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The Urgency to Incorporate the Islamic Concept of Rights into the International Human Rights Law Course in Indonesian Law Schools

Sigit Riyanto

*Department of International Law and Dean of the Faculty of Law,
Universitas Gadjah Mada, Jl. Sosio-Yustisia No. 1, Bulaksumur, Yogyakarta
Email: riyanto@gadjahmada.edu*

Fajri Matahati Muhammadin

*Department of International Law, Faculty of Law,
Universitas Gadjah Mada, Jl. Sosio-Yustisia No. 1, Bulaksumur, Yogyakarta*

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Abstract:

The discourse between International Human Rights Law (IHRL) and Islam has been a longstanding one. However, not all IHRL courses in Indonesia include Islamic human rights as one of the taught chapters. This normative research explores the urgency to include Islamic human rights in the IHRL curriculum and finds that it is indeed urgent to do so. There are two reasons found to include Islamic human rights in IHRL. First, it is a counter to the Eurocentric discourse of IHRL. Second, there are paradigmatic differences between IHRL and Islam which, if not understood, will make it difficult to fairly consider the discourse and analyze the derivative issues. There are two paradigmatic differences between IHRL and Islamic human rights, which are the epistemology and rights-obligation construction.

Keywords:

Islam; Human Rights Law; International Law; Indonesian.

Author correspondence email: riyanto@gadjahmada.edu
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Abstrak:

Diskursus antara Hukum Hak Asasi Manusia Internasional (HHAMI) dan Islam telah ada sejak lama dan hingga kini tidak habis-habis. Akan tetapi, ternyata tidak semua mata kuliah HHAMI yang diajarkan di fakultas-fakultas hukum Indonesia memasukkan HAM Islam sebagai salah satu pokok bahasan. Penelitian yang bersifat normatif ini akan mengkaji urgensi memasukkan konsep HAM Islam ke dalam kurikulum HHAMI di mana hal tersebut diketahui memiliki urgensi. Ditemukan dua alasan utama untuk melakukan hal tersebut. Pertama, sebagai salah satu *counter* terhadap narasi Eurosentrisme dalam diskursus HHAMI. Kedua, ternyata ada beberapa perbedaan yang bersifat paradigmatis antara HHAMI dan Islam, yang apabila tidak dikenal maka akan sulit mendudukkan diskursus HHAMI dan Islam dengan akurat apalagi mengkaji isu-isu turunan dengan tepat. Perbedaan paradigmatis ini ada dua, yaitu pada tatanan epistemologi serta konstruksi antara hak dan kewajiban.

Kata Kunci:

Islam; Hak Asasi Manusia; Hukum Internasional; Indonesia.

Introduction

There are so many discourses between international human rights law (hereinafter, IHRL) and Islam. So many fierce debates occur on this issue, and perhaps it can be agreed by all that there are matters of agreement and disagreements between IHRL and Islam.¹ The differences are not only in the detailed rights and application, but also at a paradigmatic level as this research will show.² Therefore, it

¹ See *inter alia*: Abdullahi Ahmed An-Na'im, "Why Should Muslims Abandon Jihad? Human Rights and the Future of International Law," *Third World Quarterly* 27, No. 5 (2006): 785-97; Mashood A. Baderin, *Hukum Internasional Hak Asasi Manusia dan Hukum Islam* (Jakarta: Komisi Nasional Hak Asasi Manusia, 2010); Ann Elizabeth Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct," *Mich. J. Int'l L.* 15 (1993): 307.

² The differences can go as deep as epistemology, as Islam and the Western-secular rooted human rights concept are worlds apart in this regard. Surely the derivative products (knowledge and rules) of the two would have differences that cannot be comprehended without first understanding the paradigmatic differences. This research goes deeper into this. Further reading on this difference of epistemology:

should be common sense to teach the Islamic concept of rights as one of the subjects in the teaching of IHRL in the world, and it should be more so in Islamic nations.³

However, a short survey conducted by the Research Team reveals that the teaching of IHRL courses in several universities in Indonesia has little to do with Islamic rights content. How can a law graduate understand, interpret, and apply Islamic laws or laws influenced by Islamic teachings without understanding or even knowing Islamic law theories? This is despite Islam being the second-largest religion in the world,⁴ and Indonesia has the largest Muslim population in the world.⁵ Besides, the Indonesian legal system has some Islamic influence albeit not formally being an Islamic state. The making of the Pancasila as the state ideology and 'source of all sources of law' was very heavily influenced by Islamic teachings and the Muslims.⁶

Some researches have addressed concern towards the issue mentioned above and also suggested prospects towards Islamization of knowledge.⁷ Those researches focus only on the Introduction to Jurisprudence course and only on particular chapters. As for the relation between IHRL and Islam, academic works mostly discuss the prospect of reconciliation the two different.⁸ It is difficult to find researches addressing the urgency to apply Islamization of

Adian Husaini and Dinar Dewi Kania, eds., *Filsafat Ilmu: Perspektif Barat dan Islam* (Jakarta: Gema Insani Press, 2013).

