

The Comparison of Criminal Acts Formulation of Religion, Religious Life, and Worship Facilities: Draft of Indonesian Criminal Code and the Penal Code United Kingdom

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How to cite : Kristian. "The Comparison of Criminal Acts Formulation of Religion, Religious Life and Worship Facilities : Draft of Indonesian Criminal Code and the Penal Code United Kingdom". *Unifikasi : Jurnal Ilmu Hukum*. 7(2). 2020. 137-151. DOI : 10.25134/unifikasi.v7i1.2409
Submitted : 03-01-2020 Revised : 07-04-2020 Accepted : 15-06-2020

Abstract : *This paper compares the policy formulation/legislation of criminal acts of religion, religious life, and worship facilities based on the new draft of Indonesian Criminal Code (RKUHP) and the Penal Code United Kingdom of 2008. This study was conducted using normative juridical methods and comparative law. The type of data employed in this study focuses on secondary data namely primary legal materials, secondary legal materials and tertiary legal materials. The data were collected through documentation and literary studies. Meanwhile, the data analysis method used in this study is qualitative and descriptive. The findings revealed the religion is fundamental and important in all aspects of human life in Indonesia. The result also showed the policy formulation/legislation of criminal acts of religion, religious life, and worship facilities stipulated on the draft of national criminal code (RKUHP) July 2018 refer to the development of policy formulation/legislation called blasphemy in England.*

Keywords: *Comparative Law; Criminal Law on Religion; Formulation.*

Perbandingan Formulasi Tindak Pidana terhadap Agama, Kehidupan Beragama dan Sarana Ibadah Antara Rancangan Kitab Undang-Undang Hukum Pidana Indonesia dengan Kitab Undang-Undang Hukum Pidana Inggris

Abstrak : Tulisan ini membandingkan kebijakan formulasi/legislasi mengenai tindak pidana terhadap agama, kehidupan beragama dan sarana ibadah dalam Rancangan Kitab Undang-Undang Hukum Pidana Indonesia (RKUHP) yang baru dengan Kitab Undang-Undang Hukum Pidana Inggris (*The Penal Code United Kingdom*) tahun 2008. Penelitian ini ditempuh melalui metode penelitian yuridis normatif dan perbandingan hukum. Jenis data yang dipergunakan pada penelitian ini dititikberatkan pada data sekunder yang terbagi dalam bahan hukum primer, bahan hukum sekunder dan bahan hukum tertier. Adapun pengumpulan data pada penelitian ini dilakukan dengan studi dokumentasi dan studi kepustakaan sedangkan metode analisa data yang dilakukan pada penelitian ini bersifat kualitatif dan deskriptif. Hasil penelitian menunjukkan bahwa agama merupakan hal mendasar atau hal yang fundamental dan bersifat penting dalam seluruh aspek kehidupan manusia di Indonesia. Hasil penelitian juga menunjukkan bahwa kebijakan formulasi/legislasi mengenai tindak pidana terhadap agama, kehidupan beragama dan sarana ibadah sebagaimana diatur dalam Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP) nasional versi bulan Juli tahun 2018 dapat dikatakan mengacu kepada perkembangan kebijakan formulasi/legislasi mengenai "*blasphemy*" di Inggris.

Kata Kunci: Perbandingan Hukum; Kebijakan Formulasi; Tindak Pidana terhadap Agama

INTRODUCTION

The Unitary State of the Republic of Indonesia adheres to the concept of Law State Nation based on Pancasila and the 1945 Constitution. The main objective of this country is to realize a fair, prosperous, safe, peaceful, and orderly state, nation, and governance as well as ensuring equal legal standing for all citizens of the community.¹ In the concept of Pancasila, religion is a fundamental thing for all aspects of human life in Indonesia. Indeed, Indonesia is a Religious Nation State that has a deep divine philosophy. Faith and religion are unique compared to other things. This is because

¹Tanti Kirana Utami, *Peran Serikat Pekerja Dalam Perselisihan Pemutusan Hubungan Kerja*, Jurnal Wawasan Hukum, Vol. 28 No. February 1, 2013, Pg. 675.

religious beliefs are closely related to the values of life spanning the world and spiritual dimensions.² On the other hand, religion can also be a unifying factor and strengthen social cohesion in state and social life.³

The speech of the first President of Indonesia, **Ir. Soekarno** on June 1, 1945 discussed Pancasila, especially the first principle, "Belief in one God". **Ir. Soekarno**, in his speech articulated the first principle, "Belief in one God" covered at least three things as follows:

- 1) The belief in one God is a virtuous Deity;
- 2) The belief in one God is a cultured Deity; and
- 3) The belief in one God is a deity with mutual respect.

Those divine values indicate the Indonesian Nation is one of the countries in the world places religion as the main foundation in all aspects of social, nation and state life. The social, nation, and state life must be implemented based on Divinity who are virtuous, civilized, cultured and have mutual respect.

"Religion" according to **Oxford English Dictionary** is "the belief in and worship of a super human controlling power, especially personal God or Gods, a particular system of faith and worship, a pursuit or interest followed with devotion".⁴

According to **the Great Indonesian Dictionary (KBBI)**, a language reference in Indonesia, religion is a teaching or a system regulates the faith (belief) and worship to God Almighty and the rules related to the interaction between humans, and humans with their environment.⁵

Elizabeth K. Nottingham, quoted by **Jalaludin** in his book or writing entitled "Psychology of Religion", defines religion as a common symptom happening "everywhere", and religion is closely related to human efforts to measure the depth of meaning of one's existence and the existence of the universe.⁶ According to **Max Muller**, quoted by **Allan Menzies** in his book/writing entitled "The History of Religions" defines religion as a mental state or state of mind that is free from reasoning and consideration. Thus, humans are able to understand the concept of "The Most Unlimited" through various names and incarnations.⁷

The provisions of Article 22 of Law of the Republic of Indonesia Number 39 of 1999 which regulates Human Rights, clearly mentioned: "everyone has a freedom of religion such as manifesting or worshiping his religion according to their belief." Furthermore, the provisions of Article 8 of Law of the Republic of Indonesia Number 39 of 1999 on Human Rights also emphasized: "Protection, advancement, enforcement, and fulfillment of human rights (HAM) are the responsibility of the state, especially the government".

