SHARIAH AND STATE IDEALS IN THE REGULATIONS OF IBADAH IN ACEH AND SOUTH KALIMANTAN

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ABSTRAK

Ibadah adalah salah satu bidang undang-undang di Indonesia yang berinteraksi dengan keharmonian agama dan kebebasan. Walau bagaimanapun, perhatian terhadap interaksi sedemikian tidak cukup diberikan. Untuk mengisi jurang ini, tesis ini mengkaji intercampuran antara undang-undang Syariah dengan cita-cita unggul negara Indonesia dalam hal keharmonian agama dan kebebasan bagi membentuk kandungan substantif peraturan-peraturan ibadah di Aceh dan Kalimantan Selatan. Kajian ini telah mengenal pasti peruntukan yang diambil daripada sumber-sumber agama Islam dan cita-cita unggul negeri. Tesis ini memenuhi tujuan utama penyelidikan ini melalui pendekatan tekstual dan sosiosejarah, dan analisis wacana. Ia juga menggunakan kaedah perbandingan untuk mengkaji persamaan dan perbezaan peraturan-peraturan di kedua-dua buah kawasan. Kajian ini menghasilkan beberapa penemuan penting. Kandungan substantif peraturan-peraturan ibadah di kedua-dua buah kawasan telah disediakan berdasarkan sumber-sumber Islam dan lain-lain; mereka telah mengambil elemen-elemen Syariah dan cita-cita unggul negeri dan mencampurkannya; terdapat perbezaan yang ketara antara norma-norma Syariah dengan cita-cita unggul negeri yang mudah dilihat dalam peraturan-peraturan solat Jumaat, tetapi tidak pula dalam peraturan-peraturan Ramadhan; Aceh menyelia kedua-dua aspek agama dan sosial solat Jumaat, tetapi Kalimantan Selatan hanya menyelia aspek yang kedua sahaja, dan untuk Ramadhan, kedua-dua kawasan menyelia kedua-dua dimensi agama dan sosial. Kesimpulan utama yang diperoleh daripada kajian ini adalah bahawa undang-undang Islam bukan merupakan sumber utama kepada pembentukan peraturan-peraturan tersebut. Kandungan isinya diambil daripada kepelbagaian sumber lain, sama seperti ideologi negeri, iaitu Pancasila. Semasa membina peraturan-peraturan berkenaan, Islam dan sekularisme bersaing untuk memberi tafsiran terhadap makna keharmonian agama dan kebebasan. Kajian ini mendesak para penyelidik mengenai undang-undang Syariah di Indonesia untuk mengambil manfaat daripada analisis yang lebih mendalam tentang kesedaran yang pelbagai sifatnya untuk memahami keadaan undang-undang dalam negara.

Kata Kunci: Ibadah, Keharmonian Agama dan Kebebasan, Pluralisme Undang-Undang, Syariah

ABSTRACT

Ibadah is one of the areas of law in Indonesia that interacts with religious harmony and freedom. However, not much attention has been given to the study of the nature of this interaction. To fill this gap, this study investigated the interconnection between Shariah and the Indonesian state ideals of religious harmony and freedom in shaping the substantive contents of the regulations of *ibadah* in Aceh and South Kalimantan. It identified the provisions that were drawn from Islamic sources and the state ideals. The methods used in the study were textual and social-historical approaches and discourse analysis. It also used a comparative method in examining the similarities and differences of the regulations in both regions. This research produced a number of key findings: the substantive contents of the regulations of *ibadah* in both regions are drawn from Islamic and other sources; the relevant authorities have taken elements of Shariah and state ideals to form the basis of decision making ; a clear line between Shariah norms and state ideals is easily discerned in the regulations of Friday prayer, but not in the regulations of Ramadhan; Aceh regulates both religious and social aspects of Friday prayer, but South Kalimantan only regulates the latter aspects; and for Ramadhan, both regions regulate its religious and social dimensions. The main conclusions drawn from this research were that Islamic law was not the main source of the regulations. It constituted just one among the variety of available sources such as the state ideology of Pancasila. While constructing the regulations, Islam and some aspects of secularism competed in interpreting the meaning of religious harmony and freedom. This research argued for researchers on Shariah laws in Indonesia to conduct a deeper plurality-conscious analysis in understanding the nature of the law in the country.

