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REVIEW ARTICLE

BRIDGING THE GAP BETWEEN
CULTURAL RELATIVISM AND
UNIVERSALITY OF HUMAN RIGHTS:
INDONESIA ATTITUDES

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ABSTRACT

Debates on the universality of human rights and cultural relativism seem to be eternal and will continue to exist as societal dynamics bring different views, concepts, and understandings of human rights and culture. However, it cannot be denied that modern international human rights law which is currently being referred to and adopted by the international community, still creates gaps in the protection of human rights. Meanwhile, the development of cultural relativism in the 20th century is quite successful in bridging the gap between the two and contributing positively to the implementation of international human rights law at the domestic level. Nonetheless, the cultural relativism approach presents critiques and challenges. By using various secondary resources, this paper begins with the concept of, debates between, and challenges of cultural relativism and universality of human rights. The paper indicates that the contribution of cultural relativism can be seen from building tolerance and protection of communal rights, the

rights of marginal groups, and the optimization of domestic law when dealing with some competing's rights. This is a good opportunity to reduce discriminatory actions against marginalized groups for maintaining tolerance and harmony in a plural society. The effectiveness of the application of "margin appreciation" in Europe should be the best practice to actualize "Asian values" or "African values" in formulating the concepts of "public morality" or "public order" clearly and precisely. The cultural relativism approach may not be used by a government to justify any human rights violation. Both of these are important considerations for Indonesia because of its ambiguous attitude in placing these two theories appropriately and purposefully.

Keywords: Universality of Human Rights; Cultural Relativism; Discrimination; Vulnerable Groups; Plural Society; Human Rights Protection.

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INTRODUCTION

Debates on universality of human rights and cultural relativism seems to be eternal and will continue to exist as societal dynamics that bring different

views, concepts and understandings of human rights and culture¹. However, it cannot be denied that modern international human rights law, which is currently being referred to and adopted by the international community, remains create gaps in the protection of human rights. Meanwhile, the development of cultural relativism in the 20th century is quite successful in bridging the gap between the two and contributing positively to the implementation of international human rights law at a domestic level. Nonetheless, the cultural relativism approach presents critiques and challenges. Among scholars, Posner criticized that the high number of ratifications of international human rights treaties is not directly proportional to the protection of human rights, needs to be a material for reflection². In one hand, countries claim to have a national interest in maintaining the unity, tolerance, and harmony of plural society, so they try to build a balance when facing conflicting rights. On the other hand, states understand the weaknesses of universality of human rights, that there are no strong and binding mechanisms in the international human rights law regime, ratified treaties can be reserved, and there are norms in human rights law that fulfil them by the state can be done in stages.

Therefore, the rigidity of the application of the principle of universality of human rights to all kind of rights, is contradictive with the international human rights law itself. The conformity of international human rights law based only on global consensus as a result of the state's ratification to the treaties will not solve the problem and fail to accommodate local traditions, practices, values, morality which are in fact diverse. The combination of these two theories needs to be directed and targeted to optimize the protection of harmonious human rights. First, the application of the strong theory of universality needs to be supported by the global community when dealing with fundamental rights such as the right to life, the right to be free from torture, or from slavery, the right without

¹ Jack Donnelly, *The Relative Universality of Human Rights*, 92 HUMAN RIGHTS QUARTERLY 281, 194-204 (2007); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 175-177 (Cornell University Press, 2013); Michael Goodhart, *Neither relative nor universal: A Response to Donnelly*. 30 HUMAN RIGHTS QUARTERLY 183, 183-193 (2008); Louis Henkin, *The universality of the concept of human rights*, 506 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 10-16 (1989); Makau Mutua, *Human rights in Africa: the limited promise of liberalism*, 51 AFRICAN STUDIES REVIEW 17, 17-39 (2008).

² ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 35-36 (Oxford University Press, USA, 2014).

discrimination, and the right to choose or embrace religion. Second, while cultural relativism theory is also important to optimize the protection of communal rights or the right of marginal groups that are often forgotten, as well as when the government needs to deal with the competing rights. For example, a state needs to make a balance between the right to freedom of expression and the right to freedom of religion when dealing with the case of FGM, Proselytism, blasphemy, LGBT, and many other sensitive issues. With a note, the state does not take refuge under the theory of cultural relativism to justify actions that violate basic rights, on the grounds of maintaining public order or public morality.

Then, is Indonesia's attitude appropriate in building a balance between the two? Having regard to the fact that Indonesia is a participating country who ratified 8 out of 9 of the core international human rights treaties, while on the other hand the protection of human rights related to the rights to freedom of religion and expression is still in the spotlight of the international community.

By using various secondary resources, this paper seeks to discuss the contribution of cultural relativism in building bridges over the gap between cultural relativism and the universality of human rights in the protection of human rights, as well as analysing Indonesia's attitude towards the universality of human rights. This paper begins with the concept of cultural relativism and universality of human rights. Then, it continues to examine critiques of the debate between cultural relativism and universality of human rights. In part two, it analyses the need to balancing between the two since a rigid understanding of the universality of human rights can ignore local values and rules³, while applying cultural relativism as a justification for coercive or discriminatory actions against vulnerable groups that was criticized by Mayer⁴. In part three, it elaborates four aspects of contribution of cultural relativism to the protection of human rights, as well as some challenges to avoid the misused of cultural relativism approach for justification of recurring human rights violations, and the state's reluctance

³ DONNELLY, 2007, *supra note 1*; Jack Donnelly, *Human rights: Both universal and relative (A reply to Michael Goodhart)*, 30 HUMAN RIGHTS QUARTERLY 198-199, 194-204 (2008); DONNELLY, 2013, *supra note 1*.

⁴ ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS, TRADITION, AND POLITICS* (Westview Press, Nashville, Tennessee, 2013).

to conduct domestication of international human rights law. Then, finally it closes with concluding remarks.

