders the legal effort and measures to protect the *adat* law community's land rights, which may potentially result to the inability to fulfil a collective aspects of their human rights.[91]

Based on the comparative analysis, it is clear that the Brazilian Constitution serves as a good example of a constitution respecting and acknowledging indigenous peoples. This is exemplified by its clear provisions on the recognition of *adat* law communities. In Indonesia's case, since statutory laws have not made a significant regulatory milestone in such matters, the Constitution may be an option to provide protection to an entity which its existence is recognized and respected by the Constitution.

E. Conclusion

In conclusion, despite the lack of sources on analysing the Brazil Constitution, the author still able to grasp the different concept of both Indonesia and Brazil's Constitution and things that Indonesian Constitution can learn from Brazil. The approach used by the 1988 Brazilian Constitution on regulating the indigenous peoples' recognition and protection are more specific than the approach used by the

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88 Javier Martinez-Lara, *The Politics of Constitutional Change,* 91.

89 Keith S. Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society", 780.

90 *Adat* law community's land related provisions are currently regulated in different regulations such as Basic Agrarian Law, as "*hak ulayat*", and Law No. 41 of 1999 regarding Forestry, as "*hutan adat*" (indigenous forest).

91 Sartika Intaning Pradhani, "Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation", *Jambe Law Journal* 1, no. 2 (2018): 184.

Amended 1945 Indonesian Constitution. The Brazilian Constitution regulates indigenous peoples' rights to be different, the ability to file a lawsuit, and provisions related to indigenous land rights. On the other hand, the Amended 1945 Indonesian Constitution only stated the State's recognition and respect to the *adat* law community, their definition, and leaves the rest of the provisions to be regulated by statutory law. Indonesian Constitution may consider adopting similar approach to provide better protection for *adat* law societies. However, the possibility of such adoption still needs further research and discussion.

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The Authoritative Power of Competition Agencies: A Comparative Analysis on U.S. and Indonesian Law

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Abstract

A good enforcement system is essential to the success of implementing the law. The competition serves a crucial role in the enforcement role in preventing unfair and anti-competitive business practices that will hinder the economic growth of many industries. However, the existing statute provides the Commission for the Supervision of Business Competition with lacking authoritative power in carrying out its mandate. In contrast, U.S. competition agencies are provided with greater authoritative power than KPPU and are successful in enforcing competition law. This paper seeks to find the extent to which the authority for Indonesia's competition agency is adequate in enforcing competition law compared to the competition agency in the U.S. This research analyzes ways for the current legislation to be improved to ensure better enforcement by Indonesia's competition agency.

Keywords: Competition Agency, Federal Trade Commission, Commission for the Supervision of Business Competition, competition law, antitrust law

Intisari

Penegakan hukum yang baik merupakan salah satu factor krusial dalam penerapan hukum. Lembaga pengawasan persaingan usaha memegang peran penting dalam penegakan hukum persaingan. Komisi Pengawas Persaingan Usaha sebagai Lembaga pengawas memegang peran penting untuk memberantas praktik bisnis yang anti-persaingan. Namun undang-undang yang sudah ada memberikan KPPU kewenangan yang terbatas dalam melakukan tugasnya. Sebaliknya, agen persaingan AS diberikan hak kewenangan yang lebih luas dari KPPU dan dapat dinilai berhasil dalam menegakan hukum persaingan usaha. Makalah ini mengkaji sejauh mana kewenangan Lembaga persaingan di Indonesia cukup mememadai dibandingkan dengan Lembaga persaingan di AS dalam penegakan hukum persaingan. Penelitian makalah ini juga menganalisa kebutuhan perbaikan undang-undang hukum persaingan usaha untuk menjamin penegakan hukum yang lebih baik dari KPPU.

Kata Kunci*: Lembaga Pengawas Persaingan Usaha, Komisi Perdagangan Federal, Komisi Pengawas Persaingan Usaha, Hukum Persaingan Usaha*

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A. Introduction

Among the central issues to the development of a State is the growth of the country's economy. A fair and competitive market proves to be one of the main economic goals. However, a fair and competitive market may not be achieved through the free market alone. Hence, there exists government intervention in promoting a competitive market condition through regulatory control.

Competition law, also referred to as "antitrust law," holds a key role in preventing unfair business practices, leading to fair competition and enhancing economic growth and development. Governments typically grant enforcement power to what is known as a competition agency or an antitrust commission to guarantee compliance against competition law.[1] Their purpose is generally to monitor and investigate any unfair business practices and protect consumers from certain market activities.

