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## RESTRICTIONS OF THE RIGHTS OF FREEDOM OF RELIGIONS: COMPARISON OF LAW BETWEEN INDONESIA AND GERMANY

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## RESTRICTIONS OF THE RIGHTS OF FREEDOM OF RELIGIONS: COMPARISON OF LAW BETWEEN INDONESIA AND GERMANY

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### Abstract

*The rights of freedom of religion and beliefs are constitutionally guaranteed, both in Indonesia and Germany. However, the right of freedom of religion is not unlimited. This paper aims to identify and analyze (1) Why there is the right of freedom of religion is restricted; (2) What product of the law is that regulates restriction on the right of freedom of religion in Indonesia and Germany; and (3) What purpose do Indonesia and Germany have in restricting the right of freedom of religion? This paper uses a normative research method that references legislation and takes a historical and comparative approach. The restriction of freedom of religion exists to protect the fundamental right or freedoms for every individual to avoid chaos. The restrictions on freedom of religion in the Indonesian Constitution are stated in Article 28 of the 1945 Constitution; Article 73 of Law No. 39 Year 1999; Article 18 of Law No. 12 Year 2005; and in PNPS No. 1 Year 1965. While Germany does not set explicit restrictions, the environment comes from the level of the Act: namely, Article 166–167 of the Criminal Code. In Indonesia, public order is defined as conformity of justice in consideration of morality, religious values, and security in a democratic society. Meanwhile, Germany defines public order as the protection of society based on the principles of balance and tolerance, in that individual freedoms must be balanced with other people's fundamental rights, although this also means that a person's idea of divinity must be excluded.*

**Keywords:** restrictions, freedom of religion, Indonesia, Germany, public order, human rights

### Abstrak

*Hak atas kebebasan beragama dan berkeyakinan mendapatkan jaminan konstitusional yang sangat kuat, baik di Indonesia maupun Jerman. Hanya saja, hak atas kebebasan beragama tersebut bukanlah tanpa batas. Tulisan ini bertujuan untuk mengetahui dan menganalisis (1) Mengapa ada pembatasan terhadap hak atas kebebasan beragama? (2) Produk hukum apa yang mengatur pembatasan terhadap hak atas kebebasan beragama di Indonesia dan Jerman? Dan (3) Apa tujuan Indonesia dan Jerman melakukan pembatasan terhadap hak atas kebebasan beragama? Tulisan ini merupakan tulisan normatif, dengan pendekatan perundang-undangan, historis dan komparatif Alasan mengapa ada pembatasan terhadap hak atas kebebasan beragama adalah untuk melindungi hak fundamental atau kebebasan dasar setiap individu, dalam rangka menghindari terjadinya chaos yang dapat mengganggu pencapaian tujuan bersama Indonesia secara spesifik mencantumkan pembatasan kebebasan beragama dalam Konstitusi yaitu Pasal 28 J UUD NRI 1945, Pasal 73 Undang-undang Nomor 39 Tahun 1999, Pasal 18 Undang-undang Nomor 12 Tahun 2005, dan PNPS Nomor 1 Tahun 1965. Sedangkan Jerman tidak secara eksplisit mengatur pembatasannya, namun diatur di tingkat Undang-Undang yaitu Pasal 166-167 Criminal Code. Tujuan Indonesia dan Jerman melakukan pembatasan adalah untuk menjamin pengakuan serta penghormatan atas hak dan kebebasan orang lain sehingga dapat menciptakan public order atau ketertiban umum. Di Indonesia ketertiban umum diartikan sebagai kesesuaian keadilan dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis. Sedangkan Jerman mengartikan ketertiban umum sebagai perlindungan masyarakat berdasarkan asas keseimbangan dan toleransi dimana kebebasan itu harus diimbangi dengan hak-hak dasar orang lain, selain itu juga bahwa ide/gagasan mengenai ketuhanan bagi seseorang dikesampingkan.*

**Kata kunci:** pembatasan, kebebasan beragama, Indonesia, Jerman, ketertiban umum, HAM

## I. INTRODUCTION

The essence of the concept of human rights is recognizing the significance of the human person without exception and without discrimination for any reason; it is the recognition of human dignity and the acknowledgment that humans are the noblest creatures on earth. An awareness of the importance of human rights in global discourse coincides with an awareness of the importance of considering human beings as the central point of development (human-centered development).<sup>1</sup> This concept of human rights is rooted in respect and dignity for human beings. Thus, it places value on human beings as subjects, not objects, and it views humans as valuable and respected regardless of race, color, sex, gender, ethnicity, language, or religion. Moral assertion is necessary, especially to protect weaker or “attenuated” individuals or communities from persecution, which usually comes from those who are stronger and more powerful.<sup>2</sup>

As dignified creatures, humans have several basic rights that must be protected; these include the right to life, the right to state one’s opinion, the right of assembly, and the right of freedom of religions and beliefs.<sup>3</sup> Discourse on freedom of religion can be found in various historical human rights documents, such as the Rights of Man, France (1789); the US Bill of Rights (1791); and the International Bill of Rights (1966). The Universal Declaration of Human Rights (abbreviated UDHR) finally compiled a summary of these rights in Article 18: “Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change one’s religion or belief as well as the freedom, either alone or in community with others, and in public or private, to manifest one’s religion or belief in teaching, practice, worship and observance.”<sup>4</sup> The right of freedom of religion is also stated in more detail in the International Covenant on Civil and Political Rights, Article 18.<sup>5</sup> This covenant was ratified by the Indonesian government through Law No. 12 of 2005. It contains the following: (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice as well as the freedom, either individually or in community with others, and in public or private, to manifest one’s religion or belief in worship, observance, practice, and teaching. (2) No one shall be subject to coercion which would impair one’s freedom to have or to adopt a religion or belief of choice.

The right of freedom of religion, which is classified within the category of basic human rights, is absolute and in the forum internum, which is a form of inner freedom (freedom to be). This right is classified as a non-derogable right. That is, rights that are specifically expressed in human rights treaties are rights whose fulfillment cannot be deferred by the State under any circumstances, including during a state of

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<sup>1</sup> Yayan Sofyan, *Memahami Substansi Hak Azasi Manusia: Kajian Filosofis, Sosiologis dan Agama* [Understanding the Substance of Human Rights: The Inquiry from Philosophy, Sociology, and Religion] (Yogyakarta: PUHAM UII, 2010), p. 7.