CONCEPT OF UNIVERSALISM AND CULTURAL RELATIVISM OF HUMAN RIGHT

I. UNIVERSALITY OF HUMAN RIGHTS

Universality of human rights based on the theory of rationalism believes that human rationality is important in protecting human rights to treat all humans equally.⁵ This theory emphasizes the importance of respecting human dignity of every human beings, because human rights are inherent, indivisible, requiring equal treatment or without discrimination to every human being universally. According to natural law theory, human right comes from nature. Human right is inherent and belong to everyone in everywhere, from birth until death⁶, simply because he or she is a human being. Therefore, international human rights law focuses on protecting individual rights rather than communal rights. As laid down in Universal Declaration of Human Rights (UDHR) of 1948 and its various derived covenants that “everyone” shall enjoy the right to life, freedom from torture, freedom from slavery, freedom from any discrimination.⁷ To guarantee human rights that originate from nature and are abstract, a legal framework is needed to ensure that the inherent rights that exist in humans are not violated by the state or other parties. According to Donders, universality of human rights produce universal human rights legal norms.⁸ These

⁵ The theory of rationalism aims to reduce the limit aspect of the theory of natural law that based on the concept of morality in which what is good and bad is changed overtime. For example, in the past the practice of slavery considered as good practice or legal, but today it considered as bad or illegal. However, other than that the idea of natural law, such as justice, equality, human dignity becomes the core concept of human rights. *See also* DONNELLY, 2013, *supra* note 1.

⁶ RONALD DWORKIN, *RIGHTS SERIOUSLY* (Edinburgh, A&C Black, 2013).

⁷ HENKIN, 1989, *supra* note 1.

⁸ Yvonne Donders, *Do cultural diversity and human rights make a good match?* 61 *INTERNATIONAL SOCIAL SCIENCE JOURNAL* 16, 15-35 (2010).

international legal norms comprise into various human rights treaties, which states can ratify.⁹

In the core instruments of human rights law tend to follow the theory of universality of human rights. For instance, the UDHR in Article 1 that “*all human beings are born free and equal in dignity and rights*”. The use of similar terms of “*all human beings*” such as “*every person*”; “*everyone*” or “*no one*” can also be found in the ICCPR.¹⁰ Universalists such as Steiner et al. believe that human rights law should be universally enforced in all contexts because it is the result of agreements with various countries about common standards that must be achieved to protect human rights.¹¹ Therefore, referring to universality of human rights theory places international human rights law above domestic law. Therefore, countries that ratify international human rights treaties have legal consequences for compliance. The national attitude is to domesticate international human rights law into national law. This domestication has consequences for the actions of amendment, cancellation of the domestic laws that block human rights protection or making a new law that are needed to follow-up the ratification and to make sure that the new law is in line with international human rights law. Universalists advise to leave or even against local cultures that are discriminated against certain groups of people, create un-equal treatment, and are not in harmony with international human rights law.

II. CULTURAL RELATIVISM OF HUMAN RIGHTS

Conceptually, cultural relativism of human right is a concept that places human rights as values that cannot escape from the influence of local culture so human rights cannot be uniformed between one country and another, because each country has a diverse culture. Therefore, the concept of cultural relativism rejects the universalism of human rights. Donnelly emphasizes that cultural relativism is influenced by reality, morals, and social

⁹ Alberto Quintavalla, & Klaus Hein, *Priorities and human rights*, 23 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 679, 679-697 (2019).

¹⁰ DONDERS, *supra* note 8.

¹¹ HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 366-367 (Oxford University Press, USA).

institutions, where each culture has three different character.¹² Therefore, what happens in one country is strongly influenced by the local culture, which other countries cannot judge.¹³ Donnelly also divides cultural relativism into two, namely (1) strong or radical cultural relativity, where values, morality, and local practice are the sole determinants of human rights morality; and willing to recognized few basic rights; (2) weak cultural relativism, will accept the concept of universality of human rights, with variations in adjustments and in strict restrictions influenced by local cultural.¹⁴ This view believes that applying international norms that are contrary to local culture violates a country's sovereignty.

Unfortunately, until recently, indigenous groups or religious minority groups often get unfair treatment because they are considered NOT "fully human beings" that make them ruled out. Discrimination against minority groups such as genocide happened during World War II and continue until today.¹⁵ Mutua warns that the excuse of the proselytizing, millions are killed and enslaved because of untold suffering. Mutua gives an example of the application of proselytism that violates the right of freedom of conscience of Africans communities to protect their own beliefs.¹⁶ The coercion of proselytism in South Africa done by Christianity and Muslim defeat differences and influentially enforce the orthodox religions.¹⁷ Mutua indicates that universality of human rights does not reach all the way into the indigenous peoples' rights. Mutua argues that indigenous beliefs have a right to be respected and left alone from more dominant external religions. The right to advance, receive, and disseminate ideas are not absolute rights and allow to be limited based on certain circumstances that prescribed by law. Therefore, Mutua suggests others to understand the Africans' culture

¹² DONNELLY, 2007, *supra* note 1.

¹³ Ulf Johansson Dahre, *Searching for a middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights*, 21 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 611, 611-628 (2017).

¹⁴ Istvan Lakatos, *Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights*, PECS J. INT'L & EUR. L. 6, 6-25 (2018). See also MICHAEL FREEMAN, *HUMAN RIGHTS*. (John Wiley & Sons, New Jersey, US, 2017).

¹⁵ For example, acts of genocide and disregard of minority rights against Jews (during World War II), still occur when international human rights law has become a legal system, such as genocide against Bosnia Muslims (1995), Rohingya Muslims (2017 to date), or Tutsi Tribes (1991). See Max Roser & Mohamed Nagdy, "Peacekeeping", *Our World in Data* (2013), retrieved from <https://ourworldindata.org/peacekeeping>.

¹⁶ MUTUA, *supra* note 1, at. 94.

¹⁷ *Id.*, at. 95.

and protect their religions from the imperialist's religions through devise norm and mechanism how to protect them.