As of the current state of competition law enforcement in Indonesia, the Commission for the Supervision of Business Competition or better known as the *Komisi Pengawas Persaingan Usaha* ("**KPPU**") is the competition agency provided with the duty to ensure compliance against Indonesia's competition law. The legislation is frequently criticized for having only provided the KPPU with little authority power to function effectively.[2] Kurnia Toha, Chairman of KPPU, stated that the lack of authority for KPPU to function has always been a hindrance in carrying the Commission's function. He noted that unlike countries such as Japan, Germany, and the United States ("**U.S.**"), Indonesia's competition agency lacks the authority to conduct searches and seizures, causing the gathering of evidence to be difficult.[3]

Evidently, as stated by the Chairman of KPPU, the competition agencies in the U.S. indeed have greater authority power than KPPU. In fact, the competition agencies in the U.S., the Federal Trade Commission and the Department of Justice, are arguably some of the leading examples of an effective enforcement of antitrust law.

Key issues have long been identified in KPPU's enforcement system in which other countries had already solved. Little has changed in the legislation and enforcement system of Indonesia's antitrust law since its inception over 20 years ago. This paper intends to identify some of the key enforcement problems of KPPU, and seek solutions by comparing the power of authority of the competition agencies in Indonesia and in the U.S. to identify the weaknesses in the KPPU's enforcement and the lack of authority in order to encourage reform in the current competition law and policy institutions. For the reasons above, this paper explores the following research questions:

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[1] Federal Trade Commission. "Competition & Consumer Protection Authorities Worldwide," last modified 2021, accessed 6 July, 2021. https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide.

[2] Manaek SM Pasaribu, "Challenges of Indonesian Competition Law and Some Suggestions for Improvement." *Economic Research Institute for ASEAN and East Asia (ERIA)* (2016): 47.

[3] Kompas. "KPPU Tidak Bisa Masuk ke Ruangan, Lalu Menyita," last modified 2020, accessed 27 September, 2021. https://money.kompas.com/read/2020/07/15/210700126/-kppu-tidak-bisa-masuk-ke-ruangan-lalu-menyita--?page=all

1. To what extent is the power of authority of Indonesia's competition agency adequate in enforcing the competition law compared to the competition agency in the U.S.?
2. How can the current legislation be improved to ensure better enforcement by Indonesia's competition agency?

B. Regulatory Framework: Indonesian and U.S. Competition Law and Agency

The influence of U.S. antitrust law was profound during the establishment of competition law in many countries worldwide. U.S. competition agencies appear to be far more effective given that they are provided the authority to conduct other powers for effective investigation. In fact, the U.S. enforcement of competition law is recognized to be one of the most effective in the world. The Global Competition Review ("**GCR**") conducts annual research to rate several competition agencies worldwide, in which both U.S. competition agencies, the Federal Trade Commission and the Department of Justice Antitrust Division, were consistently rated as the best competition agencies in the world.[4] Moreover, the U.S. was the first country to introduce competition policies and had hence undergone a longer process of development. The following part shall compare and contrast the law and enforcement systems in Indonesia and the U.S. to seek ways to improve Indonesia's outdated legislation.

a. Indonesia's Competition Law and Enforcement Body

The inception of competition law in Indonesia occurred after the 1997 Asian Financial Crisis that had also impacted the Indonesian economy. The lack of domestic competition in Indonesia's market resulted in a high concentration of power from firms. This in turn resulted in fewer choices of products and lower quality. In addition, large and powerful firms from well-connected family groups gather political power to influence government policies in their favor. The opportunity for smaller businesses to grow was limited to various barriers of entry.[5] Law No.5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition ("**Anti-Monopoly Law**") was one of the legislations formed during that era to solve the issue identified during the economic crises.

b. A Brief Overview of Indonesia's Competition Law

Since its enactment in 2000, the Anti-Monopoly Law has served as Indonesia's main legislation in competition law. The legislation is not intended to prevent or prohibit the existence of a monopoly, but it prohibits actions from firms that engage in anti-competitive activities. In 2019, there were discussions on amending the current legislation. However, much of the proposed revisions were rejected due to the consideration of its implementation and considerations from a corporate standpoint.[6]

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[4] Global Competition Review, "The Annual Ranking of The World's Leading Competition Authorities." *Global Competition Review, 18*(6) (2015): 2.

