CHAPTER I

Introduction

A. Background

The report of research and monitoring presented by SETARA Institute about Condition of Freedom of Religions/Beliefs in Indonesia is motivated by the condition of freedom of religions/beliefs which not accepting integrate guarantee from the state, and also by the actions of intolerance, discrimination, and violence which continuously occur in Indonesia. While the state already affirmed normatively about its commitment through Article 28E Verse (1 & 2) and Article 29 Verse (2) 1945 Constitution of Republic of Indonesia. The similar guarantee has been also stated in Law No. 39/1999 about Human Rights, and Law No. 12/2005 about The Ratification on International Convention of Civil Rights and Politics. However, the politics of restriction on this rights continually happened, either through the Article 28J (2) UUD Negara RI 1945 or through another legislation which are discriminatory.

Contextually, in 2013 - as well as years before 5 annual Election - in the sight of nation and state life, is commencement of political year phase. Besides that, 2013 is the last period of the President Susilo Bambang Yudhoyono, and also become the sign of last report of his leadership period. That situation is space and time context in reading the ‘text’ freedom of religions/beliefs in Indonesia. Related to that, it is very important to ask two questions which are relevant to tempus and locus associated with freedom of religions/beliefs in Indonesia. First, how is the portrait of protection and guarantee on freedom of religions/beliefs in Indonesia related to current political situation? Is there any positive correlation between national contestation – where the whole contestants are ideally becoming (seem) “more Indonesia” that is deemed worthy to be a part of national and state leadership in Indonesia
– with the fulfillment and improvement of guarantee on freedom of religions/beliefs in Indonesia, or in contrary, to be a momentum for the ‘job seeker’ and ‘rent seeker’ who are still capitulating the primordial issues (especially the religious issue and beliefs) in order to attain political benefits with the restrictive impacts in the end for improving the condition of religions/beliefs?

Second, how was the “accomplishment” of protection and guarantee on Freedom of Religions/Beliefs along the leadership period of President Susilo Bambang Yudhoyono? How were the “blue” and “red” notes in SBY’s leadership, especially in his pure last year\(^2\)?

Textually, the freedom of religions/beliefs -reviewed from aspects of the mechanism of protection- is a fundamental right which guaranteed by international norms that are universally recognized by civilized nations, either the norms which is binding (legally binding) or not. As part of the citizens of the world community of civilized nations (the United Nations), Indonesia is required to be progressively guided varying standards of universal norms in implementing freedom of religion/belief within the politico-juridical -domestic jurisdiction.

In various instruments of international human rights, the freedom of religions/belief is substantively seen as an individual right which cannot be reduced or postponed its fulfillment (\textit{non derogable rights}). Therefore, the freedom of religions/beliefs both on individual or group must be guaranteed its fulfillment by the state.\(^3\) The principle of \textit{non-derogable rights} states that it is absolute and because of that matter it cannot be postponed or differed under any circumstances.\(^4\)

In line with this, the Indonesian constitutional structure gives a more adequate guarantee to implement the freedom of religions/beliefs. That guarantee could be found in the ground norm (\textit{grund norm}) of national legislation and basic law of state (\textit{staat fundamentalnorm}).

Pancasila as the grund norm gives philosophy and moral guarantee on freedom of religions/beliefs. The first principle of Pancasila bravely states it. Even though in reality “the whole of principles” are being often interpreted paradoxically. In one hand, the first principle of Pancasila is interpreted as a principle which accommodates spirituality of meta-religion, but in the other hand that is often interpreted as a formulation which refers to formalistic diversity, moreover, for a legalization of majority religious society domination. In the second hand, the first
principle is interpreted as a reference of diversity philosophy which refers on extraction of *tauhid* concept, it means that interpretation is reduced just to overarching the quantitative majority of one religion in Indonesia that is Islam.