<sup>2</sup> Siti Musdah Mulia, *Perkembangan Konsep Tindak Pidana Terkait dengan Agama dalam Pembaharuan KUHP* [The Development of the Concept of Crime related to Religion in the Criminal Code Reform] (Jakarta: ELSAM, 2007), p.5.

<sup>3</sup> Rahayu, *Hukum HAM* [The Law of Human Rights] (Semarang: Diponegoro University, 2012), p. 2.

<sup>4</sup> United Nations, *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>5</sup> United Nations, *International Covenant on Civil and Political Rights*, New York, 16 December 1966, UNTS vol. 999, hereinafter (“ICCPR”).

emergency, such as civil war or military invasion. Non-derogable rights are considered the most important of the human rights. Non-derogable rights must be implemented and respected by states parties under all circumstances and situations. In contrast, freedom of religion is implemented in the form of freedom to create, implement, or manifest one's religion or belief, such as preaching, propagating religion or belief, and using places of worship. These are listed as a freedom of action (freedom to act).<sup>6</sup>

In Indonesia, the rights of freedom of religion and belief are backed by a very strong constitutional guarantee. In the Constitution of the Republic of Indonesia Year 1945, Section 28 E, Paragraphs 1, 2 and 3 on Human Rights state: (1) "Everyone is free to embrace religion and to worship according to their religion, choose one's education, employment, citizenship, and place to stay in the territory of the country and the right to leave, as well as the right to return." (2) "Everyone has the right to freedom of belief, and to express thoughts and attitudes according to his conscience." (3) "Everyone has the right of freedom of association, assembly, and election." In addition, Article 29 Paragraph 2 states "the State guarantees the freedom of each citizen to profess his own religion and to worship according to their religion or belief."

Law No. 39 of 1999 on Human Rights, Article 22, Paragraph 1 also stresses that "Everyone is free to embrace their religion and to worship according to his religion and belief." Another assurance will come when the government ratifies the International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 Year 2005. This covenant legally binds and obliges State parties; it is included as part of national legislation, and it guarantees a broad definition of freedom of religion and belief, particularly as provided in Article 18 of ICCPR. The rights of thought, conscience, and religion must be understood broadly and comprehensively.<sup>7</sup>

Germany also has its own constitution that governs the basic rules of human rights; it is known as the "Basic Law." The regulation of the right of freedom of religion is expressed in Article 4 as follows:<sup>8</sup>

1. *Freedom of faith and conscience and freedom to profess a religious or philosophical creed, shall be inviolable.*
2. *The undisturbed practice of religion shall be guaranteed.*

This article states that Germany's constitution protects freedom of religion and belief. In this case, the state guarantees the protection of religious practices. When you look at the settings in both countries, it appears that the right of freedom of religion is very protected and honored at the constitutional level. However, this does not mean that freedom of religion is unlimited. In fact, there are no restrictions on the rights of freedom of religion. The freedoms of realizing, implementing, or manifesting one's religion or belief (freedom to act), by countries such as Indonesia and Germany, are necessarily limited, regulated, or postponed in various law products. The purpose of these restrictions is to measure and then vary them to ward off threats to human safety and property.

<sup>6</sup> Frans Winarta, *Suara Rakyat Hukum Tertinggi [People's Voice: The Supreme Law]* (Jakarta: Kompas Media Nusantara, 2009), p. 155.

<sup>7</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <https://www.refworld.org/docid/453883fb22.html>, p.1-4. Hereinafter ("UDHR")

<sup>8</sup> Germany, *Basic Law for the Federal Republic of Germany*, Deutscher Bundestag, Berlin, 2010.

So that each person is bound to respect others' human rights in the orderly life of Indonesian society, nation, and state, such limitations are explicitly stated in the 1945 Constitution:<sup>9</sup> "In exercising their rights and freedoms, everyone shall be the subject of the restrictions as established by law in order to ensure the recognition and respect for the rights and freedoms of others and to satisfy the demands of justice, in accordance with considerations of morality, religious values, and security and public order in a democratic society."

Meanwhile, in Germany, the restriction of the right of freedom of religion is not explicitly stated in the constitutional Basic Law. But that does not mean that the freedom of religion in Germany is without limit. It is impossible for the state to limit any religious activities; however, any restrictions must be made based on several special purposes that are related to the protection of others' constitutional rights; namely, the rights of the citizens. It is stated as follows:<sup>10</sup>

*"The importance of this basic right is underlined by the specific character of the legal proviso concerning the possibility to interfere in and thus restricting the freedom of religion. Whereas other basic rights, for instance the freedom of assembly according to Article 8 GG, explicitly concede that—in the case of an outdoor assembly—this right may be restricted by or pursuant to a law, the text of Article 4 GG contains no such possibility. However, it does not mean that religious activities are beyond any state control and restriction. Yet, if the state decides to restrict religious activities, it has to pursue specific purposes. These purposes must be related to the protection of other constitutional rights as important as freedom of religion, e.g., basic rights of other citizens."*

Related to this arrangement, Germany has created a difference between the restrictions on the right of freedom of religion and the rights of other freedoms. Other freedoms, such as freedom of assembly and freedom of choosing a job, may be restricted by law for the benefit of public interests, and those should be based on the principle of proportionality. While the right of freedom of religion cannot be restricted by any legal rules, it can only be limited by the law established by the Constitution itself.<sup>11</sup>

In examining the restrictions set by the two countries, we can see similarities, such as that both allow restrictions on the manifestation of the external aspects of religion or belief practices where such restrictions are determined by the law, namely the internal aspect law. Meanwhile, religious rights cannot be prohibited or restricted. When they are viewed within the concept non-derogable rights, restrictions by both Germany and Indonesia disagree about the essentials of human rights. A series of human rights (the right to speak, the right to express opinions, the right of freedom of religion, and the right to work) that has been declared and implemented in international law, in fact, cannot always be fully applied to the national laws of a country. This is because each state as a subject has sovereignty, rights, and obligations

<sup>9</sup> Indonesia, *The 1945 Constitution of the Republic of Indonesia*, Article 28J (2).

