

CHAPTER 1

Introduction

A. Background¹

In the perspective of protection guarantee on Freedom of Religion/Belief (KBB), 2014 is the year while two transition models of government which attended in KBB protection, from the Susilo Bambang Yudhoyono's regime to Jokowi's. The policies made by SBY's regime tend to restrictive on to the freedom of religion/belief issues, so created the stagnant situation which is incline to dangerous.² SETARA Institute assessed that there's no significant progress that worth to be noted as KBB's protection. Does the Jokowi's regime will be better in running this issue? Time will answer. But, some indicators should be seen to assess about do this regime will create the new hope or not.

Whoever runs government in this Republic, so SETARA Institute will do research and assessment on the issue of Freedom of Religion/Belief in Indonesia. Those research and assessment are motivated by the real condition of freedom of religion/belief which gets no intact guarantee from state, and the intolerant action, discrimination and violence are still continually happening in Indonesia as well. Whereas normatively, the state has affirming its commitment through the Article 28E Verse (1 & 2), and Article 29 verse (2) the Constitution of Republic of Indonesia 1945. The similar guarantee also stipulated in Law No. 39/1999 about Human Rights, and Law No. 12/2005 about Ratification of International Convention on Civil Rights and Politic. But, the political restriction on this rights still occurs, either to use Article 28J (2) Constitution of Republic of Indonesia 1945 or another laws which discriminative.

Textually, the freedom of religion/belief – in terms of protecting

mechanism aspect – is the basic rights that guaranteed by the international norms that approved universally by the civilized countries, both legally binding or not. As a part of the world’s civilized country (United Nation), Indonesia asked to guided progressively all the universal norms standard in order to implement the guarantee of freedom of religion/belief in the sphere of its juridical politico – juridical domestic.

In all of international human rights instrument, the freedom of religion/belief is regarded substantively as individual rights which cannot be reduced or delayed its fulfillment (*non derogable rights*). So, the freedom of religion/belief either for individual or group should guaranteed its fulfillment by the state.³ The *non-derogable* principle argues about the infallible/absolute rights and that’s why it cannot be delayed or postponed in any circumstances.⁴

In line with it, the structure of Indonesian Constitutional gives more adequate guarantee to implement the freedom of religion/belief. That guarantee can be found in basic norm (*grund norm*) of national law and the state’s basic law (*staat fundamental norm*).

Pancasila as the basic philosophy has given the philosophical and moral guarantee to freedom of religion/belief. The first principle of Pancasila confirmed it. Even in the real life “precept of all precepts” the Pancasila is often interpreted paradoxically. On one side, the first precept meant as the principle accommodates spirituality meta-religion, but on another one is often interpreted as a formula which refers to formalistic diversity, or even often for legalizing the domination of the dominant religious communities.

On the other side, that first precept is interpreted as backrest of religious philosophical concept that refers to the extraction of monotheism, meaning reduced merely to coverage the quantitative major of one particular religion in Indonesia, in this case is Islam.

The most valid and sublime reference in reading and interpreting that first precept of Pancasila is about the statement directly given by the founding fathers and mothers of the state in the court of Committee for Preparatory Work for Indonesian Independence (BPUPKI), especially in the meeting for basic preparation of state. One of it – even the most important caused by its historical position as the formulator of Pancasila – Soekarno.

The Son of Sun, while reviewed about those precepts of Pancasila on June 1, 1945⁵ through his provocative speech, gave logical assertion about the precepts of divinity. He said:

Divinity Principle! It means not only that Indonesian people should believe in God, but individually Indonesian should have his/her own God ... Let's we believe in God. Indonesia is a country which the people inside can worship god in a way that is freely. All people should have God in culturally, means no "religious egoism". And the state of Indonesia becomes a state in God!⁶

As the basic norm, ideal of law (*rechtsidee*), basic philosophy (*philosophische gronslag*), view of life (*weltanschauung*), national ideology, national principle, and the source of all sources of law in Indonesia, Pancasila should be made as more operational constitutional guarantee, concrete, dan binding. Those guarantees can be found in our constitution, the Constitutions of Republic of Indonesia 1945 (UUD 1945).

In UUD 1945 there are some provisions give guarantee on citizens' rights to have religion and belief. At least there are two precepts in UUD 1945 which can be identified as the principle to give guarantee on freedom of religion for everyone directly, even both citizen or not. Those two provisions are Article 28E and Article 28I which states:

Article 28 E UUD 1945

- (1) Every people is freely to embrace a religion and to worship and to pray through his/her religion, to choose education and teaching, to choose job, to choose citizenship and residence in a state and leave it, and could be return.
- (2) Every people have rights on freedom to believe his/her belief, to state his/her thought and attitude, base on his/her conscience.

Article 28I verse (1) UUD 1945

The right to life, freedom from torture, the right to freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be prosecuted under a retroactive law is a human right that is not can be reduced under any circumstances.

Article 28E UUD 1945 gives guarantee for everyone to embrace a religion and belief and/or credence freely. That certainty implicitly declares freedom for all to have religion and belief. And at the time also, the guarantee of freedom of religion is also perfected by the guarantee for people to worship through his/her religion and belief.

