

Chapter I

Introduction

A. Context of Problem

In the universal declaration of human rights, the right to choose religion or his belief is a one of the nonderogable rights that cannot be substituted with other rights. International law, in fact, does not define religion. It simply uses the word to refer to what countries mean by religion.

The Universal Declaration of Human Rights, which was adopted without dissenting vote by the General Assembly of the United Nations in 1948, states in Article 18.

Article 18 of Universal Declaration of Human Rights:

"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."¹

This fundamental human right has been incorporated in the International Covenant on Civil and Political Rights and has been reaffirmed by the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief that was approved by the General Assembly of the United Nations in 1981.

¹ Universal Declaration of Human Rights act no. 18

The phrase "religion or belief" is particularly important for our reflections. Those words are related to the notion of freedom of thought and freedom of conscience. Belief is an alternative term and both are supposed to receive religion that is to receive the same legal protection. Presumably belief in this context does not mean religious beliefs, because this would be religion. Thus, "belief" in the phrase "religion or belief" is a positive way of designating beliefs that are not religious. Belief in this context refers to convictions that a person might choose to manifest them in teaching and practice, either in public or private.²

Therefore, although international law does not define religion, it does identify religion with conscience, and it enumerates a number of manifestations of protected religion. International law accepts that religion may and in most instances surely will involve teaching, practice, worship and observance. It is also clearly states that the right to freedom of religion or belief is an individual right that may be exercised individually as well as in community with others. Under international law religion and belief are individual and corporate matters that deserve for protection.

Religion is also mentioned in Article 2 of the Universal Declaration of Human Rights, which asserts that:

"Everyone is entitled to all the rights and freedoms set forth 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."

² Smith K.M, Hostmaelingen Njal, Ranheim Christian, "Hukum Hak Asasi Manusia" page : 87

It does not only mean that nations are obliged to perform a standard of non-discrimination treatment towards any religion, but also international law is not distinguish religion from races and national or social origin.

It should also be noted that freedom of religion or belief includes the right to change one's religion or belief. This means that under international law religion is something someone can change. Unlike race, color, national or social origin an individual has the right to give up her religion for another belief, or to change to a different religion. This has been strongly contested by some Muslim countries in the United Nations, which assert that no Muslim has the right to abandon Islam. Their position might be understood as opposition against freedom of religion, and it certainly is opposition to the standards of international law concerning freedom of religion or belief—at least on this particular point. It might be more accurate, however, to say that whose voice this objection simply do not accept the understanding of religion that is reflected in the Universal Declaration of Human Rights. Muslims tend to use the word "religion" refer to "true devotion to God." Religious freedom, therefore, means for many Muslims the freedom to embrace what is true. It does not mean the freedom to turn away from the truth.³

Article 26 of the Universal Declaration mentions that education under law "shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace." It is interesting that the word "religions" is not

³ Ibid page: 82

used here. International law seems to recognize that some religious groups should not be called "religions." The goal of the Universal Declaration is tolerance among all religious groups, whether within a religion or between religions.

In the Universal Declaration of Human Rights, there is foundation of international human rights law. Moreover, its provisions have been incorporated into many national constitutions. Thus, what the Universal Declaration says about religion brings major impact on the law about religion in many countries. The concept of "freedom of religion or belief" has entered into the Indonesian legal systems (and thus the legal vocabularies) of almost all of the nations of the world. What international law says about religion and also about belief will continue to shape the understanding of religious life for generations to come.⁴

In Indonesia, the national constitution provides for freedom of religion, and the Government generally respects this right in practice. There is no change in the status of respect for religious freedom by the Government during the reporting period, and government policy continues to contribute to the generally free practice of religion. However, while most of the population enjoys a high degree of religious freedom, the Government recognizes only six major religions. Some legal restrictions continue on certain types of religious activity and on unrecognized religions. The Government sometimes tolerates discrimination and violation towards minorities religious groups by some

⁴ [http:// Freedom of religion in Indonesia - Wikipedia, the free encyclopedia.htm](http://Freedom of religion in Indonesia - Wikipedia, the free encyclopedia.htm). Dec. 26,2011

peoples or groups and often fail to punish perpetrators. While Aceh remained the only province authorized to implement the Islamic law (Shari'a), several other local governments promulgated laws that implement elements of Shari'a which abrogates the rights of women and religious minorities. The Government does not use its constitutional authority over religious matters to review or to overturn these local laws. People who embrace minor religious groups and atheists continue to experience official discrimination, often in the context of civil registration of marriages and births or the issuance of identity cards.⁵

The public generally respects religious freedom. However, extremist groups uses violence and intimidation to shut down eight small, unlicensed churches and one Ahmadiyya mosque force fully to close. In addition several churches and Ahmadiyya places of worship that were forcibly shut in previous years by mobs remain closed. Some government officials and mass Muslim organizations continued to reject the Ahmadiyya interpretation upon Islamic teaching which result on discrimination against its followers are. Many perpetrators of past abuse against religious minorities were not brought to justice. Also, instances of extremists attacking and attempting to terrorize members of other religions occurred in certain provinces during the reporting period.⁶

Actually in Indonesia, there are some provision that regulate about the belief and freedom of religion. In Indonesian constitution Article No 28E, No 28I, and Article No 29 paragraph (2), which is concerning freedom of religion

⁵ [http:// Freedom of religion in Indonesia - Wikipedia, the free encyclopedia.htm](http://Freedom of religion in Indonesia - Wikipedia, the free encyclopedia.htm). Dec. 26,2011

⁶ Ibid

in Indonesia. And based on that provision, any issues of discrimination and violation towards religion can be avoided. And it is supposed to be as the basic rule that government can use in order to govern religion issues in this state. Unfortunately, this provision and the Law of Human Rights of years 1999 are not used properly and remain useless. Therefore, this situation becomes the factor that creates chaos over the discrimination against religious minorities, the failure of state apparatus to enforce the constitution order is also another factor that creates this issues. The case of Ahmadiyya and GKI Yasmin were main cases which publicly spotlighted as human rights violation issue recently.

Moreover religion is something very important for mankind, it is because religion becomes a tools to give education and direction about the purpose of live. Religion also plays main role in shaping personality. If someone truly recognizes and understands the goodness and the truth which he obtains from his religion is similar with truth values of other religions. Besides, someone who strong by believes that his religion is the rightest one will certainly continue to try to make himself useful and will consider that every job he did as the way of worshipping the Lord. They will construct their mind that what they do on behalf of his Lord will bring benefit not only for follow humans but also for the environment.

Debates about religious freedom often center on the tension between an individual or group's right to worship (or to refrain from worship) as they please versus the state's interest in maintaining order by imposing or favoring a particular religious culture which even they see themselves as the incarnation

of a deity. Therefore, religious pluralism that denies the leader's religious authority constitutes a direct challenge to royal power of government.

Another religious freedom issue is religious tolerance. While tolerance represents a step forward from persecution, a mere tolerance towards religious minorities which is performed by governments does not guarantee their religious freedom since such groups may face significant disadvantages from legal apparatus and from society in terms of equal treatment. On the other hand, absolute freedom of religious practice is problematic since this would exempt certain religious groups from laws which are designed to protect citizens from such practice as human sacrifice or the destruction of shrines which is committed by other religions.

Another aspect which is parallel with the principle of freedom of worship is the freedom to practice religious duties such as pilgrimages, public preaching, and making converts. These duties can sometimes conflict with a state's interest. For example, pilgrimages involve freedom of travel to foreign countries, as well as the entry of foreign citizens into the country in which a particular holy site is located. Public preaching can disrupt "public order" in religiously intolerant societies where the expression of unpopular views can result in riots.

B. Statement of Problem

1. How is the legal protection given by Indonesia towards the rights of religious freedom?

2. Is the protection of the state are appropriate with the international human rights perspective?

C. Research Objectives

1. The objective of this thesis is for learning deeply about how far the state gives protection towards right of religious freedom. It will explain about the regulation or provision given by government. Besides, it will learn about the mechanism of legal protection which is provided by provision to the people as citizen.
2. The second objective of this thesis is to know if the protections are appropriate with the international human rights perspective.

D. Definition of Technical Terms

Religious freedom is the rights to adhere to any form of religion or none, to practice or abstain from practicing religious beliefs, and to be free from governmental interference with or promotion of religious, as guaranteed by the First Amendment and article VI of the U.S Constitution.⁷

Religious freedom is the freedom of individuals to believe in, practice, and promote the religion of choice without (government) interference, harassment, or other repercussions - *as long as* practices based on, or resulting from, lawful action (e.g. do not encourage or result in fraud, tax evasion,

⁷ Black's Law Dictionary

murder, terrorism, acts designed to undermine the government or the constitution, the use of unethical persuasion tactics, and etc.).⁸

E. Theoretical Framework

Religious freedom has been long recognized as an inviolable human right under international conventions and treaties, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁹

Article 18 of Universal Declaration of Human right states that:¹⁰

“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.”

The ICCPR also stipulates religious freedom in Article 18:¹¹

“(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. (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. (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. (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

⁸ Apologetics Index, Religious Freedom, at <http://www.apologeticsindex.org/r04.html>, Dec.23, 2011.

⁹ John V. Hanford, Protecting International Religious Freedom: A Global Consensus, at <http://www.america.gov/st/peopleplace-english/2008/August/20080819113741cmretrop0.7964289.html>, Dec. 23, 2011.

¹⁰ Universal Declaration on Human Right, article 18.

¹¹ International Covenant on Civil and Political Rights

The freedom of religion and belief extends to the right to manifest one's religion or belief in worship, observance, practice and teaching. The right to manifest a belief is subject only to limitations that are provided by law which are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Moreover, General Comments on article 18 of the ICCPR elaborates that freedom of religion encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether it is manifested individually or in community with others.¹² It also protects theistic, non-theistic, atheistic beliefs, as well as the right not to profess any religion or belief.¹³ The freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.¹⁴ The Committee then permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way.¹⁵

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or to adopt a religion or belief of one's choice. These freedoms are protected unconditionally, just like the right of everyone to hold opinions

¹² ICCPR/C/21/Rev.1/Add.4, General Comment No. 22, par. 1.

¹³ Ibid par. 2

¹⁴ Ibid par. 5

¹⁵ Ibid par. 3

without interference.¹⁶ While the freedom to manifest religion or belief may be exercised "either individually or communally and publicly or privately". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts that give direct expression to belief, as well as various related, such as the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals that are associated with certain stages of life, and the use of a particular language customarily which is spoken by a group. In addition, the practice and teaching of religion or belief include acts that are integral to the conduct of religious groups as their basic affairs, such as the freedom to choose their religious leaders, priests and teachers; the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publication¹⁷ However, there is no manifestation of religion or belief which may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.¹⁸

Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms

¹⁶ Ibid par. 3

¹⁷ Ibid par. 4

¹⁸ Ibid par. 7

of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. However, the restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.¹⁹

If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties (States) or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant or in any discrimination against persons who do not accept the official ideology or who oppose it.²⁰

Therefore, it is clear that religious freedom is an inviolable rights which is based on international law and it is considered as fundamental human rights as stated in article 4.2 of the ICCPR that article 18 cannot be derogated from. Although the ICCPR has given full protection towards this right, it does not guarantee that the religious freedom may not be violated, for example in Indonesia. Religious freedom in the perspective of Human rights has a complex position²¹. It is usually considered as protection of human being interest as *Homo Sapiens*. It allows human to possibly develop intellectual and moral personality of them, to opt an attitude towards supernatural things, and to build a relationship with other creatures. Within the structure of state, Religious freedom has also an important position. A lot of human activities are protected by laws of religious freedom, freedom of expression, and political rights. The

¹⁹ Ibid. par. 8

²⁰ Ibid par. 10

²¹ Ifdhal Kasim, Hak Sipil dan Politik: Esai-Esai Pilihan, Jakarta: Lembaga Studi dan Advokasi Masyarakat (ELSAM), 2001, page: 238

norms are ranging from reciting a pray privately until actively participating in state political life. According to Ifdhal Kasim²², religious freedom appears as a fundamental human right in both national and international political instruments since long time ago before the development of systematical protection of civil and political rights. However, religious freedom meets its problems when facing state entities. The big issues is, the scope of legal and moral legitimation that a state may manage (regulate, limit, and prohibit) activities that are related to religious freedom

F. Research Method

1. Object of Study

The objects of this research are:

- a. The implementation of Article No 28E, Article No 29 verse (2), and Article No 28I of 1945 constitution that are related to freedom of religion.
- b. Universal Declaration of Human Rights and ICCPR concerning the freedom of religion.

