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## LAW, CRIMINOLOGY & CRIMINAL JUSTICE | RESEARCH ARTICLE

# Criminalizing and penalizing blasphemy: the need to adopt a human rights approach in the reform of Indonesia's blasphemy law

Kadek Wiwik Indrayanti<sup>1\*</sup> and Anak Agung Ayu Nanda Saraswati<sup>2</sup>

**Abstract:** The phenomenon of criminalization and penalization of blasphemy continues to be a source of debate around the world until today, including in Indonesia. The first part of this paper analyses the extent to which the blasphemy law in Indonesia is in accordance with the legality and proportionality principle. The second part addresses the legality and proportionality principle according to international human rights standards. Whereas the third part proposes methods to improve the blasphemy law in accordance with the developments in international legal framework. The results argue that the vague formulation of blasphemy can be applied to almost all acts related to religion or belief in Indonesia. Apart from causing a very broad interpretation which puts a great deal of discretion in the hands of judges, the law has and continues to be used to target activities and expressions that should be protected. Therefore, using the measures from new sources related to freedom of religion, Indonesia needs to focus on adopting a method that shifts the criminalization of blasphemy to the eradication of intolerance, discrimination, incitement to violence and violence against persons based on religion or belief, namely hate crimes.

**Subjects:** Criminal Justice - Criminology; Human Rights Law & Civil Liberties; Human Rights; Religion & Violence; Religion & Law

**Keywords:** blasphemy law; criminal sanction; proportionality; human rights; legality

### 1. Introduction

The act of blasphemy and its impact on human rights is a worldwide phenomenon. Despite the international human rights consensus against blasphemy law,<sup>1</sup> as of 2020, there are at least 84 states that still have laws prohibiting blasphemy in their books.<sup>2</sup> Although it is often argued that such a law is needed to prevent religious conflicts and promote harmony, a number of human rights bodies accordingly urges all countries to repeal their blasphemy laws and free those detained or convicted for blasphemy. Such laws are seen to be inconsistent with a number of principles in the international human rights framework in many ways.<sup>3</sup> While speaking out against blasphemy is a legitimate act, laws criminalizing the act infringe upon a number of human rights, such as freedom of religion and freedom of expression. Similarly, the report presented to the General Assembly of the United Nations (UNGA) in 2012 by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression specified that these regulations are often used to suppress the right to freedom of expression.<sup>4</sup>

In many countries (if not all), blasphemy laws remain problematic both in conception and in scope because the words are characteristically unclear and imprecise (vague), leaving the whole

conception open to misuse. The scope of what constitutes blasphemy differs in each country, including acts that insult, attack, or disrespect God or sacred things of a religion; acts that attack, insult or disrespect the religious feelings of believers; additional acts such as acts that attack religious leaders; and even acts of atheism and apostasy.<sup>5</sup> With the classical meaning of blasphemy being an act which insults or shows a lack of reverence or disrespect towards God or sacred things, blasphemy laws across the world lack the requirement of specifying intent and fail to enumerate the acts prohibited. The concept, which varies widely with culture, context, and perception,<sup>6</sup> makes the law in a number of countries open to a wide range of interpretations; thus, it can be used improperly to overpower dissenting opinions and promote intolerance, and it is disproportionately used against religious minorities.

As a legal term it is difficult, if not impossible, to agree upon a legal definition of blasphemy. Since there are different standards in each religion, the vague concept often creates legal uncertainty and encourages a high degree of subjectivity. In the international context, the differences and disagreements between societies and cultures make interpretation problems greatly exacerbated, questioning the rights owned by ideas, religions, and philosophies.<sup>7</sup> This may be the reason for the absence of a universal legal definition defining the meaning and scope of blasphemy under the human rights framework at the international level.

In contrast to the global movement to abolish blasphemy laws, such as in Iceland, Norway, Sweden, France, the Netherlands, Denmark, Malta, Australia (at the federal level), Canada and New Zealand, these laws can still be found in many domestic legal instruments, such as constitutions and statutory laws, and are even often part of national penal codes. Furthermore, punishments for blasphemy range from fines to imprisonment and even death sentences. In fact, at the moment, for blasphemy or apostasy, death penalty is still written in laws in at least 13 countries.<sup>8</sup> In practice, the latest case was in August 2020 in Nigeria when a musician in the northern state of Kano in Nigeria was punished to death by hanging for blaspheming the Prophet Muhammad.<sup>9</sup>

These laws have raised several legal issues. Since it is unfair to punish a person for a crime defined unclearly, one may question upon the basis for the criminalization. This issue becomes relevant since in a society that respects and upholds human rights, criminalising (and thus penalizing) any conduct is only possible when the crimes are clearly described. In addition, one might question the proportionality of sanctions in these laws. Undoubtedly, it is easier to argue that penalizing blasphemy by death penalty is disproportionate. However, the use of other criminal punishments, such as imprisonment, physical punishment or deprivation of liberty are still under debate, especially when it comes to the question of proportionality.

