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Decriminalization of Blasphemy in National Criminal Law: A Theoretical Reflection

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ABSTRACT

Criminal law aims to suppress crime. As part of a social defense policy, crime suppression policy is directed at protecting the public. In this case, the authorities use criminal law as a social control instrument. However, this social control is limited by the human rights of individual citizens because the state must protect the human rights of individual citizens. Thus, the formulation of criminal law shall not be ambiguous and have multiple interpretations, thereby depriving citizens of their rights and freedom of religion. In the National Criminal Code, the crime of blasphemy has been decriminalized. This study analyzes whether the politics of decriminalization of the criminal act of blasphemy in the National Criminal Code from a legal theory and legal philosophy aspect is appropriate. As legal research, the normative methodology has been used in this article. This research concludes that the politics of decriminalization of the criminal act of blasphemy in the National Criminal Code and Penal Administration Law has its legitimation from the legal theoretical and legal philosophical aspects.

KEYWORDS

Social Defense Policy; Social Control; Freedom of Religion

INTRODUCTION

Indonesia is home to a nation with diverse ethnicities, races, cultures, and religions. The motto *"Bhinneka Tunggal Ika"* (Unity in Diversity) encapsulates the anthropological reality of the Indonesian people.[1] This diversity has the potential to cause friction between religious communities in society. With this line of thinking, the politics behind the formation of the law criminalizing blasphemy in Article 156a of the Criminal Code (hereinafter referred to as WvS) was established. However, in Law Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the National Criminal Code), as a product of the reformulation of national criminal law, blasphemy has been decriminalized. Rumadi Ahmat, Senior Expert to the Presidential Chief of Staff, explained that the decriminalization of blasphemy in the National Criminal Code is a form of protection and guarantee for freedom and belief.[2] This raises the question of whether the policy of decriminalizing blasphemy is appropriate, given that Indonesian society is a religiously diverse society, which will certainly be prone to friction between religious communities if blasphemy occurs.

Before this study, research had been conducted by Nurul Safrina, Yusrizal, and Zulkifli in the form of a scientific article entitled "*Criminal Law and Criminological Analysis of Blasphemy Crimes in Indonesia*." The results of this study describe that the criminal act of blasphemy is normatively regulated in Article 156a of the WvS with the aim of protecting religious interests. In addition, using a criminological approach, the authors describe that the causes of blasphemy are the perpetrator's lack of understanding of a particular religion, the failure of religious education, weak law enforcement, and the assumption that all religions are the same.[3] The difference between previous studies and the authors' study is that previous studies analyzed the politics of criminalizing blasphemy from a criminological perspective. This differs from the authors' study, which instead analyzes the politics of decriminalizing blasphemy in the National Criminal Code as a form of pure national criminal law reform through legal research alone.

This paper aims to analyze the issue of the legitimacy of the decriminalization of blasphemy in the National Criminal Code. The author uses a normative research method in accordance with the scientific characteristics of legal science.[4] In conducting legal research using this normative method, the author implements a regulatory, conceptual, and case-based approach in analyzing the issues in this paper. This research was conducted to analyze whether the policy of decriminalizing blasphemy in the National Criminal Code is appropriate from a theoretical and philosophical legal perspective.

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1 Ana Fauzia & Fathul Hamdani, "Aktualisasi nilai-nilai pancasila dan konstitusi melalui pelokalan kebijakan Hak Asasi Manusia (HAM) di daerah" (2021) 2:2 J Indones Berdaya 157–166, online: <https://ukinstitute.org/journals/ib/article/view/2220>.

2 Office of the Presidential Staff, "KUHP Baru Berikan Jaminan Kebebasan Beragama dan Berkeyakinan Lebih Baik", (2022), online: <https://ksp.go.id/kuhp-baru-berikan-jaminan-kebebasan-beragama-dan-berkeyakinan-lebih-baik.html>.

3 Nurul Safrina, Yusrizal & Zulkifli, "Analisis Hukum Pidana dan Kriminologi Terhadap Tindak Pidana Penistaan Agama di Indonesia" (2022) 10:1 REUSAM J Ilmu Huk 37–65.

4 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2012).

METHOD

This research is a legal study with a normative character conducted by analyzing legal norms, legal theories, and legal principles that constitute the legal system. The research approaches used in this study are the legislative approach, the conceptual approach, and the case approach. The statutory laws that are analyzed in this article are the 1945 Constitution Wetboek van Strafrecht, and the National Criminal Code. The legal theories that form the basis for analyzing these norms are the theories of freedom of religion and constitutionalism. Cases that are analyzed in the case approach are 101/Pid.B/2014/PN. Atb, 322/K/Pid/2019, 391/K/Pid/2020. There are two types of legal sources used in this study, namely primary legal sources and secondary legal sources, which will be examined using a literature study method. The primary legal sources in this study include legislation relevant to this study, namely the WvS, Law Number 1/PNPS/1965 concerning the Prevention of Abuse and/or Blasphemy of Religion, Law Number 1 of 2023 on the Criminal Code, and Law Number 1 of 2026 on Penal Adjustment. Meanwhile, the secondary legal sources used in this study include books, scientific articles, and other literature related to the field of law, as well as the doctrines of legal experts.