<sup>10</sup> Stefan Korioth and Ino Augsberg, "Religion and the Secular State in Germany," in *Religion and the Secular State / La religion et l'État laïque: Interim National Reports / Rapports Nationaux Intermédiaires, issued for the occasion of the XVIIIth International Congress of Comparative Law, Washington, D.C. - July 2010* eds. Javier Martínez-Torrón/W. Cole Durham, Jr. (Provo, Utah: The International Center for Law and Religious Studies, Brigham Young University, 2010), p. 322.

<sup>11</sup> Gehard Roberts, "Religious Freedom in Germany," *Brigham Young University Law Review* 24, no. 2 (2001), p. 647.

in reaching common goals. One of these goals is to create public order by balancing the rights and obligations of the public and individuals.

The relationship between state, religion, and human rights is a relatively complex issue to study. In fact, studying freedom of religion must consider two aspects:<sup>12</sup> internal and external freedoms. The purpose of internal freedom is for everyone to be allowed freedom of thought, conscience, and religion. This right includes the freedom to embrace or adopt a religion or belief of one's choice, including for religious conversion. External freedom means that everyone has the same freedom to manifest one's religion by proselytizing and worshiping, either as an individual or in community, in public or in private. Thus, on one hand, human rights related to religious freedom is a non-derogable right for which the state must not reduce its protection under any circumstances or for any reason, but on the other hand, external freedom can be restricted by the State through legislation or even solely for the sake of protecting the rights and freedoms of others.

Experts will continue to debate this issue. It requires a comparative law study with other countries experiencing the same issue. Germany is selected for comparison in this study because it is a state of civil law which has a similar legal system to Indonesia's. The religions of the population in Germany are also compound or plural, just like in Indonesia. Yet, neither Indonesia nor Germany is a religious state. This article examines why there are restrictions on the right of religious freedom, as well as why Indonesia and Germany restrict the right of freedom of religion.

## II. DISCUSSION

### A. Reason for Restriction on Religious Rights

There is no doubt that religious freedom is a vital part of human rights in a democratic society and in other societies as well. Freedom of religion is a right that even has the status as a right that should not be derogated, reduced, or violated under any circumstances (non-derogable rights).<sup>13</sup> The importance of protecting the right of religious freedom can be seen in numerous international treaties on human rights, both universal and regional. These include the Universal Declaration of Human Rights, the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention of Human Rights, the African Charter on Human and Peoples' Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion, and the Arab Charter on Human Rights.<sup>14</sup>

For example, the UDHR states that: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public, to worship and observance"<sup>15</sup>. That is, Article 18 not only recognizes religious freedom, but

<sup>12</sup> KOMNASHAM, *Kebebasan Beragama atau Berkepercayaan di Indonesia [Religious and Faith Freedom in Indonesia]* Chandra Setiawan and Asep Mulyana eds. (Jakarta: KOMNASHAM, 2006), pp. 3, 88.

<sup>13</sup> Manfred Nowak and Tanja Vospernik, *Pembatasan-Pembatasan yang Diperbolehkan Terhadap Kebebasan Beragama atau Berkeyakinan, Kebebasan Beragama atau Berkeyakinan, Seberapa Jauh, A Reference on Principles and Practice* (Jakarta: Kanisius, 2010), p. 201.

<sup>14</sup> Wamwara John Joseph, "Limitations on the Right to Freedom of Religion or Belief under International Human Rights Law," *ADH LL.M. Paper 2011-2012*, p. 5.

<sup>15</sup> UDHR, Article 18; Joseph, "Limitations to Freedom of Religion." *Ibid*.

also freedom of thought and conscience. The article protects the private freedoms belonging to someone associated with his belief<sup>16</sup>.

Synergistic with the provisions of Article 18 of UDHR and the ICCPR, which are the main regulators created by the United Nations on human rights in the fields of civil and political affairs such as religious freedom<sup>17</sup>, Article 18 also states that: (1) "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others, in public or private, to manifest his religion or belief in worship, and to observe, practice, and proselytize." ... the rights of freedom of religion as insured by the above provisions apply absolutely in any conditions. That means that the fulfillment of the right of freedom of religion cannot be postponed or revoked<sup>18</sup>. This includes one's right to observe no religion of any kind.<sup>19</sup>

Both international agreements avouch the right to freedom of religion. However, when talking about freedom, the reality is that there has never been absolute freedom in any community.<sup>20</sup> Absolute freedom can only exist if a person separates himself from his existence as a social being. In other words, a person living alone no longer lives a communal life; therefore, his behavior does not have any implications within his community. Yet, we still question whether this is possible or not. Clearly, the answer is to say that it can never happen. Following this flow of logic, any actual fights or attempts that aim to realize absolute liberation are impossible to bring to fruition. Here we find the horizon for freedom itself, which requires people to begin with the understanding that freedom is relative. The cliché is "free within the limits."<sup>21</sup>

Therefore, freedom that can be created is actually relative freedom that can facilitate everyone's creativity and expression within a spectrum that does not diminish the rights of others. If freedom is practiced in a way that harms others or takes away from the freedom of others, then that means allowing dictatorship in the name of freedom. This means that no one can have absolute freedom without certain restrictions. Restrictions can be made based on belief when such action may result in losses to others.<sup>22</sup> So, several conventions were legalized to regulate restrictions of religious freedom.

The ICCPR states that the freedom to practice one's religion or beliefs may only be restricted by law, which is necessary to protect public safety, order, health, morals, and the fundamental rights and freedoms of others. The UDHR settled two conditions for legal restrictions: first, such restrictions must be prescribed by law. These laws

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<sup>16</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Right-CCPR Commentary* (Arlington, Virginia: NP Engel Publisher, 2005), p.41.

<sup>17</sup> Sarah Joseph, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (New York: Oxford University Press, 2000), p. 4.

<sup>18</sup> ICCPR, Article 4 Point 1 and 2.

<sup>19</sup> ICCPR General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18), UN Doc, 2003.

<sup>20</sup> Agus Triyanta, "Mencari Benang Merah Konstitusional Antara Kebebasan Beragama dan Penodaan Agama; Dari Konsep Blasphemy Law Hingga Pelarangan Ahmadiyah di Indonesia", *UNISIA Jurnal Ilmu-ilmu Sosial* 35, no. 78 (2013), p. 26.

<sup>21</sup> *Ibid.*, p. 27.