2. Classification of Legal Materials

This research is using secondary data which are from the documents or archives that are related to the discussed problems in this research. The purpose of this legal materials are to identify the materials

²² Ibid

systematically in order to answer the problems. Secondary data are divided into:

a. Primary legal material:

- 1) Article No 28E and 28I, and Article No 29 verse (2) , concerning freedom of religion in Indonesia
- 2) Universal Declaration of Human Rights and ICCPR concerning the freedom of religion

b. Secondary legal material;

- 1) Literatures
- 2) Text book
- 3) Law journals
- 4) Articles from newspapers
- 5) Internet sources

c. Tertiary legal material:

- 1) Black's law dictionary

3. Legal materials collection

Secondary legal source are collected by conducting library research through studying documents. Such as, learning and understanding the Act, documents, text books and articles from newspaper or internet sources which are related to the study of the research.

4. Approach of the study

This research is a normative research which identifies legal norms and views. The objective is to understand and to answer the problem statements by using juridical normative approach method.

5. Legal materials analysis

The legal material collections are organized by selecting the legal material that is related to the discussed problems in this research. It is structured descriptively way in order to answer the problem in a descriptive analysis.

The legal materials are collected, managed and used to answer the problems. Collected legal materials are analyzed qualitatively and descriptively, it needs to take data which are related to the problems that are analyzed so that it can be elaborated descriptively and qualitatively. Moreover, it also portrays facts, performance, and compare with the applicable law aspects. The steps are defined as follow:

- a. Classification of the legal materials collection which is based on the problems of the research.
- b. Analysed legal materials to achieve conclusion.

Chapter II

Philosophical and Religious Justifications, Standards relationship of freedom religion norms to other human rights, permissible restriction, and freedom of religion under international law and national law

A. Philosophical and Religious Justifications Freedom of Religion

The philosophically freedom of religion that will be seized on, then, might be regarded as a kind of “meta-facilitation” of freedom of religion or belief. The purpose is to contribute to the overall aim of this not by providing a univocal philosophical justification of the internationally recognized norms encapsulated in freedom of religion, but rather by arguing the case for thinking that stability at the level of social life is not jeopardized but requires plurality at the foundations of the rights to freedom of religion.²³

For the foreseeable future may take for granted that our societies are plural societies, which means that societies distinguished by the existence of several differences, and in some respects inappropriate, religions and life stances. Life stances are being the secularist or nonreligious counterparts of religion. Part of our matter is assessing the extent to which, and the ways in

²³ Lindholm, Tore. Durham, W. Cole. Bahia G. cs “Facilitating Freedom of Religion or Belief” Norwegian: Martinus Nijhoff Publishers. Page : 21

which, adherents of differing normative traditions comprehend inappropriate doctrines and engage in competitive communal practices.²⁴

The justifications of freedom of religions divide into two dilemmas. There are two basic dilemmas arise which try to spell out what it takes to establish generally granted justifications of universally applicable safeguards of freedom of religion or belief. The first dilemma is the assumption, which is serious adherents of most religious or life-stance traditions in holding their particular doctrine to be the only truth and their particular faith and/or practice to be the path of salvation, or to paradise, or to extinction of suffering, or to an autonomous and illusion-free human life. The second dilemma is a plurality. It is a set of inappropriate premises, each of which may constitute internally well-grounded support for freedom of religion, appears as a whole to be incoherent and hence turning into reasonable public grounding.²⁵

Those dilemmas of the unreasonable freedom of religion justification across normative divides may trigger in given circumstances threats to social peace, security and stability. For instance, the first dilemma can lead people into conflict among rival fundamentalist communities within a wider political order. It is not just in fundamentalist groups that may be guilty for engendering such controversies. The second dilemma consider attention to stability hazards of plural societies that failed to spell out and entrench a shared public

²⁴ Ibid

²⁵ Ibid page 23

understanding of the basis for moral solidarity across religious and life-stance divides.²⁶

1. The Autonomy Rights in Managing Religious Affairs

The autonomy of religious societies or communities in structuring their own affairs becomes one of the crucial features of any meaningful system of religious freedom. The ecclesiastical and social structures of religious societies or communities do not merely to the feature of the religious freedom that can be refashioned by the state without altering essence or they are simply considered as tools for expression of individual belief. Moreover, individual freedom of conscience mostly is intimately tied to a community of belief. If that community is not free to shape itself, the conscience of its individual believers is inevitably compromised. Religious authenticity, for both the individual and the groups of religion, cannot be fully achieved if communal autonomy is impaired.²⁷

Moreover, as the part of relation between religious institutions and the state, religious autonomy is clearly one of the main issues. The degree of separation or cooperation between religious communities and the state is partially about assuring state neutrality. The state cannot be utilized by someone to procure privileges for themselves or to force their beliefs on others individual or communities. However, it is also fundamentally important for protecting the autonomy of religious communities from state intervention and

²⁶ Ibid page: 24

²⁷ Ibid page: 291

the risks of lost authenticity. Protection of the autonomy collectively, the corporate religious activity is thus vital both to individual claims of conscience and to appropriate structure of the relationship between religion and the state.²⁸

Internal autonomy in this wider sense has two dimensions theoretically: autonomy of beliefs or religions and institutional autonomy. Autonomy of belief is to cover the rights of a religious organization to define, elaborate, and control its own doctrine. Institutional autonomy connotes the rights of a religious organization to implement their rules and demands of their religion.²⁹

The idea of religious autonomy as a corporate right, which is different from individual rights to freedom of religion, challenges the present individualist culture of human rights and understandings of the rule of law. Individual rights that protect freedom of conscience, religion, or belief are clearly rights which are guaranteed by international law. It is not explicitly assured the corporate rights in the religious organizations, which are often more a matter of inference and implications.³⁰ When corporate rights are mentioned in international instruments, they are typically described as though they are derivative from individual rights.³¹

²⁸ Ibid

²⁹ Ibid page: 292

³⁰ Ibid

³¹ Thus, in article 18 of the ICCPR states that the rights to “freedom of thought, conscience and religion” includes “freedom, either individually or in community with other and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” The collective dimension is recognized, but the focus is on the individual.

2. Autonomy in International Law

Protecting human rights have been primarily concerned with individual rights by the international instruments. However, the growing consensus concerning the rights to religious autonomy is evident in this area as well. In major international instruments that enunciate the rights of individuals to freedom of conscience and religion there is no explicit mention on the corporate rights of religious organizations. However, these rights are suggested indirectly, albeit often through derivation from individual rights. The International Covenant on Civil and Political Rights, for example, notes that religion is practiced not only alone but also “in community with others,”³² and the rights to manifest one’s faith or belief include the activities of “worship, observance, practice and teaching.”³³ Obviously, such activities generally have a collective aspect. It is clear then that religious freedom has communal dimensions. Although the ICCPR does not expressly treat religious organizations as bearers of rights, it is clear that corresponding protection can be derived from the rights which are granted to individuals.³⁴

The same thing also stated in the 1981 UN Declaration on the Elimination of All forms of Intolerance and Discrimination Based on Religion or Belief.³⁵ It repeats the notion from the ICCPR that freedom of thought, conscience, and religion find expression “either individually or in community

³² ICCPR Article 18

³³ Ibid

³⁴ Lindholm, Tore. Durham, W. Cole. Bahia G. cs “Facilitating Freedom of Religion or Belief” Norwegian: Martinus Nijhoff Publishers. Page: 310

³⁵ UN General Assembly Res. 36/35

with other.”³⁶ It lays particular emphasis on issues of discrimination, which are often linked to group membership.³⁷ Significantly, all of the specific examples of freedom of religion or belief which is enunciated in article 6 of the 1981 Declaration presuppose religious autonomy. In short, the 1981 Declaration recognizes and calls for the protection of the autonomy of religious bodies in various significant ways.

B. Minimum Standards of Freedom of Religion

This section will provide an overview of the nature and scope of the minimum standards for freedom of religion or belief in the international community, as regulated by the principal international norms. Although the international community had already addressed racial discrimination, racial hatred, and other human rights issues, the United Nations did not address racial and religious discrimination and intolerance until the early sixties, following a series of anti-Semitic outbreaks.³⁸ The United Nations gave separation to the issues and promptly drafted a declaration and convention against racial discrimination.

International organizations have to guarantee freedom of religion or belief at the global and regional extent. These measures have also some effect on domestic legislation. The measures address issues such as:

³⁶ 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art 1 (1)

³⁷ Ibid articles 2-4

³⁸ Lindholm, Tore. Durham, W. Cole. Bahia G. cs “Facilitating Freedom of Religion or Belief” Norwegian: Martinus Nijhoff Publishers. Page : 65

(1) The aspects like a nature, scope, and other substantive of freedom of religion or belief; inside- and outside-religious freedoms; the expression and manifestation of the freedom; permissible limitations and derogation of the freedom; and how the freedom clashes or interacts with other individual and collective rights.

(2) The procedural aspects is available to protect individuals' fundamental rights of freedom of religion or belief, Westphalia (1648), and Vienna (1815) treaties were important level in this development, in order to show that the international community was relatively accepting the principle of humanitarian intervention.

Such intervention was on pragmatic grounds and without any philosophical or legal justification.³⁹

1. Universal Declaration of Human Rights

The United Nations Charter does not deal specifically with religious rights, except for prohibiting the discrimination of persons based on religious grounds. The first United Nations instrument to address the subject was the 1948 Universal Declaration of Human Rights.⁴⁰ The article 18 is mostly influenced by the 1966 Covenant on Economic, Social, and Cultural Rights, the 1966 Covenant on Civil and Political Rights, the regional treaties, and the

³⁹ Ibid page: 66

⁴⁰ Ibid page: 67

Declaration on the Elimination of all forms of intolerance and Discrimination Based on Religion or Belief.⁴¹

The article 18 consists of three parts. First, it guarantees the right of freedom of thought, conscience, and religion, generally described as the *forum internum*.⁴² It may legitimate to consider the freedom of conscience and religion as included in the freedom of thought. However, freedom of conscience was not universally considered a consolidated legal concept at the time of the drafting of article 18.

Second, article 18 indicates the conversion and religious proselyting. It became difficult issues when the 1966 Covenants and the 1981 Declaration were drafted.⁴³ When those documents were drafted, the rights to teach and spread one's religion and to perform proselyting activities became controversial problems. Those problems are beyond the scope of this article. They may sometimes involve a clash with rights such as privacy, interference with the integrity of some group identities as when ethnicity and religion are closely related and even illegal acts.⁴⁴

Third, article 18 indicates the external forum, as the manifestations of religions of religious freedom. Unlike in freedom of thought and conscience, that can only be limited by complicated psychological techniques which influences the human mind, the problems arise regarding manifestations of religious rights because those rights are may possible to be derogated. Given

⁴¹ Ibid page: 67

⁴² Ibid

⁴³ <http://www.parliamentarystrengthening.org/humanrightsmodule/pdf/humanrightsunit3.pdf>.