RESULT & DISCUSSION

I. Religion and the Character of Indonesian Law

As previously explained, Indonesia is a land of diversity. This reality is expressed in the national motto, *Bhinneka Tunggal Ika* (Unity in Diversity). One aspect of Indonesia's diversity is religious diversity. Religious diversity in Indonesia cannot be separated from historical factors related to Indonesia's geographical position. Indonesia's strategic geographical position, located between two continents and two oceans, has made Indonesia a place of cultural exchange. Starting with the development of traditional animism and dynamism, the era of Hindu-Buddhist kingdoms, the era of Islamic kingdoms, the arrival of Christian missionaries, which then multiplied during the colonial era.

The founding fathers of Indonesia realized that the journey of Indonesian civilization has never been separated from the role of God. The value of Godliness is one of the values contained in Pancasila as the philosophical basis of the state.[5] Therefore, in its position as the source of all sources of law, the value of Godliness is also reflected in the Indonesian legal system. The Preamble to the 1945 Constitution of the Republic of Indonesia contains a noble view of the Indonesian people, which recognizes that the independence of the Indonesian nation is a gift from God. This is stated in the Preamble to the 1945 Constitution as follows: “By the grace of Almighty God and driven by a noble desire to live a free national life, the Indonesian people hereby declare their independence.”

Furthermore, in the body of the 1945 Constitution of the Republic of Indonesia, Article 29 paragraph (1) of the 1945 Constitution of the Republic of Indonesia explicitly stipulates that: "The state is based on belief in One God". This confirms that the Indonesian legal system cannot be separated from the influence of religion.

[5] Ferry Irawan Febriansyah, “Keadilan Berdasarkan Pancasila Sebagai Dasar Filosofis dan Ideologis Bangsa” (2017) 13:25 DIH J Ilmu Huk 1–27.

Another example is the phrase found in court decisions that reads "In the name of justice based on the One Almighty God." The significant role of religion in Indonesian legal life is also reflected in Chapter VII of the Criminal Code on Crimes Against Religion, Belief, and Religious and Belief Life. This shows that religion is one of the legal interests protected by national criminal law.

The nature of Indonesian law is in line with the social structure of Indonesian society, which is multi-religious. The diversity that exists in Indonesia has led to the emergence of legal pluralism in Indonesia. Legal pluralism refers to the phenomenon of more than one legal system being in force in society. Brian Z. Tamanaha, in his book entitled *Legal Pluralism Explained: History, Theory, Consequences,* explains that positive law often does not stand alone in the flow of social activities. There are at least three separate systems of norms that apply in society, namely *positive law, custom/consent,* and *moral/reason*.[6] Positive law often does not stand alone in the flow of society.

Custom or consent refers to customs or habits that are continuously repeated in society and accepted as law in society. Why does Tamanaha equate *custom* and *consent*? Because, in principle, customs or habits can be formed because certain practices are accepted as a pattern of relationships that continue to occur. This is then accepted by society as mandatory. Satjipto Rahardjo refers to this as "expectations" that become norms or prescriptions for certain behaviors. It is this acceptance by society that Tamanaha refers to as *consent.*

Morality refers to the assessment of whether a particular action is good or bad. Tamanaha uses the term *reason* as a counterpart *to morality* based on the argument that morality originates from human reason or rationality, and is therefore universal in nature. However, upon more comprehensive examination, it can be found that views on morality can be divided into two, namely *objectivism* and *relativism*. The *objectivist* view accepts the existence of objective moral values, meaning that there are moral values based on natural law embedded in human reason and applicable in all places and times. Meanwhile, the relativist view considers moral values to be a product of culture. Thus, the moral values accepted in one community differ from those in another community. This even extends to individual moral relativism.[7]

Regardless of the discourse on morality, customs, and positive law, all three are systems of norms that are accepted and apply in society. Suteki, in his book Hukum dan Masyarakat, states that customs and morals can also be referred to as law. This status is attributed to the acceptance of customary norms and moral norms as binding patterns of relationships by society.[8] Legal pluralism in the Indonesian context consists of modern law, *customary* law, and natural law. Modern law refers to national law. Indonesian national law is based on the European Continental legal system, so that the development of national law cannot be separated from the influence of developments in European Continental law, and even accommodates developments in the Common Law system. This is due to the phenomenon of

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6 Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (New York: Oxford University Press, 2001).

7 Belén Pueyo-Ibáñez, "Moral Inquiry Beyond Objectivism and Subjectivism" (2021) 35:2 J Specul Philos 165–175.

8 Suteki, *Hukum dan Masyarakat* (Yogyakarta: Thafa Media, 2021).

globalization, which has encouraged jurists to engage in comparative law in the development of national law.

In addition to positive law—laws established by the formal authority of the state—there are also living law and natural law. *Living law* refers to unwritten legal norms that have been accepted by society as law. This gives rise to mutual "expectations" in interactions between individuals to perform certain actions. Meanwhile, natural law refers to moral norms that evaluate human behavior. Moral norms are, in principle, based on certain philosophies. The natural law accepted by Indonesian society is a natural law based on religious or spiritual belief. Customary law grows and develops within indigenous communities. This law is preserved from generation to generation by the ancestors of these communities. Customary law is recognized as part of the Indonesian legal system. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates:

> "The state recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated in the law."

