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ARTICLE

DIVERGENCE OF HUMAN RIGHTS INTERPRETATIONS: BETWEEN THE INDONESIAN CONSTITUTION AND INTERNATIONAL REGIME PERSPECTIVES

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Abstract

Human rights are validated and legitimized mutually by domestic and international law. However, different interpretations among those two legal orders are still possible. This called as "divergence questions." This article limits and analyzes the differences in interpretation between two interpretive institutions, namely the Indonesian Constitutional Court (MKRI) and international human rights bodies. This article analyzes the MKRI's decision on the Truth and Reconciliation Law and the Blasphemy Law cases. These two decisions indicate divergent interpretations, especially concerning the issue of blanket amnesty and freedom to manifest religion. The author argues that this divergence can occur due to two factors, id est: (1) extensive interpretations by international interpretive institutions, which do not always gain acceptance by States, and (2) the clash of ideologies surrounding Indonesian constitutional thinking, in which liberalism –as a political idea that is closely related to human rights– tends not to attain a significant position compared to its competing thoughts, such as integralism.

Keywords: Human Rights Interpretation; International Human Rights Law; Constitutional Court of the Republic of Indonesia.

A. Introduction

International Human Rights Law (hereafter: IHRL) constitutes a crucial branch of public international law, comprising norms, rules, and principles aimed at protecting human rights and fundamental freedoms.[1] IHRL delineates a distinct domain within international law dedicated to human rights concerns. However, the eminent jurist Ian Brownlie challenges this notion. Brownlie took note that the standard setting regarding human rights occurs within the realms of domestic law, international conventions, or general international law.[2] From Brownlie's point of view, it is essential to recognize that human rights standards evolve in diverse and multi-layered normative systems, spanning national, regional, and international levels.

There is a close relationship between constitutionalism in the domestic realm with IHRL. Before human rights entered the international consensus, human rights norms took place in the framework of the national constitutions. However, it does not always start from national constitutional based recognition. The norm concerning civil and political rights has its antecedent from the United States and French constitutions, while economic, social and cultural rights tracked down to the concept of the Welfare State in the Weimar Germany era (1919), the 1917 Constitution of Mexico, and the 1936 Constitution of Soviet Union.[3] Especially after the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, constitution-making in various States indicated massive constitutionalization of human rights, in line with the international standard-setting. Nowak noted that the domestic constitutions and international minimal standards regarding human rights provisions nowadays tend to converge.[4]

Samantha Besson advances the theory of mutual validation and legitimation of human rights. This theory posits that human rights receive dual legitimation and positivization, both at the domestic and international levels. Those two normative systems –national and international law– operate complemen-

1 *See* H. Victor Condé. *A Handbook of International Human Rights Terminology*, *Second Edition*. (Lincoln–London: University of Nebraska Press, 2004), p. 133.

2 an Brownlie. *Principles of Public International Law*, *6th Edition*. (Oxford: Oxford University Press, 2003), p. 529-530.

3 Philip Alston & Ryan Goodman. *International Human Rights–The Successor to the International Human Rights in Context: Law Politics and Morals* (*Text and Materials*). (Oxford: Oxford University Press, 2013), p. 306-307.

4 Manfred Nowak. *Pengantar pada Rezim HAM Internasional*. Translated by Sri Sulastini. (Jakarta: Raoul Wallenberg Institute—Departemen Hukum dan HAM Republik Indonesia, 2003), p. 15-17.

tarily. Consequently, norm conflicts are unlikely to arise since human rights in constitutional and international law are both formulated as abstract norms. Nonetheless, the divergence can still come to pass in matters of interpretation, especially on the corresponding duties of the State in the concrete local context.[5]

Based on the preceding explanation, this article will analyze the divergence of human rights interpretations from the Indonesian Constitution and IHRL regime perspectives. Given the Constitutional Court of the Republic of Indonesia (hereafter: MKRI) serves as the authoritative institution for interpreting the 1945 Indonesian Constitution, this article will refer to its rulings on The Law on the Truth and Reconciliation (TRC) and Blasphemy Law. The Court interpretations will be juxtaposed with the interpretations of IHRL institutions reflected in soft laws documents, such as General Comments, Concluding Observations, Views adopted by treaty bodies.

This article discusses whether it is a fair comparison to juxtapose the interpretation of the MKRI *vis-à-vis* international human rights treaty bodies, such as the Human Rights Committee (HRC) of the 1966 International Covenant on Civil and Political Rights (ICCPR). Despite their distinct natures, both institutions actively contribute to shaping interpretations of human rights. When comparing the two, the MKRI has direct and constitutional legitimacy in interpreting human rights norms contained in the 1945 Constitution. While the court rullings are final and legally binding. However, as a party to the human rights treaties, Indonesia bears obligations to ensure that its laws, policies, or practices are compatible with the treaty to give effect to the rights enshrined within it. It is a logical consequence of human rights treaty ratification or accession.[6] Even though its interpretations are considered non-legally binding, treaty bodies possess legitimacy to determine the content of rights and state's obligations. Therefore, the UN standards and its institutions have a crucial elements in evaluating the treaty implementation, include supervisory roles.[7]

This article analyzes two selected MKRI's Decisions, which are deci-

5 Samantha Besson. "Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation." In Rowan Cruft, Massimo Renzo & S. Matthew Liao (Editors). *Philosophical Foundations of Human Rights*. 279–299. (Oxford, Oxford University Press, 2015), p. 280-290.

6 Abdul Munif Ashri. "Ratifikasi Indonesia terhadap Konvensi Anti-Penghilangan Paksa (ICPPED): Catatan tentang Keselarasan Norma dan Prospek Pembaruan Hukum." *Undang: Jurnal Hukum*, Vol. 6, No. 1 (2023)

7 Geir Ulfstein. "Individual Complaints." In Hellen Keller & Geir Ulfstein (Editor). *UN Human Rights Treaty Bodies: Law and Legitimacy*. (Cambridge: Cambridge University Press, 2012). 73–115, p. 99.

sion no. 006/PUU-IV/2006 and decision no. 140/PUU-VII/2009. The complaint on judicial reviews of those cases lodged by human rights civil society organizations (CSOs). The first case challenged problematic provisions of the TRC Law, while the second addressed concerns regarding the Blasphemy Law, which argued discriminatory and infringed religious freedom. The selection of both court rulings are based on the complainants invoked IHRL rules and standards by referring to the soft law documents. In the first case, the MKRI Decision exceeded the petition (*ultra petita*), while the latter was rejected.