These issues have also been under debate in Indonesia. Indonesia is often highlighted by the international community due to the mentioned unclear, overbroad and ambiguous blasphemy law, which over the years has been applied arbitrarily and discriminatorily against minorities. For example, in 2018 a court in Sumatra sentenced a Chinese Buddhist woman to 18 months in prison for blasphemy after making a remark to an acquaintance about the volume of mosque's loudspeakers.<sup>10</sup> Human rights organizations and the UN have urged the Government of Indonesia to repeal the law, or at least amend and reduce its penalties.<sup>11</sup> However, this is still far from reality.

While there are many articles on Indonesia's blasphemy law, this paper adds how such a law can be reformed, if not abolished, using the developments and interpretation in international human rights law. Therefore, the first part of this paper addresses the blasphemy law in Indonesia and the issue of legality and proportionality. This part analyses the absence of legal certainty in Indonesia's blasphemy law and afterwards test the proportionality of the criminal sanctions provided in the law. The second part addresses the legality and proportionality principle according to international human rights standards. Whereas the third part proposes methods on how the developments should be used to reform Indonesia's law on blasphemy.

## 2. Indonesia's blasphemy law and the issue of legality and proportionality

### 2.1. The absence of legal certainty

As a democratic country, Indonesia recognizes the right to freedom of religion of its people according to their religion or belief. The right has a strong legal basis, guaranteed by the 1945 Constitution.<sup>12</sup> Article 28 E of the 1945 Constitution states that everyone is free to embrace religion and worship according to his religion. It continues to emphasise that the right to religion is a human right that cannot be reduced under any circumstances in article 28 I. Then, article 29 (2) stipulate that the state guarantees the freedom of all person to embrace his own religion and to worship according to his religion and belief. The same provisions are also regulated in Law No. 39/1999 on Human Rights.<sup>13</sup> Nevertheless, the 1965 Blasphemy Law and the Criminal Code does not seem to be in line with the Constitution and related regulations above.

Through Article 156 (a) of the Criminal Code, Indonesia penalizes with a maximum of five years' imprisonment *any person who in public deliberately expresses his/her feelings or engages in actions that in principle is hostile and considered as abuse or defamation of a religion embraced in Indonesia; with the purpose so that people do not adhere to any religion based on the belief of Almighty God.*

Article 156 (a) of the Criminal Code is in fact a complementary to the Presidential Decree No. 1/PNPS/1965 on the Prevention of Blasphemy and Abuse of Religions (hereinafter known as the 1965 Blasphemy Law) article 4,<sup>14</sup> that was signed by Sukarno, Indonesia's first President. Article 1 states as follows:

*Everyone is prohibited from deliberately and publicly telling, recommending or seeking public support in the interpretation of a certain religion adhered to in Indonesia or carrying out religious activities that resemble the activities of the religion in question, where such interpretations and activities deviate from the main points of that religion.*

Based on both laws above, there are two laws in Indonesia that prohibit and criminalize blasphemy, namely article 156 (a) of the Criminal Code which prohibits hostility, abuse and defamation of religion (blasphemy); and article 1 of the 1965 Blasphemy Law which prohibits deviant interpretations of religions and religious activities.

The establishment of the 1965 Blasphemy Law was very political. The law was introduced during tensions at the height of fears of Communism just prior to the so-called attempted Communist coup in 1965.<sup>15</sup> Sukarno signed the presidential decree to protect the major religions recognized by the state namely Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism, accommodating the requests of Islamic organizations that turning into mystical indigenous beliefs could tarnish those major existing religions in the country. In the late 1960s, Suharto (the successor of Sukarno) banned communism after a bloody purge in 1965–1966 but retained the blasphemy law. During his administration in 1969, the decree was made into law. An anti-blasphemy clause (article 4 in the 1965 Blasphemy Law) was also inserted into Indonesia's penal code which still exists until today.

