

**Blasphemy Law in Muslim-Majority Countries: religion-state relationship
and rights based approaches in Pakistan, Indonesia and Turkey**

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Abstract

This thesis examines the blasphemy law within Muslim-majority countries in three jurisdictions namely Pakistan, Indonesia, and Turkey. Although it is very clear that the prohibition of blasphemy law is incompatible with international human rights law, the three insist its implementation. In addition, they also cooperate with other states to endorse the concept of “religion defamation”. However, the punishment pursuant to the blasphemy provisions is varies among the Muslim-majority countries depends on several factors. One of the factors is the religion-state relationship. Different forms of religion-state relationships will lead to different results in the state’s approach towards the religion. Within Muslim-majority states, there is wide range of interpretation of blasphemy provisions. The secular model in Muslim-majority states does not necessarily mean more protection for freedom of religion and freedom of expression.

Keywords: blasphemy, defamation of religion, freedom of expression, constitution-making, religion-state relationship.

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Chapter I. Introduction

“Sanctions against freedom of religious inquiry and expression act to halt the developmental process of religious understanding dead in its tracks-conflating the sanctioning authority’s current, limited grasp of the truth with ultimate Truth itself, and thereby transforming religion from a path to the Divine into a “divinized” goal, whose features and confines are generally dictated by those with an all-too-human agenda of earthly power and control”

(K.H, Abdurrahman Wahid) ¹

Samuel Huntington declared that in certain political circumstances, globalization may lead to “clash of civilizations”.² In his 1993 article, he predicted that future conflicts will arise between the West and several Islamic states.³ Surprisingly, many recent developments seem to have justified his prediction. The rising of Islamic State of Iraq and Syria (now ISIS) in the Middle East, the prohibition of the *burqa* and *niqab*⁴ in public place in Europe and the latest one (and I believe would not be the last) was *Charlie Hebdo* magazine attack in France have reflected these tensions.

In the field of human rights, it is likely the tension between the West and several Islamic countries (or at least Muslim-majority countries) continues, especially in the arena of freedom of religion and its relation with freedom of expression.

One of the crucial points of the debate is concerning blasphemy law. It is believed that the concept of blasphemy was derived from monotheistic religion such as Judaism, Christianity

¹ The former President of Indonesia and the former leader of Nahdlatul Ulama the biggest Muslim organization in the world available at <http://www.libforall.org/about-us-our-philosophy.html> accessed April 19, 2015

² Samuel Huntington and Peter L. Berger (Ed), *Many Globalizations: Cultural diversity in the contemporary world*, Oxford University Press, 2002. page.15.

³ Samuel Huntington, *Clash of the civilizations?* Foreign Affairs (summer, 1993), 48. Accessed April, 18, 2015, http://www.hks.harvard.edu/fs/pnorris/Acrobat/Huntington_Clash.pdf. In my opinion, from the term Islamic state, we can also have the derivation namely the Islamic tradition.

⁴ The *burqa* is a full-body covering including a mesh over the face, and the *niqab* is a full-face veil leaving an opening only for the eyes, both are usually used by certain Muslim women. See S.A.S v. France Application number. 43835/11. Para.11. Available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{\"itemid\":\[\"001-145466\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{\) accessed April 12, 2015.

and Islam which prohibit someone (or group) from defaming god or sacred things (including prophets and saints) in these religions.⁵ A study conducted by Grim in 2012 distinguished between blasphemy and religious defamation.⁶ The former refers to contemptuous action directed to God or to the divine and the latter refers to the criticism of religion in general.⁷ Although blasphemy law in the current study is narrowly defined, the term blasphemy is also used to include speech which criticize the religion or religious belief, religious doctrines or religious figures.⁸ In other words, it has broader meaning than before. Furthermore, the definition of blasphemy may vary in different states depending on certain circumstances.⁹ Thus, to protect the faith and the followers of a religion from being attacked (by opinion or expression), states have enacted blasphemy law.¹⁰ It is essential to note that the meaning of blasphemy law here is not limited to blasphemy law as such. In other words, it does not necessarily mean that the law is regulated in a specific Act. Hence, as long as the substance of the law concerning blasphemy in a broader meaning,¹¹ then it is classified as blasphemy law.

Scharffs identified that blasphemy laws in United States of America (USA) and European countries are mostly historical relics¹² although in European context, the situation concerning blasphemy law is quite problematic. Originally, blasphemy law in USA was

⁵ David Robertson, *A Dictionary of Human Rights* (London: Europa Publication, 2004) p. 26.

⁶ Brian J. Grim, "Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread," www.pewforum.org, last modified November 21, 2012, <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/>.

⁷ Ibid.

⁸ Evelyn M. Aswad, Rashad Hussain, and M. Arsalan Suleman, "Why the United States Cannot Agree to Disagree on Blasphemy Laws," *Boston University International Law Journal* 32, no. 1 (Spring 2014): p.29, accessed June 9, 2015, <http://www.bu.edu/ilj/files/2014/05/Aswad-US-and-Blaspemy.pdf>. See also James R. Moore, "Blasphemy Laws and Hate Speech Codes: Threats to Freedom of Expression, Dissent, and Democracy," *International Journal of Humanities and Social Science* 3, no. 18 (October 2013): p.13, accessed June 9, 2015,

⁹ Brian J. Grim, *Op.cit.*

¹⁰ Ibid.

¹¹ Not only blasphemous action directed to God but also the sacred thing in religion such as Prophets or the Saints.

¹² Brett G Scharffs, "International Law and The Defamation of Religion Conundrum," *Institute for Global Engagement* Volume II, Number I (Spring 2013) p.67. He noted that 1922 was the last year when a person was sent to prison in violation of religion blasphemy in Europe. However, United Kingdom relatively new in abolishing the Blasphemy law in 2008.

transmitted from British.¹³ Nevertheless, blasphemy laws are regarded as unconstitutional since 1952.¹⁴ The US Supreme Court in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S.495 held that the provision of New York Education Law violated the First Amendment.¹⁵ Interestingly, in certain states such as Massachusetts, Michigan, Oklahoma, Pennsylvania, South Carolina and Wyoming the blasphemy law still exist on their books.¹⁶ In Europe, several organizations have reported that blasphemy laws still exist and implemented in several countries.¹⁷ In addition, there are examples which reveal that even if such law was abolished, to some government's action seem to be inconsistent.¹⁸ In 2009, just 6 month after the repealing of blasphemy law, UK government excluded Geert Wilders –a Dutch member of parliament who was known for his criticism on Islam- from UK for public disharmony reason.¹⁹ However, according to Scharffs, the last sentenced of blasphemy law in Europe occurred in 1922.²⁰ Thus, the practice of blasphemy law in Europe probably exist but never been used as effective as before.²¹

On the contrary, in many Muslim-majority countries, blasphemy provisions are applied effectively.²² The punishment for blasphemy also varies from fine to death penalty depending

¹³ Evelyn M. Aswad, Rashad Hussain, and M. Arsalan Suleman, *Op.cit.* p.133

¹⁴ Ibid.

¹⁵ This case is related to the banned of a film entitled "The Miracle" which considered as blasphemous and sacrilegious under New York Education Law. See Evelyn M. Aswad, Rashad Hussain, and M. Arsalan Suleman, "Why the United States Cannot Agree to Disagree on Blasphemy Laws, *Op. cit* p.130. Also see Samantha Barbas, "How the Movies Become Speech," *Rutgers Law Review* 64, no. 3 (Spring 2012): p.666, accessed June 10, 2015, <http://www.rutgerslawreview.com/wp-content/uploads/archive/vol64/issue3/Barbas.pdf>.

¹⁶ Evelyn M. Aswad, Rashad Hussain, and M. Arsalan Suleman, *Op.cit.* p.130.

¹⁷ The International Press Institute (IPI) research said that there were at least 14 European countries maintained prohibition on blasphemy. See the International Press Institute, "Blasphemy laws remain in force," <http://www.freemedia.at/>, last modified June 10, 2015, <http://www.freemedia.at/ecpm/key-findings/blasphemy-laws.html>. See also The International Humanist and Ethical Union (IHEU), "Freedom of Thought 2014: A Global Report on Discrimination against Humanists, Atheists, and the Non-religious; Their Human Rights and Legal Status," <http://iheu.org>, accessed June 9, 2015, <http://iheu.org/our-work/freedom-of-thought-report/>.

¹⁸ See Sejal Parmar, *The Challenge of "defamation of religions" to freedom of expression and the International Human Rights*, *European Human Rights Review*, 2009, 3, 3. Accessed April 12, 2015, www.westlaw.uk.

¹⁹ Ibid.

²⁰ Brett G Scharffs, *Op.cit.* p.67.

²¹ See also Richard Stone, *Textbook on Civil Liberties and Human Rights* (London: Oxford University Press, 2010) p.436.

²² Policy Brief of the United States Commission on International Religious Freedom (USCIRF), *Prisoners of Belief: Individuals jailed under Blasphemy Law*, March 2014. p. 3-4. Accessed March 25, 2015. <http://www.uscifr.gov/reports-briefs/policy-briefs-and-focuses/policy-brief-prisoners-belief-individuals-jailed-under>.

on the seriousness of the violation.²³ Whereas, these states are bound by International human rights norms which prohibit the application of such laws. There are inconsistencies in their implementation. Furthermore, Pakistan, on behalf of Organization of Islamic Cooperation (formerly the Organization of Islamic Conference), has endorsed the concept of “defamation of Islam” which subsequently evolved into “defamation of religion” globally through the United Nations Commission of Human Rights (hereinafter UNCHR).²⁴ It is believed that the endorsement was not only a strategy to preserve the blasphemy law in their domestic level but also a mechanism to promote it at the international level.²⁵ Hence, it is uneasy to examine the problem concerning blasphemy laws in Muslim-majority countries solely from the international human rights approach.

Indeed this is not a coincidence, since there are several reasons to back up the choice of these states as case studies. First, according to annual report of the United States Commission on International Religious Freedom (hereinafter USCIRF), Pakistan is regarded as the worst country in the world related to the protection of freedom of religion.²⁶ The most shocking event happened in 2011 when Shahbaz Bhatti, The Minister of Minorities, who was also the only Christian in the cabinet, was assassinated following his brave criticism of the Pakistan blasphemy law.²⁷ The criticism was taken by Shahbaz in order to defend the right of the freedom of religion of the minorities from the excessive impact of blasphemy law.²⁸ Two

²³ Ibid.

²⁴ Paul Marshall, *Exporting Blasphemy Restriction: The Organization of the Islamic Conference and the United Nations*, the Review of Faith and International Affairs, (Summer 2011), 58-59. See also Allison G. Belnap, "Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights," *BYU Law Review* 2010, no. 2 (2010): p.635, accessed June 3, 2015, <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2521&context=lawreview>. The role of UNCHR was replaced by United Nations Human Rights Council in 2006.

²⁵ Kiley Widelitz, "Recommended Citation Widelitz, Kiley (2013) "A Global Blasphemy Law: Protecting Believers at the Expense of Free Speech": Vol. 6, Article 2. Available at:," *Pepperdine Policy Review* 6, no. 2 (May 2013):xx, accessed June 12, 2015,

²⁶The United States Commission on International Religious Freedom *Annual Report, Chapter Pakistan*, 2014, 75. Accessed March 24, 2015, <http://www.uscirf.gov/sites/default/files/Pakistan%202014.pdf>

²⁷ Ibid

²⁸ Ibid

months earlier, the Governor of Punjab, Salman Taseer was shot by his own bodyguard.²⁹ His bodyguard admitted that the deed was done because Taseer supported the amendment of the blasphemy law and also Taseer's support for Aasia Bibi's pardon.³⁰ Additionally, Pakistan has a considerable number of prisoners who were sentenced to death and life imprisonment because of blasphemy including Aasia Bibi who was accused for insulting the prophet Mohammad.³¹

The second country is Indonesia. Indonesia is one of the most populous countries in the world with various cultures and religions.³² Although the dominant religion is Islam, the state itself cannot be viewed as being Islamic.³³ Since Indonesia declared its independence in 1945, freedom of religion has been protected by article 29 of the constitution.³⁴ However, it is heartbreaking to see that nowadays the existence of freedom of religion is threatened. According to Center for Religious and Cross-cultural Studies, there were significant threats directed to the minority religious groups in 2012³⁵ which were sponsored by radical Muslim groups.³⁶ Not only did they attack the houses and places of worship of the minority religious group, they also tortured members of the minority religious group and one of the members was left to death.³⁷

²⁹ <http://www.bbc.com/news/world-south-asia-12111831>, Accessed January 20, 2015.

³⁰ Ibid.

³¹ Policy Brief of United States Commission on International Religious Freedom (USCIRF), *Prisoners of Belief: Individuals jailed under Blasphemy Law*, March 2014. p. 3-4. Accessed February 20, 2015.

³² In 2010, based on National Statistic Center (Badan Pusat Statistika) Indonesian population reached 237,641,326 people which is the fourth largest of the world. Approximately, about 80% of them is Islam. Available at <http://sp2010.bps.go.id/index.php>, last modified 2010. See also <http://features.pewforum.org/Muslim-population-graphic/#/Indonesia>. Last modified January 11, 2011.

³³ There is no single word concerning Islam or Islamic state as the foundation of the state found explicitly within the constitution.

³⁴ Article 29 (2) stated “ *The state guarantees each and every citizen the freedom of religion and of worship in accordance with his/her religion and belief*”

³⁵ Center for Religious and Cross Cultural Studies, "Annual Report on Religious Life 2012," CRCS, last modified 2012, <http://crs.ugm.ac.id/annual-report-top>. See also Zainal Abidin Bagir, *Defamation of Religion Law in Post-Reformasi Indonesia: is Revision Possible?* Australian Journal of Asian Law, 2013, Vol 13 No.2. page.2.