Religion is one of the souls of the Indonesian. As firmly stated in the Pancasila and guaranteed by the 1945 Constitution, religion is seen as the Indonesian State Constitution and human right. It cannot be reduced (cannot be ruled out) under any circumstances and condition and is considered important and fundamental. Thus, the State fairly includes or considers the religion, religious life, and worship facilities (or any related matters) as one of the criminal acts in its positive law (this is known as "criminal acts against religion, religious life, and worship facility or known as "Delik Agama or religious offense in English").⁸

² Mudzakkir, *Penulisan Kerangka Ilmiah Perencanaan Pembangunan Hukum Nasional Tindak Pidana Terhadap Agama Dalam Kitab Undang-undang Pidana (KUHP) dan Undang-Undang Nomor 1/PNPS/1965 Tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama (Kajian Terhadap Praktek Penegakan Hukum dan Prospek Pengaturannya dalam Hukum Positif Indonesia)*, Pusat Perencanaan Pembangunan Hukum Nasional Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Jakarta, 2010., Pg. 1.

³ *Ibid.*

⁴ *Ibid.*, Pg. 90.

⁵ <https://kbbi.web.id/agama> Last accessed on Saturday, October 13, 2018, at 03:22 p.m.

⁶ Jalaludin, *Psikologi Agama*, PT. RajaGrafindo Persada, Jakarta, 2012, Pg. 317.

⁷ Allan Menzies, *Sejarah Agama Agama*, Forum, Yogyakarta, 2014, Pg. 11.

⁸ The term "delik agama" can be found in: Oemar Seno Adji, *Hukum (Acara) Pidana dalam Prospekti*, Erlangga, Jakarta, 1981, Pg. 68. See also in: Dwidja Priyatno dan Kristian, *Delik Agama (Dalam KUHP & Rancangan KUHP Indonesia dan Telaah Perbandingan Hukum dengan KUHP Inggris, Belanda, Malaysia, Thailand, Singapura, Jerman, Prancis, Kanada, Latvia & Finlandia)*, Pustaka Reka Cipta, Bandung, 2018.

Soehino in his book entitled "Constitutional Law: The Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution is a Law State Nation" states one of the characteristics of the Pancasila, the Law State Nation, as adhered to by Indonesia is a "Religious Nation-State". Looking at the relationship between the state and religion, the concept of Pancasila State Nation does not adhere to secularism⁹, religious state nation as in theocracy¹⁰, and the concept of Islamic Nomocracy.¹¹ The concept or principle of the Pancasila State Nation is also very different from atheism State¹² and liberalism state.¹³ This is because the Pancasila State Nation is a Religious State Nation.

In this case, Religious State Nation is the social, nation, and state life in Indonesia are obligatory and must be based on the belief in one God. Thus, there is a freedom of religion. The citizens are free to embrace their respective belief or religion. The logical consequences of this prismatic choice is atheism and communism are prohibited and not allowed. This is because they overruled and even negate the belief in one God.¹⁴

Related to this, **Oemar Seno Adji** believes the concept of Pancasila State Nation has two characteristics as follows:¹⁵

1. There is a guarantee of freedom of religion

⁹This concept separates religion and state (*separation of state and church / Trennung von Staat and Kirche*). According to this, the state is the world matter while religion is afterlife matter. Accordingly, religious values must be strictly separated from state values. The secularist state generally gives freedom of religion to its citizens. This is because religion is private matter for its followers. See more in: Kaelan, *Filsafat Pancasila Pandangan Hidup Bangsa Indonesia*, Yogyakarta: Paradigma, 2002, Pg. 155.

¹⁰This concept unites religion and state (*einheit von Staat und Kirche*). This concept also views the relationship between state and religion as inseparable. Thus, the causal relationship between the state and God is direct (the state is a gift from God). According to this, the state is united with religion, state government must be run based on the words of God. This also applies in all aspects of society, nation, and state. Thus, religion will dominate the political community in a country.

See more in: Kaelan, *Filsafat Pancasila Pandangan Hidup Bangsa Indonesia*, Yogyakarta: Paradigma, 2002, Pg. 156.

¹¹See more in: Soehino, *Hukum Tata Negara: Negara Kesatuan Republik Indonesia berdasarkan Pancasila dan Undang-Undang Dasar 1945 adalah Negara Hukum*, Yogyakarta, 1985, Pg. 23-30.

¹²Countries with atheism generally have a communist ideology. Communism views the nature of the relationship between religion and state is based on the philosophy of dialectical materialism and/or historical materialism. The highest reality according to communism is material. Meanwhile, the "God" is material and economic. Thus, human value will be largely determined by this. Communism pioneered, Karl Marx, stated human creates himself. Religion is defined by communism as humans' self-awareness, a fanatical realization of humans, and a complaint of oppressed creatures. A communism, Marxist, views religion as unimportant and just an opiate for society. Thus, communism state will be atheist and even anti-theist. This is because they have a doctrine to fight religion.

See more in: Kaelan, *Filsafat Pancasila Pandangan Hidup Bangsa Indonesia*, Yogyakarta: Paradigma, 2002, Pg. 156.

¹³Liberalism in its growth is strongly influenced by the notions or rationalism ideology. The truth of reason and materialism are based on the achievement of the five senses of human. Individualism is based on individual freedom. Thus, the citizens are given full freedom to or not to embrace religion. This ideology views individuals as a source of truth which given the right to criticize religion including God, Prophet, Holy book, and other related things. Likewise, the values of religion will be very much determined by individuals. Values that are contrary to religion can even be implemented and enforced in the state if there is an individual agreement.

