

Introduction

A. Background

The freedom of religious/belief, from its protection mechanism means as a basic rights which guaranteed by international norms that universally recognized by civilized states. As a part of the civilized states (red: United Nations), Indonesia has a responsibility to progressively referring on the universal norms standards in implementing the freedom of religious/belief in the context of national jurisdiction.

In the variety instruments of international human rights, the freedom of religious/belief is substantively considered as an individual rights which its compliance could not be diminished and postponed (*non derogable rights*). In consequence, the freedom of religious/ belief for individu or group must be guaranteed its compliance by the state.¹ The principle *non-derogable rights* emphasize about absolute rights, and that's why it could not be disiminished and postponed in any circumstances.²

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- 1 Davis, Derek H., *The Evolution of Religious Liberty as a Universal Human Rights*, republished on December 5, 2006.
 - 2 Rights in this principle includes: right to life (not killed), the right to integrity of self (not persecuted, kidnapped, tortured, raped), the right not to be enslaved, the right to freedom of religion, thought and conscience, the right to be treated equally before the law, the right not to be imprisoned for failure contractual obligations, and the right to not convicted based on the retroactive law. Thereby,

Indonesian constitution so far, has a good adequate guaranty in giving protection on the freedom of religious/ beliefs. That guarantee can be founded in the basic norms (*ground norm*) of national legislation and in the state basic law (*staat fundamental norm*).

Pancasila which is approved by the founding fathers as the foundation of state, give a philosophical and moral guaranty on the freedom of religious/ belief. The first principle of Pancasila, “The Almighty Divinity,” which interpreted to underlie the four other principles, even some interprets it diametrically. On one side, the first principle of Pancasila is conceived as the principle which accommodating the Indonesian human spirituality. But, on the other hand, it is also interpreted as a formula that refers to the formalistic diversity, or it is infrequently even to legitimate some domination interests on the society of dominant religion.³ The first principle, secondary interpreted as the philosophy support of diversity which refers to the extraction concept of tawhid (monotheism). It means that principle was slightly reduced to preserve the majority quantitative of particular religious in Indonesia (red: Islam). But the actually the case is the concept of “The Almighty Divinity” which evolved by the founding fathers was quite general and did not refer to the theological interpretation of any particular religion.

The most valid and sublime referral on that first principle is the viewpoints that directly state by the founding fathers in the trial of Indonesian Independence Preparation Investigative Assembly

any kind of action that could result in the loss of the right of a person or group of people to freedom of religion-as one of the non-derogable rights-can be classified as a violation of human rights. See Ismail and Bonar Tigor Naipospos (eds), *Mengatur Kehidupan Beragama; Menjamin Kebebasan Beragama? Urgensi Kebutuhan RUU Jaminan Kebebasan Beragama/Berkeyakinan*.

- 3 The individual who embraces a non-theistic belief regarded to have not certain place in Indonesian Society and the consequence is being discriminated if improving their perspective to public. The up-to-date sample is the case of Alexander Aan who reported by the local religious leader to the police in West Sumatera because considered as the doer of spreading the view of atheis through social media.

(BPUPKI), precisely on the meeting discuss about drafting of basis of state. One of referrals – the most primary figure whose have historical position was approved as the excavator of Pancasila – Soekarno.

The Son of the Sun, when talked about Pancasila on June 1, 1956⁴ through his agitative speech, gave the straightforward affirmation about that principle of divinity. He said:

“The Godliness/ Divinity principle! It doesn’t just mean that Indonesian must trust in God indeed, but all of us must have our own God. ... Let’s us godless have. Let the state of Indonesia become a country where the people could pray the God with unimpeded way. All of Indonesian must worship our own God in cultured ways, no “egoistic religion”. And Indonesia should be one of godliness-have state!”⁵

As the fundamental norm, legal ideals (*rechtsidee*), basic philosophy (*philosophische gronslag*), way of life (*weltanschauung*), national ideology, basis of the state, and the source of all source of law in Indonesia, Pancasila became a derivate of constitutional guarantee which more operational, concrete, and binding. That guaranty should be founded inside the 1945 Constitution (UUD 1945).

Inside the 1945 Constitution stated some of provisions about the guarantee given on citizens to have religion and belief. At least, there are two subsections/articles in the 1945 Constitution that could be identified as the statement about given guarantee of freedom of religious/ belief to the citizens. Those provisions are article 28E and article 28I which reads:

4 Latter, we collosally agreed mentioned as Pancasila birth day.

5 Soekarno’s speech before BPUPKI on June 1st 1945. See Bahar, et.al [eds.], 1995, *Risalah Sidang BPUPKI dan PPKI*, (Jakarta: Sekretariat Negara), p. 80-81, or Alam [ed], *Bung Karno Menggali Pancasila*, (Jakarta: PT Gramedia Pustaka Utama), p. 28.