This article explains two points, first the human rights constitutionalization in Indonesia, and the second, it discusses the relevance and accommodation of IHRL norms in Indonesian law. By analyzing of divergent interpretations, this article unravels factors to the divergence problems.

B. Trajectory of Human Rights Constitutionalization in Indonesia

Prior the Republic of Indonesia's independence, there have been vehement debates on conflicting ideas whether human rights should be included into the Constitution. The First President Soekarno, with a strong commitment to social justice and collectivism, antagonized the basic rights concept which he perceived as rooted in individualism and liberalism. A striking rebuttal also came from the prominent Indonesian jurist, Soepomo, who introduced the "*Negara Integralistik*" (integralism) theory. Learning from historical perspectives of the Nazi Germany and Japan's totalitarianism,[8] this theory contends that there is no dualism between the State and citizen, thus, deeming the inclusion of human rights in the Constitution unnecessary.

On the other hand, Maria Ulfah Santoso, Mohammad Hatta, and Muhammad Yamin criticized the absence of human rights provisions would lead abusive of power.[9] Hatta argued that the inclusion of human rights is essential to prevent the Republic from becoming a State based on power and authority (*negara kekuasaan*). As a result of the debate, Indonesia's Constitution offers minimal guarantees of human rights. Although vehement debates happened, the constitution making process put an end to this

8 Robertus Robet. "Meninjau Kembali Negara Organis: Hak Asasi Manusia dan Demokrasi Pasca-Reformasi di Indonesia." In Robertus Robet & Todung Mulya Lubis (Editors). *Kultur Hak Asasi Manusia di Negara Iliberal*. (Tangerang Selatan: Marjin Kiri, 2020), p. 145-150.

9 *See* Muhammad Bahrul Ulum & Nilna Aliyan Hamida. "Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia." *Constitutional Law Review*, Vol. 4, No. 1 (2018): 115-116.

elegantly by including the formulation of rights, especially under article 28 of the 1945 Constitution, which now remains intact and unchanged.[10]

In the subsequent development, the 1949 Indonesia's Federal Constitution incorporates almost all substantive rights from UDHR. The constitution-making of the 1949 Federal Constitution is part of the settlement between Indonesia and the Netherlands in the Round Table Conference in The Hague. Human rights inclusion in the draft has been influenced by the UN and its UDHR. According to Herbert Faith, Indonesia adopted Western 'constitutional democracy' principles under the shadow of the 1949 Round Table Conference.[11] Acceptance of human rights norms by Indonesia could be seen as an accommodative approach to the international law in order to safeguard independence in the international realm.[12] Thus, Indonesia's decolonization process facilitated by the UN became a momentum for rewriting a more liberal Constitution.[13]

The 1950 Provisional Constitution further enhanced the already comprehensive human rights guarantees. But, unlike the 1949 Federal Constitution, it introduced some features of its own. Notably, the 1950 Provisional Constitution included the right to strike, reinforced the constitutional guarantee from the 1945 Constitution regarding citizens' right to work which is favorable for humanity, and attached the social function of the right to own property.[14] In the 1950 Provisional Constitution, national identity and collectivist ideals stand out a little more but are still compatible with liberal democracy.

The rise of 'Guided Democracy' (*Demokrasi Terpimpin*) in 1959 marked the turning point of human rights legal development in Indonesia. Soekarno's 5th July decree dissolved the Constituent Assembly (*Konstituante*) and reinstalled the 1945 Constitution. The human rights and the rule of law framework which was framed by previous constitutions collapsed following the entrenchment of Guided Democracy authoritarian rule. Later, the systematic and widespread violence in 1965-1966 –which crushed the leftist forces

10 Wiratraman, H.P. 2009. Kebebasan Berekspresi: Penelusuran Pemikiran dalam Konsitusi Indonesia. *Jurnal Konstitusi* 6 (1) April 2009.

11 Herbert Feith. *The Decline of Constitutional Democracy in Indonesia*, *First Equinox Edition*. (Jakarta: Equinox Publishing, 2007), p. 43.

12 *See* Damos Dumoli Agusman. "The Dynamic Development on Indonesia's Attitude Toward International Law." *Indonesian Journal of International Law*, Vol. 13, No. 1 (2015): 6.

13 Abdul Munif Ashri. "Pengaruh Aktor Eksternal terhadap Inkorporasi HAM dalam Konstitusi Republik Indonesia Serikat Tahun 1949." *Jurnal Konstitusi*, Vol. 20, No. 4 (2023): 640-660.

14 *See*: George McTurnan Kahin. *Nasionalisme & Revolusi Indonesia*. Translated by Tim Komunitas Bambu. (Depok: Komunitas Bambu, 2013), p. 644-645; Herlambang P. Wiratraman. "Kebebasan Berekspresi: Penelusuran Pemikiran dalam Konstitusi Indonesia." *Jurnal Konstitusi*, Vol. 6, No. 1 (2009): 117-119.

entirely– reconfigured Indonesian politics, granting power to the military.[15]

However, with all the constellation changes, a challenge for maintaining principles under the 1945 Constitution in the context of authoritarian politics turn. This executive-centric Constitution, comprising a mere 37 articles, served as a tool for the rulers to sustain regime interests.[16] Its minimalist structure persisted until the First Amendment gained momentum in 1999.