⁴⁴ Ibid

these problems, this aspect of religious freedom are proper to get special scrutiny.⁴⁵

2. The 1966 Covenants (ICESCR and ICCPR)

The United Nations attaches the further step in identifying and protecting religious rights when it promulgated the 1966 International Covenant on Economic, Social and Culture Rights (ICESCR) and the 1966 International Covenant on Civil and Political Rights (ICCPR).⁴⁶ Even though there are internationally binding instruments, some of them which were widely ratified, and consist of provisions related to religious rights, the 1966 Covenant on Civil and Political Rights is the only binding treaty that specifically contains a coherent articulation of such rights.⁴⁷

Some articles like in article 18, 19, 20, and 27 of the ICCPR are relevant to religious rights. Article 18(2) prohibits a coercion that would impair a person's freedom to have or to adopt a religion. Article 18(3) deals with the limitation on the freedom to manifest one's religion which are prescribed by law and necessity to protect public safety, order, health, or morals. Significantly, article 18 does not mention national security as an appropriate justification for religious discrimination which is committed by a state. In a delicate issue such as religious rights, limitations must be interpreted narrowly. Article 18 only permits limitations upon manifestations or the religious

⁴⁵ Ibid

⁴⁶ Lindholm, Tore. Durham, W. Cole. Bahia G. cs. *Opcit.* page: 69

⁴⁷ <http://www.parliamentarystrengthening.org/humanrightsmodule/pdf/humanrightssunit3.pdf>.

practice, namely the external forum, if such limitations are prescribed by law. The internal forum cannot be restricted or limited. This distinction is, of course, the greatest importance.⁴⁸

3. The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

This declaration was proclaimed by the General Assembly of the United Nations on 25 November 1981. This declaration is the most important global instrument regarding religious rights.

The 1981 Declaration took a clear stand with regard to the scope in religion term. The 1981 Declaration defines religion to include beliefs, namely nontheistic convictions that are related to religion, such as atheism, rationalism, agnosticism, and other beliefs, those convictions are related to religion. One of the deficiencies of the 1981 Declaration is the imprecise use of the terms discrimination clearly as a legal concept, and intolerance, a rather vague concept referring essentially to emotional, psychological, philosophical, and other attitudes that is likely to generate discrimination, hatred, or persecution.⁴⁹

The 1981 Declaration follows the structure of the Covenant in drafting the distinction between basic rights in the inner forum, conscience, and religion the external manifestations of religion worship, observance, practice, and teaching. Only external manifestations, which are in some cases listed, may be

⁴⁸ Ibid

⁴⁹ <http://www.law2.byu.edu/lawreview/archives/2000/3/1er5.pdf>. April.11.2012

limited if such limitations are prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights of others.

Overall the 1981 Declaration shows a good text, which, more or less, reflects the international community's present understanding of the minimum standard for matter of religious rights.⁵⁰

C. The Morality of Human Rights: A Religious Ground

The fundamental twofold conviction at the heart of the morality of human rights holds that each and every human being has inherent dignity and it is inviolable or not to be violated.⁵¹

The moral force behind the idea of modern human rights in some forms is no longer a highly contested as public issue. However the “why” of their moral force remains troublesome in several respects. In the first place, the range of human rights in general, as well as the content, scope, and limits of particular rights, remains highly contested. The nature of justifications may turn critically on precisely what is to be justified. Different justifications may warrant different rights and which may differ in coverage and applications. Second, differing justifications may suggest different rankings and weightings of rights when competing rights come into conflict. Third, there are questions about how competing justifications are to coexist in a common social space. Such issues are particularly problematic within the domain of freedom of

⁵⁰ Lindholm, Tore. Durham, W. Cole. Bahia G. cs “Facilitating Freedom of Religion or Belief” Norwegian: Martinus Nijhoff Publishers. Page : 75

⁵¹ Michael J. Perry.”*Toward a Theory of Human Rights: Religion, Law, Courts*”. Cambridge University Press

religion or belief. Although the existence of the right is widely recognized in the abstract, its concrete implications are often contested. This is true partially because of the incredible diversity of religious phenomena, and because at times tragic conflicts that may arise between religious freedom claims and other human rights, in particular women's rights.⁵² The "ambivalence of the sacred" calls on the hand for the highest order human rights protection and at the same time for some of the highest order protection against abuse.⁵³

D. The Relationship of Freedom of Religion or Belief Norms to Other Human Rights

There are some differences between groups of peoples sharing a certain religion on the one hand, and institutions created to serve that community such as political party. Freedom of religion, for instance, religious community has their own authority to implement the rights in conducting or managing of members of that community, the rights to manifest their religion, individually or in community with other members of their creed and in public or privately, in worship, observance, practice, and teaching. Organized institutions serving that community are entrusted, as against institutions of a different kind such as the state and as a *sine quo non* for the meaningful exercise of freedom of religion, with a sovereign range of competencies within their own respective spheres of religiously qualified or faith based on their

⁵² Ibid

⁵³ R. Scott Appleby, "The Ambivalence of The Sacred: Religion, Violence, and Reconciliation". Lanham: Rowman & littlefield Publishers, Inc.,2000

activities. The scope of sovereignty constitutes the rights to manifest their religious activity and other faith based on their institutions.⁵⁴

The rights to determine themselves of belief in communities and the performance of sphere sovereignty which is conducted by the organized structures within those communities do not exist, and cannot be exercised, in isolation from a whole range of other from the basic fundamental freedom of human rights, including the rights to equal protection and nondiscrimination, freedom of expression, freedom of assembly and association, and an effective remedy to vindicate the freedom of religion for the protection of the integrity of the people in that community.⁵⁵

Religion and other religious communities may also deny some of the values systems that collected with the idea of human rights protection. The scriptures of diversity in religions ordained punishments which are denounced as being cruel and inhuman by contemporary standards. Proponents of a variety of religions, in defiance of the norms against totalitarianism and discrimination, insist on the establishment of political communities with a distinct commitment to their own religious persuasion. Many religions endorse gender discrimination and condemn people on basis of their sexual orientation. The rights to determine their belief in communities and the sovereign sphere of religious institutions need political authorities that refrain from prohibiting internal religious practices. They should impose restrictions on manifestations

⁵⁴ Lindholm, Tore. Durham, W. Cole. Bahia G. cs. *Loc cit*, page : 123

⁵⁵ Ibid

of religion or belief, when necessary, to protect public safety, order, health or morals.

The freedom to manifest one's freedom of religion is not an absolute freedom. It must be exercised by respecting for the rights and freedoms of others and within the confines of the general interest. Essentially it is limited by an enclave of entitlements that are determined by the conceptual of religion itself. International law proclaims that the rights of freedom of religion to be a nonderogable rights, and it never supposed to be suspended by the national emergency. The performances of freedom of religion may be subjected to constraints are controlled by the needs of public safety, order, health or morals, or the fundamental rights of other. It's obstacle of it may not impair the main element and the meaning of freedom. A religion may never be regulated, sanctioned, or proscribed by the state that imposed coercive means.⁵⁶

E. Permissible Restrictions on Freedom of Religion or Belief

Government is the main actor in creating of such discriminatory policies by clearly siding with one religion (the majority one) and assisting or exploiting this religion by using to restrict to discriminate other religion or belief. However, sometimes governments may also try to maintain a neutral position if there is a conflict among different religious communities. Regardless their approach, however, there will be some cases in which they

⁵⁶ Ibid

will be called upon to use their power under international human rights law in order to restrict the manifestation of religion or belief.⁵⁷

1. Restrictions for the Protection of Public Safety

The main goal of the public safety clause is to allow restrictions on the public manifestation of religion and all kind of their processions, if a specific danger arises and threatens the safety of persons including their life, integrity, property, and health. It happens especially when certain religious community gets into conflict against other religious communities like the case in Northern Ireland, Bosnia and Herzegovina, India, or Nigeria. It may also happen when religious customs are used to serve political interests of certain individual some individually or communities. For example, when a religious group threatens safety of persons or property, states are authorized to take measures that are strictly necessary and proportional in order to protect public safety, including the prohibition of particularly dangerous religious groups and criminal action against the perpetrators. Those are included into religious hatred or war propaganda in contravention of Article 20 ICCPR.⁵⁸

2. Restrictions for the Protection of Public Order

The freedom to manifest one's religion may only be restricted on this ground in order to avoid disturbances. Public Order should be narrowly construed which means the prevention of public disorder. It should not be

⁵⁷ http://www.oslocoalition.org/deskbook_nowak_vospernik.php.view: April 12,2012

⁵⁸ Lindholm,Tore. Durham,W.Cole. Bahia G.cs *Opcit.* Page : 151

confused with a similar sounding French legal expression that is used in civil and administrative law and private international law, the *Pordre public*, is focusing on the fundamental public policies of a society. Furthermore we can see the implementation through the registration of applicable regulations into political demonstrations which are also applied for funeral and other religious processions in order to maintain the conduct traffic and the peace.⁵⁹

In the case of *Manoussakis v. Greece*, is an example where the public policy is used in an arbitrary or discriminatory manner against certain religious groups. The restriction of the freedom to manifest one's religion becomes requirement for religious communities to be registered as legal entities under domestic law and to comply with general laws that regulate public meetings or the establishment of public places of worship. Furthermore, in the mentioned case before the European Court of Human Rights had to rule on the compatibility of a conviction of Jehovah's witnesses for having set up and operating a place of worship without the authorization of the Greek Minister of Education and Religious Affairs. This kind of policy with such discriminatory manner is attributable as a violation of freedom of religion.⁶⁰ The Court held that the legal authorization requirement was consistent with Article 9 ECHR conditions. It observed, however, that Greece had used this requirement to impose rigid, or prohibitive conditions on practice of religious beliefs to certain non-Orthodox movements. Taking into account that the applicants in 1996 still had not received an express decision on their requests of 1983 and 1984 for

⁵⁹ Ibid page: 152

⁶⁰ Ibid page: 154

permission to inaugurate their place of worship, the court decided that the conviction of the applicants constituted an interference with their freedom to manifest their religion which was not necessary in a democratic society.

The protection of “public order” becomes quite popular for the government to justify their policy by restricting the freedom of religion of prisoners. Even though restriction of the prisoner’s freedom of religion is under the circumstances in order to protect the public order or the public safety, the impression that that European Commission of Human Rights preferred to rely on their ill-conceived concept of “inherent limitations” instead of applying the limitation clause of Article 9(2) ECHR.⁶¹ In some cases there was a refusal from the prison authorities to provide special food required by a religion and also a prohibition for a Buddhist prisoner to grow bread, including a prohibition for a Sikh prisoner to wear special clothing, and etc. Those prohibitions are justifiable since they were non usually practiced in the respective state.⁶²

3. Restrictions for the Protection of Health

The limitation on the ground of public health is permitted as a state intervention as long as it is intended primarily to prevent epidemic or other diseases. The mandatory state may do such intervention such as a vaccination

⁶¹ Ibid page : 155

⁶² Ibid

when it is done for the public health interest. For example, the health of others religious convictions may certainly be restricted.⁶³

Regarding the “public safety” clause there is a doubt whether the state also has the right to protect an individual’s health against his or her own religious convictions. In some examples such as when Jehovah’s witnesses refuse all blood transfusions, for saving life and when Sikhs refuse to wear safety headgear.⁶⁴

4. Restrictions for the Protection of Morals

The human Rights Committee stressed in its General Comment:

“The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”

However “Morals” is always used as the least clear and most controversial of all the legitimating grounds for justifying restrictions on the freedom to manifest one’s religion or belief.⁶⁵ Meanwhile, mostly every religion claims that their system of respective values consists of the main part of moral values, at least for those who adhere to this particular religion or belief. It seems difficult to draw a concept of a higher and quasi universally accepted concept of morals which states could invoke to justify restrictions of religious manifestations even when it seems that one can imagine areas where different religious and secular values are able to be held in an “overlapping

⁶³ Ibid page: 157

⁶⁴ Ibid page: 158

⁶⁵ Ibid page: 159

consensus”.⁶⁶ A protection towards the fundamental rights of the third parties might be a reference to justify the appropriate limitation based on the ground of morals in the functional matter. However, it is difficult to imagine moral values of sufficient magnitude in order to justify the limitation of freedom of religion. Furthermore, the constellation of values that fall within the protection of fundamental rights and freedoms of other as attached high value.⁶⁷