See more in: Kaelan, *Filsafat Pancasila Pandangan Hidup Bangsa Indonesia*, Yogyakarta: Paradigma, 2002, Pg. 156.

¹⁴See more in: Soehino, *Hukum Tata Negara: Negara Kesatuan Republik Indonesia berdasarkan Pancasila dan Undang-Undang Dasar 1945 adalah Negara Hukum*, Yogyakarta, 1985, Pg. 23-30.

¹⁵Yopi Gunawan & Kristian, *Perkembangan Konsep Negara Hukum & Negara Hukum Pancasila*, PT. Refika Aditama, Bandung, 2015., Pg. 97-98.

This statement indicates in the concept or principle of Pancasila state nation; the freedom of religion is positively connoted. In other words, there is no place and no opportunity for atheism and anti-religious propaganda or ideology.

Thus, the concept of freedom of religion in the Pancasila state nation has several meanings as follows:¹⁶

- a) It is the State or the government obligation to always provide opportunities and develop a healthy religious life in the State of Indonesia.
 - b) Based on the provisions of Article 28E paragraph (1) Jo and Article 29 paragraph (2) of the 1945 Constitution, the state or government does not impose religion because religion is based on belief. It cannot be forced and the concept of religion has never forced individuals to embrace it.
 - c) Pancasila and the 1945 Constitution guarantee the freedom of rights (the most basic and important rights) in human rights, the humans' dignity as God's creatures. Therefore, freedom of religion is neither a gift from the state nor a group.
 - d) Every religion is universal. This means the teachings of a religion are valid at any place (anywhere) and at any time. It does not recognize differences in skin color (race) and other world-related differences. Therefore, the State or government will not or cannot obstruct the religious relationship between its citizens and other nations or religious centers to the advancement of religion. Meanwhile, the State or government is obliged to take any action or policy so its implementation remains and fits into the provisions of law and all prevailing laws and regulations. Based on the concept or principle of Pancasila, the national government is responsible to maintain order in society, social, nation, and state life.
2. There is no rigid and absolute separation between religion and the state
- This means the concept of Pancasila State Nation Pancasila which has the Jakarta Charter, views the first principle, the belief in one God as *causa prima*. In such a concept, the state will not tolerate constitutional guarantees on the freedom of anti-religious (and other things related) to live in the midst of a pluralistic legal system of Indonesian society. The constitutional state of Indonesia has its own characteristics showing special aspects of human rights (such as do not separate the state and religion, the recognition of human rights as known in the West, recognition of social rights and people's economic rights which must be guaranteed and become the main responsibility of the state). Thus, the concept or principles of Pancasila state nation is different from rule of law or socialist legality concepts.

Related to the concept of a religious state nation or 'religious nation-state' as adopted in the above-mentioned concept of the rule of Pancasila, all religions are valid in Indonesia (Islam, Protestant Christianity, Catholicism, Hinduism, Buddhism, and Kong Hu Cu), and are considered as a major legal interest that must be protected by law and the State. It is also not just a part of public order regulating the sense of religion or the tranquility of religious life.¹⁷ Policy formulation/legislation and protection processes or law enforcement processes related to criminal acts against religion, religious life, worship facilities. It shows Indonesia is indeed not a religion-based-state or a secular-based-state. Indonesia is a country with a belief in one God.

The insults or other similar matters to a religion exists and valid in Indonesia can disrupt the stability of religious life, endanger peace, tranquility, and security of social life, and endanger the unity of the nation and the State. Thus, the legal interests must be protected. The offenses against religion, offenses related religion¹⁸ become a top priority that must be protected by criminal law. Specifically, policy formulation/legislation in renewing and perfecting the National Criminal Code.

However, some parties reject or object to include criminal acts against religion, religious life, and worship facilities in the new draft of Indonesian Criminal Code (RKUHP, July 2018 version). They argue that there are many articles on the new draft of the Indonesian Criminal Code (RKUHP)

¹⁶*Ibid.*

¹⁷Muladi, *Beberapa Catatan Berkaitan Dengan RUU KUHP Baru*, Paper Presented at the National Seminar on the National RUU KUHP organized by Batam International University, Batam January 17, 2004, Pg. 7.

¹⁸Muladi, *Pembaharuan Hukum Pidana yang Berkualitas di Indonesia*, Magazine of Legal Issues, Faculty of Law, Diponegoro University (UNDIP), No. 2-1988, Pg. 25.

in July 2018 which leads to over-criminalization. Some people believe religious matters are a private business. Thus, not all religious matters must be included in the realm of law (as a criminal act). On the other hand, it needs to be realized that religious issues are a very sensitive issue and can become a factor that destroys the unity and integrity of the Indonesian nation. Policy formulation/legislation regarding criminal acts against religion, religious life, and worship facilities are also deemed important in creating legal order, social order, peace, harmony, tranquility, welfare (materially and spiritually), social justice, and creating stability and resilient for the nation.

Several parties state the formulation/legislation policies on criminal acts against religion, religious life, and religious facilities is regulated in the new draft of the Indonesian Criminal Code (RKUHP), July 2018. It refers to the development of policy formulations/legislation regarding "blasphemy" in the UK. In fact, the regulation regarding "blasphemy" in England has many weaknesses and received a lot of criticism from various experts and circles. The weaknesses are in the concept of "blasphemy". Legal protection is only given to certain religions and does not protect the legal interests of other religions in England. Thus, people are rarely prosecuted for committing this crime. Accordingly, this study intends to compare the policy formulation/legislation regarding criminal acts against religion, religious life, and religious facilities in the new draft of the Indonesian Criminal Code with the Penal Code United Kingdom in 2008. The research questions are formulated as follows: What is the policy formulation/legislation on criminal acts against religion, religious life, and worship facilities stated in the new draft of the Indonesian Criminal Code 2018? What is the policy formulation/legislation on criminal acts against religion, religious life, and religious facilities written in The Penal Code United Kingdom 2008? And Does the policy formulation/legislation on criminal acts against religion, religious life, and religious facilities in the National RKUHP July 2018 refer to the development of policy formulation/legislation of "blasphemy" in the UK?

