

# In search of new narratives

## The role of cultural norms and actors in addressing human rights contestation

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### Introduction

As is frequently reiterated in contemporary times, we are living through a challenging period for human rights. Despite celebrating 50 years of the Covenants in 2016 and 70 years of the Universal Declaration of Human Rights (UDHR) in 2018, rights continue to be contested and may have even lost ground in recent years. Scholars and practitioners have been warning of the threats to democratic values and human rights around the world, highlighted in 2016 by the Brexit vote in the UK and the election of President Trump in the USA. There have also been challenges to international rights institutions, like the USA leaving the UN Human Rights Council and Burundi and the Philippines withdrawing from the International Criminal Court. The former UN High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, criticized populist leaders like Presidents Trump and Duterte, noting that “the further away we get from those historical and dreadful experiences [of WWII], the more we tend to play fast and loose with the institutions created to prevent repetition”.<sup>1</sup> He also lamented the backlash on women's rights, evident from the “*return to greater inequality and harmful customs*” like female genital mutilation (FGM/C) (Ra'ad Al Hussein 369; emphasis in original). To drive home his critique, al-Hussein chose to step down as High Commissioner rather than seeking a second term.

Scholars too have commented on the challenges to and perceived decline of human rights. Hopgood argues that the “endtimes are coming for human rights as effective global norms” due to the increasing contestation inside and outside the human rights movement, combined with the relative erosion of the USA's power and the rise of Southern States (11). He notes that the (re)emerging areas of the world are not secular, with religion playing a stronger role in influencing their public attitudes. De Sousa Santos agrees, noting that “theology's center of gravity has moved to the Global South” (21). Indeed, religion is experiencing a type of resurgence, especially in political and public life (Toft 48; Fadel 1). In the last few decades, it has become a global phenomenon for people to claim “religion as a constitutive element of public life” (Sousa Santos 11). Studies show that the world is becoming more religious, with the relative size of religiously unaffiliated

people declining (Pew Research Centre, *Why People*; Pew Research Centre, *The Future of World Religions*). Hopgood argues that there is a “new salience of religion globally” and that “the foundations on which secular human rights were based are not available universally” (17).

It is difficult to share Hopgood’s perspective for several reasons. First, human rights have been contested internationally at least since the UDHR,<sup>2</sup> and it is disputable whether secular foundations for rights were ever universally available. It is also unclear why they should be, given the huge diversity of the world’s some 200 States and the foundationally relative nature of human rights (Donnelly 99; Glendon 146–147). While culture, including religion, has been the basis of many critiques of human rights, it is also a source and promoter of rights. For example, religion “has always been an inspiring source for the social groups and movements that have struggled against injustice and oppression throughout history” (Sousa Santos 22). Religious actors have played extensive and consequential roles in various democratization efforts around the world (Toft 51). In addition, religious organizations have long been providing human rights related services to the public like education and healthcare. As such, a relative increase in religiosity is not necessarily detrimental to the cause of human rights.<sup>3</sup> Religion can be highly effective in human rights implementation due to its ability to guide and shape human behavior. On this basis, religious involvement should be sought out, encouraged, and facilitated – not feared.

Today’s challenging times may not present us with the end of human rights, but rather an opportunity to take stock, re-imagine, and re-engage a wider variety of actors on human rights. It is submitted that in addition to the formal State norms and actors, cultural ones like religion are also needed to participate in resolving human rights contestation and forging supporting narratives. Given the multiplicity of challenges facing human rights, it is necessary to have a plurality of actors working in support of rights. Nationally, these actors may be considered as human rights’ domestic constituents, comprising individual citizens as well as civil society. While the negative role of cultural norms and actors, and particularly religious ones, in abusing rights has been the subject of much scholarship, their positive role in implementing and protecting rights has received less attention. Therefore, this chapter explores the role of religious norms and actors in human rights implementation, focusing on Islam in Indonesia as a case study.<sup>4</sup> The chapter commences with a brief analysis of the contestation between human rights and religion, as well as an unpacking of religion as a site of internal contestation. The chapter then presents the Indonesian case study, which provides examples from practice of how religion (in this case Islam) can and has been used to promote human rights. To conclude, the chapter urges further engagement of religious actors and more polycentric approaches to human rights.

## **Contesting cultures and human rights**

Despite more than 70 years since the adoption of the UDHR, the universality of rights is still contested. While the international human rights system has developed

greatly in this time, challenges continue to be made based on culture. Key challenges have been presented by cultural relativists and advocates of ‘Asian values’ (Cerna; Kausikan), postcolonial and ‘Third World Approaches to International Law’ scholars (Mutua; Falk et al.), and on the basis of Islam. Such critics have contested both the conception and content of human rights, as well as their practical application in diverse communities around the world. Of all the cultural critiques, Brems concludes that those based on Islam come the closest to rejecting the universality of human rights (Brems, *Human Rights* 290). The Islamic critique is made all the more important given that Muslims currently make up around 25 per cent of the total global population (Pew Research Centre, *The Changing Global Religious Landscape*), and Islam is the world’s fastest growing religion. Islam is growing twice as fast as the world’s population and is projected to overtake Christianity as the largest religion in the next half century (Pew Research Centre *Why Muslims*). One scholar has claimed that the salient “question of the twenty-first century may very well be religion, particularly Islam” (Fadel 1).