Along with the *Reformasi*, the 1945 Constitution underwent four rounds of amendments between 1999 and 2022. Despite retaining its title as the '1945 Constitution,' numerous changes have been made to its authentic text. While the structural cores remain, there has been a significant shift towards embracing liberal democratic principles, replacing earlier provisions that supported authoritarian politics.[17] All the more, the second amendment in 2000 introduced substantial human rights guarantees spanning from Article 28A to 28J, showcasing an impressive acceptance of IHRL norms.

Actually, in the discourse surrounding the 1945 Constitution, four main political ideologies intersect: liberalism, integralism, socialism, and Islamism.[18] Early constitutional debates on human rights reflect the clash between liberal and integralist ideals. Traced back to the *Konstituante* (1956–1959) era, the third ideology, socialism, invoked its own vision of human rights. The communist and radical nationalists –which grouped in this political spectrum– viewed human rights as an instrument to challenge capitalism and colonialism.[19] Islamism, representing the latter perspective, has a strong influence on human rights understanding in Indonesia.

At least, Indonesian law posits a theistic notion of human rights. Article 1 point a. of Law No. 39/1999 on Human Rights stipulates: "Human rights mean a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest

15 Jemma Purdey, Antje Missbach, and Dave McRae. *Indonesia: Negara dan Masyarakat Dalam Transisi*. Translated by Muhammad Haripin. (Tangerang Selatan: Marjin Kiri, 2023), p. 81-83.

16 *See* Denny Indrayana. *Amandemen UUD 1945: Antara Mitos dan Pembongkaran*. Translated by E. Setiyawati. (Bandung: Penerbit Mizan, 2007), p. 151-164.

17 Simon Butt & Tim Lindsey. *Indonesian Law*. (Oxford: Oxford University Press, 2018), p. 3.

18 Adriaan Bedner. "The Need for Realism: Ideals and Practice in Indonesia's Constitutional History." In Maurice Adams, Anne Meuwese, and Ernst Hirsch Ballin (Editors). *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*. 159–194. (Cambridge: Cambridge University Press, 2017), p. 161-162.

19 Adnan Buyung Nasution. *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959*, *Cetakan Ketiga*. Translated by Sylvia Tiwon. (Jakarta: Pustaka Grafiti Utama, 2007), p. 134.

esteem and protected by the State, law, Government, and all people in order to protect human dignity and worth." At the time of the constitutional amendment, the Islamic factions advocated for the inclusion of religious values as one of the grounds for restricting human rights (limitation provisions) in the 1945 Constitution.[20] As Article 28J paragraph (2) of Indonesia's Constitution stated: "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, 'religious values' (*nilai-nilai agama*), security and public order in a democratic society."

C. The Accommodation and Relevance of International Human Rights Law

Discussing the place of IHRL within the framework of Indonesian law inherently prompts significant inquiries regarding the relationship between international and national legal systems. These issues often revolve around two major theoretical perspectives: 'Monism' and 'Dualism'. The Monist viewpoint perceives international and national legal systems as interconnected components of a singular legal system. In contrast, the Dualist perspective posits that these two normative systems are of distinct order, each operating within its sphere.[21]

The 1945 Constitution and other relevant legislations, unfortunately, lack of explicit provisions that clarify the status of international law in domestic legal order. However, scholars indicate that Indonesia theoretically is a Monist State, bearing in mind that Indonesia adopted the Civil Law system as inherited by Dutch colonial rule.[22] Palguna and Wardana argue that, as reflected in constitutional adjudication cases, MKRI appears to practice 'Pragmatic Monism', wherein the judges consider international law as far as its contents not contradicting the Constitution.[23]

Article 7 paragraph (2) of Law No. 39/1999 sets that IHRL rules

20 Ahmad Rofii & Nadirsyah Hosen. "The Constitutionalization of 'Religious Values' in Indonesia." In Melissa Crouch (Editor). *Constitutional Democracy in Indonesia*. (New York: Oxford University Press, 2023), pp. 241–259.

21 *See* Gideon Boas. *Public International Law: Contemporary Principles and Perspectives*. (Cheltenham: Edward Elgar, 2012), p. 120-122.

22 Simon Butt. "The Position of International Law Within the Indonesian Legal System." *Emory International Law Review*, Vol. 28, No. 1 (2014): 1–28. Butt argues that Indonesia may theoretically be Monist, but Dualist in practice.

23 I Dewa Gede Palguna & Agung Wardana. "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law." *Asian Journal of International Law* (2024): 1–21.

"accepts" (*diterima*) by Indonesia become the responsibility of the Government. As stated by Justice Minister Muladi in the *Memorie van Toelichting*, this provision served as "filters for the entry of a universal view of human rights."[24] These filters operate through two channels: ratification, which includes reservations, and legislative programs. Except for the Convention against Enforced Disappearances (ICPPED), Indonesia has ratified or acceded to nearly all international human rights treaties. The acceptance through legislation filter may refer to the criminalization of genocide and crimes against humanity, adopted from the Rome Statute of the International Criminal Court, through Law No. 26/2000 on the Human Rights Court.[25]

The norm acceptance channels for IHRL could actually include a third filter, namely domestic judicial decisions. IHRL rules can be incorporated into national law through judicial interpretations by domestic courts.[26] When IHRL rules qualify as international customary law, national judicial decisions may signal acceptance and adherence. Furthermore, judicial decisions could become elements of international custom, either as a state practice or as a subjective component (*Opinio Juris*).[27]

In constitutional adjudication, IHRL rules are often utilized by the judges. MKRI frequently cites IHRL instruments in judicial reviews concerning discrimination issues. This referencing by MKRI was useful to strengthen the judicial reasoning or to add new rights that are not explicitly arranged in the 1945 Constitution, *inter alia*: the right to water, the right to vote, and the right to be presumed innocent. Previous studies indicate that MKRI adopts a more open approach to IHRL,[28] suggesting a convergence between constitutional rights and international human rights.

It is important to note that IHRL cannot be self-implemented. Elkins, Ginsburg, and Simmons emphasize the necessity of social ac-

24 The Peoples' Representative Council of the Republic of Indonesia. "Risalah Rapat Proses Pembahasan Rancangan Undang-Undang Tentang Hak Asasi Manusia dan Komisi Nasional HAM." 5 July 1999.