[5] Thee Kian Wie (2004). "Indonesia's Experience with Its First Anti-Monopoly Law." *Economics and Finance Indonesia, 52*(2), (2004): 187-205.

[6] Federal Trade Commission, "The Annual Ranking of The World's Leading Competition Authorities", 2.

The Indonesian Competition Law divides restrictions into three categories: restricted agreements (Articles 4–16), restricted conducts (Articles 17–24), and abuse of dominant position (Articles 25–28). The remaining sections of the Indonesian Competition Law deal with the establishment of the KPPU law enforcement body of the Anti-Monopoly Law, case-handling procedures, sanctions and criminalization, general exemptions, and transitional and adjudicatory provisions.

The Omnibus Law on Job Creation as Supplemented by Government Regulation No. 44 of 2021 ("**Omnibus Law**") had made changes to the current Anti-Monopoly Law that was supplemented through the Government Regulation No. 44 of 2021 ("**GR No. 44 of 2021**"). Firstly, any objection against a KPPU ruling is no longer appealed to the District Court and instead transferred to the Commercial Court.[7] Secondly, there is a removal of the maximum fine limit that may be imposed (although this was later changed in which Article 12 of GR No.44 of 2021 sets the maximum fine).[8] The provisions from the Anti-monopoly Law have not changed significantly other than the few changes or additions through the Omnibus Law. Other provisions governing competition law include government regulations and rules from KPPU.

c. The Main Functioning of KPPU

Indonesia's competition agency, KPPU, was also formed through the Anti-Monopoly Law. KPPU serves as an independent body to the national government with investigation power against violations and may impose administrative sanctions. Through its Commission Tribunal, the KPPU can also rule on a case and make a decision imposing administrative sanctions that include :[9]

i. Declarations ruling an anti-competitive agreement to be null and void;
ii. A declaration that mergers, consolidations, and acquisitions of commercial entities are null and void;
iii. Injunctions prohibiting vertical integration, monopolistic tactics, unfair business competition, and the abuse of a dominating position;
iv. Determination of remuneration payments.

KPPU is responsible for case handling for the alleged violations against Indonesia's competition law. The procedure of case handling is governed mainly through the KPPU Regulations No. 1 of 2010 and KPPU Regulations No. 1 of 2019.

d. Procedure for Case Handling through the KPPU

An important aspect to understanding the strengths and weaknesses of the competition agency is through analyzing its mechanism or procedure in handling a case. The analysis of the Commission's procedure will also aid in identifying similarities and differences against another competition agency.

A KPPU case begins either through a report from a party who filed a complaint alleging a breach of Indonesian competition law, an initiative directly from KPPU, or

[7] Article 19 Government Regulation No. 44 of 2021

[8] Noverius Leoli, "Respons KPPU terkait perubahan sejumlah pasal persaingan usaha di UU Cipta Kerja," last modified 2020, accessed 1 July, 2021. https://nasional.kontan.co.id/news/respons-kppu-terkait-perubahan-sejumlah-pasal-persaingan-usaha-di-uu-cipta-kerja.

[9] Article 47 Government Regulation No. 44 of 2021

a report from a reporting party (usually a competitor) seeking compensation. The case is then processed through obtaining clarification and inquiry or through research and investigation of the firm, followed by filing, commission council hearing, and commission decision.[10]

Before conducting an inquiry into a report, there must be sufficient information and evidence. The report will be followed up on by the work unit in the responsibility of report handling. The work unit and the reporting party must go through a clarification procedure to check for any information missing in the report for administrative purposes. Both the work unit and the reporting party should check and complete the requirements within 10 working days for each information transfer.[11]

The investigation shall begin at the first stage, at the primary council hearing (*Laporan Pemeriksaan Pendahuluan*). The Commission may call upon the reported party to give a response to the claimed breach, as well as the names of the witness and expert, and any relevant documents at the primary council hearing.[12] This will last for no more than 30 working days.[13]

Assuming that there is sufficient evidence acquired at the primary council hearing, the next stage to investigating shall take place at the advanced council hearing (*Laporan Pemerikasaan Lanjutan*). The evidence from the investigator, the reporting party, and the reported party acquired at the primary council hearing will be examined during this stage. The witness, language expert, expert, and government will all be summoned to the advance council hearing by the Commission. The procedure takes a maximum of 60 working days to complete and can be prolonged for a maximum of 30 days. The procedure takes a maximum of 60 working days to complete and may only be extended for another 30 working days.[14]

Through the analysis of all the information and evidence acquired through the two stages of council hearing, the Commission must announce its decision. The decision may impose an administrative sanction against the firm and the hearing may even provide advice for the government to the market needs.[15] The party sanctioned must fulfill the administrative penalty within 30 working days, or object through an appeal to the Commercial Court within 14 days. An appeal to the Commercial Court's ruling can be filed to the Supreme Court.