A central issue for Islam (and some other religions) is that human rights must take second place behind divine law (Roy and Annicchino 17; Lenzerini 77; Brems *Human Rights* 286–287, 289). This can be seen in Art. 24 of the 1990 *Cairo Declaration on Human Rights in Islam*, which subjects all of the rights therein to Islamic law. Similarly, Muslim majority States often enter so-called Islamic reservations when ratifying international human rights treaties (Rishmawi 368). Such reservations typically note that the treaty is only binding in so far as it does not conflict with Islamic law (Brems, *Human Rights* 267–284). While some argue that such reservations undermine the object and purpose of the treaties, their impact on the treaty and legal obligations therein are unresolved (Lenzerini 90–100; Donders, *Cultural Pluralism*). Despite this, An-Na’im concludes that the Islamic tradition is in fact generally consistent with human rights norms, “except for some specific, albeit very serious, aspects of the rights of women and freedom of religion and belief” (An-Na’im *Why should Muslims* 87; Fadel). Typically cited examples of the incompatibility of Islam and human rights include Islam’s permissibility (at times and in some places) of child marriage, FGM/C, polygamy, and its prohibition of apostasy.

Various UN human rights bodies have addressed such so-called harmful practices based on cultural beliefs and held them to be human rights violations (UN CEDAW/CRC Joint General Recommendation). In this way, religion, and culture in general, is often portrayed as an obstacle to human rights enjoyment or a cause of their violation. Merry notes that human rights discourses tend to view culture as an ancient practice, something primitive or backward that obstructs progress (60). However, culture is in fact marked by dynamism and contestation, and not uniformity or consistency (Merry 67). Rather than a product, culture is a process continually undergoing change, with no well-defined boundaries and multiple influencers (Donders, *Human Rights* 6). Not only is culture not static, but it is not monolithic. Anthropologists describe culture as “unbounded, contested . . . marked by hybridity and creolization” (Merry 67). A function of this hybridity and internal contestation is that the lived practices of a particular culture

or cultural norm may be varied. Nyamu highlights that “cultural assertions often fail to reflect the full social reality,” where the day-to-day lived practices can be more diverse than the stated norms (Nyamu, *How Should Human* 405; Nyamu, *Are Local* 132). As such, notwithstanding even firm attestations of cultural norms and practices, alternatives will often co-exist among cultural communities.

The same applies to religion, as a part of culture. While an agreed definition is elusive, culture can generally be seen to encompass the complex features that characterize a society/social group, including modes of life, value systems, traditions, and beliefs (UNESCO, *Universal Declaration of Cultural Diversity* preamble; UNESCO, *World Conference on Cultural Policies* preamble). According to Geertz, culture signifies “a system of inherited conceptions expressed in symbolic forms by means of which men [sic] communicate, perpetuate, and develop their knowledge about and attitudes towards life” (89). As these definitions indicate, culture includes religion as a value and belief system. As such, religions can also be described as dynamic and contested, with Islam being no exception. In fact, “contrary to popular Western characterizations, there is no single uncontested definition of Islam and its precepts” (Mokhtari 470). Islam has various, and often conflicting, interpretations of its normative framework, and, similarly, Muslims have diverse opinions about and approaches to human rights (Ernada 101–102). While there can be contestation between Islam and human rights, there can also be internal contestation within Islam regarding human rights. As such, Muslims can and have used Islam to oppose as well as to support human rights. The next section presents an illustration of how Muslims in Indonesia used Islam to promote human rights.

### **Islamic law and institutions in Indonesia and their role in human rights promotion**

Indonesia is a relevant case to study regarding Islam as it is the State with the world’s largest Muslim population of around 200 million. Indonesia also has strong Islamic institutions, such as Nahdlatul Ulama (NU) and Muhammadiyah, which boast huge combined memberships of over 100 million – some of the largest in the world. Despite not formally being an Islamic State, Islam clearly holds much influence in Indonesia. From a human rights perspective, Indonesia is a party to the main international human rights treaties and regionally is a strong supporter of rights.<sup>5</sup> This section sets out a brief background to Islamic law and institutions and their manifestation in Indonesia, highlighting their intra-plurality and scope for diversity. It then gives an example of how Islamic norms and actors were instrumental in promoting women’s right to family planning and the ways in which they are currently being employed to tackle other contemporary human rights issues. Family planning was selected due to the focus given to it in Indonesia by local, national, and international organizations, and its long-term status as a Government priority. Indonesia’s family planning programme is now five decades old and has a strong history of engagement with Islam. The programme is

viewed internationally as a success for reducing Indonesia's fertility rate by more than half, and is advocated as an example for other (Muslim) States (BKKBN 1; Solomon et al. 4).