RESEARCH METHODS

The main focus of this study is on policy formulation/legislation on criminal acts against religion, religious life, and religious facilities regulated in the new draft of the Indonesian Criminal Code (RKUHP) 2018 and in the Penal Code United Kingdom in 2008. This research employed normative juridical methods and comparative law. The comparative law was used in this study because legal comparison refers to an investigation to obtain deeper and more comprehensive knowledge of certain laws.¹⁹ Comparative law is a method or way of making comparisons used in all branches of law.²⁰ Comparative law has a practical purpose, a supportive tool or instrument to create public order, to reform national laws, and to provide knowledge of various regulations and legal ideas to legislators, judges, and other professional parties.²¹

The data used in this study was focused on secondary data. The secondary data sources included primary legal materials, the binding legal materials consisting of basic regulations (the 1945 Constitution of the Republic of Indonesia and its amendments) and all statutory regulations concerning research topics or materials; Secondary legal materials, the legal materials that provide further explanation on primary legal materials such as books, journals, seminar and symposium materials, academic papers, research results, draft laws, and other related literature; and tertiary legal materials, the legal materials that provide further explanation of primary and secondary legal materials including the Great of the Indonesian Dictionary (KBBI), encyclopedias, legal dictionaries, and other related materials.²² The data collected using documentation study and literature study and analyzed using qualitative and descriptive method.

RESULTS AND DISCUSSION

¹⁹Dedi Mulyadi, *Perbandingan Tindak Pidana Pemilu Legislatif Dalam Perspektif Hukum di Indonesia*, PT. Refika Aditama, 2013, Pg. 13. Lihat juga dalam: Barda Nawawi Arief, *Perbandingan Hukum Pidana* (revised edition), Jakarta, PT. RajaGrafindo, 2011, Pg. 4.

²⁰Dedi Mulyadi, *Ibid.*, See also in: Barda Nawawi Arief, *Ibid.*

²¹Romli Atmasasmita, *Perbandingan Hukum Pidana*, CV. Mandar Maju, 2000., Pg. 12.

²²Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta, CV. Rajawali, 1985, Pg. 14-15.

Indonesia is a country adheres to the concept of law state nation and the principles of welfare state nation. The state can use law as a tool to regulate, administer, and guarantee the welfare of its people.²³

In realizing the concept law state nation, the stage or process of formulation/legislation becomes the most strategic and the most important stage of the entire policy process. This is to concretize, operationalize, or functionalize laws and regulations (in overcoming criminal acts occurs in society). This is because this stage formulated policy lines and provided criminalization²⁴ and penalization²⁵ processes as the basis of legality (a benchmark to determine or know a certain and clear forms of prohibited actions and threatened with punishment). This will also affect the application stage (the process of implementing the law) and the stage of execution (the process of implementing the law). For instance, in the practice of protecting and respecting human rights in relation to the religious life of all Indonesian. This is in line with **Henny Nuraeny** and **Tanti Kirana Utami** stated that "human rights is defined as the fundamental rights of the human person".²⁶

Criminal acts against religious interests in Indonesian word is known as "*penistaan agama* (blasphemy of religion)". It is actually a very difficult problem to eradicate on earth. This is because the motivation of people committing criminal acts, the blasphemy or religious blasphemy is usually due to political, business, personal ego, and other various related motives.²⁷

The word *Penistaan* or *penodaan* (blasphemy) is derived from a basic word of "*nista* (despicable)" or "*noda* (stain)" which means something despicable, loophole, or low.²⁸ Meanwhile, the word *Penistaan* or *penodaan* (blasphemy) can be interpreted as harassment, insult and humiliation. Thus, it can be concluded *penistaan agama* (blasphemy of religion) is someones' attempt to insult or belittle something in the form of actions or words.²⁹

In doing criminal crimes against religion, religious life, and worship facilities, **Oemar Seno Adji** quoted by **Barda Nawawi Arief** in his book/writing entitled "*Delik Agama dan Penghinaan Tuhan (Blasphemy) di Indonesia dan Perbandingannya di Berbagai Negara*" states there are three theories related to this matter such as:³⁰

1. *Religionsschutz Theorie* (Protection of Religion Theory).
According to this theory, religion is a legal interest or object that will and must be protected (religion is deemed necessary to be protected) by the state through a series of laws and regulations.
2. *Gefuhlschutz Theorie* (Teori Perlindungan Terhadap Perasaan Keagamaan).
According to "*Gefuhlschutz Theorie*" or Theory of protection of religious feelings, the legal interests that will be or want to be protected by law or statutory regulations are the feelings or religious feelings or feelings from its followers

²³Ahmad Hunaeny Zulkarnaen dan Tanti Kirana Utami, *Perlindungan Hukum Terhadap Pekerja Dalam Pelaksanaan Hubungan Industrial*, PJIH Vol. 3 Number 2 2016, Pg. 408.

²⁴the criminalization process is the process of determining an act of a person as an act that can be punished. This process ends with the formation of the law. The act is punishable by a criminal sanction. See more in: Sudarto, *Hukum dan Hukum Pidana*, Alumni, Bandung, 1977. Pg. 44-48.

²⁵the penalization process is the process of determining the criminal sanctions imposed on offenders who have committed prohibited acts according to the criminal law. See and compare with: Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung, 2002, Pg. 32.