Article 28E of the 1945 Constitution

- (1) Everyone have own rights to have one religion/belief and to worship according to their religions, to choose education and learning, jobs, citizenship and their residence in the area of states or leave it, and get back again.
- (2) Everyone has own rights to trust one belief, to state their mind and attitude, on accordance to his conscience.

Article 28I (1) of the 1945 Constitution

The right to life, right not to be tortured, right of freedom of thought and conscience, right of freedom of religion, right to do not be treated as a slave, right to be treated equally before the law, the right to do not be prosecuted on retroactive law, are the human rights which cannot be diminished under any circumstances.

The article 28E of the 1945 Constitution gives guarantee to the people to embrace a religion and belief freely. Those provisions explicitly declared a freedom for everyone to have their own religion or belief. In the same time, they can pray accordance to their religion and belief.

A guarantee inside the 1945 Constitution evidences that the right to have a religion or adherence to a religion by an individual, is an essential human right.⁶ In the empathic statement could be said that

6 The Text drafting team of Comprehensive Process and Result of Change of the 1945 Constitution, *The Comprehensive Text of Change the Undang-Undang Dasar Negara Republik Indonesia 1945, Background, Process and Results of Discussion. 1999-2002, Book VIII The Nation and Resident, Human Rights, and Religion (Revision Edition), General Secretary and Secretariat of Constitutional Court, Jakarta, 2008, page. 286. (Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku VIII Warga Negara dan Penduduk, Hak Asasi*

the freedom of religion or belief is the most fundamental right of all human rights. Besides that, the freedom of religion is not a granting of state, that's why state cannot requires citizens or the state even should not intervene on the issue of each citizen's religion.⁷

With its significant position, the freedom of religious/ belief – based on the universal rights of Human Rights – is placed as derogable right – as stated as Article 28I (1) of the 1945 Constitution. As one of the non derogable rights, the freedom of religious/ belief cannot be diminished or revoked by anyone else.⁸

Besides giving the guaranty and adequate position of freedom of religious/ belief as the *non derogable rights*, The 1945 Constitution also arrange the relations between states and religion, the portion of state in the context of respect and protection on that rights. That is stipulated in Article 29 The 1945 Constitution:

The Article 29 The 1945 Constitution

- (1) The state is based on the almighty divinity
- (2) The state guarantees the people to have a freedom of religious/ belief and worshipping/praying themselves accordance to their religions/beliefs.

Based on those two articles, could be inferred that the constitutional guaranty on freedom of religious/ belief is strongly stated in the 1945 Constitution. That constitutional guaranty implicates to the proposing (also the detail of policy demands), such as:

1. The states must guarantee the aegis and a spacious place for independence citizens to get his freedom of religious/ beliefs and worship/praying themselves accordance to their religions/beliefs.

Manusia, dan Agama (Revised edition), Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta, 2008, p. 286).

7 *Ibid.*, p. 320.

8 *Ibid.*, p. 293.

2. The state is not allowed to make some of prohibitions and obstacles for citizens to pray or to practice their religion/belief.⁹

In accordance with Article 29 the 1945 Constitution, the state has a constitutional responsibility to protect the right of freedom of religious/ belief on its citizens. State also has an obligation to guarantee the freedom of religious/ belief as stipulated on Article 28E and Article 29 the 1945 Constitution. That is in line with what mandated in Article 28I (4) of the 1945 Constitution that should be fulfilled by the state, especially the government. It means that the government has an adequate responsibility to protect and to respect the Human rights.

The obligation of protecting (to protect), promoting (to promote) and fulfilling (to fulfill) and respecting (to respect) of Human Rights' values as mandated in Article 28I (4) of the 1945 Constitution, should be done on balance, where one of the obligations is executed, so the other one should be too. That's the reason why the government should be consistent in implementing the enforcement of human rights.

Therefore, the responsibility to give guaranty, protection, promotion, the particular right of freedom of religious/ belief for citizens is held by the state. The state serves as the obligations stakeholders. State is not allowed to delegate that obligation execution to the non-governance actor to execute it. Because the execution of state's obligation run by non-governance actor will open a space to the group to do some discriminations and violence in the name of religion.

The mandate of constitution which derived of basic state philosophy, are supported by its instruments in the term of regulation. Some of regulations can be identified on its main framework stipulated in the law 39 of 1999 on Human Rights and the Law number 12 about International Covenants Ratification of Civil Rights and Politics. Thus, have that constitutional guaranty implementation become ideal already? This is the lies of problem. There are some tensions in that constitutional guaranty implementation. The disparity between *das*

9 See Ismail Hasani (Ed), *The Document of Deletion Policy of Discrimination on Religion/Belief*, Pustaka Masyarakat SETARA, Jakarta, p. 81.

sollen constitution and *das sein* policy is highly visible more specific, detail, and concrete. The main problem of constitutional mandate implementation on freedom of religion can be classified into three main clusters.