A relativist like Mutua questions about the concept of individual rights that excludes communal rights.¹⁸ Mutua calls the concept of individual right as a Western product, while Henkin calls this concept as "Eurocentric formulation of human rights".¹⁹ Both Mutua and Henkin argue that these concepts override culture values rooted in pluralistic society.²⁰ This approach would be a difficult to accept by countries with diverse societies such as in Asia or in Africa.²¹ Mutua questions the Western attitudes that narrate female genital mutilation (FGM) as barbaric African atrocities that make women as "victims" and perpetrators as "barbarians" thereby violating human rights, are western imperialism.²² The autonomous choice of women or the involvement of medical technology in FGM and highly valued of cultural tradition should be to respect FGM, apart from some who reject it.²³ Mutua is true that the FGM tradition should be respected as a communal right. If this tradition violates the right to be free from torture, then the "torture" aspect may be challenged, but not its tradition is prevented.²⁴ Increasing awareness of African women about hygienist is urgent and abandonment of FGM should be based on the women concern. Uniformity of HR in this western view would eliminate communal rights, because IHRL does not require uniformity. Therefore, Mutua believes that

¹⁸ *Id.*

¹⁹ HENKIN, 1989, *supra* note 1, at. 43.

²⁰ *Id.*, at. 14. See also MUTUA, *supra* note 1, at. 90; Adamantia Pollis, Peter Schwab, and Christine M. Koggel, "Human rights: A western construct with limited applicability", *MORAL ISSUES IN GLOBAL PERSPECTIVE. Vol. 1: Moral and Political Theory* (2006); ADAMANTIA POLLIS & PETER SCHWAB (EDS), *HUMAN RIGHTS: NEW PERSPECTIVES, NEW REALITIES* (Colorado, US, Lynne Rienner Publishers, 2000); Adamantia Pollis, *Human rights and globalization*, 3 *JOURNAL OF HUMAN RIGHTS* 343, 343-358 (2004).

²¹ Christina M. Cerna, *Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts*, 16 *HUMAN RIGHTS QUARTERLY* 740, 740-752 (1994); MUTUA, *supra* note 1; Pollis, Schwab, & Koggel, *supra* note 20. See also Pollis & Schwab (eds), *supra* note 20.

²² MUTUA, *supra* note 1.

²³ Rigmor C. Berg, & Eva Denison, *A tradition in transition: factors perpetuating and hindering the continuance of female genital mutilation/cutting (FGM/C) summarized in a systematic review*, 34 *HEALTH CARE FOR WOMEN INTERNATIONAL* 837, 837-859 (2013).

²⁴ MUTUA, *supra* note 1, at. 24.

human rights should be adjusted following local contexts in order to respect communal rights.²⁵

DEBATES BETWEEN THE TWO THEORIES, CRITIQUES AND CHALLENGES OF CULTURAL RELATIVISM

The debates between cultural relativism and universality of human rights create a divergence among scholars where some of them support the notion that human right is universal and should be applied equally, regardless the countries' local cultures or religions, while relativists reject this idea.

Mutua's critiques are quite strong, but to apply cultural relativism to be relevant with domestic context would depend on the proactive attitude of the national government to adopt international human rights law into domestic law. International human rights law itself does not fully prohibit the limitation of human rights as elaborated earlier. Since in the past time was no such clear guidance on how to practice legitimate proselytism or FGM should be done, these practices seem acceptable in any way. But, after the ratification of United National Convention Against Torture (CAT) or the adoption of UN Resolution 13/18 on FORB, the practice of FGM and proselytism right is not absolute. No one can be pushed to do FGM or no one is permitted to coerce others to change their religions. Everyone can change or leave his/her own religion and convert to other religion based on their concern. The tradition of FGM which is believed by a certain community as part of religious command, such as in South Africa or in Indonesia, should be respected in certain condition, such as if it done without coercion and without causing harm or diseases. Or, teaching religion to others can be justified by human rights law if the teaching of religion is carried out without coercion, and when someone converts to other religion, it is done based on his free choice and belief. The right to practice worship or trust is only possible if it jeopardizes national interests, public health, public order, and public morals. The practice of FGM as a religious command certainly needs to be stopped if this endangers public health. Respecting a society's culture

²⁵ Mutua calls his experience to be Baptist under Christianity when he was studied. Ignoring peoples' right could be done in subtle ways through economic assistance or education that makes someone leave their original religion and convert to another religion.

does not always mean rejecting international human rights laws. Okere (1984) reasons that “the African conception of “man” is not that an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity”.²⁶ Although they reject to use of Western standard for all humanity, but still they agree that many international human rights laws are valid.²⁷

However, Mutua's view that says that human rights law does not provide an adequate portion of respect for communal rights is reasonable. It is also true that communal right is only briefly mentioned in UDHR, while various UN Resolutions that recognized the communal rights are not legally binding. Unfortunately, many national laws experience slow changes in adjusting the community dynamics or in formulating the standard restrictions of the rights to be adapted with domestic context. As the result, the same attitude of HR violations that have been done by imperialist country towards minority groups tend to be copied by their own government.²⁸

Although Mutua's observation in South Africa is true that in the past, the application of universality of HR was failed to provide equal treatment between majority and minority groups. However, the unequal treatment remains happened today. Many countries in Asia and Africa who support CR release their own HR instruments, such as the ACHPR and the Asian Declaration of HR (ADHR), as well as various national HRL. But they still engage HR violations against their own citizens rights both individual and communal rights. For example, according to South Africa Human Rights

²⁶ B. Obinna Okere, *The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: a comparative analysis with the European and American systems*, 6 HUMAN RIGHTS QUARTERLY 141, 141-159 (1984).

²⁷ In this principle, the government (state) has an obligation to ratify International Human Right Instruments and agreements and then continues with domestication to adjust IHRL with local custom and regulations. This is the point where all complications appears when domestic law and values were considered more suitable than the universal value of human rights and therefore could be rejected or reduced. There are many forms of rejection by many countries starting from a formal reservation from applying several articles on incompatibility ground with domestic law up to ratification delay or rejection of ratification or they are ratified but delaying the domestication process indefinitely. *See African Charter on Human and People Rights (ACHPR)*.