The existence of guarantee in UUD 1945 showing that rights of freedom of religion or to have a religion by individual is the essential human rights.⁷ In the strength statement could be declare that rights of religion is the most human rights of all human rights. Besides that, rights of religion is not a given from state, not a given from group, that's why state cannot oblige its citizen or even the state cannot intervene the religious problem of its citizens as well.⁸

By having that very significant role, so the rights of religion – in accordance to the universal norm of human rights – is placed as *non derogable rights* as stated as Article 28I verse (1) UUD 1945. As the right which is categorized as *non derogable rights*, so rights of religion/belief cannot be reduced in any circumstances.⁹

Besides to give guarantee and position on rights of religion/belief as the *non derogable rights*, UUD 1945 also sets relation between state and religion and its position in the context of respect and protection of that right. That matter is setted in Article 29 UUD 1945 which states:

Article 29 UUD 1945

- (1) The State is based on the God Almighty
- (2) The State guarantees every resident to embrace his/her own religion and to worship according to his/her religion and belief.

From those two articles can be observed that the constitutional guarantee on rights of religion is strongly stipulated in UUD 1945. That constitutional guarantee imply on meaning (at the same derivative policy demands a more detailed) follows:

1. The state should gives guarantee of aegis and wide space for every citizen to embrace religion and to worship their religion and belief freely.
2. The state is forbidden to make prohibition and obstacle for residents to worship his/her religion and belief.¹⁰

Based on provision of Article 29 UUD 1945, the state has constitutional responsibility to protect rights of religion on people. The State has obligation to guarantee the freedom of religion/belief as stipulated as in Article 28E and Article 29 UUD 1945. This matter is in line with the mandate in Article 28I verse (4) UUD 1945 that must be fulfilled by the state, especially government. The Article 28I verse (4) states that the protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government. It means that government has obligation to protect and to respect human rights.

The obligation of government to protect, to promote, to fulfill and to respect the values of human rights as mandates as Article 28 I verse (4) UUD 1945 must be performed comprehensively, while one obligation is done so another obligations should be done also. At that point, the government must be consistent in promoting human rights enforcement.

Because of it, the obligation to give guarantee, protection, promotion of human rights, particularly rights of religion for citizens, are exists on the state. The state should act as obligation owner. The state is forbidden to delegate those obligations accomplishment to non state actor to perform it. Because, the obligation performed by non state actor will give a chance of violence behind the name of religion and belief. Besides that, it will open a space for the communal emersion which will perform violence to another people with difference belief through the name of religion.

The constitutional mandate created from the state foundation philosophy and strengthened by its derivative instruments in the form of law. Some laws which can be identified its main framework are Law

No. 39 year 1999 about Human Rights and Law No. 12 about Ratification of International Covenant on Civil Rights and Politics. Thereby, has the implementation of that constitutional guarantee already ideal?

Here is the problem. There is tension in implementation of that constitutional guarantee. Disparity between constitutional *das sollen* and government's policy *das sein* which more detailed, specific and concrete are highly visible. The main problem on this constitutional mandate implementation can be classified into three main clusters.

First, is incongruous regulation. The central weak point in mismatch of guarantee on freedom of religion/belief is Law No. 1/PNPS/965 about Prevention of Abuse and/or blasphemy. Article 1 of that Law states:

Everyone is prohibited in public to telling, to advocate or to seek public support, for an interpretation of a religion that is practiced in Indonesia or conduct religious activities that resemble the activities of such a religion; interpretations and activities which deviate from the principal teachings of the religion.

The basic mistakenness in that Law – as illustrated explicitly in basic formula of Article 1 above – such as: 1) Government discriminates religious adherents with subjective interpretation that assessed “not in line” with majority's interpretation, 2) The State intervenes too much into private space (*forum internum*) of individual, even up to interpreting sphere of their ratio and consciousness, 3) The state not guarantee the legal certainty for all of citizens by forming and implementing law which managing the object and abstract, vague and absurd substancy.

Not conducive situation of constitutional guarantee implementation on freedom of religion/belief is strengthened by the verdict of Constitutional Court of Republic of Indonesia in demand of judicial review of that Law Number 1/PNPS/1965 which submitted by civil society group. The Constitutional Court presents not strong arguments juridically and disable to affirms about religion-state relation. The Constitutional Court decided the optional (politics) law to stay considering that law as the constitutional one. Even so, on

to the existence of Law above, the Constitutional Court through the Verdict Number 140/PUU-VII/2009 in Case Filling of Law Number 1/PNPS/1965 recognize that this law have weakness, so that it needs to own change.

Of position of Law Number 1/PNPS/1965 which is so problematic, as long as it is not eliminated or erased, so that Law is still being a positive justice that is premised for forming some its regulations on religious life settings. That regulation shaped Ministerial Joint Decree, they are:

1. The Joint Decree of Minister of Religion and Minister of Internal Affairs Number 9 and Number 8 Year 2006 about Guidelines Task Regional Head/Deputy Head of the Maintenance of Religious Harmony, Empowerment Forum for Religious Harmony, and the Construction of Houses of Worship (Two Joint Regulation of the Minister);
2. Joint Decree of Minister of Religion, Attorney General and Minister of Internal Affairs of Republic of Indonesia Number 3 Year 2008, Nomor KEP-033/A/JA/6/2008, Nomor 199 Year 2008 about Warnings and commands to the devotees, members, and/or Board Member Indonesian Ahmadiyah Congregation (JAI) and Community (SKB Three Ministers).