First is incongruence regulation. The central weak point in unbalance on guaranty of freedom of religious/ belief is stipulated in the Law 1/PNPS/1965 says on prevention of abuse and/or defamation of religion. The Article 1 of that law states that:

“Everyone is not allowed in front of the public to telling, recommending or attempting the public support to intrepret a followed religion in Indonesia or doing some religious activites that resembles religion’s activities; interpretation and which activity that deviate from that religion’s main doctrine.”

The fundamental mistakes in that law – as explicitly illustrated in Article 1 above – inter alia: 1) The government do discrimination on religion followers using the interpretation which subjectively judged “different” with majority interpretation, 2) The state do a too-far intervention into private space (*forum internum*) of citizens, infiltrating even into their head and heart, 3) The state does not guarantee legal certainty for whole of citizens by forming and adjusting the laws which arrange the object and substance that abstract, unclear and absurd.

That minor situation of constitutional guaranty implementation of freedom of religious/belief supported by the decision of Constitutional Court of Republic of Indonesia in judicial review on the law 1/PNPS/1945 which filed by civil society group. The Constitutional Courts gave weak arguments juridically and unable to expressly explaining about religion-state relations. The Constitutional Court decides a choice of law (politics) to stay consider that law as a constitution. Although the Constitutional Court through decisions 1/PNPS/1965 confessed about that law containing weakness, therefore, change is really necessary.

Even having some problems, the law 1/PNPS/1965 still stays as a positive law that becomes an anvil to create some operational/

implementing regulation about religious life. That regulation in the form of Joint Decree of Ministers, namely:

1. Joint Decree between Minister of Religion and Minister of Internal Affair 9 and 8 of 2006 on Guidelines Task of Regional Head/ Deputy in Maintenance of Religious Harmony, Empowerment Forum for Religious Harmony, and Construction of Houses of Worship (Joint Decree of Two Minister);
2. Joint Decree of Minister of Religion, Attorney General, and Minister of Internal Affair 3 pf 2008, KEP-033/A/JA/6/2008, 199 of 2008 on Warning and Order to the Followers, Members, and/ or Board Member of Jemaah Ahmadiyah Congregation (JAI) and Citizens (Joint Decree of Three Ministers).

Moreover, not less than 15 regulations on regional level were published which containing the principles and content that refers to regulations above. That regional regulation can be founded in West Java¹⁰, Bekasi¹¹, Bogor,¹² East Java¹³, South Sumatera¹⁴, and others.

Many kinds of regulation are often factually become a main trigger of some intolerant behavior and discrimination violence on minority religion group. In the perspective of Human Rights, any regulation

10 As the sample in West Java, has made a Local Government of West Java 12 of 2012 on The Cessation on Worshipping Activities of Ahmadiyah Follower in Indonesia in West Java Governor's Area.

11 In Bekasi District there is a decree of Major 40 of 2011, on the disallowance of Ahmadiyah followers in Bekasi Regent.

12 In Bogor Regency, July 20, 2005 The Regent of Bogor, Head of Local Representatives of Bogor, Dandim 0621, Kepala Kejaksaan NegeriCibinong, Kapolres Bogor, Head of PN Bogor, DANLANUD ARS, Ministry of Religion and MUI of Bogor have made a Joint Decree of Disallowance of Activities of Ahmadiyah Community in Indonesia in Bogor Regency.

13 Disallowance of Ahmadiyah mentioned in Decree of East Java Governor No. 188/94/KPT/013/2011 about disallowance of Activity Ahmadiyah Followers in Indonesia, in East Java.

14 The regulation of South Sumatera Governor No. 563/KPT/BAN. KESBANGPOL &LINMAS/2008 on September 1, 2008.

could be categorized as the Human Rights Violations through the law and regulation (*violation by rule*).

Second is lack of institutional supporting power of the state government. The constitutional guaranty which affirmed by the 1945 Constitution and its derivatives law is ideally back-up by institutional structure which reinforcing that implementation of constitutional mandate. But the fact is, the government doing some mistakes on life of religion/belief in Indonesia through establishment of institution which precisely negated that constitutional mandate and also stimulated some intolerant behavioral practices and discrimination in life of religious/belief of citizens.

The governmental institutions that participating in legitimize intolerant behavior and discrimination on the followers of particular religion/belief, such as: Indonesian Ulema Council (MUI). The main problem of MUI in the context of freedom of religious/ belief is its authority in giving fatwa (Islamic decree) about certain religion misdirection, sects, or mazhab (Islamic thought).