The most valid and sublime reference to read and to interpret that first principle of Pancasila is the statement of which directly told by *the founding fathers and mothers* in the court of Investigation Agency of Indonesian Independency Preparation Effort (BPUPKI), especially a meeting about the arrangement of grund norm. One of them – the most important because of his historical position as the Pancasila excavator – is Sukarno.

The Son of the Sun, while reviewing Pancasila on June 1, 1945 through his agitative speech, gave a straightforward assertion about that divinity principle. He said:

> The divinity principle! Not only the Indonesian society should have God, but all of Indonesian should individually have his/her own God. ..... Let’s have God. Let the state of Indonesia is a country that every person can worship God in a way that freely. All the people should be cultured of believe in God, with no “religious egoism”. And the Indonesian state should be a Believe in God country!\(^6\)

As the basic norm, the legal ideals (*rechtsidee*), the philosophical basic (*philosofische gronslag*), the view of life (*weltanschauung*), national ideology, and the main source of all of law sources in Indonesia, Pancasila supposed to be downgraded into a constitutional guarantee which is more operational, concrete, and binding. That guarantee could be found in our constitution, the Indonesian Constitution of 1945. (UUD Negara RI 1945).

In that 1945 Indonesian Constitution, there are some provisions of which giving guarantee on citizen’s rights to worshipping and have their own believe. At least, there are two articles in the 1954 Constitutions which can be identified as the articles which give directly guarantee on freedom of religions to everyone, no matter of their citizenship. Those two provisions are Article 28E and 28I which reads as follow:

**Article 28E of 1945 Indonesian Constitution:**

1. Every person is freely to embrace religion and to worship
as his religion, to choose education and teaching, to choose job, to choose citizenship and residence in area of state and to leave it, and to be pleased for coming back again.

(2) Every person has rights on freedom of beliefs, to state his/her argument and expression, in accordance with his conscience.

Article 28I verse (1) 1945 Indonesian Constitution

Rights to live, rights to be tortured, rights to freedom of thought and conscience, rights of religions, rights to be enslaved, rights to be recognized as a private behind the law, and rights not to be prosecuted under a retroactive law is a human right that cannot be reduced under any circumstances.

The Article 28E of 1945 Constitution of Republic of Indonesia gives a guarantee to everyone to embrace religion or/and belief freely. That provision implicitly declares about freedom to everyone to embrace religion and beliefs. In the same time, that guarantee on freedom of religion is also enhanced with guarantee for them to worshipping in accordance with their religions and beliefs.

The guarantee in 1945 Constitution indicates that the freedom of religion or the embracement of religion by an individual is a very essential human right. In the straight statement could be declared that the freedom of religion is the most fundamental human right within the other human rights. Besides that, freedom of religion is not gift from the state or the groups, since that the state cannot oblige the citizens or the state should not intervene against the religious issue each of its citizens.

With that more significant power, so that the freedom of religion also, in line with the universal norm of human rights, must be placed as the non derogable rights as stipulated as in Article 28I verse (1) UUD Negara RI 1945. As the rights in non derogable rights category, so freedom of religion/belief cannot be reduced or revoked by anyone.

Besides giving guarantee and position freedom of religion/belief as
non derogable rights, 1945 Constitution of Republic of Indonesia is also managing relation within state and religion as its role or state power in the context of respect and protection of those rights. That matter is set in Article 29 of 1945 Constitution of Republic of Indonesia which states as follows:

Article 29 of 1945 Constitutions of Republic of Indonesia

(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/belief.

From the two of articles above can be observed that the constitutional guarantee on freedom of religion is strongly stipulated in 1945 Constitutions of Republic of Indonesia. That constitutional guarantee implicates to the meaning (and at once with more detail derivative policy demand) as follows:

1. The State must give guarantee of aegis and widest possible space to all free citizens to embrace religion and to worship according their religions/beliefs.