The following graph illustrates the procedure of case handling in brief:

[10] Pasaribu, "Challenges of Indonesian Competition Law and Some Suggestions for Improvement".

[11] Article 14 KPPU Regulations No. 1 of 2010

[12] Article 48 KPPU Regulations No. 1 of 2010

[13] Article 49 KPPU Regulations No. 1 of 2010

[14] Article 57 KPPU Regulations No. 1 of 2010

[15] Shidarta (n.d.), "Prosedur Beracara di KPPU (Komisi Pengawas Persaingan Usaha)," accessed 1 July, 2021. https://business-law.binus.ac.id/2013/01/20/prosedur-beracara-di-kppu-komisi-pengawas-persaingan-usaha/.

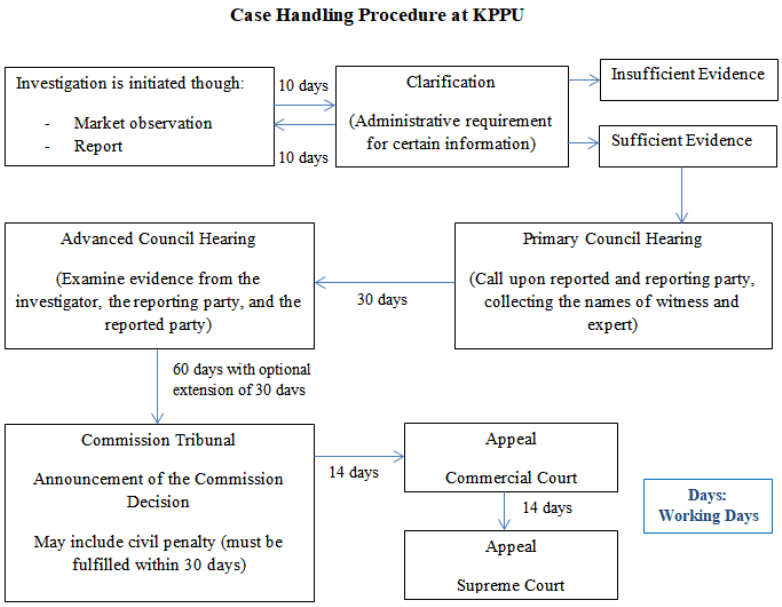

Figure 1. Case handling procedure through the KPPU

e. *U.S. Competition Law and Enforcement Body*

Competition law began much earlier in the U.S. than in Indonesia. In the 1800s, many large firms control both the supply and the pricing of their respective industries. As a result of the monopolies, there was no competition, and smaller businesses and individuals had no option about who they may buy from. This continued until President Theodore Roosevelt dismantled numerous trusts by pursuing what is now known as the "antitrust law".[16]

There are two competition agencies in the U.S., that is the Federal Trade Commission ("**FTC**") and the Antitrust Division of the Department of Justice ("**DoJ**"). The FTC is an independent administrative agency and focuses on administrative violations, whereas the DoJ is part of the executive government body responsible and holds exclusive authority for criminal investigation and sanctions.[17]

i) A brief overview of U.S. competition law

The antitrust law in the U.S. has undergone more stages of development. There are three main legislations enacted since the establishment of competition law:

1. The Sherman Antitrust Act ("**Sherman Act**") was the first piece of legislation passed by the U.S. Congress in 1890 to prevent power concentrations. Two main provisions were enacted through this piece of legislation:

[16] Federal Trade Commission, "Antitrust Laws: A Brief History - Consumer Information," accessed 7 June, 2021. https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf.

[17] Yasir Arifin Mochtar, "Kewenangan Ideal Lembaga Penegak Hukum Persaingan Usaha Di Indonesia." (2019): 46. https://dspace.uii.ac.id/handle/123456789/13977.

a. Firstly, the legislation prohibits any trade restraints between states or with foreign countries. This ban extends to any arrangement to control prices, limit industrial production, share markets, or eliminate competitors, not only formal cartels.
b. Secondly, the legislation prohibits any effort to monopolize any aspect of U.S. trade or commerce.