Furthermore, several laws, such as Law No. 5 of 1960 concerning Basic Agrarian Principles, the National Criminal Code, and several other laws, explicitly regulate customary law as part of the Indonesian legal system. However, this should not be understood as if the existence of customary law is indebted to the recognition of national law. This is because customary law is a law that existed and lived in the activities of the Indonesian people before modern law came into effect. However, there are debates between the scholars of strong legal pluralism and weak legal pluralism in Indonesia. According to the strong legal pluralism scholar, the customary law shall be equally positioned to the national law. Meanwhile, the weak legal pluralism scholars who support legal unification suggest that customary law shall be subordinate to national law.[9]

Natural law refers to moral laws that are accepted and applied in society. Indonesian society is a religious society. Religious and spiritual matters are deeply ingrained and even serve as guidelines for relationships in Indonesian society. Article 29 of the 1945 Constitution of the Republic of Indonesia itself explicitly stipulates that Indonesia is a state based on belief in One God. This shows that Indonesian society views religion as one of the guiding lights of its life. Thus, natural law with a religious-spiritual character is also accepted as the law that applies in social relationships. However, natural law does not only originate from religion; natural law can also originate from human reason. Human reason is considered to have an inherent ability to make *moral judgments.* This then becomes natural law with a rational character.

Given the reality of pluralism in the Indonesian legal system, it is inevitable that there will be *interfaces* or intersections between the national legal system, customary law, and natural law. As explained earlier, national law is a reflection of customary law and natural law. The state legal system derives its material sources

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[9] Anggoro Syahriza Alkohir & Tunggul Anshari Setia Negara, "The Struggle for Recognition: Adat Law Trajectories under Indonesian Politics of Legal Unification" (2021) 29:1 Int J Minor Gr Rights 33–62, online: <https://www.jstor.org/stable/10.2307/27360218>.

from customary law and natural law. Therefore, the moral standards that apply in society are pluralistic. In principle, there is no universal morality.[10] This is important because, from a sociological perspective, society's compliance with the law is not solely based on the formal aspects of legislation. More than that, society's compliance with national law is based on whether the community accepts the validity of the legislation. This is known as the concept of sociological validity. This sociological validity depends on whether national law reflects unwritten laws (customs, traditions, and/or religion) that exist within society. This is important because, from a sociological perspective, society's compliance with the law is not solely based on the formal aspects of legislation. More than that, society's compliance with national law is based on whether the community accepts the validity of the legislation. This is known as the concept of sociological validity. This sociological validity depends on whether national law reflects unwritten laws (customs, traditions, and/or religion) that exist within society.

With such a legal and philosophical basis, the religious character inherent in the Indonesian legal system becomes a logical reason for the regulation of criminal acts against religion in the Criminal Code. Any public policy, including criminal law policy, shall reflect and cohere with the social interest of its subject. This shall be done so that the law can intervene in social activities effectively.[11]

II. Criminal Acts of Blasphemy in Positive Law

The criminal offense of blasphemy was first recognized in January 1965 in Presidential Decree No. 1 of 1965 on the Prevention of Abuse and/or Blasphemy of Religion (hereinafter referred to as Penpres 1/1965). The Presidential Decree was later changed to Law No. 1/PNPS/1965 on the Prevention of Abuse and/or Blasphemy (hereinafter referred to as Law PNPS 1/1965). Article 4 of Law PNPS 1/1965 added the criminal offense of blasphemy as a new criminal offense in the 1945 Criminal Code (*Wetboek van Strafrecht* (WvS)) with the following formulation:

> "Any person who deliberately expresses feelings or commits acts in public: a. that are essentially hostile, abusive, or blasphemous toward a religion practiced in Indonesia; b. with the intention of preventing people from practicing any religion based on belief in One God, shall be punished with a maximum imprisonment of five years."[12]

The formulation of Article 156a WvS does not need to consider whether the act of blasphemy has caused unrest in society. It is sufficient that the perpetrator commits blasphemy through words or actions in public that are defamatory to a particular religion practiced in Indonesia.[13]

In its development, the constitutionality of Article 156a has been reviewed by the Constitutional Court of the Republic of Indonesia more than once. However,

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10 Tamler Sommers, *Relative Justice: Cultural Diversity, Free Will, and Moral Responsibility* (Princeton University Press, 2012).

11 Geoffrey Swenson, "Legal Pluralism in Theory and Practice" (2018) 20:3 Int Stud Rev.

12 Moeljatno, *Kitab Undang-Undang Hukum Pidana* (Jakarta: PT Bumi Aksara, 2021).

13 D A Shah, "Constitutional Arrangements on Religion and Religious Freedom in Malaysia and Indonesia: Furthering or Inhibiting Rights?" (2014) 1:1 Indones J Int Comp Law 260–299, online: <https://heinonline.org/HOL/Page?handle=hein.journals/indjicl1&div=13&g_sent=1&casa_token=&collection=journals>.

none of the Constitutional Court decisions granted the petitioners' requests and upheld the validity of Article 156a WvS because the state is responsible for maintaining public order in society. If Article 156a WvS did not exist, there would be the potential for unrest in society because there would be no law enforcement against blasphemy, which should be protected.