³ See for example, at the Ahmad Ibrahim Kuliyyah of Laws, International Islamic University of Malaysia, there is a course named "Fundamental Rights in Islam".

⁴Drew Desilver and David Masci, "World's Muslim Population More Widespread than You Might Think," Pew Research Center, 2017, <http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/>.

⁵Desilver and Masci.

⁶M. Saifullah Rohman, "Kandungan Nilai-Nilai Syariat Islam alam Pancasila," *Jurnal Studi Agama Millah* 13, No. 1 (2013): 209-11.

⁷ See *inter alia*: Fajri Matahati Muhammadin and Hanindito Danusatya, "De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The 'Introduction to Jurisprudence' Textbooks On The 'Norm Classification' Chapter," *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 1, No. 2 (2018): 135-58.

⁸ See *inter alia*: Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003). Baderin's work juxtaposes the rights in IHRL and Islam and suggests possible ways to reconcile the differences.

knowledge specifically in the context of the teaching of IHRL. Therefore, this research brings forth something new by observing the need for Islamization of knowledge in the context of teaching IHRL.

This research observes the urgency to incorporate the Islamic concept of rights into the IHRL courses in law schools. There are two major problems found, and it is these two problems which are discussed in this research: First, Islam's relation with international law throughout the ages has been met with problems of 'Eurocentrism'. Second, there are two paradigmatic differences between IHRL and the Islamic concept of rights, which are: Epistemology (secular and non-secular), and the construct of rights and responsibilities. These two problems are the focus of the discussion in this research, and it is found that they are essential to understand to objectively comprehend the discourse of IHRL and Islam. Likewise, it will be very difficult to understand the discourse of IHRL and Islam without introducing the Islamic concept of rights, especially at the paradigmatic level, in the IHRL courses.

Method

This research is mainly doctrinal legal research that analyses legal principles, doctrines, and theories and their relevance towards the teaching of IHRL. Two approaches will be combined, i.e. post-colonial theories in critical international law especially as argued by Antony Anghie, and the Islamic worldview as developed by Syed Muhammad Naquib Al-Attas. A literature review is conducted primarily using information and data obtained from books, articles, researches, and the primary, secondary, and tertiary sources of law of both international and Islamic law.

Discussion and Result

Unlike the secular understanding of what 'religion' means and encompasses, Islam is an *Al-dîn* whose meaning includes 'judicious power'.⁹ The Islamic legal system itself has the Al-Qur'ân and Sunnah

⁹ Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, Vol. 3 (Bayrût: Librairie du Liban, 1968), 942-47. For a detailed comparison between the Islamic notion of 'religion' and the secular one, see Syed Muhammad Naquib Al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993); Zara Khan, "Refractions Through the

as primary sources, and matters not specifically and explicitly regulated in those primary sources will be derived from those primary sources through *ijtihad*.¹⁰

Islam and International Law

One of the branches of Islamic law (*fiqh*) regulates the conduct of the Islamic nation with other nations, namely *fiqh al-siyar* (known also as the 'Islamic international law').¹¹ This branch of *fiqh* recognizes agreements and customary laws as source of law as long as they do not contradict the primary sources.¹² *Fiqh al-siyar* has historically contributed positively to the development of the norms of international law.¹³ There are claims that the first charter of rights in the world is the Madinah Charter.¹⁴ In this age, there is still a little role for Islamic law in modern international law, such as the use of Islamic law rules or maxims by the judges of the International Court of Justice.¹⁵

Additionally, there are numerous human rights treaties ratified by Muslim nations that also submitted reservations based on Islamic law.¹⁶ The practice of these Islamic nations which diverges from the

Secular: Islam, Human Rights, and Universality" (The City University of New York, 2016).

¹⁰Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor: The Other Press, 2003), 20; Wahbah al-Zuhayli, *Uşûl Al-Fiqh Al-Islāmī*, vol. 1 (Tehran: Dar Ihsan, 1997), 19; 'Abd al-Karim Zaydan, *Synopsis on the Elucidation of Legal Maxims in Islamic Law*, trans. Md. Habibur Rahman and Azman Ismail (Kuala Lumpur: IBFIM, 2015), 29.

¹¹Imam Al-Shaybānī, *The Islamic Law of Nations: Shaybani's Siyar*, trans. Majid Khadduri (Maryland: John Hopkins Press, 1966), 5-6.

¹² Al-Shaybānī, 8.

¹³Jean Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute, 1985), 15-17; Nahed Samour, "Is There a Role for Islamic International Law in the History of International Law?," *European Journal of International Law* 25, no. 1 (2014): 313-19.