As a matter of fact, some regulation in regional level published by using the principles and content refers to those regulations. Regional regulation meant can be found in West Java province, Bekasi City, Bogor, Sampang District, West Nusa Tenggara, and others.

Those various regulations are factually often to become main trigger of some intolerant actions and discriminations on minority group happening. In human rights perspective, those regulations can be categorized as violation on human rights through the law and regulation (*violation by rule*).

Second, is lack of institutional support power of the state. The constitutional guarantee which affirmed by UUD 1945 and its derivation legislation, is ideally backup by institutional structure which strengthening that constitutional mandate implementation. But, the fact is, government performs problematization on life of religion/belief

in Indonesia through institutional establishment that actually negates its constitutional mandate and stimulates intolerant actions occurrence and discrimination in life of religion/belief of citizens as well.

The institutions, which recognize its existence and legitimacy even in the arena of state, which also legitimates intolerant and discriminative action on adherents of certain religion/belief, are:

The Coordinating Board on Public Trust Monitoring (Bakor Pakem). This institution is recognized in governmental institution of Republic of Indonesia on almost last three decades through the Decree of Attorney General of Republic of Indonesia Number P-108/J.A./5/1984 has extraordinary powers terrific – and absurd as well, i.e to prevent religious blasphemy in Indonesia.

“The Work Result” of this semi-permanent institution which membership consist of Attorney General, National Inteligent Agency and Ministry of Religion, including to process and to recommend formally the activities of Ahmadiyah followers in Indonesia. To see the task and authority, this institution is actually an arm of the state to intervene so far in a very private affair of citizens which religion/belief, which is guaranteed by the constitution.

Another institution which is also problematic on life of religion/belief is Indonesian Ulema Council (MUI).¹¹ The main problem of MUI in the context of freedom of religion/belief is about its authority” to give fatwa about apostasy on certain religion, sect or madzhab, and certain fathom. Some fatwa are Fatwa Number: 7/MUNAS VII/MUI/11/2005 about Pluralism, Liberalism, and Secularism of Religion which proscribes those three thought that was subjectively conceived by MUI. “The Law Product” produced by another MUI’s authority is about the guideline of 10 Criteria of deviant sect which was produced in National Working Meeting of MUI in 2007. That guideline is assessed by some circles to worsen negative situation because of its usage as “legal” foundation to justify intolerant action and discrimination on religion/belief.

Besides MUI and Bakorpakem, the Interfaith Communication Forum (FKUB) is also become the problematic one. Ideally, “FKUB has a role to give guarantee of people to worship freely, to embrace a certain belief, people are guaranteed safely and comfortably. Then FKUB should become a connector to seek the similar matters from religious

people, especially in the context of living together as the part of citizens in national life.”¹²

In another sentence, FKUB should be an instrument of enforcement mechanism of religion pluralism and belief horizontally and non structural. The leaders and religious leaders/belief who involved in are part of participation in the form of involvement and civil engagement that promotes pluralism and cares of harmony. The fact says, FKUB is part of the state structure, regime structure. FKUB more dominantly seems as the state power instrument in order to uniformity interpretation of truth which determined by “the established religion” in Indonesia.

Third, is the weak performance of state government official. State apparatus “behind the counter” often do not perform to do an inclusive interpretation of freedom of religion/belief. We often witness the officers in the field is unable (unwilling) to protect the freedom of religion/belief. Even in a highly increased chaos they are not able to use coercive instruments to provide human security for all religious adherents and to prevent discriminatory practices and intolerance to the faiths of certain religion/belief, especially minorities.

Those three weak points, both partially or cumulatively – for SETARA Institute’s assumption – is the main factor that stimulates the violation occurrence, even the crime in the name of freedom of religion/belief. So that the life situation of religion/belief in the Pancasila state is not conducive enough, even in the past five years, the phenomenon of religious/belief intolerance improvement practices improved.¹³

That background is one of *back mind* behind the annual agenda of SETARA Institute doing monitoring research and analysis of actual situation on freedom of religion/belief in Indonesia and present it in a report about progress or decline situation of freedom of religion/belief, that analyzed through the human rights perspective, and complemented by the deepening of intolerance and discrimination case of religion/belief.

Exceedingly, the previous monitoring research since 2007 showed that the macro and micro condition on freedom of religion/belief in Indonesia was very bad. Some of bad portraits which stained the condition of freedom of religion/belief all this time, are: the state absence in almost of all violation happening, impunity on violators, omission infringement actions, and neglect victims of violations. Thus

reports of this kind are increasingly finding urgency and significance as a reminder to the state officials to immediately commit, act, restoring the situation of freedom of religion/belief.