³⁶ See Bagir, Ibid. p.3

³⁷ Ibid. The video version can be watched at Bernard Agapa, "Anti Ahmadiyah - Violence in Cikeusik, Indonesia," *Youtube*, July 9, 2011, accessed June 12, 2015, <https://www.youtube.com/watch?v=r4cBG9lut0A>.

The third country is Turkey. Different from the previous two, Turkey is the only Muslim-majority in Europe but has also declared itself as a secular state. However, according to annual report by USCIRF, several types of violations of freedom of religion have occurred in Turkey.³⁸ For instance, in 2012, a musician was charged for *tweeting* the contents of which were found to offend religious values through his twitter.³⁹ Interestingly, the threat to freedom of religion was not only directed to the minority groups but also to the majority group.⁴⁰

Several studies concerning freedom of religion and blasphemy law have been conducted. Some of them took the in-depth focus on one state while other chose the comparative method. Hefner, in 2013, studied the religious freedom in Indonesia.⁴¹ Beginning with historical background of the making of the Constitution, he explained the tension between the polarized groups in certain time sequences and whether they wanted to take Islamic values as the fundamental values of the Constitution.⁴² However, in his article, Hefner dedicated a large portion for political debates among the elites rather than the blasphemy law itself.

Rehman and Berry examine “defamation of religion” in Pakistan from a theoretical perspective and also the practice of the “defamation of religion” itself.⁴³ Departing from the Pakistan-sponsored debates “defamation of religion” at the UN and how the concept was

³⁸United States Commission on International Religious Freedom Policy Brief , *Prisoners of Belief: Individuals jailed under Blasphemy Law*, (USA: United States Commission on International Religious Freedom(USCIRF), 2014), accessed February 21, 2015, <http://www.uscirtf.gov/reports-briefs/policy-briefs-and-focuses/policy-brief-prisoners-belief-individuals-jailed-under->, Op. Cit. page. 5, see also USCIRF, "Annual report Turkey Chapter and Summaries," www.uscirtf.gov, last modified 2015, <http://www.uscirtf.gov/reports-briefs/annual-report-chapters-and-summaries/turkey-chapters-and-summaries>.

³⁹ Ibid, page 4.

⁴⁰ See Annual report of USCIRF from 2010-2014 which portray how the Muslim-majority in Turkey also face the restriction from freedom of religion. Available at www.uscirtf.gov.

⁴¹ Robert W Hefner, "The Study of Religious Freedom in Indonesia" *Institute for Global Engagement* 2, no. 2 (Summer 2013): xx, accessed April 12, 2015, <http://www.tandfonline.com/doi/pdf/10.1080/15570274.2013.808038>

⁴² Ibid. p19-24.

⁴³ Javaid Rehman and E. Berry, "Is “Defamation of Religions” Passé? The United Nations, Organization of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan," *The George Washington International Law Review* 44 (2012): accessed February 13, 2015, <http://docs.law.gwu.edu/stdg/gwilr/PDFs/44-3/1-%20Rehman%20Berry.pdf>.

implemented in Pakistan, Rehman and Berry finally concluded that despite the ambition of promoting the ‘defamation of religion’ concept at the UN, the practice of the blasphemy law in Pakistan is clearly incompatible with human rights.⁴⁴ The ambiguity of the “defamation of religion” concept has been addressed by Parmar as well.⁴⁵ In her article, she described that the concept of “defamation of religion” has evolved from the concept of defamation of Islam.⁴⁶ She also added that the resolutions which were directed to combat defamation of religion seem to undermine the International human rights especially freedom of expression.⁴⁷

Another study was done by Rahman,⁴⁸ who analyzed freedom of religion in South Asia which consist of 8 countries.⁴⁹ In his article, Rahman pointed out significant facts related to Pakistan and other countries in the region that religion plays very vital role in the state.⁵⁰ In addition, he argued that the South Asian people have not fully enjoyed the freedom of religion yet.⁵¹ Nevertheless, the problem within Pakistan was examined briefly with very little explanation concerning the background of the constitution making process.

A particularly detailed study of the topic of this thesis was carried out by Asma T. Uddin in 2011.⁵² In Uddin’s work, she compared Indonesia, Pakistan, and Egypt. In her article, she explained the existing condition of the freedom of religion in those countries geographically.⁵³ Afterwards, she described the blasphemy laws in three above mentioned countries. However,

⁴⁴ Ibid. p.471.

⁴⁵ Sejal Parmar, *op. cit.*

⁴⁶ Ibid, p.4.

⁴⁷ Ibid. p.10

⁴⁸ Muhammad Rubaiyat Rahman, *Religion and Human Rights: South Asia perspective*, in Mizanur Rahman and M. Rahmat Ullah (Ed), *Human Rights and Religion*, ELCOP Yearbook of Human Rights 2014. 80-90.

⁴⁹ Ibid. 85-89.

⁵⁰ Ibid. 89.

⁵¹ Ibid.

⁵² Asma T Uddin, "Blasphemy Laws in Muslim-Majority Countries," *The Review of faith and International Affairs*, summer 2011, xx, accessed February 11, 2015, <http://www.becketfund.org/wp-content/uploads/2012/09/SSRN-id1885757.pdf>.

⁵³ Ibid. 48-50.

she approached the problem in the perspective of rights and related it to UN resolutions regarding defamation of religion.

Thus, in the light of comparative perspective, this thesis will analyze the issue of blasphemy law in relationship with freedom of religion and freedom of expression. It not only focused on the compatibility of blasphemy law with international human rights law but also the analysis of religion-state relationship and the constitution making process in above mentioned countries. In addition, this thesis will be divided into five chapters.

The first chapter will give introduction to the topic. The second chapter will examine the religion-state relationship in Pakistan, Indonesia and Turkey and also the discourse of blasphemy law within international law instruments. I will begin with a theoretical explanations which refers to Hirschl and Durham & Scharffs analysis.⁵⁴ This chapter will determine the classification of the countries in the continuum of religion and state relationship models. In addition, this chapter also describes the constitution making process of the countries given to give the context of the Constitutional provisions especially the actors involved. Chapter four will elaborate the international law instrument concerning the right of freedom of religion and the freedom of expression. Additionally, it also elaborate such instrument in the domestic level. Another aspect in this chapter is the role of Islamic International Organization namely Organization of Islamic Cooperation (OIC). This is because the OIC has been actively involved in anti-defamation religion campaign for the last decades. Chapter five will interrogate the practice of blasphemy laws in above-mentioned countries. Finally, I will outline the possible policy recommendations after examining the problems which occurred.

⁵⁴ W. Cole Durham Jr and Brett G Scharffs, *Law and religion, National, International, And Comparative Perspectives* (New York: Wolters Kluwer, 2010), p 113-162. And Ran Hirschl, Comparative Constitutional Law and Religion, in Tom Ginsburg and Rosalind Dixon (Ed), *Comparative Constitutional Law: Research Handbook in Comparative Law*, Edward Elgar, 2011. p. 422-438.

Chapter II. Religion –State relationship

It is likely that the form of religion-state relationship will affect the behavior of the state towards religion. Thus, the religion-state relationship has significant impact to the freedom of religion. This chapter will elaborate briefly on the form of religion-state relationship and how the religion—state relationship in Pakistan, Indonesia and Turkey is anchored in their constitutions.

II.1. Continuum of religion-state relationship;

To identify the religion-state relationship in the above mentioned states, I will, first, explain the possibility of ranges of religion-state relationship. Durham & Scharffs have described this relationship into ten continuum structures which range from absolute theocracy to abolitionist state.⁵⁵ In addition, they explain that these structures were based on both historical evidence and abstraction as well.⁵⁶ Durham & Scharffs came up with 10 models of religion-state relationship while Hirschl lists 8 as described in the table below.⁵⁷

Table 1. Models of religion state relationship Durham & Scharffs (2010) and Hirschl (2013)

Durham & Scharffs	Hirschl
Absolute theocracy	Atheist state
Established churches	Assertive secularism
Religious status system	Separation as State Neutrality toward Religion
Historically favored and endorsed churches	Weak Religious Establishment
Preferred set of religions	Formal separation with de facto pre-eminence of one denomination

⁵⁵ Cole Durham and Brett Scharffs, *Op cit.* p. 116-121

⁵⁶ *Ibid.* p.117.

⁵⁷ Ran Hirschl, *Op.cit.* p. 422-437

Cooperationist regimes	Separation alongside multicultural accommodation
Accommodationist regimes	Religious Jurisdictional enclaves
Separationist Regimes	Strong establishment – Religion as a Constitutionally Enshrined Sources of Legislation
Secular control regimes	
Abolitionist states	

Basically, Both Durham & Scharffs and Hirsch's studies have similar ideas in explaining the possible range of religion-state relationships. Such categories are very helpful to understand the states policy toward religion. However, both studies also admitted that to some extent the categories might overlap with one to another.

II.2. Religion-State relationship in Pakistan, Indonesia and Turkey;

This sub chapter will describe the religion state relationship within Pakistan, Indonesia and Turkey in the light of the religion state relationship models provided by Cole & Scharffs and Hirschl. To decide which model is applicable in the given countries, it is important to examine the content of each of those (written) constitutions.⁵⁸ As we know, most modern states consider the constitution as the supreme law. Within the constitution, we may find the structures of the government, the functions of government institutions and the citizen's rights as well.⁵⁹ In addition, it is typical in the constitutions to have several formal procedure of how

⁵⁸ All of the countries which have been the object of this thesis have written (codified) constitution.

⁵⁹ Generally speaking, the constitution reflects the framework of the state powers. However, to some extent, there might be cases which revealed the inaccuracy of what has been written in the constitution and the practice. This is usually defined as a "sham" constitution. However, Tushnet criticize this category since it fails to give appropriate metric for the distinction. Thus, we can trace the implementation of those constitutional provisions

to amend or change the provisions of the constitutions. In these given countries, according to their constitutions,⁶⁰ the relationships of religion and state are varied despite their Muslim dominant population.

In Pakistan, the constitution's official name is "The Constitution of Islamic Republic of Pakistan".⁶¹ From the name itself, we can infer that there is a sense of incorporation of the Islamic religion into the state of Pakistan. In fact, the preamble also declares in its first paragraph that the sovereignty –of the state and entire universe - belongs to Allah.⁶² Furthermore, the second and the third paragraph of the preamble stated that the principles of democracy, equality, freedom, tolerance and social justice shall be implemented in accordance with Islam especially with Holy *Quran* and *Sunnah*.⁶³ However, the preamble also provides the opportunity for the minorities to manifest their religion and develop their cultures freely.⁶⁴ The eighth paragraph of the preamble also mention the guarantee of several fundamental rights including freedom of thought, belief and faith.⁶⁵ Whereas the constitution guarantees these fundamental rights, it also states that they can be limited if the limitation is prescribed by law and in considerations of law and morality.⁶⁶

through the practice of it. See Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Massachusetts: Edward Elgar, 2104) p.11.

⁶⁰ All of the examined constitutions are taken from the official websites of governmental institutions of a given countries. For Pakistan, the constitution was taken from National Assembly of Pakistan's website available at http://www.na.gov.pk/uploads/documents/1333523681_951.pdf, Accessed in May 27, 2015. Indonesian Constitutions was taken from Ministry of State Secretariat of Republic of Indonesia website available at http://www.setneg.go.id/images/stories/kepmen/legal_product/uud_1945.pdf, Accessed in May 27, 2015. It is essential to note that there is no official English translation of Indonesian constitution since there is a law which stated that the official language of the constitution is Indonesian. Finally, Turkish Constitution was taken from Ministry of Foreign affairs website available at https://global.tbmm.gov.tr/docs/constitution_en.pdf, Accessed in May 27, 2015.

⁶¹ The Constitution of Islamic Republic of Pakistan is provided by National Assembly of Pakistan. Available at http://www.na.gov.pk/uploads/documents/1333523681_951.pdf, Accessed in May 27, 2015.

⁶² Allah is an exclusive term in Islamic teaching to define the only God. Ibid.

⁶³ *Sunnah* or *hadith* is the textual narrative of what the Prophet Mohammad had said, done or tacitly approved. This is the second highest source within Islamic law hierarchy. See Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (New York: Cambridge University Press, 2005), xx, available at <http://www.hadith-studies.com/Hallaq-Origins-Evolution-Islamic-Law.pdf>. p.42.

⁶⁴ The Constitution of Islamic Republic of Pakistan, Op cit.

⁶⁵ Ibid

⁶⁶ Ibid.

The affirmation of Islam as the official religion of the state is stated in article 2 of the constitution.⁶⁷ Nevertheless, the constitution of Islamic Republic of Pakistan also emphasizes the guarantee of freedom of the citizens to profess and manifest their religion.⁶⁸ But again, as mentioned in the preamble, this provision also has to be the subject to law, public order and morality.⁶⁹ In addition, the constitution also regulates the taxation and education in religious sphere and prohibits one religion from interfering with another religion.⁷⁰ Those provisions are regarded as a safeguard for the religion itself. Another provision concerning the religion is stipulated in article 26 and 27 which provide for non-discrimination principle in accessing public places and services. In other words, no one can be discriminated in accessing public places and services solely based on their religion.