The U.S. DoJ can enforce these two main provisions through federal court and litigation. Firms that are found to violate the Sherman Act can be compelled to dissolve by the courts, and injunctions can be granted to prevent illegal conduct. Corporate executives who operate their business in a way that violates antitrust laws may be fined or imprisoned. Furthermore, private parties who have been harmed by a violation are allowed to sue for even as much as three times the amount of damages they have suffered.[18]

2. The Clayton Act was later passed in 1914. After decades of enacting the Sherman Act, the government found that it was unsuccessful in handling anti-competition behavior by firms. The Act was used infrequently and unsuccessfully against industrial monopolies, owing to limited court interpretations of what constitutes interstate trade or commerce. The Clayton Act protects U.S. consumers by prohibiting mergers and acquisitions that are likely to impede competition. The Clayton Act serves as an extension of the Sherman Act's broad principles, and it defined several prohibited activities that either led to or ended in monopolization.[19]

3. Along with the Clayton Act, the FTC Act of 1914 was also passed. Congress established a new government agency, the FTC, to monitor unfair commercial practices. It empowered the FTC to investigate and prosecute unfair competition and deceptive conduct.[20]

There were a few more laws implemented during the evolution of competition law in the U.S., in addition to the three primary legislations mentioned above. The Robinson-Patman Act (1934), the Celler Kefauver Anti-Merger Act (1950), the Hart Scott Rodino Antitrust Improvement Act (1976), and the International Antitrust Enforcement Assistance Act are examples of these laws (1994).[21]

ii) <u>The main functioning of the FTC and DoJ</u>

As mentioned previously, unlike most countries that have only one body of enforcement for competition law, the US has two: the FTC and the DOJ Antitrust Division. Although the two agencies have overlapping jurisdictions, the agencies are separated by the Act specified only to them; the FTC holds exclusive jurisdiction of

[18] Encyclopedia Britannica, "Sherman Antitrust Act," last modified 2020, accessed 6 July, 2021. https://www.britannica.com/event/Sherman-Antitrust-Act.
[19] *Ibid*.
[20] *Ibid*.
[21] Mochtar. 'Kewenangan Ideal Lembaga Penegak Hukum Persaingan Usaha Di Indonesia'. 47.

cases under the FTC Act, and the DoJ holds exclusive jurisdiction of cases under the Sherman Act.[22]

The FTC is an independent agency within the executive branch of the U.S. federal government.[23] The legal basis for the FTC's authority is provided through the Federal Trade Commission Act ("**FTC Act**"). The FTC's authority includes investigative, legislative, and enforcement powers. The investigative powers of the Commission refer to the Commission's ability to conduct a search and acquire information and evidence. Within its investigative rights, if the Commission has reason to suspect that the law is being or has been broken, the Commission may take enforcement action through an administrative or judicial process. Fines may be imposed for violations of certain laws, which are increased yearly for inflation. Besides investigative and enforcement power, the Commission also has legislative powers against unfair business practices under Section 18 of the FTC Act.[24] Besides competition law, FTC also has consumer protection authorities, however that aspect will not be discussed as it falls outside the scope of this paper.

The DoJ Antitrust Division is also entrusted with the duty to monitor business activities and prevent anti-competitive behavior. The agency was established long before the FTC, through the enactment of the Sherman Act. The DoJ itself acts as an extension of the Attorney General in the enforcement of federal law. Unlike the FTC who may only seek civil remedies, the DoJ may seek civil and criminal remedies.[25]

It may be deduced that Indonesia's KPPU is more comparable to the FTC in terms of its principal role and authority. Both the KPPU and the FTC are autonomous federal authorities of the executive branch that may only seek civil remedies. While presence of the DoJ cannot be ignored, the FTC provides to be a better comparison to the KPPU in terms of their function, authority, and case processing procedure. Comparing the procedure of KPPU and FTC in conjunction with one another may direct the focus to better, realistic objectives.

iii) Procedure for case handling by the FTC

As explained previously, the investigative authority of the FTC is provided under the FTC Act. Following is the mechanism in which FTC processes its cases. The process of investigating a firm is initiated upon receiving a report or through market observation. When the Commission receives a report, it may be forwarded to the Legal Investigation Division, which is overseen by the Chief Examiner and where it is reviewed by a staff attorney. The Commission will then conduct a preliminary inquiry. The purpose of the preliminary inquiry is to gather enough evidence to assess if the

[22] Robert Roulusonis. "Understanding How And Why The U.S. Competition law system is decentralized" *Enero-Junio*, Vol. 63/1(2015) 2-3.