Besides it, in the level of practice, database availability and national sophisticated baseline data which could be used as reference of life situation on religion/belief in Indonesia, also a real need as sociological reference of policy and regulation drafting in supporting human rights promotion.

This report becomes more relevant as one portrait of condition of freedom of religion/belief. Monitoring research and publication of this annual report aims to: [1] to document and to publicate the violation facts and guarantee maneuver/progress on freedom of religion/belief in Indonesia; [2] to push the state to full guarantee the freedom of religion/belief including to do the change of some regulation products that restricting freedom of religion/belief and victims' rights recovery; [3] to provide the data baseline about freedom of religion/belief; and [4] to strengthen network among civil society and public in general to expand constituency in order to participate of supporting the guarantee on freedom of religion/belief.

The research and monitoring report on this transitional period of Susilo Bambang Yudhoyono's regime to Joko Widodo regime will perform some parts:

- a) The findings are displayed quantitatively accompanied by a qualitative analysis of the condition of religious freedom in Indonesia in 2014,
- b) Baseline conditions and guarantees of religious freedom in Indonesia within the scope of national macro and micro-local areas in the last 8 years of monitoring,
- c) Big home works in the field of religious freedom in the last 8 years is based on accumulative data research and monitoring with relevant analysis, and
- d) The new government's agendas in the field of freedom of religion and belief based on content analysis of the vision and mission of President Joko Widodo, combined with the results of in-depth interview with religious leaders in different areas of monitoring.

B. Research Methodology

In order to monitor the condition of freedom of religion / belief in the year 2013, SETARA Institute conducted monitoring in 10 provinces, namely: Aceh, West Sumatra, Banten, Jakarta, Yogyakarta, West Java, Central Java, East Java, West Nusa Tenggara, and East Nusa Tenggara. However, a portrait of freedom of religion/belief in other regions remains collected through various sources of media and monitor network. As such, the report is presented as it includes the territories of Indonesia.

Data collecting was performed by [1] monitoring by 10 local observers; [2] focus group discussion; [3] data collecting taken from institutions of religion/belief and governmental institutions; [4] interview with some state authorities, local figures and society in 10 relevant provinces area; and [5] using media documentation.

Data and analysis collecting in this monitoring used parameter theoretically used in human rights disciplines and practically guided by civilized country. That parameter is especially International Covenant on Civil and Political Rights which ratified by Indonesian government through Declaration on The Elimination of All Forms of Intolerance and of Discrimination Based On Religion or Belief which initiated through UN General Session resolution No. 36/55 on November 25, 1981.

The data validity review which is used in this monitoring research is triangulation technique.¹⁴ The used triangulation technique is source triangulation, i.e by comparing and checking behind the degree of belief of information through time and different tools. The source triangulation in this research is done by comparing achieved data from personal and paper (indepth interview and documentation) or paper and paper (including in this category is testing the degree of trust through the comparing and tracking online sources), from one person to another person.

C. Theoretical Study and Conceptual Framework

Monitoring and report writing about condition on freedom of religion/belief in Indonesia rests on human rights perspective, that put down the freedom of religion/belief as individual rights that cannot be delayed its fulfillment (*non derogable rights*). Therefore, the used definitions in this monitoring and research writing refer to definitions in legal discipline of human rights. Freedom of religion/belief is a guarantee given by state of freedom of religion/belief for individual and freedom of worshipping for individual and community. The freedom of religion is fundamental human rights.¹⁵

Religious or belief terminology in human rights perspective is not meant narrowly interpreted and closed but constructed widely. Public misunderstanding that happens, often states the belief of God (theistic) that called as religion. Whereas the Buddhism as non-theistik and Hinduism as polytheistic are same called as religion. The meaning of religion or belief is not restricted only the traditional religion or institution which has analog character or practice with that Religion and belief that just formed and minority religion intitled to get protection from dominant religious community and power holder.¹⁶ The human rights perspective strictly states, even theistic follower, non theistic, or they are with have no religion or belief, are same to have rights and to get protection.¹⁷

The main instrument of human rights which managing guarantee freedom of religion/belief is International Covenant of Civil and Political Rights (1966) especially Article 18, that includes: (1) freedom to embrace or to choose certain religion on his/her own belief, and freedom, even individual or together with another people, in public or private area, to embody religion or belief through the religious activities, observance, practice and teaching; (2) without coercion until disturbing his/her freedom to embrace or to choose certain religion base on his/her consciousness; (3) freedom to embody certain religion/belief of someone is just can be restricted by legal provision, and just if it is needed to protect security, orderliness, health or social moral, or rights and freedom of another people; (4) the states follower of this covenant are promise to respect the freedom of parents, and when it's applicable, the legal guardians, to ensure that the religion and moral of their children are appropriate with their own beliefs.

Indonesia on 2005 has ratified this International Covenant through the Law UU No. 12/2005 about Ratification of International Covenant on Civil and Political Right. This covenant is legally binding and as the state parties who have ratified it, Indonesia has obligation to put it as part of national regulation and give periodical report to Human Rights Commission of UN.