### **Islamic law and institutions in Indonesia**

The word 'Islam' means peace, well-being, surrender, or salvation, and the purpose of Islamic law is generally defined as the happiness of all humans in this world and the afterlife (Daud Ali 39). The sources of Islam include the *Qur'an*, *Hadith*, *fiqh*, *Sunnah*, and *shari'ah*.<sup>6</sup> Together, these sources contribute to what is referred to as 'the Islamic tradition'; however, they do not represent "a coherent or consistent body of teachings or precepts from which a universally agreed upon set of Islamic norms can be derived" (Hassan, "Is Family Planning" 226). Given the numerous inconsistencies and variances among the sources and their interpretation, Hassan concludes that "it is scarcely possible to speak of 'Islam' or 'the Islamic tradition' as if it were unitary" ("Is Family Planning" 226–227). Contrary to religious groups like Catholics, there is no set religious hierarchy in Sunni Islam (predominant in Indonesia) or ultimate leader like the Pope. In such an environment, there is a great scope for a diversity of views and beliefs within the Islamic faith. For example, there are four main schools of Islamic thought (*madhabs*) and Muslims may choose which to follow: *Hanafi*, *Maliki*, *Shafi'i* (predominant in Indonesia), and *Hanbali* (Daud Ali 115–120). Furthermore, within each of these schools and among their followers there is a divergence of views.

Lukito notes that Islamic law is full of differences and that pluralism lies at its soul.<sup>7</sup> Islam's intra-plurality is also facilitated by its openness to interpretation. Despite frequent popular representation as literalist, Islamic law has always contained scope for interpretation (Rinaldo 1790; Bakircioglu 24). Scholars claim that Islam in Indonesia takes a highly interpretive approach emphasizing jurisprudence (*fiqh*), resulting in contemporary Indonesian Islamic thought and practice being 'radically diverse' (Rinaldo; Butt 281). This is also facilitated by the fact that, unlike some other Muslim majority countries, Indonesia does not have a grand *mufti* – or acknowledge a single grand scholar of Islam (Assyaukanie 4). This interpretive tradition has given rise to multiple understandings of Islamic law not just in Indonesia but around the world. While some texts such as those regarding faith, prayer, fasting, charity, and the pilgrimage (the five pillars of Islam) are fixed and common to the whole Muslim community, others relating to human relations with one another and with objects may have numerous iterations and variations.<sup>8</sup>

This diversity and contestation within Islam is possible as, while the *Qur'an* is sacred and immutable as the word of God, its interpretation is not (Hursh 291). Scholars agree that Islamic jurisprudence (*fiqh*), as a work of human reasoning, is dynamic and subject to change from time to time and place to place (Daud Ali 32–34; Mir Hosseini 632). In conjunction with the lack of a clear hierarchy, anyone can interpret Islamic texts if they have the requisite knowledge and skills:

knowledge of Arabic, the *Qur'an*, and *Hadith*, understanding of the science of Islam and *fiqh*, and honesty (Daud Ali 74; Ismah 491–509). Like jurisprudence in other legal systems, *fiqh* involves the creative processes of reasoning and argumentation. While some interpretations may be seen as more authentic, authoritative, or persuasive than others, there is no definitive or closed group of scholars permitted to interpret Islamic texts. Equally, there is no individual or group who censors the results of the independent reasoning (*ijtihad*) of Islamic scholars. Rather, what is compelling is whether the principles or rules of interpretation and legal theory (*usul al-fiqh*) have been applied (Hallaq, *An Introduction to Islamic Law* 16). In fact, reasoning is key in Islam and highly valued, with Daud Ali claiming that: “Among the things that God gives to human beings, the most valuable one is human reason” (14, 71).

In Arabic, *tafsir* means ‘interpretation’ and refers to *Qur'anic* exegesis. According to this traditional method, if a text is definite and absolute with no other meaning or interpretation, then it is considered fixed – *qath'i*. However, if the meaning is unclear or not detailed, it is *zanni* and open to interpretation (Ernada 119). *Ijtihad* is an interpretive technique or methodology whereby on the basis of concerted effort and reasoning, a qualified person makes a determination according to the time and place of a matter unclear or unregulated in Islamic law (*zanni*).<sup>9</sup> Through reasoning, analogy, and interpretation, Islamic law can be applied and adapted to contemporary situations while upholding Islamic doctrine. In this way, and with the exception of the prohibitions in Islam, the rules can change with the times (Daud Ali 23; An Na'im 88). As such, *ijtihad* is a mechanism for developing Islamic law, which functions to accommodate the changes and demands of society over time (Daud Ali 73, 79). A debate arose regarding *ijtihad* and to what extent it can still be practiced, or whether the ‘gate of *ijtihad*’ has closed.<sup>10</sup> Rejecting this, Hallaq argued that accepting that the gates of *ijtihad* were closed would mean that Islam becomes inadequate and unable to apply *Shari'ah* to newly arising problems (Hallaq, *On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad* 132; Al-Alwani 65–68). In Indonesia today, there are many new issues insufficiently addressed in the *Qur'an* or *Hadith* that require *ijtihad*.<sup>11</sup> The fact that certain aspects can (and do) evolve based on new information and contemporary circumstances reflects the vitality and dynamism within Islamic law.