²⁶Henny Nuraeny dan Tanti Kirana Utami, *Legal Protection Against Children Who Are Victims Of Human Trafficking In Cianjur District Studied By Human Rights Perspective*, Jurnal Dinamika Hukum, Vol. 15 No. 2, May 2015, Pg. 174.

²⁷ Ahmad Jazuli, *Penyelesaian Konflik Penodaan Agama Dalam Perspektif Hukum Pidana Di Indonesia (Conflict Accomplishment of Blasphemy in Indonesia'S Criminal Law Perspective)*, Jurnal Penelitian Hukum De Jure, Volume 17, Nomor 3, September 2017, p-ISSN 1410-5632, e-ISSN 2579-8561, 2017, Pg. 330.

²⁸ Kresna Adi Prasetyo dan Ridwan Arifin, *Analisis Hukum Pidana Mengenai Tindak Pidana Penistaan Agama Di Indonesia*, Gorontalo Law Riview, Volume 2 No. 1 – April 2019, E-ISSN: 2614-5030, P-ISSN: 2614-5022, 2019, Pg. 4.

²⁹ *Ibid.*

³⁰Barda Nawawi Arief, *Delik Agama dan Penghinaan Tuhan (Blasphemy) di Indonesia dan Perbandingannya di Berbagai Negara*, Badan Penerbit Universitas Diponegoro (UNDIP), Semarang, 2007., Pg. 2.

3. *Friedensschutz Theorie* (The Theory of Peace Protection or The Theory of Peace Protection of Religious People).

Friedensschutz Theorie or known as “the theory of peace” or “theory of peace protection of religious people” states the protected object or legal interest is interconfessional religious peace or tranquility among the followers or belief.

Based on the three basic theories, criminal acts against religion, religious life, and worship facilities can be further described into several forms of criminal acts, such as:³¹

- 1) A criminal act against a group of people whose ties based on religion;
- 2) Criminal acts against religious officers who are on duties;
- 3) Criminal acts against groups of people who practice worship according to their religious beliefs;
- 4) Criminal acts against religious objects, prophets, messengers, holy books, and other things;
- 5) Criminal acts against houses or places of worship;
- 6) Criminal acts against religious beliefs that cause people to not believe in their God or encourage people to follow atheism; and

The criminal act of blasphemy/defamation of the content of religious teachings.

As mentioned previously, several parties argue the policy formulation/legislation regarding criminal acts against religion, religious life, and worship facilities in the new draft of the Indonesian Criminal Code 2018 to refer to the Penal Code United Kingdom.³² In European countries, the term criminal acts against religion or crimes against religion is commonly known as “blasphemy” because blasphemy is included in the scope of religious offenses.

The origin of the word “*blasphemy*” come from the word “*blasphemem*” (Ancient Greek), “*blasphemen*” (an English term in medieval times), “*blafemer*” (old French term), “*blasphemare*” (Latin), which is a combination of the word “*blaptein*” means “to destroy” and the word “*pheme*” means “reputation”. Thus, *blasphemy* can simply be interpreted as “an act of destroying reputation” or an act of “humiliation” atau “defamation”.³³ In the context or in relation to non-criminal sanctions against religion, the word “*blasphemy*” can also be interpreted as *defamation of the name of God*, which means blasphemy against the name of God. In broad meaning, *blasphemy* can also be interpreted as blasphemy against things that are considered sacred by a religious belief.³⁴

The term “*blasphemy*” Was firstly known in the 13th century England and for the first few hundred years, this word only had one meaning, “the act of insulting or showing contempt or lack of reverence for God”.³⁵ The next development is in the early 17th century, the word or terminology “*blasphemy*” was first applied figuratively to impoliteness or a lack of respect for divine things.³⁶

Black’s Law Dictionary defines *blasphemy* as: “the offence of speaking matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind or to excite contempt and hatred against the church by law established, or to promote immorality”.³⁷

³¹Mudzakkir, *Op.Cit.*, Pg. 117.

³² See also in: Ahmad Hunaeni Zulkarnaen, Kristian, M. Rendi Aridhayandi, *Kebijakan Formulasi Delik Agama dalam Kitab Undang-Undang Hukum Pidana Yang Baru*, Jurnal Ilmu Syari'ah dan Hukum Vol. 3, Nomor 1, 201, ISSN: 2527-8169 (P); 2527-8150 (E), Fakultas Syari'ah IAIN Surakarta, 2018, Pg. 36.

³³ See and compare with: Atika Yuanita Paraswaty, *Tindak Pidana Terhadap Agama dan Kehidupan Beragama dalam RKUHP*, Aliansi Nasional Reformasi KUHP, 2016, Pg. 3.

³⁴Rumadi, “Kebebasan dan Penodaan Agama: Menimbang Proyek “Jalan Tengah” Mahkamah Konstitusi RI”, dalam [http://journal.uinjkt.ac.id/index.php/indoislamika/](http://journal.uinjkt.ac.id/index.php/indoislamika/article/download/1177/1049) article/download/1177/1049, Last accessed on Wednesday, October 31, 2018, at 08:48 a.m.

³⁵<https://www.merriam-webster.com/dictionary/blasphemy> Last accessed on Sunday, October 14, 2018, at 03:41 p.m.

³⁶*Ibid.*

³⁷Ifdhal Kasim, *Perkembangan Delik Agama Dari Masa Ke Masa*, (Konsultasi Publik RUU KUHP: Perlindungan Hak Asasi Manusia melalui Reformasi Hukum Pidana), Aliansi Nasional RKUHP dan Komnas HAM, held in Hotel Santika Jakarta, July 3-4, 2007., Pg. 3.