25 Munif Ashri. "Ratifikasi Indonesia terhadap Konvensi Anti-Penghilangan Paksa", *Loc.Cit*.

26 Wen-Chen Chang & Jiunn-Rong Yeh. "Internationalization of Constitutional Law." In Michel Rosenfeld & András Sajó (Editors). *The Oxford Handbook of Comparative Constitutional Law*. 1165–1184. (Oxford: Oxford University Press, 2012), p. 1168.

27 *See* International Law Commission. "Draft Conclusions on Identification of Customary International Law, With Commentaries." *Yearbook of the International Law Commission*, Vol. II Part Two (2018).

28 Bisariyadi. "Referencing International Human Rights Law in Indonesian Constitutional Adjudication." *Constitutional Review*, Vol. 4, No. 2 (2018): 256-266; Eko Riyadi. "Institusionalisasi Norma dan Standar Hak Asasi Manusia di Indonesia." In Aksel Tømte *et.al*. *Metodologi Hukum Hak Asasi Manusia: Nalar, Praktik dan Tantangannya dalam Sistem Peradilan Indonesia*. 149–211. (Depok: Rajawali Pers, 2023), p. 160.

tors, including activists and judges, to bring about local impact for human rights treaties. Legal mobilization and effective implementation by the court may make IHRL norms have significant meaning in reality.[29] It is always dynamics and interactions between international human rights law and local translation into bureaucracy, policies, and even culture.[30]

D. Human Rights Divergent Interpretations in Constitutional Adjudication

1. The 'General' or 'Blanket' Amnesties Issue

Indonesia has State responsibility debt for various gross human rights violations that occurred during the rise and fall of the New Order authoritarian era. The blueprint of legal policy for settling the past gross human rights violations –as set out in The People's Consultative Assembly Decision No. V/MPR/2000 on Strengthening National Unity and Law No. 26/2000– will be realized through judicial by ad hoc Human Rights Tribunal and non-judicial by TRC mechanism.

Against the backdrop, Law No. 27/2004 on TRC was established, taking cues from South Africa's TRC model.[31] Indonesia's TRC adopted the 'truth for amnesty' model in which the grant of amnesty for gross human rights violations of individual offenders serves as a trade-off for truth disclosure and confession. Thus, this approach may be called a 'conditional amnesty' process.[32]

The victim's group and human rights CSOs criticize some provisions in Law No. 27/2004, such as the essence of amnesty (Article 1 point 1 Law No. 27/2004), the grant for victims' compensation and rehabilitation which is dependent on the offenders' amnesties (Article 27), and substitutive character of TRC mechanism to the judicial settlement through ad hoc Human Rights Tribunal (Article 44). MKRI just partially granted the petition,

29 *See* Zachary Elkins, Tom Ginsburg, and Beth A. Simmons. "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice." *Harvard International Law*, Vol. 54, No. 1 (2013): 209.

30 Merry, Sally Engle, *Human rights and gender violence : translating international law into local justice* (Chicago [etc: University of Chicago Press 2006).

31 Robertus Robet. *Politik Hak Asasi Manusia dan Transisi di Indonesia: Dari Awal Reformasi hingga Akhir Pemerintahan SBY*. (Jakarta Selatan: ELSAM, 2014), p. 144-145.

32 Jeremy Julian Sarkin. "How Conditional Amnesties Can Assist Transitional Societies in Delivering on the Right to the Truth." *International Human Rights Law Review*, Vol. 6, No. 2 (2017): 143–175.

especially regarding Article 27. Nonetheless, the MKRI just annulled the entire Law with the rationale that this provision serves as the core rule.

The MKRI legal reasoning asserted that the victims' grant for compensation and rehabilitation conditioned by an amnesty for the offenders overrides victims' legal protection. Amnesty shall not affect the rights of the victims. The MKRI reaffirms the fundamental principles of the victims' right to remedy and reparations, as outlined in UN General Assembly Resolution No. 60/147.

With the invalidation of Law No. 27/2004, MKRI stated that there are various means for settling gross human rights violations through reconciliation processes, such as (1) legal policy (legislation) which is in line with the 1945 Constitution and universal human rights standards, or (2) political policies for "general rehabilitation and amnesties." Even if the first MKRI 'recommendation' is indeed wise, the latter may bring fatal problems for accountability. This recommendation may have the potential to strengthen the meaning of impunitive 'reconciliation' promoted by the political elites of the previous regime.[33] At this point, MKRI seems to legitimize the policy for unconditional or blanket amnesties.

The suggestions for "general rehabilitation and amnesties" seem contradictory with the MKRI's own stance which underscores the need for limitations on amnesty grants. MKRI affirms that there are limitations for granting amnesty, *inter alia*: (1) the offenders should not benefit from the amnesties, (2) should not have any legal consequences as far as the victims' right to reparation, and (3) should not be granted to those who commit violations of human rights and humanitarian law amounting to crimes. However, blanket amnesties, in its very concept, absolve any relevance of crimes. Thus, the third limitation is overridden.[34]

33 *See* Herlambang P. Wiratraman. "Akses Keadilan bagi Korban Pelanggaran Hak Asasi Manusia Berat Pasca Putusan Mahkamah Konstitusi No. 006/PUU-IV/2006." *Jurnal Rechtsvinding*, Vol. 2, No. 2 (2013): 189.