2. The State is not able to create varied prohibitions and restriction for people to worship their religions/beliefs.\textsuperscript{10}

Based on the stipulation in Article 29 of 1945 Constitutions of Republic of Indonesia, state is taking constitutional responsibility to protect freedom of religions/beliefs of all of citizens. The state is also having obligation to guarantee freedom of religion/belief as stipulated as in Article 28E and Article 29 1945 Constitution of Republic of Indonesia. That matter is in line with the mandate in Article 28I verse (4) 1945 Constitution of Republic of Indonesia which is must fulfilled by the state, especially the government. The Article 28I verse (4) states that the protection, advancement, establishment, and human rights fulfillment of human rights are the obligation of state, especially the government. It means that the government is burdened the obligation to protect and to respect human rights.

The authority of government to protect, \textit{to promote}, to fulfill and to respect the values of human rights as mandated as Article 28I verse (4) of 1945 Constitutions of Republic of Indonesia in one breath, if that
one obligation should be performed, and so do the other too. From that point, the government must be consistent in performing human rights establishment.

Because of it, that obligation to guarantee, to protect, and to promote human rights, particularly for freedom of religion to every people, lies in state. The state is applicable as the authority stakeholder. The state is forbidden to delegate its obligation performance to non-state actor to perform it. The reason is, the performance of state obligation by non-state actor will give opportunity to the problem occurrence of violation on freedom of religion and belief. Besides, it will open a space for appearance of groups who performs violation to another people of whose embrace different belief.

The constitutional mandate which derived from the state basic philosophy is reinforced by its varied derivative instruments in the form of legislations. Some of legislation which can be identified in its main framework is the Act No. 39/1999 about Human Rights and the Act No. 12/2005 about International Covenant Ratification on Civil Rights and Politics. Thus, had that constitutional guarantee implementation ideal for us?

This is the problematical point. There are some tensions in that implementation of constitutional guarantee. The disparity is highly visible within das sollen and das sein in more specific, detail and concrete government policy. The main problem of constitutional mandate implementation on freedom of religion is classified into three main clusters.

The first, is regulation incongruence. The central weak point in that inconsistency of guarantee on freedom of religion/belief is the Act Number 1/PNPS/1965 about Prevention of Misuse and/or Religion Blasphemy. The Article 1 of that Act states:

Every person is prohibited to telling, to recommending or to striving public supports, in order to do interpretation about certain religion that is embraced in Indonesia or to do religious activities which resembles religious activities of that religion; interpretation and the activity of which deviates from the principle teachings of that religion.

The fundamental fallacy in that law, as explicitly illustrated as
in formulation of the above Article 1, they are: 1) The government discriminates to certain religion followers with his subjective interpretation that “not in line” with majority interpretation. 2) The State deeply intervenes to the individual private space (forum internum) of citizen, moreover into the interpretation space of their heads and hearts, 3) The State do not guarantee the legal certainty for all of citizens by forming and applying the law which manage the abstract, vague and absurd.

The not-conducive situation for that constitutional guarantee implementation on freedom of religion/belief is reinforced by the verdict of Constitutional Court of Republic of Indonesia in judicial lawsuits on the Act Number 1/PNPS/1965 which submitted by civil society groups. The Constitutional Court provides arguments of which are weak juridically and disable to state strictly about relation within religion-state. The Constitutional Court decides a political law to stay consider about that law as a constitutional. Nonetheless, to the existence of those acts, the Constitutional Court through its verdict Number 140/PUU-VII/2009 in case of Judicial Review of Act Number 1/PNPS/1965 profess that this law has weakness, so that need to be changed. In the problematic position of the law Number 1/PNPS/1965, as long as it is not erased or canceles, so that Act is a positive law which can be made as reference to creating some implementing regulations about religious life control. That implementing regulation have the form Joint Decree of Ministers, they are:

1. The Joint Decree of Religious Ministry and Internal Affairs Ministry Number 9 and Number 8 Year 2006 about Implement Task Guidance of Regional Head/Vice Regional Head in Religious Harmony Maintenance, Empowerment of Religious Harmony Forum, and Establishment of House of Worship (Joint Decree of Two Ministers);

2. The Joint Decree of Religious Ministry, General Attorney and Internal Affairs Ministry of Republic of Indonesia Number 3 Year 2008, Number KEP-033/A/JA/6/2008, Number 199 Year 2008 about Warnings and Commands to the Adherent, Members, and/or Board Members of Jemaat Ahmadiyah Indonesia (JAI) and Citizens (SKB Tiga Menteri).