<sup>22</sup> Pranoto Iskandar, *Hukum HAM Internasional, Sebuah Pengantar Kontekstual* (Cianjur: IMR Press, 2010), p. 44.

cannot be arbitrary in any way that could set limits on religious freedom; restrictions must be formulated in accordance with the general terms and objectives and they must differentiate from court decisions. Usually the decision to restrict the religious rights is issued by the government and run by a public administration agency with due regard to the scope of its authority. Secondly, restrictions must correspond to at least one of the justifications designed to secure and respect the rights and freedoms of others. They must also be designed in accordance with morality, public order, and general welfare in a democratic society.<sup>23</sup> A comparison of the differences in scope and limitations possessed by the UDHR and the ICCPR are shown in Table 1.1.

**Table 1.1: Comparison of UDHR and ICCPR Related to Freedom of Religion**

Issues	UDHR	ICCPR
Scope	Freedom of thought, conscience, and religion; this right includes freedom to change religion or belief and freedom, either individually or jointly with others, and either publicly or privately, to practice a religion or belief in teaching practice, worship, and observance.	The freedom to adopt a religion or belief of one's choice, and freedom, either individually or jointly with others, both in public places and enclosed, to practice religion or belief through worship activities, regulation, practice, and teaching.
	Defined by law solely for securing due recognition and respect for the rights and freedoms of others, and to meet fair conditions in terms of morality, public order, and general welfare in a democratic society.	Governed by law and necessary to maintain public order and general welfare, health, and morality, and to respect the basic rights and freedoms of others.

Source: Primary Data, 2016

Based on the these definitions, restricting the implementation of freedom of religious rights means contradicting the rights of religious freedom itself. Such an assumption seems logical because on one hand, the right of religious freedom is absolute under any circumstances, and compliance cannot be reduced or aborted under any normal or emergency circumstance. On the other hand, the right to freedom of religion must be limited, so that in practice it does not collide with others' rights. However, upon further study, this assumption of the contradiction is not true. That is, it can be explained based on the character of the concept of the right to

<sup>23</sup> Article 29 UDHR.



religious freedom, which has two aspects; namely: one's beliefs (forum internum) and the manifestation of these beliefs (external forum).

### 1. Forum Internum

Forum internum concerns religious freedom, which is abstract because it lies in a person's heart and conscience. Only those who believe in religion can define faith as part of forum internum. Forum internum is home to an individual's personal inner recognition. It is home to individuals' spiritual beliefs, which are precisely understood only by the person himself. Others may understand only in part or not at all. Therefore, other individuals or entities outside of the owner of the this area of belief cannot and may not interfere.<sup>24</sup> Forum internum describes a person's commitment, which is directed inward and is deeply personal to one's faith, beliefs, and chosen religion. Khrisnaswami calls it a faith in the deepest realm and the individual's consciousness.

Thus, in this area, a person has the right to own and embrace religion and beliefs through conscious choice. Whether one embraces and maintains their chosen religion or belief can only be ascertained by the concerned person himself. Any coercion from outside to believe or to leave is impossible.<sup>25</sup> Hence, also, any restriction to this area is impossible. Therefore, in all cases, forum internum is widely regarded as an absolute freedom<sup>26</sup> that cannot be restricted, prohibited, or defined as a legislative product. Legislative product restrictions are only applied to the aspects of "conduct" or to the domain of forum externum regarding religious rights.

### 2. Forum Externum

Forum externum is the right of freedom of religion that is invisible because it is a religious behavior manifested in the form of ritual based on people's religious teachings and beliefs. This includes the activities of worship, practice, and arrangement of teachings.<sup>27</sup> Forms of religious practice vary widely depending on how and whether people accept the religion's teachings.<sup>28</sup> For example, following a religion's teachings could include praying five times a day, going to church, worshiping statues, stones, or other objects for the purpose of performing religious rituals, or any other repeated religious practices. Due to the intersection with the interests of others or the public, even this forum externum can be limited because it is possible for its implementation to interfere with others' fundamental rights of freedom. Because this can potentially intersect with another person's rights and freedom of religion, it could cause disruption to public order and security.<sup>29</sup>

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<sup>24</sup> Uli Parulian Sihombing, *Hak Atas Kebebasan Beragama/Berkeyakinan di Dalam Perspektif HAM: Teori dan Praktek [Right to Religious/Belief Freedom under the Human Rights Perspective: Theory and Practice]* (Jakarta: ELSAM, 2013), p. 5.

<sup>25</sup> Komisi HAM Nasional, *Pemetaan Hak atas Kebebasan Beragama dan Kepercayaan di Enam Daerah [The Mapping of Rights of Freedom of Religion and Beliefs in Six Region]* (Jakarta: Komnasham, 2009), p. 22.

<sup>26</sup> Nowak and Vospernik, *Pembatasan-Pembatasan yang Diperbolehkan* p. 204.

<sup>27</sup> Imral Rizki Rahim, "Kontroversi Pelarangan Ahmadiyah di Indonesia: Perspektif Hak Asasi Manusia," *Padjadjaran Jurnal Ilmu Hukum Journal of Law* 1, no. 1 (2004), p. 26.

<sup>28</sup> Al Khanif, *Hukum dan Kebebasan Beragama di Indonesia* (Yogyakarta: LaksBang Mediatama, 2010), p. 110.

<sup>29</sup> *Ibid.*, p. 111.

**Table 1.2: Aspects of Rights of Freedom of Religion**

NO.	INTERNUM FORUM	EXTERNUM FORUM
1.	Individual	Collective
2.	Absolute	Relative
3.	Private	Public
4.	Freedom of HAVING religion and HAVING faith	Freedom to conduct religion and faith
5.	Cannot intervene	Possible to intervene
6.	<i>Non-derogable right</i>	<i>Derogable right</i>
7.	Abstract	Visible

Source: Secondary Data, 2016

In summary, not all aspects of the rights and freedoms of religion and belief are non-derogable; that is, within the spectrum of rights that cannot be reduced under any circumstances. The aspects that cannot be reduced or disposed of exist in the realm of forum internum. In this sense, everyone has full rights to freedom of religion. This is because freedom is the “fruit” of one’s ideas and reflection on religion and it is probably the main reason why one chose their faith. Therefore, compliance with this type of freedom should be an absolute given without any restrictions whatsoever, including from or by the state. This freedom is protected without exception.<sup>30</sup>

When the religious rights and freedom interact in public spaces or in association with the implementation of religious teachings, as in worship, this is commonly referred to as freedom of religion in forum externum. The existence of this freedom obviously causes an intersection among human beings occupying public spaces. Therefore, access to this type of freedom must be limited so that it will not cause friction among respective faiths. Even then, restrictions must be governed by law and must be deemed necessary to protect public safety, order, health, morality, and the fundamental rights and freedoms of others.<sup>31</sup>

In this case, the law is enabled to restrict freedom; if these freedoms are left legislatively unchecked, a collision among individuals’ freedoms will occur. Through legislation, the State’s oversight helps to avoid collisions among rights and to provide stability for various freedoms. The State is entitled to impose restrictions on the rights of religious freedom because the goal is to maintain a balance among various rights and freedoms in order to avoid conflict, especially in terms of religious freedom.