Another Human Rights Instrument which sets the freedom of religion/belief is *Declaration on The Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* which issued through the General Session of United Nation No. 36/55 pada 25 November 1981. This declaration is setting the guarantee on freedom of religion/belief more detail than International Covenant about Civil and Political Rights, and just because it is a declaration, so that this is not binding for state parties. But, even it is not legally binding, this declaration reflects wide consensus of international community. That's why it has moral power of international relation practice in general. As a member of United Nation, Indonesia cannot ignore this declaration to performing the obligation to fulfill its citizen's rights as well.

The Article 6 of Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

According to the provision in Article 1, this Declaration and subjecting to the provisions of Article 1 verse (3), rights of freedom of thought, conscience, freedom of religion or belief should include these freedoms:

- 1) To worship or to come together in accordance to a certain religion or belief, and to establish and to maintain places for these purposes;
- 2) To establish and to set any kinds of proper charity or humanity institution;
- 3) To make, to get and to use in adequately many kinds of things and materials which is necessary relating to the ceremony or religious tradition of a certain religion or belief;
- 4) To write, to state and to spread any kinds of publishing of which relevant to this fields;
- 5) To teach a certain religion or belief in appropriate places for these purposes;

- 6) To collect and to accept financial donation and another-form donations voluntarily from personal or institutional;
- 7) To exercise, to point, to choose with succession of those proper leaders which are asked with religious requirements and standards of a certain religion or belief;
- 8) To respect the free days, and to celebrate great religious days and ceremonial days;
- 9) To build and to maintain communications with someone or society about religious problems or beliefs in national or international level, the ceremony according to the teachings of someone's religion or belief;

The Constitution of Republic of Indonesia, 1945 Constitution, in Article 28E also states the guarantee on freedom of religion/belief as following:

- (1) Every person are free to embrace certain religion and to worship in accordance to his/her religion, to choose education and teaching, to choose job, to choose citizenship, to choose residence in area of a state and to leave it, and to be able to return as well.
- (2) Every person has rights on freedom to convince a belief, to state his/her thought and action, in accordance with his/her conscience.

According to those both instruments of human rights and the Constitution of Republic of Indonesia above, the operational definition of freedom of religion/belief is simply defined as including freedom to embrace a certain religion or belief of his/her own choice, the freedom of personal or jointly with another one to worship their religion or belief in accordance with what they believe on, and to obey, to practice and to teach in open or secretly way, including freedom to change religion or belief, or even to not embrace any religion or belief at all.¹⁸ Meanwhile, the Article 28E affirms that freedom of religion/belief is a constitutional right of every citizen.

The Human Right law is a legal instrument which placing state as state parties; it means that state is a legal subject that responsible to obey the human rights law. As a legal subject, every single human rights abuse is always pointing state as the perpetrator. The violation on

human rights law occurs when the state do not obey the binding norm which stipulates in covenant and international convention, where the state has promised to obey it through ratification.

The Human Rights epistemology affirmation as explained as above, is also more clarifying the difference within human rights and international criminal law, which put the individual as a subject of law. As private law, kinds of punishment which is known in human rights perspective are international sanction, obligation policy changes, and the fines are reserved for the victims whose rights have been violated in the form of compensation, restitution and rehabilitation. Whereas, in international criminal law (Statuta Roma), besides individual as the subject of law, the kinds of punishment which inflicted to perpetrator is also form a sentence of imprisonment.

Indonesia as a state parties in international law of human rights, obligation of state to respect and to protect the freedom of every person in the name of religion or belief.¹⁹ The basic principle of state obligation to respect human rights is about the state not performs any kinds of performance which infringe the individual or group integrity or ignore their freedom. Meanwhile, obligation to protect is taking the necessary actions to protect the rights of a person/group of people on crimes/violations of law/ violence that perpetrated by individuals or other groups, including the neglect taking precautions that inhibit the enjoyment of their freedom.

Even though the main character of human right cannot eliminated or revoked and also totally exist on any human, but based on the agreed principle of Siracusa, there are two treatment of human rights implementation, i.e:

The *non-derogable rights* principle (the rights that fulfillment cannot be delayed or be deffered) and *derogable* (the rights that fulfillment can be delayed or be deffered). The Siracusa Principle underlines that the rights which can be delayed or be deffered, just can be applied on certain situation and condition that are deemed harmful to the public interest.

Meanwhile, the principle of *non-derogable rights* states that it is an infallible/absolute rights, and because of that reason, it cannot be deffered or postponed in any circumstances. The rights which is contained in this principle, including: rights of life (rights not to be killed), rights

on self wholeness (not to be tortured, kidnapped, persecuted, raped), rights to be not enslaved, rights to embrace religion, to think and to have belief, rights to be treated equally behind the law, right not to be imprisoned for failing to meet contractual obligations, and rights not to be convicted under the retroactive law. Therefore, all kinds of action that may causing the disappearance of someone's or group's rights on freedom of religion/belief – as one of elements of *non-derogable rights* – can be classified as human rights violation.