The first question to be addressed is to what extent Indonesia's blasphemy law is in accordance with the principle of legality. The fundamental principle of legality is regulated in article 1 of Indonesia's Criminal Code, which reads that an act shall not be punished except based on the strength of existing criminal legislation. Based on the provisions of the article, a person can only be convicted if at the time the act is committed, the law states that the act is prohibited and is subject to criminal sanctions.

The formulation of blasphemy in article 156 (a) of the Criminal Code and or article 4 of the 1965 Blasphemy Law,<sup>16</sup> is still far from the principle of legality. While the article states that blasphemy is

a criminal act that is primarily aimed at the intention of being hostile or abusive or defaming against a religion, it does not specify the elements that constitute defaming against a religion or blasphemy. The terms “hostility, abuse and defamation” in the article do not mention the object of blasphemy, whether it is blasphemy against God; insult to God’s messenger, holy books or religious worship; or other forms or actions. It is true that the term “blasphemy” is referred to as a criminal act, yet the vague formulation makes it applicable to almost all acts that are connected to religion. Hence, the interpretation can become very broad. There are even debates whether the feelings of religious followers are included in the scope. In this context, an action can become a criminal act based on the opinion of a person or group of people (disturbance of the feelings of a certain group of people),<sup>17</sup> and not because of the action itself.<sup>18</sup>

In addition, article 1 of the Blasphemy Law has its own challenges. The ambiguous definition and limitation of blasphemy in that article makes it possible for acts of interpreting religion “differently” (including religious activities) to be considered as blasphemy on the basis of deviance. For this reason, in several cases where the feelings of people (the majority group) were offended due to different religious interpretations or activities, the judge has concluded that the elements of blasphemy have been fulfilled.

At the moment, blasphemy in Indonesia can include very broad and various acts such as interpreting religion differently, insulting religion, claiming Islam, making fun of the prophet’s family, claiming to be a prophet, insulting the prophet, tearing the Koran, baptizing children *en masse*, claiming to be able to bring angels, using a dog head logo for packaged rice, and suspending Friday prayers in the framework of the Covid-19 health protocol.<sup>19</sup> These unclear scope and limitation of blasphemy resulting to wide interpretations puts a great deal of discretion in the hands of prosecuting attorneys, adjudicators or judges, or opponents, who could easily be influenced by personal concerns or political priorities. Thus, it may give great flexibility to anyone, especially judges, to interpret it broadly and freely, which can result in inconsistent, arbitrary and diverse legal products.<sup>20</sup> The subjectivity of different interpretations and applications of the elements of crime also affects the neutrality of the courts and raises the question of the extent to which judges are able to set aside their religious feelings in order to fulfil the requirements of objectivity as stipulated by the law.

In practice, various court decisions have defined the elements of article 1 of the Blasphemy Law and article 156 (a) of the Criminal court differently. Investigators, public prosecutors and panel of judges in local courts and the Supreme Court are often confused by both provisions. In the Lia Eden’s case for example, the judges found him guilty of blasphemy and violating article 156 (a) of the Criminal Code because he had spread religious understanding that was deemed deviant.<sup>21</sup> Likewise, Ahmad Mosadeq,<sup>22</sup> who should have been charged under article 1 of the Blasphemy law for committing blasphemy on the basis of his interpretation of Prophet Hood (considered a deviant understanding), was charged for violating Article 156 (a) of the Criminal Code. Both cases shown that the elements of blasphemy have been mixed up by the court.

Until now, there is no clear and generally agreed set of descriptions for what constitutes an offensive or blasphemous opinion or expression against religion that should be criminalized, leaving the authorities to decide on their own what constitutes blasphemy without a standard or guidelines to decide what constitutes acts of blasphemy and the intent of the crime. Although the law does regulate the intent by using the word deliberately, the vague and ambiguous language of blasphemy makes the law inconsistent with the principle of legality.

## **2.2. Testing the proportionality of the sanctions**

As stated above, a number of surveys have reported countries that still criminalize blasphemy,<sup>23</sup> with most sanctions embedded in the criminal codes. This raises concerns and issues of human rights specifically in regard to the sanctions of the act. The forms of sanction vary considerably including administrative sanctions (fines) or a combination of prison terms and fines as in Algeria,

Greece or Poland; extended punishments of up to five years in prison as in Indonesia; largely extended sentences for example, up to 20 years as in Afghanistan; corporal punishment as in Sudan; and even the death penalty, which is possible in countries such as Pakistan and Saudi Arabia. The debate regarding the proportionality of sanctions continues to rise.