Based on this, we can draw an implementation line of permissible religious teachings in private and public. This systematic interpretation of the intent and

<sup>30</sup> Karen Murphy, *State Security Regimes and the Right to Freedom of Religion and Belief* (London: Routledge, 2013), p. 13.

<sup>31</sup> Komnasham, *General Commentary of International Covenant on Civil and Political Rights* (Jakarta: KOMNASHAM, 2009), p. 51.

purpose of these provisions leads us to the conclusion that private freedoms that actively enliven the proselytizing of religion or beliefs cannot be restricted. However, such practices can only be treated as private if and only if the practice does not exceed the territory of individual existence and autonomy and does not touch the freedom and the private sphere of others<sup>32</sup>. Therefore, the private sphere is primarily concerned with the practice of religious rituals and habits at home, either alone or in spiritual/religious community. Once these activities bear the character of changing another person, they leave the private sphere of freedom of religion and belief. Thus, once a religious activity leaves the private sphere, the sessions can be limited.

The aforementioned restrictions can be used, due to interference with public safety, order, health, morals, or the fundamental rights and freedoms of others.<sup>33</sup> If these activities have already penetrated the public domain, and are no longer only in the private sphere, the country has a legal and legitimate right to interfere with a person's inappropriate manifestation of religion or belief. If it is judged that the activities in the public space are already threatening public safety, health, morals, or the fundamental rights of other individuals, then the State is allowed to restrict such activities.

Based on what we have learned, we can conclude that the reason restrictions on the right of religious freedom exists is to reach mutual goals. Implementation of the right of religious freedom must not be interpreted as free without limitation. The rationale for restrictions on individual freedom is to avoid chaos that could harm the achievement of mutual goals.

This conclusion is associated with John Stuart Mill's Harm Principle, which states that everyone is free to express their beliefs so long as it does not result in disadvantages (harm) to others.<sup>34</sup> An individual is free to act as he pleases if his actions do not violate the rights of others. The freedom of every individual is blocked when there is contact with another person's rights. This intersection undoubtedly restricts a person's freedom to disturb or harm the rights and freedoms of others. Therefore, everyone has the right to express themselves, and limits only apply when one's rights intersect with the rights of others.

In concert with some of these provisions, Immanuel Kant provides insight related to human rights and freedoms. According to Kant, individuals will tend to fight for independence in the areas of freedom and autonomy. However, the implementation of personal freedom may be detrimental to the rights of others. Therefore, the law is needed to prevent violations of the rights of others as a result of the implementation of one's freedom. The law aims to create normalcy in the implementation of religious freedom in the life of a nation. To achieve that goal, of course setting that law also includes restricting the implementation of one's religious beliefs. Because every law is created to ensure freedom, then it is necessary that the law itself must also limit the exercise of one person's freedom interfering with another's<sup>35</sup>.

In some of these perspectives, John Rawls views freedom as the most important right, while all other rights are complementary. Freedom can and might be restricted only by freedom itself; that is, only if: First, it strengthens the whole system of freedom

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<sup>32</sup> National Commission of Human Rights, *Pemetaan Hak atas Kebebasan Beragama dan Kepercayaan di Enam Daerah*, (Jakarta: National Commission of Human Rights, 2009), p. 26.

<sup>33</sup> ICCPR Article 18 Point 3.

<sup>34</sup> Iskandar, *Hukum HAM Internasional*, p. 44.

<sup>35</sup> *Theology of Constitution*, p. 51.

enjoyed by everyone; and second, to ensure that freedoms of the same or different basic liberties are well protected<sup>36</sup>. Contrarily, there should be no restrictions in addition to these two things.

According to this theory, religious freedom can be restricted by religious freedom itself, as well as by other fundamental freedoms. The construction of restrictions will eventually strengthen the whole system of freedom, allowing all to enjoy it<sup>37</sup>.

## **B. The Purpose of Restricting Religious Rights in Indonesia and Germany**

### **1. Restriction of Religious Rights**

A constitutional warrant for the freedom to manifest belief or forum externum can be restricted. Such restriction is only conducted to strengthen the system of religious freedom itself. This means that restrictions can only be implemented with the goal of keeping the forum externum by person such that it does not violate or harm the same rights or fundamental rights of others. For this reason, the restriction is set out in Article 28 A (2) of the 1945 Constitution, which states: "In carrying out their rights and freedoms, everyone shall be subject to the restrictions established by law with the sole purpose of securing due recognition and respect for the rights and freedoms of others and to meet the demands of justice in accordance with considerations of morality, religious values, security, and public order in a democratic society."

The Article explicitly clarifies the restriction of the right of religious freedom as only being done through an Act. It is a logical consequence of the principle that any restrictions, revocation, or reduction of human rights must be approved by Parliament.

This is also confirmed in Act No. 12 of 2005 under Article 18 (3) that states: "Freedom to practice religion or beliefs may only be restricted by law, which is necessary to protect public safety, order, health, morals, or the rights and freedoms of others. Article 18 (3) of Law No. 12 of 2005 implies restrictions on the right of religious freedom that aim only for freedoms of an external nature (forum externum), manifested as worship practice, observance, and teaching. Restriction conditions should be based on the law, on the grounds of public safety, public order, health and morals, fundamental rights and freedom of others, and the necessity of realizing these reasons. This means that Article 18 (3) is a comprehensive provision for restricting the right to freedom of religion and belief."<sup>38</sup>

The National Constitution, in Article 73 of Law No. 39 of 1999 on Human Rights, states that:

*"Rights and freedoms stipulated in this Law are limited by and under the law and can only be limited by, and under the law, solely for ensuring the recognition and respect for human rights and freedom of others, morality, public order, and national interest."*

In this provision, the restriction of the rights and freedom of religion exists not

<sup>36</sup> John Rawls, *Teori Keadilan; Dasar-dasar Filsafat Politik untuk Mewujudkan Kesejahteraan Sosial dalam Negara [Theory of Justice]*, trans. Uzair Fauzan and Heru Prasetyo (Yogyakarta: Pustaka Pelajar, 2006), p. 256.