5. Restrictions for the Protection of the (Fundamental) Rights and Freedoms of Others

1) Proselytism

A religion has the tendency to interact within each other. In some circumstances, it will disturb the religious freedom of other. Here state often to feel the need to interfere with the freedom to manifest religion in order to protect religious freedom of others. The government always positions themselves to be neutral in order to avoid problems. It will be different if government follows the system of a state church and/or clearly give priority treatment to certain religious community. Thus it tends to arise the danger of arbitrary or discriminatory treatment. An example for this tendency, as the case of the European Court of Human Rights illustrates, is the Greek system of favoring the Orthodox Church by discriminating other religious communities, including Muslims, Catholics, or Jehovah’s Witnesses.⁶⁸

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid page:160

A typical condition also happens in Greece where proselytism is regarded as impermissible interference with other religions, and indeed constitutes a criminal offence. The Greek law defines it as “any direct or indirect attempt to intrude on the religious belief of a person by writing a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his experience, trust, need, low intellect or naivety.”⁶⁹

2) Blasphemy

As a form of protection towards the religious feelings which are being offended by others and in order to maintain freedom of conscience, religion, or belief against improper missionary activities by other religious community, there is a policy which is created by the Greek government to criminalize blasphemy offence of proselytism. By implementing this kind of punishment the government already interferes with the individuals’ freedom to manifest their religion through missionary activity in order to protect the religious freedom of people for not to be converted. The state already breaks the line of intervention when they start to punish the blasphemy. They interfere the freedom of expression in order to protect religious feelings or morals, not necessarily freedom of religion. Therefore, there might be a question upon the issue of blasphemy which deals with in an article on permissible restrictions on freedom of religion or belief. However, the question started from a

⁶⁹ Ibid

development of a highly controversial case law of protecting religious feelings as part of the “peaceful enjoyment” of freedom of religion in Article 9 ECHR against offensive publications.⁷⁰

In general, the case law of the European Court seems to protect moral standards which are equal with the religious feelings of the majority in the respective countries, or the feelings of minorities for which there is strong sympathy. Someone may detect in this approach a discriminatory element. If the court would apply this jurisprudence, however, equally to all religious feelings, freedom of expression in this field could be heavily jeopardized.

3) Additional Rights and Freedoms of Others

A state is able in some certain conditions under an obligation to restrict the manifestation. However, there is a hesitation since this conduct is similar with intervention in particular the rights to life, liberty, integrity, privacy, marriage, property, health, education, equality, the prohibition of slavery and torture as well as the rights of minorities.⁷¹ These objectives, to some extent, overlap with the other limitation grounds as mentioned above. A state measure to protect the rights to life, health and physical integrity against violence which are caused by religious groups can, of course, also be justified as protecting public safety, order and health. If such measures aim, however, only for protecting the life or health of the person or a person who manifest the religion, it cannot be justified as protecting the rights of others.

⁷⁰ Ibid page:162

⁷¹ Ibid

F. Prohibition of Discrimination and Incitement that Causes Religious Hatred

In its General Comment on the rights to freedom of thought, conscience, and religion, the Human Rights Committee has put much emphasis on equality and nondiscrimination.⁷² Of particular relevance to this chapter is that limitations on the freedom to manifest one's religion or belief are only permissible if they are not discriminative.⁷³ It is important to note several principles of the events in which religious discrimination occurs. State action which might otherwise be covered by a legitimating ground for limitations is not permissible if the limitation has a discriminative purpose or effect.

It is useful to review some of the major concerns about discrimination that have been enunciated in the international human rights arena. Therefore, the Human Rights Committee's General Comment emphasizes that the fact that certain religion which is recognized as a state religion and its followers comprise the majority of the population shall not result in any privilege for this religion that may lead to discrimination against other religious followers or nonbelievers.⁷⁴ The same holds true if a set of beliefs is treated as official ideology in constitutions or proclamations of ruling regime.⁷⁵ A public education system which includes instruction of a particular religion or belief is only permissible if such provision is made for nondiscriminatory exemptions or

⁷² General Comment 22

⁷³ Ibid par. 8

⁷⁴ Ibid par. 9

⁷⁵ Ibid par. 10

alternatives.⁷⁶ Finally, the Human Rights Committee recalls the obligation of governments that derives from Article 20 ICCPR to prohibit any manifestation of religion or belief which spreading propaganda for war or giving advocacy of national, racial, or religious hatred that constitutes incitement for discrimination, hostility, or violence.⁷⁷

G. Freedom of Religion and Belief and Discretionary State Approval of Religious Activity

The human rights movement has shown their significant effort to contribute on the rule of law. The idea of individuals should be subjected only by the rule of law. Not to be bound by the rule of men is the insistence that human shouldn't be subjected to the arbitrary power or discretion of others. It becomes the basic reason for this movement.⁷⁸ This applies with special forces in the domain of religion.

Most typical violations take form not only in the form of legislation, but also administrative action that prevents people from engaging in religious activities which are properly protected under international human rights agreements and under many national constitutions as well.

The new administrative state make countless involvement of state institutions and religious, often low-level, approvals, licenses, permits, and other governmental decisions that can severely contradict with the life of religious communities. State may have laws that involve governmental

⁷⁶ Ibid par. 6

⁷⁷ Ibid par. 7

⁷⁸ Lindholm, Tore. Durham, W. Cole. Bahia G. cs. *Opcit.* page: 425

decision making to issue that involves financial support for religious associations and their projects or to grant special privileges from tax obligations. Such decisions consist of consideration on recognition of religious community legal status, land use permits them to build worship facilities, tax status determinations, visa approvals for travel of religious personnel, approvals in connections with educational institutions, the issuance of licenses for priests, and the authorization of public worship. The administrative decision is able to restrict the existence of believers and their associations in hospital, prisons, and educational institutions.⁷⁹

In many cases, the state makes discretionary decisions for the protection of the rights of individuals, organizations, and society. However, the risk of abuse remains and it must be avoided. Otherwise, state action may result in granting privilege unjustifiable, discrimination against other religious communities, or the curtailing of activities that should be protected and free.

International instruments do not directly mention the range of ways that government permission may encroach on religious freedom.⁸⁰ These documents simply provide that everyone should be free to exercise his or her religion or belief in any form, individually or together with others, without any restrictions by the state.⁸¹ Similarly, constitutions and legislation in many countries around the world contain articles that guarantee the rights to exercise religion or belief without authorization from the state. However, as a practical

⁷⁹ Ibid page: 426

⁸⁰ Ibid page: 426

⁸¹ Restriction can be imposed only in case of the necessity to guarantee the security, order, health, morality rights and freedoms of other people. For example, ICCPR.

matter, bureaucrats are accustomed to exercise their powers, and they may either intentionally or unintentionally tread on religious freedom as a result.

There was a case from the European Court of Human Rights dealing with the ways in which administrative decision-making may interfere with the freedom of religion or belief. *Manoussakis v. Greece*⁸² had profound implications for a range of recurrent types of problems, dealing as it does with a variety of potential rule of law violations. Many problems in *Manoussakis* reflect general problems of state power abuse in a democratic society. They apply it with excessive force when the domain of religion is involved.

Manoussakis v. Greece

In the *Manoussakis* case, Jehovah's witnesses appealed their criminal convictions for using an unauthorized place of worship. In March 1983, Mr. Manoussakis rented a room in the Ghazi district of the city of Heraklion. According to the private rental agreement, he intended to use the room "for all kinds of meetings, weddings, and etc. for Jehovah's Witnesses." Three months later, in June, Mr. Manoussakis and his associates applied for a permit to use the facility as a place of worship. The chairman of the Ghazi District Council refused to certify the applicants' signatures. He withdrew his refusal in October 1983 at the urging of the prefect of Heraklion, the Deputy Minister of the interior, and the Speaker of the Greek Parliament. The application thus became

⁸² *Manoussakis v. Greece*, 23 EHRR 387 (1997) (ECtHR 1996-A, No. 59/1995/565/651, 26 September 1996)

eligible for consideration by the Ministry of Education and Religious Affairs in October 1983.⁸³

Meanwhile, on 30 July 1983, the Ghazi Orthodox Parish Church notified the Heraklion police that Jehovah's Witnesses were conducting a meeting in Mr. Manoussakis's rented room without authorization. The church authorities wanted the police to take punitive action and to prohibit further unauthorized meetings.⁸⁴

Between November 1983 and December 1984, the Ministry of Education sent five letters to Mr. Manoussakis and his fellow Jehovah's witnesses saying that it could not grant a permit because it "had not received all the necessary information from the other departments concerned." The Ministry took no further action on the application for a permit.⁸⁵

In March 1986, the Heraklion authorities began the prosecution of Mr. Manoussakis and his associates for having "established and operated a place of worship for religious meetings and ceremonies of followers of the Jehovah's witnesses denomination without authorization from the recognized ecclesiastical authorities and the Minister of Education and Religious Affairs, such authorization being required for the construction and operation of a church of any faith."⁸⁶

Greek laws required a valid application which come from at least fifty families "from more or less the same neighborhood and living in an area at a

⁸³ Ibid par. 7-9

⁸⁴ Ibid par. 10

⁸⁵ Ibid par. 11 , 51

⁸⁶ Ibid par. 12

great distance from a temple of the same denomination. It being assumed that the distance makes it difficult for them to observe their religious duties.”⁸⁷

The law also required the Minister of Education and Religious Affairs to consider the non-binding “preliminary finding” of the local Orthodox Metropolitan as to whether “the true position regarding religious practice in the locality” warranted the construction of a temple.⁸⁸

In convicting the defendants, the Heraklion Criminal Court found that they “had converted the room into a place of worship. In other words, it became a small temple without the authorization of the recognized ecclesiastical authority and of the Ministry of Education and Religious Affairs.”⁸⁹ The convictions were continued by Greek appellate courts and the Heraklion police sealed the room which was rented by the Jehovah’s Witnesses.

The European Court of Human Rights is be guided in article 9 of the European Convention on Human Rights, ”the restrictions imposed on Jehovah’s Witnesses by the Greek Governments effectively prevent them from exercising their rights to freedom of religion.”⁹⁰ There are 3 kinds of pre-conditions to determine that governments action can interferences the freedom of religion. First, limitations must be “prescribed by law.” This requirement “does not merely refer to domestic law, which is expressly mentioned in the preamble

⁸⁷ Ibid par. 23

⁸⁸ Ibid par.26

⁸⁹ Ibid par.15

⁹⁰Ibid par. 41

of the Convention.” Those pre conditions are enacted in the article 9.”⁹¹
Therefore it is considered as a rule of law constraint. Second, the limitations must have a legitimate aim, such as for interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Third, limitations must fulfill the necessary of a democratic society.”⁹²

H.Freedom of Religion or Belief under International Humanitarian Law And International Criminal Law

Heightened religious concerns during the suffering, death, and destruction of military conflicts receive recognition and protection under international humanitarian law, particularly four Geneva Conventions of 1949 and their two additional protocols of 1977.