²⁸ For instance, the enforcement of Blasphemy Laws that inherited from colonized countries remains exist in various countries until today, although many scholars indicate that the laws tend to violate the right to freedom of religions, particularly since the laws have been targeted various minority religions. For further reading, *please see Melissa A Crouch, Law and religion in Indonesia: The constitutional court and the blasphemy law*, 7 ASIAN JOURNAL OF COMPARATIVE LAW 1, 1-46 (2011).

Report from 2012 to 2017, human right that violated the most is the right to equality in the form of unfair discrimination on the ground of racial discrimination with total number of complaints increased from 511 in 2012/13 to 705 in 2016/17.²⁹ Moreover, in Asia regions, HR violations against minority groups still becomes the main issue. Human rights violations against Rohingya still continue to happen in Myanmar,³⁰ and in other countries since they become the refugees.³¹ The transition to democracy in African and Asian countries still faces challenges. Promotion and protection of human rights in countries that tend to glorify CR will also depend on governments' will and ability.

CONTRIBUTION OF CULTURE RELATIVISM IN HUMAN RIGHTS PROTECTION

I. BALANCING OF CULTURAL RELATIVISM AND UNIVERSALITY OF HUMAN RIGHTS

Basically, relativists such as Mutua or Donnelly do not fully oppose universalist groups who support IHRL. Mutua³² did not totally reject IHRL but wanted a cross-cultural dialogue on human rights to optimize the protection at the domestic level. The conception of universality such as individual claims and state obligations have been practiced cross-culturally and historically international human rights law by various nations such as in Arab countries, Asia, Africa.³³ Those countries are also members of the UN and ratified various international HR instruments. These mean that the relativists also recognize Dworkins' theory of natural law that HR is inherently owned by humans because of their dignity.

²⁹ See South African Human Rights Commission, Human Rights-overview of Human Rights Violations 2012-2017.

³⁰ UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar* 21 (2018). Available from https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.

³¹ Rohini J. Haar, Karen Wang, Homer Venters, Satu Salonen, Rupa Patel, Tamaryn Nelson, Ranit Mishori & Parveen K. Parmar, *Documentation of human rights abuses among Rohingya refugees from Myanmar*, 13 CONFLICT AND HEALTH 1, 1-14 (2019).

³² MUTUA, *supra note 1*, at. 94.

³³ DONNELLY, 2007, *supra note 1*, at. 284-285.

However, in order to guarantee and justify the abstract inherent rights of human beings, a written law is needed. This argument is supported by the theory of positivism so that human right is not violated by the duty holder.³⁴ This theory has led to the birth of various international human right conventions,³⁵ the ratification of the state of these conventions,³⁶ including the domestication of international human rights law in various countries through amendments of constitutions and national legal reforms.³⁷ Unfortunately, the effectiveness of international human rights law is questioned not only by relativists such as Mutua,³⁸ but also positivists such as Posner. Posner point outs that the high number of ratifications of international human rights law is not directly equivalent to the effectiveness of human rights protection at the domestic level. There are still many human rights violations did by the state parties.³⁹

Moreover, the current developments show that Asian values, African values, Islamic values or Western values are translated to support human rights. Meaning that there are no values that are incompatible with or fully compatible with human rights.⁴⁰ Donnelly argues that culture relativism is “a set of doctrines that imbue cultural relativity with prescriptive force”⁴¹ or “the principles sources of validity of a moral right and rule”.⁴² In other words, Donnelly implies “the relative universality of human rights”.⁴³ It means, although HR is conceptually based on moral code and functionally universal as mentioned by Henkin above, but its implementations are relative and depend on how the society interprets rights and to what extent the empirical, political, and

³⁴ ROSALYN HIGGINS, PROBLEM AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (Oxford, Clarendon Press, 1994).

³⁵ There are at least nine of core human rights treaties, namely ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICRMW, CED, CRPD. Where each instrument is monitored by treaty bodies. See the complete treaties available at <http://ohchr.org/en/ProfessionalInterest/Pages/CoreInstruments.aspx> [accessed May 2, 2020]

³⁶ Recently, the total number of state parties to the ICCPR are 173 countries, while the total number of state parties to the ICESCR are 170 countries. See at <https://treaties.un.org/Pages/ViewDetails.aspx> [accessed May 2, 2020]

³⁷ Domestication of IHRL is needed to ensure that human rights norms are adopted in order to ensure legal certainty in the protection of human rights for everyone.

³⁸ MUTUA, *supra* note 1, at. 94.

³⁹ POSNER, *supra* note 2.

⁴⁰ DONNELLY, 2007, *supra* note 1, at. 290.

⁴¹ *Id.*, at. 294.

⁴² JACK DONNELLY, Repression and Development: The political contingency of human rights trade-offs, In *Human Rights and Development* 305-328 (Palgrave Macmillan, London, 1989).

⁴³ *Id.*

philosophical contexts are permitted.⁴⁴ Because every culture and society differ in significant ways.⁴⁵ However, Donnelly reminds that radical or strong culture relativism is “*misguided*” because its denial to human dignity. While radical universalism is also denial to the local wisdom and national self-determination.⁴⁶ Following Donnelly thoughts, in one hand, it is very urgent to make a balance between culture relativist approach and universality approach through accepting the idea of universality of human rights. On the other hand, recognizing culture as a source of limitation and exception according to local values and context, what fit best on their local situation, is needed. The balance is also relevant with the core HR instruments, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economical Social Cultural Rights (ICESCR).⁴⁷

II. CONTRIBUTIONS TOWARDS VULNERABLE RIGHTS PROTECTION

It is no doubt that radical ethnocentrism can also cause violence and discrimination in society, when it only focuses on the cultures of the majority.⁴⁸ However, without denying the existence of IHRL, CR contributes in promoting and protecting communal rights or vulnerable rights in third world countries in several ways as long as the governments are able to overcome its challenge.