34 The Constitutional Court of the Republic of Indonesia Decision No. 006/PUU-IV/2006, p. 124.

According to the UN Office of the United Nations High Commissioner for Human Rights, 'blanket amnesties' refer to amnesties that exempt broad categories of gross human rights violations offenders from prosecution and/or civil liability without the beneficiaries having to satisfy preconditions, such as those aimed at ensuring full truth disclosure about the crimes or violations.[35] Blanket amnesties are characterized as unconditional, and consequently tend to be considered illegitimate. In line with the Belfast Guideline Amnesty and Accountability, amnesties may gain legitimacy if it's established to create institutional and security conditions for sustainable protection of human rights, and also require individual offenders to take part in measures concerning the truth, accountability, and reparations process.[36]

Amnesty sparks intense debates within the discourse of transitional justice. It is utilized frequently as a crucial component in post-conflict resolution and the restoration of stability.[37] However, granting amnesty for gross human rights violations is contested as a form of 'de jure' impunity.[38] While the Constitutional Court of South Africa upheld conditional amnesty during the post-apartheid transition,[39] the Inter-American Court of Human Rights takes a divergent approach, establishing an 'anti-amnesty jurisprudence'.[40] Through various cases, the Inter-American Court of Human Rights has ruled that amnesty designed to shield perpetrators of gross human rights violations from prosecution is inadmissible and constitutes a violation of the 1969 American Human Rights Convention.[41] Contemporary cases and scholarly

35 United Nations Office of the United Nations High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Amnesties*. (New York–Geneva: United Nations, 2009), p. 8.

36 Transitional Justice Institute. *Belfast Guidelines on Amnesty and Accountability Report*. (Northern Ireland: Transitional Justice Institute Research Paper No. 14-04, 2013), p. 9-10.

37 Tom Hadden. "Transitional Justice and Amnesties." In Cheryl Lawther, Luke Moffet and Dov Jacobs (Editors). *Research Handbook on Transitional Justice*. 358–376. (Cheltenham: Edward Elgar Publishing, 2017), p. 358.

38 *See* Selman Ozdan. "Immunity vs. Impunity in International Law: A Human Rights Approach." *Baku State University Law Review*, Vol. 4, No. 1 (2018): 43.

39 *See* Constitutional Court of South Africa. *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*. CCT17/96. 25 July 1996.

40 *See* Wayne Sandholtz & Mariana Rangel Padilla. "Law and Politics in the Inter-American System: The Amnesty Cases." *Journal of Law and Courts*, Vol. 8, No. 1 (2020): 155-159.

41 Landmark case: Inter-American Court of Human Rights. *Case of Barrios Altos v. Peru*. Judgment of March 14, 2001. (Merits), para. 41-44.

legal writings show a lack of consensus on the matter. Additionally, there remains uncertainty as to whether the prohibition of amnesty attains international customary law status.[42]

The HRC has a stance that amnesty for gross human rights violations is incompatible with human rights norms. In its General Comment No. 20 (1992)[43] and No. 31 [80] (2004),[44] HRC invoked that amnesty for gross violations of human rights such as torture is not in line with the State's duty to investigate, as States bear the obligation to make perpetrators –without taking any account of their official capacity– to face the justice process. Before those General Comments were adopted, HRC Views on the individual communications case of *Hugo Rodríguez v. Uruguay* asserted that amnesty legislation shielded the prosecutions for previous human rights violations.[45] Thus, the victims cannot obtain an 'effective' remedy and reparation. As reflected in this case, HRC prioritized judicial remedies, such as criminal investigation, to redress the gross human rights violations.[46]

The UN approach to transitional justice regarding amnesty largely shared the same views with the HRC. Guidance Notes of the Secretary-General (2010) emphasize that the UN will neither establish nor offer support for post-conflict resolution or political transitions that involve amnesties for the most serious crimes and gross violations of human rights.[47]

2. The Blasphemy Law

Religious freedom, recognized as a fundamental human right, has been validated and legitimized by domestic constitutional, and international law. Scholarly legal writing indicates that religious freedom is enshrined in numbers of internation-

42 William A. Schabas. *The Customary International Law of Human Rights*. (Oxford: Oxford University Press, 2021), p. 99-101.

43 Human Rights Committee. "General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)." A/44/40 (1992), para. 15.

44 Human Rights Committee. "General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant." CCPR/C/21/Rev.1/Add.13 (2004), para. 18.

45 Human Rights Committee. "Communication No. 322/1988: Hugo Rodríguez v Uruguay." CCPR/C/51/D/322/1988. (1994), para. 12.4.

46 Manfred Nowak. *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd Revised Edition*. (Germany: Norbert Paul Engel Verlag, 2005), p. 66.

47 United Nations Secretary General. "Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice." (2010), p. 4.

al customary laws.[48] Article 18 of ICCPR guarantees this right. Also, the 1945 Constitution of Indonesia ensures its protection, although the article has been formulated in a broad scope.[49]

However, despite the legal presence of a relatively guarantee of religious freedom, Indonesia has critical human rights records on the treatment of religious minorities. As a relic from the authoritarian era, Presidential Decree No. 1 of 1965 on Blasphemy Law (*Penetapan Presiden Nomor 1/PNPS Tahun 1965 tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama*, Law 1/PNPS/1965) legalized the discrimination against minorities. Under this law, religious groups outside the recognized religions by the State can be accused of abusing or defaming the predominant religion.[50] The Blasphemy Law is certainly flawed because it is vague and often interpreted abusively, criminalizing not only overt acts of hostility (*permusuhan*), abuse (*penyalahgunaan*), or defamation (*penodaan*), but also behaviors that result in individuals not adhering to any religion. This provision has been wielded in instances to prosecute individuals identifying as atheists.[51]

Moreover, this Law was utilized and misused to discriminate against Ahmadiyya, Shia, and Gafatar (*Gerakan Fajar Nusantara*) sects.[52] These religious practices are perceived as diverging and deviant (*sesat*) from the beliefs of the majority of Sunni Muslims in society.[53] There have been several regional regulations (*Peraturan Daerah*) that ban Ahmadiyya activities, such as the use of West Java Governor Regulation Number 12 of 2011 on the Prohibition of Activities of the Indonesian Ahmadiyya Congregation (*Jemaat Ahmadiyah Indonesia*) in West Java. Therefore, the Blasphemy Law has been easily misused as