[23] Federal Trade Commission. "About the FTC," accessed 6 July, 2021. https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/about_the_ftc.html

[24] Federal Trade Commission. "A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority," last modified 2021, accessed 6 July, 2021. https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

[25] Robert Roulusonis. "Understanding How And Why The U.S. Competition law system is decentralized" *Enero-Junio*, Vol. 63/1(2015) 2-3.

Commission has jurisdiction and whether the problem is significant enough to merit further examination. [26]

If the matter analyzed is deemed important and that it falls within the jurisdiction of the Commission, an attorney-examiner will then be appointed to analyze the case further. Attorney-examiners produce detailed reports regarding the case, as well as whatever documents relevant to the reports. When the attorney-examiner believes he has gathered all of the required information, he writes a report outlining the facts and presenting his opinions and suggestions. The attorney-examiner may either determine that there has been a violation of the antitrust law or conclude that there were no violations of the Commission's statutes and recommend that the case be closed. The Chief Examiner will take a final check of the attorney-examiners' reports.[27]

Next is the administrative procedure in which the Commission decides whether a conduct is illegal through an adjudicative process. The Commission may challenge unfair business practices in breach of the antitrust laws. If the Commission has reason to suspect that a law violation has occurred, it may file a complaint detailing its allegations. If the respondent chooses to settle the allegations, it can sign a consent agreement, which consents to the entry of a final order, and forgo its right to judicial review. [28]

On the other hand, if the respondent chooses to challenge the accusations, the complaint is heard shall be adjudicated by the Administrative Law Judge ("**ALJ**"). The ALJ is a tribunal that operates under the Rules of Practice of the Commission. The investigation will be carried out by the FTC's "complaint counsel", who is personnel of the relevant bureau or regional office. The ALJ will make a "first ruling" based on the conclusions of the complaint's legal analysis. The respondent has the right to appeal the initial judgment to the Commission as a whole. The Commission will conduct the trial and render a final judgment following an appeal of an initial decision. The respondent has the right to appeal the final decision to the U.S. Court of Appeals. Further appeal after this stage shall be brought to the Supreme Court.

The following graph illustrates the procedure of case handling in brief:

[26] Robert Elliot Freere, "FTC Practice and Procedures." *The Federal Bar Journal, VI*(4) (1945) 3-5.

[27] *Ibid*.

[28] Federal Trade Commission. 'A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority'.

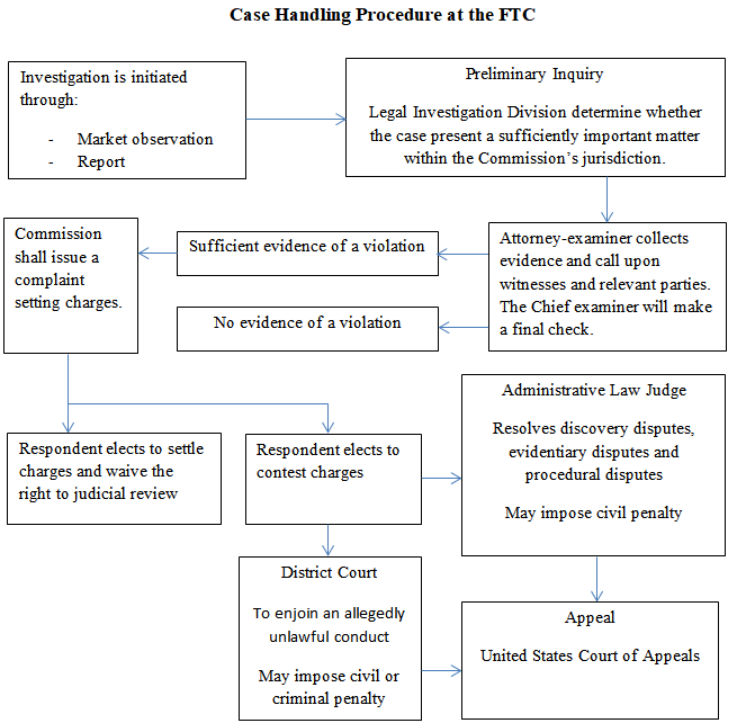

Figure 2. Case handling procedure through the FTC

C. The Authoritative Power of Competition Agencies in Indonesia and the U.S.

Through examining the case handling procedure, and the investigation authority for the competition agencies in both the U.S. and in Indonesia, we may infer several points regarding the authority power of the competition agencies in each respective country.