In the end of the war, it leaves a problem concerning some specifically antireligious acts of violence or during military aggression. This left behind conflict then is addressed through the norms and tribunals of international criminal law. It is the most salient and critical elements of humanitarian law which have become universally recognized as crimes against humanity such as genocide. Meanwhile violations of the laws and customs of war are identified as war crimes as in the Rome Statute of the International Criminal Court of

⁹¹ Lindholm,Tore. Durham,W.Cole. Bahia G.cs. *Opcit.* Page : 428

⁹² Ibid

1998 and its predecessors. This action was finally done when considerations of justice resume their natural priority.⁹³

The presence of Humanitarian law, cannot be separated from historic context and its specific purpose to promote humane treatment of people and to ameliorate their suffering during times of war and it has inherent limitations to its application. The Geneva Conventions generally apply only for the duration of the armed conflict and only to protect people under forces on land and naval forces, prisoners of war, and alien civilians. However the universality of the humanitarian norms that underlies in underlying the laws of war is not entirely suppressed in the Geneva Conventions specifically. First, common article 3, declares three minimum standards even concerning domestic violence, during “non-international armed conflict character,” such as:

(1) Requiring noncombatants to be “treated humanely, without any adverse distinction based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria”;

(2) Prohibiting violence, hostage taking, outrages upon personal dignity, and extrajudicial sentences and executions; and

(3) Requiring care for the sick and wounded. Nondiscrimination on the basis of “religion or faith” is one of the essential minimum standards of humanitarian law under all circumstances.

Second, article 72 of Additional Protocol I that triggers substantive human rights into the “humanitarian law is protect the civilian objects from the

⁹³ Ibid page : 429

conflict contained in the Fourth Convention,” by incorporating “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict” (emphasis added). Third, article 75 of Additional Protocol I and article 4 of Additional Protocol II expressly protect freedom of religion or belief, not only against discrimination, but also as affirmative, substantive entitlements for all noncombatants: “Each party shall respect the person, honor, convictions and religious practices of all such persons.”⁹⁴ “All persons who do not take a direct part or who have ceased to take part in hostilities . . . are entitled to respect for their person, honor and convictions and religious practices.”⁹⁵

Human rights instruments do not only have and invoked human rights, but also human rights instruments have crossed over into the field of humanitarian law, the theater of armed conflicts. The responsibility of all people to protect human rights and dignity, and particularly religious belief and practice, have crossed military lines as already regulated under the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) that is applicable during times of armed conflict. This implementation can be seen from the unrestricted language on the descriptions of the of human rights possessors under the ICCPR, e.g., “every human being,” “everyone,” “all persons,” and the language of the derogation clause in article 4. First, human rights can be derogated under the ICCPR only “In time of public emergency

⁹⁴ Additional Protocol I, article 75(1)

⁹⁵ Additional Protocol II, article 4(1)

which threatens the life of the nation.”⁹⁶ Therefore human rights persist even during times of armed conflict, until hostilities reach the stage of emergency that the life of the nation is jeopardized. Then human rights can be derogated only “to the extent strictly required by the exigencies of the situation” and cannot “involve discrimination solely on the ground of . . . religion.”⁹⁷ Second, under the nonderogation provisions, “no derogation” may be created from the right of freedom of thought, conscience, and religion which are protected by article 18.⁹⁸ Third, the limitations clause in the ICCPR provision regarding freedom of religion or belief⁹⁹ pointedly does not include “national security” as a legitimate ground for limiting manifestation of religion or belief, although “national security” appears among the proper grounds for limitations of the rights of freedom of expression, assembly, and association.¹⁰⁰ Fourth, the ICCPR prohibits “any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁰¹

I.Facilitating Freedom of Religion or Belief through Religious Association

Laws

While struggling for the ideal fundamental freedom, there are some points which are strongly standing still and difficult to be changed such as

⁹⁶ ICCPR, article 4(1)

⁹⁷ ICCPR, article 4(2)

⁹⁸ ICCPR, article 4(2)

⁹⁹ ICCPR, article 18(3)

¹⁰⁰ ICCPR, article 19(3),21, and 22(2)

¹⁰¹ ICCPR, article 20

entrenched social attitudes that sometimes are embedded in centuries of tension and bitterness; painful histories of discrimination and persecution; ethnic rivalries; limitations in the ability of education systems to internalize values of toleration and respect; failures on the part of religious leaders to help translate religious ideals of respect for others into religious practice; and so forth. Within this often discouraging landscape, progress with respect to religious association laws, although with its own challenges, is comparatively easy and exerts powerful leverage on the more general objective of facilitating freedom of religion or belief.¹⁰²

By focusing on the features that facilitative laws on religious association should have, a number of preliminary points should be fairly clear. In the first place, religious communities must be free from any acquire legal entity status. Second, in legal systems that have separate laws for religious organization and for secular nonprofit association, religious organization should be free to choose either option. Generally, separated religious association laws will have more attractive features since such laws should be sensitive to the unique requirements of freedom of religion or belief. However it hurts nothing and leave the option open for organizing as a normal nonprofits entity. If the requirements for the religious association law are more burdensome to a particular religious group than those that apply it to secular nonprofit associations, impermissible discrimination against religious

¹⁰² Lindholm, Tore. Durham, W. Cole. Bahia G. cs. *Opcit.* Page :400

organization almost certainly occur. This concern can be solved when religious groups are free to choose which form of organization they prefer.¹⁰³

Religious association laws need to allow communities belief flexibility significantly in the way they structure their affairs. Matters of ecclesiastical polity and ecclesiastical office almost always reflect doctrinal beliefs and religious practice. Commonly, the problem here is that religious association laws are drawn up with traditional religious groups and practices in mind, without allowing sufficient flexibility for other belief groups. Assumption about the nature of clergy and religious government that are perfectly appropriate for familiar groups, written legislation for a church may not apply neatly to religious orders. Strict interpretation of rules by those who are on charge for implementing them can cause further problems.

Review on application for entity status (registration, incorporation and the like) must be structured scrupulously in maintaining the neutrality of the state. Those who are conducting the review process should be limited on reviewing formal statutory requirements (e.g., provided requisite information about founders, adequate contact information, adequate provision which is made for assets in the event of dissolution, etc.). They should have no discretion to assess matters that go to the substance of beliefs or religion practices. State authorities must remain neutral in assessing the truth of religious beliefs and must treat all groups impartially.

¹⁰³ Ibid

J.The Evolution of International Protection of Religious Freedom and The Evolution list of Human Rights

International protection of religious freedom has undergone profound historical transformation over the past five centuries. It exhibit significant process range of the variation in its social forms, substantive scope, reach of applicability, mode of implementation, and institutional stability. It obviously complicates the task of justification, since the task of moral justification clearly varies, that depend on how this *justificandum* is specified¹⁰⁴. These constitute three remarkably different models of political protection of religious liberty although they are partially overlapping, such as:

- (i) The *cuius region, eius religio* model: international peace treaties provides for territorial separation of people who have different religious persuasions. For example by keeping Catholics, Lutherans, and Reformed apart in different regions and providing them modicums of toleration of circumscribed dissidents and their rights to orderly emigration should a new confession be imposed in the realm; second :
- (ii) The minority protection model : International (bilateral or multilateral) treaties provides protection for religious minorities within the state territory of a hegemonic or religious majority; and finally :

¹⁰⁴Donnelly,Jack. “*Universal Human Rights in theory & practice*” New York: Cornell University Press. Page:: 57

- (iii) The human rights model: international (global or regional) treaties that codify international standards and provide international monitoring on universal human rights for individual human beings and religious or life-stances communities for freedom of religion or belief.¹⁰⁵

The Evolution of Lists of Human Rights

In the most general terms, a list of rights reflects a society's understanding on the principal of "standard threats" to human dignity. For example human rights to excrete, for example, seems silly because there is no serious threat. However if preventing excretion became a diabolical new method of torture or repressive social control, recognition towards human rights to excrete might make sense.¹⁰⁶

Not every kind of systematic suffering leads to a rights recognition. Politics largely determines whether any particular indignity/threat/rights is recognized. Nonetheless, our list human rights has evolved, and will continue to change, in response to social and technological changes, such as: the emergence of new techniques of repression, changing ideas of a human dignity, the rise of new political forces, and even past human rights successes (which allow attention and resources to be shifted to threats that previously were inadequately recognized or insufficiently addressed).¹⁰⁷

¹⁰⁵ Ibid

¹⁰⁶ Ibid page: 58

¹⁰⁷ Ibid

Although John Locke's short list of life, liberty, and estates which was in Thomas Jefferson's hand was expanded to life, substantial headway only happened with the nineteenth-century rise of the working class as an effective political force. The resulting political struggles led to new understandings on the meaning of and conditions necessary for a life of dignity that was rooted in significant measure in the experience of the social and economic devastation of early industrialization. Over the course of more than a century, the rights to property gradually was supplemented by, and ultimately largely subordinated to extensive set of economic, social, and cultural rights.¹⁰⁸

The list of civil and political rights has also changed dramatically. Today in the West, they take the rights for a free press largely for granted. Two hundred years ago, however, Tom Paine was prosecuted for sedition because of his pamphleteering since and President Adams used the notorious restrictions of the Alien and Sedition Acts against his political adversaries, including Thomas Jefferson. The rights for freedom of association has been extended to associations of workers for scarcely more than a century. Genocide was recognized as an international crime only in the aftermath of the Holocaust. "Disappearances" has more recently reshaped our understandings of the rights to life and protection against arbitrary arrest and detention.¹⁰⁹

List of human rights is based only loosely on abstract philosophical reasoning and *a priori* moral principles. They emerge instead from the concrete experiences, especially the sufferings, of real human beings and their political

¹⁰⁸ Ibid

¹⁰⁹ Ibid

struggles to defend or realize their dignity. Internationally recognized human rights reflect a politically driven process of social learning.¹¹⁰

K.Freedom of Religion under Indonesian Law

This declaration set out chapter by chapter by Law No 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights). As stipulated in article 18, it mentions right for every person to freedom of thought, conscience and religion and the protection of those rights. Constitution 1945 states that the state guarantees freedom of religion and faiths (Section 28E conjunction with Article 29 paragraph 1). In fact, in Article 28 of the 1945 Constitution states that religious freedom cannot be reduced under any circumstances. These provisions are strengthened in Article 22 of Law No. 39/1999 on Human Rights. Every person has the freedom of thought, conscience, and religion.

The principle and provisions concerning religious freedom as mentioned above are still very general and they need further elaboration. If it is related to the issue of religious freedom in Indonesia today, the problem can be divided into at least four categories:

1) The relationship between freedoms of religion with other religions. This becomes a problem because of the plurality of religious teachings that lead into in a conflict between one religion with another religion.

¹¹⁰ Ibid

- 2) The relationship of religious freedom and other faiths. This concerns the problems of deviated thought and unusual practice of religious teachings by religious people are considered deviated.
- 3) The relationship between freedom of religion and government. When there is a religious conflict, the government's role is absolutely necessary as a mediator and facilitator of inter-religious or inter-religious.
- 4) Relationship between religious teaching and the Universal Declaration of religious freedom. Universal human rights is problematic since it is conceptually and practically collided with the principles of the religion.

In Article 73 of Law No 39 year 1999 about Human Rights, the implementation of the freedom of human rights shall not violate human rights of others, shall not break the law, morality, order, and religious norms.

It's a thing that cannot be denied that the Constitution and Law No 39 Year 1999 on Human Rights has guaranteed the right of every citizen to freedom of religions and worship according to religious belief. State are obliged to respect and guarantee freedom of religion or faiths of all individuals in the territory without distinction of race, color, sex, language, religion and belief, political or other opinion, natives or immigrants, and their origins. However the law also provides that in implementing the teachings of religion and belief, it would have to prioritize the elements of order and honor the values of the sanctity of religious teachings / beliefs of others. Regarding this purpose then freedom of religion need to be rationalized based on a balance between rights and obligations. Therefore the government can regulate or

restrict the freedom to practice religion or belief through legislation. Government is obliged to restrict the manifestations of religion or belief that may endanger the fundamental rights of others, especially the right to life, liberty, physical integrity of violence, personal, marriage, property, health, education, equality, prohibiting slavery, cruelty, and also the rights of minorities.

L. Islam and Human Rights

Many authors argue that contemporary human rights doctrines merely replicate 1400-years-old Islamic ideas. The standard argument in extensive literature is that “Islam has laid down some universal fundamental rights for humanity as a whole, which are to be observed and respected under all circumstances . . . fundamental rights for every man by virtue of his status as a human being”. “The basic concept and principles of human rights (have) from every beginning been embodied in Islamic Law.”¹¹¹ Such claims, however, are almost entirely baseless.