It was also stated, “blasphemous words are punishable for their manner, their violence or ribaldry or more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society and to be cause of civil strife”.³⁸

David Nash in his writing entitled “Analyzing the History of Religious Crime: Models of ‘Passive’ and ‘Active’ Blasphemy since the Medieval Period” stated “in a very broad sense blasphemy is concerned with insults to god (s) and the sacred; more specifically it constitutes ‘the use or abuse of language, or behavioural acts, that scorn the existence, nature or power of sacred beings, items, or texts’”.³⁹

Related to this, **AP. Simester & GR. Sullivan** in their book/writing entitled *Criminal Law: Theory and Doctrine* stated “blasphemous words are punishable for their manner, their violence or ribaldry or more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society and to be a cause of civil strife”.⁴⁰

According to **Thomas Aquinas**, blasphemy is “a sin committed directly against God”. Thus, blasphemy is more grave than murder, which is a sin against one’s neighbor. However, **Thomas Aquinas** also added that blasphemy can do no harm to God.⁴¹ In this case, **Thomas Aquinas** emphasized the perpetrator or blasphemer intends to destroy the honor of God and will depend on the evil intentions of the person concerned and not cause the effect or impact of actions that “harm” or “hurt” God.⁴²

Barda Nawawi Arief mentioned in *Discussion Paper No. 24 (1992)* about “Blasphemy”, it has three definitions such as general definition, dictionary definition, and every day life definition. Here are the following explanation:⁴³

- 1) In general definition, the word “blasphemy” has several meanings such as:
 - a. Swear word related to religion. If this act is carried out in the broadcast media, it can be viewed as blasphemous;
 - b. Any public rejection of basic religious concepts is also seen as blasphemous.
- 2) In dictionary, the word “blasphemy” covers the following definitions:
 - a) impious utterance or action concerning God or sacred thing;
 - b) irreverent behavior towards anything held sacred;
 - c) profane speaking of God or sacred things, pious irreverence;
 - d) slander, evil speaking, defamation; and
- 3) In everyday life definition, the word “blasphemy” means irreverent behavior towards anything held in great esteem and respect.

It needs to be realized Humans are creatures created by Allah SWT who have the same position on earth. Every human being has dignity which is inherent in his humanity such as the relationship between human and God.⁴⁴ According to the researcher’s opinion, Types of blasphemy or insult to God, religion, and religious life are categorized into the following actions:

1. Cursing God and God’s name;
2. Taking God’s name in vain;
3. Unlawfully pronouncing the name of God;
4. Destroying holy books;
5. Interpreting holy books illegally and incorrectly;
6. Insulting prophets, messengers and others;

³⁸*Ibid.*

³⁹David Nash, *Analyzing the History of Religious Crime: Models of ‘Passive’ and ‘Active’ Blasphemy since the Medieval Period*, *Journal of Social History*, edisi 41.1, 2007, Pg. 6.

⁴⁰Lihat selengkapnya dalam: AP. Simester & GR. Sullivan, *Criminal Law: Theory and Doctrine*, Oxford: Hart Publishing, 2000. Lihat juga dalam: Ifdhal Kasim, *Perkembangan Delik Agama Dari Masa Ke Masa*, *Op.Cit.*, Pg. 3.

⁴¹See more in: Thomas Aquinas, *Summa Theologiae*, 60 vols., Cambridge: Blackfriars, New York: McGraw Hill., Pg. 1964–1973.

⁴²*Ibid.*

⁴³Barda Nawawi Arief, *Delik Agama dan Penghinaan Tuhan (Blasphemy)*, *Op.Cit.*, Pg. 75.

⁴⁴Tanti Kirana Utami, *Model Perlindungan Sosial Bagi Penyandang Disabilitas Di Kabupaten Cianjur Dikaji Dalam Perspektif Hak Asasi Manusia*, *Jurnal Living Law* e-ISSN 2550-1208, Volume 11 Nomor 2, October 2019, Pg. 133.

7. Saying inappropriate things about God and things related to God and His attributes;
8. Saying inappropriate things about certain religions;
9. Interfering worship;
10. And any related action.

In the researcher's opinion, any form of action committed, blasphemy or insult to God, religion, and religious life can be qualified as follows:

1. Blasphemy against God, religion, and religious life as physical violence.
 2. Blasphemy against God, religion, and religious life as indirect intersubjective violence.
- Blasphemy against God, religion, and religious life as psychological violence.

In the UK, the policy formulation/legislation regarding "blasphemy" has many fundamental weaknesses and received a lot of criticism from various parties. The weakness is legal protection is only given to certain religions (Christianity only) because, in England, Christianity plays a very important role in the structure of society. This can be seen in "*actus reus*" or the evil deeds of blasphemy: "... if it denies the truth of the Christian religion or of the Bible or the Book of Common Prayer or the existence of God"

As legal protection is only given to certain religions, there has been criticism to protect the legal interests of other religions in the UK. This is also based on the fact that for more than a hundred years people have rarely been prosecuted for committing "blasphemy" (insulting God and other things related to God).⁴⁵

Criminal acts against religion, religious life, and worship facilities in the new draft of Indonesian Criminal Code in July 2018 are strictly regulated in Chapter VII, "Criminal Actions Against Religion and Religious Life". This crime is categorized into the following forms:

- 1) Criminal Actions Against Religion:
 - a. Insult to Religion (Article 326 and Article 327 RKUHP); and
 - b. Incitement to Abolish Belief in Religion (Article 328 RKUHP).
- 2) Criminal Actions Against Religious Life and Worship facilities:
 - a. Interference with the Worship and Religious Activities (Article 329 RKUHP);
 - b. Insult to People Who do worship or insult Worship leaders (Article 330 RKUHP); and
 - c. Destruction of Worship facilities (Article 331 RKUHP).

The Penal Code United Kingdom 2008 strictly regulates "public place" includes any place to which the public have access either unconditionally or upon payment, or which is for the time being used for any public or religious meetings or as an open Court.

Criminal acts against religion, religious life and religious facilities (or at least crimes related to religion), in The Penal Code United Kingdom 2008, is explicitly regulated in Part VII regarding "Offences Relating To Religion" and other forms of criminal act mentions in Section 146, subsection (3), Section 292 subsection (1) paragraph (h) Jo. Section 292 subsection (2) dan Section 294 subsection (3).