Even the human rights discourse recognized about the restriction in fulfilling the guarantee of human right, this observation remains to cover many kinds of violations, either the categorized *forum internum* right, or freedom which categorized in *forum externum*. The absolute freedom, basic, namely *forum internum* (internal freedom) is a freedom where there's neither party could intervene its realization and enjoyment of this. The rights which included in the clump of internal freedom are (1) rights to embrace and shift the religion freely; and (2) rights not to be enforced to embrace or to not embrace a certain religion.²⁰

Whereas the social freedom or *forum externum* (external freedom), in a particular situation, the state is permitted to restrict or to confine this rights and freedom, but with *margin of discretion* or strict and legitimate prerequisite in accordance to the Siracusa principle.²¹ The rights which included in external freedom clump, are (1) freedom to worshipping either personally or jointly, in an open or secretly way; (2) freedom to build house of worship; (3) freedom to wear/use religious symbols; (4) freedom to celebrate religious special day; (5) (6) rights to teach and to spread religious teaching; (7) rights of parents to teach religious teaching to their children; (8) rights to establish and to manage a religious organization or association; and (9) rights to share religious materials to personal or group.²²

Violation on freedom of religion or belief is a form of failure or negligence of state in implementing of intervention of people's freedom or to do not give protection a personal or group of who are being the objects of intolerant or criminal offense in the name of religion or belief. Therefore, the violation on freedom of religion/belief defined as removal, revocation, limitation or reduction of rights or personal basic freedom to embrace religion/belief which is done by the state, either by commission or by omission.

The human rights terminology which related to freedom of religion/belief is intolerant and discrimination. Intolerant is derivative of about his group, belief system or life style are higher than the others. This matter can evoke several consequences from lack of respect or disregard to others until institutionalized discrimination, such as *apartheid* (racial segregation policy) or deliberately demolition of someone through genocide. All of those actions originated from denial of human fundamental value.²³

A discrimination is “every restriction, harassment, or excommunication which are done directly or indirectly based on the differentiation of human through the religion, tribe, racial, ethnic, group, class, social status, economical status, gender, language, political belief, which resulted in a reduction, or elimination of irregularities recognition, implementation or application of human rights and basic freedom in life both individually or collectively in the field of politics, economics, law, social, culture, and another life aspects.”²⁴

The discrimination and intolerance based on religion,²⁵ is a form of violation on freedom of religion/belief, as meant as in the Article 2 verse 2 of Declaration on Elimination of All Forms of Intolerance and Discrimination Based on the Religion/Belief, that is “any distinction, exclusion, prohibition, or preferences (*favoritism*) which are based on religion or belief and its purpose or consequence to eliminate or to reduce the recognition, enjoyment or exercise the human rights and fundamental freedoms on one similar basic,” such as do not want to receive a certain group or to revealing and to exposing the hatred against another group based on the difference of religion or belief.

The intolerance crime and hatred are actions which motivated by the hatred or bias against someone or a group based on the gender, race, skin color, religion, origin country, and/or sexual orientation. The intolerant action may constitute as serious crime, such as assault and fighting. It also could be in the forms of minor crime, such as ridicule to someone’s race/religion. The written communication includes graffiti which indicates prejudice or intolerance against someone or a group of people because of hatred. Including the vandalism and conversation based on intolerance or what is considered as a joke by some peoples.

The crime based on the hatred is an intolerant crime and prejudice which aims to hurt and to intimidate someone because of his/her

racial, original country, religion, sexual orientation and because of *different ability* factor. The spread of hatred by using detonation, arson, weapons, vandalism, physical violence, and verbal violence threats to instill the fear to the victims, make them becomes vulnerable to further assault and alienated, powerless, suspicion and fear. Another part of them are probably to become frustration and angry if they consider that the government and another groups in their community do not protect them. When the perpetrator of hatred not to be accused as a criminal and their actions are stated as faults, their crimes could weaken the community with even the strong/healthy racial connection as well.²⁶

UNESCO wrote some of intolerance symptoms and behavioral indicators²⁷:

Language: contamination and connotative exclusive language which removes value, degrading and no-humanizing cultural group, race, nation or sexual. The denial of language rights.

Stereotyping: to describe all members of a group by characterized through similar attribute – commonly are negative.

Quiping: to capturing attention on behavior, attribute and certain characteristic in order to mocking or to insulting.

Prejudice: assessment on negative generalization basic and stereotype on main actual fact of a case or specific behavior of individual or group.

Scapegoating: to blaming a traumatic event or social problem on someone or certain group.

Discrimination: the exception of social guarantee and activity by just taking the adverse reasons.

Ostracism: to act as if there is no one or the other is absent. The rejection of speaking or recognizing another party or their cultures.

Harassment: intentional behavior to intimidate and to humiliate another party, often intended as a trick to remove them by force from the community, organization or group.

Desecration and Elimination: forms of symbol desecration or religious structure which are intended to eliminate the value and to mock their beliefs and their identities that these structure and symbols are precious for them indeed.

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 eject formally or forced or denial of the right to enter or be present in a place, in a social group, profession or another places where there is an activity of group, including where the survival is depending, such as working place or shelter and others.

Outcome: denial of possibilities to fulfilling basic needs and/or to participating fully in society, especially in joint activity.

Segregation: Forcible separation of people by different race, religion or gender, usually to the disadvantage of certain group (including apartheid).