<sup>37</sup> *Theology of Constitution*, p. 53.

<sup>38</sup> Mirza Nasution, *op.cit.*, p. 99.

only to protect and respect the rights and freedoms of others, as well as to maintain security, stability, and order; and to preserve the moral values of religion, but also in consideration of decency and for the sake of the nation.

Act 1 of 1965 on PNPS also states that the purpose of government restrictions aims to foster and protect tranquility among religions. The explanation states that to prevent prolonged endangerment to the unity of the Nation, and within the framework of vigilance to the Nation and the Guided Democracy, it is necessary to issue a Presidential Decree. The Decree of the President was realized on July 5, 1959 as one way to channel nationality and religious order so that everyone in all parts of Indonesia can enjoy religious peace and the security to pray according to his religion. With the intention of fostering religious peace, this Presidential Decree first prevents the occurrence of abuse in principle religious teachings by the priests (chapters 1–3); and second, protects religious peace from disfigurement/humiliation/ blasphemy as well from any proselytizing of religion that is not traced to God Almighty (Article 4).<sup>39</sup>

Thus, restriction on the right of religious freedom may be made on the condition that it is related to legal provisions. In this case, the law is enabled to restrict freedom to prevent a collision between freedoms of individuals. The State uses legislation to avoid a collision of rights and to balance various rights and freedoms.

In Indonesia, freedom of religion means that one is free to believe and embrace any religion without coercion and to worship without fear or threat from others. However, this individual freedom is limited by the rights of other believers, which means that a religious believer is not free to harass or desecrate other religions, nor to interpret the teachings of a religion unilaterally in a way that undermines other religious teachings. It also means that an individual has the freedom to not embrace one religion. Freedom of religion means that one cannot force others to convert to another religion unless it is according to an individual's own wish and conscience; one cannot provoke others to follow a deviant sect or invite others to believe in no religion.

Commonly referred to as Basic Law, the German Constitution also provides safeguards for freedom of religion and belief, as mentioned in Article 4. Article 4 explains that freedom of religion, belief, and religious status is a matter that cannot be contested<sup>40</sup>. Besides, Germany is also guided by the European Convention on Human Rights (Article 9),<sup>41</sup> although with regard to restrictions on the right of religious

<sup>39</sup> National Commission of Human Rights, *Penyelenggaraan Negara yang Baik, Masyarakat dan Warga* (Jakarta: Komnas HAM, 2000), p.15.

<sup>40</sup> Germany Basic Law, Article 4 [Freedom of Faith, Conscience, and Profession]

(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

<sup>41</sup> German Basic Law, Article 9 Freedom of thought, conscience, and religion.

1. Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

freedom, the Basic Law does not explicitly regulate. Even so, this does not mean that there are no limitations or restrictions, because ensuring freedom of religion or beliefs without explicit limitations still requires the proviso of no influence on the general law due to that freedom of religion. Restrictions to religious freedom must always be interpreted within their limited rights, such that freedom of religion is also restricted. It then becomes a manifestation of the law in Germany.

Although the German Constitution does not provide definitions or provisions of restrictions on religious freedom, Germany's Book of Criminal Code (Criminal Code Article 166-167)<sup>42</sup> provides penal provisions against defamation of religion and assault on religious activities. For example, publicly insulting others' religion or beliefs, or spreading it through writing receives a maximum of three years imprisonment. This proves that restrictions on freedom of religion in Germany is governed by the Criminal Code.

**Table 2.1 Comparison of Regulations in Indonesia and Germany**

INDONESIA	GERMANY
<p>Article 28]of UUD NRI 1945 (The 1945 Constitution)</p> <ol style="list-style-type: none"> <li>1. Everyone shall respect each others' Human Rights in an order of society, nation, and state.</li> <li>2. In the implementation of rights and freedoms, everyone shall be subject to the restrictions established by law with the sole purpose of securing due recognition and respect for the rights and freedoms of others and to meet a fair justification in accordance with considerations of morality, values in religion, security, and public order in a democratic society</li> </ol>	<p>Article 166 of Criminal Code</p> <p>Defamation of religion, religious associations, and ideology:</p> <ol style="list-style-type: none"> <li>1) Whoever publicly or through dissemination of written materials (Article 11 (3)), defames other's religion or ideology in a manner capable of disturbing public order, will be subject to imprisonment not exceeding three years or a fine.</li> <li>2) Any person who, publicly or through dissemination of written materials (Article 11 (3)), defames a church or religious associations or other ideology in Germany, or the institutions or their customs in a manner capable of disturbing public order, will be subject to the same punishment</li> </ol>

<sup>42</sup> German Übersetzung des Strafgesetzbuches (Criminal Code), Section 166 Defamation of religions, religious, and ideological associations.

1) Whosoever publicly or through dissemination of written materials (section 11(3)) defames the religion or ideology of others in a manner that is capable of disturbing the public peace, shall be liable to imprisonment not exceeding three years or a fine.

2) Whosoever publicly or through dissemination of written materials (section 11(3)) defames a church or other religious or ideological association within Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall incur the same penalty.

	<p>Part 167          Interferes practice of religion          (1) Whoever          1) knowingly and improperly interfere with religious services or religious worship from churches or other religious associations in Germany, or          2) do malign mischief at a place dedicated to the worship of a religious association, will be subject to imprisonment not exceeding three years or a fine.          (2) ceremony of ideological associations in Germany will be equivalent to a worship</p>
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Sources: Primary Data, 2016

From the information in this table, we can conclude that the similarity between Indonesia and Germany in terms of religious freedom is that both guarantee mutual absolute freedom of religion for each individual in society. Protection of the rights of religious freedom is outlined in each country's constitution, showing their commitment to ensuring freedom of religion. Both nations also have ratified the ICCPR; hence the implications of legal protection for the right of religious freedom is not much different, because the ICCPR already provides high quality standards for the exercise of religious freedom. However, there are still some differences in restrictions between the two countries, particularly regarding the interpretation of public order.