Khalid M. Ishaque argues that “Muslims are enjoined constantly to seek ways and means to assure to each other what in modern parlance we call ‘human rights’”. While he admits that “human rights” cannot be translated into the language of the Islamic holy works, he nevertheless claims that they lie at the core of Islamic doctrines. The fourteen “human rights” that Ishaque claims

¹¹¹ Mr. Makki, representative of Oman to the Third Committee of the U.N. General Assembly, speech of October 25, 1979. UN document A/C.3/34/SR.27.

are recognized and established by Islam. However, they are only duties of rulers and individuals, not rights held by anyone.¹¹²

The scriptural passages which cited about for “rights protection of life” are in fact divine injunctions not to kill and consider life as inviolable one. The “rights for justice” means a duty of rulers to establish justice. The “rights for freedom” is a duty not to enslave unjustly (not even a general duty not to enslave). “Economic rights” turn out to be duties to help to provide the need one. The purported “rights for freedom of expression” is actually a duty to speak the truth that is not even an obligation of others but an obligation of the alleged right-holder.¹¹³

Muslims are indeed regularly and forcefully called upon by scripture, tradition, religious leaders, and ordinary believers to treat others with respect and dignity. They are enjoined, in the strongest possible terms, to pursue both personal well-being and social justice. These injunctions clearly call to mind the values of the Universal Declarations of Human Rights. However they appeal to divine commands that which are to realize these values simply did not include equal and inalienable rights held by all human beings.¹¹⁴

“Human rights in Islam, as prescribed by the divine law, are the privilege only of persons of full legal status. A person with full legal capacity is a living human being of mature age, free, and of Moslem faith”. This makes “human rights” the privileges of (only) free adult Muslims. Infidels receive

¹¹² Donnelly, Jack. “*Universal Human Rights in theory & practice*” New York: Cornell University Press. Page: 72

¹¹³ Ibid

¹¹⁴ Ibid page: 75

only guarantees of life, property, and freedom of religious; slaves only a right to life while women enjoy still another set of rights and duties.¹¹⁵

In Islam, in the realm of “human rights”, the most important thing instead of rights that someone holds a consequences of one’s status or actions, not the moral fact of being human. If the rights we are discussing are indeed “duty based and interdependent on duties that one owes to God and the community, they are not human rights.”¹¹⁶

The Holy Qur’an certainly does not require Muslims to accept such legal ideas and their associated practices. Many contemporary Muslims (entirely justifiably) reject such views. Nonetheless, it accurately represents the historically dominant practice of most Muslims societies much as most Christian societies. Throughout most of their histories Christians treated non-Christians as inferior, despite the apparently universalistic egalitarianism of the New Testament.

Islam teaches that “it is the state’s duty to enhance human dignity and alleviate conditions that hinder individuals in their efforts to achieve happiness” (Said 1980: 87). It may be true that “there is no aspect of human need but Islam, in its ethical, social and liturgical perspective, has made provision for it”. The social and political precepts of Islam reflect a strong concern for human good and human dignity, which may even be a prerequisite for human rights. The central to Muslims traditions is “a profound affirmation

¹¹⁵ Ibid page: 72

¹¹⁶ Ibid

of human freedom, dignity, and autonomy”. But none of this is equivalent to a concern for, or recognition of, human rights.¹¹⁷

1. Non Violence in Islam

In general, Islam is rarely associated with the practice of nonviolence. This fear is felt by the Christian world in medieval times when looking at the rate of development of Dar al-Islamis, “house of Islam”. Competing with a great and amazing culture it echoed the fear that is often felt by people when seeing the emergence of modern Western Muslims in today’s conflicts. This negative mindset has also been mastered the news: the enemy is described as biting a Damascus dagger in his mouth. It means that European perception have the different perception on Islam, they assume that Islam is full of violation. Whereas, Islam is the peaceful religion that spreads the Islamic teaching in Southeast Asia and Africa through the traders and teachers, with nonmilitary invasion.¹¹⁸

Islam does not distinguish the idea between religion and state. This means that Islam does not differentiate between worldly affairs and the affairs of the afterlife as Islam sees them as a unified whole a reflection of the God. The goal is to make the lives of Muslims became a real human beings.¹¹⁹

¹¹⁷ Ibid page: 76

¹¹⁸ Daniel L.Smith, Christopher. “*Lebih Tajam Dari Pedang: Refleksi Agama-agama Tentang Paradoks Kekerasan*”. Penerbit Kanisius. Page:153

¹¹⁹ Ibid

For the realization of justice, the Prophet teaches us the need for a relentless action. This action is called “jihad”. Embodiment of nonviolence is the deepest roots of jihad.¹²⁰

2. Islam, Freedom, and Human Rights

The essence of Islam is not contradicted with Human Rights, he even had great respect for human rights and freedoms. If the principles in the Quran are summarized, there are many points that strongly support the principle of universal human rights. These principles have been stated in various meetings of Muslims. The first is the Universal Islamic Declaration of Rights, organized by a group of Islamic scholars and leaders in a conference in London in 1981 that officially was affiliated with UNESCO in Paris. The Declaration contains 23 articles concerning human rights in Islam.

Declaration of London was followed by the Cairo Declaration which was issued by the Organization of Islamic Conference (OIC) in 1990 (1411). From the preliminary declaration it may be summarized into some points:

- 1) Islam recognizes the equality of all people regardless of their origin, race, gender, skin color and language,
- 2) The equality is the basis for human rights and obligations,

¹²⁰ Ibid

3) Human freedom in the Islamic community is consistent with the essence of life because human beings are born in a free state and free from pressure and slavery,

4) Islam recognizes similarity between the rulers and the people that should be subject to God's law of discrimination,

5) A member of the community and the citizens have the right to prosecute those who disturb public tranquility.

The declaration composed 25 articles that cover issues of human dignity, equality, human being as a family, the need for cooperation among human beings, irrespective of nation and religion, freedom of religion, domestic security, the need for solidarity with the individual in society, education as duty, the protection of public health, the liberation of society from poverty and ignorance, and so forth.¹²¹

Overall, the articles in the Cairo Declaration can be summarized into five points:

(1) Human Rights in Islam are derived from the teachings of Islam. According to Islamic teachings human being is regarded as a noble creature. (Quran 17:70)¹²²

(2) Human Rights in Islam is a gift from God, and not a gift from the human to another human being with human will. (the rights in Islam are natural)

¹²¹ Sulieman Abdul Rahman Al-Hageel, "Human Right in Islam and Refutation of the Misconceived Allegation Associated with These Right", Dar Eshbelia, Riyadh, S.A. Page: 82-83

¹²² And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference. (Quran 17:70)

(3) Human rights in Islam is comprehensive. Including political, economic, social, and cultural rights.

(4) Human rights in Islam are an integral part of sharia.

(5) Human Rights in Islam are not absolute because it is limited by the Islamic objects and the purpose to protect the rights and interests of society in which consist of individuals.

Besides the Arab League on 15 September 1994 in its meeting in Cairo Egypt, it issued so-called Arab Charter of Human Rights Charter. The Charter consists of article 39 concerning the things that are more complete than what has written in the Universal Declaration of Human Rights.

Regarding the freedom which is the most important part of human rights. Human beings are given supremacy over other creatures. They were created with the best of creation.¹²³ In addition to the perfection of creation, human beings were also granted with the nature of holiness that tend to know and worship to the Lord, and free from evil tendencies. The evil nature of human beings is obtained from their environment. By virtue that man, created as a caliph in the earth (Sura 2:30; 20:116).¹²⁴ Therefore, it is human responsibility towards his Creator to avoid and follow the restrictions that predestines. To carry out its responsibilities that people will have the ability to see, feel, hear and most importantly, think. Giving is a principle for the birth of

¹²³ We created the best of human creation (QS 95:4)

¹²⁴ And [mention, O Muhammad], when your Lord said to the angels, "Indeed, I will make upon the earth a successive authority." They said, "Will You place upon it one who causes corruption therein and sheds blood, while we declare Your praise and sanctify You?" Allah said, "Indeed, I know that which you do not know."(Quran 2:30). And [mention] when We said to the angels, "Prostrate to Adam," and they prostrated, except Iblees; he refused.(Quran 20:116)

science and development. Science, in Islam, is positioned as a gift from God and humans who do sciences are honored as glorious creatures. It means that man will be glorified by God because of his knowledge. Otherwise the noble Lord he would if he runs to his responsibilities with science.

However only God is the owner in matters of freedom and the freedom of absolute. Humans, despite being created as supreme one among other creatures, was granted with limited freedom and limited capacity as that living creature on earth that has many limitations. Efforts to change human's limited nature into unlimited one are dangerous illusion. This dangerous effort may be harmful for human beings only.¹²⁵

Human freedom in Islam is defined variously by jurist, theologians, and philosophers. From jurist perspective, it is technically free to use *Hurriyah* terms that are often associated with slavery. A slave is said to be free if he no longer controlled by others. However it is widely freely in Islamic law is the law of human freedom before God that not only related to the human relationship with God but our relationship with nature, with other human beings and even with ourselves. In Islam, suicide is not regarded as an individual right, it is a sin because it exceeds the rights of God.

According to the theologians human freedom is not absolute. Therefore, humans only can do limited things which is called as *ikhtiyar*. *Ikhtiyar* etymologically has the same root with word "*Khayr*" (good) that means a good choice. *Istikaharah* is praying to choose the good one among the bad.

¹²⁵ Hossein Nasr, Seyyed."Islamic Life and Thought".George Allen & Unwin, London, Boston, Sydney. Page: 17-18.

Therefore, free in this sense means free to choose the good among the bad. Surely this interpretation is the limits of human freedom knowledge of goodness. Since human knowledge is imperfect, thus God gives knowledge through revelation. People who do not know the idea of good and bad not free. He is free to the extent of limited skills and limited knowledge as a human being.

Regarding to human rights issues today, there are two important issues that need to be discussed the first is freedom of thought and expression, and religious freedom. Freedom of thought and expression have a high position in Islam. However, the thought and expression must be accompanied with faith on God. Islam does not acknowledge free thinking that actually sue God as the West usually does. In addition, the freedom of expression or in Islam is called *ijtihad*.

Islam granted freedom of religion that contain at least three meanings: The first is that Islam gives freedom to people of faith to embrace their respective religions without any threat and pressure. There is no compulsion for non-Muslims to embrace Islam. Second, if a person has become a Muslim, he cannot freely change his religions. His religion was embraced either from birth or because of conversion. Third, Islam gives its followers the freedom to live the teachings of his religion which shall not come out along the lines of Sharia and jurist. Since religious cases that happened in this country deal with freedom of religion on Islam, it needs to be

highlighted in the context of the Universal Declaration and the applicable legislation.

Chapter III

Legal Protection Giving by Indonesia towards the Citizen under the International Human Rights Law

A. Protection the Freedom of Religion in Indonesia

The International Covenant on Civil and Political Rights (ICCPR) set out chapter by chapter on Law No 12 of 2005, on the Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights). It mentions in Article 18, the rights of every person to freedom of thought, conscience and religion and the protection of those rights. Constitution 1945 states that the state guarantees freedom of religion and faith (Article 28E conjunction with Article 29 paragraph 1). In fact, in Article 28 of the 1945 Constitution states that religious freedom cannot be reduced under any circumstances. Those provisions are strengthened in Article 22 of Law No. 39/1999 on Human Rights. Every person has the freedom of thought, conscience, and religion.