First, cultural relativism build tolerance among divers community and supports for the protecting of communal rights.⁴⁹ Since IHRL is too

⁴⁴ HENKIN, 1989, *supra note 1*, at. 284.

⁴⁵ CERNA, *supra note 21*; POLLIS, 2004, *supra note 20*.

⁴⁶ DONNELLY, 2007, *supra note 1*, at. 292.

⁴⁷ In order to protect the right to FoRB and FoE that guaranteed under Art.18 to Art.21 of the ICCPR, the States need to protect the principle of individual autonomy (Art.1) and the principle of equality and non-discrimination (Art.2 and 4 of the UDHR). These principles are universally accepted and should not be reduced by the States on behalf of culture relativism. Therefore, the limitation of FoRB and FoE are permissible under Art.18 (3) or 19 (3) of the ICCPR as long as the limitations are not contradictive with the right guaranteed under Art.1, 2, and 4. For instance, the enforcement of BL may be accepted in perspective of a weak culture relativism, but it would be problematic if the enforcement of such law excluded or discriminated certain groups of people because of their religion or belief is different with the majority.

⁴⁸ DONNELLY, 2007, *supra note 1*; DONNELLY, 2013, *supra note 1*; MAYER, *supra note 4*.

⁴⁹ Richard Harvey Brown, & Laure Bjawi-Levine, *Cultural Relativism and Universal Human Rights: Contribution from Social Science of the Middle East*, 4 THE ANTHROPOLOGIST 163, 163-174 (2002).

focused on protecting individual rights, it often ignore local culture that respected by community. As Donnelly notes that radical cultural relativism can also threaten human rights if the culture of the majority is placed above all else. Cultural relativism contributes to tolerance so that majority groups do not hegemony minority groups, while minority groups respect the rights of majority groups. In a plural society like countries in Asia, mutual understanding and respect for differences is very important, to avoid horizontal conflicts or hatred that can trigger greater conflict. For example, supporting the use of local languages continues to be pursued by the United Nations, the African Charter of Human and People Rights is quite successful in recognizing the existence of marginalized groups in Africa.⁵⁰ Furthermore, in 2016, the Constitutional Court of Indonesia acknowledges beliefs to be mentioned in citizen identity cards.⁵¹ The challenge is that this achievement requires a long process and time to build public awareness and law enforcement on the importance of respecting the rights of minority groups, as well as the willingness and speed of government to reform national laws.

Second, cultural relativism allows domestic law to determine the standard of limitation of HR through considering some aspects, such as “public order” or “public morality” as lay down in Articles 18 (3), 19 (3), 20 (3) of the ICCPR. Public order or morality are formed and respected by a local community to maintain order of living together.⁵² For example, in exercising the right of expression, every person or religious person has the right to share information or educate others about religion, but to proselytize someone to convert to other religion is certainly limited by public order. Each country will have different definitions of what public order and morality mean. European countries themselves also use “margin appreciation” to accommodate how “public order” and “public moral” are used as judges’ considerations in deciding various cases of coinciding human rights violations,⁵³ while in Asia and Africa known as “Asian values” and “African Values”. The challenge is to build political awareness of government and parliament to immediately

⁵⁰ Kealeboga N Bojosi & George Mukundi Wachira, *Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples’ Rights*, 6 AFRICAN HUMAN RIGHTS LAW JOURNAL 382-406 (2006).

⁵¹ Decision of the Constitutional Court of Indonesia No. 97/PUU-XIV/2016

⁵² Robert P. George, *The Concept of Public Morality*, 45 THE AMERICAN JOURNAL OF JURISPRUDENCE 17, (2000).

⁵³ Onder Bakircioglu, *The application of the margin of appreciation doctrine in freedom of expression and public morality cases*, 8 GERMAN LAW JOURNAL 711, 711-733 (2007).

reform various outdated regulations that potentially violate the rights of vulnerable groups into the new laws that formulated clearly and definitely.⁵⁴

Third, cultural optimizes the protection of vulnerable groups. According to the theory of human capabilities, international human rights law is based on recognition of common values that can be applied to all humanity as a minimum standard so that people are efficient functioning.⁵⁵ However, this theory forgets the fact that the human condition is not always the same. There are several marginal or vulnerable groups either naturally (diffable persons, children) or because of social construction (women, LGBT) or because of situations of war or economic weakness (refugees, immigrants) making them retarded and vulnerable to becoming victims of violence or discrimination. Therefore, they need special treatment or attention to be able to enjoy their rights as human beings.⁵⁶ The UDHR and twin covenants do not specifically regulate women's rights, children's rights, and the rights of vulnerable groups such as refugees, immigrant workers, disabled people, LGBT, religious minorities. Therefore, in many ways, these elderly groups are often the targets of human rights violations in various countries. Relativists have succeeded in encouraging protection by the promotion of special groups, namely the birth of various special conventions such as CEDAW, ICRC, the Migrant Workers Convention, Refugee. Sally Merry through vernacularization encourages the protection of women's rights in various countries and finding common ground of IHRL with local values that they have known and applied.⁵⁷

⁵⁴ For example, the desire to maintain blasphemy laws in several countries of Asia regions in order to protect religious pluralism must be accompanied by efforts to immediately revise the blasphemy law that still uses ambiguous restrictions on public order parameters. If not, violence and discrimination against minority religious groups will continue to occur in these countries.

⁵⁵ MARTHA NUSSBAUM, & AMARTYA SEN, (eds). *THE QUALITY OF LIFE* (Oxford, Clarendon Press, 1993); John Rawls *Theory of Justice*, (Oxford, Oxford University Press, 1971).