⁴⁵Accordingly, *The Law Commission* in the working paper (in 1981) has provided recommendation for legal regulations, "*blasphemy*", replaced by "an offence of using threatening, abusive or insulting words or behaviour at any time in any place of worship of the Church of England, or in any other certified place of religious worship, in any church yard or burial ground, with intent to wound or outrage the feelings of those using the premises concerned". See more in: *Ibid*.

In practice, this crime is difficult to prosecute. This is because of the difficulties to prove the elements of *mens rea* (error) in the criminal act. This is indeed one of the reasons why prosecutions of blasphemy cases or cases in the UK are so rare.

See more in: Aliansi Nasional Reformasi KUHP, *Catatan Terhadap Beberapa Ketentuan dalam Rancangan KUHP, Institute for Criminal Justice Reform*, Jakarta Selatan., 2015, Pg. 170.

A criminal Law expert, Molan, reminds "the law does not criminalise all immoral acts ...". This is due to the following reason: "... because there may be difficulties of proof; there may be difficulties of definition; rules of morality are sometimes difficult to enforce without infringing the individual's right to privacy; the civil law sometimes provides an adequately to the parties affected by the conduct; in any event, how do we ascertain prevailing 'moral opinion' given the deep divisions within modern society?". See more in: Molan, *Modern Criminal Law*, Oxford: Oxford University Press, 2003. See and compare with: Ihdhal Kasim, *Perkembangan Delik Agama...*, *Op.Cit.*, Pg. 6.

In connection with the criminal acts regulated in Part VII, “*Offences Relating To Religion*”, The Penal Code United Kingdom 2008 divides the types of crime into five form such as: ⁴⁶

- 1) Insulting any religion .
- 2) Disturbing religious assembly
- 3) Writing or uttering words, etc with intent to wound religious feeling
- 4) Hindering burial, etc
- 5) Trespassing on burial place

Based on the provisions on criminal acts against religion, religious life, and worship facilities in the new draft of the Indonesian Criminal Code (RKUHP) July 2018 and The Penal Code United Kingdom 2008 mentioned in the above description, the similarities and differences in the formulation/legislative policies are shown in the following table:

Table of comparison on policy formulations/legislation on criminal acts against religion, religious life and facilities of worship in the New Draft of the Indonesian Criminal Code and the Penal Code United Kingdom 2008.

No.	Actions Criteria	The New Draft of The Indonesian Criminal Code	The Penal Code United Kingdom
01.	Insults the religion adheres in public (lowers the sanctity of religion and disrespect and offend the religion followers). These actions include insulting the Greatness of God, the Word, His Attributes, or insulting the Prophet / Rasul.	Article 326 RKUHP.	Subject to the provisions stipulated in Section 111 and/or Section 115.
02.	Broadcasting, showing, posting text or pictures, playing a recording, and disseminating through information technology facilities of The criminal act of insulting religion with the intention of making the contents of the writing, picture, or recording known or better known to the public.	Article 327 RKUHP.	Section 113.
03.	performing any kinds of incitement publicly intended to eliminate the belief in e legally held religion	Article 328 RKUHP.	unregulated
04.	Interrupting, obstructing, or unlawfully disband religious assembly (all activities related to religion) by means of violence or threats.	Article 329 paragraph (1) of the RKUHP.	Subject to the provisions stipulated in Section 112 and/or Section 294 subsection (3).

⁴⁶The Penal Code United Kingdom, Revision 1 Januari 2008, Laws Of Montserrat, Pg. 49.

05.	Interrupting, obstructing, or unlawfully disband people doing worship or religious ceremonies (all activities related to religion) by means of violence or threats	Article 329 paragraph (2) RKUHP.	Subject to the provisions stipulated in Section 112 and/or Section 294 subsection (3).
06.	Making noise near the houses of worship during worship	Article 329 paragraph (3) of the RKUHP.	Subject to the provisions stipulated in Section 112 and/or Section 294 subsection (3).
07.	Publicly insulting (mocking or making fun of) a person doing or leading worship (religion followers doing or leading worship or a religious official).	Article 330 RKUHP.	Subject to the provisions stipulated in Section 115.
08.	Tainting or illegally destroying or burning house or objects used for worship.	Pasal 331 RKUHP.	<i>Section 111.</i>
09.	Illegally obstructing the burial of a corpse, or without legal authority destroying, dissecting a corpse, or are obliged to bury the corpse but fail to do so.	subject to the provisions of Article 288, Article 290, and others. (See and compare with Paragraph 8 of the RKUHP regulates "Disturbance to Funerals and dead body").	<i>Section 114.</i>
10.	Offending someone's feeling or insulting someone's religion, or knowing a person's feelings may be hurt because their religion has been insulted, by trespassing the burial, or a special place for funeral or burial ceremonies or keeping the remains of a dead person, or by insulting a dead person or interfering with funeral or memorial services gathering	subject to the provisions of Article 288, Article 289, Article 290, and others. (See and compare with Paragraph 8 of the RKUHP regulates "Disturbance to Funerals and dead Bodies").	<i>Section 115.</i>
11.	Publicly insulting one or several groups based on race, nationality, ethnicity, skin color, and religion.	Article 261 RKUHP.	unregulated
12.	Broadcasting, showing, or posting text or pictures or play recordings publicly or disseminating by means of information	Article 262 RKUHP.	unregulated