As a matter of fact, some regulations in local level are issued
through the principles which refer to the mentioned regulations. The local regulation in question can be found in West Java, City of Bekasi, Bogor City, Sampang Regency, West Nusa Tenggara, and others.

Some those regulations factually often become the main trigger of intolerant behavior occurrence and discrimination on minority religious group. In perspective of Human Rights, those various regulations can be categorized as human rights violation through the rule or regulation (violation by rule).

The second is the weakness of institutional support of state government. The constitutional guarantee which is affirmed by 1945 Constitution of republic of Indonesia with its derivative laws, are ideally backed-up by institutional structure which reinforces that constitutional mandate implementation. But, the fact, the government appears problems of religious/beliefs life in Indonesia through institutional establishment of which actually negates that constitutional mandate and stimulates the occurrence of intolerant practice and discrimination in life of religious/beliefs among citizens.

The institutions which are existed and recognized its existence and legitimacy in state arena which are also legitimating the intolerance and discriminative actions on certain religion/beliefs adherents, such as: Coordinating Body for Monitoring Mystical Beliefs in the Society (Bakorpakem). The institution which is firstly recognized in governmental institution of Republic of Indonesia in almost three decades ago through the verdict of General Attorney of Republic of Indonesia Number KEP-108/J.A./5/1984 has great authority, and absurd at once, that is: to prevent the occurrence of religions blasphemy in Indonesia.

“The Working Result” of semi-permanent institution which its members consists of such as General Attorney, National Intelligence Agency and Ministry of Religious, are formally: to cook up and to recommend the stoppage of Ahmadiyah’s activities in Indonesia. Looking their tasks and authorities, the institution is supposed to be the arm of the state in deeply doing intervention into the most private business of citizen, that is to embrace religions/beliefs which guaranteed by the constitution.

Another institution which is also problematic in life of religion/belief is Indonesian Ulema Council. The main problem of MUI in the
context of freedom of religious/beliefs is its “authority” in giving fatwa of misdirection on religion, sects or mazhab, and about another certain teaching. Some fatwa are Fatwa Number: 7/MUNAS VII/MUI/11/2005 about Pluralism, Liberalism, and Secularism of Religion which proscribes those three views of thought that is subjectively conceived by MUI. “The Law Products” which are produced from MUI’s authority, such as the Guidance of 10 Criterion of Deviant Sects that are issued in National Meeting of MUI in 2007. That guidance is assessed by some groups to disturb the negative atmosphere of diversity because it is often used as “law” reference to justify intolerance practice and discrimination of religion/belief.

Besides MUI and Bakorpakem, Inter-Religious Harmony Forum (FKUB) is also problematic. Ideally, “FKUB has role to give guarantee that every person are free to worship, free to belief, are being full guaranteed safely and comfortably. Then FKUB is also being the connector of finding similar points of religious groups, especially in the context of together life as part of citizen in nation life.”

In the other sentence, FKUB should be a mechanism of pluralism strengthening of religion/belief both horizontally and non-structurally. The leaders and religious leaders who are involved inside, are being the part of participations in involvement and civil engagement which promotes pluralism and maintains harmony. The fact, FKUB is a part of structure of the state, the regime structure. FKUB is more dominant to be the instrument of state’s power to homogenize about the truth interpretation which is determined by “established religion” in Indonesia.

The third is the poor performance of the state apparatus or government officials. The state officials who are “behind the desk” often not perform to do inclusive interpretation of guarantee on freedom of religion/belief. The state official in the field are often disable (do not want) to protect freedom of religions/beliefs. Moreover, in more escalated chaos, they cannot use coercive instruments to perform human security for all of religious adherents and to prevent the occurrence of intolerant and discrimination practices to the certain religion/belief adherent, especially the minority group.