⁵⁶ The special treatment given by the state to vulnerable groups such as children, women, disabled groups, refugees at a glance is contrary to the concept of "equality of treatment". This is known as affirmative action or positive discrimination. This positive discrimination action is needed to catch up the backwardness suffered for example, women who live in patriarchy society. This special treatment is temporary. For example, a quota giving 30 percent of women legislative candidates to be very important to increase women's participation in politics. Likewise, the various facilities provided by the state to the diffable certainly vary in their levels between one country and another, because the land line is also influenced by the level of the economy and natural resources owned by the state. An important note is that the willingness of the state to gradually and continuously achieve progressive fulfillment of marginal groups is urgently needed.

⁵⁷ Sally Engle Merry, *Transnational human rights and local activism: Mapping the middle*, 108 *AMERICAN ANTHROPOLOGIST* 38, (2006).

The acceptance of cultural relativism should be directed as an effort to bridge the gap between IHRL and domestic or local law that existed long before the birth of international human rights law. So, in the transition to democracy era, third world countries need support from the international community to optimize HR protection, and expect them to not radically judge countries with the stigma of "human rights violators" as is often reported by international HR Non-Government Organizations such as Amnesty International or Human Rights Watch. On the other hand, cultural relativism approach is not a justification that can be loosely used by the state to violate HR of its citizens. According to Zechenter, ignorance and repetition of the same human rights violations in the name of cultural relativism certainly create an attitude of skepticism and criticism for cultural relativism worshipers who are considered to support or excuse HR violations occurring within the country.⁵⁸

INDONESIA ATTITUDE

I. SUPPORT TO THEORY OF UNIVERSALITY, BUT LESS PROPORTIONAL

Indonesia's support for the theory of universality of human rights can be seen from its attitude and political support for the international legal regime, but less proportional. First, Indonesia is the country in Southeast Asia that has ratified the most important international human rights treaties. Among the nine main human rights instruments, Indonesia has ratified eight of them, that are the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Protection of the Rights of the Child, the Convention on the Elimination of All Forms of Violence against Women, etc. Almost all the

⁵⁸ For example, even though Myanmar has received much criticism from various international communities, a closed attitude and repetition of violations of Rohingya rights is a form of ignorance of Myanmar government on the name of CR. There is a need for willingness and full effort from countries in the transition of democracy to optimize the role of the government and parliament in domestication of IHRL to reformulate the standard limiting of "public order" and "public morality" that are appropriate and clear. See Elizabeth M Zechenter, *In the name of culture: Cultural relativism and the abuse of the individual*, 53 JOURNAL OF ANTHROPOLOGICAL RESEARCH 319, 319-347 (1997).

treaties were ratified without reservation of essential articles. Some reservations were made regarding the settlement of disputes in the international court. This makes perfect sense because since 2000 Indonesia has established a human rights court.

Second, Indonesia has amended the Constitution four times to strengthen democratization and protection of human rights. In the second Amendment of 2002, the Chapter X on Human Rights was Indonesia's major achievement in domesticating international human rights law. The existence of Article 28 letters A through J can be said to be almost total adoption from the Universal Declaration of Human Rights. In article 28 I, Indonesia also recognizes fundamental rights that cannot be limited or reduced under any circumstances. Unfortunately, article 28 J as a closing article, no longer distinguishes explicitly between rights that are non-derogable and those that are derogable. This lack of clarity causes the inaccuracy of the universality of human rights in Indonesia. As a result, several issues that hinder the right to freedom of religion are still in the spotlight. The freedom to choose or embrace any religion or beliefs of every citizen is clearly mentioned in Article 28I of Indonesia Constitution and categorized as a non-derogable rights in accordance with Article 18 of the ICCPR. However, when Indonesia only recognizes 6 official religions and the government can claim other religions as heretical, Article 28I loses its binding power due to the enactment of Article 28J which is the reason for legitimizing claims and punishment to "misleading" religions. Considerations for protecting religion as public morality and public order are considerations supported by Article 18 (3) of the ICCPR. This is why blasphemy's law in Indonesia is still a subject of ongoing debate. As the guardian of the constitution and the protector of the constitution, the Constitutional Court correctly concludes that the Blasphemy Law contains norms that are multiple interpretations and need to be amended. However, on the other hand the Constitutional Court did not declare Blasphemy Law contrary to the constitution. The Constitutional Court believes that before the legislature drafted a replacement law from the blasphemy law, then to avoid the legal vacuum, the blasphemy was not cancelled. As a result, when the substitute law is not agreed upon and produced by the Parliament, the Blasphemy Law continues to be used to prohibit or punish those who embrace a religion deemed "heretical". Thus, the right to freedom of choice and embrace religion as a fundamental right that is universal and cannot be reduced under any

circumstances, is still not appropriately accommodated by Indonesia. It is not surprising if in the UPR in each round, Indonesia continues to get the spotlight of fellow countries ratifying the ICCPR and stake holders for violations of the right to freedom of religion and recommending revision of the blasphemy law.

Third, Indonesia is very active in international forums for the promotion of human rights. The re-election of Indonesia as a non-permanent member of the UN Security Council for a period of 2019-2020 shows Indonesia's commitment in maintaining world peace. Unfortunately, within the country, Indonesia still has homework that has not been completed for past human rights violations. The lack of independence of the National Human Rights Commission is an obstacle to uphold fundamental rights that violated by the state apparatus. This tradition of impunity contradicts to the universality of human rights. This condition greatly affects not only to the growth of democracy in Indonesia, but also to the level of public trust in Indonesia's commitment to protect human rights. Indonesia's ratification of a number of international human rights treaties will be considered merely in the interest of building an image of foreign politics, rather than upholding human dignity.