¹⁴Badria Al-Awadhi, "Address by the Dean of the Faculty of Law and Shari`a in the University of Kuwait," in *Human Rights in Islam* (Geneva: International Commission of Jurists, 1982), 28.

¹⁵Awn S. Al-Khasawneh, "Islam and International Law," in *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, ed. Marie-Luisa Frick and Andreas Th Müller (Martinus Nijhoff Publishers, 2013), 34-41.

¹⁶Such as the International Covenant on Civil and Political Rights 1966 (ICCPR) and Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW), where many Islamic states made reservation.

other nations may be recognized as a persistent objection that creates an exception from the development of the customary international law¹⁷ of human rights. This is in addition to the Cairo Declaration on Human Rights in Islam (1990). However, there are various challenges and problems which diminish the role of Islam in international law. Some scholars suggest that it is partly due to the failure of the Organization of Islamic Cooperation to take lead,¹⁸ while others point their fingers towards the crisis of knowledge within the Islamic community itself.¹⁹

'Eurocentrism' as an External Problem

Scholars do not seem to deny that modern international law is of European origin. Some of these scholars accept this without questioning further,²⁰ but other scholars and thinkers, especially those using the post-colonial theory, are more critical and point out that there has been an injustice throughout history which needs to be corrected.

These thinkers have traced back this problem to medieval Europe during the rise of the natural law school of Francisco De Vitoria who justified colonialism as the center of international law at the time: The 'civilized nations' (i.e. the European nations) must 'civilize the uncivilized nations' (i.e. other than the European nations).²¹

¹⁷Malcolm N Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008), 91-93. There is a debate on the 'other states' approval' requirement in this.

¹⁸ See *inter alia*: Salim Farrar, "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?," *Chinese Journal of International Law* 13, no. 4 (2014): 787-817.

¹⁹ See *inter alia*: Syed Muhammad Naquib Al-Attas, *Risalah untuk Kaum Muslimin* (Kuala Lumpur: ISTAC, 2001).

²⁰ Sugeng Istanto, *Hukum Internasional* (Yogyakarta: Penerbit Universitas Atmajaya Yogyakarta, 1994), 9-10.

²¹Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2004), 251. This train of thought was adopted by other scholars in that era including those dubbed as 'fathers of international law' such as Emer de Vattel. De Vattel justified the conquest over the natives of North America because these natives were nomadic, while the 'natural law' (according to the Europeans, that is) demands the permanent cultivation of the lands. See Emer De Vattel and Joseph Chitty, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (PH Nicklin & T. Johnson, 1835), 35.

In that global colonial era, the colonial powers have made various efforts to eradicate the practice of Islamic law in their colonies. For example, in the part of Nusantara (which is now Indonesia), well-established and pre-existing *adat* and Islamic courts were abolished and replaced by the Dutch law courts.²² It was only after independence that Islam could become an important element in the system of governance in Indonesia,²³ and this is even only to a few matters. This was how a 'Eurocentric' international law was formed, and then preserved through the era of legal positivism.²⁴ It was even further preserved throughout the post-World War II decolonization period,²⁵ and continues to this day where the European (more referred to as 'Western') worldview becomes the measure of truth and correctness by the mere virtue of being Western.²⁶

Examples of this include the imposition of the Western human rights standards of good governance at the World Bank,²⁷ strange and ill-justified UN reports issued by the Committee Against Torture and UN Rapporteurs regarding lashing as a penalty,²⁸ the European Union policy on investments which requires the investee state to apply EU-

²²Ramlah, "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama di Indonesia," *Jurnal Kajian Hukum Islam* 12, No. 1 (2012): 386-90.

²³ As explained earlier, even the Pancasila as state ideology was heavily influenced by Islam and the Muslims. See: Rohman, "Kandungan Nilai-Nilai Syariat Islam dalam Pancasila"; Marybeth T. Acac, "Pancasila: A Contemporary Application of Maqasid Al-Shari' Ah?," *Journal of Indonesian Islam* 9, no. 1 (2015): 59-78.

²⁴ Fajri Matahati Muhammadin, "Universalitas Hak Asasi Manusia dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial," in *Hak Asasi Manusia: Dialektika Universalisme vs Relativisme Di Indonesia*, ed. Al-Khanif, Herlambang P. Wiratraman, and Manunggal Kusuma Wardaya (Yogyakarta: LKiS, 2017), 7; John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), 1-2.

²⁵Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 254; Antony Anghie, "Towards a Postcolonial International Law," in *Critical International Law: Post-Realism, Post Colonialism, and Transnationalism*, ed. Prabakhar Singh and Benoit Mayer (Oxford-New Dheli, 2014), 136-37.