As such, different Islamic scholars (*ulama*) can make an interpretation after studying the religious texts and jurisprudence and arrive at different outcomes. This internal contestation can and does happen, with, for example, Indonesian Islamic institutions like Nahdlatul Ulama and Muhammadiyah taking different positions in *fatwas* on the same issue. A *fatwa* is a religious ruling or statement made by an individual or institution trained in Islamic jurisprudence in response to a request for clarification on an issue of religious principle or dogma (Menchik 364; Hallaq, *An Introduction to Islamic Law* 9–10). *Fatwas* are a crucial mechanism for transmitting Islamic rules and values from scholars to the general public and, as “responsive to political and social pressure,” they typically

change more rapidly than the bulwark of Islamic jurisprudence (Menchik 364). For example, Muhammadiyah declared smoking *haram*<sup>12</sup> on the basis of new information regarding its negative health impacts, while others like NU continue to view smoking as permissible (*makrouh*).<sup>13</sup> In this situation there is a difference of opinion (*ikhtilaf*) and it is then for each Muslim to decide for themselves which position to follow (Bakircioglu 38). This is possible as *fatwas* are not legally binding or enforceable (Hallaq, *An Introduction to Islamic Law* 9). This interpretive scope and the (sometimes significant) plurality within Islam provides space for dialogue and debate within Muslim communities. This creates an environment in Indonesia that can support reasoned discussions and exchanges of views, as well as a diversity of views.<sup>14</sup>

As the State with the largest Muslim population in the world, Indonesia is also home to the largest Islamic institutions: Nahdlatul Ulama and Muhammadiyah. These institutions provide a range of services, including spiritual, educational, and health, with many members looking to them for guidance and following their teaching. Importantly, they both have commissions that produce *fatwas*. Another important Islamic institution is the Indonesian Council of Ulama (*Majelis Ulama Indonesia* – MUI), an independent advisory or consultative body for the Government, which also declares *fatwas* on relevant issues (Sciortino et al. 87). MUI's *fatwa* commission has 65 members (men and women), comprised of members from Islamic institutions across Indonesia including Muhammadiyah and NU. While Muhammadiyah and NU were created independently and have huge grassroots membership, the Indonesian Government under Suharto formed MUI in 1975 as a top-down measure with no membership network (Cammack and Feener 33–35; Assyaukanie 4–6).

These three Islamic institutions and their related *ulama* have great authority in Indonesia among their communities. For example, “the average Muslim believer seldom contradicts” religious leaders, (van Doorn-Harder, *Controlling the Body* 1028) and “they see the ‘*ulama*’ – not the State – as the guardians of Islamic law and regard their authority as absolute” (Nurlaelawati 271). To illustrate, most Muslims consider a marriage valid not depending upon State recognition, but whether it has been concluded according to Islamic law (Bedner and van Huis 187). Clearly, it is the *ulama* and other religious leaders who are perceived to hold authority regarding Islam. Professor Huzaemah (a senior female *ulama* and member of MUI's *fatwa* commission) highlighted this, noting that when the *ulama* speak people are more willing to comply than when only the Government speaks.<sup>15</sup> As such, these Islamic leaders and institutions are highly influential in Indonesia and are looked to by their communities to guide their behavior. These three Islamic institutions, and other smaller faith-based organizations, were all engaged in Indonesia's family planning programme.

### ***Islam and Indonesia's family planning programme***

The Indonesian Government's close collaboration with Islamic leaders to promote and protect women's right to family planning goes back to the 1970s when, in

response to the high maternal mortality and fertility rates, Indonesia instigated an ambitious family planning programme (BKKBN 1). The programme secured political will from across various levels of Government, the community, and faith-based actors to decrease the fertility and maternal mortality rate, as well as to promote women's health and economic status (BKKBN 1). Now, 50 years later, the programme is considered an international success for having reduced Indonesia's fertility rate by more than half (BKKBN, UNFPA, USAID and FP2020 8). While having numerous children was previously seen as a status symbol and resource to support the family, today Indonesians prefer a small(er) family (Utomo et al. 74). Indonesia's programme has been hailed internationally as a model of family planning, and specially recognized for its active and effective partnerships with religious institutions. In fact, field research undertaken by this author in Indonesia leads to the conclusion that *but for* the involvement of Islamic law and institutions, the programme would have failed.

Due to Islam's highly influential position in Indonesia, the Government acknowledged early on that it would be necessary to include Islam in its family planning programme (Marshall 14). This is because Islam (like other religions) contains "highly developed codes of behavior related to sexuality and reproduction that are proscriptive in regulating marriage, sexuality, gender relations and roles, and procreation within the faith group" (Kissling 212). Due to the impact of such religious norms on reproductive health, understanding and addressing a health problem's socio-cultural determinants can be as important as addressing the medical aspects (Azuh et al. 106). The Indonesian Government did this by broadly engaging Muslim leaders, organizations, and communities from the outset of the family planning programme. For example, the Government spent time and money engaging Muslim leaders and scholars, including taking them abroad to learn best family planning practices in other Muslim majority States. While initially opposed to family planning, these leaders and their organizations altered their stance and came to support the Government's programme. This was done based on progressive interpretations of Islamic texts, as well as by external and internal contestation.