However, in the 2023 National Criminal Code (National Criminal Code), the criminal offense of blasphemy has been decriminalized. Article 622, paragraph (1), letter h of the National Criminal Code in the Closing Provisions has become a norm that ends the validity of Article 4 of Presidential Decree 1/1965. Furthermore, in Article 300 Chapter VII of Book Two of the Law Number 1 of 2023 on Criminal Code concerning Criminal Acts Against Religion, Belief, and Religious or Belief Life, the phrase "blasphemy" is no longer found in any provision. It is stipulated as stated below:

> "Any Person in Public who: a. commits acts which are hostile in nature; b. express hatred or hostility; or c. incite to commit hostility, violence, or discrimination, against religions, other persons' beliefs, parties, or groups based on religion or belief in Indonesia, shall be punished with imprisonment for a maximum term of 3 (three) years or a maximum criminal fine of category IV."

On the latest development, the provision has been revised by Law Number 1 of 2026 on Penal Adjustment (Penal Adjustment Law) as stated below:

> Paragraph (1)
> "Any person who, in public: a. commits acts of a hostile nature; b. expresses hatred or hostility; or c. incites violence or discrimination, against another person, group, or community based on religion or belief in Indonesia, shall be punished with imprisonment for a maximum term of three (3) years or a maximum criminal fine of category IV."
>
> Paragraph (2)
> "Any act or statement, whether written or oral, that is made objectively, limited to one's own group, or of an academic nature regarding a religion or belief, and is accompanied by efforts to avoid the use of words or sentence structures that constitute hostility, expressions of hatred or hostility, or incitement to commit hostility, violence, or discrimination, shall not constitute a Criminal Offense as referred to in paragraph (1)"

The pre-revision version of Article 300 of the National Criminal Code, as stated above, didn't stipulate any "blasphemy" offence anymore. However, "religion" was still stipulated as an object of the hatred, violence, or discrimination offence. Meanwhile, the latest revision of Article 300 by the Penal Adjustment Law does not stipulate "religion" itself as an object of offence. The latest version of the article stipulates a person, group, or community as the objects of the offence that is committed based on religion or belief in Indonesia. Furthermore, it expressly limits the scope of the criminal provision so that it does not encompass acts carried out within one's own group or academic activities.

III. Criminal Law: Social Control vs. Constitutionalism

Criminal law falls within the scope *of social defense policy*. All forms of *social defense policy* are essentially efforts to protect society in order to achieve social welfare. More specifically, criminal law is included in *criminal policy*, which is a form of *social defense policy.* As *a criminal policy*, the objective of criminal law is to combat crime.[14] The concrete manifestation of criminal law's efforts to combat crime is through the politics of criminalization and penalization. Sudarto, as quoted by Mahrus Ali, explains that criminalization is the process of making an act punishable by law. Meanwhile, the politics of penalization is the process of attaching criminal sanctions to an act so that it becomes a criminal act. The policy of penalization includes determining the type of crime, the severity of the punishment, and the technicalities of carrying out the punishment.[15] The protection of society, which is the main objective of criminal law, is concretized in the form of social peace. This is why criminal law is public law. With its dichotomy as public law that emphasizes its function in regulating the relationship between the state and individuals in relation to the public interest, criminal law becomes an instrument of the state to ensure that every subsystem in a social system, such as politics, society, and the economy, can function properly to guarantee the interests of society.[16]

Discussing criminal law as a tool of the state to protect society cannot be separated from the social contract as the basis for the formation of criminal law. One explanation of social contract theory comes from Thomas Hobbes. Hobbes illustrates a chaotic situation in interactions between humans in a pre-state condition. In a pre-state condition, every human being is a wolf to other humans. As in the law of the jungle, humans would fight each other to defend their respective existences due to their natural wild instincts. Therefore, these humans agreed to form an agreement to live together as a society. Each individual gave all of their rights to Leviathan in exchange for security and peace from Leviathan. To achieve this security and peace, Leviathan was given absolute authority over all individuals in society. The hope was that Leviathan's absolute authority would instill fear in society so that all members of society would obey every law of Leviathan.[17]

Beccaria adopted Hobbes' theory of social contract in arguing his own theory of social contract. Like Hobbes, Beccaria, as quoted by Scolnicov, assumed that in a pre-state condition, human life was chaotic because people fought each other to fulfill their interests and defend their existence. However, in Beccaria's thinking, the people who formed the social contract did not surrender all their rights to the ruler, but only a small part of their individual freedom to the extent necessary to obtain reciprocity from the ruler in the form of security guarantees for themselves.[18] The

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14 Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 2005).

15 Mahrus Ali, "Kebijakan Penal Mengenai Kriminalisasi dan Penalisasi Terhadap Korporasi (Analisis Terhadap Undang-Undang Bidang Lingkungan Hidup)" (2020) 15:2 Pandecta Res Law J 261–272.

16 Vincent Chiao, "What is the Criminal Law for?" (2016) 35:2 Law Philos 137–163.

17 Thomas Bambang Murtianto, "Thomas Hobbes: Ketakutan sebagai Dasar Terbentuknya Negara" (2022) 1:1 Novum Argum 97–107, online: <https://ejournal.uki.ac.id/index.php/noa/article/view/4466>.

18 Anat Scolnicov, "Beccaria, Treason and the Social Contract" (2022) SSRN Electron J 1–23.

freedom that remains attached to each member of society becomes the limit of the ruler's power over members of society.