²⁶ Wan Mohd Nor Wan Daud, *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonialization* (Johor Baru: UTM Press, 2013), 6-7.

²⁷ The primary victims were the Latin American States. See Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 261-62.

²⁸ Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and the Convention Against Torture," *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 18-20.

style human rights as prerequisite to investments,²⁹ the imposition of the Western-secular gender equality standards in CEDAW,³⁰ and many others. This is the unjust imposition of Western worldview and its products as a universal standard,³¹ also referred to as 'Eurocentrism'.

Traces of Eurocentrism in Law School Education

It has been explained earlier how Islamic law in Indonesia has been heavily reduced due to colonialism. This heavily impacts education. For many years and decades, Islamic law is made alien to law students (including the Muslim students) except for the few parts of it already codified to the Indonesian national legislation. A survey has been conducted towards the law students (Muslims only) of one of the best law schools in Indonesia, and one hundred percent of the respondents did not know any basic of *al-qawā'id al-fiqhiyyah*, but they all recognized the Latin legal maxims which have the same meaning with the basic *al-qawā'id al-fiqhiyyah* asked to them.³²

From the most fundamental aspects, the concept of religion as a norm is taught to display as if it is disconnected from other aspects of life. In the Introduction to Jurisprudence course, for example, most textbooks explain that 'religious norms' is a separate norm from the others such as legal norms, ethical/moral norms, and social norms (although they may complement each other).³³ Religious norms are said to be: (i) only regulating human-God relations, and (ii) has

²⁹Lorand Bartels, "The European Parliament's Role concerning Human Rights in Trade and Investment Agreements," 2014, <http://www.europarl.europa.eu/cmsdata/86031/Study.pdf>.

³⁰ Muhammadin, "Universalitas Hak Asasi Manusia dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial," 12, 13, dan 16.

³¹ Padahal ia sejatinya tidaklah universal. Lihat: Muhammadin, "Universalitas Hak Asasi Manusia Dalam Hukum Internasional: Sebuah Pendekatan Post-Kolonial."

³² Vina Berliana Kimberly, Novita Dwi Lestari, and Fajri Matahati Muhammadin, "Incorporating Qawaidh Fiqhiyyah to the 'Principles of Law' Chapter in the Introduction to Jurisprudence Course in Indonesia's Legal Education," in *International Conference on Research in Islamic Education 2018 Conference Proceeding, Fakultas Tamadun Islam, Universiti Teknologi Malaysia* (Kuala Lumpur: Springer, 2019), (upcoming).

³³Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 3rd ed. (Yogyakarta: Liberty, 1991), 5-12; Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Prenadamedia Group, 2008), 79-83; Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bhakti, 1991), 26.

weaknesses because it only prescribes obligations and does not have worldly sanctions.³⁴ On the other hand, Islam, as explained earlier, is not at all like that.³⁵

Because of that, all courses with traces of Eurocentrism, including IHRL, must be critically reviewed and renewed. Otherwise, these courses will do nothing but preserve and continue the intellectual legacies of colonialism. It must be noted that the Preamble of the Indonesian constitution, in its first line, reads “...*penjajahan di atas dunia harus dihapuskan.*”³⁶ Law students must be aware of a broader extent of the IHRL discourses. Particularly in the discussion of this research, the Islamic concept of rights must be introduced as it is not only a very contemporary discourse but also because it is very close to the identity of the Indonesian people which was once eroded by colonialism.

Islam, Islamic Epistemology, and Its Implications

An undeniable reality of the human rights concept in international law (i.e. IHRL) is its origin from a secular concept.³⁷ This is despite some non-secular states that ratify the IHRL instruments and therefore implement them in a non-secular manner (insofar as they can do so).³⁸ The problem is that the distinction between a secular and non-secular worldview is often understood only at the surface. This is while the differences between the two are very fundamental, and the failure to understand it would render students unable to properly and objectively understand derivative issues.

The first thing to understand is that the term ‘secular’ is fundamentally a worldview of reality as explained by C. A. van Peursen: “...*deliverance first from religious, and then from metaphysical,*

³⁴Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 9-10.

³⁵ See further: Muhammadin and Danusatya, “De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The ‘Introduction to Jurisprudence’ Textbooks on The ‘Norm Classification’ Chapter”; Khan, “Refractions Through the Secular: Islam, Human Rights, and Universality.”

³⁶ Loosely translated: “... colonialism must be eradicated from the face of the earth.”

³⁷Michael Freeman, “The Problem of Secularism in Human Rights Theory,” *Human Rights Quarterly* 26, no. 2 (2004): 399.