For example, NU and Muhammadiyah issued *fatwas* in favor of family planning, undertook public advocacy promoting family planning as well as women's health and equality, and provided reproductive healthcare services to the public. NU and Muhammadiyah were well placed to be effective in these roles given their established trust and legitimacy within the Muslim community. Their position can be contrasted to that of international human rights law in Indonesia, where (like in many former colonial States) international law is approached with skepticism given its historical role in justifying as well as facilitating colonialism (Anghie 112). During field work in Indonesia, many interview participants remarked upon the poor domestic resonance of human rights and the limited understanding of rights in general. An NGO representative reported that human rights are viewed as part of the 'Western agenda,' with those promoting them labelled as 'Western

agents.’<sup>16</sup> However, given the normative overlap, Islam can be engaged to further human rights goals. According to Hassan, it is easier to assure Muslim women that the *Qur’an* supports their reproductive rights than it is to tell them that a UN document will set them free (Hassan, *Challenging* 66). As such, it can be more effective to rely upon Islamic norms rather than international ones to increase a Muslim community’s acceptance and utilization of family planning.

The Government’s top-down measures with Islamic leaders and their institutions were complemented by the bottom-up work of Muslims who advocated reform from within. Reformist Muslim scholars played an indispensable role by performing contextual (re)interpretations of Islamic law in line with women’s rights and equality (Mulia, “Muslim Family Law”; Nurmila; van Doorn-Harder *Women Shaping Islam*). This was possible given the scope for a diversity of views within Islam, and particularly within the interpretative approach in Indonesia. This interpretive scope and intra-plurality provides space for dialogue, debate, and contestation within Muslim communities and dynamism of Islamic norms. Those seeking gender equality in Indonesia used this interpretative scope to raise contestation, gain supporters, and push reforms. For example, the women’s branch of NU, Muslimat, pressured the organization’s central board to amend its position on family planning by contesting their interpretation of Islamic law and advocating their own reinterpretation (Marshall 17; Menchik 365, 368). In this way, both the Indonesian Government and individual Muslims mobilized Islam to support women’s right to family planning. As the State lacks authority to determine or reform Islamic norms, it had to work with the Muslim community to do so. While the State can lack legitimacy in such situations, the leaders as well as members of Islamic organizations can have both authority and agency, including Muslim women.

This example illustrated that multiple actors and norms, and not just those of the State, can have a distinct role to play regarding human rights. Given its lack of authority regarding Islamic law, the Indonesian Government was dependent upon internal, bottom-up reform from within the Muslim community. This internal reform was in turn dependent upon the inherent dynamism and contestation of Islamic law, making the case study a prime example of how internal actors are agents in negotiating cultural norms. As the reforms were introduced by Muslims and according to Islamic interpretive processes, they were more likely to be viewed by the community as legitimate and applicable. While this process of negotiation and reform was internal, the Government encouraged and facilitated internal actors pursuing human rights compliant interpretations of Islam. This supportive (rather than direct) role of the State as an external actor is also advocated in the literature on cultural transformation, which also stresses the need to include and support marginalized voices (Brems, *Reconciling Universality* 229; Nyamu, *How Should Human Rights* 394; An-Na’im, *Toward a Cross-Cultural* 37). This shows the need for human rights to have domestic constituents or local citizenry and for States to find and support such actors within their national communities.

### **Islam's role in addressing contemporary human rights issues in Indonesia**

As such, Islam can play a foundational and positive role in promoting and protecting human rights in Indonesia. This approach of relying upon *fatwas* to promote human rights compliant behavior has worked in the past and continues to be employed to address contemporary issues. A pertinent example of using *fatwas* to address a very sensitive religious issue is that of child marriage, which is considered a human rights violation (UN CEDAW/CRC Joint General Recommendation). Under the Indonesian Marriage Law (No.1 of 1974 art. 7), marriage is permitted for girls from the age of 16 years and for boys from 19 years. Many have sought to challenge this law and to eradicate the widespread practice of child marriage in Indonesia, which has one of the highest number of child brides worldwide, with one in four girls married before they turn 18.<sup>17</sup> For example, a case was brought unsuccessfully before the Indonesian Constitutional Court in 2015 that sought to challenge the constitutionality of the law. Since then, other initiatives have been taken up, including a *fatwa* against child marriage by women *ulama*.

The world's first ever gathering of women *ulama* was held for three days in April 2017 at an Islamic Boarding School in Cirebon, West Java, Indonesia. Hundreds of participants, including both female and male *ulama*, academics, journalists, and activists, attended the National Congress of Female Muslim Clerics (*Kongres Ulama Perempuan Indonesia*) – an event years in the making (Britton; Robinson).<sup>18</sup> Addressing themes such as “Amplifying Women Ulama’s Voices, Asserting Values of Islam, Nationhood and Humanity,” the Congress sought to recognise and celebrate women *ulama*, and to address pressing issues facing women such as sexual violence, religious extremism, child marriage, polygamy, and protection for migrant workers. While addressing these serious issues, the Congress was also an opportunity and space for women *ulama* to develop contacts, build networks, and share experiences. The Congress included cultural and musical performances and even provided reproductive healthcare services to participants.

At the Congress, the women *ulama* issued a rare *fatwa* against child marriage.<sup>19</sup> Simply issuing the *fatwa* was an historic act, as male *ulama* have typically monopolised this exercise. For example, the Indonesian Ulama Council (*Majelis Ulama Indonesia* – MUI) is comprised almost entirely of men (Ismah 491). The Congress’ *fatwa* is therefore an important symbol of the women *ulamas*’ religious authority. The *fatwa* against child marriage is all the more noteworthy given that MUI and other Islamic institutions support child marriage, which remains legal under Indonesian law.<sup>20</sup> In their *fatwa*, the women *ulama* argued for the minimum age for legal marriage to be set at 18 years for girls, and urged the Government to raise the current age from 16 years. While the *fatwa* (like all *fatwas*) is not legally binding, it holds great authority in Indonesia. At its conclusion, the Congress presented their recommendations to Indonesia’s Minister of Religious Affairs on behalf of the Government.

