

# RETHINKING THE CONSTITUTIONALITY OF INDONESIA'S FLAWED ANTI- BLASPHEMY LAW

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Received: 22 September 2021 | Last Revised: 7 December 2021 | Accepted: 20 December 2021

## Abstract

This study examines the constitutionality of Indonesia's Anti-Blasphemy Law, which has been challenged unsuccessfully at the Constitutional Court on three occasions, in 2009, 2012, and 2018. While the Court has acknowledged the law's provisions are open to multiple interpretations, it insists on maintaining the law as it is, on the grounds that the right to religious expression is not absolute, as freedom and rights are restricted under Article 28J of the 1945 Constitution. The Court believes that canceling the law would create a dangerous legal vacuum. The ambiguity of the Court's decisions on the constitutionality of the Anti-Blasphemy Law is illustrated in recent blasphemy cases that have not been explored in previous studies. This study uses a doctrinal legal approach to examine why the Anti-Blasphemy Law is flawed and to analyze to what extent the 'particular constitutionalism' approach influenced the Court's decisions when declaring the constitutionality of the law. As such, the Court's misinterpretation of the core principles of the competing rights – the right to religious freedom and the right to freedom of expression – and its standard limitation, have been ignored. The findings of this study show that in dealing with the Anti-Blasphemy Law, the Court has a narrow and limited recognition of human rights law. The Court's

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fear of revoking the Anti-Blasphemy Law is based only on assumptions and is less supported by facts. The Court has failed to realize that the implementation of the flawed Anti-Blasphemy Law in various cases has triggered public disorder, with people taking justice into their own hands.

**Keywords:** Constitutional Court, Constitutionality of Law, Indonesian Anti-Blasphemy Law, Religious Expression, Standard Limitation of Human Rights.

## I. INTRODUCTION

The objective of developing International Human Rights Law (IHRL) is to encourage all states to respect, protect, and fulfill the human rights of their citizens.<sup>1</sup> The practices of some countries are still far from compatible with international law.<sup>2</sup> Under the umbrella of IHRL and the right to freedom of religion or beliefs (FoRB), everyone expects their state to respect their right to seek, embrace, change, and manifest their own choice of religions or beliefs without facing any interference either in public or in private. In terms of the right to freedom of expression (FoE), citizens expect their government to respect their expression of religious teachings and thoughts without unnecessary limitations.<sup>3</sup> However, in many countries across the world,<sup>4</sup> the existence of anti-blasphemy laws has led law enforcers to unjustly limit the right to religious expression.

Indonesia's Anti-Blasphemy Law<sup>5</sup> (the IABL) is flawed because it is not in line with human rights law. Also, it is ambiguous on what constitutes religious defamation. Moreover, it lacks a legitimate limitation of freedom of expression. Instead, it places excessive limitations on religious freedom. These limitations are then used to restrict the rights of minority religious groups, on the pretext of

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<sup>1</sup> The United Nations drafted the Universal Declaration of Human Rights (UDHR) in 1948 to be a common standard of achievement for all peoples and all nations after the atrocities of two world wars. See OHCHR, "International Law," OHCHR, 2021, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>.

<sup>2</sup> Malcolm Langford, "Critiques of Human Rights," *Annual Review of Law and Social Science* 14, no. 1 (October 13, 2018): 69–89, <https://doi.org/10.1146/annurev-lawsocsci-110316-113807>; Eric A. Posner, *The Twilight of Human Rights Law* (Oxford, UK: Oxford University Press, 2014).

<sup>3</sup> Full respect and protection of human rights were among the aspirations of Indonesian citizens following the downfall of authoritarian President Soeharto in 1998. Therefore, IHRL was adopted and embedded in the 1945 Constitution.

<sup>4</sup> According to the United States Commission on International Religious Freedom, 71 countries still enforce anti-blasphemy law. See USCIRF, "Respecting Rights?" <https://www.uscifr.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf>.

<sup>5</sup> The IABL was enacted in 1965 as Law Number 1/PNPS/ 1965 on Prevention of Abuse and/or Blasphemy toward Religion.

maintaining religious harmony. In most blasphemy cases in Indonesia, the police arrest people who are considered to have defamed one of the established, state-recognized religions, or they arrest followers of minority religious groups suspected of defiling or deviating from the recognized religions.<sup>6</sup> The criminalization of unorthodox religious groups and the government's reluctance to revoke Islam-oriented regional regulations are at odds with the state's official platform of religious pluralism.<sup>7</sup> The government and its supporters believe that censorship of insulting opinions and criticism are justified by IHRL since the right to FoE is not an absolute right.<sup>8</sup> However, the IABL, which limits the right to FoE, is often too restrictive, ambiguous, and discriminative. Instead of preventing hate speech, the law threatens the essence of the fundamental rights to freedom of speech and religion, and even jeopardizes democratization.

This study examines the constitutionality of the IABL, which featured in three decisions of the Constitutional Court: No. 140/PUU-VII/2009, No. 84/PUU-X/2012, and No. 76/PUU-XVI/2018. While the Court has acknowledged the IABL contains provisions with multiple interpretations, it insists on maintaining the law by arguing it is constitutional and aligned with Article 28J of Indonesia's 1945 Constitution. Article 28J states:

1. Every person shall respect human rights of others in the order of life of the society, nation, and state.
2. In exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society.

In view of Article 28J, the Constitutional Court has said that as the right to religious expression is not an absolute right, it could be limited in order to

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<sup>6</sup> According to Andreas Harsono, more than 150 people have been punished under the IABL. Andreas Harsono, "Indonesia to Expand Abusive Blasphemy Law," Human Rights Watch, October 31, 2019, <https://www.hrw.org/news/2019/10/31/indonesia-expand-abusive-blasphemy-law>.

<sup>7</sup> Tim Lindsey and Butt, Simon, "State Power to Restrict Religious Freedom: An Overview of the Legal Framework," in *Religion, Law and Intolerance in Indonesia* (London: Routledge, Taylor & Francis Group, 2016).