Unlike Pakistan, Indonesia does not impose the death penalty towards blasphemy. The sanction stipulated and enforced (as is the case with the majority of countries that have blasphemy laws) is imprisonment, with a maximum of five years. While it is absent in the Criminal Code, the 1965 Blasphemy Law regulates the stages that must be passed before someone is convicted. As stipulated in Article 2, the imposition of sanctions for violating the law (article 1) cannot be carried out without a warning or dissolution.<sup>24</sup> If the violation is committed by a person, then the person is given a strong order and warning to stop his actions by a joint decree of the Minister of Religion, the Attorney General and the Minister of Internal Affairs. If the violation is committed by an organization or a religious sect, the President of the Republic of Indonesia can dissolve the organization or sect and label it a prohibited organization/sect based on the recommendation from the three authorities listed above. Furthermore, according to article 4, if the person or organization still continues to violate the provisions of article 1, then that person, his adherents, members and/or members of the relevant organization shall be punished with imprisonment of up to five years. However, in many cases, these stages are not applied.

Indonesia's blasphemy law may seem proportional since the punishments do not include death penalty, torture and other cruel, inhuman or degrading treatments, such as forced labor. However, prescribing imprisonment for a crime that has no clear definition, and limitation is still an unresolved issue that needs to be addressed. Law enforcement must be based on the intention of the perpetrators which do not violate one's freedom of thought, conscious, opinion and/or expression.

### **2.3. The “Do more harm than good” process to reform the law**

Human rights activist and organizations, including those from the international community, have pushed Indonesia to repeal its blasphemy law. Various parties have made several attempts to abolish or at least revise the article on blasphemy through the right of judicial review before the Constitutional Court. In essence, the testing of constitutionality aims to find the direction and interpretation of religious freedom and to determine the relevance of the blasphemy law in relation to the current social conditions of Indonesian society. Unfortunately, in 2010, 2013 and 2018, the Constitutional Court ruled that the Blasphemy Law remains constitutional under the pretext of maintaining public order among religious groups. In its decision, the Court began to discuss at length the relationship between the Constitution, the State and religion, by noting that the philosophical basis of the Indonesian State was the result of a compromise between two schools of thought, namely secular and Islamic, neither of which was adopted as the basis of the State.<sup>25</sup> The Court then observed that Indonesia's concept of “State of Law” is not the same as the concept of “rechtstaat” and the concept of “rule of law”. This is based on the fact that the Constitution places Belief in One God (the first principle in Pancasila) as the main basis along with religious values that underlie the life of the nation and state.<sup>26</sup> The panel of judges seemed to use the cultural relativism perspective in its view where the law's characteristic of religious freedom is one of the elements that distinguishes Indonesia from other countries, especially the West. According to the Court, articles on blasphemy can not only be seen from the legal aspect but need also from a philosophical perspective that places religious freedom in an “*Indonesian perspective*”. Things such as the basis of divinity and religious values become a measure (parameter) to distinguish good law from bad law, and even to determine the constitutionality of a legal product. Based on the decision, Indonesia's respect for international human rights instruments such as the ICCPR is still based on Pancasila and the state constitution. The influence and position of religion becomes very important in the context of religious freedom in Indonesia which is evidenced by the permissibility of human rights restrictions on the basis of religious values.<sup>27</sup>

However, while the Constitutional Court does not have the authority to make editorial improvements and content coverage of the law, the Court did indicate the need to revise the law, both in

the formal scope of the legislation and in substance, to give it clearer material elements and avoid misinterpretation in practice.<sup>28</sup> In this regard, even if the Blasphemy Law cannot be revoked, it should be corrected to avoid multiple interpretations and discrimination.

Unfortunately, the improvements made by the Government and the House of Parliament (DPR) through a proposed Bill of the Criminal Code have not been in line human rights laws and standards. In its final draft, under Chapter 7 entitled “*Crimes against religion and religious life*”, there is still an article that prohibits expressing feelings or committing acts that are hostile or blasphemy against the religion adhered to in Indonesia. The Bill not only has expanded the elements of article 1 of the 1965 Blasphemy law but also has not substantially improved the formulation. This could be and has been proven to be dangerous as it will make interpretations different from the mainstream or majority be penalized.