Repression: Forcible prevention on Human Rights enjoyment.

Demolition: detention, physical abuse, livelihood displacement, armed assault and murder (including genocide).

The violation of intolerance and hatred are one of criminal act with individual object, which is related with freedom of religion/belief. For this kind crime, the responsibility is addressed to individuals as a criminal law. While the state's responsibility is to protect every person from the threat of intolerance and legal process, while the violence occurs.

In the context of Indonesian law, this kind of crime is actually accommodated by the Law Book of Criminal Law (KUHP), Article 156²⁸ which mentions:

Whoever said that a sense of hostility, hatred or contempt against one or some groups of Indonesian people in front of public, punishable by a maximum imprisonment of four years a maximum fine of four thousand five hundred rupiah.

The statements of group in this article and next article means that every part of different Indonesian people with one or some other parts because of race, origin country, religion, origin residence, ancestry, nationality or position according to the constitutional law.

However, in practice of Indonesian law, these articles are actually used contrarily, that is to ensnare the people who were accused of heresy and religious defamation wing. Though, this article is an instrument that could be used to criminalize the practice of intolerance.

In its relation with religious intolerance, SETARA Institute distinguishes between passive intolerance with active intolerance. The passive intolerance is residue from intact religious belief and interpretation against religious teaching which is believed as the only truth for his/herself as an individual and social beings. He/she in his/her cognitive, believes that his/her religion as a consequence from social relation with different parties who are different in their background, willing or unwilling to accept that reality and to adapt.

Conversely, the active intolerance active does not only see their religion as the only truth, but also tend to see their different interpretations of the religious fellow and also other religions as false and heretical. The following are the most obvious differences between them are passive intolerance with intolerance active is situated on the action. They are categorized as active intolerance not expressing it through the statement but also action.

This Report of Freedom of Religion/Belief in Indonesia lies in monitoring framework of the monitoring-human rights

based, especially in clumps of International Covenant on Civil and Political Rights. Therefore, the method of this report is based on the approach of ‘violations’. Through the approach of that ‘violation’, this report could be understood as an effort in order to examine how far the state performs its generic obligation to respect and to protect freedom of religion/belief. This report writing also refers to framework for communications which is developed by Special Rapporteur of United Nation for freedom of religion/belief.

Based on above definitions, there are three violations by state, they are: [a] by doing active action which allows restriction, distinction, intervention, and or obscure the enjoyment of someone in religion/belief (*by commission*); [b] by letting the person’s right be violated (*by omission*), including to letting every criminal act committed by a person cannot processed by law, and (c) by the way to make regulation that gives opportunity of human rights violation occurrence (*by rule/judiciary*).

Besides document violations on freedom of religion/belief which is performed by the state, this monitoring also documenting violation which done by citizen against another citizen. This violation by citizen in outline includes three main classifications: [a] crime in form of assault on house of worship, physical intimidation, and so on; and [b] intolerance act, besides [c] *condoning* by social figures.

With this framework, this monitoring report divides into 6 categories of violation act with different legal subject and responsibility;

- [1] The active action of state (by commission),
- [2] The omission act which done by the state (by omission),
- [3] Formation of regulation which violates/invites violation (by rule/judiciary),
- [4] Criminal act by citizen,
- [5] By society performed intolerance,
- [6] Condoning by community figure.

Against violation which done by the state, the legal frame that is used to go about it, is the human rights law that stipulated in civil covenant and politics and in some other human rights conventions that

have been ratified, constitution of state, positive law in domestic level which manages the obligation of state. Whereas for the violation and intolerance which is done by citizen, the legal frame that can be used is Law Book of Criminal Law (KUHP), especially that form in crime/criminal offense. ■

Endnotes

- 1 To remember this research and monitoring report as annual agenda, so the background and conceptual theory of this research is in general not too much different from the previous one. Just do contextualization and enrichment of a few parts which are considered important and giving the necessary emphases.
- 2 See Halili and Bonar Tigor Naipospos, *Stagnation on Freedom of Religion/Belief in 2013* (Jakarta, Pustaka Masyarakat Setara, 2014)
- 3 Davis, Derek H., *The Evolution of Religious Liberty as a Universal Human Rights*, republished in December 5, 2006.
- 4 The rights which contained in this principle, such as: Rights to live (not be killed), rights on self wholeness (not be tortured, kidnapped, abused, raped) rights not to be enslaved, freedom of religion, expression and beliefs, the right to be treated equally before the law, the right not to jail for failing to meet contractual liability, and rights not to be convicted under the retroactive law. Thus, any kind of action which could result in loss of the right of a person or group of persons to freedom of religion-as one of the non-derogable rights-can be classified as a human rights violation. See Ismail and Bonar Tigor Naipospos (eds), *Mengatur Kehidupan Beragama; Menjamin Kebebasan Beragama? Urgensi Kebutuhan RUU Jaminan Kebebasan Beragama/Berkeyakinan*, (Pustaka Masyarakat Setara, 2011)
- 5 Later, after the collapse of Desukarnoization project undertaken by the Suharto regime, we agreed to make the colossal return that date as the birthday of Pancasila.
- 6 Sukarno's speech before the trial of BPUPKI on June 1, 1945. See Bahar, et.al [eds.], 1995, *Risalah Sidang BPUPKI dan PPKI*, (Jakarta: Sekretariat Negara), page. 80-81, or Alam [ed], *Bung*