With regard to the three reasons above, it is proper and Indonesia should prioritize the principle of universality of human rights compared to the principle of cultural relativism. Susetyo's view⁵⁹ which states that it is the duty of the state to place national and regional specialties and various historical, cultural and religious backgrounds must be remembered to promote and protect all human rights and fundamental freedoms for reasons of the complexity of the Human Rights regime in Indonesia so that according to him International human rights law in Indonesia cannot be implemented in the same way as it is applied in the Western world, it seems that it needs to be reviewed. Conflict of domestic law with international human rights law that still exists today, should not be used as a justification for Indonesia to continue deviations or violations of human rights and hide from reasons of cultural relativism. Susetyo elaborated on the complexity of human rights law which contradicts human rights law regarding 4 (four) matters, namely right to live, freedom of religion/freedom of conscience, right to marriage,

⁵⁹ Heru Susetyo, *Human Rights Regime between Universality and Cultural Relativism: The Asian and Indonesian Experience*, 16 *INDONESIAN J. INT'L L.* 19, 191-209 (2018).

right of sexual orientation, and some of the personal rights but considered in Indonesia as public domain. Susetyo also acknowledged that these rights have guaranteed internal protection the Law on Human Rights No. 39 of 1999 which is the adoption of values and principles enshrined at UDHR 1948. For example, on Article 4 “*The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the human rights law that cannot be diminished under any circumstances whatsoever*”. But Susetyo tolerated Indonesian regulations to maintain capital punishment, even though for reasons other than those permitted by Article 6 paragraph 3 of the ICCPR. Death penalty which continues to be maintained and applied for a crime: premeditated murder, drug offences, terrorism, genocide or crime against humanity, and corruption as set in Criminal Code and other special laws should be criticized. Article 16 (3) does allow countries that still apply capital punishment, but with strict consideration and conditions.

First, it concerns the type of criminal action. Capital punishment is only permissible if it is applied to extraordinary rations, bringing victims in very large numbers, and carried out systematically. Of the four crimes mentioned above, only genocidal crime is still permitted to be limited to death penalty. Meanwhile, Article 6 (3) also confirms that capital punishment cannot be aimed at minors or pregnant women. Third, capital punishment should be an *ultimum remedium*, and it is possible for suspects to submit amnesty or forgiveness. Fourth, it is important to emphasize that capital punishment can only be and can be imposed by a competent court in accordance with the principles of the rule of law. Therefore, these points should be adopted in criminal law in Indonesia, should the death penalty be defended. Loose requirements in the application of capital punishment as long as it applies in Indonesia will be very vulnerable to be misused to violate the human rights of citizens. Indonesia's ambiguity in perpetuating capital punishment is still strong. This is evidenced by the continuing death penalty in the latest Criminal Code Bill. Even in the Bill, especially in Article 100, the decision to suspend the death penalty depends on the judge's decision, which should refer to Article 6 (3) is the right of everyone to get a postponement of capital punishment. Moreover, the right to life is a fundamental and constitutional right of every citizen guaranteed in article

28A of the Constitution. From data released by the Institute for Policy Research and Advocacy (ELSAM) and the Institute for Criminal Justice Reform (ICJR) from 1987 there were 189 convicts who were sentenced to death, in January 2015, 164 death row inmates were still executed by the Attorney General.⁶⁰ However, none of these perpetrators committing genocide as permitted by Article 6 (3) of the ICCPR. This means that all convicts should be given the broadest possible effort to propose a postponement of the death penalty, or at least replace it as a life sentence.

II. ATTITUDE TOWARDS CULTURAL RELATIVISM

As the previous review, the theory of cultural relativism is important to consider in building a balance between protecting communal rights and individual rights, protecting marginal groups, or resolving conflicting rights that are coincide. Unfortunately, this theory has not been properly applied in Indonesia, although this theory has the opportunity to fill the gap between universal human rights and cultural relativism. This situation happens because the government tends to apply cultural relativism approach to legitimize human rights violations that occur in practices, in the name of protecting national interests, public order, or public morals.

First, it has been a long time since indigenious peoples in Indonesia have fought for their rights as the adherents of traditional religions or beliefs to gain recognition from the state. But their demand never materialized. Traditional religions or beliefs in Indonesia are considered as “*non-religion*” or as part of the national cultural heritage. Therefore, they are under the responsibility of the Ministry of Education and Culture, instead of the Ministry of Religion. The adherents of non-believers may not proclaimed their beliefs as religion. Meanwhile, according to Article 63 and 64 of the Law No 23 of 2013 on Population Administration, everyone who want to apply for a resident identity card (KTPs) is required to identify his or her religion from one of the six official religions recognised religions in Indonesia, namely Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism. As a result, believers cannot put the name of their belief

⁶⁰ See *Hukuman Mati Dapat Kurangi Kejahatan, Mitos!*, <https://icjr.or.id/hukuman-mati-dapat-kurangi-kejahatan-mitos/>

in the religion column on the resident identification card. In practice, the choice can be made by simply mention one of the six religions recognized by the government. But the impact is not as simple as that. If a person chooses one religion that recognized in Indonesia, then he or she lets the government ignore his or her right to choose and hold his or her own religion freely. Or, if the person prefers to hold his own religion or believe that not recognized by the government, he or she cannot apply for a citizen identification card. As consequences, they will have difficulty to enjoy public services such as legalizing marriage, accessing education, finding a job, voting on general election, and many other things. These situations cause the person's basic rights as a citizen is invalidated. The adherents of believers were treated unequally before the law. On the other hand, if the person filled the religion column randomly, they could be charged as criminal for falsification of document. Then, considering that the KTP is very urgent for every citizen to be able to enjoy various public services, in 2014 the Minister of Home Affairs suggested that the section of religion in the KTP should be optional instead of compulsory, so that the believers still can apply a KTP by left the section blank. Although since the 1st July 2018 the Constitutional Court of Indonesia has decided that all believers of indigenous faith are allowed to put their faith as "*penghayat kepercayaan*" on the identification card, however the implementation of this new policy still far from perfect. Some region has been successfully complying with the new policy, others still struggling to follow up the ruling.

Another example is about the unequal treatment of the state before the law towards members of minority religious groups such as Shia and Ahmadiyya. A new religious group who have different practice than the official recognised religions would immediately labelled as defiant groups by the government or banned to practices or criminalized. The religious teachings that confront the interpretation of the orthodox teaching group would immediately labelled as blasphemous or heresy no matter that under Article 29 of the 1945 Constitution says the state guarantees all persons the freedom of worship, each according to his or her own religion or beliefs.