From the preamble and the provisions, we can see that the Pakistan Constitution is mainly inspired by Islamic teaching. Thus, the main source of the legislation and regulation is derived from Islamic legal sources such as holy *Quran* and *Sunnah*. However, there is certainly room for other religions which are described as minorities and who were also allowed to manifest their faith and beliefs. Unfortunately, there is no definition of the term within the constitution. Nevertheless, one may assume that this term is including non-Muslim because in the preamble the term is used after the paragraph which stated that the Muslim shall be enable to live in accordance with the teaching of Holy *Quran* and *Sunnah*.⁷¹ Subsequently, the constitution also states that the adequate provision shall be applied for the minorities as well.⁷²

⁶⁷ See article 20. Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ See article 21 and 22. Ibid.

⁷¹ Paragraph 5 of the Preamble

⁷² Paragraph 6 of the Preamble

The term non –Muslim then covers various religions and beliefs and also the scheduled castes⁷³ as stipulated in article 260 of the Interpretation chapter.⁷⁴

Having said that, in light of religion state relationship model, Pakistan model falls within category of “*Established churches*”⁷⁵ as described by Durham & Scharffs which means that it has formal recognized religion which incorporated into the state or *Strong establishment* – *religion as a constitutionally enshrined source of legislation* as described by Hirschl.

Unlike in Pakistan, there is no single word which explicitly mentions “Islam” or “Muslim” in the 1945 Constitution of the State of the Republic of Indonesia (hereinafter the 1945 Constitution).⁷⁶ However, one may find the word “God” in the 1945 Constitution preamble and provisions. The third paragraph of the preamble stated that the independence of Indonesia was a blessing from God. Furthermore, the later “God” was believed as the monotheistic God.⁷⁷

There are two articles in the 1945 Constitution which mention God overtly. The first is concerning the oath taken by the President (and the Vice President) when he or she inducted in the formal ceremony.⁷⁸ Another article stated that the state of Indonesia shall be based upon

⁷³ The term “scheduled caste” is refers to ***dalit*** people, which is regarded as the lowest caste according to Hindu’s culture. In addition, Individuals who belong to this caste are forbidden to touch since they come from dirty. See Pakistan Dalit Solidarity Network (PDSN) *Scheduled Caste Women in Pakistan: Denied a life in dignity and respect*, (Pakistan: CEDAW Committee, 2013), accessed May 29, 2015, http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGOsSubmissionPakistan_ForTheSession54.pdf. p.11-12

⁷⁴ In this article Non-Muslim is defined as “*a person who is not a Muslim and includes a person belonging to Christian, Hindu, Sikh, Budhist, or Parsi community, a person Quadiani group, or Lahore group (who calls themselves Ahmadi’s or by any other name), or a Baha’i, and a person belonging of any scheduled castes*”.

⁷⁵ Again, the term of “churches” cannot be taken literally but in the Pakistan context it can be replace by Islamic religion or even a mosque.

⁷⁶ The name of 1945 Constitution of the State of the Republic of Indonesia Indonesian Constitution refers to the date of when it was first enacted. However, from 1945 up to the present time, this Constitution has undergone several amendments. See Jimly Asshiddiqie, *The Constitutional Law of Indonesia: a Comprehensive Overview* (Selangor: Sweet & Maxwell Asia, 2009) p.58.

⁷⁷ The full text of the paragraph is “*...Indonesia’s national independence shall be enshrined in the Constitution of the state of the Republic of Indonesia, established within the structure of the state of the Republic of Indonesia with **the sovereignty of the people based upon belief in the one and only God***”..

⁷⁸ “*I swear by **God** that I shall fulfill my duties as the President of the Republic of Indonesia..*” see article 9 paragraph (1).

belief in the One and the Only God.⁷⁹ Again, this refers to “monotheism God”. Although the 1945 Constitution does not stipulate the word “Islam” and “Muslim” but from the phrase “the One and only God”, it cannot be denied that the influence of the religion is considerably heavy toward the constitution.

There are two separate chapters within the 1945 constitution which address freedom of religion under the title of “Religion” and “Human Rights”. The former chapter was the original provision of the 1945 constitution while the latter resulted from the latest amendment of the 1945 constitution following the reformation era in 1998.⁸⁰ Article 29 paragraph (2) of the 1945 constitution has stipulated that the state shall guarantee the citizen/resident to have their own religion or beliefs and manifest them freely. Additionally, article 28E also stipulate the similar content but puts religion and belief in separate provisions.⁸¹ Although article 28I underlines the character of the right of freedom of religion which cannot be limited in any circumstances, but the Constitutional Court of the Republic of Indonesia has held that the previous provision should be read in conjunction with article 28J paragraph (2). The latter article suggests the opposite that all the rights and freedoms are subject to certain restrictions. Certainly, the right of freedom of religion was included into that restrictions⁸²

Another important point is that within judicial power, there are two institutions which exercise such power namely Constitutional Court and Supreme Court.⁸³ The Supreme Court

⁷⁹ Article 29 paragraph (1).

⁸⁰ For further explanation see Denny. J Indrayana, "Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition," (PhD diss., University of Melbourne, 2005).

⁸¹ Article 28 E paragraph (1) stated that “*Every person shall be free to adhere to a religion and to worship in accordance with his/her religion*” and paragraph (2) stated “*Every person shall have the right to the freedom to hold a belief, to express his/her thought and attitude, in accordance with his/her conscience*”.

⁸² In a 5:4 Decision, Constitutional Court of the Republic of Indonesia held that the capital punishment is constitutional. One of the reasons made by the court was that the restriction of the rights and freedom in article 28J applied not only to “derogable rights” but also to “non-derogable rights”. Then, the Constitutional Court added that this was based on the “original intent” of the framers of the constitution. See Constitutional Court of the Republic of Indonesia Decision Number 2-3//PUU-V//2007 paragraph [3.24]. Unfortunately, the decision is available in Indonesian language only.

⁸³ See Article 24 paragraph (2) of the 1945 Constitution.

supervises the inferior courts including religious affairs court. The latter, even though it uses the term “religious affairs”, it solely deals with disputes which emanate from certain Islamic Law (family law and inheritance).⁸⁴ Nevertheless, in a speech delivered before the Pakistan Supreme Court Judges, the Chief Justice of The Republic of Indonesia Bagir Manan mentioned four branches of judiciatures in Indonesia under the Supreme Court were including “Islamic Courts”.⁸⁵ The “Islamic Courts” as Bagir mentioned before are actually referred to “religious affairs courts”.

Under those circumstances, it is very difficult to put Indonesia in a single model of religion state-relationship. In its constitution, there is no formal recognition to certain religion or to one religion but there is recognition of a *Monotheism God*. In addition, it is undeniable that the existence of religious affair courts gives the impression of “favoritism” to one religion namely Islam. For this reason, one might say that the relationship between religion and state in Indonesia can be classified as “intermingling model”. Technically, it can be classified as *Cooperationist regime*. Nevertheless, to some extent, it might also include in another models such as *religious status system* (since it has “religious affairs court”) or *preferred set of religions* (since it demonstrate the multi-tier recognition).⁸⁶

⁸⁴ Ibid. the term used in Indonesian language is “*Pengadilan Agama*” and when it translated literally into English it will become “Religious Court”. Since there was no official English translation of the 1945 Constitution, most of the unofficial English translation of the 1945 Constitution usually use the term “religious affairs courts.” For instances the unofficial translation provided by Ministry of State Secretariat of Republic of Indonesia website available at http://www.setneg.go.id/images/stories/kepmen/legal_product/uud_1945.pdf, or International Labor Organization (ILO) available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf. See also Clauspeter Hill and Jörg Menzel, eds., *Constitutionalism in South East Asia* (Singapore: Konrad Adenauer Stiftung, 2007) p.89.

⁸⁵ Bagir Manan, "Independence of Judiciary, Indonesian Experience" (speech, International Judicial Conference to commemorate The Fiftieth Anniversary of Supreme Court of Pakistan, Pakistan, August 11, 2006) Available at <http://www.supremecourt.gov.pk/ijc/Articles/2/10.pdf>.

⁸⁶ This model will resulted in sort of hierarchical recognition which put several traditional religions above the other beliefs. In other word, the traditional religions will have privilege from the state compare to other system of beliefs. See W. Cole Durham & Brett Scharffs, *Op. cit.* p.119

The last state is Turkey. Although the population is mostly shaped by Muslim, Turkey is considered as secular country.⁸⁷ Compared to the previous case-studies, the constitution of The Republic of Turkey (Turkey Constitution) makes no mention of God. In fact, the preamble of Turkey Constitution put very significant notion of Atatürk's role in shaping the nation.⁸⁸ What is more, the fifth paragraph of the preamble precluded "sacred religious feeling" into the public affairs and emphasized that those affairs shall be applied in line with the principle of secularism. Article 2 states that the characteristic of the Republic is secular and loyal to the nationalism of Atatürk. According to this article, the provision concerning the characteristic of the Republic is regarded as "eternal" provision. The substance of which cannot be revoked.⁸⁹ Hence, the idea of secularism is considerably strong in Turkey.

Turkish states ideology is considered as militant secularism. The constitution provides the right of freedom of religious belief and to manifest their belief.⁹⁰ In addition, the constitution also obliges the religious cultures curricula to be applied in primary and secondary schools along with the lesson of morals.⁹¹ The constitution provided for an institution called *Presidency of Religious Affair* (in Turkey *Diyanet İşleri Başkanlığı*). However, there is no further explanation concerning the functions and tasks of the aforementioned institution. According to article 1 of the Law number 633, this institution's main task is to manage the Islamic belief, worship and ethics.⁹² Moreover, it is likely the Turkish government provides

⁸⁷ According to PEW Research Center, in 2009, the population of Muslim in Turkey was 73,619,000 or 98% of the total population available at <http://www.pewforum.org/2009/10/07/mapping-the-global-Muslim-population/>.

⁸⁸ See The Preamble of the Turkish Constitution Paragraph 1. The name "Atatürk" refers to Mustafa Kemal, who was also known as the father of the modern Turkey. He was the one who came with the idea of secularization in Turkey which tried to exclude the religious life from state sphere. Sometimes, his movement was defined as *Kemalism* See Soner Cagaptay, *Islam, Secularism, and Nationalism in Modern Turkey Who is a Turk?* (New York: Routledge, 2006), pdf, p.14. See also Umut Azak, *Islam and Secularism in Turkey: Kemalism, Religion and the Nation State* (London New York: I.B.Tauris & Co Ltd, 2010), pdf, p.9.

⁸⁹ Article 4 of Turkish Constitution.

⁹⁰ Article 24 of Turkish Constitution. However, the implementation of this article should be read in conjunction with another article which give several limitation such as the national unity. In other words, the religious teaching is not prohibited as long as this not endangered national unity. See article 14.

⁹¹ Ibid.

⁹² Presidency of Religious Affair, "Basic principles and Objectives," <http://www.diyanet.gov.tr>, last modified 2013, <http://www.diyanet.gov.tr/en/category/basic-principles-and-objectives/23>. accessed May 28, 2015.

certain fund to this institution such as salaries for the various employees.⁹³ Surprisingly, the Turkish constitution also contains the prohibition to “*abuse religion or religious feelings, or things held sacred by religion...*” which is parallel with the existence of the blasphemy law.⁹⁴ Thus, this provision can be read as the protection of religious beliefs from being offended.

Hirschl has categorized Turkey as an *assertive secularism* model⁹⁵ which is similar to Durham & Scharffs’s *secular control regime* model. However, these categories emphasize the domination of the state toward religion. Thus, when the state gives certain amount of funds to religious institutions, that behavior should be read as the control of state over religion. This is very important in order to distinguish it from another model such as *cooperationist* or *accommodationist*.

Another piece of evidence of how strong the secularism in Turkey is case law of European Court of Human Rights (hereinafter ECtHR) in *Refah Partisi* (the Welfare Party) and *Others v. Turkey* (2003). Here, the Refah party complained before the ECtHR concerning its dissolution by Turkey Constitutional Court.⁹⁶ However, The Grand Chamber held that the dissolution of the Refah party did not violate the Convention.⁹⁷ The Court argued that the dissolution of Refah party by Turkey Constitutional Court was justified since *sharia* law was incompatible with the principle of secularism and democracy.⁹⁸ For some scholars, Refah party case-to some extent- was a blatant instance of how democracy can protect itself from the threat of another system (militant democracy).⁹⁹

⁹³ Ibid.

⁹⁴ Article 24.

⁹⁵ Ran Hirschl, *Op.cit.* p. 424.

⁹⁶ *Refah Partisi (the Welfare Party) and Others v. Turkey* Application no. 41340/98, 41343/98 and 41344/98 available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936#{"itemid":\["001-60936"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936#{"itemid":["001-60936"]}) Accessed in May 28, 2015. Paragraph 23.

⁹⁷ Ibid. Paragraphs 135-136.

⁹⁸ Ibid. paragraph 125.

⁹⁹ Svetlana Tyulkina, “Militant Democracy,” (PhD diss., Central European University, 2011), http://www.etd.ceu.hu/2012/tyulkina_svetlana.pdf. p.224

II.3. Constitution-making process and Constitutional designs in Pakistan, Indonesia and Turkey;

The constitution itself is a product which resulted from several processes-including the participation of public-which is called Constitution-making.¹⁰⁰ That processes certainly involves various stakeholders including political leaders and the citizens in very complex deliberations.¹⁰¹ Hence, the constitution making processes is political.¹⁰² Political in this sense means that it not only reflects the deliberation of societal values and institutions but also the power rivalry among individuals or groups.¹⁰³

As indicated in the previous chapter, the constitution describes the framework of how the state will be directed including the framework for the religion state relationship and the protection of religious freedom as well. Indeed, the constitution also plays significant role as a source of state legislation including the blasphemy law. Thus, at first, it is very important to scrutinize the constitution in the period when the current blasphemy law was enacted in order to get the sense of coherency (or incoherency) between the law and the constitution. In addition, the development of the constitution also needs to be visited to see whether there have been any changes or not.