48 Schabas. *The Customary International Law of Human Rights*. *Op.Cit*., p. 200-207.
49 Article 28E (1) and (2) § Article 28I (1) § Article 29 (2) The 1945 Constitution of Indonesia.
50 Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI). *Panduan Bantuan Hukum Indonesia 2014*. (Jakarta: YLBHI–Yayasan Obor Indonesia–AusAID, 2014), p. 377.
51 Purdey *et.al*. 2023. *Op.Cit*., p. 252.
52 Paul Marshall. "The Ambiguities of Religious Freedom in Indonesia." *The Review of Faith & International Affairs*. Vol. 16, No. 1 (2018): 85-96.
53 Mahaarum Kusuma Pertiwi. *Religious Freedom and the Indonesian Constitution: A Case Study of the Blasphemy Law, Marriage Law, and Civil Administrative Law*. Doctor of Philosophy Thesis. (Macquarie Law School, Faculty of Arts, Macquarie University, 2021), p. 202-203.

the legal basis for these discriminatory actions. In the case of H. *Abdul Basit et.al v. West Java Governor* (2011), the General Chair of the *Jemaat Ahmadiyah Indonesia* and others challenged several discriminatory regional regulations before the Supreme Court. However, the Court upheld their validity and confirmed that the prohibition of Ahmadiyya activities in public spaces is justified. Aligning with the majority sentiment, the Supreme Court deemed the presence Ahmadiyya as causing unrest and disturbances to security, order, and tranquility in society.[54]

The constitutionality of the Blasphemy Law has been challenged several times in the court reviews. The first case decision in 2009 stands out as particularly significant as a landmark precedent, in which MKRI consistently applied the principle *stare decisis*.[55] The first petition was brought by the "Religious Freedom Advocacy Team," comprising human rights CSOs and prominent figures promoting pluralism, such as the Fourth President of Indonesia, Abdurrahman Wahid (Gus Dur). The Blasphemy Law claimed to be unconstitutional and incompatible with the principles of the rule of law, equality before the law, religious freedom, and the right to be free from discriminatory treatment. The constitutional argument invoked by the complainant also problematizes the lawmaking aspects and the problem of state intervention in determining whether the interpretation of a religion is true or false.

This judicial review case reignites the debate about the relationship between the State and religion. MKRI then ruled in affirmation of the Blasphemy Law validity. The necessity to safeguard harmony, peace, and public order became the primary rationale behind the MKRI Decision. MKRI, indeed, suggests that the parliament has to consider revising it to strike a better balance between protecting religions and ensuring religious freedoms. However, MKRI's decision tended to be in favor of public order

54 *See* Indonesian Supreme Court Decision No. 23/P/HUM/2011 on Abdul Basit et.al v. West Java Governor et.al, p. 57.

55 Zaka Firma Aditya. "*Judicial Consistency* Dalam Putusan Mahkamah Konstitusi Tentang Pengujian Undang-Undang Penodaan Agama." *Jurnal Konstitusi*. Vol. 17, No. 1 (2020): 80-103.

broadly rather than individual human rights protection.[56]

In its General Comment No. 34 regarding freedom of opinion and expression, HRC asserts that laws prohibiting the expression of disrespect towards religion, including 'blasphemy laws,' are not in line with the ICCPR.[57] While acknowledging that limitations on expression may be justified for the interest in overcoming the incitement to discrimination, hostility, or violence, in accordance with Article 20 paragraph (2) of the ICCPR, the HRC emphasizes that such prohibitions are incompatible with the principles of the Covenant.[58]

The HRC's Concluding Observations on Indonesia's initial report criticizes the persistence of the Blasphemy Law, which prohibits the divergent interpretations of religious doctrines from the teachings of protected and recognized religions in Indonesia, thereby discriminating against minority groups such as Ahmadiyya. The HRC was of the view that the Blasphemy Law is inconsistent with the Covenant and therefore suggests its repeal, despite the MKRI validating its constitutionality.[59]

While blasphemy law in Indonesia persists, human rights discourse at the international level has pushed efforts to replace such laws to the extent of criminalizing and penalizing hate speech.[60] This shift is evident in the soft law text of the 2012 Rabat Action Plan, which suggests blasphemy laws replacement to remove obstacles to religious freedom, as well as protect healthy dialogue and debate regarding religion.[61]

E. The Contributing Factors of Divergence

After reviewing the MKRI decisions, the author argues that two main fac-

56 Melissa Crouch. "Indonesia's Blasphemy Law: Bleak Outlook for Minority Religions." *Asia Pacific Bulletin*, No. 14, January 26 (2012).

57 Human Rights Committee. "General Comment No. 34–Article 19: Freedom of Opinion and Expression." CPR/C/GC/34 (2011), para. 48.

58 *Ibid*.

59 Human Rights Committee. "Concluding Observations on the Initial Report of Indonesia." CCPR/C/IDN/CO/1 (2013), para. 25.

60 Kadek Wiwik Indrayanti & Anak Agung Ayu Nanda Saraswati. "Criminalizing and Penalizing Blasphemy: The Need to Adopt a Human Rights Approach in the Reform of Indonesia's Blasphemy Law." *Cogent Social Sciences*, Vol. 8, No. 1 (2022): 1–14.

61 *See* United Nations Office of the United Nations High Commissioner for Human Rights. "Annual Report of the United Nations High Commissioner for Human Rights." A/HRC/22/17/Add.4 (2013), para. 25.

tors contribute to the divergent human rights norms interpretations, *id est*: (1) 'extensive interpretations' by the IHRL regime interpretative institutions, and (2) conflicting ideologies in the Indonesian constitutional thinking. These two will be elaborated below, especially deal with why such divergence occurred.