Moreover, the law does not establish a clear and adequate description of the types of expressions that are so offensive or improper that they should be subject to criminal sanctions. While many regret the wordings of the article arguing that it is inconsistent with Indonesia’s obligation under international human rights law,<sup>29</sup> the DPR considers that the existence of the blasphemy articles are still needed in the life of the nation and state. In its legal form, the article acts as a means of social control in the community, thus avoiding the potential for the community to act on their own. The expansion of the blasphemy articles aims to create social order and avoid harm in society. Sociologically, in the context of Indonesia’s diversity, the existence of friction between religion and its adherents is undeniable, ranging from differences in sects to the emergence of various acts of attack or insult by religious adherents against religion and beliefs. Some argue that the disparities in the social, cultural, historical, economic and political uniqueness of Indonesia influence and contribute to the formation of the value claims and perceptions of what constitutes human rights,<sup>30</sup> including religious freedom and expression.<sup>31</sup>

In practice, the vague formulation of blasphemy in Indonesia’s Criminal Code often makes it difficult for the police and prosecutors to interpret the law.<sup>32</sup> Until today, there has been an increase in cases of blasphemy. While Article 156 (a) of the Criminal Code was only applied 10 times during the New Order (1966–1998), at least 47 cases were brought to court and led to the conviction of 120 people after 1998.<sup>33</sup> According to Amnesty International, at least 106 defendants have been tried under the blasphemy law since 2005.<sup>34</sup> Setara Institute also reported that between 1965 and 2017, there were a total of 97 cases of blasphemy with a variety of acts charged.<sup>35</sup> In 2020, there were at least 67 cases, where between January and May alone, there were 38 cases spreading throughout Indonesia.<sup>36</sup> In addition, there is a trend to convict blasphemy based on the Information and Electronic Transaction Law (ITE Law). Unfortunately, in 2020, many children (teenagers) were reported to have violated article 28 (2) and article 45 (a) 2 on hate speech of the ITE Law because they were accused of blasphemy for uploading videos on TikTok. Many find this unfortunate because the article regulates on spreading of hatred or hostility to certain communities based on ethnicity, religion, race, and intergroup, but used as blasphemy, and now being used to target children aged 14, 15, and 16 years old. The cases have also become a concern in the sense that it is very difficult for people accused of blasphemy to escape from this article.<sup>37</sup>

### **3. International human rights standard on legality and proportionality**

The principle of legality assures that no defendant may be punished arbitrarily. This means that laws prohibiting acts or omissions as a criminal offence must be clearly and precisely formulated to ensure that individuals can regulate their behaviours accordingly.<sup>38</sup> The crimes must be classified and described in appropriate and unambiguous words or languages through accessible definition to give a complete meaning to the principle of *nullum crimen nulla poena sine lege praevia*.<sup>39</sup> In other words, there must be a clear definition (and/or explanation) of the criminalized behaviour, which determines its elements and the factors that differentiate it from permitted behaviours or conducts.<sup>40</sup> The purpose of a clear definition is to avoid ambiguous formulation of

the prohibited and sanctioned acts.<sup>41</sup> Vague laws undermine the rule of law by leaving open doors for prosecution and selective understanding by government officers and judges.

In terms of blasphemy, laws should be used to protect the rights of individual persons and not a religion per se. The key point regarding freedom of religion (and expression) with is related to blasphemy is that human rights are not meant to defend a belief, a religion, or a certain viewpoint that is based on religious beliefs. In other words, international human rights law protects the rights of individuals, and in some cases, groups of individuals but does not protect abstract entities such as religions, beliefs, ideas or symbols.

Furthermore, criminalization of anything that may offend the feelings of adherents can be very problematic. If blasphemy is interpreted as an act that may insult or hurt religious feelings, then the imposition of criminal sanctions would be determined based on the emotional reaction of a person or group of people, which cannot be measured due to the absence of objective standards. In this ambiguity, it is the authorities who subjectively decide what constitutes blasphemy without clear boundaries. This has been highlighted by the Human Rights Committee of the United Nations, suggesting that the law should give limited discretion to those accountable for their execution and should offer adequate guidelines to enable both law enforcers and the general public to regulate and limit the types of expression that should be restricted.<sup>42</sup> That is why the criminalization of opinions and expressions is inconsistent with the international human rights framework. Furthermore, blasphemy laws require subjective interpretation, and are prone to arbitrary enforcement. These laws are used to punish religious minorities and anyone who questions or disagrees with the state-sponsored or majority religion, as well as to suppress political opposition and to silence those who hold minority views.