This remarkable Congress was an initiative of Indonesian Muslim women who sought to contest male authority in Islam and the dominant male interpretations of Islamic law. Their strategy is to achieve this by “strengthening the expertise and knowledge of female ulama, networking among them, affirmation and appreciation of their work, as well as strengthening their cultural existence” (*Kongres Ulama Perempuan Indonesia*). In their deliberations and argumentation at the Congress that gave rise to the *fatwas*, the women *ulama* used classical Islamic texts, including the *Qur’an* and the *Hadith*. However, they also relied upon the Indonesian Constitution and international law, including the UDHR. This is a prime example of how international human rights law can be used by diverse groups in diverse ways. It shows how various actors beyond the State are involved in the promotion and protection of human rights, and how they legitimize rights in context by reference to Islamic law. Due to the authority of *fatwas* in the Muslim community in Indonesia, this *fatwa* may assist in combatting child marriage.

In fact, the following year, in December 2018, the Indonesian Constitutional Court unanimously ruled that the current legal age of 16 years for girls to marry was unconstitutional. The Court held that child marriage violated the Constitution’s protection of a girl’s right to education and to a healthy life and that the differences in ages for boys and girls was discriminatory. The case had been brought by three wives who had been pushed into childhood marriages and forced to quit school (Afrianty). Importantly, the Court referred in Section 3.16 to the international *Convention on the Elimination of All Forms of Discrimination Against Women* and to bringing Indonesian law into line with its international obligations. This decision is all the more remarkable given that the same Court only three years earlier in 2015 had declined to overturn the marriage age for girls. Intervening in this period was the women *ulama’s fatwa* of 2017 against child marriage. It is unclear what, if any, impact or influence this *fatwa* had on the Constitutional Court’s decision making, but it is clear that human rights compliant change is coming to this issue in Indonesia.

While the previously mentioned examples related to women’s rights, *fatwas* have also been issued in Indonesia on a wide range of topics relating to human rights. For example, several *fatwas* have been issued relating to public health and the environment. Given the limited access to sanitary toilets for many in Indonesia, open defecation is a problem that leads to contaminated water and a spread of diseases.<sup>21</sup> In collaboration with the Government as well as the United Nations Children’s Fund (UNICEF), MUI issued a *fatwa* against open defecation in 2016 (Cronin). It also developed sermons for use by religious leaders at Friday prayers to urge people to change their practices and improve hygiene habits. That year MUI also issued a *fatwa* on environmental destruction, holding that it was forbidden – *haram* – to burn forests for illegal farming, which has devastated large parts of Indonesia and caused air pollution (BBC). Also at the women *ulama’s* Congress in 2017, a similar *fatwa* was issued on environmental destruction, urging the Government to improve regulations on the protection of nature (Fitri Ramadhani).

*Fatwas* have also been issued regarding combatting terrorism (Associated Press; Ingber) and even fake news (Heriyanto; Halim).

While *fatwas* can be linked to pro-human rights behaviors and positions, they can also oppose them. Assyaukanie looks at the connection between *fatwas* and violence in Indonesia, concluding that intolerant *fatwas* have been linked to subsequent violence. For example, a 2015 *fatwa* by MUI called for same-sex or homosexual acts to be punished, including by the death penalty.<sup>22</sup> This ruling can be seen to contradict human rights law, which protects individuals from discrimination and violence based on sex, sexual orientation, and gender identity (UN Office of the High Commissioner for Human Rights).<sup>23</sup> Despite MUI's ruling, internal contestation exists, with other Muslims like Siti Musdah Mulia arguing that Islam rejects discrimination and hatred of LGBT persons based on its core principles of justice and equality.<sup>24</sup> Mulia submits the contextual interpretive methodology is best able to discern Islam's "universal moral message" and that an ahistorical or literal approach "can only lead to erroneous interpretations" (*Understanding LGBT Issues* 11). She concludes that the discrimination of LGBT persons in Islam is due to religious interpretation and not to the religion itself (Mulia, *Understanding LGBT Issues* 11).

The previously mentioned examples illustrate how powerful Islamic groups can be as actors in Indonesia and how Islam can be used to both oppose as well as uphold human rights. They also illustrate that there are, of course, no silver bullets and limitations to all approaches to human rights implementation, including relying upon religion. While Islam can be used to contest human rights, it can also agree or align with rights. Furthermore, contestation can occur on a variety of levels and between different actors, including between individual Muslims, within Islamic institutions, between different *fatwa* commissions, and between Islamic leaders and Government officials. While such processes of internal contestation and reform can take time and be complex and uncertain, as seen in the example of family planning, they can lead to meaningful change to a community's norms in line with human rights. Building support for human rights compliant positions from within Islamic groups and institutions can therefore be imperative to the success of any changes seeking to implement rights in Indonesia. In this regard, Mulia herself concludes: "There is still much work to be done" (Mulia, *Understanding LGBT Issues* 11).