	technology, which contain statements of hostility intended to reveal or better known the contents publicly, one or several groups can be determined based on race, nationality, ethnicity, skin color and religion which results in violence against people or property.		
13.	Claiming to have supernatural powers, informing, giving hope, offering, or providing assistance to others because of his actions can cause illness, death, mental or physical suffering to someone.	Article 270 RKUHP.	unregulated
14.	Stealing religious sacred objects or objects used for religious purposes.	Article 516 RKUHP.	unregulated
15.	unlawfully benefiting oneself or others by using a false name or position, using deception or a series of false words (including misuse of religion), moving people to surrender an object, giving a debt, making a debt confession, or write off debt	Pasal 531 RKUHP.	unregulated
16.	obtaining contributions for unauthorized charity purposes and the exemption for contributions made at a legal place of worship.	unregulated	Section 292 subsection (1) paragraph (h) Jo. Section 292 subsection (2).
17.	destroying all or part of a national, racial, ethnic, or religious group intentionally	Article 648 RKUHP.	Section 146 subsection (3).
18.	Committing actions as part of a widespread or systematic attack on the civilian population in the form of persecution of a group or association on the basis of politics, race, nationality, ethnicity, culture, religion, gender, or persecution for other discriminatory reasons has been universally recognized as prohibited under international law.	Article 649 RKUHP.	unregulated

In conclusion, related to the criminalization of criminal acts against religion, religious life, and worship facilities in Indonesia, It should be noted that the use of criminal sanctions must be in the form of *ultimum remidium*, the sanction imposed as “the last drug” (option). The criminal sanctions will be imposed or applied if other legal sanctions, such as civil sanctions and

administrative sanctions, are no longer able to solve the existing problems.⁴⁷ Therefore, **H.L. Packer** in his book/writing entitled: "The Limits of Criminal Sanction" stated: "The criminal sanction is once prime guarantor and prime threatener of human freedom. Used providently and humanely, it is guarantor; used indiscriminately and coercively, it is threatened".⁴⁸

CONCLUSION

Religion is a fundamental thing and important in all aspects of human life in Indonesia. This is because all social, community, national, and state life must be based on the belief in one God. This is affirmed and guaranteed based on Pancasila as the Soul of the Nation, the 1945 Constitution as the State constitution, and Law of the Republic of Indonesia Number 39 of 1999 which regulates the protection of human rights.

Policy formulation/legislation regarding crimes against religion, religious life, and religious facilities stated in the new draft of the Indonesian Criminal Code (RKUHP) July 2018, as a consequence of the adoption of the concept or principle of the Pancasila State Nation, "religious nation-state", the concept of a divine state with the main characteristics of freedom of religion and the absence of rigid and absolute separation between religion and the State. Thus, all religions are legal in Indonesia (Islam, Protestant Christianity, Catholicism, Hinduism, Buddhism, and Confucianism) and freedom for every citizen to embrace and believe in these religions are legal interests that must be protected by law and State.

In providing such protection, it is necessary to convey the formulation/legislation stage as the most strategic and important stage for concretizing laws and regulations in tackling criminal acts. This is because the lines or policy directions are formulated to operationalize or functionalize the regulations at this so-called stage or process. In relation to this, policy formulation/legislation regarding criminal acts against religion, religious life, and worship facilities in the New Draft of the Indonesian Criminal Code 2018 and in the Penal Code United Kingdom 2008 are based on *Religionsschutz Theorie*, *Gefuhlschutz Theorie*, and *Friedensschutz Theorie*. This is because both constitutions stated the law intends to protect religion, religious feelings, and the peace of religious communities.

Policy formulation/legislation regarding criminal acts against religion, religious life, and worship facilities in the Indonesian legal system needs to be implemented. This is because of insult, blasphemy or other similar things to God, the Prophet/Messenger, the holy book, or adherents of a valid religion in Indonesia can disrupt the stability of religious life, may endanger the peace, tranquility and security of social life, and may also endanger the unity, integrity, the national security of the nation and the State. Policy formulation/legislation regarding criminal offenses against religion, religious life, and religious facilities regulated in the new draft of the Indonesian Criminal Code (RKUHP) July 2018 is based on the development of policy formulations/legislation on "blasphemy" in the UK. However, some differences apply such as the criminal act of insulting one or several groups of the population based on race, nationality, ethnicity, skin color, and religion; declaring oneself to have supernatural powers, informs, gives hope, offers, or assists other people that because of their actions it can cause illness, death, mental or physical suffering to a person; theft of religious holy objects or objects used for religious purposes and criminal acts of fraud by using or abusing religion (the British Penal Code unregulate these things). In addition, it needs to be realized that the criminal act of "declaring oneself to have supernatural powers, informing, giving hope, offering, or assisting others that because their actions can cause illness, death, mental or physical suffering to a person" is a form of national crime in Indonesia as a consequence of the recognition of the laws that live in society.

SUGGESTION

To overcome various problems that may arise in the future, in connection with the discussion in this paper, several things can be suggested as follows: Policy formulation/legislation regarding

⁴⁷Aliansi Nasional Reformasi KUHP, *Catatan Terhadap Beberapa Ketentuan ...*, Op.Cit., Pg. 172.

⁴⁸Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Hukum Pidana*, PT. Alumni, Bandung, 1998., Pg. 156.

criminal acts against religion, religious life, and worship facilities written in the New Draft of the Indonesian Criminal Code 2018 should not only protect the interests of certain religions (Legal religions issued by the State) but must also provide legal protection to various religious sects that live, grow and develop in a very plural of Indonesian society. In addition, the Penal Code United Kingdom 2008 can be used as a comparison/reference for formulating criminal acts against religion, religious life, and religious facilities in reforming the national criminal law. However, above all, we must uphold the interests of the Indonesian nation and state to implement policy formulations/legislation relating to criminal acts against religion, religious life, and worship facilities in Indonesia and reform the national criminal law. Besides, it is also necessary to do legal comparisons with other countries or to conduct comparative legal studies with various international instruments. In conclusion, having a national spirit is very important to strengthen the unity, integrity, defense, and resilience of the Republic of Indonesia and provide protection and prosperity for every human being in Indonesia today and in the future.

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