³⁸For example Indonesia, Saudi Arabia, and others.

control over human reason and language.”³⁹ Secularism is then derived into the disenchantment of nature, the desacralization of politics, and deconsecration of values.⁴⁰

Secularism then affects epistemology, especially on the sources of knowledge. The human mind’s ratio becomes the only criteria of truth and source of knowledge,⁴¹ while metaphysical realities have neither relevance nor epistemological value.⁴² One of the effects is the promulgation of secular-derived theories such as August Comte’s *Law of Three Stages* which assumes that a man taking knowledge from religion is the most primordial stage of man, while a man taking knowledge from the scientific inquiry is the modern (and most advanced) man.⁴³

On the other hand, Islam is very different. The first time the Al-Qur’ān mentions *taqwā*, it is in the form of *muttaqīn* (‘people of *taqwā*’).⁴⁴ That mention is followed by a list of characteristics of the *muttaqīn*, and the very first characteristic is ‘to believe in the *ghayb* or unseen’.⁴⁵ How can someone believe in metaphysical realities without making them a source of knowledge? This is why the Islamic epistemology puts *khobar sādīq* or true news (which includes divine revelation) as one of the causes of knowledge other than ratio, senses, and intuition.⁴⁶ This is where the secular and Islamic epistemology clash.

³⁹Cited in: Harvey Cox, *The Secular City: Secularization and Urbanization in Theological Perspective* (New Jersey: Princeton University Press, 2013), 2.

⁴⁰Al-Attas, *Islam and Secularism*, 18.

⁴¹Adnin Armas and Dinar Dewi Kania, “Sekulerisasi Ilmu,” in *Filsafat Ilmu: Perspektif Barat dan Islam*, ed. Adian Husaini and Dinar Dewi Kania (Jakarta: Gema Insani Press, 2013), 7.

⁴²Justus Harnack, *Kant’s Theory of Knowledge* (London: Macmillan Publisher, 1968), 142–45.

⁴³Auguste Comte, “Plan of the Scientific Work Necessary for the Reorganisation of Society,” in *Comte: Early Political Writings*, ed. H.S. Jones (Cambridge: Cambridge University Press, 1998), 81.

⁴⁴*Taqwā* means the consciousness of Allah.

⁴⁵*Ghayb* means ‘the unseen’, referring to things that exist in a metaphysical but not a physical materialistic plane. See Q.S al-Baqarah 2 :2-3, especially verse 3 where the characteristics of the ‘people of *taqwā*’ are mentioned.

⁴⁶Sa’d al-Din Al-Taftazani, *A Commentary on the Creed of Islam (Sa’d Al-Din Al-Taftazani on the Creed of Najm Al-Din Al-Nasafi)* (New York: Columbia University Press, 1950), 15–17.

Some scholars such as Helen Quane merely demand that secular international law must take precedence over religious teachings when they contradict each other.⁴⁷ Meanwhile, one cannot simply put man-made laws over God-made laws unless they have by default applied a secular framework that sees anything 'religious' as primordial as per Comte's theory. Quane simply dismisses the Islamic epistemology without any mention of it and bases her entire case on a secular view.

On the other hand, putting Islamic laws below other laws is one of the nullifiers of Islam.⁴⁸ Even the Pancasila, considering what the First *sila* says, cannot accept Quane's argument. However, it may seem that Quane's position represents mainstream scholarship. Therefore, secular thinkers would not recognize the epistemological problem behind this train of thought and therefore unable to address the issue objectively and correctly.

Case Study: Religious Blasphemy

One of the most concrete case studies to best illustrate the significant difference between both epistemologies is the criminalization of religious blasphemy. On one hand, the position of IHRL is clear. Various bodies under the UN have stated that the criminalization of religious blasphemy is a violation of the freedom of expression.⁴⁹ On the other hand, Islam supports the criminalization of religious blasphemy. There is a consensus among the classical Muslim jurists that religious blasphemy is punishable by death.⁵⁰ Behind both of these different positions are significant epistemological differences.

⁴⁷ Helen Quane, "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?," *Oxford Journal of Legal Studies* 33, No. 4 (2013): 675.

⁴⁸Committing a nullifier of Islam would render a Muslim no longer within the fold of Islam. Shalih bin Fauzan Al-Fauzan, *Syarah Nawaaqidhul Islam* (Jakarta: Akbar Media, 2017), 122-40.

⁴⁹ OHCHR, "Blasphemy Law Has No Place in a Tolerant Nation like Indonesia - UN Rights Experts," *Office of the High Commissioner of Human Rights*, May 22, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21646&LangID=E>; HRC, "General Comments No. 34 (CCPR/C/GC/34)" (Geneva, 2011), <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁵⁰Imam ibn Al-Mundzir Al-Naysaburi, *Al-Ijma* (Saudi Arabia: Maktabah Al-Furqan, 1999), 174.