Another institution that also takes a part on making mistakes in the context of freedom of religious/ belief is Coordination Agency of Society Beliefs Monitoring (*Bakorpakem*). That is the first recognized governmental institution of Republic of Indonesia in almost three decades which has a serious authority. Its authority is adjusted through the Decree of Attorney General of Republic of Indonesia KEP-108/J.A./5/1984, that is: preventing the defamation of religion in Indonesia. According to the Chairman of National Commission of Human Rights (Komnas HAM) on the period of 2007-2012, Ifdal Kasim, that authority would break the right of freedom of religion that constitutionally guaranteed.¹⁵

One of “working result” of semi-permanent institution that whose membership comes from elements, such as: Attorney General, State

15 See “*Kewenangan Bakorpakem Harus Dipersempit*”, in <http://orangnusantara.blogspot.com/2009/01/kewenangan-bakorpakem-harus-dipersempit.html>, accessed on December 1, 2012

Intelligence and Minister of Religion, which charges in processing and officially recommending cessation of Ahmadiyah religious activities in Indonesia. From its task and authority, this institution should be taking part in intervening of the highly-privacy of citizens, the freedom of religious/ belief that guaranteed by constitution.

Besides MUI and Bakorpakem, the Inter-Religious Harmony Forum (FKUB) is also being the problem. Ideally, “FKUB has role to guarantee people to pray or to do their worship, people are free to choose any religion, and it is extremely guaranteed safely and comfortably. Then FKUB also should to mediate in order to find similar points of religious groups, certainly in the context of living together as a part of citizens in nation life.”¹⁶

It means that FKUB should be a mechanism of enforcement of horizontal and non-structural religious/belief pluralism. The leaders and religious leaders who involved in, is a part of participation and civil engagement that promotes the plurality and maintains the harmony. The fact is, FKUB becomes a part of state’s structure, regime’s structure. FKUB dominantly seems as the state-power instrument to equalize perception about the truth that determined by “established religion” in Indonesia.

Third is the lack of performance of state government official. The government official “behind the desk” is frequently not performing inclusive commentary about freedom of religious/ belief. Even in escalated *chaos*, they unable to use their coercive instruments to create *human security*, to prevent intolerant action and discrimination for the certain religion’s followers, especially for minority group.

Those three weak points, partially or cumulatively, in the perspective of SETARA Institute, becomes important factors that stimulate some of violent or abuse on freedom of religious/ belief. So that, the situation of religious life in the country of Pancasila, becomes not conducive,

16 H. Abdurrahman K., The Director of FKUB South Sulawesi, in interviewed by researcher team of SETARA Institute in order to collecting data on a research on December 28, 2012.

and the phenomenon escalation of intolerant action of religion/belief happened within in five years.¹⁷

This background becomes one of *back mind* behind the annual plan of SETARA Institute to do “camerawork” on the actual situation of freedom of religious/ belief in Indonesia and perform it through the report about *progress* or *decline* situation of freedom of religious/ belief which analyzed by using the human rights’ perspective, and enclosed with deepening the intolerant cases and discrimination of religion/ belief.

This report is being more relevant as the real condition portrait of freedom of religious/ belief in Indonesia. Monitoring and publication on this annual report is aimed to [1] to document and to publish the facts of violent and breakthrough/progress of guaranty of freedom of religious/ belief in Indonesia; [2] to push the state to fully guarantee the freedom of religious/ belief, including to do the change of some products of regulations that restricting the freedom of religious/ belief and recovery of victims right; [3] to provide *baseline* data about freedom of religious/ belief; and [4] to enforce the linkage around the civil society and public in general to expanding constituency to push it in giving guaranty of freedom of religious/ belief.

B. Methodology

Programatically, on 2012 SETARA Institute monitored in 13 provinces of Indonesia, they are: Aceh, North Sumatera, Riau, Banten, Jakarta, West Jawa, Central Jawa, Yogyakarta, East Jawa, South Sulawesi, South Kalimantan, Bali, and West Nusa Tenggara. Nevertheless, the condition potrait of freedom of religious/ belief in other regions was also collected from many sources of medias and monitoring network. Even so, the presented report also still covered other regions of Indonesia.

17 Read Hasani and Naipospos (eds) 2011, *Politik Diskriminasi Rezim Susilo Bambang Yudhoyono: Kondisi Kebebasan Beragama/Berkeyakinan di Indonesia 2011*, (Jakarta: Pustaka Masyarakat Setara), as particularly

The data collection is done by [1] monitoring of 13 regional observers; [2] data collection is taken from some religious institutions; and [3] observing from local and national media. That monitoring program was held from January 1 – December 15, 2012. The monitoring was done by using the human right parameter, particularly International Covenant about Civil Right and Politics that ratified by Indonesian government in the law 12 of 2005. Another parameter that used also is *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion/ Belief* which coined through the resolution of General Assembly of United Nation 36/55 of 25 November 1981.

Refers to Framework of human rights, there are two ways of state of doing violent, such as; [a] by doing an active action that enable the occurrence of disallowance, discrimination, interference, and or enjoyment blockage of freedom of religious/ belief (*by commission*); and [b] by allowing the violation of a person's rights (*by omission*), including to allow every criminal action done by someone but cannot be prosecuted.