Before the state of Pakistan was formed in 1947, it used to be British colony along with India of so called British-India.¹⁰⁴ Since the differences of political and cultural point of views, Pakistan decided to separate with India.¹⁰⁵ The most influential figure behind the separation of

¹⁰⁰ Jonathan Wheatley, "The constitution-making process: an analytical framework," in *Patterns of Constitutional Design the Role of Citizens and Elites in Constitution-Making*, ed. Jonathan Wheatley and Fernando Mendez (Burlington: Ashgate, 2013), p.7.

¹⁰¹ Ibid. p.16.

¹⁰² Yash Ghai, *The Role of Constituent Assemblies in Constitution Making*, (Sweden: International Institute for Democracy and Electoral Assistance (IDEA), 2011), accessed May 31, 2015, p.2.

¹⁰³ Ibid.

¹⁰⁴ Iftikhar H. Malik, *History of Pakistan* (London: Greenwood Press, 2008), pdf, p.1.

¹⁰⁵ India and Pakistan were used to be one colony under the British Government. Ibid. p.122.

Pakistan is Muhammad Ali Jinnah, who was also known as *Quaid-i-Azam* (great leader).¹⁰⁶ Under the flag of All-Indian Muslim League (established in 1906 in Dhaka and also known as Muslim League), Jinnah had proposed new state based on Islamic value.¹⁰⁷ In other words, Islam is the *raison d'être* of the new existing state of Pakistan.

Although Pakistan gained its independence in 1947, this new country did not have its own constitution to be applied.¹⁰⁸ Typically, newly-born states who have received their independence from their colonial power preserved the previous legal system until they establish a new one. In Pakistan's context, the India Act of 1935 was used as the temporary constitution.¹⁰⁹ The tasks to formulate the constitution and form the legislation was in the hand of Constituent Assembly.¹¹⁰ However, it took 9 years for the Constitutional Assembly to accomplish their task.¹¹¹

The composition of the Constitution Assembly was dominated by the members of Muslim League.¹¹² Hence, it was understandable that the content of the constitution was mainly driven by those members. However, inside the Assembly, the debates also took place concerning the nature of the new state.¹¹³ The members were polarized into two groups namely the traditionalist and the modernist. The former demanded that the new state shall be the Islamic state and the latter took the more moderate position by including some aspects of modern constitutions.¹¹⁴ Nonetheless, both polar were agreed that Islam would be the core of the new

¹⁰⁶ Ibid. p.130.

¹⁰⁷ Lawrence Ziring, *Pakistan: At the Crosscurrent of History* (Oxford: Oneworld Publications, 2003), pdf. p.4.

¹⁰⁸ Iftikhar H. Malik, *Op.cit.* p.130.

¹⁰⁹ Pakistan, India and Bangladesh were used to be one under British administration. Ibid.

¹¹⁰ Pakistan Constituent Assembly consisted of 69 members, elected during the British era and was projected to create the new constitution and others legal instruments. Ibid.

¹¹¹ Ibid.

¹¹² Fakhr Ul-Islam and Muhammad Iqbal, "Islamizing the Constitution of Pakistan: the Role of Maulana Maudoodi," *Al-Idah* 27 (December 2013): p. 59, accessed May 30, 2015, <http://www.szic.pk/journal/DEC2013/6.pdf>.

¹¹³ Ibid. p.59

¹¹⁴ Ibid. p.60

state. As can be seen, the influence of Islamic values is irreplaceable until the present time. In the end, these Islamic values are used to justify the existence of blasphemy law.

Blasphemy law was introduced in Pakistan by the British in 1860.¹¹⁵ These provisions were integrated within Indian penal code 1860 which was also applied for India and Bangladesh.¹¹⁶ The milieu of the enactment of the code was to contain the political unrests which were mainly driven by religious issues.¹¹⁷ At that time, the law was dedicated to serve the British in preserving its power and was not in favor of certain religion.¹¹⁸ The considerable shift happened in 1980s when General Zia –ul-Haq came into power and introduced the new blasphemy law. Unlike the previous, the content of the new blasphemy law tend to be in favor of Islam.¹¹⁹ It was proved by the using of the new formula of “*particular religious beliefs*” (Islam) to replace the term “*all religious beliefs*”.¹²⁰ In other words, the protection offered by blasphemy laws which previously address all religious belief then became narrowly exclusive to specific religion namely Islam. It is important to realize, even though there have been several constitutional changes, the blasphemy law still remains. This will be elaborated more in the next chapter.

Unlike Pakistan, the Indonesian constitution was created one day after the independence proclamation on August 18th, 1945. Prior to that, the preparation of the constitution was done several months before the Independence Day. It was Japanese who set up the establishment of body for searching of the endeavors of preparing Indonesian Independence (BPUPKI).¹²¹ This body was established by Japan as the part of their strategy

¹¹⁵ Center for Research and Security Studies, "Blasphemy Laws in Pakistan A Historical Overview," Center for Research and Security Studies (CRSS), last modified 2013, <http://crss.pk/wp-content/uploads/2010/07/Report-on-Blasphemy-Laws-.pdf>. p.8

¹¹⁶ Ibid.

¹¹⁷ Ibid. p.9

¹¹⁸ Ibid. p.10

¹¹⁹ Ibid. p.23

¹²⁰ Ibid.

¹²¹ Peter M. Marzuki, *An Introduction to Indonesian Law* (Malang: Setara Press, 2011), p.27.

to gain the support of Indonesian in facing the Allies in the World War II.¹²² Interestingly, the result of the work of this body was beyond what had been expected since it not only worked on the possibility of Indonesian independence but also drafted the constitution for the new state.¹²³ Afterwards, the body was transformed into the Indonesian preparation independence committee whose task was to take every measures towards Indonesian independence including prepare the constitution. Finally, on 18th August, 1945, the constitution was ratified. It still in force with some amendments.

During the drafting of the constitution, the framers of the Indonesian constitution agreed upon most of the content of the constitution. However, before all the members of the committee agreed, there was substantial debate concerning the philosophical ground of the state in the light of religion state relationship. As a consequences, the committee was divided into Islamist and nationalist which proposed different ideas. On one hand, the Islamist group insisted to integrate the word Islam into the constitution and was eager for the new state to implement *sharia* law for Muslim citizens.¹²⁴ On the other hand, the nationalists refused the idea and argued that such action would lead into national disintegration.¹²⁵ It was because some provinces in the eastern part of Indonesia had demanded that they would separate themselves from Indonesia if the state became Islamic.¹²⁶ Finally, Soekarno tried to compromise those polar by using more moderate term instead of Islam and Allah.¹²⁷ Thus, there is no term “Islam” in the 1945 Constitution. Nonetheless, the sense of religiosity can be identified through the term “God almighty” and “the One and only God” which reflected Islamic teaching namely *tawheed* (monotheism in Islam). Blasphemy law in Indonesia was enacted in 1965 and still

¹²² Ibid.p.28.

¹²³ Jimly Asshiddiqie, *Op.cit.* p.60.

¹²⁴ Ibid.

¹²⁵ Robert. W. Hefner, *Op.cit* p.21.

¹²⁶ Ibid.

¹²⁷ Ibid.

applies until today.¹²⁸ The law was enacted as a response of the rise of Indonesian communist party (PKI).¹²⁹ Hence, the existence of such law was under the regime of the older version of 1945 constitution before the current amendment. The law was aimed to protect the major religions in Indonesia.

Finally, this sub chapter will describe the constitution making in Turkey. Historically speaking, Turkey was recognized as one of the biggest countries in world history with the legacy of Ottoman Empire. However, the modern Turkey generally associated with the *Kemalism*.¹³⁰ As was mentioned above, *Kemalism* also means secularism. The main characteristic of this *ism* is the massive efforts to throw away the role of religion in the political life. Özbudun examined the constitution making in Turkey during the *Kemalism* era.¹³¹ He argued that the constitution making process in 1924 was not based on appropriate representatives.¹³² In addition, most of the representatives were not freely chosen.¹³³ What is more, in the 1924 Constitution, almost all the members of the legislative assembly came from Mustafa Kemal's party.¹³⁴ However, he added that the content of the constitution still represent the democratic spirit.¹³⁵ There is no blasphemy law in Turkey as such.¹³⁶ The substance of blasphemy is integrated into penal code.¹³⁷ The penal code of Turkey originally inherited from Ottoman Empire and has undergone several amendments.¹³⁸ Although the influence of

¹²⁸ Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7, no. 1 (2012): p. 3, accessed May 31, 2015, doi:10.1515/1932-0205.1391.

¹²⁹ Ibid.

¹³⁰ Andrew Mango, "Ataturk," in *The Cambridge History of Turkey: Volume 4 Turkey in the Modern World*, ed. Resat Kasaba (New York: Cambridge University Press, 2008), pdf p.67.

¹³¹ Ergun Özbudun, "Turkey's Search for a New Constitution," *Insight Turkey* 14, no. 1 (2012): xx, accessed May 31, 2015, http://file.insightturkey.com/Files/Pdf/insight_turkey_vol_14_1_2012_ozbudun.pdf.

¹³² Ibid.

¹³³ Ibid. p.40.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society*, (Italy: Council of Europe Publishing, 2010), accessed June 1, 2015, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e).

¹³⁷ Ibid.

¹³⁸ M. Yasin Aslan, "Transformation of Turkish Criminal Law from the Ottoman-Islamic Law to the Civil Law Tradition," *Ankara Bar Review* 2 (2009): p.96, accessed June 1, 2015,

Kemalism was heavily considered in the constitution making process some of the provisions provides the ground for anti-blasphemy law.¹³⁹

II.4. Conclusion

As can be seen, the religion state relationship models vary from one polar to another polar. These categories are derived from either the possibility of the religion state relationship in theoretical perspective and from experience concerning the factual condition of those relationships. However, sometimes these models seem to overlapping with one another. In addition, one state may not fit into one of the categories or even represent several characteristic part of it. Furthermore, within the Muslim majority country, the religion state relationship also vary depending on their historical background.

The constitution is mostly influenced by the constitution making processes. The composition of the framers also determines the content of the constitution. The existence of blasphemy law in the above mentioned countries resulted from different constitutional and historical background. In addition, those laws are evolving depending on certain circumstances.

¹³⁹ See article 24

Chapter III. Freedom of Religion and Blasphemy Law

Based on the report presented by Pew Research Center in 2014, there is an increasing trend concerning the religion involvement in social hostilities globally.¹⁴⁰ The report also revealed the increasing trend of government restriction on freedom of religion.¹⁴¹ Indeed, those are worrying facts in the light of freedom of religion.

Scolnicov noted that freedom of religion may seem contradiction in terms.¹⁴² On the one hand it implies the freedom or free from constrain. On the other hand, there is inherent imposition in religions which restrain the freedom. This is because religions provide system of values which apply for the life of their followers and basically constraining.¹⁴³ To some extent, those values even contradict with the value of the state. In Indonesia for example, several religious groups are eager to establish the Islamic caliphate whereas within the constitution there is an eternal provision which prohibit any amendment concerning the form of state.¹⁴⁴ This, however, has put certain states into difficult situation since it has to balance all the interests of all citizens. The special protection given by the state to certain religions will be regarded as discriminatory to other religions or beliefs. In certain circumstances, the privileges along with political and economic interests were regarded as considerable determinants in social hostilities.¹⁴⁵ Thus, it will raise the problem of equality since the right to freedom of religion require the equal treatment for individuals in the similar circumstance.

¹⁴⁰ PEW Research Center, "Religious Hostilities Reach Six-Year High," PEW Research Center, last modified January 2014, p. 7. Available at <http://www.pewforum.org/files/2014/01/RestrictionsV-full-report.pdf>.

¹⁴¹ Ibid.

¹⁴² Anat Scolnicov, *The Right to Religious Freedom in International: Between group rights and Individual rights* (New York: Routledge, 2011) p.1

¹⁴³ Ibid.

¹⁴⁴ Article 37 paragraph (5) of 1945 Constitution.

¹⁴⁵ Ahmad Ubbe, Laporan Pengkajian Hukum Tentang Mekanisme Penanganan Konflik Sosial, (Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI, 2011), p.77 accessed June 1, 2015, Available at <http://www.bphn.go.id/data/documents/pkj-2011-10.pdf>. See also Zahid Iqbal and Sumaira Lodhi, "Extremist and Religious Violence: An Economic Overview of Pakistan," *International Journal of Research in Applied, Natural and Social Sciences (IMPACT: IJRANSS)* 2, no. 11 (November 2014).

Given those points, this chapter will elaborate the protection of freedom of religion and the freedom of expression at both international and national level. The reason why freedom of expression also included in this chapter is the unavoidable overlap or even tension between freedom of religion and freedom of expression especially when it comes to manifestation of religion.¹⁴⁶ In addition, this chapter also discusses the role of Organization of Islamic Cooperation (OIC) because the three are the member of OIC.¹⁴⁷ It is essential to note that one of the aims of the current organization is to combat defamation on Islamic religion which also influences the existence of blasphemy law.¹⁴⁸ Furthermore, this chapter will examine the practice of blasphemy law in the given states.

III.1. International human rights laws and national law on freedom of religion and freedom of expression;

This sub chapter will elaborate the law concerning the freedom of religion and the freedom expression from International level to domestic level. Both freedoms are described because it has closely linked each other in the light of blasphemy law.¹⁴⁹

There are several instruments concerning the right of freedom of religion which range from International to national level. First two main instruments are related to major United Nations documents namely the United Nation Charter (hereinafter UN Charter) and the Universal Declaration of Human Rights (hereinafter UDHR). Article 1 paragraph (3) of the UN

¹⁴⁶ W. Cole Durham Jr and Brett G Scharffs, *Op.cit.* p.165.