Keywords: *Ibadah*, Legal Pluralism, Local Regulation, Religious Harmony and Freedom, Shariah

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List of Abbreviations

BAZ	Badan Amil Zakat (government-sponsored agency for *zakat* management)
BPUPKI	Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (Investigatory Committee for Independence of Indonesia)
DPR	Dewan Perwakilan Rakyat (House of People's Representatives or National Legislature)
DPRD	Dewan Perwakilan Rakyat Daerah (legislature at provincial or district level)
DPU	Dewan Paripurna Ulama (Plenary Board of Ulama)
DSI	Dinas Syariat Islam (Office of Shariah in Aceh)
F-ABRI	Fraksi Angkatan Bersenjata Republik Indonesia (faction that represents armed forces)
F-KKI	Fraksi Kesatuan dan Keadilan Indonesia (faction of several tiny nationalist parties)
F-KP	Fraksi Karya Pembangunan (faction of Golkar Party during the New Order period)
F-PBB	Fraksi Partai Bulan Bintang (faction of Crescent Moon Star Party)
F-PDKB	Fraksi Partai Demokrasi Kasih Bangsa (faction of a Christian party)
F-PDU	Fraksi Perserikatan Daulatul Ummat (faction of several tiny Islamic parties)
F-PG	Fraksi Partai Golkar (faction of Golkar party in the post–New Order era)
F-PKB	Fraksi Partai Kebangkitan Bangsa (faction of National Awakening Party)
F-PP	Fraksi Persatuan Pembangunan (faction of United Development Party during the New Order regime)
F-PPP	Fraksi Partai Persatuan Pembangunan (faction of United Development Party in the post–New Order era)
F-Reformasi	Fraksi Reformasi (faction that consisted of PAN (National Mandate Party) and PK (Justice Party))

F-TNI/POLRI	Fraksi Tentara Nasional Indonesia/Polisi Republik Indonesia (faction of armed and police forces)
F-UD	Fraksi Utusan Daerah (faction of representatives of regions)
F-UG	Fraksi Utusan Golongan (faction of interest groups representatives)
GAM	Gerakan Aceh Merdeka (Free Aceh Movement)
GBHN	Garis Besar Haluan Negara (Broad Outlines of National Policy). During the New Order period, it was always a part of MPR's decrees, which placed it third in the rank of Indonesian legal hierarchy after Pancasila and the 1945 constitution.
GOLKAR	Golongan Karya (Functional Groups)
HUDA	Himpunan *Ulama Dayah* Aceh (Association of Dayah Ulama of Aceh)
IAIN	Institut Agama Islam Negeri (State Institute for Islamic Studies)
IDR	Indonesian Rupiah
INPRES	Instruksi Presiden (presidential instruction)
KEPPRES	Keputusan Presiden (presidential decree)
KMA	Keputusan Menteri Agama (decree of minister of religious affairs)
MORA	Ministry of Religious Affairs
MPR	Majelis Permusyawaratan Rakyat (People's Consultative Assembly)
MPU	Majelis Permusyawaratan Ulama (Consultative Council of Ulama)
MUI	Majelis Ulama Indonesia (Council of Indonesian Ulama)
MYR	Malaysian Ringgit
NAD	Nanggroe Aceh Darussalam
NU	Nahdlatul Ulama
PAH	Panitia Ad Hoc (Ad Hoc Committee)
PAN	Partai Amanat Nasional (National Mandate Party)
PDI-P	Partai Demokrasi Indonesia Perjuangan (Indonesia's Struggle
PDR	Partai Daulat Rakyat (People Sovereignty Party)