<sup>8</sup> See the arguments by the government and religious organizations, when agreeing to maintain the IABL, in *Judicial Review of Constitutional Court Law*, Decision of Constitutional Court No. 140/PUU-/2009; No. 84/PUU X/2012; No. 56/PUU-XVI/2017 (The Constitutional Court of the Republic of Indonesia 2017).

maintain respect for the rights of others and to protect public order.<sup>9</sup> Also the Court believes that revoking it would create a dangerous vacuum of law.<sup>10</sup>

The conundrum concerning the IABL is that although flawed, it was declared constitutional by the Constitutional Court. If the IABL is constitutional, why does the Court acknowledge the law is flawed? The Court has been unwilling to repeal the IABL based on an assumption that social disorder would erupt if people commit blasphemous acts and there is no IABL under which they can be charged. Therefore, the Court has decided the IABL should be kept until a new bill is ready. The Court did not consider that Indonesia already has a Criminal Code to maintain public order and prevent unlawful acts in society.

Although there are previous studies about the IABL, the ambiguity of the Constitutional Court's decisions on the constitutionality of the law has resulted in new legal precedents that have not been widely discussed. Indonesia has adopted IHRL and ratified the United Nations International Covenant on Civil and Political Rights (ICCPR) and its derivative documents,<sup>11</sup> but this study will analyze how the Constitutional Court has applied those norms and principles fully and precisely during its reviews of the IABL.

## II. METHOD

This doctrinal legal study uses a qualitative approach to examine the Constitutional Court's decisions that upheld the constitutionality of the IABL while also recognizing its flaws. This study begins by examining whether the concept of intersection between the rights to FoE and FoRB and the concept of legitimate limitation of human rights has been fully enshrined in the Court's decisions. It also considers to what extent the Court's decisions on the constitutionality of the IABL have been influenced by the misinterpretation of the core principles of FoRB and FoE and their legitimate limitation. Failure to recognize the core

<sup>9</sup> See Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2009 (p. 305); No. 84/PUU X/2012 (p. 142–145); No. 76/PUU-XVI/2018 (p. 35) (The Constitutional Court of the Republic of Indonesia).

<sup>10</sup> See Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2009 (p. 304); No. 84/PUU X/2012 (p. 142); No. 76/PUU-XVI/2018 (p. 33) 2017 (The Constitutional Court of the Republic of Indonesia 2017).

<sup>11</sup> Indonesia adopted the ICCPR through Law No. 12 of 2005.

principle of non-discrimination in respecting religious freedom and its standard limitation has allowed the state to impose excessive limits on such rights.

### III. ANALYSIS AND DISCUSSION

#### 3.1. Intersection between the right to FoRB and FoE

The provisions of the IABL that limit the right to religious expression fall into the intersection between the right to FoE and FoRB. Religious expression can be restricted by the state when it is considered to violate the rights or freedoms of others. This is in line with ICCPR Article 19(3), which states: "The exercise of the rights ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals."

Religious expression can also be restricted by the state when it is considered harmful or involves spreading hatred that advocates discrimination. This is covered in ICCPR Article 20(2), which states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

The right to FoRB is a fundamental right of every person and is guaranteed by Article 18 of the Universal Declaration of Human Rights (UDHR), as well as Article 18 of the ICCPR, UN Human Rights Committee (UNHRC) General Comment No. 22 on Article 18 of the ICCPR, and the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (Resolution 36/55).<sup>12</sup> The core values of the right to FoRB under Article 18 of the ICCPR can be observed in General Comment No. 22 and Resolution 36/55. The ICCPR and its derivative documents do not stand merely as legally binding norms but also as a common standard that is adopted by civilized nations.

<sup>12</sup> The UN General Assembly reinforced the right to FoRB with the adoption of General Comment No. 34 on freedoms of opinion and expression. Paragraph 48 of GC No. 34 states: "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3 ...."

According to Heiner Bielefeldt, religious freedom is, in principle, a universal right inherent in every human being and it cannot be revoked, as neglecting this right will result in the neglect of other rights.<sup>13</sup> Bielefeldt explains that the right to FoRB has two dimensions, namely the internal dimension and the external dimension.<sup>14</sup> The internal dimension includes the right to choose, leave, and depart from other religions; under Article 4(2) of the ICCPR, the state is not allowed to derogate such rights. The external dimension covers the right to worship, teach, and the observance of religion, which the state is allowed to limit within the framework of Article 18(3) of the ICCPR. However, these restrictions have to be in a strict and clear arrangement, and cannot reduce the essence of fundamental rights or discriminate against certain religious groups.<sup>15</sup> Under Article 18(3), restrictions on freedom of religion or beliefs are only permissible if “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. Such restrictions should also fulfill a proportionality test. The legitimate standard of limitation is vital to be understood to avoid excessive limitation of rights, as will be elaborated on in the next section.

In a democratic society, it is essential to fully respect and protect the right to FoE,<sup>16</sup> which is protected for everyone, everywhere.<sup>17</sup> At the international level, it is protected under the UDHR<sup>18</sup> and the ICCPR<sup>19</sup>, particularly in Article 19 and Article 20 of the latter. Both the UDHR and ICCPR have been adopted as a common standard of achievement of human rights protections for all people in all nations.<sup>20</sup> Other instruments are the UN Human Rights Committee

<sup>13</sup> Heiner Bielefeldt, “Freedom of Religion or Belief—A Human Right under Pressure,” *Oxford Journal of Law and Religion* 1, no. 1 (April 1, 2012): 15–35, <https://doi.org/10.1093/ojlr/rwro18>.

<sup>14</sup> *Ibid.*, 21.

<sup>15</sup> *Ibid.*, 23.

<sup>16</sup> Emily Howie, “Protecting the Human Right to Freedom of Expression in International Law,” *International Journal of Speech-Language Pathology* 20, no. 1 (January 2, 2018): 12–15, <https://doi.org/10.1080/17549507.2018.139261>.

<sup>17</sup> International Center for Not-for-Profit Law, “The Right to Freedom of Expressions: Restriction on Fundamental Rights,” *Global Trends in NGO Law* Vol.6, 1; See also UN General Assembly Resolution 59(1), December 14, 1946.

<sup>18</sup> See Resolution 217 A (III) of December 10, 1948.

<sup>19</sup> The ICCPR was adopted by General Assembly Resolution 2200A (XXI) of December 16, 1966, entered into force March 23, 1976, and has been ratified by 165 countries, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>20</sup> The right to FoRB and FoE are protected in all regions, such Europe, see Article 10 of the European Convention on Human Rights; in America, see Article 9 of the American Convention on Human Rights; in Africa, see Article 13 of the African Charter on Human and People's Rights; in Asia, see Article 22 Paragraph on Civil and Political

(UNHRC) General Comment No. 34 on freedoms of opinion and expression. These documents embody all values, concepts, principles, standards, and rules that have been ratified and practiced by the international community,<sup>21</sup> including Indonesia.