¹⁴⁷ Organization of Islamic Cooperation , "Member states," Organization of Islamic Cooperation, last modified 2014, <http://www.oic-oci.org/oicv2/states/>

¹⁴⁸ Article 12 of OIC Charter, See Organization of Islamic Cooperation. , "OIC Charter," <http://www.oic-oci.org>, last modified 2014, http://www.oic-oci.org/oicv2/page/?p_id=53&p_ref=27&lan=en.

¹⁴⁹ Office of the High Commissioner of Human Rights , "Rapporteur's Digest on Freedom of Religion or Belief Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications," <http://www.ohchr.org/>, last modified 2011, p.89. Available at <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>. See Also The WAHID Institute , "Lampu Merah Kebebasan Beragama Laporan Kebebasan Beragama dan Toleransi di Indonesia 2011," <http://wahidinstitute.org/>, last modified 2011, p.14-18. Available at <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>.

Charter emphasizes the non-discrimination principle.¹⁵⁰ In that article, religion is one of the decisive factors of such principle to achieve global cooperation, solving the various international problems, and respecting for human rights.¹⁵¹

Different from the UN Charter, UDHR explicitly stated in article 18 that everyone has the right to:

*“freedom of thought, conscience, and religions; 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”.*¹⁵²

Saudi Arabia refused to vote since the phrase *“freedom to change his religion or belief”* regarded as incompatible with the teaching of Islam.¹⁵³ As the member of UN, Pakistan, Indonesia and Turkey are bound by this declaration. As a matter of fact, Pakistan and Turkey were included in the states who voted in favor of declaration.¹⁵⁴

Subsequently, the right to freedom of religion also can be found in international human rights treaty law. There are two major covenants namely the International Covenant on Civil and Political Rights (hereinafter ICCPR) and International Covenant on Economic Social and Cultural Rights (hereinafter ICESCR). However, the analysis will be heavily focused on the former since it clearly stipulate such right. In general, both Covenants underlined the non-discrimination principles including to religion.¹⁵⁵ In addition, ICCPR explicitly stated that

¹⁵⁰ See article 1 paragraph (3) of United Nations , "Charter of United Nations," <http://www.un.org/>, accessed June 2, 2015, <http://www.un.org/en/documents/charter/chapter1.shtml>

¹⁵¹ Ibid. See also Anat Scolnicov, "Freedom of Religion or Belief: Group Right or Individual Right?" (PhD diss., London School of Economics, 2005), p. 16-32 <http://etheses.lse.ac.uk/1925/1/U222042.pdf>.

¹⁵²(emphasis given) The United Nations, "the Universal Declaration of Human Rights," <http://www.un.org/>, accessed June 2, 2015, <http://www.un.org/en/documents/udhr/>.

¹⁵³ Anat Scolnicov, "Freedom of Religion or Belief: Group Right or Individual Right?" (PhD diss., London School of Economics, 2005), Op. cit. p.20. Interestingly, Pakistan was considered as one of the Islamic state but it also voted for the declaration See United Nations , *Yearbook of the United Nations 1948–1949* (United Nations, 20), p. 535, https://web.archive.org/web/20130927221000/http://unyearbook.un.org/1948-49YUN/1948-49_P1_CH5.pdf.

¹⁵⁴ See United Nations, *Yearbook of the United Nations 1948–1949* (United Nations, 20), p. 535, https://web.archive.org/web/20130927221000/http://unyearbook.un.org/1948-49YUN/1948-49_P1_CH5.pdf.

¹⁵⁵ See Article 2 (1) of ICCPR and article 2 Paragraph (2) of ICESCR. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> and <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

everyone has the right to freedom of thought, conscience, and religion.¹⁵⁶ Different from the UDHR, the phrase of “*freedom to change religion*” was wiped out from the ICCPR provision. The full version of the article is:

*“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.”*¹⁵⁷

It is likely that the disappearing of the phrase related to the objection of some countries as Saudi Arabia has shown. Nevertheless, according to the General comments 22 the right to change the religion also included.¹⁵⁸ In addition, the general comment also distinguishes the characteristic of the freedom of religion.¹⁵⁹ It distinguishes between the freedom of thought, conscience, and religion from the freedom of manifestation of the previous. According to the general comment, the freedom of thought, conscience, and religion classified as non-derogable right.¹⁶⁰ Paragraph 3 of the general comments also linked the freedom of thought, conscience and religion with article 19 of the ICCPR which stipulates the right to hold opinion without interference.¹⁶¹ Finally, the provision also put the justified limitation on the manifestation of the religions or beliefs.¹⁶²

ICESCR give a little portion concerning the freedom of religion. In ICESCR, right of the parent or legal guardian to choose their children’s educational institution based on their conformity is granted.¹⁶³

¹⁵⁶ Article 18 of ICCPR.

¹⁵⁷ Ibid.

¹⁵⁸ Generally speaking, general comment is regarded as authoritative interpretation of the convention, See general comment number 22 paragraph (5) Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

¹⁵⁹ Ibid, Paragraph (3) the former refers to *forum internum* and the latter refers to *forum externum*.

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Article 18 of ICCPR.

¹⁶³ Article 13 paragraph (3) of ICESCR.

In 1981, the General Assembly of UN had produced the resolution regarding the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (hereinafter The Resolution or the Declaration).¹⁶⁴ Compared to UDHR and ICCPR, the resolution describes more detailed content related to freedom of religion.

It is essential to note that the declaration has no binding effect. However, within the declaration, there is a huge moral sense contained.¹⁶⁵ Although some of the content of the declaration might not bind, the non-discrimination principle -as stated in the declaration- is protected under customary law.¹⁶⁶

In the regional context, it is important to put European Convention of Human Rights (hereinafter EHCR or The Convention) since Turkey is bound with the Convention. Within the Convention, the freedom of religion is stipulated in article 9.¹⁶⁷ The formulation of the article is similar to article 18 of UDHR. In addition, there are several conditions under which the limitation of religion manifestation can be applied namely prescribed by law; necessary in a democratic society; protection of public order: health and morals; and for the protection of freedom of others.¹⁶⁸ In some cases, freedom of religion has intertwined with freedom of expression. One of possibilities is that an individual or groups in the way they manifest their religion violates rights of others. Another possibility is that individual or groups may infringe the right of the freedom of religion possessed by the religious believers.¹⁶⁹

¹⁶⁴ General Assembly of United Nations, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief A/RES/36/55*, (un.org, 1981), accessed June 3, 2015, <http://www.un.org/documents/ga/res/36/a36r055.htm>.

¹⁶⁵ Derek H. Davis, "The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," *BYU Law Review* 2, no. 2 (2002): p.230, accessed June 3, 2015, <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2109&context=lawreview>.

¹⁶⁶ Anat Scolnicov, *Op. cit.* p.25.

¹⁶⁷ ECHR article 9, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed June 3, 2015.

¹⁶⁸ *Ibid.* paragraph 2.

¹⁶⁹ W. Cole Durham and Brett G. Scharffs, *Op.cit.* p.185.

The freedom of expression also has strong legal basis within international legal instruments. However, briefly, this paragraph will describe the most important one. Article 19 of UDHR stipulated the right to freedom of expression and opinion including the freedom to seek and receive information.¹⁷⁰ In addition, the freedom of expression and opinion is also stated in the article 19 of ICCPR. Essentially, both articles 19 of UDHR and ICCPR contain the similar idea. The slight differences are only in the media of expression and opinion and also the components of limitation. Article 19 of UDHR only mention that the freedom of expression and opinion can use “any media”, whereas article 19 of ICCPR gives more elaboration to express the rights whether orally, writing, printing, or through art.¹⁷¹ Concerning the limitation of the right, UDHR has several components namely “determined by law”, to secure and “protect rights and freedoms of others”, “morality”, “public order” and “general welfare of democratic society”.¹⁷² While in ICCPR the components are determined by law”, to secure and “protect rights and freedoms of others”, “morality”, “public order” and “public health.”¹⁷³ General comments number 34 provides more detailed information regarding freedom of expression and opinion. First paragraph of the comment stated that “freedom of opinion and expression are essential in any society”.¹⁷⁴ In addition, freedom of opinion and freedom of expression covers several forms of expressions including expression which may regarded as *deeply offensive*.¹⁷⁵ The responsibility of the state party to ensure the protection of those rights shall be guaranteed by incorporating human rights law into domestic level.¹⁷⁶ Furthermore, according to Camden principle, public officials “as far as possible to avoid making statement

¹⁷⁰ UDHR article 19

¹⁷¹ ICCPR article 19.

¹⁷² Ibid.

¹⁷³ UDHR Article 29 paragraph 2.

¹⁷⁴ General comments number 34 paragraph 1, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

¹⁷⁵ (emphasis added) Ibid, paragraph 11

¹⁷⁶ Ibid, paragraph 7-8 See also principle 1 of Camden principles on freedom of expression and equality. Available at <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

that promote discrimination”¹⁷⁷ and also “combating negative stereotyping against individuals or groups”.¹⁷⁸ Scope of the responsibility should cover all branches of the states namely executive, legislative, and judicial.¹⁷⁹ Nevertheless, in the light of this thesis, the most relevant issue in the general comments is the prohibition of blasphemy law.¹⁸⁰ Thus, the existence of blasphemy law remain problematic.

The protection of freedom of expression also can be found in the regional level. ECHR include this protection in the article 10 and it still developing through the case law in European Court of Human Rights (ECtHR).¹⁸¹ From the case law, the scope of information and ideas not only limited to the inoffensive or favorably received but also the shocking, offensive and disturbing.¹⁸² Hence, every restrictions and sanctions imposed in the given situation should be proportional.¹⁸³ In this context, Turkey is bound by this convention.

In the national level, the protection of the freedom of religion and the freedom of expression were stipulated either in the constitution and certain laws. In Pakistan, the guarantee of the right to freedom of religion and freedom of expression can be found in the constitution. The preamble of the constitution stated that those rights regarded as fundamental rights.¹⁸⁴ Right to freedom of religion stipulated in article 20 and the right to freedom of expression is guarantee in article 19.¹⁸⁵ It is likely the freedom of religion has special place in the Pakistan constitution compared to freedom of expression. At least, it can be seen from the limitation of those rights. The restriction upon freedom of expression is tighter than freedom of religion.

¹⁷⁷ Principle 8.1 of Camden principles on freedom of expression and equality. Available at <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

¹⁷⁸ Ibid, 8.2

¹⁷⁹ Ibid, paragraph 7

¹⁸⁰ Ibid, paragraph 48

¹⁸¹ ECHR Article 10. *Op.cit.*

¹⁸² *Handyside v. the United Kingdom* judgment of 7 December 1976, § 49

¹⁸³ *ibid*

¹⁸⁴ Preamble of Pakistan Constitution, paragraph 6.

¹⁸⁵ Article 19 and 20 of Pakistan Constitution.

The Pakistan constitution stated that the freedom of religion is subject to law, order, and morality.¹⁸⁶ Concerning the freedom of expression, constitution stated that such freedom is the subject to “*..any reasonable restriction imposed by law in the interest of the glory of Islam or integrity, security or defense of Pakistan, ..public order, decency or morality, and in relation to contempt of court*”.¹⁸⁷ Even though Pakistan has Human Rights Commission (HRCP), but it has no specific act regarding the human rights. In addition, HRCP has no competence to hear and decide the cases.

Unlike Pakistan, there is no phrase of freedom of expression and freedom of opinion in the preamble of 1945 constitution of Indonesia. The formulation of those rights is stipulated in the different provisions in the 1945 constitution. Article 28 E, 28I and 29 provide protection of the freedom of religion. In addition, there is emphasizing in article 28 I that freedom of religion is “non-derogable” right. The guarantee of freedom of expression is stipulated in article 28 and 28E paragraph 3.¹⁸⁸ The protection of such rights also provided by Law number 39/1999 concerning Human rights.¹⁸⁹ In Turkey constitution, the protection of freedom of religion and freedom of expression are stipulated consecutively in article 24 and 25. As was mentioned above, within the same article of the freedom of religion, namely article 24, there is anti-blasphemy substance as well.¹⁹⁰

To sum up, the guarantee of the freedom of religion and the right of freedom of expression is multileveled from international to national level. Furthermore, those provisions not only guarantee individual rights but also burdening the Government with responsibilities.

¹⁸⁶ Article 20. Ibid.

¹⁸⁷ Article 19. Ibid.

¹⁸⁸ Article 28, 28E, of 1945 Constitution.

¹⁸⁹ Article 25 and 29 of Law number 39/1999 concerning Human Rights, for unofficial translation available at <http://www.hsph.harvard.edu/population/womenrights/indonesia.women.99.doc>.

¹⁹⁰ Article 24 of Turkish Constitution.

III.2. Role of Organization of Islamic Conference (OIC)

Pakistan, Indonesia and Turkey are members of OIC.¹⁹¹ In general, the main idea of the establishment of the OIC is to have cooperation among the Muslim and protect the interests of Islam.¹⁹² The idea of OIC can be traced back to the idea of the unity of Muslim under the Caliphate.¹⁹³ In addition, OIC establishment also can be read as a response of Islam to the modernity.¹⁹⁴ To some extent, modernity had made some Muslims to feel insecure, alienated, and dispossessed.¹⁹⁵ Nevertheless, the most significant trigger was the attack on Al Aqsa mosque in 1969.¹⁹⁶ The attack of the mosque had raised the solidarity among Muslim states.