Whereas with regard to the principle of proportionality, the restriction or punishment executed by corrective action and the severity of the prohibited act must be balance. In criminal law, the principle that punishment should not be harsher than it should be and that it should be appropriate to the crime as well as be measured by the gravity of the crime provides a coherent basis of assessment to determine whether it is excessive or proportional.<sup>43</sup> Proportionality has been explained to mean that one should not break a nut using a steam hammer if a nutcracker would do.<sup>44</sup> It thus requires decision makers to use appropriate means to achieve certain ends. This principle is actually an ancient conception incorporated in the Code of Hammurabi, using the principle of an eye for an eye and a tooth for a tooth.<sup>45</sup> The Magna Carta and the 1689 English Bill of Rights also contain the proportional punishment principle, i.e., the sentence must be proportional to the gravity of the crime committed.<sup>46</sup> All violations of individual rights must be limited to the extent necessary and proportionate to achieving a legitimate goal. Therefore, all states must define the crimes clearly and use proportional legitimate means to punish crimes.

Apart from treaties, this principle which has also been reflected in international jurisprudence requires a set of options or alternatives for punishment where imprisonment is forced only when no other sanction is proportional to the nature and seriousness of the offence. Therefore, the punishment must take into account every aggravating and mitigating factor where all acts of detention must be justified, adequate, necessary and proportional to the objectives sought.<sup>47</sup> This is similar to the most common version of the four-stage proportionality test, which covers a legitimate aim, rational connection, necessity, and proportionality.

The development of the proportionality test was improved by Lord Sumption through a four stage test, suggesting that the question relies on a proper analysis of factual cases put forward in defence of the measure to determine whether the objective is adequately significant to validate the fundamental right limitation; whether it is reasonably related to the objective; whether less intrusive measures could have been used; and whether, with respect to these problems and the severity of their consequences, a fair balance has been achieved between individual rights and the interests of the community.<sup>48</sup> This is important to search for a fair balance between the demands



of the public interest and the requirements of the protection of the basic rights of the individual.<sup>49</sup> The balance can be achieved necessarily through considerations of proportionality. Plus keep in mind that a court's examination of proportionality must be conducted by objective criteria,<sup>50</sup> namely the severity of the offence and the penalty; the punishments forced toward other criminals in the same jurisdiction, that is, whether the same penalty is given to more serious crimes; and the sentences handed down for committing the same crime in other jurisdictions.

In blasphemy cases, the question to be answered is whether the results of the fundamental right limitations are proportionate to the restrictions put on individuals (the proportionality per se of the individual restriction). Of course, there needs to be an assessment of the necessity or proportionality of a limitation of a fundamental right whenever a claim is made alleging that such necessity or proportionality is lacking. There is a need for courts to comprehensively assess the inevitability, applicability and proportionality of the overall restriction as well as the actual criminal sanctions, by ascertaining the precise impact of the restriction made in the interest of others. Furthermore, courts need to verify the very need for criminal sanctions on blasphemy, assuming beyond any doubt that only a criminal regulation could afford the requisite protection of religious freedom and expression. They need to consider the effectiveness of the protection granted by civil law measures in this area, departing from their earlier line of adjudication; wherever available, lesser interfering restrictions of fundamental constitutional liberties should be applied.<sup>51</sup>

With respect to sanctions at the domestic level, it becomes important to make careful distinctions between the form of expression that must be seen as a criminal offence; the form of expression that should not be criminally punished but can justify civil suits; and the form of expression that does not give rise to criminal and civil sanctions but still raises concerns in terms of tolerance, civility and respect for the beliefs of others.<sup>52</sup> In criminal law, criminalizing acts of blasphemy through unclear definition and boundaries gives legitimacy to social persecution of individuals (and groups) deemed to offend mainstream religious feelings. However, it has been previously stated that a person's religious feelings are subjective and difficult to measure. Even if blasphemy is considered to offend feelings, there are methods other than criminalization that can be applied to achieve the principles of proportionality and harmony.<sup>53</sup> In addition, the former Special Rapporteur on freedom of religion or belief stated that the application of the death penalty for blasphemy (including against religion) is disproportionate and even unacceptable.<sup>54</sup>