The FTC and the KPPU are similar in their structure, decision, and execution power. As previously described, both the FTC and KPPU are independent administrative agencies under the executive branch of the government. Both Commissions also have the authority to make decisions against a case within the Commissions' tribunals. However, the FTC and KPPU do not have execution power against their courts' decision (the Commission's decision shall be requested through the District Court/Commercial Court).[29] In addition, both Commissions may not impose or seek a criminal penalty against any violation of the antitrust law. For instance, although both agencies have the right to access documents and persons to collect evidence,[30] both Commissions must request the Court to impose a penalty if the party refuses to obey the order.

While similar in their structure and execution power, the two Commissions have different investigation authority power. Through comparing the authority power of both competition agencies, we find three important aspects in which the KPPU and

[29] Law No. 5 of 1999, Article 46 paragraph (2); FTC Act, Section 5(c), 15 U.S.C. Sec. 45(c)
[30] Law No. 5 of 1999, Article 41; FTC Act, Section 9,15 U.S.C. Sec. 49

the FTC differ: (1) Authority to search; (2) Authority to seize; and (3) Investigation Assistance;

Firstly, the FTC has the investigative authority to search (*penggeledehan*), in which the KPPU does not. In contrast, the FTC is fully authorized to conduct a search. Section 3 of the FTC Act stipulates, "*The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the [U.S].*" This section implies that the FTC has the authority to make searches on private premises for the reasons and duties imposed through the FTC Act. In contrast, KPPU can not conduct a search and may only investigate a firm through an investigator (*penyidik*) such as the police.[31] The lack of investigative power to make searches is one of the main issues identified by KPPU members across time that prevents them from acquiring evidence.[32]

Secondly, KPPU has no authority to conduct a seizure (*penyitaan*), whereas the FTC has already done so in many cases. The FTC is granted the authority to seize property for investigation under Section 13(b) when the FTC has reason to believe that there is currently a violation or to prevent a potential violation.[33] The FTC may request the seizure directly to the District Court and take action upon permission. The KPPU, on the other hand, has no such authority, which also acts as a hurdle to the investigation of suspected firms.

Thirdly, and perhaps most importantly, the FTC is provided with better investigation assistance, and that they share jurisdiction with the DoJ that may seek criminal sanction. Not only does the FTC receive investigation assistance from the police, but the Commission may also receive assistance from the FBI under some cases.[34] KPPU, in contrast, is the sole competition agency in Indonesia and may conduct investigations through the police force upon request. [35] As both the FTC and KPPU are not mandated with judicial power, both competition agencies may not impose a criminal sanction. However, this has no bearing on the enforcement of competition law in the U.S. because any violation of competition law that carries a criminal penalty immediately falls under the jurisdiction of the DoJ. Hence, the structure of the competition law enforcement system in the U.S. simply allows a wider scope of authority power to prevent anti-competitive behavior from firms.

Through this comparative analysis, it may be deduced that the competition agencies in Indonesia (KPPU) and in the U.S. (FTC) are largely similar in structure and execution process, but are rather different in the scope of investigation power. The competition agencies in both countries are classified as independent administrative agencies, and hence the authorities that may be granted are limited to their position.

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[31] Law No. 5 of 1999, Article 41 paragraph (3)

[32] Kompas. "KPPU Tidak Bisa Masuk ke Ruangan, Lalu Menyita," last modified 2020, accessed 27 September, 2021. https://money.kompas.com/read/2020/07/15/210700126/-kppu-tidak-bisa-masuk-ke-ruangan-lalu-menyita--?page=all

[33] John Vecchione, "An Insidious Consequence of the FTC's Use of Section 13(b) Injunctions: Denial of Counsel," last modified 2021, accessed 8 July, 2021. https://nclalegal.org/2020/10/ftcs-use-of-section-13b/.

[34] Rifqon Khairazi, "The Objectivity Of The Business Competition Supervisory Commission In Deciding Business Competition Cases In Indonesia. *Indonesia Private Law Review." 2*(1) (2021): 1-10. doi:10.25041/iplr.v2i1.2146

[35] Global Compliance News, "Antitrust and Competition in Indonesia", accessed July 3, 2021. https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-indonesia/.