It is undeniable that the Constitution and Law. 39 Year 1999 on Human Rights has guaranteed the right of every citizen for freedom of religions and worship according to religious belief. State are obliged to respect and guarantee freedom of religion or faith of all individuals in the territory without distinction of race, color, sex, language, religion and belief, political or other opinion, natives or immigrants, and their origins. However the law also provides that in

implementing the teachings of religion and belief, it would have to prioritize the elements of order and honor the values of the sanctity of religious teachings / beliefs of others. For this purpose, freedom of religion need to be rationalized based on balance between rights and obligations. Therefore the government can regulate or restrict the freedom to practice religion or belief through legislation. Government is obliged to restrict the manifestations of religion or belief that may endanger the fundamental rights of others, especially the right to life, liberty, physical integrity of violence, personal, marriage, property, health, education, equality, prohibiting slavery, cruelty, and also the rights of minorities.

On June 9 2008, the Minister of Religious Affairs, the Minister of Home Affairs, and the General Prosecutor issued 3 Ministerial Joint Decree (*SKB 3 Menteri*). This regulation was about the warning and the commands to the member of the Indonesian Jama'ah Ahmadiyah (JAI) and civilians. This provision contained 6 points that warned and commanded adherents or member of the Indonesian Jama'ah Ahmadiyah for not to deviating the religious teaching of Islam and discontinue their religious activity. There are some punishments provided for the perpetrator. However, this provision was viewed as a political decision. Therefore it was lack of legal aspect and might invoke horizontal conflict.

As in order to protect the rights of citizen, government through the legislation drafted the Penal Code. The existence of punishments for the person

or group of people are expected to be able to protect the citizen concerning freedom of religion.

1. The Emergence of the Penal Code Bill Discourse

Recently Indonesians are enlivened by the draft proposals of the Parliament of the Republic of Indonesia (DPR-RI). The draft in question is the Bill of Penal Code, on the article regarding crimes against religion and religious Life. In the Penal Code bill, this articles were in Chapter VII which consisted of 8 chapters and divided into two parts. The first set of criminal acts are religious life and religious facilities. The substance of the bill of Penal Code regarding article on the Crime of Religion and Religious Life was a proposed revision of the old Penal Code that were in Chapter V on crimes against public order. This chapter did not specifically explain the public interest, such as: expressing feelings of hatred and hostility to the government of Indonesia (articles 154 and 155), desecrating the flag and symbol of the state (Article 154 A), Indonesia (art. 156) and so on. As for the article that explicitly explains the defamation of religion is only payable in section 156A alone.¹²⁶ However, nowadays the draft itself has been amended, there were some amendment in the article.

Controversy on the presence of the Penal Code Bill especially in article crime against religion and religious life is unlikely to stop. Moreover, the bill which was proposed by government in 2008 will be discussed by the House of

¹²⁶ Abdullah, Irwan. Siregar, Ferry Muhammadsyah. Said, Muhammad. "DIALEKTIKA TEKS SUCI AGAMA: Strukturasi Makna Agama dalam Kehidupan Masyarakat" Pustaka Pelajar: Yogyakarta. Page: 107

Representatives of Indonesia (DPR-RI). It is because, various article, especially the five articles at the beginning of the eight chapters in the bill contained a lot of controversy (rubber article) that might lead to horizontal conflict/ interfaith conflict anytime in Indonesia. The positive intention of government that tried to regulate religious life it received mixed responses. Most of discourses that were developed in the public domain more likely to be negative, especially for the minority or non-Muslims in general.¹²⁷

It should be pointed out that article 156A does not come from *Wetboek van Strafrecht* (WvS) the Netherlands, but it was adopted from the Law on the Prevention of Abuse or Defamation of Religious No. 1/PNPS/1965, as stipulated in article 1. Article 4 of the law immediately ordered that provisions are included in the Penal Code. In the preamble of Law No. 1/PNPS/1965, it explained that there are four reasons for the inclusion of blasphemy article in the Penal Code, they are:

(1) This law was created to secure the State and society, the ideals of the revolution and national development, while the abuse or desecration of religious seen as a threat to the revolution,

(2) The emergence of various streams psychotherapy or organizations/community trust that is considered contrary to the teachings of religion and law. The religious sect which as violator against the law, breaking the national unity of religion and tarnishing, were background for government to issue a national awareness of this law

¹²⁷ Ibid page: 110

(3) This rule was intended to prevent abuses from religious teachings that regarded as the basic teachings of the scholars of religion is concerned,

(4) It mentioned six recognized religions (Islam, Christianity, Catholics, Hinduism, Buddhism, and Confucianism). This laws restrict the presence of minor religious sect that exist outside of six major religions.¹²⁸

The Law No. 1 PNPS year 1965 actually was reviewed on judicial process in the Constitutional Court but it was rejected by judges. However, there was a dissenting opinion from the judge Maria Farida Indrati, as follow:

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“In a state based on law (*Reschstaat*), the legislation is one important element in the framework of governance. In considering Presidential Decree No. 1 of 1965 on the Prevention of abuse and/or Defamation of religion it stated that the establishment of a Presidential decree was created in order to secure the state and society, the ideals national revolution and national development towards a just and prosperous society, to prevent abuse or desecration of religion, as well as for securing the revolution. Presidential Decision was one type of (shape) the legislation that was formed based on the Letter of the President of the Republic of Indonesia No 2262/HK/59 of State Regulation on 20 August 1959 which was sent by President Soekarno to the chairman of the House of Representatives. In the letter the

¹²⁸ Ibid page: 108

¹²⁹ <http://www.djpp.depkumham.go.id/berita-hukum-dan-perundang-undangan/481-pendapat-berbeda-maria-farida-uu-penodaan-agama-bermasalah.html>

President stated that in addition to three state regulations which were explicitly written in the Constitution of 1945, namely, law, government regulation in lieu of law, and government regulation, government also establishes the existence of some other state regulations, are as follows: "Besides, the Government sees the need to conduct some other State Regulations, namely: Decision of the President, to implement the Decree of the President / Commander in Chief of the Armed Forces on July 5, 1959 on " Back to the Constitution of 1945";

Based on explanation above, i would argue against the Law No 1 PNPS year 1965 concerning the prevention and the defamation of religion, there are some fundamental issues such as:

1)The Law a quo is product from the past, although formally based on the Transitional Provisions in article 1 of the constitution 1945 still has the validity, but substantially has the weakness because there is fundamental changes towards constitution 1945 especially articles concerning human rights.

2)The formation of the law No 2 year 1969 concerning statement that presidential decision and presidential regulation became the law, which is as an order from MPRS decree No XIX/MPRS/1966 concerning reviewing judicial decision the product from legislative outside the product of MPRS which is not appropriate with constitution 1945 and MPRS decree No XXXIX/MPRS/1968

concerning the implementation of MPRS decree No XIX/MPRS/1966, the implementation from second commands MPRS decree and Law No 5 year 1969 concerning statements that presidential decision and presidential regulation became the law, especially in article 2 and its explanation been ongoing for 40 years

3)The various issues that often lead to the arbitrary actions in the implementation of the Law a quo and the conflict in the provisions of its articles to several articles in the Constitution of 1945, especially article 28E, Article 28I and Article 29, I conclude that request from the applicant should be granted.”

The Penal Code Bill on the article Religion and Religious Life, cause the pros and cons in the group "recognized religion", as well as if to assert the existence of religion or religious sect outside the state-recognized religions. Penal Code Bill only set up the group of religions which are recognized by the state which amounts 6 (Islam, Christiany, Catholics, Hinduism, Buddhism and Confucianism). In fact the religions or religious sects outside the recognized religious are found in Indonesia. How will they preserve their existence as part of religious diversity? Will their religious activities be charged under the Penal Code Bill? The same question can be addressed to the recognized religious group because of the articles in the Penal Code bill contentious interpretation on. In fact, the guarantees religious freedom is strong

enough as the juridical basis of law in Indonesia which was mentioned in the article 29 Constitution 1945 paragraphs of 2. In addition, Law No. 39 of 1999 on Human Rights also stated that the normative basis of religion and beliefs is a fundamental right that cannot be contested.¹³⁰

The emergence of this Penal Code Bill further adds the long list of product range of religious law into the state. The articles in the Bill of Criminal Code regarding religion should be focused on addition to protect the public interest, as well as to protect freedom of religion, either majority or minority group from discrimination and the threat from tyranny. However, it seems that such hope is assumptive difficult to put into practice. Bill of Penal Code had not moved from the old spirit, which is still struggling in the formal recognition of the recognized religious in the state. Whereas in the context of religious group, “state official” is the pros and cons. Meanwhile, the existence of religious groups or religious sects that are not recognized by state are not regulated in these articles. In fact, his spirits were castrated and repressed their existence and presence.¹³¹

In Indonesia the freedom of religion is not fully free without limitation. There are some regulations that govern about it in order to avoid the violation against other religions.

¹³⁰ Abdullah, Irwan. Siregar, Ferry Muhammadsyah. Said, Muhammad..*Opcit* .Page: 108

¹³¹Ibid page: 109

2. Limitation of Rights and Religious Freedom in Indonesia

Rights and freedoms as mentioned to above include the freedom to adopt or establish religion or belief that people choice. Every person has the freedom, whether individually or in the community, publicly or privately to manifest his religion or belief in teaching and worship. However, the rights and freedoms are not absolute freedom.

Islamic restrictions on the rights and freedom of religion, thought and opinion are described in the Declaration of London in detail as follows:

- (1) Every person has the rights to express thoughts and beliefs as far as within the scope which is set in law. However, no one is entitled to disseminate falsehood or to spread the word that might disturb public tranquility or harass another person dignity.
- (2) Looking for science and the search for truth is not only a right but duty for Muslims.
- (3) Rights and obligations of Muslims for protesting and fighting against oppression, although in this case should be against the state authorities.
- (4) There is no limit to disseminate information, it should not endanger the safety of society and the State and is still within the scope permitted by law.
- (5) No person entitled to insult or harass other religious beliefs or provoke public hostility. Respecting the beliefs of other religions is an obligation for Muslims.¹³²

¹³² Cited from Muddathir Abd al-Rahim, in *The Human Rights Tradition in Islam*, Praeger, Westport, Connecticut, London, 2005, page 170-171.

Although the Declaration of London has been quite clear, the breadth and freedom to express human rights institutions should remain limited and cannot be restricted the other provisions. Article 28J of the 1945 Constitution stated that:

- (1) Every person shall respect the rights of others in an orderly life of the nation, and state;
- (2) In exercising the rights and freedoms, each person subject to such limitations which are determined by law solely for the purpose of securing due to recognition and respect for the rights and freedoms of others according to considerations of morality, religious values, security and public order in a democratic society.

This provision is strengthened in Article 73 of Law No.39 year 1999 on Human Rights, the implementation of the freedom of human rights must not violate human rights of others, must not violate the law, morals, order, and religious norms. Besides, the article 70 of Law No 39 year 1999 more clearly stated that:¹³³

“In exercising the rights and freedoms, everyone shall be subject to the restrictions set by law for the purpose of securing due to recognition and respect for the rights and freedoms of others and meet the demands of justice according to considerations of morality, security and public order in a democratic society.”

It's undeniable fact that the Constitution and Law. 39 Year 1999 on Human Rights have secured the rights of every citizen for freedom of religion and worship according to religious belief. Government is obliged to

¹³³ Law No.39/1999 on Human Rights

respect and guarantee freedom of religion or faiths of any individual within the territory without distinction of race, color, sex, language, religion and belief, political or other opinion, natives or immigrants, and their origins.

However the law also provides that in implementing the teachings of religion and belief, it would have to prioritize the elements of order and honor the values of the sanctity of religious teachings/beliefs of others. In order to achieve it freedom of religion need to be rationalized on the basis of balance between rights and obligations. Therefore, the government can regulate and restrict the freedom for practicing religion or belief through legislation. Government is obliged to limit manifestations of religion or belief that may harm the fundamental rights of others, especially the rights to life, liberty, physical integrity of violence, personal, marriage, property, health, education, equality, prohibiting slavery, cruelty, and also the rights of minorities. The legal basis or principles which govern the freedom of religion are enshrined in Article 156 of Penal Code, Law No. I PNPS of year 1965, Minister of Home Affairs and Minister of Religion LCS. No. 1 of 1969 and decree No. 70 of 1978 Minister of Religion that stated as follows:¹³⁴

Every person has the right to join a religion, which means:

- (1) Any person upon consciousness and his own beliefs may embrace a religion freely without pressure, intimidation or coercion.
- (2) Any person may only adopt a religion. However, it is not permissible to embrace two or more religious in the same time.