PGI	Persatuan Gereja-Gereja di Indonesia (Communion of Indonesian Churches).
Perda	Peraturan Daerah (regional regulation)
Permenag	Peraturan Menteri Agama (Ministry of Religious Affairs' regulation)
PK(S)	Partai Keadilan Sejahtera (Prosperous Justice Party)
PKU	Partai Kebangkitan Umat (Muslim Community Awakening Party)
PNI	Partai Nasional Indonesia (Indonesian National Party)
PNU	Partai Nahdlatul Umma (Muslim Community Revival Party)
PP	Peraturan Pemerintah (government regulation)
PPKI	Panitia Persiapan Kemerdekaan Indonesia (Preparatory Committee for Independence of Indonesia)
PPP	Partai Persatuan Pembangunan (United Development Party)
PSI	Partai Sosialis Indonesia (Indonesia Socialist Party)
PSII	Partai Sarekat Islam Indonesia (Indonesian Islamic Union Party)
PUSA	Persatuan Ulama Seluruh Aceh (All-Aceh Association of Ulama)
RUU	Rancangan Undang-Undang (bill of statute)
Satpol PP	Satuan Polisi Pamong Praja (Civil Service Police Unit).
Sekjen	Sekretaris Jenderal (general secretary)
Sekneg	Sekretariat Negara (State Secretariat)
SKB	Surat Keputusan Bersama (Joint-decree)
UIN	Universitas Islam Negeri (State Islamic University)
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UU	Undang-Undang (statute)
UUD	Undang-Undang Dasar (constitution)
UUD 45	Undang-Undang Dasar 45 (Basic Law or Constitution of Indonesia).

Glossary of Terms

Adzan	call to prayer.
Ahwal al-syakhshiah	personal law.
Aqidah	Islamic faith or creeds.
Akhlak	Islamic ethics.
Amar ma'ruf nahi munkar	promotion of good and prevention of wrong.
Dakwah Islamiyah	Islamic propagation.
Baitul Mal	Islamic treasury.
Bhinneka Tunggal Ika	a Sanskrit phrase that means 'Unity in Diversity.'
Dayah	Islamic boarding schools in Aceh; in Java, it is known as *pesantren.*
Dinar	gold coin.
Dinas Syariat Islam	Shariah Office.
Dirham	silver coin.
Diyat	"blood money", a monetary compensation for involuntary manslaughter or bodily harm.
Fatwa	a legal opinion issued by a *mufti,* i.e., a highly qualified scholar of the Shariah in answer to a question stating a concrete case (which does not necessarily have to be based on actual facts).
Fiqh	Islamic jurisprudence or legal doctrine. Literally means 'understanding.'
Hadith	Prophet's saying; collected traditions, teachings, and stories of the prophet Muhammad, accepted as a source of Islamic doctrine and law second only to the Qur'an.
Hibah	Islamic donation or gift.
Hudud	fixed punishments for certain crimes such as adultery or fornication and theft.
Hukum Adat	Customary law.

Ibadah	ritual acts of worship; human's relations to God.
Ijma'	consensus of Islamic scholars.
Ikhtilath	actions involving a male and female which properly should take place only between husband and wife.
Ilmu Tajwid	the art of reciting the Quran.
Jarimah	crime.
Jinayat	criminal law.
Kaffarat	expiation for accidental homicide, as well as for breaking the fast of Ramadan or breaking an oath.
Khalwat	a close proximity between unmarried or unrelated couples.
Khamar	liquour, alcoholic beverage.
Khatam Al-Quran	complete recitation of the Quran.
Khusyu'	tranquility, concentration.
Liwath	a sexual relation between male persons.
Madrasah	Islamic school.
Madhhab	Muslim schools of law such as Hanafi, Maliki, Shafi'i, and Hanbali. These schools of law refer to their founding fathers respectively: Abu Hanifa (d. 767), Anas b. Malik (d. 795), Muhammad Idris al-Shafi 'i (d. 820), and Ahmad b. Hanbal (d. 855).
Mahkamah Shariah	Shariah Court.
Maisir	gambling.
Mawaris	inheritance.
Mu'amalat	transactions; rules governing relations between human beings.
Muhammadiyah	the second largest Muslim association in Indonesia, after NU. It was established in 1912 and generally advocates reinterpretations of established religious practices and the heritage of Salafi ya modernist movement.