Article 19 of the UDHR and Article 19(1) of the ICCPR both acknowledge the right to freedom of opinions.<sup>22</sup> This freedom is elaborated upon in ICCPR Article 19(2), which states: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

According to Scanlon, the word “freedom” means that every person has the autonomy to decide independently what they should believe and what they should do.<sup>23</sup> Thus, government actions that censor one’s thoughts, opinions, or beliefs expressed through various media are contradictory to Article 19 of the ICCPR, unless IHRL permits a valid reason. Government suppression of opinions and beliefs is especially concerning if it only targets political rivals or minority groups through repression or criminalization. This is because the freedom “to seek, receive, impart information or ideas in all kinds” is protected equally and only can be limited under ICCPR Article 19(3) and Article 20(2) and (3).

The restriction of FoRB is similar to the limitation of the right to FoE, so the two will intersect in their application.<sup>24</sup> On the one hand, protecting the right to FoE would strengthen exercising FoRB.<sup>25</sup> On the other hand, both rights could also interlock in tension and limit each other.<sup>26</sup> Moreover, the right to FoE

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Rights of the ASEAN Declaration on Human Rights; and in Middle East, see Article 32 of the Arab Charter on Human Rights.

<sup>21</sup> Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2006).

<sup>22</sup> Article 19(1) of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19(1) of the ICCPR states: “Everyone has the right to hold an opinion without any interference.”

<sup>23</sup> Thomas Scanlon, “A Theory of Freedom of Expression,” *Philosophy and Public Affairs* 1, no. 2 (1972): 204–26.

<sup>24</sup> Alice Donald and Erica Howard, “The right to freedom of religion or belief and its intersection with other rights,” *ILGA-Europe*, January 2015; Asma T. Uddin, “Provocative Speech in French Law: A Closer Look at Charlie Hebdo,” *FIU Law Review* 11, no. 1 (September 22, 2015), <https://doi.org/10.25148/lawrev.11.1.14>.

<sup>25</sup> Donald and Howard, “The right to freedom of religion.”

<sup>26</sup> Anshuman A. Mondal, “Articles of Faith: Freedom of Expression and Religious Freedom in Contemporary

is a precondition to the enjoyment of other rights,<sup>27</sup> in which the limitation of FoE should not breach other rights such as FoRB,<sup>28</sup> since a state is permitted to exercise restrictions through its domestic law,<sup>29</sup> such as anti-blasphemy laws.<sup>30</sup>

The IABL, like anti-blasphemy laws in several countries, was inherited<sup>31</sup> from a former colonial power.<sup>32</sup> Such laws have long been used to restrict hate speech and insults against religious artifacts, holy personages, customs, and beliefs.<sup>33</sup> In practice, the IABL tends to limit the right of religious minorities to express their beliefs and teachings, which is incompatible with IHRL. First, according to UNHRC General Comment No. 34, blasphemy laws are incompatible with the ICCPR unless, as per ICCPR Article 20(2) they are limited to preventing “incitement to discrimination, hostility or violence”.<sup>34</sup> The limitation should only be permissible if applied to the external dimension of the FoRB.<sup>35</sup> However, prosecuting people because their religion or belief is considered deviant violates the internal dimension of their rights guaranteed in Article 18 of the ICCPR.<sup>36</sup>

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Multiculture,” *Islam and Christian–Muslim Relations* 27, no. 1 (January 2016): 3–24, <https://doi.org/10.1080/09596410.2015.1114240>.

<sup>27</sup> Howie, “Protecting the Human Right.”

<sup>28</sup> Philippe Schmitter and Terry Karl, “What Democracy Is...and Is Not,” *Journal of Democracy* 2, no. 3 (January 1970): 75–88.; Howie, “Protecting the Human Right,” 2.

<sup>29</sup> Julie Fraser, “Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law,” *The International Journal of Human Rights* 23, no. 6 (July 2019): 974–92, <https://doi.org/10.1080/13642987.2019.1577539>.

<sup>30</sup> *Black’s Law Dictionary* defines blasphemy as: “Any oral or written reproach maliciously cast upon God, His name, attributes, or religion .... It embraces the idea of detraction, when used towards the Supreme Being, as “calumny” usually carries the same idea when applied to an individual ....” (155–56).

<sup>31</sup> For example, Pakistan’s blasphemy law was inherited from that codified by the British colonial government in India in 1860. See also W. Cole Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, Second edition, Aspen Select Series (New York: Wolters Kluwer, 2019).

<sup>32</sup> Durham and Scharffs, *Law and Religion*.

<sup>33</sup> David Nash and Chara Bakalis, “Incitement to Religious Hatred and the ‘Symbolic’: How Will the Racial and Religious Hatred Act 2006 Work?” *Liverpool Law Review* 28, no. 3 (2007): 349–75.

<sup>34</sup> Article 20(2) states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

<sup>35</sup> According to Article 18(1) of the ICCPR, the right to freedom of religion or beliefs is divided into two dimensions. One dimension is related to the right to hold and change religion. This right is also known as the *forum-internum*, in which no one or no state can interfere with the liberty of any person to hold or choose the religions or beliefs. The second dimension is the right to manifest the religions or beliefs or known as *forum-externum*. For example, everyone has the right to practice, worship, teach, and observe the religions or beliefs, either alone or in society, either private or public and could be a subject of such limitation under Article 18(3).

<sup>36</sup> Article 18(1) states that every person has the right to embrace religion according to their beliefs. This article is broadly interpreted to include the right to determine a religion, leave a particular religion, convert to a religion, or not even have a religion. Heiner Bielefeldt, a UN special rapporteur on FoRB, cites the rights stipulated in Article 18(1) as an internal dimension that functions absolutely, meaning the state cannot limit it. The principle of religion without coercion is at the core of Article 18(1).