#### **4. A swift from blasphemy to hate speech and or hate crimes**

Blasphemy laws are widely condemned at the United Nations and by the international human rights community because they ban questioning and criticism of religions interpretation, debate and discussion of religious doctrines or beliefs have and will always be present in every religion. In order to be criminalized and penalized, religious expressions must be in the form of incitement to acts of discrimination, hostility and violence. Religious interpretations, activities and expressions that do not have the intention to incite acts of discrimination, hostility and violence are, therefore, not deemed worthy of criminal sanctions and imprisonment. Such view has shifted the criminalization of hate speech and/or hate crimes instead of blasphemy, since those acts of hate speech and hate crimes which cannot be legitimized on the basis of freedom of expression.<sup>55</sup>

The main rule on hate speech is found in article 20 (2) of ICCPR which prohibits any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Specifically, hate speech alone consists of two aspects, namely the act of hatred from the majority to the minority because it has the potential to provoke the masses to commit crimes based on ethnicity, religion, and race between groups; and treatment based on power or actions of the majority groups against minority groups which have the potential to cause turmoil and even more massive acts of violence. Whereas hate crime is a criminal offence committed with a bias motive.<sup>56</sup> Hate speech would not be a crime without the bias motive, it lacks the first essential element of hate crimes. However, direct and immediate incitement to criminal acts is prohibited. Both, hate speech and hate crimes against members of other groups (including

religious groups) are contrary to human rights values and principles, especially tolerance, social peace, and non-discrimination. This means that the provision of criminal sanctions against perpetrators of hate speech and hate crimes is appropriate and proportional since the expression or action is carried out deliberately by promoting public hostility and violence, which leads to disharmony or social disorder. With regard to this type of expression and action, the state's imposition of criminal sanctions is justified and proportional.

That is why the difference between the elements and blasphemy and hate speech and/or hate crimes need to be addressed. The motto that “not everything that can be said should be said, and not everything said should be punished.”<sup>57</sup> Every religious group must inevitably tolerate critical statements and debates about their religious activities or beliefs as long as such statements or actions are not in the form of advocacy or incitement that leads to hatred and violence, thereby disturbing public peace. This means that in a democratic society, it should be possible to criticize religious ideas, though such criticism may be considered offensive towards the religious feelings of adherents. In other words, except hate speech and hate crimes, all ideas, even though surprising or disturbing, must in principle be protected.

Religious leaders must also tolerate public criticism and debate over their religious activities as long as the criticism does not constitute religious hatred and sedition, which could lead to disturbance of public peace or discrimination against followers of certain religions. In this context, criminalizing acts of blasphemy is unnecessary and disproportionate. States should ensure that criminal sanctions are only imposed in the most serious cases by taking into account contextual factors, such as intention. Therefore, incitement to hatred, such as religious hatred, should be the object of criminal sanctions. In other words, it is not necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without incitement to hate as an essential element.<sup>58</sup> Thus, criminal sanctions are not appropriate in relation to insulting religious feelings and even more so blasphemy. Speaking of intention, the difficulty in proving *mens rea* is one of the reasons why prosecutions for blasphemy cases are very rare in several countries, such as in the UK where since 2008, the provisions have been revoked.<sup>59</sup> At the same time, there is an obligation for the state to openly provide space for a healthy dialogue by using the right to freedom of expression in a responsible manner.

The development from criminalizing and penalizing blasphemy to hate speech and/or hate crimes has several legal bases. First, is the UN Human Rights Council Resolution No. 16/18 Year 2011 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.<sup>60</sup> In combating intolerance, stigma and negative religious stereotypes, the UN Human Rights Council provides a formula for each country to take effective measures to ensure that public officials do not discriminate against someone based on his/her religion or belief when carrying out his/her duties and obligations as well as to promote the ability of members of all religious communities or beliefs to manifest the teachings or values of their religion or beliefs and contribute openly and equally in social life.<sup>61</sup> The resolution is not intended as a binding law that imposes criminal sanctions but rather uses a dialogue and education to overcome intolerance, as long as it does not manifest in the form of incitement to hatred or acts of violence.<sup>62</sup> Thus, criminalization only applies to opinions or expressions containing hateful expressions or utterances that incite acts of discrimination, hostility and violence based on religion or belief, as stipulated in ICCPR and ICERD.