Munakahat	marriage.
Murtad	apostate.
Musafir	traveler.
Musahaqah	a sexual relation between female persons.
Pancasila	literally means 'five principles.' It is found in the preamble to the 1945 Indonesianconstitution and included (1) belief in One Almighty God, (2) a just and civilized humanitarianism, (3) national unity, (4) Indonesian democracy through consultation and consensus, and (5) social justice.
Pengadilan Agama	Religious State Court.
Pengadilan Negeri	General State Court.
Perda	*Peraturan Daerah*
Qada	*fasting* of other days as substitute for those missed in Ramadan.
Qadha	judgeship, the entire range of the judge's judicial activities.
Qadhi	single judge applying the Shariah.
Qadzaf	calumny, defamation: the *hadd* offence of an unfounded accusation of unlawful sexual intercourse.
Qanun	exclusively refers to Regional Regulations produced by the legislature of Aceh from the year 2002 onwards, whether or not relating to Islamic norms.
Qishas	retaliation for homicide or wounding.
Qiyas	analogical reasoning.
Piagam Jakarta	literally means Jakarta Charter. It was actually the first draft of the preamble to the Indonesian constitution and it contained what has since become a well-known phrase in Indonesia, consisting of 'seven words': *dengan kewajiban menjalankan syariat Islam bagi pemeluknya* [with the obligation of carrying out Islamic *Shariah*for its adherents].
Rukun Islam	"Five Pillars of Islam": The Islamic profession of faith (*syahadat*); five obligatory prayers (*shalat*) a day; paying

	annual alms (*zakat*); fasting during the lunar month of Ramadhan (*sawm*); and making the pilgrimage to Mecca (*hajj*).
Sakadup	The term in Banjarese language, particularly in Kuala dialect, is used to refer to two objects: (1) a camel-litter; and (2) a cloth-covered food stall during the month Ramadhan. It is derived from the Arabic word "*syuqduf*." In Hijaz (Saudi Arabia), it is used as the synonym of the word "*howdaj*" which means "camel litter." It is an enclosed or curtained couch mounted on shafts and put on camels used to carry a passenger. The word was probably imported from Hijaz (a region in the west of present-day Saudi Arabia better-known for the Islamic holy cities of Mecca and Medina) by Banjarese who came back from pilgrimage.
Syiar Islam	activities glorifying Islam.
Talaq	divorce.
Tarawih	extra prayers performed at night after *Isya'* prayer in the month of Ramadhan.
Ta'zir	a discretionary and corrective punishment for committing the prohibited acts or for omitting the obligatory acts. Although the legal texts of Qur'an and *Sunna* mention both prohibited and obligatory acts, there is no punishment specified therein. The punishment of *ta'zir* is left to the discretion of the ruler.
Ulama	Islamic religious scholars.
Ummat	The Islamic community; the Muslim community. *Umma/Umat* community, group of people; Muslim community as identifi ed by the integration of its ideology, religion, law, mission and purpose of life, group consciousness, and ethics and mores, irrespective of their differences in origin, region, color, language, and so on.
Ushul Fiqh	literally means the science of the bases of *fiqh*. *Methodology of Islamic jurisprudence (fiqh).*
Uzur syar'i	reasonable cause according to Islamic law.
Wakaf (waqf)	Islamic religious endowment; a perpetual charitable trust or endowment for the benefit of family members or the public at large.
Wilayatul Hisbah (WH)	It derived from Arabic *wilayah al-hisbah*. It was an early

	Islamic institution that organized public administrative functions of both moral/normative and administrative/technical sorts. In the context of Aceh, it is defi ned as an institution whose task is to monitor and to advocate the application of *qanun* for the sake of promoting good and prohibiting evil (*amar ma'ruf nahy munkar*). It is sometimes inaccurately referred to as '*Shariah* police.'
Zakat	religious taxation or Islamic alms; an obligation on every Muslim to purify his earnings and possessions by giving away a portion to the poor and the needy on the basis of one's wealth.
Zina	illicit sexual intercourse; fornication, adultery, any illegitimate sexual activity.

CHAPTER ONE

INTRODUCTION

In Indonesia, at national level the central government[1] has enacted Shariah laws on *hajj*, *zakat*, and Islamic bank. However, all these laws do not replace any existing law as hajj and zakat are not covered by any law before and Islamic banking co-exists with the conventional banking. In short, they are new additions to existing laws.