Besides to documenting of the violent of freedom of religious/ belief that was done by state, this monitoring also refers to documenting the criminal actions that done by citizens on other citizens which including as the abuse on freedom of religious/ belief. Those citizens' actions largely covering; [a] the criminal action in form of assault of places of worship, intimidation, physical violence, and ecetera; and [b] intolerant actions.

This monitoring report divides 4 categories of violation acts with the subject of law and responsibilities;

- [1] By commission actions by the state
- [2] By omission actions by the state
- [3] Crime by citizens
- [4] Intolerant by citizens

Through the violent category of *by commission* and *by omission*, the legal framework to question the matters is the human rights law figured in Civil Covenant and Political Rights and also founded in

other ratified human right conventions, coupled with Constitution and Domestic law regulating about the state's obligations. Meanwhile, for the category of crime done by citizens and intolerance, the legal framework which can be used is Criminal Code (KUHP).

C. Operational Definition

Monitoring and report making about condition of freedom of religious/belief in Indonesia rests on the perspective of human rights which placed the freedom of religion/belief as an individual right as non derogable right. Regarding on it, the definition that used in this monitoring and report making rests on the disciplines of human rights law. The freedom of religious/ belief is a guaranty given by the state for freedom of religious/ belief and freedom of worship for individual and group. The freedom of religious/ belief is fundamental human rights.¹⁸

The term of religion or belief in the perspective of human right is not narrowly interpreted and closed, but it must be widely constructed. Public misconception happened, usually says about belief on God (theisme) which called religion. But the actually case is non-theistic Buddhism and polytheistic Hinduism also called as religion. The definition of religion or belief is not being confined as a traditional religion or the institution which has characters or analog practice with those traditional religions. Religion or belief which has just be formed and minority religion has the right to get the equal protection that dominant and powerful.¹⁹ The human rights perception also confirms about theistic, non-theistic, or following the religion or belief is same in reserved the right and protection.²⁰

The main instruments of human rights that arrange about an guarantee of freedom of religious/ belief is International Covenant on Civil Right and Political Rights (1966), particularly article 18,

18 Davis, Derek H., *op.cit.*

19 Article 2 – General Comment 22 about Article 18, Human Right Committee of UN, 1993

20 *Ibid.*

that contains of: (1) freedom to follow or to choose a religion or belief depend on their own choice, and the freedom, individually or collectively with others, in the public places or closed place, to apply their religions or beliefs in worship, obedience, practice, and instruction; (2) without coercion to follow or to choose religion or belief according to his wishes; (3) freedom to interpret religion or belief just confined by prescribed by law, and if necessary to protect public safety, orderliness, health, or moral, or fundamental freedom on others; (4) The countries which pro to this Covenant promises to respect the freedom of parents, legal guardians if approved, to ensure the religion and moral for their children are in accordance with their children's liking.

Indonesia on 2005 had ratified this international covenant through the Law 12 of 2005 on Ratification International Covenant about Civil Rights and Political Rights. This Covenant is legally binding and as the state parties that had ratified it, Indonesia is compulsory to include it as a part of national regulation and make periodically report to Human Rights Commission of United Nations.

The other instruments of Human Rights which arrange of guarantee of freedom of religious/belief is *Declaration on The Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* which triggered through the Resolution of General Assembly of United Nation 36/55 on November 25, 1981. This declaration is more detail to organize the guarantee of freedom of religion or belief that International Covenant about Civil Right and Political Right, but unfortunately, it is only a declaration so that its role is not binding for state party. But, even it is not legally binding, that declaration reflects broad consensus from international community. Because, it's generally has moral power on international relation. As a member of United Nation, Indonesia cannot ignore this declaration in order to run its obligation on fulfilling its citizens.

The article 6 of Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion/ Belief:

Based on the certainty of Article 1 of this Declaration and also obedient on certainties in article 1 (3) freedom of thought, conscience, religion or belief should including some freedoms, such as;

- 1) Worship and gathering in relation to one religion or belief, and build and also manage places for those purposes;
- 2) To build and manage some of real charity or humanity institution;
- 3) To make, to get and to use all of their own-made materials which needed to hold their ceremony or customs of a religion or belief;
- 4) To write, to express and to promote any kind of publication which relevant to these field;
- 5) To teach about a religion or belief in the certain place for these purposes;
- 6) To collect and to achieve any kinds of charity and other voluntary donations from individual or institution;
- 7) To train, to point, to choose or to nominate with certain leader succession who asked with requirements and standards of any religion/belief;
- 8) Respecting the rest days, and celebration and ceremonial days;
- 9) To build and to manage communication among individual and society in the context of problems of religion or belief in the scope of national and international, religious ceremony accordance with personal religion or belief;

The 1945 Constitution, in the Article Pasal 28E also confirms about the guaranty of freedom of religious/ belief, as the sounds of this following articles:

- (1) Every human being has his own freedom to follow religion and to worship/to pray accordance his religion, to choose education and instruction, job, citizenship, places to stay in the country and to leave it, then to get back again.
- (2) Every human being has a right on freedom of belief, to state his thought and attitude, accordance with conscience.