In addition, criminalization must meet the requirements of a three-part test, namely legality, legitimacy, and necessity. Restrictions must be clearly regulated in a statutory regulation and should have one or more legitimate aims, so restrictive measures are indeed necessary to achieve predetermined and justifiable goals. Criminal sanctions related to unlawful forms of expression that violate the right to respect a person's belief should be seen as a last resort. Thus, such measures should be applied only in situations that are justifiable when no other means appears capable of achieving the desired protection of an individual's rights.<sup>63</sup> Concerning the question of

the extent to which criminal law is adequate and/or effective for the purpose of striking the right balance between the right to freedom of expression and the right to respect for one's beliefs, the commission reiterates in its view that criminal sanctions are only appropriate in relation to incitement to hatred. If a statement is not included as incitement to hatred, then the statement or work of art must not be an object of criminal sanctions. Therefore, criminal law as the last resort should be applied with extreme caution in the area of freedom of expression.

Second, is the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>64</sup> The Rabat Plan, as a follow-up resolution to 16/18, is an authoritative document that opens the obligations of State) to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to violence, hostility or discrimination. Internationally, the Rabat Plan of Action provides guidance on how national legislation, the judicial system and public policy makers can adopt international provisions prohibiting any support for national, racial or religious hatred that contains incitement to action of discrimination, hostility or violence. The enactment of laws and regulations related to blasphemy is counter-productive to the realization of harmony between religious communities. This is because the blasphemy law can create obstacles to debate, criticism, and dialogue between and among religious communities or beliefs, almost all of which are positive, healthy, and necessary. In addition, blasphemy laws often provide different protections for different religions or beliefs. Persecution of religious groups or minority beliefs is often based on the excessive application of laws related to religion or beliefs even though the text of the rules appears neutral. Furthermore, there is not a single provision of international human rights law that provides for the right to freedom to embrace a religion or belief that is free from or cannot accept criticism.

Based on the human rights approach and new sources of norms related to freedom of religion and intolerance, the focus of the government should be on hate speech and hate crimes. In order to avoid the practice of regulating deviation, desecration, and hostility against religion which is often seen as vulnerable to violating the rights of freedom of religion or belief, the government should prefer measures to combat intolerance, stigmatization, and incitement to violence. That is why the international community continues to press countries to replace the general blasphemy provision with one that prohibits incitement to religious hatred as well as come up with a new detailed set of legislative provisions to include incitement to religious hatred.

## 5. Conclusion

Until today, there is no clear and generally agreed set of descriptions for what constitutes a blasphemous opinion or expression against religion that should be criminalized in Indonesia. The vague formulation of the law has made blasphemy be applied to almost all acts related to religion or belief. Apart from causing a very broad interpretation, the unclear formulation can also be used to target opinions or expressions that should be legitimate and protected. This ambiguity has left the authorities to decide on their own what constitutes blasphemy without a legal standard.

In addition, imprisonment to punish people who commit acts of blasphemy where the elements and boundaries are not clear is disproportionate. This is based on the principle of legality that assures a defendant may be punished only if the acts or omissions of a criminal offence are clearly and precisely formulated in the law. In this case, the criminalization of blasphemy is against international human rights law since the imposition of criminal sanctions are determined based on subjective interpretation. Criminal sanctions related to unlawful forms of expression that violate the right to respect a person's belief should be seen as a last resort. Thus, even if blasphemy is considered to cause feelings of offence, there are other ways or methods (other than criminalization) with imprisonment that can be applied to achieve the principles of proportionality and harmony.

It is noteworthy that the Constitutional Court itself in its decision has stated the need for revision of the Blasphemy Law, both in the formal scope of the legislation and in substance, to give it

a clearer meaning and avoid misinterpretation in practice. However, an ideal revision is still far from reality. Through the proposed Bill of the Criminal Code, the government has expanded the articles through Chapter 7 entitled “Crimes against religion and religious life”. Therefore, by using a human rights approach and taking consideration of new sources of norms ((measures from the Human Rights Council Resolution as well as the Rabat Plan of Action)) related to freedom of religion, the revisions should be focused on shifting the blasphemy law to laws criminalizing and penalizing hate crimes. This is because hate crimes are contrary to the values and principles of human rights, especially tolerance, social peace, and non-discrimination, making criminal sanctions against the perpetrators of these types of acts appropriate and proportional.

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