## 2. Comparison of the Purpose of Restriction of Religious Rights in Indonesia and Germany

Indonesia and Germany are the UN member states that both agreed to and signed the international conventions related to human rights. The implication of this participation is that both nations must regulate human rights in their constitutions. However, as stated in the foregoing discussion, those freedoms should still be restricted. The law is the only means,<sup>43</sup> of restricting the freedom of religion. Even then, it can only be done when such restrictions are in the realm of implementation, embodiment, or in the manifestation of religious teachings (the freedom to act). As mentioned in the previous paragraph, the purpose of restrictions is to prevent threats to the safety and property of others. The restriction is solely intended to protect the interests of the entire community. The State's regulation in the sphere of

<sup>43</sup> *Ibid.*, Section 167 Disturbing the exercise of religion.

(1) Whosoever.

1) intentionally and inappropriately disturbs a religious service or an act of religious worship of a church or other religious association within Germany or

2) commits defamatory mischief at a place dedicated to the religious worship of such a religious association shall be liable to imprisonment not exceeding three years or a fine.

(2) The ceremonies of an ideological association within Germany shall be equivalent to religious worship.

religious life is still needed to create order in the life of the State. Indonesia is a very heterogeneous country, and because of that, it takes more effort to keep the peace among the various religious communities.

**Table 2.2 Purpose of Restriction to the Freedom of Religion**

NO.	INDONESIA	JERMAN
1.	Other Fundamental Rights	Other Fundamental Rights
2.	Justice: Based on morality, religious values, security, and public order.	Public Order/Public Tranquility: Based on the principle of equity and tolerance.

Source: Primary Data, 2016

As seen in Table 2.2, there are similarities in the purpose of restrictions to freedom of religion in both countries, which are associated with public order. However, there are differences regarding the definition of public order in both countries. An analysis on this comparison follows.

The pluralistic conditions in Indonesian society are more or less influenced perspectives on freedom of religion. Some cases, such as the case of Ahmadiyah,<sup>44</sup> and the case in Sampang,<sup>45</sup> are examples of actions that haunt the meaning of freedom of religion in Indonesia. The purpose of the restrictions, which should be aimed at creating peace, is often interpreted partially by some parties such that a group feels justified in degrading and disturbing other religious groups, which ultimately disrupts public order.

Aside from the previous rationale, public order becomes a fundamental reason for restriction. The meaning of public order<sup>46</sup> as it is related to the restriction of human rights in Indonesia is a conformity of justice with considerations of morality, religious values, security, and public order in a democratic society. According to Daniel Webster, justice is the most noble of human needs.<sup>47</sup> Every human being has the right to receive justice. Law is a compilation of rules incorporating the norms and sanctions that intend to create order in human relationships; therefore, through the justice system, security and order can be maintained. Setting restrictions on human rights within legal norms is legitimate way to reduce human rights. Individuals'

<sup>44</sup> Law as a tool of social control is a theory offered by Roscoe Pound and means that law is used as a tool to control society.

<sup>45</sup> The teachings of Ahmadiyah is brought by Mirza Ghulam Ahmad by rooting on the teachings of Islam, but with several adjustment that considered as misleading, far from the sharia of Islam. The disciple of Ahmadiyah in Indonesia is prone to violent assault because due to the indictment of worshiping deviant sect.

<sup>46</sup> Sampang Case is a case of assault to the disciple of Syiah sect in Madura. Majority moslem in Indonesia is the disciple of Sunni sect. There are several fundamental differences in the conduct of rite in both sects.

<sup>47</sup> See Article 28 J of The 1945 Constitution of Republic of Indonesia.



morale grows from birth and continues to develop in society. Because a conceptual system of moral and law already exists, a person grows and absorbs these systems and can apply it in their individual life, as well as to society.<sup>48</sup>

Indonesia is a State of Law guided by Pancasila in the implementation of national life. Therefore, it is not a religious state, nor a secular country, nor even an atheist country, but it is a State of Law. In Indonesia, there is a close bond between state and religion; therefore, if religious teachings require intervention from the state, then that should be stipulated in legislation. Pancasila is based on the principle of faithfulness to God Almighty. Because of that, the principle of God Almighty becomes an element of state in Indonesia, as part of a State of Law.<sup>49</sup>

The principle of God Almighty is revealed through Article 29 Paragraph (1), which states that the State is based on the belief in one God Almighty. This principle was born out of the recognition that for all people in Indonesia, freedom can be achieved by the grace of God Almighty. Citing the opinion of Mahfud MD,<sup>50</sup> the concept of a state that is faithful to God implies that Indonesia is not a state of religion nor a secular state, but a state of Pancasila, which is a nation, state, or country that is guided by religion. Therefore, the foothold for setting restrictions to religious freedom in Indonesia refers to the principle of God Almighty (theology of Constitution).

On the other hand, Germany recognizes the doctrine of "separation of state and church."<sup>51</sup> In a state of life, this means that there is separation between religion and state so that the state does not use religion as a political instrument. The State does not intervene regarding the freedom of expression, both internally and externally, as long as these expressions do not violate the rights of others and do not disturb other people's tranquility or sense of comfort.

For the government of Germany, public order is interpreted as public peace, and it is related to the realm of others' human rights with the principle of tolerance shown toward religious communities. This limits religious freedom for the sake of others' rights, and these interests are contrary to the Constitution's objectives.<sup>52</sup> This is done based on the principles of balance and tolerance, where freedom must be balanced with others' fundamental rights, and that the idea/notion of divinity for someone should be set aside for the protection of society and public order. In accordance with the provisions of Article 4 of Basic Law, ever religious activity that is based on conscience is protected and inviolable.

The provisions of Articles 166 and 167 relate to the defamation of religion and set restrictions that affect the public order. Although there are no civil or administrative rules that specifically govern blasphemy or sacrilege, according to a general rule,

<sup>48</sup> Muhammad Alim, *Demokrasi dan Hak Asasi Manusia dalam Konstitusi Madinah dan UUD 1945 [Democracy and Human Rights in Medina Constitution and the 1945 Constitution]* (Yogyakarta: UII Press, 2001), p. 24.

<sup>49</sup> Bahar Saafroedin, *Hak Asasi Manusia [Human Rights]* (Jakarta: Pustaka Sinar Harapan, 1997), p. 45.