This condition hurts the feeling of justice in the society and indicates that the state has interfered the right to freedom of religion in the area of *forum internum*. The prohibitions and punishments toward the leaders or followers of a new religious teachings such as Shia or Ahmadiyya in Indonesia are usually under the consideration to maintaining social order

assuming that their new teachings would tarnish the teaching of recognised religions and can cause conflict in society. However, since the enforcement of the Law No.1/PNPS/1965 concerning Anti-Defamation of Religions, there is no such regulation that has definitive description about what does disturbing social order mean or what does tarnishing a religious value means. As the result, the blasphemy law is used more to punish followers of religious minorities who have different teachings than to prevent more dangerous of incitement of hatred.

This kind of approach to cultural relativism, namely grouping hundreds of religions into six official religions, aims to maintaining religious harmonization in Indonesia, at first glance it seems could minimize the potential complex of religious conflicts. However, in fact there are fundamental human rights principles that are ignored, namely the right to receive equal treatment, the right of non-discrimination, the right to choose and embrace a religion according to one's belief. Thus, the cultural relativism approach has been used inappropriately because it still creates unfair treatment between officially recognized religions and non-recognized religions or traditional beliefs, so that what has been decided by the Constitutional Court should immediately ensure its implementation in practice to restore citizens' rights. country that has long been neglected by the state.

Second, it is easier to protect marginalized groups in Indonesia through a cultural relativism approach. Various affirmative actions to give special treatment to women, children, or groups with disabilities by increasing local cultural values accepted by the community can help them to fully enjoy their rights and reduce the practices of discrimination against them. For example, Indonesia as the largest Muslim community have valuable Islamic teachings to respect for mothers or women. "Honor your mother, your mother, your mother, then your father". Local values of society that pay respect to mothers or women like this accelerate Indonesia's efforts when it comes to implementing CEDAW and passing the Act No. 23 of 2004 on Anti-Domestic Violence.

Third, Indonesia can be said to be a strong follower of cultural relativism. If there is a conflict between domestic law and international human rights law, there is a tendency that domestic law takes precedence over international human rights law. For example in the Constitutional Court Decisions No 140/PUU-VII /2009, No 84 / PUU-X / 2012, and No 76 /

PUU-XVI / 2018, the Court stated that "...in providing opinions on law and justice upheld by the Court, the Court is not based solely on one perspective of religious freedom, but also based on various other perspectives, namely the perspective of the rule of law, democracy, human rights, public order, and religious values adhered to in Indonesia. Phrase "*based on...public order, and religious values adhered to in Indonesia*" means that Indonesia adheres to a strong cultural relativism. The question is how the court formulates "*religious values adhered to in Indonesia*" as binding legal norms, while there are dozens of religions practiced in Indonesia. Is the word "*adhered*" to be interpreted as limited to "*the official religion recognized by the state*" or is it all religions "*having followers*" in Indonesia. How to find common ground between these religious values. Although there is no clear explanation regarding this matter, in various regulations and public policies related to the issue of blasphemy, the phrase "*practiced religion*" is interpreted as "the six official religions recognized by the government". The cultural relativism approach without clear measurements will certainly continue to cause injustice and unequal treatment before the law.

Thus, Indonesia's challenge today is how to put the universality of human rights right on target. Regarding fundamental rights as guaranteed in Article 28I, restrictions should not be made for any reason. Waiver of one or all of these fundamental rights is a form of ignorance of human dignity. Meanwhile, the understanding of cultural relativism in which the state places national interests or moral values of domestic society above international norms is only possible with derogable rights such as the right to freedom of expression, or the right to express religion that endangers and discriminates against other groups such as hate speech. Local values cannot be used as justification for the government to exclude or ignore fundamental rights, such as the right to choose or embrace a particular religion. The success of the government out of the polemic of the recognition of religious minority rights as in the case of believer is now become the best practice that should be applied to other minority groups.

CONCLUSION

Cultural relativism is a valuable contribution from sociologists and anthropologists to bridge the gap between international human rights law

and domestic context. Thus, providing space for the international community to play an active role in promoting and protecting HR, without ignoring human dignity. The contribution of cultural relativism can be seen from building tolerance and protection of communal rights, the rights of marginal groups, and the optimization of domestic law when dealing with some competing's rights. This is a good opportunity to reduce discriminatory actions against marginalized groups for maintaining tolerance and harmony in plural society. The effectiveness of the application of "margin appreciation" in Europe should be the best practice to actualize "Asian values" or "African values" in formulating the concepts of "public morality" or "public order" clearly and precisely. Cultural relativism approach cannot be used by a government to justify any human rights violation. A totalitarian government system or any kind attitude of rejecting humanitarian assistance will only place cultural relativism approach as a mask to cover up ulcers of human rights violations that continue to be carried out by the state. The state's reluctance to reform several repressive domestic laws is certainly a challenge. Dark history as a colony, does not seem to provide enough lessons for totalitarian government, when using its power to oppress its own citizens through various HR violations. Cultural relativism approach can be optimally carried out if there is a willingness and maximum effort from the state to achieve better progress. Indonesia's attitude towards understanding the universality of human rights and cultural relativism is still ambiguous. The approach of universality of human rights is not yet optimally protecting the right to freedom of choice and religion. The right to choose and embrace religion is still interfered with by the state on the pretext of protecting public order or religious values adhered to in Indonesia. This kind of cultural relativism approach to human rights gives rise to a sense of injustice towards minority religious groups which have always been victims of the criminalization of the state. Progress in the recognition of trust groups lately is a form of contribution to the cultural relativism approach that is appropriate and balanced, so it should be appreciated and developed to solve similar problems.

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QUOTE

To deny people their human rights is
to challenge their very humanity

Nelson Mandela
South African civil rights activist

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