Both Hobbes' social contract theory, which gives absolute authority to the ruler, and Beccaria's social contract theory, which views the authority of the ruler as limited by the inherent freedom of individual members of society, illustrate that the ruler has a duty to ensure security and peace. This means that the ruler, through the law—including criminal law—exercises a function of social control over society. This social control means that the ruler, with his authority, ensures that every member of society obeys the applicable laws. This effort is carried out through the formulation of criminal sanctions that are proportional to the crimes committed. The deterrence effect can be realized through proportionality between criminal sanctions and crimes.[19] The rationale that the punishment imposed must be proportional to the act stems from the philosophy of utilitarianism developed by Jeremy Bentham. The philosophy of utilitarianism assumes that human nature determines decisions with free will to act based on considerations of pleasure and suffering. Humans will commit an act if the pleasure obtained through the act exceeds the suffering they must experience.[20] Therefore, proportional punishment will influence the process of forming an individual's will because the suffering inherent in the punishment is balanced with the pleasure obtained by the individual through the crime. In other words, the pleasure obtained by the individual through the crime will be absorbed by the suffering that must be endured through criminal sanctions. The intervention of the authorities through the threat of criminal sanctions on the formation of individual will, so that it is always aimed at security and peace, is a form of social control through criminal law.

However, along with the development of human civilization, there has been the idea of limiting the power of the state over individuals. Such limitations are regulated in a written legal document created by the authorities. In Indonesia, the 1945 Constitution of the Republic of Indonesia serves as the formal constitution of the Indonesian state, which is *a species* of *the genus* of constitutions in the form of a codification of rules regarding the structure of state organization. In addition to regulating the structure of state administration, constitutions generally also regulate the fundamental rights of citizens. Therefore, constitutions are often said to be a bulwark protecting the fundamental rights of citizens from the arbitrariness of state power. Thus, every law and regulation must take into account the restrictions on state power in the constitution, known as constitutionalism. Laica Marzuki defines constitutionalism as the idea of building a *limited state* in which the administration of the state and government is not arbitrary. In this case, state power must be limited and strictly regulated in the Constitution as the basic law of the state's legal system.[21] In the modern era, there is an idea known as new constitutionalism, which, through the ideas put forward by Sweet & Matthews, states that rights and effective rights protection are fundamental to the democratic

[19] K D Tomlinson, "An Examination of Deterrence Theory: Where Do We Stand?" (2016) 80 Fed Probat, online: <https://www.proquest.com/trade-journals/examination-deterrence-theory-where-do-we-stand/docview/1917879090/se-2?accountid=31533>.

[20] MA Yani, "Pengendalian Sosial Kejahatan; Suatu Tinjauan terhadap Masalah Penghukuman dalam Perspektif Sosiologi" (2015) 3:1 Cita Huk 77–90.

[21] Laica Marzuki, "Konstitusionalisme dan Hak Asasi Manusia" (2011) 8:4 J Konstitusi 479–488.

legitimacy of the state.[22] It therefore rejects models of legislative sovereignty (e.g., of Australia, the French Third and Fourth Republics, and of Great Britain until recently), as well as those ideologies that would confer on one person or party unconstrained political authority.

Based on these definitions, the main objective of constitutionalism is to protect the rights of citizens by limiting the power of the government in the constitution. Article 28E paragraph (2) of the 1945 Constitution of the Republic of Indonesia grants every person the right to believe, express their thoughts, and attitudes according to their conscience. In this case, certain parties cannot intervene in the exercise of this right, including the Government's Executive Branch through state organs or institutions. However, restrictions on this right may be imposed if stipulated in the law, as provided for in Article 28J paragraph (2) of the 1945 Constitution regarding restrictions on human rights. Therefore, there needs to be clear regulations in the law governing restrictions on human rights. Such restrictions must be imposed to protect the human rights of citizens in accordance with the spirit of constitutionalism and to ensure legal certainty in their implementation. The spirit of constitutionalism, which limits state intervention in the freedoms and human rights of citizens, is in line with the principle of legality in criminal law.

In order to establish a national criminal law that protects individual human rights, a criminal law that provides legal certainty is necessary. The spirit of legal certainty is the foundation of the principle of legality as a fundamental principle of criminal law. The principle of legality is enshrined in Article 1, paragraph (1) of the WvS, which stipulates: “No act can be punished unless it is based on the force of criminal law in existing legislation, before the act is committed.” Similarly, Article 1, paragraph (1) of the National Criminal Code stipulates: “No act shall be subject to criminal sanctions and/or measures, except under the authority of criminal regulations in legislation that existed prior to the act being committed.”