<sup>50</sup> Maruarar Siahaan, *Undang-Undang Dasar 1945 Konstitusi yang Hidup [The 1945 Constitution: The Living Constitution]* (Jakarta: Secretary General and the Secretariat of Constitutional Court, 2008), p. 561.

<sup>51</sup> Mahfud MD, *Politik Hukum [The Politics of Law]* (Jogjakarta: UII Press, 2008), p. 23.

<sup>52</sup> This Doctrine was popularized by Thomas Jefferson, Sociohistorically, this doctrine emerged at the time of medieval Europe in the time period of renaissance that ended the dark era. The society at that time began to feel skeptical of leaders who come from the church. The development of this doctrine does not only mean that State is apathy toward religion, but also avoids the intervention of religion against the life of the state, [www.allhistory.org](http://www.allhistory.org), accessed on August 12<sup>th</sup> 2016.

a demand for compensation can be required for material damage as a result of a criminal act against the dignity of a person<sup>53</sup> (Section 253<sup>54</sup> of Civil Code (Bürgerliches Gesetzbuch (BGB))).<sup>55</sup> The 1969 reformation of Germany's Criminal Code explains that Article 166 aims to protect the public, despite ideas against divinity and one's feelings.<sup>56</sup>

There are several examples of these cases in Germany, such as the case of Albert Voss. Voss is an atheist and a former sports teacher who was fined €500 (£400) for abusing the Christian religion by sticking the slogan of the Antichrist on a windshield.<sup>57</sup> Or the case of Michael Schmidt-Salomon that dealt with the slander of one's religion by playing the lyrics of a Maria Syndrome song on May 28, 1994. The German Court decided to ban the playback of the song because it violated provisions of Article 166 of the German Criminal Code.

We can conclude that religious freedom in Germany also has restrictions, which fall within the realm of public order. The Constitution guarantees freedom of expression and art as well as freedom of religion; however, these freedoms must be balanced with others' fundamental rights, and therefore these freedoms are subject to restrictions when other constitutional principles are considered contrary to the freedoms. The goal is to create a constitutionally protected tranquility in the interests of tolerance for religious affairs, and this ideology is important to maintain peace in the community.<sup>58</sup>

Germany's Constitution mandates that legislation may restrict freedom of religion according to specific requirements. Namely, the freedom of others can be restricted by law to protect legitimate public interests and in accordance with constitutional standards such as proportionality, certainty, or the protection of reasonable beliefs. Freedom of religion may not be restricted by law only by recognizing the warrant for protection of the public interest. This can only be restricted by law that forces the public's interest as regulated in the Constitution itself.<sup>59</sup> These limits must be interpreted in a narrow sense that respects the importance of religious freedom. Thus, the balance must remain optimized to respect freedom of religion and other legitimate public interests.<sup>60</sup>

<sup>53</sup> Gerhard Robbers, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany," *Emory International Law Review* 19 (2005): 841.

<sup>54</sup> Lena Stern, *Der Stafgrund der Bekenntnisbeschimpfung*, (Satz und Gestaltung: H. Gietl Verlag & Publikationsservice, 2011)

<sup>55</sup> German Criminal Code, Section 253 Intangible damage.

(1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law.

(2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.

<sup>56</sup> [dejure.org](https://dejure.org/gesetze/BGB/253.html), "Law information System Ltm. (Rechtsinformationssysteme GmbH), (Strafgesetzbuch, Abschnitt 11, 166 Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen)", <https://dejure.org/gesetze/BGB/253.html>, accessed on 1<sup>st</sup> October 2016.

<sup>57</sup> Fischer, German Criminal Code (StGB), 58. Aufl. 2011, § 166 StGB, Rn. 1.

<sup>58</sup> Justin Huggler, "Germany fines man for 'blasphemous' car bumper stickers", <http://www.telegraph.co.uk/news/worldnews/europe/germany/12174806/Germany-fines-man-for-blasphemous-car-bumper-stickers.html>, accessed on August 12<sup>th</sup> 2016.

<sup>59</sup> See German Court decision at Federal Administrative Court, Decision. 11.12.1997, Az.: 1 B 60.97, <https://www.jurion.de/Urteile/BVerwG/1997-12-11/1-B-6097>, accessed on 15 September 2016.

<sup>60</sup> BVerfGE 32, 98 (107).

From our examination, we can conclude that as UN member states, both countries recognize the principles of the Universal Declaration of Human Rights as well as the general ICCPR. Public order is also the factor that restricts religious freedom in both nations. Certainly, there are differences related to public order; that is, Indonesia interprets public order as related to religious freedom when such actions are not contrary to law and aimed for justice in accordance to moral values, religion, and safety; while Germany does not incorporate the religious element into the concept of order in general, but maintains an element of balance and tolerance. The concept of Indonesia's God Almighty State is also a foundation for distinction, where God Almighty does not separate from the life of state and society in Indonesia, while Germany explicitly separates religious life from the State.

### III. CONCLUSION

Everyone is free and has the right to express their beliefs and convictions as long as it does not result in losses to others. The reason why there are restrictions on these rights is to protect the fundamental rights or basic freedom of every individual. The rationalization of fundamental restrictions on the freedom of individuals is to avoid chaos that could interfere with the achievement of mutual objectives. This is done to ensure that the freedom of the same or different fundamental freedoms are well protected, so that it will strengthen the whole system of freedom that everyone shares.

There are some differences in the hierarchy of governing restrictions on freedom of religion in Indonesia and Germany. Indonesia specifically includes restrictions on the freedom of religion in the Constitution, Article 28 NRI J Constitution of 1945, Article 73 of Law No. 39 of 1999, Article 18 of Law No. 12 of 2005, and PNPS No. 1 of 1965. While Germany does not set explicit limitations. The assurance lies in Article 4 of the Basic Law, and Article 107 of the Lander Law, whereas the restrictions are on the level of the Act; namely, Articles 166 and 167 of the Criminal Code. Germany also follows the European Convention on Human Rights, so those principles automatically apply in Germany.

Indonesia and Germany's objective in restricting the rights of religious freedom is to ensure recognition and respect for the rights and freedoms of others, as well to create public order. In Indonesia, public order is defined as the conformity with justice by consideration of morality, religious values, security, and public order in a democratic society. This is seen in the Pancasila as the foundation of the State. Meanwhile, Germany defines public order as the protection of society based on the principles of balance and tolerance, where freedom must be balanced with the fundamental rights of others, but where it is also true that the idea of divinity for someone is excluded.

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