### **Conclusions: religion as sites of internal contestation for promoting human rights**

Clearly, human rights are not the sole concern of States but a broad web of actors and norms in society. As these few examples show, religious actors have come together in different ways to implement human rights in Indonesia. Rejecting Hopgood's negative forecast, Toft claims that "the human rights regime is not only not dead, but thriving" (49). Arguably, the human rights movement around the world is now more decentralized and locally owned than before (Toft 49).

Such a development should be welcomed. There are limitations to only relying upon formal State institutions to implement human rights, and benefits to involving cultural norms and actors like religion. These benefits include enhancing the cultural legitimacy and resonance of human rights, as well as expanding the local citizenry for rights. Without detracting from the pivotal role of the State in international human rights law, there is a need to recognize the role of these other actors, which is also supported in international law (Fraser). The UDHR itself proclaims in the preamble that every individual and organ of society is responsible for realizing human rights. Given the challenges of human rights implementation and ongoing contestation, an inclusive approach to rights that embraces States as well as other actors and norms is necessary. This is particularly important in contemporary times where there is increasing religiosity around the globe. Islam especially will become a more prominent player in the future as the world's largest religion.

As seen in the Indonesian example, change in line with international human rights law is not only possible but can also be effective when advocated by Muslims according to Islamic law. This reflects the special position of Islam within the Indonesian Muslim community, and the influential role that religion plays in communities all around the world. It relies upon the agency of community members to promote human rights compliant positions and to internally contest those that are non-compliant. Rather than an obstacle to rights enjoyment, religion and culture can be formidable allies in human rights protection. The human rights movement would be well served to better recognize this. Given its embedded nature and legitimacy within communities, as well as its normative overlap with human rights, religion can be a vital asset in human rights protection. Involving religion and other cultural norms and actors can ensure that rights are communicated and implemented in culturally appropriate ways, which not only facilitates their adoption but also pays due respect to cultural diversity. Therefore, while State norms and actors should be used to domestically implement human rights, so too should cultural norms and actors.

Ultimately, the question of whether or how much a State involves religious actors in domestically implementing human rights is a normative or political question. It will depend on a number of internal factors, including whether there is an official State religion, majority religion, or even an anti-religious or secular State. Notwithstanding the legal obligations, political and logistical issues, mixes such as public-private partnerships can bring human rights closer to the public, engaging various actors in society in meaningful ways and promoting bottom-up support for rights. As such, even if States can implement human rights independently, they should collaborate with religious actors where possible in order to reap the social benefits. Harnessing human rights to such domestic forces will help ensure their realization (Heyns and Viljoen 488). As former UN High Commissioner for Human Rights Mary Robinson noted: "We are all custodians of human rights" (UN Commission on Human Settlements). Inclusive participation in human rights implementation can improve simultaneously their legitimacy

and efficacy. Particularly in these times of transition and contestation, the human rights community needs to embrace all actors and narratives supportive of rights.

## Notes

- 1 Keaten, Jamey. "UN Rights Chief Warns UN Could 'Collapse' Without Change." *The Associated Press*, 20 Aug. 2018. [www.nytimes.com/aponline/2018/08/20/world/europe/ap-eu-un-human-rights.html](http://www.nytimes.com/aponline/2018/08/20/world/europe/ap-eu-un-human-rights.html). Accessed 27 Aug. 2018.
- 2 Concerns about the UDHR's claim of universality were raised at the time of drafting by inter alia the American Anthropological Association (AAA). Executive Board, AAA, 'Statement on Human Rights' (1947) 49 *American Anthropologist* 539. See also Dembour.
- 3 Of course, not all religious customs and practices will be aligned with human rights, and some may be in violation. For example, the practices of FGM/C and child marriage are supported in Indonesia by religious authorities. However, religion will also be important in redressing and changing such practices.
- 4 This case study is based on doctoral field work completed by the author in Java, Indonesia in January and February 2017, which included qualitative research methods including semi-structured interviews. Part of this study, including parts of this chapter (between "The Indonesian Government's close collaboration with Islamic leaders to promote and protect . . . and for States to find and support such actors within their national communities"), were previously published as Julie Fraser, "Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law." *International Journal of Human Rights*, 2019. doi:10.1080/13642987.2019.1577539.
- 5 For example, Indonesia is part of the Association of Southeast Asian Nations (ASEAN) and is involved in its human rights initiatives including the ASEAN Human Rights Declaration (18 Nov. 2012) and the Intergovernmental Commission on Human Rights; for more information see <http://aichr.org>. Accessed 17 Nov. 2017.
- 6 The *Qur'an* is the primary source as the word of God revealed to the Prophet, while the *Hadith* are the Prophet's statements or sayings. *Sunnah* is the practice, custom, or tradition of the Prophet; *fiqh* is the science of jurisprudence; and *Shari'ah*, meaning the path or way, is a complete code of conduct based on the rules and regulations revealed to the Prophet. See for example Hallaq *An Introduction* 16; Daud Ali 31.
- 7 Interview with Prof Dr Ratno Lukito, State Islamic University UIN Sunan Kalijaga (21 Feb. 2017, Yogyakarta, Indonesia).
- 8 Two categories have been identified as relating to worship (fixed) and *muamalah* (open). In relation to the latter, regarding relations between people and objects, the *Qur'an* gives only general provisions (only around three per cent of the *Qur'anic* verses), so authorities can manage and formulate them in time and place, so long as they do not conflict with the *Qur'an* and spirit of *Shari'ah* (Daud Ali 21–23, 56, 103; Sciortino, Marcoes-Natsir, and Mas'udi 87).
- 9 This legal determination cannot conflict with the spirit of Islamic teachings or contradict the *Shari'ah*. Daud Ali 14, 23, 34, 71.
- 10 In this debate some had argued that Islam was sufficiently elaborated with all essential questions addressed, and therefore there was no need for further *ijtihad* – and that the gate had closed. While this position was accepted by many, it was contested and dismissed by others. Hallaq (1986) 130–132.
- 11 Interview with Prof Dr Huzaemah Tahido Yanggo, Rector of Institute of *Qur'an* Studies, Islamic University of Indonesia, and member of MUI *fatwa* commission (1 Feb. 2017, Jakarta, Indonesia).
- 12 "Islamic jurists have classified all human actions into one of five categories on a spectrum: obligatory (*Wajib*), recommended (*Mustahabb*), permitted (*Masmouh*),