In essence, the principle of legality contains the idea that an act can be considered a criminal offense punishable by criminal sanctions only if it has been regulated as a criminal offense according to a written law that has been in force previously. The birth of the principle of legality began as a reaction by French legal scholars to the arbitrary French courts. Montesquieu and Rousseau were French legal scholars who became the main proponents of the principle of legality as an effort to resist the arbitrary power of the French king, which culminated in the French Revolution of 1789. In Montesquieu's thinking, the separation of state powers was necessary in order to protect and guarantee the freedom of citizens. This separation of powers consists of legislative, executive, and judicial powers. In terms of judicial power, judges must be free and independent from executive intervention. According to Montesquieu, this separation of powers must be carried out through written laws that reflect the laws that exist in society. In line with Montesquieu, Rousseau argued that every human being has natural freedom. Therefore, when pre-state individuals form a social contract, restrictions on natural freedom must be regulated in written law. Written law or legislation is a reflection

[22] Prisilia Kornelia Moonik, “The Constitutionalization of Human Rights in the 1945 Constitution of the Republic of Indonesia According to Lockean Natural Rights” (2025) 9:2 Refleks Huk J Ilmu Huk 215–236.

of *the volante generale* or general will of society. Laws, as a reflection *of volante generale*, become the boundaries of power and the direction of rulers appointed based on the social contract in carrying out their executive functions.[23] In essence, both Montesquieu and Rousseau expressed the spirit of protecting the rights and freedoms of individual citizens through the limitation of the authority of rulers. The spirit echoed by Montesquieu and Rousseau became the basis for von Feuerbach in 1801 through his book "Lehrbuch des Peinlichen Recht," which introduced the principle of *nullum delictum, nulla poena sine praevie lege poenale*, which means "there is no crime without a pre-existing criminal law."[24]

Machteld Bott, as quoted by Eddy Hiariej, puts forward four basic meanings of legality, namely: "*nullum crimen, nulla poena sine lege* praevia" (from the Author: "*Lex praevie*"); "*nullum crimen, nulla poena sine lege* certa" (from the Author: "*Lex* certa"); "*nullum crimen, nulla poena sine lege* scripta" (from the Author: "*Lex* scripta"); and "*nullum crimen, nulla poena sine lege* stricta" (from the Author: *"Lex* stricta").[25] In the case of *lex certa*, this principle contains the idea that the criminalization and penalization of criminal acts must be outlined in clear legislation. This means that criminal law must clearly define criminal acts and their penalties so as not to give rise to multiple interpretations. Unambiguous criminal law norms are necessary to prevent arbitrary power and injustice. If criminal law norms are ambiguous, it opens up the possibility for judges to interpret the law subjectively against the defendant. Therefore, in the process of formulating criminal law in legislation, lawmakers must ensure that the formulation of criminal acts and the threat of criminal sanctions are unambiguous. Furthermore, according to the author, if lawmakers are unable to assess that the acts to be criminalized are difficult to clearly define as criminal acts, then these acts should not be criminalized. This is because it must be remembered that, based on the social contract, the authorities are given the task of guaranteeing the human rights of individual citizens. Meanwhile, criminal law norms that are unclear in their formulation have the potential to open the door to arbitrary justice that deprives citizens of their fundamental rights.

The same applies to the criminal offense of blasphemy. The criminal offense of blasphemy in Indonesian national criminal law is regulated in Article 156a WvS. The element of "blasphemy against a religion" is an element that does not meet the requirements *of lex certa* because it is unclear and open to multiple interpretations. This is evident in several Supreme Court decisions, as shown in the table:

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[23] Vincentius Patria Setyawan, "Asas Legalitas Dalam Perspektif Filsafat Hukum" (2021) 37:1 Justitia Pax 127–146.

[24] Anirut Chuasanga & Argo Victoria Ong, "Legal Principles Under Criminal Law in Indonesia dan Thailand" (2019) 2:1 J Daulat Huk 131–138, online: <https://media.neliti.com/media/publications/324353-legal-principles-under-criminal-law-in-i-973319e9.pdf>.

[25] Eddy OS Hiariej, *Prinsip Prinsip Hukum Pidana* (Jakarta: Cahaya Pustaka Utama, 2014).

Table 1. Supreme Court Decisions on Criminal Acts of Blasphemy

No.	Decision Number	*Ratio Decidendi*	Decision
1	101/Pid.B/2014/PN. Atb Appeal: 805/K/Pid/2015	"...the defendant was not entitled to receive the Holy Host, so the defendant's act of receiving the Holy Host constituted blasphemy or desecration of the Catholic faith."	Imprisonment for 1 (one) year and 6 (six) months
2.	322/K/Pid/2019	"… the defendant's conversation with the witness … about the loud call to prayer … angered Muslims and based on a fatwa from the Fatwa Commission of the Indonesian Ulema Council (MUI) of North Sumatra Province, it was declared that the defendant's words/statements were blasphemous against religion, namely Islam, which is the religion embraced in Indonesia."	Imprisonment for 1 (one) year and 6 (six) months
3.	391/K/Pid/2020	"The defendant ... attempted to study the interpretation of the Quran independently and tried to write a book ... to be marketed ... Then the defendant quickly realized his mistake, admitted his guilt, and apologized for withdrawing his book ..."	Imprisonment for 1 (one) year

Source: Supreme Court Decision Directory, 2023.

The *ratio decidendi* of these rulings shows that there are no clear parameters for the Panel of Judges to assess the fulfillment of the elements of blasphemy. As a result, the assessment of the fulfillment of the elements of blasphemy is based on the subjective feelings of religious communities and religious laws, which are also subjective in nature, depending on the interpretation of the religious community concerned of its religious teachings. This is also acknowledged by Adami Chazawi in his book, which states that because it is not religion but religious communities that have feelings, the parameters for assessing blasphemy are based on the spiritual feelings of the religious communities concerned.[26] In short, determining whether an act constitutes the criminal offense of blasphemy is based on the subjective assessment of religious communities. Such a norm certainly does not meet the requirements *of lex certa* because it is unclear and open to multiple interpretations.