The right of a person to manifest or to express his or her religious thought may be subject to limitation under Article 18(3) or Article 19(3), but the state does not have to criminalize the person, except when the expression falls under Article 20(2) and (3), constituting incitement to discrimination, hostility, or violence.<sup>37</sup>

Jeroen Temperman has emphasized that while the right of expression is protected by the ICCPR, IHRL does not recognize the right to one's religion and belief being always protected from criticism, ridicule, or insult, or the right to have one's religious feelings respected.<sup>38</sup> Nevertheless, in *Otto-Preminger-Institut v. Austria*, the European Court of Human Rights concluded it was a legitimate aim to protect the right not to insult others in their religious feelings.<sup>39</sup> The state is permitted to intervene in FoE if such expression is intended against the religious feelings of others.<sup>40</sup> In this sense, the case of *Otto-Preminger-Institut v. Austria* should be considered incompatible with ICCPR Article 20(2), and the perpetrator should not be punished.<sup>41</sup>

Moreover, the 2012 Rabat Plan of Action, which concerns the prohibition of national, racial or religious hatred, recommends that ICCPR state parties, when limiting religious expression, consider six aspects: context, speaker, intent, content, extent and likelihood of incitement to hatred.<sup>42</sup> This approach aims to

<sup>37</sup> Article 20 states: "(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." UNHRC General Comment No. 22 states: "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated." The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR state: "No limitation referred to in the Covenant shall be applied for any purpose other than for which it has been prescribed." In most Western countries, the violation of the right to FoE is usually submitted to the civil court rather than the criminal court. See also Article 4A of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which states that States Parties: "Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."

<sup>38</sup> Jeroen Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech," *BYU L Rev* 3 (2011): 729.

<sup>39</sup> *Otto-Preminger-Institut v. Austria*, 11/1993/406/485, Council of Europe: European Court of Human Rights, 23 August 1994, [http://www.echr.coe.int/echr/application\\_number\\_13470/8](http://www.echr.coe.int/echr/application_number_13470/8).

<sup>40</sup> *Ibid.*, 14.

<sup>41</sup> Jeroen Temperman, "Freedom of Expression," 735–736; Dmitry Kuznetsov, "Freedoms Collide: Freedom of Expression and Freedom of Religion in Russia in Comparative Perspective," *Russian Law Journal* 2, no. 2 (2015): 75, <https://doi.org/10.17589/2309-8678-2014-2-2-75-100>.

<sup>42</sup> Amy Shepherd, "Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR," *Utrecht Journal of International and European Law* 33, no. 85 (2017): 62–83, <https://doi.org/10.5334/ujel.405>.

protect the right of individuals from harmful speech that advocates violence or discrimination against people of a certain race, religion or ethnicity, as guaranteed in Article 20. Obviously, from a human rights perspective, an individual is a rights holder.<sup>43</sup> Therefore, Bielefeldt emphasizes that respecting everyone's human dignity is crucial in protecting human rights. This requires equal treatment of everyone regardless of race, religion, gender, and other social determinants.<sup>44</sup>

To achieve a balance between FoRB and FoE, the application of anti-blasphemy laws should be directed from merely protecting religious symbols or feelings to protecting individuals' rights from incitement of hatred. Whether the IABL is focused on preventing the incitement of hatred against the individual will be discussed further. Moreover, it is important to legitimately and proportionally apply the standard limitation of the right to FoE, in order to prevent excessive limiting measures that could negate other fundamental and essential human rights.

### **3.2. Legitimate and Proportional Limitation of FoRB Intersecting with FoE**

Since the IABL corresponds with government measures to limit religious expression, this study focuses only on examining standards for limiting FoE. Unlike the right to FoRB, the right to FoE is not an absolute right.<sup>45</sup> A state is permitted to exercise discretion of restrictions through its domestic law.<sup>46</sup> However, the restriction itself must be strict with clear interpretation, regulated by law, and used for the purpose stated in the agreement.<sup>47</sup> Therefore, when a person needs to manifest their religion or beliefs, that person cannot be punished because of his/her belief, imagination, or thought, except if the religious expression of the person advocates incitement of hatred against other religions or beliefs (Article 20(3)) or endangers other people's lives or safety. The permissible scope of legal

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<sup>43</sup> Bielefeldt, "Freedom of Religion or Belief," 23.

<sup>44</sup> Ibid.

<sup>45</sup> Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* 26, no. 1 (2010): 183–236.

<sup>46</sup> Fraser, "Challenging State-Centricity and Legalism."

<sup>47</sup> Julie Frances Debeljak, "Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006," *Melbourne University Law Review* 32, no. 2 (2008): 422–69; Durham and Scharffs, *Law and Religion*.

limitations of FoE is described in both Article 19(3)<sup>48</sup> and Article 20(3) of the ICCPR and explained further by the UN Economic and Social Council through the adoption of the Syracuse Principles on the Limitation and Derogation Provisions in the ICCPR,<sup>49</sup> as adopted by the UN General Assembly through UNHRC General Comment No. 22.<sup>50</sup> These principles aim to avoid misinterpretation by state members by helping them understand the provisions when adopting them into domestic laws.

Summarizing Article 19(3), the Syracuse Principles, and UNHRC General Comment No. 22, Durham and Scharffs have noted four stages that a court must carry out when seeking to limit a person's right to freedom of religion and expression. The limiting policy should pass those four stages of testing respectively and thoroughly, and when a policy fails the test, the defendant should be released.<sup>51</sup> The four stages are outlined below.

Stage I. The restrictions on freedom of religion and expression must be set out in law. This requirement consists of a formal element and a qualitative element. A formal element requires the state interference be legally authorized.<sup>52</sup> Legally authorized means that the law is enacted by law-making bodies, through a legitimate process, and not contradictory with the respective state's constitution. Most importantly, the limitation on the right should "be compatible with the objects and the purpose of the Covenant".<sup>53</sup>

Stage II. The restrictions are only for violations committed in public. The explanation of this aspect can be found in the six points of 2011 Rabat Plan of

<sup>48</sup> Article 19(3) of the ICCPR provides FoE's limitation clause: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputation of others; (b) for the protection of national security or of public order, or of public health or morals."

<sup>49</sup> See the Syracuse Principles on the Limitation and Derogation Provisions in the ICCPR, UN Doc. E/CN.4/1985/4, Annex (1985).

<sup>50</sup> See "UN Human Rights Committee, General Comment 22(48)," adopted by UNHRC on July 20, 1993. UN Doc. CCPR/C/21/Rev.1/Add.4 (1993).

<sup>51</sup> Durham and Scharffs, *Law and Religion*.

<sup>52</sup> W. Cole Durham, Jr, "Religious Freedom in a Worldwide Setting: Comparative Reflections," in *The Proceedings of the 17th Plenary Session on Universal Rights in a World of Diversity: The Case of Religious Freedom 29 April-3 May 2011* (Vatican City: Pontificia Adademia Scientiarum, 2012).

<sup>53</sup> See "UNHRC General Comment No. 22(9)."