Those three weak points both partially or cumulatively, in the assumption of SETARA Institute, are the main factors which stimulates
some violations or crime in the name of freedom of religions/beliefs. With the result that, the situation of life of religion/belief in this Pancasila country is not becoming conducive, indeed the phenomena of intolerant and discrimination practice occurs in the last five years becomes increase.¹³

That reason is one of back minds behind the agenda of SETARA Institute to doing research, also observation and analysis as well on the actual situation of freedom of religions/beliefs in Indonesia and perform it in a report about progress or decline of situation on freedom of religions/beliefs, which analyzed through the perspective of human rights, and accompanied by the deepening on cases of intolerant and discrimination of religion/belief.

All the more, the previous observation report since 2007 shows that the macro and micro condition of freedom of religions/beliefs in Indonesia are poor. Some bad portraits which coloring the condition of freedom of religion/belief all this time, are: the absence of state in almost all of cases of violation, impunity on violation actors, the omission of violation action, and negligence of violation’s victims. Thus, this kind of report will find its urgency and significance as the reminder for all of state administrator to do the action quickly, to recover the situation of freedom of religion/belief.

Besides that, in practical level, the availability of database and baseline of sophisticated national data which can be created as reference about the life condition of religions/beliefs in Indonesia is also being the real needs as social reference of legislation drafting and state policy in supporting promotion human rights. This report becomes more relevant as one of portraits of condition of freedom of religion/belief in Indonesia.

This report becomes more relevant as the real portraits of condition on freedom of religion/belief in Indonesia. The research, observation and publication of violation facts and the guarantee breakthrough/advances of freedom of religion/belief to: [1] to documenting and to publish the facts of violations in Indonesia; [2] to encourage the state to fully ensure the freedom of religion/belief, including to do alterations of some regulations’ products which restricting the freedom of religion/belief and recovering the victims’ rights; [3] to provide the data baseline about freedom of religion/belief; [4] to reinforcing the network of
civil society and public in general in order to expand constituency to participate and to encourage the guarantee on freedom of religion/belief.

B. Methodology

Within the framework of the monitoring on condition of freedom of religion/belief in 2013, SETARA Institute do observation in 10 provinces, they are: Aceh, West Sumatera, Banten, Jakarta, DI Yogyakarta, West Java, Central Java Tengah, East Java, West Nusa Tenggara, and East Nusa Tenggara. However, the condition portrait of freedom of religion/belief in another region remains collected through kinds of media resources and observer network. Thus, the presented report remains including another region in Indonesia.


Data collection and data analysis in this observation is using a parameter which theoretically is used in human rights disciplines and practically is guided by civilized country. That particular form of parameter is International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-hak Sipil dan Politik) which had been ratified by Indonesian government through The Act UU No. 12/2005. Other parameter which is also used, is Declaration on The Elimination of All Forms of Intolerance and of Discrimination Based On Religion Or Belief which was published through UN General Assembly resolution No. 36/55 on November 25, 1981.

The data validity review which is used in this research and observation is triangulation technique of data validity testing. The triangulation technique which used is triangulation sources, they are by comparing and re-checking the degree of trust of an information through the different time and instrument. The triangulation sources in this research is done by comparing collected data from persons and paper (result on deep interview and documentation) or paper and paper (including in this category is review on decree of trust through comparison and online resources search), or person with another person.
C. The Conceptual Frame

The research and observation of condition on freedom of religion/belief in Indonesia rests on human rights perception which places the freedom of religion/belief as an individual right of non derogable rights. So that, those used definitions in this report and observation refers to the definitions in law disciplines of human rights. The freedom of religion/belief is a guarantee from the state for people to embrace religion/belief and to worship in accordance with their religion/belief. The freedom of religion/belief is the most fundamental human rights.\textsuperscript{15}