From the institutional perspective, OIC regarded as a “problematic” international organization.¹⁹⁷ At least, there are two weaknesses which can be found concerning the institutional arrangement of OIC namely the membership and the absence of rule-enforcing body.¹⁹⁸ There was no clarity regarding the criterion of membership and that makes sovereignty of the state members still to be the main feature.¹⁹⁹

However, the considerable role of OIC mainly concern with their consistent effort in advocating “defamation of religion” at international level. The “defamation of religion” as a

¹⁹¹ Up to now, there are 57 members of States in OIC. Available at <http://www.oic-oci.org/oicv2/states/>

¹⁹² Article 1, OIC Charter Available at http://www.oic-oci.org/oicv2/page/?p_id=53&p_ref=27&lan=en.

¹⁹³ Gokhan Bacik, "The Genesis, History, and Functioning of the Organization of Islamic Cooperation (OIC): A Formal-Institutional Analysis," *Journal of Muslim Minority Affairs* 31, no. 4 (December 2011): p.98, accessed June 3, 2015, doi:10.1080/13602004.2011.630864.

¹⁹⁴ Ibrahim Kalin, "OIC: A Voice for the Muslim World"? *International Institute for the Study of Islam in the Modern World (ISIM Review)* 17 (Spring 2005): p.36. Accessed June 4, 2015, https://openaccess.leidenuniv.nl/bitstream/handle/1887/17056/ISIM_17_OIC_A_Voice_for_the_Muslim_World.pdf?sequence=1.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid. p.599

¹⁹⁷ Ibid. p.604

¹⁹⁸ Ibid. p.601.

¹⁹⁹ Not until 2008, the criterions of the membership of the states were obscure. Thus, the membership of OIC was so flexible so that one can find that several members of the OIC were not Islamic state or at least Muslim majority state. What is more, the effectiveness of OIC was also criticized since there was no rule-enforcing body and there was strong nationhood among the members. Ibid. p.596

concept was introduced by Pakistan as the representative of OIC in 1999.²⁰⁰ The first draft of the endorsed resolution used the title of defamation of Islam instead of defamation of religion.²⁰¹ This resolution was submitted by Pakistan to United Nations Commission on Human Rights (this Commission was replaced by United Nations Human Rights Council in 2006) as a response to Muslims feeling which frequently associated with terrorism and violation of human rights.²⁰² Finally, United Nations Commission on Human Rights (and its successor) has passed several resolutions regarding combating defamation of religion.²⁰³ Although the resolutions have no binding force, but those would give moral incentive to its supporters globally.

There was an evolution regarding the content of the resolutions. As have been mentioned before, it was initiated by Pakistan with strong emphasis on the protection on Islam. Nevertheless, it was slowly evolved into broader and more general scope of protection of religion. In 2000, the title of the resolution draft was changed from “defamation of Islam” to “defamation of religion”. Finally, from 2002 the title of resolution has been changed into “combating defamation of religion”.²⁰⁴ After September 11, the member states of OIC got the momentum and were actively involved in the movement to combat of what so called “Islamophobia”.²⁰⁵ Islamophobia is a term to describe the discriminatory treatment which

²⁰⁰ See Sejal Parmar, *Op.cit.* p.2, See also Brett Scharffs *Op.cit.* p 67. See also United Nations, "Commission on Human Rights Report on The Fifty-Fifth Session: Economic and Social Council Official Records, 1999," p.308. <http://www.un.org/>, last modified April 30, 1999, <http://www.un.org/en/terrorism/pdfs/2/G9914457.pdf>.

²⁰¹ Allison G. Belnap, "Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights," *BYU Law Review* 2010, no. 2 (2010): p.635, accessed June 3, 2015, <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2521&context=lawreview>.

²⁰² Ibid.

²⁰³ G.A. Res. 7/19, Combating Defamation of Religions, U.N. Doc. A/RES/7/19 (Mar. 27, 2008); U.N. Human Rights Council Decision 1/107, Incitement to Racial and Religious Hatred and the Promotion of Tolerance, U.N. Doc. A/HRC/DEC/1/107 (Nov. 13, 2006).

²⁰⁴ Julia Alfandari, Jo Baker, and Regula Atteya, "Defamation of Religions: International Developments and Challenges on the Ground," <http://www.jobakeronline.com>, last modified January 2011, <http://www.jobakeronline.com/wp-content/uploads/2011/03/Defamation-of-Religions-2011-Alfandari-Baker-Atteya.pdf>. p.7

²⁰⁵ Ibid. p.5

directed to Muslims.²⁰⁶ Having said that, the resolutions which have been produced was mainly focus on Islam or Islamophobia.²⁰⁷

It is important to note that the OIC movement also invites the criticisms from other states especially from Western Europe and Northern America regions.²⁰⁸ One of the criticisms was the use of language regarding “defamation of religion” which was regarded as vague term.²⁰⁹ Another criticism was the content of the resolution which was regarded too “Islam-minded”.²¹⁰ Indeed, within the plural society, it is uneasy to accept this idea. In addition, the practice of law concerning the “defamation of religion” is only in favor of the established religion and not for the minorities.²¹¹ Furthermore, from the freedom of expression point of view, this idea will results the “chilling effect” especially when it comes to criticism toward the religion. Thus, one might worry that the idea of “defamation of religion” to be the norm of international blasphemy law.²¹² However, there is an alternative opinion which argue that the implementation of the defamation shall be contextual depend on particular circumstances and cannot be insisted universally.²¹³ But still, it has to be compatible with the principles of democracy.²¹⁴

²⁰⁶ Allison G. Belnap, "Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights," *Op.cit.* p.635

²⁰⁷ Ibid.

²⁰⁸ Julia Alfandari, Jo Baker, and Regula Atteya, "Defamation of Religions: International Developments and Challenges on the Ground," *Op. cit.* p.6

²⁰⁹ See Allison G. Belnap, *Op. cit.* p.635. See also Julia Alfandari, *Op.cit.* p.11. Parmar use “lack of definition” instead of “vague”, See Parmar, *Op. cit.* p.3

²¹⁰ Ibid.

²¹¹ The U.S. Commission on International Religious Freedom, *The Dangerous Idea of Protecting Religions from “Defamation”: A Threat to Universal Human Rights Standards*, (The U.S. Commission on International Religious Freedom, 2009), p.2, accessed June 4, 2015, <http://www.uscifr.gov/reports-briefs/policy-briefs-and-focuses/defamation-religion-policy-focus-fall-2010-update>.

²¹² Ibid, see also Brett Scharffs, *Op.cit.* p.69

²¹³ Nicole McLaughlin, "Spectrum of Defamation of Religion Laws and the Possibility of a Universal International Standard," *Loyola of Los Angeles International and Comparative Law Review* 32, no. 3 (2010): p.425, accessed June 3, 2015, <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1013&context=ilr>.

²¹⁴ Ibid.

III.3. Practice of blasphemy law

Blasphemy law in Pakistan is incorporated in Pakistan penal code (hereinafter PPC). It was originated from Indian penal code which was made by British colonial and directed to be used in India.²¹⁵ The law covered certain countries which in this modern day called India, Pakistan and Bangladesh.²¹⁶ Originally, the content of the law was neutral in the sense that it was applied to all religion without any preference to certain religion.²¹⁷ Indeed, it can be seen from the using of language. The blasphemy law used the term “religion” only, without added any certain religions after that. As was mentioned in the previous chapter, the aim of the law was to establish the order of the colony from huge potential of social unrest in southern Asia.²¹⁸ In 1920 the situation was even worse that made the British added several stricter law.²¹⁹ After gained the independence, Pakistan still using the penal code instead of change it.²²⁰

Historically, the practice of blasphemy law in Pakistan can be divided into two era namely before and after the General Zia-ul-Haq’s regime. General Zia-ul-Haq was the sixth president of Pakistan who came from military background. He gained his power through a *coup* against Zulfikar Ali Bhutto.²²¹ In addition, he was associated with the Islamic movement.²²² Before General Haq’s regime, there were only 8 cases of blasphemy.²²³ The interesting thing was that all the cases involved either Muslim against another Muslim or non-Muslim against

²¹⁵ Pakistan and India used to be part of India and they had similar penal code namely Indian Penal Code 1860. See Center for Research and Security Studies, "Blasphemy Laws in Pakistan a Historical Overview," Center for Research and Security Studies (CRSS), p.10, last modified 2013, <http://crss.pk/wp-content/uploads/2010/07/Report-on-Blasphemy-Laws-.pdf>.

²¹⁶ Ibid.

²¹⁷ Ibid

²¹⁸ Ibid

²¹⁹ Ibid

²²⁰ Ibid p.15

²²¹ Iftikhar H. Malik, *History of Pakistan* (London: Greenwood Press, 2008), pdf, p.168-169

²²² Ibid.

²²³ Center for Research and Security Studies, "Blasphemy Laws in Pakistan A Historical Overview," Center for Research and Security Studies (CRSS), Ibid.

Muslim.²²⁴ When General Zia-ul-Haq was in power, he exercised the policy of “Islamization” including in the criminal law.²²⁵ He introduced the new blasphemy law which included the term Islam and holy figure of Islam, Qur’an and Muhammad as the sacred elements which were not allowed to be blasphemed.²²⁶ Interestingly, this was not apply for holy figure from another religions.²²⁷ In addition, there was no remedies for the blasphemous action which was done towards non-Muslim.²²⁸ It was not surprising when during his regime, there were 80 cases of blasphemy had been reported.²²⁹ Several articles were inserted to PPC namely article 295B, 295C, 298A, B, C. Basically, those articles are meant to protect Islam as religion than the individual followers. Here are the full articles:²³⁰

295-B: Whoever willfully defiles damages or desecrates a copy of the Holy Qur’an or of an extract there from or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

295-C: Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to a fine.

298-A: Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulaf-e-Raashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

298-B: (1) Any person of the Qadiani group or the Lahori Group (who call themselves ‘Ahmadis’ or by any other name) who by words, either spoken or written, or by visible representation, (a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (PBUH), as ‘Ameerul-Mumineen,’ ‘Khalifa-tul-Muslimeen,’ ‘Sahaabi’ or ‘Razi Alah Anho’; (b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as ‘Ummul-Mumineen’; (c) refers to, or addresses, any person, other than a member of the family (Ahlebait) of the Holy Prophet Muhammad (peace be upon him) as Ahle-bait; or (d) refers to, or names, or calls, his place of worship as ‘Masjid’; ... shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Qadiani group or Lahori group (who call themselves ‘Ahmadis’ or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as ‘Azan’, or recites Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

²²⁴ Ibid

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Ibid

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Unofficial translation of Pakistan Penal Code, last modified 1860, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46816797.pdf>.

298-C: Any person of the Qadiani group or Lahori group (who call themselves 'Ahmadis' or by another name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representation, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

As can be seen, the articles were set up not only to protect Islam but also to protect sacred figures in Islam including Prophet Muhammad, his family, and his friends (*sahabah*). In addition, the law also excludes the Ahmadis from Islam. What is more, there will be harsh punishments if certain provisions are violated. For example, Article 295B will give life imprisonment sentence to individuals who are “willfully defiles damages or desecrates a copy of the Holy Qur’an”. The maximum sentence for insulting Prophet is even worse, namely death.²³¹

Among the three states, Pakistan regarded as the harshest. In 2014, USCIRF reported the massive violence which were related to religion.²³² According to the report, from 2013 to 2014 there had been 122 incidents based on sectarian which resulted in 430 deaths.²³³ This was including the assassination of Rashid Rehman, a human rights lawyer, who was defending an individual in the case of blasphemy.²³⁴ Prior to that, Center for Research and Security Studies had studied the blasphemy case from 1953 to 2012. The research revealed the numbers of offenders during that period were 434.²³⁵ This study also cited the other finding which shown that up to 2012 the numbers of blasphemy cases were 1,058.²³⁶ In addition, 17 individuals are in a death row and 19 of others are serving lifetime sentence (part of other 38 inmates).²³⁷ In 2010 there was shocking case related to blasphemy. Aasia Bibi, a Christian woman was

²³¹ Article 295C. Ibid.

²³² United States Commission on International Religious Freedom, *Pakistan Factsheet*, (Washington DC: United States Commission on International Religious Freedom, 2014), accessed June 5, 2015, <http://www.uscifr.gov/sites/default/files/Pakistan%20Factsheet.pdf>. p.1

²³³ Ibid

²³⁴ Ibid.

²³⁵ Center for Research and Security Studies, Op. cit. p.51

²³⁶ Ibid.

²³⁷ USCIRF, *Annual Report*, (USA: United States Commission on International Religious Freedom, 2014), <http://www.uscifr.gov/sites/default/files/Pakistan%202014.pdf>. p.76

sentenced to death by Lahore High Court after being reported by her neighbor on blasphemy.²³⁸ Afterwards, the story continued with the assassination of Punjab Governor, Salman Taseer, by his own bodyguard since he supported Aaisa Bibi to be released.²³⁹ Thus, from the U.S point of view Pakistan regarded as country of particular concern (CPC).²⁴⁰ Even though the numbers of the accused are mostly Muslim, but when it compare to the percentage of the population, then the numbers of the accused from the minority side were extremely high. According to the report, one of the causes of the high number of blasphemy cases was the content of the law itself.²⁴¹ The law has put the religions in unequal position by placing certain denomination²⁴² of Islam as the highest religion so that it deserved to be specially protected. Indeed, it potentially threatens the minorities. In addition, in the blasphemy case, the strength of the evidence is not fully considered and sometimes the law was misused to solve the civil problems, community rivalries and politics as well.²⁴³ This was confirmed by the Chairman of Pakistan Ulema Council, Hafiz Ashrafi, who said that most cases-of 1500- were about “personal case” not about blasphemy.²⁴⁴

Pakistan has acceded ICCPR in 2010.²⁴⁵ However, along with the accession, Pakistan also made reservation to several articles of the ICCPR which seem problematic.²⁴⁶ The statements of reservation only emphasize the right of Pakistan to make reservation upon ICCPR. The full statement is “*The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in*

²³⁸ Ibid.