Action.<sup>54</sup> First, the court should consider first the status or position of the speaker in society, particularly when he or she speaks in public, whether the speech is intentionally targeted to certain groups. Second, the court should consider the speaker's intention, meaning the action requires a relationship between the object, speech subject, and the audience. Third, whether the likelihood or imminence of incitement happens, which means that some degree of risk of harm must be identified.<sup>55</sup> Fourth, 'public' means the speaker cannot be punished if the expression is done in a private space. Fifth, the speech should be considered as public nature, which means that "the statements circulated in a restricted environment or widely accessible to the general public". Sixth, the context should be prevalent with social and political conditions when the speech was delivered and shared.

Stage III. The restrictions must meet the 'necessity test' with at least one of the following objectives: (a) maintaining public order; (b) protecting people's morality; (c) protecting public health; (d) protecting and respecting the rights of others. Durham notes that although the limitation must be tested on a case by case basis, the state cannot breach the fundamental right of "freedom of thought, conscience and religion", and the state cannot prefer to only protect a certain religion by imposing arbitrary punishment to hold back the right to manifest one's religion.<sup>56</sup> Importantly, the limitation grounds should be strictly related only to the enumerated grounds and with clear interpretation.<sup>57</sup> The extended limitation grounds that are not stated in Article 19(3) or Article 20(2) may not be invoked to justify a limitation.<sup>58</sup>

<sup>54</sup> In an effort to end discrimination against minority religions, the UN of General Assembly in 2013 adopted the Rabat Plan of Action (RPA) on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination hostility, or violence. (see UN General Assembly A/HRC/22/17/Add.4).

<sup>55</sup> RPA, 11.

<sup>56</sup> Durham, "Religious Freedom in a Worldwide Setting".

<sup>57</sup> *Ibid.*, 374; "UNHRC General Comment No. 22(48)."

<sup>58</sup> See also Article 9(2) of the European Convention on Human Rights and Article 8 of the Asian Declaration of Human Rights (ADHR). The articulates that a state can only limit such rights if the limitation has been determined by the statute made by legislation to guarantee basic human rights and freedoms and respect the rights of others. The limitation must be considered as one of the conditions, namely (a) protecting national security; (b) taking care of public order; (c) protecting public health; (d) protecting public morals; (e) achieving community welfare. Compared with the limitation requirements contained in the ICCPR, the criteria of limitation in the ADHR seems more lenient because it adds another aspect of "achieving public welfare" as one of the considerations that can be used to make restrictions. Meanwhile, the AHRD does not provide a concrete definition. Thus, this loose limitation can be interpreted broadly by each country. Therefore, the extended limitation in the ADHR by adding the aim of "achieving community welfare" is not in line with the Article 19(3) of the ICCPR.

Stage IV. The restrictions must meet the 'proportional test', which means the restrictions should guarantee equal treatment to everyone through proportional application of punishment and must not be prone to discrimination against other minority groups.

In sum, FoE is indeed a non-absolute right. However, the right to FoE is fundamental for every human being and essential in a democratic society. Therefore, the right to FoE can be limited only by a strict requirement, having necessary and certain purpose, without any means to discriminate against others, following the steps of legitimation limitation under IHRL, and without any means to reduce the essential rights that are protected under Articles 18, 19, and 20 of the ICCPR. Whether or not these standard limitations have been fully adopted by the IABL and followed by the Indonesian Constitutional Court will now be discussed further by examining the flaws in the law.

### **3.3. Is the 1965 Anti-Blasphemy Law Flawed?**

A flawed law is one that has a shortfall in terms of its content and the process by which it was made. The flawed law has a presumption of legality before it is repealed by the legislative body or revoked by the constitutional court if its substance is contradictory to the constitution of the country. Indonesia's 1945 Constitution has been amended four times, and arguably the most important amendment was the adoption of IHRL,<sup>59</sup> now embedded in more than 10 provisions of the Chapter IV on Human Rights. Historically, the IABL was formed in 1965, when the 1945 Constitution had not adopted human rights legal norms, and until now, the law's content has not changed. Consequently, the norms of IHRL embedded in the 1945 Constitution were not used as the basis for reference in the formation of the IABL. The following explanation will further emphasize why the IABL is considered a flawed law.

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<sup>59</sup> Many authors indicate that IHRL is embedded in the provisions of the 1945 Constitution because Indonesia has ratified 9 out of 10 of the core international human rights instruments, such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), CERD, the Convention Against Torture (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the Committee on Migrant Workers (CMW). See Jimly Asshiddiqie, "Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today," *Constitutional Review* 1, no. 2 (March 28, 2016): 1, <https://doi.org/10.31078/consrev121>.

First, the main objective of the IABL is to protect religions rather than protecting 'religious people' themselves, so that punishing individuals who adhere to a religion or belief is considered normal, rather than allowing religions to be criticized. Although the core principles of FoRB are articulated in Articles 28D, 28E, 28I, 29 of the 1945 Constitution, the IABL contains different values and norms. According to Article 29 of the 1945 Constitution, Indonesia is a country based on "Belief in the One and Only God". Article 1 of the IABL interprets this as homogeneous religion,<sup>60</sup> in which no one should encourage any person to have no religion or to interpret the religious teaching of the main religions differently. Meanwhile, Article 18 of the UDHR and Article 18 of the ICCPR protect the rights of a person to have no religion or belief in their own religion. Various cases decided under the IABL merely punished someone who insulted religious symbols or followed different teachings of the main religions, instead of punishing the incitement of hatred. Therefore, the IABL would not comply with IHRL since it is merely protecting the religious system or the personal feelings of others.<sup>61</sup>

Second, the IABL has no clear conception of what is defined as defaming religion.<sup>62</sup> The ambiguous concept laid down in the law's Article 1 defines defaming religions in broad terms. At least five actions could be considered blasphemy: (a) insulting a religion; (b) persuading someone to be a non-believer; (c) disturbing a religious ritual or making noise near a house of worship; (d) insulting a cleric while leading a ritual; (e) criticizing the teaching of religion, including criticizing other religious practices. The IABL is articulated under Law No. 1/PNPS/1965 in correlation with Articles 156A and 157 of the Indonesian Criminal Code. In 2008, Indonesia enacted the Electronic Information and Transactions Law (ITE Law), which included two articles subsequently used in some blasphemy cases. Article 28(2) of the ITE Law prohibits dissemination of "information aimed at causing hatred or hostility". Article 45A(2) of the ITE Law can also be used to

<sup>60</sup> Tim Lindsey and Helen Pausacker, *Religion, Law and Intolerance in Indonesia* (London: Routledge, Taylor & Francis Group, 2017).