The secular IHRL position sees no virtue in criminalizing religious blasphemy. This is because *inter alia* most major textbooks explain 'benefit' as a purpose of law with Jeremy Bentham's utilitarianism.⁵¹ John Stuart Mill, Bentham's student, stated that punishments should only be applied only to prevent material danger or loss towards other members of the society (as opposed to the moral infringement).⁵² Bentham is secular, and Mill accepts Comte's Law of Three Stages.⁵³ Surely they do not consider metaphysical danger or loss such as in the context of *aqidah*.⁵⁴

On the other hand, Islam sees it differently. The purpose of the *Syari'ah* (*maqāṣid al-syari'ah*) is to achieve *maṣlaḥat* (advantage) both in this world and the hereafter.⁵⁵ *Maṣlaḥat* is therefore divided into the hereafter's *maṣlaḥat* and the world *maṣlaḥat*.⁵⁶ The hereafter's *maṣlaḥat* truly takes precedence over the world *maṣlaḥat*,⁵⁷ because Islam sees this world as a mere means to achieve the hereafter⁵⁸ and heaven is the best destination in that hereafter.⁵⁹

One of the subjects under *maṣlaḥat* is the *hifdz al-dīn* (preservation of belief, meaning towards Islam) is the glorification of

⁵¹ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty Press, 2006), 80; Marzuki, *Pengantar Ilmu Hukum*, 119; Achmad Ali, *Menguak Tabir Hukum*, 2nd Edition (Jakarta: Penerbit Kencana, 2015), 92-95.

⁵² John Gray, *Mill on Liberty: A Defence*, Second Edition (London and New York: Routledge, 1996), 3.

⁵³ James E. Crimmins, "Bentham on Religion: Atheism and the Secular Society," *Journal of the History of Ideas* 47, no. 1 (1986): 95-110; Sujith Shashi Kumar, "Reassessing JS Mill's Liberalism: The Influence of Auguste Comte, Jeremy Bentham, and Wilhelm von Humboldt." (London School of Economics and Political Science (United Kingdom), 2006), 62.

⁵⁴ Further discussions regarding utilitarianism and *maqāṣid al-syari'ah*: Nurizal Ismail, Fajri Matahati Muhammadin, and Hanindito Danusatya, "The Urgency to Incorporate Maqasid Shari'ah as an Elucidation of 'Benefit' as a Purpose of Law in Indonesia's Legal Education," in *1st International Conference on Law, Technology, and Society (ICOLESS) 2018* (Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2019).

⁵⁵ Imam Ibn Ashur, *Treatise on Maqasid Al-Shariah* (London: IIIT, 2006), 71.

⁵⁶ Imam Al-Ghazali, *Shifa'al-Ghalil Fi Bayan Al-Syabah Wa Al-Mukhil Wa Masalik Al-Ta'lil* (Baghdad: Mathba'ah al-Irsyad, 1971), 159-61.

⁵⁷ Al-Ghazali, 159; Nyazee, *Islamic Jurisprudence*, 204-6.

⁵⁸ Imam Ibn Al-Qayyim Al-Jawziyah, *'Uddatush Shabirin* (Jakarta: Qisthi Press, 2010), 264.

⁵⁹ See *inter alia*: Q.S Ali Imron 3:185.

Allah, His *dīn* (religion), and his messengers (i.e. prophets).⁶⁰ Blasphemy violates that very fundamental and basic aspect of Islam,⁶¹ and Muslims committing it are considered no longer in the fold of Islam and therefore the laws related to apostasy (*riddah*) would apply towards them.⁶²

It is therefore clear that IHRL which is based on secular-based jurisprudence and thought cannot accept the criminalization of religious blasphemy, while Islam can. Which epistemology should one choose? This is not a difficult choice for Muslim studying law in a state-based upon the Pancasila as a state ideology. Surely this can be debated further. However, if this difference is not even introduced in the classrooms, students will not be able to objectively and accurately comprehend problems rising from these epistemological differences between IHRL and Islam. Consequently, they will be unable to make proper and coherent conclusions when analyzing those problems.

It is understood that this discussion seems more of a philosophical discussion rather than that of law. However, multidisciplinary approaches in legal education (or the education any field, really) is an inevitability.⁶³

The Concept of 'Human Obligations' in Islam

In the realm of IHRL, the term 'rights' (meaning 'entitlement'), is often mentioned as a recurring theme. On the other hand, the term 'obligation', is rarely mentioned other than 'obligation to respect/guarantee rights'. Islam is different in this respect, and this difference has paradigmatic implications.

IHRL is constructed to heavily lean towards rights, one of the factors is that it historically was a regime born out of the extremely massive violation of human rights during World Wars I and II.⁶⁴

⁶⁰ Abd al-Raḥmān Al-Sa'di, *Taysiru Al-Karīma Al-Raḥmān Fī Tafṣīri Kalāmi Al-Mannān* (Cairo: Dar al-Hadith, 2002), 357.