Based on the mentioned international instrument of human rights and the 1945 Constitution, the operational definition of freedom of religious/ belief briefly consists of freedom of religious/ belief accordance with his own choice, the individual freedom or together with others to worship his certain religion/belief accordance his chosen religion/belief, and obey, practice and teach it openly or secretly, including freedom to change religion or belief, or even to do not following any religion or belief also.²¹ Meanwhile the Article 28E confirms that the freedom of religious/ belief is the constitutional right for every citizen.

The Law of Human Rights is the international civil law which places state as the state party; it means that state is the subject of law which responsible to obey the law of human law. As the subject of law, so that every human right violation happened, always points the state as the perpetrator. The violation on human right happened when the state cannot obey the binding norms which stipulated in the covenant and international conventions, even the state has promised to obey it through the process of ratification.

The confirmation of epistemology of Human Rights as explained above is more clarifying the difference human right and international criminal law, which has places individual as the subject of law. As the civil law, kinds of punishment in the context of human rights law is the international sanction, obligation of policy change, and the fines are intended for victims who their rights have been violated in the form

21 Article 18 The Universal Declaration of Human Rights (1948): "Every human being has freedom of thought, conscience and religion; in this context includes the freedom to change his religion or belief, and freedom to declare his religion or belief by teaching, practicing, and doing worship and obeying it, either alone or with others, in front of the public or himself."

compensation, restitution, and rehabilitation. While in international criminal law (Statuta Roma), besides the individual is being the subject of the law, the sanction inflicted to the perpetrators also formed as sentence of imprisonment.

Indonesia as the state party on the international law of human rights has an obligation (*obligation of the state*) to respect and to protect the freedom of religious/belief.²² The main principle of state to respect the human rights is, the state do not doing everything which break the individual integrity or group, or ignores their freedom. Meantime, the obligation to protect is taking some needed actions to protect people's right on his crime/lawlessness/violence which done by individual or other group, including to take the action on preventing of ignoring on their enjoyment freedom.

Even the main character of human rights cannot be removed or revoked and comprehensive on every humankind, but based on the principle of Siracusa which mutually agreed, there are two treatments of the implementation of human right, that is: principle *non-derogable rights* (the rights which cannot be diminished or postponed its fulfillment) and *derogable rights* (the rights which can be diminished and postponed its fulfillment). The principle of siracusa underlines that the rights which can be diminished and be postponed only is enforced on the certain situation and condition which considered can endangered public interests.

And meantime, the principle of *non-derogable* rights confirms about the absolute rights, and therefore that rights cannot be diminished or postponed in any certain situation or condition. The rights which contained in this principle includes: right to life (not killed), the right to integrity of self (not tortured, kidnapped, persecuted, raped), the right not to be enslaved, the right to freedom of religion, thought and conscience, the right to be treated equally before the law, the right not to be imprisoned for failure contractual obligations, and the right to not convicted accordance to a retroactive law. Thus, all of actions

22 See Article 18 DUHAM, article 18 ICCPR, Article 28 I, 28E, 29 the 1945 Constitution.

which lead to disappearance the rights of people or group to free in following his/their religion – as a matter of *non-derogable rights*— can be classified as human rights abuse.

Even the discourse of human rights admits of disallowances to fulfill the guaranty of human rights, this monitoring stays to cover some of rights, either which included in category of *forum internum* or freedom of *forum externum*. The *forum internum*, as the absolute freedom of individual, fundamental, is a freedom where there's none can be doing intervention on manifestation and enjoyment of these rights and freedom. Which including in internal freedom category are: (1) freedom to follow a certain religion and move from one religion to other; and (2) right not to be forced to adhere or not adhere to a religion.²³

In contrary, the social freedom or *forum externum* (external freedom), in a certain situation, is allowed to restrict or restrain these rights and freedom, but through the *margin of discretion* or strict prerequisites and legitimate based on the principles of Siracusa.²⁴ Which including in external freedom category are: (1) freedom to worship both individually or collectively; (2) freedom to build places of worship; (3) freedom to use religious symbols; (4) freedom to observe religious days; (5) freedom to lead certain religion; (6) the right to teach and spread the teachings of religion; (7) the right of parents to educate a religion to their children; (8) the right to build or manage organization or religious associations; and (9) the right to deliver religious materials to individual or groups.²⁵

23 See article 18 of DUHAM, Article 18 ICCPR, The Universal Declaration of 1981 about The Deletion of Intolerance and Discrimination based on Religion/ Belief, and general comment No.22 Committee of Human Rights of UN.