<sup>61</sup> Temperman, "Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech."

<sup>62</sup> See Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2010, 298 and 304 (The Constitutional Court of the Republic of Indonesia 2010).

criminalize hate speech against religion. Nonetheless, the latter article is rarely implemented by the courts.

As previously mentioned, according to the Rabat Plan of Action, to qualify as incitement of hatred, an act has to be considered in terms of the six-part threshold test: (1) social and political context, (2) status of speaker, (3) intent to incite the audience against a target, (4) content of the speech, (5) extent of its dissemination, and (6) likelihood of incitement to hatred.<sup>63</sup> So only a leader who is speaking in public in the context of a public meeting and intentionally delivering a speech to advocate the audience to attack another person based on hatred of his or her religion or race can be accused of hate speech. In practice, Indonesian courts focus on criminalizing actions or speech that qualify as blasphemy under Article 1 of the IABL, instead of focusing on hate speech. The five actions that can be considered forms of blasphemy under the IABL are focused on protecting “the feelings of the main religions’ followers”. Being insulted or not will depend on the feelings of the people. Therefore, the interpretation of each form depends on the subjectivity of the judge who interprets the action. Each form can be loosely interpreted.<sup>64</sup>

For instance, in East Kalimantan in 2017, Balikpapan District Court sentenced a doctor named Otto Rajasa to two years in jail for “disseminating hatred and hostility” in a social media post. Rajasa had written a Facebook post that criticized a mass rally staged by Muslims in Jakarta against the city’s then-Governor Basuki ‘Ahok’ Tjahaja Purnama, whose political rivals had accused him of blaspheming Islam. Rajasa was convicted under Article 28(2) of ITE Law, under which it is prohibited to “disseminate information aimed at causing hatred or hostility”. However, there is no clear definition of ‘hatred or hostility’. The phrase is too ambiguous and could be interpreted subjectively by the authorities. The court failed to prove whether Rajasa’s post could be categorized as a dangerous expression that had advocated religious hatred to incite hostility or violence, as referred to in Article 20 of the ICCPR.

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<sup>63</sup> RPA.

<sup>64</sup> Melissa A. Crouch, “Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law,” *Asian Journal of Comparative Law* 7, no. 1 (2012), <https://doi.org/10.1515/1932-0205.1391>.

In another case, East Jakarta District Court in 2017 sentenced Ahmad Musadeq, a leader of a group called the Fajar Nusantara Movement (*Gerakan Fajar Nusantara*, Gafatar), to five years in jail for blasphemy against Islam. Gafatar had been deemed a deviant sect and banned in 2016 because it combined elements of Islam, Christianity and Judaism. Musadeq was convicted under the Criminal Code's Article 156A(a) which carries a maximum five-year term for any person who "deliberately in public gives expression to feelings or commits an act ... abusing or staining a religion, adhered to Indonesia." He was also convicted under the Criminal Code's Article 55(1) on perpetrating or provoking a punishable act; and Article 64(1) on multiple crimes and misdemeanors. The court's decision to convict Musadeq aimed to "protect public order" by punishing those who espouse teachings deemed not in line with orthodox religions. There have been numerous cases in Indonesia of people being charged for alleged hate speech or blasphemy, based on ambiguous provisions, and then severely punished.

The Constitutional Court has confirmed the vagueness of the IABL. In its Decision No. 140/PUU-VII/2009, the Court stated: "The substance of the Law on the Prevention of Blasphemy on Religion [...] in terms of the form of regulation, formulation, and legal principles needs to be refined."<sup>65</sup> The Court further noted: "The need for revision of the Law on Prevention of Blasphemy of Religion, both within the formal scope of legislation, as well as in substance, in order to have material elements that are more clarified so as not to cause misinterpretation in practice."<sup>66</sup> The exact same view was echoed in two other decisions, No. 76/PUU-XVI/2018 and No. 84/PUU-X/2012. The Constitutional Court believes the law in question does not limit the right to belief but limits religious expression in public that is considered hostile or abuses or desecrates the religions adhered to in Indonesia. Nevertheless, the word 'abuse' or 'blasphemy' is often used to declare as heretical, religious teachings that have different interpretations from the six major religions recognized in Indonesia. In cases involving Muslim minority groups, such as Ahmadiyya and Shia, which were the applicants of

<sup>65</sup> Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/PUU-VII/2009, 298 (The Constitutional Court of the Republic of Indonesia 2009).

<sup>66</sup> *Ibid.*, 304.



judicial reviews No. 76/PUU-XVI/2018 and No. 84/PUU X/2012 respectively, the Constitutional Court believes the IABL is used to respect and protect religions from such 'deviations'. The Court said an authoritative ulema (Muslim leader) can decide whether such teachings are deviant or not. Unlike the Rabat Plan of Action, under the IABL anyone can be ensnared with a blasphemy charge, even though they are not an important figure and their speech was not delivered with the intention of influencing followers to hate other religious groups and commit acts of violence against them.

Third, the IABL contains discriminative norms since the law is only applicable or targeted at persons belonging to minority religious groups. The Elucidation of Article 1 of the IABL states the term 'religions' means the six main religions recognized by the government: Islam, Christianity, Catholicism, Hinduism, Buddhism, and Confucianism. Article 1 has been understood by law enforcement that the law only protects those main religions. Therefore, religions outside those six are often excluded from legal protection. In blasphemy cases in Indonesia, more than 150 people coming from minority religious groups have been criminalized and convicted under the IABL.<sup>67</sup>

The Constitutional Court, in its decisions No.140/PUU-VII/2009, No. 84/PUU X/2012 and No. 76/PUU-XVI/2018, repeatedly stated the IABL does not prohibit a person from having beliefs that are different from other religions or beliefs, but what is limited is when those beliefs are expressed in public or disseminated to others. The Court believes that under Article 28J of the Constitution and under IHRL, the manifestation of religious expression can be limited by law. It is true that limitations of FoRB and FoE are also applicable in IHRL, specifically under Article 18(3) and Article 19(3) of the ICCPR. However, the Constitutional Court ignores that FoRB consists of two aspects, the internal dimension (*forum-internum*) that cannot be limited in all circumstances, and the external dimension (*forum-externum*) that can be limited. The Court has narrowly interpreted Article 28J of the Constitution as not differentiating between the internal and external dimensions, in which the state can limit both. This

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<sup>67</sup> Harsono, "Indonesia to Expand Abusive Blasphemy Law."

interpretation becomes problematic since the standard limitation of religious expression is not regulated clearly in either the Constitution or the IABL. The four stages of testing legitimate and proportional limitations under UNHRC General Comment No. 22 on Article 18 of the ICCPR, i.e., legitimacy test, necessity test, proportionality test, and non-discriminatory test,<sup>68</sup> are beyond the Court's consideration.