²³⁹ <http://www.bbc.com/news/world-south-asia-12111831>, Accessed January 20, 2015

²⁴⁰ Pakistan classified as CPC from 2002. CPC means that such country involved in the severe violations concerning the freedom of religion. See USCIRF, *Annual Report*, (USA: United States Commission on International Religious Freedom, 2014), *Op.cit.*

²⁴¹ Ibid.

²⁴² In this context, Ahmadi regarded as non-Islam.

²⁴³ Center for Research and Security Studies, *Op. cit.* p.7

²⁴⁴ Hafiz Ashrafi, in the interview with Al Jazeera, "Al-Jazeera 101 East: Murder in God's Name," *Youtube*, April 3, 2013, min. 17. Accessed June 14, 2015, https://www.youtube.com/watch?v=4oYJO1wK_Ys.

²⁴⁵ <http://indicators.ohchr.org/>

²⁴⁶ The United Nations, "United Nations Treaty Collection," <https://treaties.un.org>, last modified June 13, 2015, https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en#EndDec.

*respect of various provisions of the Covenant at the time of ratification.*²⁴⁷ Pakistan has made the reservation for articles 3, 6, 7, 12, 13, 18, 19 and 25 of the ICCPR.²⁴⁸ In addition, Pakistan also refused the periodic reporting as stipulated in article 40.²⁴⁹ Hence, several countries objected with the Pakistan reservations upon such articles in ICCPR.²⁵⁰ Essentially, Pakistan's reservation was mainly because of the compatibility of such articles with Pakistan constitution.²⁵¹ In other words, the reserved articles were incompatible with Pakistan Islamic constitution including article 18 and 19.

From the perspective of law of treaty, it is unacceptable because the reservations which have been made by Pakistan were incompatible with the aim and the object of ICCPR namely to promote universal respect of human rights and freedoms.²⁵² Nonetheless, based on the communication received by the Secretary General of United Nations, in 2011 Pakistan had withdrawn the reservations so that the ICCPR was fully applied.²⁵³ Although the reservations have been withdrawn, in fact, the blasphemy law still applies effectively. Thus, it can be said that the main problem concerning blasphemy law in Pakistan is the compatibility of Pakistan Islamic constitution with the standard given by ICCPR. In Pakistan, Islamic values will be the main consideration which tends to be problematic because paragraph 8 of General comments number 22 has suggested that the sources of moral should be derived from difference religious views not only from particular religion.²⁵⁴ However, from the perspective of Pakistan

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ At least, there are 24 states objected with Pakistan reservation including Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, and so forth, See https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en#EndDec.

²⁵¹ Ibid

²⁵² See article 19.c of Vienna Convention of Law of Treaties 1969, Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

²⁵³ Ibid

²⁵⁴ Paragraph 8 General comments 22, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en

constitutional law, even though the blasphemy law is not compatible with international human rights, but it is compatible with the Constitution of Islamic State of Pakistan.

Compare to Pakistan, blasphemy law in Indonesia has several distinctive features. Blasphemy law in Indonesia was unprecedented. In other words, the law was not inherited from the former colonialist but it was passed 24 years after the Independence in 1945. In addition, it was derived from Presidential decree namely “*Penetapan Presiden Republik Indonesia Nomor 1/PNPS Tahun 1965 Tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama.*”²⁵⁵ The enactment process was unusual because the law should be enacted by parliament not by President. It is important to note that at that time, Indonesia was under President Soekarno who came with his authoritarian style of leadership.²⁵⁶ In order to disguise the authoritarian character of his regime, he named his regime as “guided democracy”.²⁵⁷ Nonetheless, the presidential decree was transformed into Law in 1969 namely Law Number 5 of 1969.²⁵⁸ Political setting of the enactment was heavily influenced by the rise of Indonesian Communist Party (PKI).²⁵⁹ In fact, the blasphemy law was an attempt to prevent the massive influence of PKI and harmonize the other elements of the nation namely the nationalist and the religious group.²⁶⁰

The structure of the law was consists of two parts namely the provisions and the elucidation. Furthermore, there were only 5 articles. The content of prohibitions of blasphemy

²⁵⁵ It can be translated as Presidential Decree No 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion. Available in Indonesia only and can be accessed in the official website of the Ministry of Religious Affairs at <http://www.kemenag.go.id/file/dokumen/UU1PNPS65.pdf>

²⁵⁶ Adrian Vickers, *A History of Modern Indonesia* (Melbourne: Cambridge University Press, 2005), pdf, p. 144.

²⁵⁷ Ibid.

²⁵⁸ M. Atho Mudzhar, "Pengaturan Kebebasan Beragama dan Penodaan Agama di Indonesia dan Berbagai Negara" (Ministry of Law and Human Rights, Padang, June 28, 2010). p.2.

²⁵⁹ Uli Parulian Sihombing et.al., *Menggugat BAKORPAKEM Kajian Hukum Terhadap Pengawasan Agama dan Kepercayaan di Indonesia* (Jakarta: The Indonesian Legal Resource Center (ILRC), 2008), pdf, p.41

²⁶⁰ Ibid.

was stated in article **156a** which was also unusual. Article 156 had ordered the insertion of the latter article into the criminal code. Article 156a stated:²⁶¹

A person who deliberately and publicly expresses feelings or behaves in a manner that:
a. involves hatred, misuse, or **insulting of a religion** followed in Indonesia, and
b. has the intention that a person should not practice any religion at all that is based on Belief in Almighty God, shall be sentenced to a maximum of five years jail

What is more, article 1 described the prohibition of deviation from the orthodox religious teaching which is also can be read as the effort to protect the existing major religions. According to the elucidation of the law, there were 6 major religion recognized by the state including Islam, Catholic, Protestant, Hindu, Buddha and *Khonghucu* (Confucianism).²⁶² Nevertheless another religions such as Taoism, Jews and Shinto has the similar rights but less favorable.²⁶³ Hence, in this context it is likely Indonesia falls into Cole & Scharffs's category namely *preferred set of religions* state which applies *multi-tier* recognition. In addition, the substance related to blasphemy also can be found in the Law number 11 of 2008 concerning Electronic Information and Transaction (ITE Law).²⁶⁴ Article 28 paragraph (2) stated “*Any Person who knowingly and without authority disseminates information aimed at inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and intergroup (SARA).*” This article often used by the police to charged individuals on the basis of blasphemy.

²⁶¹ Presidential Decree No 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion

²⁶² Elucidation of article 1 Presidential Decree No 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion.

²⁶³ Ibid

²⁶⁴ Law number 11 of 2008 concerning for Indonesian version Available at Ministry of Communication and Information website https://jdih.kominfo.go.id/produk_hukum/view/id/167/t/undangundang+nomor+11+tahun+2008+tanggal+21+april++2008, for Unofficial translation Available at <http://www.bu.edu/bucflp/files/2012/01/Law-No.-11-Concerning-Electronic-Information-and-Transactions.pdf> Accessed June 6, 2015.

According to USCIRF annual report in 2014, more than 120 individuals were involved in the blasphemy case since 2003.²⁶⁵ This number, however, is still growing. In 2015, along with the massive use of social media, several individuals were also charged under the ITE Law.²⁶⁶ Another data concerning the practice of blasphemy law comes from Amnesty International (AI). According to AI, from 2005-2014 there were 39 individuals who have been punished because of blasphemy.²⁶⁷ Again, the individuals belong to religious minorities were the most convicted.²⁶⁸ In contrast, official report from the Ministry of Religious Affairs in 2013 has mentioned nothing concerning the issue of blasphemy law.²⁶⁹ One of the leading cases was the Tajul Muluk case in 2012.²⁷⁰ Tajul was the leader of Shi'a sect in the East Java province.²⁷¹ In 2011, he and his followers had to leave his village because hundreds of people had attacked their houses.²⁷² Afterwards, he was convicted for blasphemy under Law number 1 PNPS/1965 and been sentenced for 2 years imprisonment.²⁷³ In the court of appeal, his sentence was added for another 2 years so that his final sentence was 4 years.²⁷⁴ His lawyer team tried to bring the case before the Supreme Court but it had been rejected.²⁷⁵ At the surface, the case was seen to be religious tension between *shi'a* and *sunni* as such.²⁷⁶ However, the facts of the case was

²⁶⁵ The United States Commission on International Religious Freedom, *Annual Report 2014*, (Washington D.C: United States Commission on International Religious Freedom, 2014), accessed June 6, 2015, <http://www.uscifr.gov/sites/default/files/Indonesia%202014.pdf>.

²⁶⁶ The United States Commission on International Religious Freedom, *Annual Report Indonesia 2015*, (Washington DC: United States Commission on International Religious Freedom, 2015), accessed June 6, 2015, <http://www.uscifr.gov/sites/default/files/Pakistan%20Factsheet.pdf>.

²⁶⁷ Amnesty International, *Prosecuting Beliefs: Indonesia's Blasphemy Laws*, (London: Amnesty International Ltd, 2014), p.33 accessed June 5, 2015, <https://www.amnesty.org/en/documents/asa21/018/2014/en/>.

²⁶⁸ Ibid. Religious minorities in this sense not only limited to other religion but also within one religion.

²⁶⁹ Ministry of Religious Affairs, *Laporan Tahunan Kehidupan Keagamaan di Indonesia Tahun 2013*, (Jakarta: Puslitbang Kehidupan Keagamaan Badan Litbang dan Diklat Kementerian Agama RI 2014, 2013).

²⁷⁰ Verdict Of Pengadilan Negeri Sampang Number: 69/Pid.B/2012/PN.Spg

²⁷¹ Amnesty International, *Prosecuting Beliefs: Indonesia's Blasphemy Laws*, (London: Amnesty International Ltd, 2014), p.18 accessed June 5, 2015, <https://www.amnesty.org/en/documents/asa21/018/2014/en/>.

²⁷² Ibid. See also The WAHID Institute, "Lampu Merah Kebebasan Beragama Laporan Kebebasan Beragama dan Toleransi di Indonesia 2011," <http://wahidinstitute.org/>, last modified 2011, annex.

²⁷³ Ibid

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ *Shi'a* (Shi'i) and *Sunni* are the two of three major groups in Islam. Shi'a refers to partisans of Ali bin Abi thalib (the fourth Caliph) and Sunni refers to the followers of the Prophet Muhammad. Both groups were constructed during the power contestation after the death of Prophet Muhammad. Both of them had different point of view regarding the successor of the Prophet Muhammad. Demographically, Sunni are the largest population including

complicated since there was intermingling causes has been involved namely love, family, different interpretation of religion teaching, and unfinished accumulated social cultural problems.²⁷⁷

It was 3 years before the conviction of Tajul Muluk, the Law number 1/PNPS/1965 had been challenge before the Constitutional Court of Indonesia.²⁷⁸ The Constitutional Court held that the Law was not unconstitutional and refused the applicant's argument.²⁷⁹ The Constitutional Court added, the ultimate aim of the blasphemy law in Indonesia was to protect the religion not to violate the rights.²⁸⁰ Nonetheless, it cannot be denied that the protection will be mainly focused on the "orthodox religions" not the minorities since they regarded the minorities as the deviants.

Indonesian government has ratified ICCPR in 2005. Thus, ICCPR has been incorporated into national legal system through Law number 12 Year 2005 without any single reservation. Indeed, Indonesian government shall apply the covenant comprehensively. As was mentioned above, the authoritative interpretation of ICCPR has stated that blasphemy law is incompatible with International human rights law. As a consequence, state parties (including Indonesia) are obliged to ensure the protection of afore-mentioned rights by generating every branches of the state including legislative and judicial branch. In reality, the fact is the opposite. As a matter of fact, legislative and judicial branches have legitimized the existence of

in Indonesia. See Seyyed H. Nasr, *ISLAM: Religion, History, and Civilization* (San Fransisco: HarperCollins Publisher, 2002), p.10-11

²⁷⁷ Tim Temuan dan Rekomendasi, *Laporan Tim Temuan dan Rekomendasi (TTR) Tentang Penyerangan terhadap Penganut Syiah di Sampang, Madura*, (Jakarta: Tim Bersama, 2013), p.43 accessed June 6, 2015, <http://www.komnasperempuan.or.id/wp-content/uploads/2013/09/LAPORAN-PUBLIK-TIM-TEMUAN-DAN-REKOMENDASI-TTR-SYIAH-SAMPANG.pdf>.

²⁷⁸ Constitutional Court of Indonesia Decision number 140/PUU-VII/2009 Available at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_Putusan%20PUU%20140_Senin%2019%20April%202010.pdf

²⁷⁹ Ibid. paragraph 5.

²⁸⁰ Ibid.

blasphemy law. Again, this fact has revealed the strong influence of domestic constitutional law and political pressure as well.²⁸¹

Compared to the previous countries, Turkish Constitution declared itself as the secular country. However, minor finding in the blasphemy case also exist. The USCIRF annual report had proposed Turkey to be one of the Countries of the Particular Concern in 2013.²⁸² The main concerns in those reports were the systematic and continued violation of freedom of religion including the limitation on non-Muslim religious minorities.²⁸³ In 2014 USCIRF reports, the status of Turkey was decreased to Tier 2.²⁸⁴ From 2012 up to present time there is no word “blasphemy” in the annual report. However, in 2014, there was special report concerning the individuals who were jailed under the blasphemy law and Turkey was one the countries which included in the report.²⁸⁵ It was Fazil Say who was charged in 2012 because he tweeted materials which classified as denigrating the religion.²⁸⁶ As a state party of both ICCPR and ECHR, Turkey has enjoyed “double supervision” from two human rights institution simultaneously. In other words, the government action related to the guarantee of freedom of religion and freedom of expression will be scrutinized by both institutions. Under ICCPR, Turkey is obliged to provide regular report to the Human Rights Committee via Secretary General.²⁸⁷ In addition, Turkey also bound with the ECHR which provide individual

²⁸¹ Human Rights Watch, "Indonesia: Court Ruling a Setback for Religious Freedom," <http://www.hrw.org/>, last modified April 19, 2010, <http://www.hrw.org/news/2010/04/19/indonesia-court-ruling-setback-religious-freedom>.