24 The Principle of Siracusa is a principle talks about provisions on disallowance and derogation in the term of ICCPR. Established in the meeting Panel of 31 experts on human rights and international law from the world countries in Sicilia, Italy on 1984. This meeting produced a set of standard of interpretation on caluses of limitation right in ICCPR.

25 All of these guaranties listed in Article 18 of ICCPR, the general comment No.22 Committee of Human Rights of UN, and Universal Declaration 1981

The violation on freedom of religious/ belief is a form of failure or negligence in the implementation of state such as to intervene people or to protect people or group whom become the targets of intolerance or crimes based on religion or belief. So, the violation on freedom of religious/ belief is an action of removal, revocation, limitation or reduction of rights and basic personal right on freedom of religious/ belief done by institution of the state, either active actions (*by commission*) or omission of action (*by omission*).

The next terminology of human rights related to freedom of religious/ belief is intolerance and discrimination. Intolerance is derived from the belief which claims that the group, belief system or lifestyle, is higher than others. This can lead to a number of consequences from the lack of respect or neglect of others up to institutionalized discrimination, such as *apartheid* (racial segregation policy) or the deliberate destruction of people through genocide. Those all action comes from a denial of human fundamental values.²⁶



Photo: <http://www.rmanews.com>

While discrimination is “any disallowances, harassment, or exclusion which directly or indirectly based on the differences in religion, ethnicity, race, ethnic group, class, social status, economic status, gender, language, political views, which results in reduction,

about The Deletion of Intolerance and Discrimination Based on Religious/ Belief.

26 UNESCO, *Tolerance: The Threshold of Peace. A teaching/Learning Guide for Education for Peace, Human Rights and Democracy* (Preliminary version). Paris: UNESCO, 1994, h. 16.

deviations or removal admission, implementation or application of human right and basic freedom in the life of personal or group in the aspects of politics, economy, law, social, culture and others.”²⁷

The discrimination and intolerance accordance to the religion,²⁸ means a form of violations on freedom of religion, as stipulated in Article 2 (2) of the Declaration on *The Elimination of All Forms of Intolerance and of Discrimination Based On Religion Or Belief*, is “any distinction, exclusion, prohibition or preferential treatment (favoritism) based on religion or belief and the purpose or its consequence to negate or to reduce admission, enjoyment or implementation of human rights and fundamental freedom on similar basic,” as if does not want to accept a group or disclose and expose hatred to another groups accordance to their differences on religion or belief.

The intolerance crime and hatred are actions which motivated by the hatred or bias on a person or group accordance to the gender, race, skin color, religion, home country, and/or their sexual orientation. The intolerance action is a serious crime, such as assault or fighting. It also can be lighter actions, such as a mockery of the person’s race/religion. The written communication, including graffiti that shows prejudice or intolerance on individual or group based on the hatred. Including the vandalism (destruction) and dialogue accordance to intolerance or other which are considered by some people as the joke.

The violation on hatred is an intolerance crime and prejudice that aims to harm or to intimidate someone because of his race, tribe, home

27 Law 39 of 1999 on Human Rights, Article 1.

28 The Article 1 of UN Declaration about The Deletion of all forms of Intolerance and Discrimination on Religion or Belief (1981): “[1] Humankind has right on freedom of thinking, conciousing, and having religion. This right also includes the freedom to follow a religion or belief based on his choice, and freedom, either individually or in a group, both closely or openly, to interpret his religion or belief through his worship, ritual, practice and preachment; [2] No one could get coercion which could disturb his freedom in following his choosen religion or belief; [3] The Individual Freedom to practice his religion or belief just restricted by the determination of law which important to protect the safety, peace and moral public and another’s freedom.”

country, religion, sexual orientation and different ability factor. The dissemination of hatred through the detonation, burning, weapons, vandalism, physical violence, verbal abuse and threats in order to instill the fear to the victims, to make them become vulnerable to further attack and feel alienated, helpless, suspicious and frightened. Some of them perhaps become frustration and angry and assume that government and other group in their communities won't to protect them. When the perpetrator of hatred not be prosecuted as criminals and their actions stated as a mistake, their crimes can weakens the community, even the community with its relation with the most strongest/good race.²⁹

UNESCO noted some of intolerance indications and its behavioral indicators: (UNESCO: Tolerance: the threshold of peace. A teaching/learning guides for education for peace, human rights and democracy (Preliminary version). Paris: UNESCO. 1994, p. 16.)

Language: contamination and pejorative language or exclusive language which eliminates the valuecondescend and humanizes the group of culture, race, national or sexual. The disclaimers right on language.

Making stereotype: to describe the member in a group which characterized by the same attribute – it is usually negative.

To satirize: attract attention to the behaviors, attributes and certain characteristics with the purpose of mocking or insulting.

Prejudice: judgment based on negative generalizations and stereotypes accordance to the actual facts of a case or the specific behaviors of individuals or groups.

Scapegoating: to blame the traumatic moment or social problems on a certain person or group.