Indeed, the Constitutional Court's consideration is highly ambiguous and contradictory because, on the one hand, the Court says the IABL respects every person's right to a different belief or religion. Yet the Court appears to have overlooked that weaknesses in law enforcement cannot be separated from weakness of legal substance.

In cases of blasphemy, the government is not neutral. This non-neutrality arose when the government, through the Ministry of Law and Human Rights, asked the Indonesian Ulema Council (MUI) to issue a fatwa on heresy against Gafatar. It was also evident when the government issued a letter banning Gafatar on the grounds that its dissemination, interpretation, and activities had deviated from Islamic teachings. From the perspective of permissible limitation of the right to FoE, particularly the legality test, Durham (2012) indicates that neutrality is a condition that must be met to fulfill the legality test. However, since there is no such limitation standard mentioned in the IABL, in dealing with Gafatar, the legality test is not examined. As a result, Gafatar leaders have been convicted by various courts.

The blasphemy cases against the Gafatar leaders applied Article 156A of the Criminal Code, finding them guilty of deliberately and publicly expressing feelings or committing actions "abusing or staining a religion, adhered to Indonesia".<sup>69</sup> If Gafatar had disturbed public order by applying coercive rules on its adherents to follow new teachings and abandon their previous teachings, then the courts should have proved such actions. So, the courts have not moved from the main goal of protecting the feelings of the followers of the majority religions, and

<sup>68</sup> Durham and Scharffs, *Law and Religion*.

<sup>69</sup> See Banda Aceh District Court Decision No. 80/Pid.B/2015/PN Bna on defendant T. Abdul Fatah Bin T. Muhammad Tahib; Jantho District Court Decision No. 03/Pid.C/2015/PN-Jth of 6 February 2016.

have never considered the feelings of Gafatar followers. In this case, the courts failed to understand the difference between the *forum-internum* and *forum-externum* on the right to FoRB. The courts should have stopped hearing the cases and declared the defendants not guilty. However, this has never happened in blasphemy cases in Indonesia, although in some politically charged cases, police have frozen investigations.<sup>70</sup>

### 3.4. Rethinking the Constitutionality of the IABL

#### 3.4.1. Using Universal Constitutionalism to Protect Fundamental Rights

Considering the arguments behind the flaws of the IABL, this section elaborates on why the constitutionality of the IABL needs rethinking. In general, the constitutionality of a statute or a law is the condition that laws adopted by parliament follow an applicable constitution, or the condition in which a particular norm is determined valid under the constitution.<sup>71</sup> When the content of a law violates or contradicts the constitution, it is unconstitutional. Usually, the judicial branch, such as the constitutional court or supreme court, interprets laws and determines if a statute or law is unconstitutional through the mechanism of judicial review. According to various literature, Indonesia's Constitutional Court tends to use the Austrian model based on Hans Kelsen's theory.<sup>72</sup> According to this model, a statute of law reviewed by a constitutional court aims to examine if the law made by the legislative body is in line with the country's constitution. On this matter, the Indonesian Constitutional Court is authorized to decide that a law is null and void in part or in its entirety, invalidating its decisions on all individuals and institutions.<sup>73</sup>

<sup>70</sup> Police issued a Cessation of Investigation Order in a case of alleged blasphemy by Sukmawati Soekarnoputri, a daughter of founding President Sukarno because there was insufficient evidence. The complainants claimed their religious feelings were hurt by a poem in which Sukmawati compared Indonesian traditions to Islamic traditions. See Karina M. Tehusjarana, "Police End Probe into Blasphemy Allegations against Sukmawati," The Jakarta Post, June 17, 2018, <https://www.thejakartapost.com/news/2018/06/17/police-end-probe-into-blasphemy-allegations-against-sukmawati.html>.

<sup>71</sup> See Julian Arato, "Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations," *International Journal of Constitutional Law* 10, no. 3 (2012): 627–59, <https://doi.org/10.1093/icon/mor079>.

<sup>72</sup> Asshidiqie, "Constitutional Adjudication and Democracy." See also Julian Arato, "Constitutionality and Constitutionalism," 627–659. In addition to the Austrian model, there is the American model, in which the Supreme Court carries out constitutional review. A third model is the French model, in which the validity of law is determined by the Constitutional Council.

<sup>73</sup> Asshidiqie, "Constitutional Adjudication and Democracy," 1–2.

The state is obliged, through its law and system, to treat everyone equally without any interference or limitation or other conditions that impair any individual's enjoyment of rights.<sup>74</sup> In Indonesia, the principles of non-discrimination and equality are guaranteed explicitly by the 1945 Constitution through Articles 27, 28I, 28D and 28H.<sup>75</sup> Therefore, there is no doubt that both principles are the core human rights principles to be considered by the Constitutional Court when examining human rights cases.

In the past, the Constitutional Court made several landmark decisions that upheld the principles of non-discrimination and equality. Notably, in Decision No. 97/PUU-XVI/2016, the Court declared certain provisions of the Civil Administration Law to be conditionally unconstitutional because they had restricted followers of traditional beliefs from obtaining compulsory identity cards and family cards. The Court stated that "restrictions on the basis of beliefs that result in different treatment between citizens are discriminatory actions".<sup>76</sup> This consideration was similar to previous decisions, namely No. 070/PUU-II/2004 (on the Law on the Establishment of West Sulawesi Province), No. 27/PUU-V/2007 (on the prohibition of public officials becoming city council chairpersons), and No. 024/PUU-III/2005 (on the Law on Regional Government). Another discriminatory provision was annulled in Decision No. 011-017/PUU-1/2003, in which the Court stated the General Election Law's Article 60G banning former members of the Indonesian Communist Party from participating in elections was a form of discriminative policy contradictory to Article 27 and Article 28D of the 1945 Constitution. In Decision No. 006/PUU-IV/2006, the Court stated that Article 2C and Article 3 of the Truth and Reconciliation Commission Law were contradictory to the Constitution because they discriminated against victims of the past human rights violations since such victims could not demand their right of compensation and rehabilitation until they were willing to forgive the

<sup>74</sup> Louis Henkin, ed., *Human Rights*, 2nd ed., University Casebook Series (New York, NY: Thomson Reuters/Foundation Press, 2009).