[26] Adami Chazawi, *Hukum Pidana Positif Penghinaan* (Malang: Media Nusa Creative, 2020).

There is no legal certainty regarding the limits of blasphemy, so it is possible that citizens who are expressing their freedom of religion could be charged with the criminal offense of blasphemy simply because what they say or even teach contradicts the teachings of a particular religion, thereby hurting the spiritual feelings of a particular religious group. This clearly contradicts the spirit of the principle of legality to achieve legal certainty and protect the human rights of citizens.

IV. Social Peace and Freedom of Religion

As previously explained, the duty of rulers who have been given authority through a social contract is to guarantee security and peace in society. However, as explained by Beccaria, the authority of rulers is not absolute because rulers only receive a small portion of individual freedom. In other words, rulers do not have the right to restrict freedoms that are not given to them by individuals in a social contract. In relation to the limited authority of the ruler, apart from Beccaria's theory, there is also a theory from John Locke. Locke describes that in a pre-state situation, each individual has their own freedom and their lives are governed by a moral order that comes from natural law. Every individual has the right to life, liberty, and the right to own property. However, there is no guarantee that individuals can each exercise these freedoms. Therefore, these individuals form a social contract and establish a political authority entity tasked with guaranteeing their natural freedoms.[27] These natural human freedoms, which consist of the right to life, the right to freedom, and the right to own property, are known as human rights.

In its development, human rights have become a concern of the international community. This is evidenced by the birth of the Universal Declaration of Human Rights (UDHR) on December 10, 1948. The preamble to the UDHR expresses the international community's awareness that every human being has an inherent dignity and is entitled to equal rights. Recognition of human dignity and human rights is the foundation of freedom, justice, and world peace. The international community's awareness was born out of World War II. World War II opened the eyes of world leaders to close the door on war in the lives of the world's people and to strive for lasting peace. Therefore, the UDHR provides a general standard for the protection of human rights, especially those that are most inseparable from a person's dignity as a human being, without any dichotomy based on any grounds.[28] Article 2 of the UDHR stipulates:

> "Everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made based on the political, jurisdictional, or international status of the country or territory to which a

[27] JMV Sasan, "The Social Contract Theories of Thomas Hobbes and John Locke: Comparative Analysis" (2021) 9:1 Shanlax Int J Arts, Sci Humanit 34–45.

[28] M Kamruzzaman & SK Das, "The Evaluation of Human Rights: An Overview in Historical Perspective" (2016) 3:2 Am J Serv Sci Manag 5–12, online: <https://www.researchgate.net/publication/318851323_The_Evaluation_of_Human_Rights_An_Overview_in_Historical_Perspective>.

person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty."

Article 2 of the UDHR contains the norm that every human being has the rights and freedoms outlined in the UDHR without exception, based on any characteristics, as standardized in Articles 3 to 27 of the UDHR. The regulation of human rights in the UDHR includes the right and freedom of religion in Article 18 of the UDHR:

"Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."

Through a systematic interpretation of Article 18 of the UDHR in conjunction with Article 2 of the UDHR, the right and freedom of religion as human rights regulated in the UDHR are inherent rights and freedoms of every individual without exception, based on any characteristics. These rights and freedoms of religion also include the right to practice one's religion through teaching, religious practices, worship, and religious celebrations. This is reinforced in Article 18 of the ICCPR:

Paragraph (1)

"Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community, with others, and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching."

Paragraph (2)

"No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

Paragraph (3)

"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Article 18, paragraph (2) of the ICCPR stipulates protection of the rights and freedoms of individuals to practice their religion without coercion. In the author's opinion, the element of "coercion" in this article also includes coercion carried out by the state through its authorities. Furthermore, Article 18, paragraph (3) of the ICCPR stipulates that the rights and freedoms of religion can only be restricted by the national law of a country when necessary for the protection of society, public order, public health, and public morals.

Article 18, paragraph (3) of the ICCPR is interesting because it allows, within certain limits, restrictions on the right and freedom to express religion by the state through its national laws, one of which is the protection of public security and order. In the author's opinion, the norms in this provision do not automatically legitimize the state to freely derogate from the right to express religion under the pretext of protecting society. This is because the word "necessary" in Article 18, paragraph (3) of the ICCPR has two meanings. First, restrictions on the right to express religion can

only be imposed if such restrictions are necessary. Thus, there is a principle of subsidiarity in restricting the right and freedom to express religion, which means that the state's legitimacy in restricting the right to express religion is only valid if there is no other way to protect the community other than by restricting the right to express religion. Second, restrictions on the right to express religion can only be carried out to the extent necessary. Therefore, there is a principle of proportionality, which means that restrictions on the right to express religion by the state must be proportional or balanced with the objectives of society that are to be achieved.