The terminology of religion or belief in human rights perception cannot be interpreted narrowly and closely but should be constructed as widely. General misunderstanding that occurs, often states about trust on God (theistic) that mentioned as religion. Whereas the Buddhism which is non-theistic and Hinduism that called polytheistic, are religion too. The meaning of religion or belief cannot be restricted on the traditional religions or on institution which has characteristic or analog practice with that traditional religion. The religion or belief which is just formed and becomes minority religion entitled to get protection from ruling dominant religious community.\textsuperscript{16} The Human Rights perspective also states that, both theistic adherents, non-theistic adherent and they who said no embrace religion/belief are having same rights and getting protection.\textsuperscript{17}

The main instrument of Human Rights which sets the guarantee of freedom of religion/belief is International Covenant about Civil Rights and Politics (1966) especially the Article 18, which includes: (1) freedom to embrace and to choose religion base on his/her own choice, and freedom, either personally or jointly with another one, either in public or closed place, to manifest religion or belief in worshipping activities, compliance, practice and teaching; (2) without coercion so disturbed freedom to embrace or to choose a religion or belief of his choice; (3) freedom of manifesting personal religion or belief just can be restricted by provision of law, and just if needed to protecting security, orderliness, and health or social moral, or basic rights and freedom of people; (4) the countries of this Covenant promises to respect freedom of parents, legal guardians - if it is recognized, to ensure that the religious and moral for their children are in accordance with their own beliefs.

Indonesia in 2005 had ratified this International Covenant through
the Act No.12/2005, about Ratification of International Covenant on Civil and Political Rights. This covenant is legally binding and as the state parties who ratified it, Indonesia must put it in as a part of national legislations and give periodic report to Human Rights Commission in United Nation.

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

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 subject to the provisions of Article 1 verse (3), rights of freedom of thought, conscience, the kinds of freedom are:

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 print, 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 day, 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 that guarantee on freedom of religion/belief as below:

(1) Every person are free to embrace certain religion and to worship in accordance with his/her religion, to choose education and teaching, to choose job, to choose citizenship, to choose residence in area of a state and leave it, and to be able to return.

(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 simple defined 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. 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 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, the kinds of punishment which is known in human rights perspective, is 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. 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 actions necessary 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 Syracuse, there are two treatment of human rights implementation, i.e:

The non-derogable rights principle (the rights that fulfillment cannot be delayed or deferred) and derogable (the rights that fulfillment can be delayed or deferred). The Syracuse Principle underlines that the rights which can be delayed or deferred, 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 deferred 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,
freedoms, 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; and (2) rights not to be enforced to embrace or to not embrace a certain religion.20

Whereas, 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 Syracuse principle.21 The rights which included in external freedom clump, are (1) freedom to worshiping 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.  

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.”  

The discrimination and intolerance based on religion, 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 including 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 susceptible 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 of members of a group by characterized through similar attribute – commonly are negative.

Quipping: 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).


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 rupiahs.

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 approachment 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 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 Given this research and observation is annual agenda, so the background and conceptual frame of this research and observation, is generally not too different with the previous one. It just contextualization and enrichment are done to some parts which considered important and needed to be emphasized.

2 2014 is a transition within the “old” and “new” reign. So that the achievement of protection and guarantee on Freedom of Religions/Beliefs in 2014 was the performance results of two presiden.


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 Speech of Sukarno before the trial of BPUPKI on June 1, 1945. See Bahar, et.al [eds.], 1995, *Risalah Sidang BPUPKI dan PPKI,*

8 Ibid., hlm. 320.

9 Ibid., hlm. 293.


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 Natioanl Sharia Council (DSN). Substantivelly, 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.

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.


16 Paragraph 2 – General Comments 22 about Article 18, UN of Human Rights Commitee, 1993


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 the Article 18 DUHAM, Article 18 ICCPR, Article 28 I, 28 E, 29 UUD Negara RI 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.


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.”


This article is area dispute of the above interpretation on “*hate crimes*” (statement of hatred and hostility). During this day, the use 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.