1. The Acceptability of Extensive Interpretations

Basically, the interpretation of the international human rights treaties still refers to the general rules stipulated in Articles 31–33 of the Vienna Convention on the Law of Treaties. However, it was argued that human rights treaties have unique features, each accompanied by its own distinctive legal methodology. Human rights treaties somehow differ from the general international conventions, whereas these treaties do not contain reciprocal rights and obligations for the States. The beneficiaries of human rights treaties are individuals and, to some extent, vulnerable groups, positioning them as the third parties of the treaties. Thus, the 'extensive' interpretations, based on the 'object and purpose' of the treaties gain more weight.[62] The protection and dignity of individuals has its centrality in interpretations of human rights. Consequently, the legal methods employed seem to be 'pro persona.'[63]

The interpretations of IHRL interpretive institutions often demonstrate an extensive approach and more or less tend to be judicial activism. This tendency, for instance, is evident in the European Court of Human Rights jurisprudence, where the 'living instrument' doctrine has evolved and gained acceptance. This doctrine sheds the light that human rights treaties should be interpreted from the perspective of present-day conditions.[64] Furthermore, the principle of '*effet utile*' assists that the human

62 This legal interpretation may be called a 'teleological' or 'liberal' interpretation. *See* Muhammad Ashri. *Hukum Perjanjian Internasional: Dari Pembentukan Hingga Akhir Berlakunya.* (Makassar: Arus Timur, 2012), p. 94-96.

63 *See*: Magdalena Sepúlveda *et.al*. *Human Rights Reference Handbook*, *Third Revised Edition*. (San Jose: University for Peace, 2004), p. 45-49; Cecilia Medina Quiroga. "The Role of International Tribunals: Law–Making or Creative Interpretation?." In Dinah Shelton (Editor). *The Oxford Handbook of International Human Rights Law*. 649–669. (Oxford: Oxford University Press, 2013), p. 652; Walter Kälin & Jörg Künzli. *The Law of International Human Rights Protection*, *Second Edition*. (Oxford: Oxford University Press, 2019), p. 34-35.

64 Landmark case: The European Court of Human Rights. *Case of Tyrer v. The United Kingdom*. Judgment of April 28, 1978. (Application No, 5856/72), p. 12.

rights treaty shall be interpreted for effective and practical implementation. Applying this principle, the European Court of Human Rights views that the State's obligation became more positive, rather than merely negative and passive in facilitating the realization of human rights.[65] Similarly, interpretations by the Inter-American Court of Human Rights have improved human rights standards while concurrently tightening the States' obligations.[66]

Extensive approaches are clearly not without opposition. The Inter-American Court of Human Rights, in particular, has faced sharp criticism for its 'anti-amnesty jurisprudence.' Regarding its antagonism toward amnesties, the Inter-American Court of Human Rights was accused as "an aristocratic organ guilty of human rights absolutism." Also, this Court faces criticism for institutional ideological preferences that tend to exercise "interventionist judicial activism." Furthermore, the prioritization of legalistic formulas by the Court, wherein 'amnesty' is almost equated with 'impunity,' has also drawn significant criticism.[67]

The discourse surrounding amnesty finds relevance in MKRI's Decision No. 006/PUU-IV/2006. In this Decision, the judges did not accept the 'anti-amnesty' interpretation. It can be observed, indeed, that MKRI tends to adopt a State-centric perspective rather than prioritizing a victim-centered approach.[68] The MKRI acknowledges the necessity of limiting amnesty but is wary of interpretations from the IHRL which tend to impose an absolute prohibition on amnesty for gross human rights violations, as this may impede national reconciliation efforts. Consequently, MKRI's suggestions then legitimize the use of 'general' or 'blanket amnesties,' albeit accompanied by political policy for victim rehabilitation.

65 Alastair Mowbray. "The Creativity of the European Court of Human Rights." *Human Rights Law Review*, Vol. 5, No. 1 (2005): 57–79.

66 Quiroga. 2013. *Op.Cit*., p. 668.

67 Michail Vagias. "Rethinking Amnesties and The Function of the Domestic Judge." *Constitutional Review*, Vol. 9, No. 1 (2023): 164-167.

68 Wiratraman. 2013. *Loc.Cit.*

'Anti-amnesty jurisprudence' which is elaborated by extensive interpretations indeed reflects the maximalist vision on accountability over all considerations on political stability issues. However, the broad acceptance of such interpretations by the State still falls far short of the mark.

Since the drafting of the Rome Statute of the International Criminal Court, the issue of prohibiting amnesty has emerged, but the final consensus among States remains elusive. Likewise, with the Draft Articles on Prevention and Punishment of Crimes against Humanity prepared by the International Law Commission, a clear prohibition on amnesties has yet to be formulated into a draft provision.[69] Thus, the matter of the legality of amnesties in international law remains in a 'gray area.'[70] The absolute anti-amnesty tendency –which is too strict and narrowly leaves flexibility– is feared to widen the "compliance gap," where States are increasingly reluctant to comply with the norms set by the IHRL regime.[71]

2. Conflicting Ideologies: Liberalism Discourse

One of the essential aspects emphasized in liberalism is the position of individual rights.[72] Clearly, liberalism has become a crucial component of human rights values.[73] Ideologically, liberalism questions the dangers that might arise from the tyrannical practices of the majority.[74]

The previous explanation maps the conflicting ideologies surrounding Indonesian constitutional thinking. As discussed above, there is striking friction between liberalism and integralism in the human rights discourse. Although it also has influence, liberalism can be said to only tend to be a minor voice.

69 International Law Commission. "Draft Articles on Prevention and Punishment of Crimes Against Humanity, With Commentaries." *Yearbook of the International Law Commission*, Vol. II, Part Two (2019).

70 Carsten Stahn. *A Critical Introduction to International Criminal Law*. (Cambridge: Cambridge University Press, 2019), p. 259.

71 Louise Mallinder. "The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws." *The International and Comparative Law Quarterly*, Vol. 65, No. 3 (2016): 680.

72 Robertus Robet & Hendrik Boli Tobi. *Pengantar Sosiologi Kewarganegaraan: Dari Marx sampai Agamben*. (Tangerang Selatan: Marjin Kiri, 2014), p. 53.

73 Nowak. 2003. *Op.Cit*., p. 1.

74 Jürgen Habermas. "Remarks on Legitimation through Human Rights." *Philosophy and Social Criticism*, Vol. 24, No. 2/3 (1998): 89.