²⁸² The United States Commission on International Religious Freedom, *Annual Report 2013*, (Washington D.C: United States Commission on International Religious Freedom, 2013), accessed June 6, 2015, [http://www.uscifr.gov/sites/default/files/resources/Turkey%202013\(1\).pdf](http://www.uscifr.gov/sites/default/files/resources/Turkey%202013(1).pdf)

²⁸³ Ibid.

²⁸⁴ The United States Commission on International Religious Freedom, *Annual Report 2014*, (Washington D.C: United States Commission on International Religious Freedom, 2013), accessed June 6, 2015, <http://www.uscifr.gov/sites/default/files/Turkey%202014.pdf>

²⁸⁵ The United States Commission on International Religious Freedom Policy Brief, *Prisoners of Belief: Individuals jailed under Blasphemy Law*, (USA: United States Commission on International Religious Freedom (USCIRF), 2014), accessed February 21, 2015, <http://www.uscifr.gov/reports-briefs/policy-briefs-and-focuses/policy-brief-prisoners-belief-individuals-jailed-under>.

²⁸⁶ Ibid. p.4

²⁸⁷ Article 40 ICCPR

mechanism to have a standing before the ECtHR if all local remedies have been exhausted. The only case from Turkey in ECtHR concerning blasphemy law was *I.A. v Turkey*, application no.42571/98 in 2005.²⁸⁸ The applicant was a manager of publishing house who was accused to be blasphemous to God.²⁸⁹ It was because in 1993, his publishing house had published Abdullah Riza's novel which was regarded as blasphemous.²⁹⁰ Finally, the ECtHR concluded that there was no violation of article 10 and gave wider margin of appreciation to Turkey.²⁹¹ Hence, even though the final decision of ECtHR was no violation, but at least there was certain mechanism to protect individual rights.

While blasphemy law is clearly incompatible with freedom of expression, there is still ongoing debates concerning hate speech. The debates were mainly about the limit of hate speech. Including in hate speech are insults, epithets or slurs directed to individuals or groups which mainly based on immutable characteristic such as race, religion, or gender.²⁹² Freedom of expression protect individuals from hate speech but not protect the ideas.

III.4. Conclusion

As was mentioned above, The Protection of freedom of religion and freedom of expression in the Muslim-majority countries range from international to national level. Nevertheless, there are differences in the formulation of each freedom in each state. In the country which has strong relationship between state and Islam, the provision of either freedom of religion or freedom of expression shall be apply in accordance to teaching of *Quran* and *Sunnah*. Additionally, there was tendency to bring the idea of blasphemy law into international

²⁸⁸ *I.A. v Turkey*, application no.42571/98, Available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["blasphemy"\],"respondent":\["TUR"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-70113"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

²⁸⁹ Ibid

²⁹⁰ Ibid, paragraph 4

²⁹¹ Ibid, paragraph 31

²⁹² Douglas M. Fraleigh, "Freedom of expression in the Marketplace of ideas" available p. 139. at http://www.sagepub.com/upm-data/34513_6.pdf

level. The OIC as the Islamic international organization has promoted within UN Human Rights bodies the concept of defamation of religion in the international level. However, it is very clear that the concept is too vague to be accepted universally. Finally, the practices of blasphemy law are vary among the Muslim majority countries. There is a tendency that the practice of the blasphemy law in Muslim-majority countries related to the degree of religion and state relationship. More closer of a state to Islam ideology will pave the way to a harsher punishment. In addition, the role of supranational body also significant in reducing the excessive impact of blasphemy law.

Chapter IV. Policy Recommendation

From the previous chapters, at least there are several significant points to be noted. Firstly, the blasphemy law in three states come from different historical backgrounds. Nevertheless, the existence of such laws are aimed to preserve the dominant views of particular religion, namely Islam. In fact, Islam here is not the general term but refers to particular denomination of Islam that is *Sunni*. Secondly, the practice of blasphemy law was not only related to the religion as such but also other social aspects. Thirdly, the absence of particular groups in the constitution-making process resulted in the lack of the representation of their ideas in the constitution including the protection for religious minorities and their right of freedom of expression. Fourthly, although there are several international instruments regarding the freedom of religion and freedom of expression but yet the instruments are not applied effectively. More importantly, members of OIC are still trying to endorse the concept of “defamation of religion”. Hence, this chapter will provide policy recommendations both in the legal and non-legal approach for UN and for the Muslim-majority countries.

IV.1 Legal approach

In the domestic level, each government should ensure the protection both freedom of religion and freedom of expression simultaneously. This should involve all branches of government. Since the blasphemy laws still exist in their legal system, they should be invalidated. The legislative branches should repeal the blasphemy law and change it. Article 142 paragraph (b) of Pakistan constitution stipulate that Parliament (*Majlis-e-Shoora*) of Pakistan has the power to make laws with respect of criminal law, criminal procedure and evidence.²⁹³ When the doctrine of *actus contrarius* applied, the latter also has power to repeal it. The similar action can be applied to Grand National Assembly of Turkey according to article

²⁹³ See Article 142 (b) of Pakistan Constitution. Available at http://www.na.gov.pk/uploads/documents/1333523681_951.pdf

7 of its constitution.²⁹⁴ In Indonesia, the annulment of blasphemy law can be legislative branch through House of Representatives (Dewan Perwakilan Rakyat).²⁹⁵ However, this mechanism seems problematic because as was mentioned above, an effort to repeal the law may resulted in physical threat. Shahbaz Bhatti and Salman Taseer are the very clear examples of it.²⁹⁶ Modify the blasphemy law can also be alternative. This mechanism is needed especially when majority of the society disagree with the annulment option. To modify here has two meanings. First, the law should be change into clearer definition to gives more legal certainty and avoid the arbitrary exercise of the law. Second, it also can be modify to protecting individuals more than ideas. Hence, in my opinion, repealing the law can be regarded as long term objective while to modify is preferable for the short term objective.

Judicial branch should review the blasphemy law whether its substances are compatible with international human rights standard. However, it also depend on the constitutional design of the states. When the design of the constitution follows dualism doctrine, it might be problematic. Pakistan for instance, its constitution clearly stipulate that Allah is the holder of sovereignty and Islam is the religion of the state. Thus, every legislations must comply with Islamic values. As a result, the existence of the law which protect the sacredness of those values is considered as constitutional. While Pakistan Supreme Court has no power to review the constitutionality of the law, both constitutional court of Turkey and Indonesia have the power to review the constitutionality of the law.²⁹⁷ Blasphemy law has been reviewed by Indonesian

²⁹⁴ Article 7 “*Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated*” Available at https://global.tbmm.gov.tr/docs/constitution_en.pdf

²⁹⁵ Article 20 of 1945 Constitution, Available at http://www.setneg.go.id/images/stories/kepmen/legal_product/uud_1945.pdf

²⁹⁶ Both were killed because they supports the amendment of the blasphemy law.

²⁹⁷ Article 148 of Turkey constitution. Available at https://global.tbmm.gov.tr/docs/constitution_en.pdf, and Article 24 C of 1945 Indonesian constitution. Available at http://www.setneg.go.id/images/stories/kepmen/legal_product/uud_1945.pdf

constitutional court and was declared as constitutional. Again, it shows that the design of the constitution has great impact to court decision.

In international level, UN must not follow the resolution proposal endorsed by OIC concerning “defamation of religion” if such proposal contain substances in favor of particular religion and curtail the freedom of expression. It is very dangerous to use an overbroad concept such as “defamation of religion” because this may result in the abuse of power by the authority especially when it directed to religious minorities. Adoption of such proposal by the UN will provoke the other states to preserve their blasphemy law or even to strengthen it.

IV.2 Non-legal Approach

Legal guarantees of freedom of religion and freedom of expression are range from national to international level. However, the excessive impact of blasphemy law still remain especially for the minorities. Legal approach solely cannot solve the problem of blasphemy law in Muslim majority country. One of the biggest issue is the incompatibility of (the interpretation of) Islamic teaching with international human rights law concerning freedom of religion and freedom of expression.

Islam is not monolithic. There are many sects inside Islam.²⁹⁸ Different sects might have different understanding concerning freedom of religion and freedom of expression. Kamali noted that there is freedom of religion in Islam.²⁹⁹ His argument is based on the verse of the Quran which stated that there shall be no compulsion in religion.³⁰⁰ However, he also

²⁹⁸ Institute of Community Cohesion, "Understanding and Appreciating Muslim Diversity: Towards better Engagement and Participation," p.6-39 <http://multifaiths.com>, last modified April 2008, <http://multifaiths.com/pdf/islamicoco.pdf>.

²⁹⁹ Mohammad H. Kamali, *Freedom of Religion (Al-Hurriyyah al-Diniyyah)* in Mohammad H. Kamali *Freedom of Expression in Islam Islamic Text Society* (Cambridge: Islamic Text Society, 1997), pdf, chapter.9.

³⁰⁰ Ibid

found that there is *hadith* or *sunnah*³⁰¹ of the prophet which stated “kills whoever changes his religion”.³⁰² Refers to several prominent *sunnah* experts, Kamali argue that the *sunnah* has several weaknesses which can reduce its reliability.³⁰³ Concerning freedom of expression, Kamali confirm that the truth is one of key ethical norms in Islam. Thus, it regarded as a ground for freedom of expression.³⁰⁴ However, the truth is not the only key ethical norm, but it should go hand in hand with other norms such as prohibition to harm the others. Thus, it is difficult to draw the limit of freedom of expression because there are some principles in Islam which incompatible with today’s concept of freedom of expression.³⁰⁵ For example, protection of speech which contains shocking and disturbing ideas is not in line with the Islamic norms. Additionally, this concept of freedom of expression in Islam also regarded as dynamic concept which change all over the time.³⁰⁶

Therefore, there should be in-depth study concerning Islamic principles and pluralism especially from “the insider”. “The insider” here means that the study comes from the Islamic tradition itself. The awareness of those principles should be built from inside so that it can be implemented effectively. Afterwards, the result of the study can be disseminated to governmental and educational institutions.

Never ending (interfaith) dialogues should be conducted among Muslims and between religions. It is very important, because it can reduce the distrust among believers or non-believers. In addition it can build stronger social cohesion. The dialogues should be develop not only reach the religious clerics but it also reach the grass root level. In international level,

³⁰¹ See footnote 63.

³⁰² Mohammad H. Kamali, *Freedom of Religion*, Op.cit

³⁰³ Ibid

³⁰⁴ Mohammad H. Kamali, "Ethical Limits on Freedom of Expression with Special Reference to Islam," *Cile Journal*, Spring 2014, p.46, accessed June 14, 2015, <http://www.cilecenter.org/en/wp-content/uploads/2014/11/Recommended-Articles-English-Ethical-Limits-on-Freedom-of-Expression.pdf>.

³⁰⁵ Ibid.p.61-62

³⁰⁶ Ibid.

UN should initiate the dialogues and develop the understanding between the states along with non-governmental organizations.

Finally, “welfare approach” also can be implemented. Welfare approach means that the state tried to reduce the tension by creating particular mechanism to enhance the well-being of the society. Since most of the population live in poverty, it is likely it will be easier to be provoked.

IV.3. Conclusion

There are two approaches offered in the policy recommendation namely legal and non-legal approach. Legal approach covers the maximizing of legal instruments from national to international level. This approach involving all branches of government and International organization as well. Since the problems cannot be solved only by legal approach, then it will need another approach. The latter emphasizing interfaith dialogue mechanism and the dissemination of the idea of pluralism in the government and educational institutions.

Chapter V. Conclusion

Within Muslim-majority countries, the relationship between religion and state are vary depend on their social and historical background. Despite the dominant population of Muslims in those states do not automatically make the states change into Islamic. Some of the states apply blasphemy law in their jurisdiction in order to protect certain denomination of Islam. Identification of one state to Islam resulted in favoritism to Islam. As a consequences, the state regards the other religions and beliefs in the second place. Hence, that violates the principle of equality.

Blasphemy law is incompatible with international law of human rights. The threat of blasphemy law in Muslim-majority countries usually directed against the manifestation of religion of the minorities. In addition, it also used to oppress criticism towards (dominant) religion from others. There are no adequate protection for the minorities since the lower degree of participation in the decision making. Frequently, blasphemy laws are misused due to personal, economic and political interests. Thus, blasphemy law cannot be read as blasphemy law as such but it should be read in connection with other social aspects.

The guarantee of freedom of religion and freedom of expression range from national to international level. However, the implementation of the rights was less effective. The role of OIC in endorsing the concept of religion defamation in the favor of Islam cannot be accepted universally. Hence, there should be an interdisciplinary approach to deal with the problem of blasphemy law from domestic to international level. In domestic level, it can be reached by maximizing all governmental institutions including executive, legislative and judicial branches to support the freedom of religion and freedom of expression. In addition, UN can initiates the mutual frameworks combating religious-based hate speech and focus on education based on multiculturalism without giving any privilege to particular religion.

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