⁶¹ Al-Sa'di, 357. See also: Imam Ibn Al-Qayyim Al-Jawziyah, *Al-Jawāb Al-Kāfī* (Al-Maghrib: Dar al-Ma'rifah, 1997), 46.

⁶² See: Q.S al-Tawbah, 9:65-66. See also: Imam Muhammad bin 'Abd al-Wahhab, *Nawaqidhul Islam - Pembatal Islam (Matan dan Terjemah)* (Surabaya: Pustaka Syabab, 2015), 164-83.

⁶³ See: Mochtar Kusumaatmadja, "Pendidikan Hukum di Indonesia: Penjelasan Tentang Kurikulum 1993," *Jurnal Hukum & Pembangunan* 6, no. 1994 (1994): 498-99.

⁶⁴ Shaw, *International Law*, 271.

However, this absence of ‘human obligations’ to balance the ‘human rights’ was one of the main critics of the Indonesian Council of Ulema towards international human rights.⁶⁵ This problem is also a deviation from the pattern of balance between rights and obligations in legal education. For example, law students are taught in their first semester about the relation between ‘law, rights, and obligations’.⁶⁶ Even, Law No. 39 of 1999 concerning Human Rights prescribes *Kewajiban Dasar Manusia* (i.e. human fundamental obligations).⁶⁷

If two different regimes have different constructions of balancing rights and obligations, surely there would be very different understandings of what ‘rights’ mean and how they are perceived. As a consequence, the detailed enumeration of rights would surely have different meanings between the two different regimes altogether. This is the case with IHRL and Islam.

Islam, in contrast to IHRL, provides both rights and obligations while somewhat inclining towards obligations. From the most fundamental nature of a human being, humans are created with the obligation –not rights—to worship Allah as explained in Q.S al-Dzāriyāt 51:56: “*And I did not create the genie and mankind except to worship Me.*”

Only then that Allah decrees that humans have rights as He is *Al-Raḥmān* which means The Most Compassionate and Merciful towards all creation without exception⁶⁸ and has prohibited *dzulm* (the violation of rights) upon Himself and all creation.⁶⁹ This is why, as argued by Shamrahayu bt. Abdul Aziz, Islam is essentially duty-

⁶⁵“Fatwa Majelis Ulama Indonesia No. 6/MUNAS VI/MUI/2000 Tentang Hak Asasi Manusia” (Jakarta, 2000), 381, <https://mui.or.id/wp-content/uploads/2017/02/26.-Hak-hak-Asasi-Manusia-HAM.pdf>.

⁶⁶Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 38–46.

⁶⁷Articles 67-70 of Law No. 39. Of 1999 concerning Human Rights: Obeying the law, defending the state, and respecting the human rights of other people.

⁶⁸Imam Ismail ibn Katsir, *Tafsir Al-Qur’an Al-Adzim*, vol. 1 (Beirut: Dar al-Kutub ‘Ilmiya, 1998), 39.

⁶⁹Imam Muslim, *Sahih Muslim* (Riyadh: Bait Al-Afkar Ad-Dauliyyah, 1998), ḥadīth no.2577. Imam An-Nawawi and Muhammad bin Shalih Al-Utsaimin, *Syarah Hadits Arba’in Imam Nawawi* (Yogyakarta: Media Hidayah, 2006), 195.

based.⁷⁰ This difference with IHRL would create paradigmatic differences towards derivative issues which, if not understood, would result in misunderstanding.

A Case Study on Derivative Issues

Among the differences between IHRL and Islam due to the difference in the construction of rights and obligations is related to knowledge and education. IHRL, through Article 13 (1) of the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR), prescribes a right to education.

On the other hand, to receive an education is not a right but rather an obligation.⁷¹ Islamic jurists divide knowledge in two types: first, knowledge which is obligatory to be learned by everyone (*farḍ al-'ayn*) such as the knowledge of *tawhīd* and basic *fiqh*;⁷² and second, knowledge which is obligatory to some people (*farḍ al-kifāyah*) due to a collective necessity of it within the community, such as medical science.⁷³

The Islamic State has obligations to *inter alia* implement and enforces the *Syari'ah* (which contains rights and obligations),⁷⁴ which includes providing education to facilitate the society's need to fulfill their obligation to receive an education. This would also mean that the society would then also have rights to be guaranteed to receive education by the Islamic State so that they can fulfill their obligation as explained earlier. From here, more derivative issues may follow, such as whether someone may choose to be uneducated (IHRL: yes, Islam: no), and many more.