- Karno Menggali Pancasila*, (Jakarta: PT Gramedia Pustaka Utama), page. 28.
- 7 Drafting Team of Comprehensif Script of Process and Results on 1945 Constitution Amandement, *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 Manusia, dan Agama (Revised Edition)*, General Secretary and Registrar of Constitution Court, Jakarta, 2008, page. 286.
 - 8 *Ibid.*, page 320.
 - 9 *Ibid.*, page. 293.
 - 10 See Ismail Hasani (ed), *Dokumen Kebijakan Penghapusan Diskriminasi Agama/Keyakinan*, Pustaka Masyarakat SETARA, Jakarta, page. 81
 - 11 Indeed, there is an ambiguity in the case of institutional existence of MUI, is that institution which is established since 1975 as usual social institution like the other social organization, such as NU and Muhammadiyah? Or this is an institution of state. On one hand, as stated as in its Articles of Association (its public version can be accessed in feature of “MUI Profile” in website www.mui.or.id), MUI is just a media of ulema zu’ama and moslem scholar. But on the other hand, this institution is financed by the state through APBN besides income from halal certification. Two institutions under MUI are also “allowed” by the state to have “wet” authority, they are: Research Institute of Food and Drugs, Drinks and Cosmetics (LP-POM) and National Sharia Council (DSN). Substantively, by observing the state financing and its authority, MUI can be categorized as auxiliary state agency. However, when referring to its formal profile, MUI appears as a non-state institution.
 - 12 H. Abdurrahman K., Head of FKUB of South Sulawesi, Interview of SETARA Institute, on December 28, 2010.
 - 13 Read Hasani dan Naipospos (eds) 2011, *Politik Diskriminasi Rezim Susilo Bambang Yudhoyono: Kondisi Kebebasan Beragama/Berkeyakinan di Indonesia 2011*, (Jakarta: Pustaka Masyarakat Setara, 2011)

- 14 Triangulation is a technique of data validity checking that utilize something outside the main data, in order to checking or to comparing that data. See Lexy J Moleong, 2002, *Metodologi Penelitian Kualitatif*, (PT Remaja Rosda Karya, Bandung), page. 178.
- 15 Davis, Derek H., *op.cit.*
- 16 Paragraph 2 -- General Comments 22 about Article 18, UN of Human Rights Committee, 1993
- 17 *Ibid.*,
- 18 Article 18 about Human Rights Universal Declaration (1948): “Every person has rights of freedom of thought, conscience and religion; in this context includes freedom of changing the religion/ belief, and freedom to declare religion or belief by teaching, practicing, worshiping and obeying, both personally or jointly with another one, in public or alone.”
- 19 See Article 18 DUHAM, Article 18 ICCPR, Article 28 I, 28 E, 29 Constitution of Republic of Indonesia 1945.
- 20 See the Article 18 DUHAM, Article 18 ICCPR, Universal Declaration 1981 about Elimination of Intolerant and Discrimination Based on Religion/belief, and General Comment No.22 Human Rights Committee of United Nation
- 21 The Principle of Siracusa is a principle about restriction provision and rights derogation in ICCPR. It was established in Sicilia, Italy in 1984. This meeting resulted a set of interpretation standard on restriction clause of rights in ICCPR.
- 22 All of these rights are stipulated in Article 18 of ICCPR, General Comment No. 22 of Human Rights Committee of United Nation, and Universal Declaration 1981 about Elimination of Intolerant and Discrimination Based on Religion/Belief.
- 23 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.
- 24 UU No. 39 Year 1999 about Human Rights, Article 1.
- 25 Article 1 United Nation Declaration about Elimination All

Forms of Intolerance and Discrimination Based on Religion or Belief (1981): “[1] Every person has rights on freedom of thought, conscience and religion. This rights includes the freedom to embrace religion or belief in accordance to his/her choice, and freedom, both individually or jointly, closely or openly, to manifest his/her religion or belief in the form of worship, ritual, practice and teaching; [2] No one get coercion which can interfere his/her freedom of chosen religion or belief.; [3] Freedom of someone to worship his religion or belief just can be restricted by law and important to protect safety, peace and public moral and basic rights and freedom of others.”

- 26 U.S. Department of Justice, *Hate Crime: The Violence of Intolerance*, <http://www.usdoj.gov/crs/pubs/htecrm.htm>, accessed on December 1, 2008.
- 27 UNESCO. *Tolerance: the threshold of peace. A teaching/learning guide for education for peace, human rights and democracy (Preliminary version)*. Paris: UNESCO. 1994, p. 16.
- 28 This article is dispute area of the above interpretation on “hate crimes” (statement of hatred and hostility). During this day, the usage of this article is always identified with Article 156a which is derived from Law No.1/PNPS/1965, that is precisely used to ensnare people accused of heresy.