¹³⁴ Minister of Home Affairs and Minister of Religion LCS. No. 1 of 1969 and decree No. 70 of 1978 Minister of Religion

(3) Every follower of a religion is free to develop and propagate his religion.

However, they are not free to develop and force other people to follow their religion.

(4) Every religious adherents is free to practice their religion, which means free without interference, obstruction and restriction from any party to worship according to their religion.

(5) Free to develop and maintain the essence of the teachings of religion. They are not permitted to mess up the religious teachings / beliefs of others.

Every religious believers are freely to establish place of worship that means:¹³⁵

(1) Free to build design, model, exterior and interior. They are not permitted to design buildings that exactly resemble the shape of a worship place of other religions.

(2) Free to build place of worship legitimate land but they are not permitted to build a house of worship in other places including places of worship contrary to the statutory provisions.

Restrictions on freedom of religion are also performed by Western countries that claim to have carried out human rights as well. In Europe, at this time, they only permit the establishment of mosques in limited amount. In Western countries (Europe and America) which are is known as a champion of democracy, there are provisions that prohibit mosques to use loudspeaker. Even the British Muslim students are not easy to pray in public school. The

¹³⁵ Ibid

French government has so far not allowed the veil to be worn by students in local public schools and etc. It means that even the secular countries still need to arrange the freedom of religion.¹³⁶ However, the restrictions on freedom of religion between Indonesia and the Western countries is different. If religion in Western countries is prohibited to go public domain, in Indonesia it is precisely because religion into public domain. Muslims who became the largest population in Indonesia carry out their religion in social life, politics, economics, and culture. When the Muslims established Islamic Bank, the country had come to set and regulate that.

B. The Protection in Indonesia is not Appropriate with International Human Rights Perspective

The rights of people especially in the context of freedom of religion, are accommodated in many international instruments such as UN Declaration, ICCPR, ICESCR, and other international instruments. Those that instruments are contain the protection of the citizen towards freedom of religion without any discrimination, violation, and intervention. Moreover, Indonesia was ratified some of them and supposed to be used as the guidance and as rule of conduct to govern the protection towards the citizen. Law No. 12 year 2005 as the set out on the ratification of ICCPR, so the government and the citizen should be implement it as the guidance for enforcement human rights. But in

¹³⁶ <http://blog.echurchwebsites.org.uk/2011/02/23/religious-freedom-european-union/>

fact, the Act No. 12 of 2005 is like not use for guidance for enforcement of the human rights in Indonesia.

Law No 39 year 1999 provides give guarantee and freedom for the citizen to embrace and manifest a religion as their belief, and it also almost similar to article 28 and 29 Constitution 1945 that give freedom of thought towards citizen. However, apparently the government fails to implement the constitution and the law because there some violations and discriminations against some groups of people regarding to their religion. Discrimination still happens in Indonesia. The existence of 3 Ministerial Joint Decree (*SKB 3 Menteri*) actually contradicts against article No. 29 Constitution 1945, in one side give the freedom of thought but in other side give the limitation. The purpose of the 3 Ministerial Joint Decree actually is to provide protection for the followers of the *ahmadiyah*, on the other hand this provision also has purpose to control and give limitation on their worship activity and prohibition to perform religious activity outside their community.

3 Ministerial Joint Decree actually state did intervention towards religious domain and gave limitation to them (in this matter *ahmadiyah* followers). Meanwhile the ICCPR stated that any person has a freedom of religion without any intervention. Otherwise, limitation of religious life should be prescribed by legal test. The limitation should be: prescribed by laws, should have legitimate aim, and the limitations must be necessary in a democratic society. Therefore, the rights of people to do their religious duties

are protected by the law and should be achieved by the law, in other circumstances.

The inappropriate itself can be seen with the existence of discrimination in Indonesia, for example, the mistreatment from the majority religious community towards minority religious communities, destruction towards certain place of worship that consider as deviation. Whereas, the discrimination are prohibit in the international human rights instruments, such as in the 1981 Declarations on the Limitation of All Forms Intolerance and Discrimination based on Religion or Belief. It was also stated in the General Comment on the rights to freedom of thought, conscience, and religion. The Human Rights Committee has put much emphasis on equality and non-discrimination.

Restriction of the freedom to choose a religion or a certain belief including all of the religious activity in Indonesia just is limited for six religion that are recognized by Indonesia government. Religious belief and another religion outside six major religions are not recognized by state. These things contradict with the Article 18 ICCPR.

Besides recognizing six religions, sometimes government also issued deviate sect religious outside the six religions. Whereas, there is no certainty and legal basis for any party to consider or to make decision a belief or religion is deviate or not. Moreover, arrest the leader of the minority religious community with accusations defamation on religion. It contradicts with Article 27 ICCPR. According to this provision, person who becomes member of

religious minority community shall not be denied especially their rights to worship and practice their religion.¹³⁷

There are interventions from the government toward their citizen in the matter of freedom of religion. One of them through the issuance of 3 Ministerial Joint Decree, state was allowed to private domain that supposed to be free from any intervention. The less a government intervention against private domain is better (negative rights), and basically ICCPR contains the provisions about restriction on the use of power by repressive state apparatus.

1. Religious Discrimination and the Political Marginalization of the Civil Rights of Citizens.

Any kinds of discrimination and the political marginalization on the civil rights of citizen are prohibited according to ICCPR. However, in Indonesia it still happened. Pancasila as the basic philosophy of the state, as set forth in the preamble of the 1945 Constitution, actually is mirror of the whole substance of the constitution. Although it has experienced amendment, any amendment must adopt the platform that contains ideal rights. As a nation which most people embrace to the religion of Islam, the state describes that the interests of the people are stick to spiritual basis of Pancasila as stipulated in article 29 UUD 1945 as follows:

- (1) The state is based on the principle of divinity almighty.

¹³⁷ ICCPR Article 27

- (2) The state guarantees the independence of each citizen to embrace their religion and to worship according to his religion or belief.

Recently through the second amendment on year 2000, the 1945 constitution listed a new chapter that regulated human rights which were include in article 28 A to 28 J especially article 28 E that regulate the freedom of every person.¹³⁸

Article 28 E, either paragraph (1) and (2) have a relationship that is very relevant to the article 29 of the 1945 Constitution. Before the emergence of article 28 E that included in the 1945 as an amendment, it was interpreted as an “independence” or “freedom” of religion and religious beliefs. In fact, article 28 E paragraphs (1) and (2) that explicitly and clearly distinguish between “freedoms of religion” and “believe in freedom of faith”, can immediately change the interpretation of the first? The answer is no.

The existence of the marriage Law (Law No. 1 year 1974) that was published in 1974, at that regime the uses of religious symbols are felt, which can be proved on the formulation of Article 2:

- (1) The marriage is valid, if it is performed according to the laws of each religion or belief.
- (2) Every marriage is recorded according to the laws and regulations applicable.

Article No. 2 year 1974 actually avoid the marriage between different religions, because when they are married there should be just one applicable

¹³⁸ Mulkhan, Abdul Munir. Murniati, Agustina Prasetya. Mufid, Ahmad Syafi’I. cs .”*Diskriminasi di Sekeliling Kita: Negara, Politik, dan Multikulturalisme.*” Institut DIAN: Yogyakarta. Page: 38

law for them. It is intended to protect the citizen for providing legal certainty for them.

Article 2 of Law No. 1 of 1974 is contrary to the provisions of Article 28 E Paragraph 1 and 2 of the 1945 Constitution. It is because the 1945 Constitution guarantees the freedom for everyone to embrace the religion and belief. Therefore time to Law No. 1 year 1974 supposed to also respect for the marriage which conducted by a group of people who become followers of religion, because they are also guaranteed by the constitution. They have to be granted a space to note their marriage in a civil record.¹³⁹

It contradicts with Universal Declaration of Human Rights in the Article 16. According to this provision, a adult man and women, without being restricted by race, nationality or religion, have the rights to marry and create a family.

If the state does not conform with the Constitution, it means the state just gives freedom for everyone to believe on the implications that freedom is guaranteed. It means the state reneged its obligation to protect, respect, promote, and enforce the rights of its citizens, as mandated by Article 71 and 72 of Law No. 39 of 1999 on human rights.¹⁴⁰

It seems that religious norms are used as symbols of power, regardless the political policy that may emerge discrimination which is certainly prone to disintegration.

¹³⁹ Ibid page: 39

¹⁴⁰ Ibid page: 41

In fact, religion is a fundamental human rights and a personal right of a person as dignity as human beings. The state is not entitled to interfere rights of every human being. The state shall respect and protect, and give adequate facilities.

2. Political Discrimination as a Violation of Human Rights

It is inappropriate to restrict the state to decide recognition on certain religion. Millions of Indonesian marriages are not valid because they did not record in the civil record. Furthermore, their children do not have rights to claim legal relationship with their father.¹⁴¹

The label of "status of children outside of marriage" would bring a psychological impact for the children. At the same time, it weakens the status of his mother as a woman who has no right to claim the inheritance when her husband died. Besides, in the event of divorce the woman is not entitled to sue *Gono-gini* (shared marital assets) which was acquired during marriage. It means state policy on recognition of religion puts women as victim. The state should be able to guarantee people's rights to build a family (as guaranteed by the Act No. 39 of 1999).¹⁴²

It seems that such policy creates discrimination as mentioned above. However, it has not been recognized by policy makers that their policy actually contains the seeds of conflict. The emergence of public dissatisfaction

¹⁴¹ Ibid page: 44

¹⁴² Ibid page: 45

over the treatment of government, may even cause a sense of apathetic to the interests of the State.

If such issues still insolvable, widening dissatisfaction towards government may emerge horizontal conflict easily may be ignited and very harmful for national unity.¹⁴³

The political discrimination is inappropriate against the ICCPR. Such discrimination is regulated under the Article 26 ICCPR, according to the provision stated that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹⁴³ Ibid Page: 51

Chapter IV

Conclusion and Recommendations

Based on statement of problems and explanations on previous chapters, the conclusions and recommendations are:

1. The protection that is given by the state for people to maintain their right of freedom of religion is not fully protected by the state as stipulated on article 28, article 29 of Indonesian Constitution, Law No. 12 year 2005 concerning the ratification of ICCPR, Law No. 39 year 1999 concerning Human Rights, and Law No. 1 PNPS year 1965 concerning prevention and defamation of religion. The state protection is still durable due to the concept of majority and minority that may lead into subjectivity of state. In case of discrimination of religion that happened in Indonesia, the right of minority was abused by the majority and state did not prevent such abuses.
2. An international law promotes to cover the right of people within the UN Declaration, ICCPR, and any international instrument. In Indonesia, there is a law No. 1 PNPS year 1965 that law regulated about limitation of religious discrimination which can be committed by the state. Otherwise the limitation on religious life should be prescribed by legal test, that the limitation should be prescribed by laws, should have legitimate aim, limitations must be necessary in a democratic society. Therefore, the rights of people to do their religious duties is protected by the law and should be achieved by the law. A right of people to do their religious life is protected

under international and national law. In other words, the protection which is provided in Indonesia is still inappropriate with International Human Rights Law.

Recommendation:

The state should ammend the existing regulation such as The Law No. 1 PNPS year 1965 regarding the discrimination of religion because it is violates the right of people to exercise their religious duties. International regulation that regulate it should be fully enforced under the national law as consequences to protect the right of the people. However, the important things are the intentions, attentions, and effort from government to enforce the rights of citizen concerning freedom of religion and give the protection for them.

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