It is worth admitting that, even unlike communism which has been officially prohibited, liberalism has a negative connotation in the Indonesian political lexicon. The antagonistic stance against liberalism has its historical roots. One of the examples refers to Soekarno's views during the drafting of the 1945 Constitution which questioned the relationship between liberalism and various forms of domination, especially colonialism. It was Soekarno too who accused liberalism as the culprit of the problem behind political instability in the Indonesian parliamentary democracy years (1950-1957). From the outset, liberalism encountered strong opposition from socialism, Islamism, and integralism. However, this ideology has always persisted in Indonesian political discourse, often emerging as a counter-narrative to the collectivist, populist, religious, or class-based political spectrum.[75]

The MKRI's Decision No. 140/PUU-VII/2009 shows an "Indonesianess" interpretation of religious freedom.[76] In that case, MKRI asserts the supremacy of national law, stating that respect for international human rights treaties and instruments must be in accordance with the State's philosophical foundation as well as the 1945 Constitution,[77] where the principle of "Belief in One Almighty God" (*Ketuhanan Yang Maha Esa*) has a fundamental position.

Cekli Pratiwi's analysis suggests that the MKRI set aside the core norm of non-discrimination. The Court failed to consider that the restriction of religious freedom in the Blasphemy Law led to discriminatory treatment in reality. Thus, the MKRI tends to favor a 'particular constitutionalism' approach, which interprets human rights norms narrowly.[78] Also, as explained by Pertiwi, the MKRI has relied on the utilitarian argument, emphasizing the

75 David M. Bourchier & Windu Jusuf. "Liberalism in Indonesia: Between Authoritarian Statism and Islamism." *Asian Studies Review*, Vol. 47, No. 1 (2023): 70-75.

76 Crouch. 2012. *Loc.Cit.*

77 The Constitutional Court of the Republic of Indonesia Decision No. 140/PUU-VII/2009, para. [3.34.5]–[3.34.9], p. 273-275.

78 Cekli Setya Pratiwi. "Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law." *Constitutional Review*, Vol. 7, No. 2 (2021): 291-293.

necessity for Blasphemy Law to prevent religious disputes. This argument favors the majority and overlooks the rights of minorities, as the interpretation of religious teachings that are 'deviant' certainly departs from the perspective of the majority.[79]

Historically, the enactment of Blasphemy Law intended to oppose liberal ideals which were portrayed as foreign, 'Western,' and incompatible with the national identity. Indeed, this discriminatory Law emerged colored by intense political rivalry between Islamic and Communist factions. However, Soekarno's Guided Democracy enacted it as part of the broader rejection of liberalism. [80]

The MKRI's Decision restricts the freedom to manifest religion excessively. The judges' reasoning appears to draw on the rights limitation provisions in the 1945 Constitution (Article 28J paragraph (2)), which add a new 'legitimate' restriction ground, *id est*: religious values. However, such ground is absent in the IHRL rules and standards. Thus, human rights in Indonesia may be restricted based on religious values consideration, thereby justifying the restriction of religious minority rights.[81]

In the MKRI's Decision, the reasoning to restrict the freedom to manifest religion shows a strong nuance of integralism discourse. As introduced by Soepomo, integralism discourse prioritizes harmony and unity over the ideals of individual rights and freedoms within the political realm. As Robet highlighted, the challenge to instilling a human rights culture in Indonesia is hindered by the lingering influence of integralism. Somehow, the State elite's perspective on democracy, human rights, and Indonesian politics centered on the State, harmony, and unity. Inevitably, substantial obstacles to upholding human rights in Indonesia tend to come from a kind of argument about "maintaining unity" or "preserving harmony,"[82] which also could be seen in the MKRI's stance.

79 Pertiwi. 2021. *Op.Cit*., p. 207.
80 *Ibid*, p. 100.
81 Butt & Lindsey. 2018. *Op.Cit*., 254.
82 Robet. 2020. "Meninjau Kembali Negara Organis." *Loc.Cit*.

F. Conclusion

The gap between norm and its application has been discussed by many scholars, and even such gap has been concerned by those who work on socio legal studies. This article offers an argument which stipulate complexities surrounding amnesty and religious freedom issues as addressed in the MKRI's Decisions, highlighting the diverging interpretations of human rights norms between national and international interpretive institutions. The author posits that such 'interpretation' divergence may stem from methodological or legal interpretation issues, as well as ideological factors. Indeed, such influenced interpretation can be discussed further into a deeper understanding about the judges' background, social political context, and its coherence reasoning on court rullings. Perhaps, this would be further research will touch these issues.

Regarding amnesties, the extensive approach utilized by international institutions faced challenges at domestic implementation, given that interpretations often entail stricter State obligations. The states have not fully accepted the absolute anti-amnesty interpretation, which could restrict their discretion in addressing gross human rights violations. Conversely, the judicial review of the Blasphemy Law case underscores how ideological factors significantly shape divergent interpretations. In this instance, the MKRI adopted an integralist perspective, prioritizing harmony in the name of preventing religious conflicts over liberal ideals such as minority rights protection.

Further legal writing to reconcile divergent interpretations of national and international interpretive institutions becomes relevant, especially dealing with study of the court, behaviour, and its ideological perspectives.[83] The theoretical contribution from such research is significant to narrowing the divergence gap and widening human rights convergence. The compatible interpretations among interpretive institutions will strengthen the mutual validity and legitimacy of human rights.

83 Related studies offer such debate, such as, Jaegere, Josephine de, *Judicial review and strategic behaviour : an empirical case law analysis of the Belgian Constitutional Court* (Cambridge: Intersentia 2019); Withana, Radhika, *Power, politics, law international law and state behaviour during international crises* (1st ed.; Leiden ; Martinus Nijhoff Publishers 2008); Randazzo, Kirk A, en Richard W Waterman, *Checking the courts : law, ideology, and contingent discretion* (1st ed.; Albany, New York: SUNY Press 2014) <doi:10.1515/9781438452890>.

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