A second derivative issue that resulted from the different construction in rights and obligations, which is very central, is the issue of religion and worship. On one hand, the ICCPR in articles

⁷⁰Shamrahayu Binti Abdul Aziz, "Islamic Concept of Human Rights," in *Human Rights Law: International, Malaysian and Islamic Perspectives*, ed. Abdul Ghafur Hamid @ Khin Maung Sein (Selangor: Thomson Reuters Malaysia Sdn Bhd, 2012), 329.

⁷¹ See *inter alia*: QS. Taha 20: 114, QS. Al-Nahl 16: 78, QS. Muhammad 47: 19, and see also: Imām Al-Ghazālī, *Ihyā' 'Ulūm Al-Dīn*, vol. 1 (Beirut: Dar al-Kutub 'Ilmiya, 1971), 14.

⁷²Al-Ghazālī, 1:14.

⁷³Al-Ghazālī, 1:15-16.

⁷⁴Musthafa Al-Khin and Musthafa Al-Bugha, *Konsep Kepemimpinan dan Jihad dalam Islam: Menurut Madzhab Syafi'i* (Jakarta: Darul Haq, 2014), 110-11.

18(1)-(2) rules that every human being has the freedom to choose their religion and manifest them in acts of worship, and that they may not be forced in a manner that would disrupt that freedom. Here, the role of the government is to guarantee that such freedom is enjoyed by their people.

Islam sees the issue very differently. As explained earlier, to worship Allah is essentially an obligation (instead of a right) towards all *jinn* and human beings as Q.S al-Dzāriyāt 51:56 mentions. Besides, Islam only recognizes one religion (i.e. Islam) as the true religion as Q.S Ali Imrān 3:19 stated: “Indeed, the religion in the sight of Allah is Islam.”

As a side note, it is important to note that the consequence of the obligation to worship Allah in Islamic terms does not mean that Muslims may coerce non-Muslims to accept Islam.⁷⁵ Rather, it is understood to mean that Muslims must conduct *da'wah* (propagation) with good arguments and in the best of manners.⁷⁶ If a non-Muslim refuses to accept Islam until the end of her/his life, it would be their business with Allah.⁷⁷

The differences of construction between IHRL and Islam regarding religion and worship, which is a right according to IHRL and an obligation according to Islam, causes a complex relationship between the two. At times, IHRL and Islam can agree on certain issues. For example, the Human Rights Committee declared that the *hijāb* (or *khimār*, referring to the headscarf worn by Muslim women) prohibition in Uzbekistan was a violation of human rights.⁷⁸ The Muslims would surely support the condemnation towards that Uzbekistan policy. However, there are times when disagreements and misunderstandings occur between IHRL and Islam. An example of

⁷⁵See: QS. Al-Baqarah 2: 256, and: Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, vol. 1 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 623–24.

⁷⁶ Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, vol. 5 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 3989–90.

⁷⁷ I.e. to receive punishment in the hereafter. See: QS. Al-Kahf 18:29, also see: Haji Abdulmalik Abdulkarim Amrullah, *Tafsir Al-Azhar*, vol. 6 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 4191.

⁷⁸ UN Human Rights Committee, *Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000, para. 6.2.

this is Ann Elizabeth Mayer's critic of the imposition of *hijāb* in Saudi Arabia.⁷⁹

According to Mayer, Saudi's policy is not Islamic teaching but rather a mere political maneuver. In her explanation, it is clear that Mayer sees that for Muslim women to wear the *hijāb* is a right (which may or may not be exercised, at the discretion of the individuals), while the government should have only taken the role as guarantor of rights.⁸⁰ However, in Islam, wearing a *hijāb* is obligatory for grown-up women.⁸¹ As explained earlier, an Islamic state has to implement and enforce the *Syari'ah* which is duty-based. This is different from an IHRL construct, where Mayer seems to misunderstand and therefore ends up with an inaccurate conclusion.

Conclusion

It has also been shown that there are some paradigmatic differences between IHRL and the Islamic concept of rights which, if not understood, will cause much misunderstanding. It is difficult to truly understand religion-related issues such as deviant sects or religious blasphemy if one analyzes the relevant Islamic laws but using a secular epistemology. For instance, failing to understand the difference in the construction of rights and obligations (i.e. IHRL focusing on rights, and Islam focusing on both but leaning towards obligations) would also lead to misunderstanding and confusion in derivative issues. Therefore, it is essential to incorporate the Islamic concept of rights in the curriculum of the IHRL course in Indonesian law schools. More importantly, the syllabus must emphasize the identification and understanding of the paradigmatic differences between IHRL and the Islamic concept of rights. This is hoped to help facilitate the students to be able to study and analyze issues related to IHRL and Islam more objectively and accurately.

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⁷⁹Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct," 393-97.

⁸⁰Mayer, 402-3.

⁸¹ Except in front of their immediate family. Imam ibn Ḥazm, *Marātib Al-Ijmā'* (Beirut: Dar al-Kutub al-'Ilmiyyah, n.d.).

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