29 U.S. Department of Justice, Hate Crime: The Violence of Intolerance, <http://www.usdoj.gov/crs/pubs/hctecrm.htm>, accessed on December 1, 2008.

Alienation (ostracism): behave seemed the other is absent or does not exist. The refusal of speak or admit the other and even their cultures.

Harassment: the behavior that is intended to intimidate and humiliate others, frequently meant as way of removing them by force out of community, organization or group.

Desecration and elimination: forms of desecration of a symbol or a religious or cultural structure which aims to eliminating the value and mocking their beliefs and identities which to it the structures and symbols mean on.

Snarling (bullying): use of superior physical capacity or a large number of (people - ed.) to insult others or to eliminate their ownership or status.

Expulsion: to officially or forcibly evict or disclaimers the right to enter or to be present in a place, in social groups, professions or other places where there are group activities, including where survival depends on, such as the workplace or place of refuge (shelter), and so on.

Expenditure: disclaimers possibilities to fulfill basic needs and/or fully participate, particularly in joint activities.

Segregation: forcible separation of people by race, religion or gender which is different, usually in order to disadvantage of certain groups (including apartheid).

Repression: forcibly preventing of the enjoyment of human rights.

Destruction: detention, physical violence, livelihood displacement, armed assault and murder, (including genocide).

Intolerance violation and hatred is one of crime with individual-object being, who relates with freedom of religious/ belief. For this violation, the obligation is addressed to the individuals as the criminal law subject. Whereas the responsibility of the state are protecting

people³⁰ from intolerance threat and processing it through the law when a violation happened.

In the context of Indonesian law, this kind of violation actually accomodated by Criminal Code, Article 156³¹ which confirms:

“Who ever expressed the hostility, hatred or humiliation to one or some group segment of Indonesian society in public, will be threatened by imprisonment 4 years maximally and fine of four thousand and five hundred rupiah.”

The term of segment here and other articles means every part of Indonesian people which different each other or some other because of their races, home country, religion, descendants, nationality or position in constitutional law.

Thus, in practice of Indonesian law, these articles actually used the oppositely, that to ensnare those accused of heretical and desecrate of religion. Though, this article is an instrument which could be used to criminalize the practice of intolerance.

In relation to religious intolerance, SETARA Institute distinguishes the terms of passive intolerance with active intolerance. Passive intolerance is the residue of a whole religious belief and the interpretation of the religion which is believed as the only one truth for themselves as individuals and social beings. He still believes in his religion cognitively but as a consequence of social relations with others who has different background, even in case ready or not, must be accepting that real condition and adapting. Instead active intolerance not only see their religion as the only one truth, but also tend to see

30 Article 2 (1) of 1966 on ICCPR. The responsibility of State in the context of fulfilling its obligation that published from this ICCPR, is absolutely and immediately.

31 This article is an area of contestation of interpretation on “hate crimes”. During this time, the use of this article always be related to the article 156a which a product of PNPS 1/1956, that precisely be used to ensnare those who accused as heresy.

their different interpretations in each other religion and other religions as well as wrong and heretical. The obvious different among the passive intolerance and active intolerance lies on the action. For the active intolerance, the express it not only through the statement, but also the action.

The report of freedom of religious/ belief in Indonesia is stipulated in the human right-based monitoring Framework, particularly in the clamps of International Covenant on Civil and Political Rights. Therefore, the method of this report preparation is based on the approach of ‘violation’. Through this approach of ‘violation’, this report could be understood as the effort to measure how far the state do its generic obligation in respecting and protecting the freedom of religious/ belief. The writing Framework of this report refers to the *Framework for communications* which improved by the United Nation (UN) Special Rapporteur for freedom of religious/ belief.

Referring to definitional explanation above, so there are two ways of state to do violations; [a] by doing an active action that possibly create disallowances, differences, intervention, and or obstructing a person in the enjoyment of freedom of religion / belief (*by commission*); and [b] by allowing a person’s rights to be violated, including allowing any criminal offense which committed by a person that not be prosecuted (*by omission*).

Besides documenting violations on freedom of religious/ belief which done by state, this report also states about criminal offense which done by people to other (citizens) connected to the freedom of religious/ belief. These citizen’s actions generally include; [a] to burn houses of worship, intimidation, physical violence and others, are included in the terms of crime, and [b] intolerance actions.

With such Framework, this monitoring report divides 4 categories of violations with subject of law and different responsibility;

- [1] Active-action by the state (by commission)
- [2] Omission-act by the state (by omission)
- [3] Criminal-action by citizen, and
- [4] Intolerance by society.

To the category of by commission and omission violation, the legal Framework to question it must be referred to the Human Rights' Law which stated in some of Ratified-Conventions about Human Rights, coupled by the constitution and domestic law which sets about responsibility of the state. And, for the category of crimes committed by citizens and intolerance action, the legal Framework that could be used is Criminal Code (KUHP). []