In the Indonesian legal system, the protection of religious freedom is also a constitutional right of citizens. Article 28E paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates:

> "**Every person shall have the right to embrace a religion and to worship according to his religion**, to choose education and teaching, to choose a profession, to choose citizenship, to choose a place of residence within the territory of the state and to leave it, and to have the right to return." (bolded by the author)

This provision is further emphasized by Article 28I paragraph (1), which stipulates:

> "The right to life, the right not to be tortured, the right to freedom of thought and conscience, **the right to religion**, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive laws are human rights that **cannot be diminished under any circumstances**." (bolded by the author)

Furthermore, Article 29 paragraph (2) affirms the state as *the normadressaat*: "The state guarantees the freedom of each citizen to embrace their respective religions and to worship according to their religion and beliefs." This provision affirms that the state, through its political authorities, is obliged to guarantee the freedom of religion and worship of the citizens of Indonesia.

Returning to John Locke's view of human rights, the duty of the ruler is to guarantee the natural rights of members of society. This means that the political authority of the ruler, which is granted based on a social contract, is limited by the natural rights of individuals. Therefore, no policy of the ruler may violate human rights. In the context of criminal law as part of criminal policy, efforts to combat crime through criminal law must still guarantee the implementation of the human rights of citizens. Therefore, in the formulation of the criminal law system, a balance is needed between protecting the interests of society and protecting the human rights of individuals, which are formulated in substantive and formal criminal law regulations, both of which are *ius poenale*. This is because when individuals with human rights form a society, what is known as the human rights of society also arise. *Ius Puniendi*—the right of the state to implement a criminal justice system against perpetrators of criminal acts—must be limited by *Ius Poenale* in order to restrict the rights of the state with regard to the human rights of individuals. This shows that the protection of human rights is an integral part of social control policy. Social control by the state through criminal law is not an arbitrary authority, but an authority that is limited by human rights, including the right to freedom of religion.

In terms of the right to freedom of religion, there are two scopes for the implementation of this right, namely *the internal forum* and *the external forum*. The implementation of the right to freedom of religion in the forum exists within the inner sphere of a person, where everyone is given the freedom to believe in any religion according to their beliefs. For example, by adhering to a particular religion or belief and changing the religion or belief that has been adhered to previously. In this forum, it is not possible to restrict the right to freedom of religion, given that its scope lies within each individual. Thus, in this case, the government cannot intervene in regulating citizens to believe in a particular religion or belief. Every individual has the freedom from coercion by certain individuals or groups to express their thoughts on a particular religion or belief.

The forum externum is the scope of freedom of religion in which individuals manifest their religion or belief in public spaces. This manifestation can take the form of worship, practice, and teaching of religion or belief in public and private spaces. In this case, the state may intervene by restricting certain freedoms of manifestation of religious teachings or beliefs as stipulated in legislation under certain circumstances. This is possible because the public sphere, which is the space for the manifestation of certain religious teachings or beliefs, may cause friction with the rights of other individuals.

Acts and statements, whether written or verbal, that are hostile or hateful in nature can cause conflict within society. Therefore, the state prevents such conflicts by criminalizing such acts. The criminal law policy regarding religion and belief in the National Criminal Code differs from the provisions of Article 156a of the *WvS*. The provisions in Chapter VII of Book Two of the National Criminal Code remove the phrase "blasphemy" from every article therein. The forms of intent that are subject to criminal sanctions in this chapter emphasize acts that have the potential to cause hostility, hatred, violence, or discrimination against religions, beliefs, groups, or communities based on a particular religion or belief. This provision provides legal certainty for citizens, especially religious scholars, in expressing their opinions in religious studies. This is emphasized in the Explanation of Article 300 of the National Criminal Code as follows:

> "Any act or statement, whether written or oral, that is carried out objectively, limited to one's own circle, or of a scientific nature regarding a particular religion or belief, accompanied by an effort to avoid words or phrases that are hostile, statements of hatred or hostility, or incitement to hostility, violence, discrimination, or blasphemy, does not constitute a criminal offense under this Article."

Such a regulation is an ideal form of limiting state power over the right to freedom of religion, more specifically, over scientific studies of religion. In addition, the restrictions in the National Criminal Code limit the state's power to intervene in the right to freedom of religion without sacrificing social control and integration. In the context of national human rights, such legislative policies limit the power of the state in internal and external forums. This demonstrates respect for religious freedom in national criminal law policy.

CONCLUSION

Criminal law, as part of criminal policy, aims to combat crime. As part of social defense policy, efforts to combat crime are directed at protecting society. This is where criminal law as an instrument of social control functions. The state, through its authorities, is tasked with maintaining security and peace in society. However, in maintaining peace in society, the authority of the rulers is limited by the human rights of individual citizens. This is because the authority of the rulers stems from a social contract in which each individual forming the social contract has human rights. This authority is given to them to guarantee the fundamental rights of individual citizens, including the right and freedom of religion. Therefore, in the formulation of criminal law, legislators must not criminalize acts that have the potential to take away the rights and freedom of religion of citizens through the formulation of norms that are not *lex certa*, i.e., unclear and open to multiple interpretations. This commitment of the legislature is consistent with the value of constitutionalism, which advocates protection of citizens against the arbitrary exercise of power by the government. In fact, the concept of "blasphemy" in Article 156a of the WvS in jurisprudence and doctrine does not have clear parameters. The assessment of the element of "blasphemy" is based on the interpretation and subjective spiritual feelings of certain religious communities. This situation severely infringes on the religious rights and freedoms of citizens. Therefore, the policy of decriminalizing the criminal act of blasphemy in the National Criminal Code and the Penal Adjustment Law is an appropriate step from a theoretical and philosophical legal perspective.

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