- disapproved but not forbidden (*Makrouh*), or absolutely forbidden (*Haram*).” Hasna 182; Daud Ali 28.
- 13 Muhammadiyah *fatwa* No. 6/SM/MTT/III/2010. See further Dessy Sagita and Anita Rachman, ‘Indonesian Clerics Join Smoking Fatwa Row’ Jakarta Globe (15 Mar. 2010) <http://jakartaglobe.id/archive/indonesian-clerics-join-smoking-fatwa-row/>. Accessed 3 Jan. 2018.
  - 14 This statement represents a generalization that may not be reflected across all of Indonesia, which is highly diverse. Furthermore, this space for dissent and contestation and its scope will vary in other Muslim communities in States around the world based on the context.
  - 15 Interview with Prof Dr Huzaemah Tahido Yanggo, Rector of Institute of *Qur’an* Studies, Islamic University of Indonesia, and member of MUI *fatwa* commission (1 Feb. 2017, Jakarta, Indonesia).
  - 16 Interview with the Director of Rahima (30 Jan. 2017, Jakarta, Indonesia).
  - 17 UNICEF Indonesia. “Research Brief: Child Marriage in Indonesia: Progress on Pause.” 2016, 2. [www.unicef.org/indonesia/UNICEF\\_Indonesia\\_Child\\_Marriage\\_Reserach\\_Brief\\_.pdf](http://www.unicef.org/indonesia/UNICEF_Indonesia_Child_Marriage_Reserach_Brief_.pdf). Accessed 14 Nov. 2017.
  - 18 See the official website of the Congress (in Bahasa Indonesia) <https://kupi-cirebon.net>. Accessed 14 Nov. 2017.
  - 19 *Fatwas* were also issued regarding sexual violence and destruction of the environment. See Ross, Eleanor. “World’s Largest Gathering of Female Muslim Clerics Issue Fatwa Against Marital Rape, Child Marriage.” *Newsweek*, 28 Apr. 2017), [www.newsweek.com/gathering-female-muslim-clerics-issue-fatwa-against-child-marriage-rape-591442](http://www.newsweek.com/gathering-female-muslim-clerics-issue-fatwa-against-child-marriage-rape-591442). Accessed 14 Nov. 2017.
  - 20 For example, MUI, NU, and Muhammadiyah supported child marriage in the 2015 case against it brought before the Constitutional Court: [www.ibtimes.co.uk/indonesia-constitutional-court-throws-out-petition-raise-girls-minimum-marriage-age-18-1507855](http://www.ibtimes.co.uk/indonesia-constitutional-court-throws-out-petition-raise-girls-minimum-marriage-age-18-1507855). Accessed 2 Feb. 2019. See also Indonesian National Commission on Violence against Women (Komnas Perempuan), ‘National Human Rights Institution Independent Report Regarding the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women in Indonesia, 2012–2016’ Submitted to the CEDAW Committee (30 Dec. 2016) paras. 26, 52, [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/IDN/INT\\_CEDAW\\_IFN\\_IDN\\_26445\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/IDN/INT_CEDAW_IFN_IDN_26445_E.pdf). Accessed 12 Nov. 2016.
  - 21 Approximately 63 million people in Indonesia practice open defecation. UNICEF and World Health Organization, *Progress on Drinking Water and Sanitation*, 2012, p. 20.
  - 22 Indonesia’s highest Islamic clerical body issues *fatwa* proposing the death penalty for people caught having gay sex (Molloy; *The Conversation*).
  - 23 See for example UN Office of the High Commissioner for Human Rights, “Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law,” HR/PUB/12/06 (2012) [www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf](http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf). Accessed 3 Feb. 2019.
  - 24 See Siti Musdah Mulia. “Understanding LGBT Issues in Islam Promoting the Appreciation of Human Dignity.” 2nd CSBR Sexuality Institute – 11-18 Sept. 2009, Istanbul. Mulia concludes that the *Qur’an’s* “commitment to the values of equality and freedom is total and unqualified” (Mulia 9).

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