Due to this, both the Commissions may only impose a civil sanction and that the execution process still falls within the authority of the judicial body. The main difference between the two competition agencies in terms of enforcement power is that the FCC has far greater investigation authority and assistance than KPPU. However, the fact that the DoJ and the FTC share authority in enforcing antitrust law and can pursue criminal penalties for specific violations has a significant influence on the overall enforcement structure of competition law in the U.S.

D. The Way Forward for Indonesian Competition Law

The very aim of comparing Indonesian and U.S. competition agencies is to seek ways in which Indonesia's competition law enforcement may be improved. The next challenge after identifying the strengths and weaknesses of the two competition agencies is to find out the applicability of adopting the enforcement system from one jurisdiction to another despite very different legal structures and market conditions.

KPPU's lack of investigation power has already been discussed by legislators. In fact, within the revision of the Anti-Monopoly Law (RUU 5/1999), few legislators intend to give the Commission authority to conduct searching and seizure with the assistance of the police. This suggestion in the revised Anti-Monopoly Law was heavily criticized by business organizations such as the Indonesian Employer's Association (*Asosiasi Pengusaha Indonesia*) and the Indonesian Chamber of Commerce and Industry (*Kamar Dagang dan Industri Indonesia*).[36] The criticism stems from the fear that the Commission would obstruct business activities and investment, resulting in increased uncertainty for firms. Another argument was that the authority to conduct searching and seizure, especially without prior evidence, is simply excessive. The notion would constitute as an infringement to the presumption of innocence despite the nature of the crime that is not an "extraordinary crime".[37]

In addition, the FTC's right to seize has also been criticized in the U.S. as obstructive and abusive to companies. In particular, the freezing of assets had obstructed the running of business activities.[38] Responding to the concerns of employer's associations, the right to seize may indeed be too excessive and intrusive. Hence, granting the authority to seize for the KPPU may only lead to power abuse.

A right to search, on the other hand, is crucial to the competition agency's ability to identify market abuses. In addition, the application of such investigative powers in another jurisdiction proves that there are ways to give the Commission the right to searching without infringing the principle of presumption of innocence. To solve the issue, the Commission should only be permitted to conduct searching only after acquiring sufficient preliminary evidence, including economic evidence, and with the approval of the Commercial Court. The revision for the Anti-Monopoly Law was rejected due to the concerns described above. However, considering that these investigative activities had instead aided in better enforcement, the Commission should consider revising the current law as such.

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[36] Rio Christiawan. "Menakar Revisi UU Persaingan Usaha," last modified 2019, accessed 27 September, 2021. https://investor.id/national/menakar-revisi-uu-persaingan-usaha

[37] *Ibid.*

[38] Cause of Action Institute. "Court to FTC: Effort to freeze assets goes too far," last modified 2018, accessed 27 September, 2021. https://causeofaction.org/court-to-ftc-effort-to-freeze-assets-goes-too-far/

E. Conclusion

Competition agencies hold a crucial role to ensure compliance against the competition law and protect the market. The creation of Law No. 5 of 1999 and the establishment of KPPU as a result of that legislation has had a significant impact on the Indonesian economy. The research of this paper identifies that KPPU lacks the enforcement capacity to function effectively as a competition agency. Unfortunately, despite this issue and the criticisms that follow, there have been little modifications in the statute and the authority power of the Commission for over 20 years.

The FTC in the U.S., which shares a similar enforcement system to the KPPU, has greater authority power in conducting their investigation. This is concluded through examining the procedure for case handling, the investigation authority, and assistance, as well as the decision and execution power of the two competition agencies. The FTC differs from KPPU through having the investigation power to conduct search and seizure.

The result of this research concludes that legislators should consider granting KPPU the authority to conduct searches. While there will certainly be opposition from business owners and investors, the ability for the Commission to investigate a firm is crucial to optimally prevent private market abuse. At the same time, it must be noted that the Commission should only be able to acquire this right only after obtaining sufficient preliminary evidence of a violation.

The enforcement of competition law, like any other branch of law, requires proper attention. The impact of weak competition law enforcement will not be as obvious as the consequences will follow long after. Nonetheless, competition agencies, businesses, and legislators should work together to achieve healthy market conditions.

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

Ivan Gautama[1]

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.,

[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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