<sup>75</sup> Luthfi Widagdo Eddyono, "The First Ten Years of The Constitutional Court Of Indonesia: The Establishment Of The Principle Of Equality And The Prohibition Of Discrimination," *Constitutional Review* 1, no. 2 (2016): 119–46.

<sup>76</sup> Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 97/PUU-XIV/2016, 53 (The Constitutional Court of the Republic of Indonesia 2016).

perpetrators of the violations. Conversely, in the cases challenging the IABL, the Court put aside the core principle of non-discrimination. The Court argued that as long as the restriction on the right to religious expression is carried out through law, then the restriction is legitimate,<sup>77</sup> without considering whether such restrictions lead to discriminatory treatment of certain religious groups. In this sense, the Court has applied the 'particular constitutionalism' approach, which interprets the human rights norms embedded in the Constitution in a narrow sense.

Unlike several decisions in which the 'universal constitutionalism' approach was applied, in the judicial reviews of the IABL, the Court repeatedly said that religious expression is not an absolute right and the IABL is a valid law to limit such right. The Court noted that it "only examines the contents of the law against the 1945 Constitution".<sup>78</sup> The Court also said: "The Law for the Prevention of Blasphemy of Religion is still needed and does not conflict at all with the protection of human rights as regulated in the 1945 Constitution."<sup>79</sup> The decision relies on the Article 28J of the 1945 Constitution and limits itself to communicating with the IHRL that Indonesia has adopted. The Court did not consider the flaws of the IABL that were sufficient grounds to declare it unconstitutional.

### **3.4.2. Strict Limitation of Rights to Ensure no Fundamental Right is Violated**

The Constitutional Court has stated the IABL "threatens anyone who publicly expresses hostility toward other religions or expresses different teachings to the main religions". However, as elaborated earlier, the scope of blasphemy is so wide that it has become too generic and a common tool for criminalizing religious minorities. The criminalization becomes apparent when it involves religious minorities because the government or the majority religion feels attacked by critics from minority groups.

<sup>77</sup> *Ibid.*, 277–279, 288.

<sup>78</sup> Judicial Review of Constitutional Court Law, Decision of Constitutional Court No. 140/ PUU/2010, 294 (The Constitutional Court of the Republic of Indonesia 2010).

<sup>79</sup> *Ibid.*

### 3.4.3. Repealing IABL: A Boon, not a Vacuum, for Human Rights and Democracy

Moreover, considering the provisions of Article 18(3) and Article 20(2) and (3) of the ICCPR, the IABL should focus on religious expressions that encourage discrimination against other religious groups, rather than focusing on imposing restrictions on beliefs. The different religious beliefs between Islam and Protestantism, between Protestantism and Catholicism, between Islam and Hinduism, are a form of diversity that has long been accepted by Indonesia because of its social diversity. The diversity of schools of thought within a religion can also be accepted by society without making it an excuse to punish minority or unorthodox religious groups. The state does not need to limit its citizens' beliefs, since the six main religions have grown because of the freedom of their followers to choose, embrace, and practice their beliefs without sanction or punishment from the state.

There is no doubt that hate speech against any religion should be banned, and the perpetrator should be punished. UNHRC Resolution No. 16/18 of 2011,<sup>80</sup> as a correction of the Resolution of Anti-Defamation (of Islam) of 2009,<sup>81</sup> emphasizes that any intolerant acts toward any religions or beliefs, without distinction, should be addressed by every member state, while, all religions and beliefs should be treated equally. The Universal Periodic Review of the UNHRC has recommended that Indonesia "introduce legislation to repeal the blasphemy law of 1965". However, from what we have considered above, Indonesia is still hesitant to declare the IABL is unconstitutional or needs revision. As a member of the Organization of Islamic Cooperation, which initiated Resolution 16/18, Indonesia should intensify its efforts to implement the resolution. Combating blasphemy is only meant to protect religions or religious symbols, rather than protecting the rights of individuals. Ultimately, Indonesia should take immediate steps to

<sup>80</sup> In 2011, the United Nations Human Rights Council (UNHRC) adopted Resolution 16/18 to combat intolerance and discrimination on the basis of religion or belief. Resolution 16/18 "corrected" the 1999 UNHRC Resolution on Defamation of Religion by putting the rights of individuals at the center of the protection regime.

<sup>81</sup> Waves of Islamophobia in European and American countries prompted Muslim countries to oppose sentiment-based hatred toward Islam. The change of nomenclature to a Resolution Against Blasphemy was finally agreed by Muslim countries, where the basic idea should be to fight hatred against Islam and hatred against other religions.

repeal the IABL and amend its draft Criminal Code by shifting the criminalization of blasphemy into the criminalization of incitement to discrimination, hostility, and violence, in line with international standards.

## VI. CONCLUSION

The Indonesian Constitutional Court seems to have applied the 'particular constitutionalism' approach when reviewing the IABL. There is no doubt that this approach caused the Court to limit itself from openly interpreting the human rights provisions laid down in the 1945 Constitution. As a result, the core values, general principles, and norms of IHRL were not fully adopted. By declaring the constitutionality of the IABL, the Court ignored the fact that the flawed IABL could be used to limit all kinds of religious expression and criminalize people from minority religions outside the six state-recognized religions. The Court seems to have ruled out the two basic core values in the right to FoRB, namely the principle of non-derogable right of the *forum-internum* freedom, and the principle of non-discrimination. The Court's omission of both principles in its decisions on judicial review of the IABL have led to the Court to repeatedly affirm the constitutionality of the law, even after IABL caused discriminative and repressive law enforcement against minority religious groups and triggered interreligious conflict.

The findings of this study illustrate the flawed IABL opens space for the politicization of law enforcement. The absence of indicators regarding defamation of religions and the absence of a standard limitation of the right to religious expression cause law enforcement officers to freely interpret the character of the two according to the development of socio-political interests in Indonesia. As a result, the planned revision of the original law is stagnant, while the number of blasphemy cases handled by police and the courts continues to rise. It seems to have escaped the Constitutional Court's attention that the IABL itself is a main cause of religious tension, public disorder, and horizontal conflict that accompany law enforcement against blasphemy. Moreover, the argument for maintaining the IABL to avoid a legal vacuum is weak. The universal constitutionalism approach,

which has been successfully applied by the Constitutional Court, should be redoubled in reviewing the IABL, so the fundamental right of the people to be treated indiscriminately is not degraded on the pretext of protecting public order.

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