Since the era of local autonomy or decentralisation[2] started effectively in 1999, a number of provinces such as West Sumatra, South Sulawesi, South Kalimantan and other regencies and cities have implemented the Shariah regulations. These Shariah regional regulations (popularly called *Perda Syariat or Peraturan Daerah Syariat*) are issued by both local legislative and executive bodies at the regional level: provinces, regencies and cities. They are a joint-product of both bodies. In general, these Shariah regulations designed to govern three aspects of public life:(1) social

[1]Indonesia is a unitary state. It is governed as one single unit by the central government and regional governments (provinces, regencies, cities, and villages). The political power of the regions is given by the central government through the devolution of some of its authorities. Laws passed by the central government apply nationwide. Meanwhile, laws passed by regional governments apply only within its territories. See:Gerald Seymour Maryanov, *Decentralization in Indonesia as a Political Problem*, 1st Equinox ed. (Jakarta: Equinox Pub., 2009), 39-46; ibid.

[2]The Era of Regional Autonomy began in 1999 when the President Bacharuddin Jusuf Habibie signed Law 22/1999 on Regional Governance on May 7, 2009, a year after the fall of Soeharto's New Order. It is the devolution of power by the Central Government to regional governments (provinces, regencies, cities, and villages). The local governments have authorities on health, education, environmental and infrastructure services, and other functions except for national defence, international relations, justice, monetary policy, religion, and finance. See: Gary F. Bell, "The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws," *Asian-Pacific Law and Policy Journal* 2, no. 1 (2001).

crimes especially prostitutions and gambling; (2) ritual observances among Muslims such as reading the Qur'an, Friday congregations and fasting during Ramadhan; and (3) Islamic dress code in public sphere—especially the headscarves for women.[3] Almost all the regulations fall within the category of law with offences and sanctions. However, they are not *hudud*-based laws.

Although the government has enacted many areas of Islamic law into state legal system at national and local levels, however there are no clear rules and consensus for the implementation of Shariah.[4] Among internal Muslims there are no clear conception for determining: (1) which areas of Shariah that require the involvement of the state and those do not require the state to enforce it; (2) which interpretation, *madhab*, and understanding should be adopted; (3) which subject-matters apply only to Muslims and subjects apply to every person regardless of religion (Muslims and non-Muslims); (4) into what kinds of state laws Shariah should be transformed (e.g. civil law, criminal law, administrative law, public law). Other problems are the acceptability by non-Muslims if Shariah applies to them and the conformity of Shariah with the rule of law, constitutional and human rights.

Since its enactment and implementation Shariah regulations have been criticised by human rights activists, women activists, and certain quarters of Muslim and non-Muslim citizens. They argue that the regulations are not in conformity with international standards of protection of fundamental rights, particularly with regard

[3]Dewi Chandraningrum, "Perda Sharia and the Indonesian Women's Critical Perspectives," (2006). http://www.asienhaus.de/public/archiv/PaperPERDASHARIA.pdf (accessed May 17, 2007).

[4]Arskal Salim and Azyumardi Azra, "The State and Shari'a in the Perspective of Indonesian Legal Politics," in *Shari'a and Politics in Modern Indonesia*, ed. Arskal Salim and Azyumardi Azra(Singapore: Insitute of Southeast Asian Studies, 2003); Nadirsyah Hosen, "Religion and the Indonesian Constitution: A Recent Debate," *Journal of Southeast Asian Studies* 36, no. 03 (2005).

to the protection of individual human rights and freedoms, including religious freedom for all Indonesians. The women activists stated that the regulations discriminate against women. And non-Muslims argue that the regulations are discriminative against them and posing a threat to the unity of the nation.[5]

In June 2006, the central government, particularly the People's Legislative Assembly (*Dewan Perwakilan Rakyat*-DPR) questioned the legality and constitutionality of the regional regulations. 56 Members of the House filed a complaint about the prevalence of Shariah regulations in the cities, regencies and provinces of Indonesia, demanding that the President should repeal them. This action was criticized by other members of the House. Some said that the regulations are the product of democratic process and should not be repealed. Others argued that the House should follow the existing current law by bringing the case to the Supreme Court or Constitutional Court for judicial review. However, finally they agreed to close the issue to prevent tensions and conflicts between various religious groups.[6]

Criticisms also came from out of the House. This legislative action was criticized by the Communion of Indonesian Churches (*Persekutuan Gereja-Gereja di Indonesia-*

[5]Arskal Salim, "The *Shari'ah* Bylaws and Human Rights in Indonesia," *Studia Islamika: Indonesian Journal for Islamic Studies* 15, no. 1 (2008); Melissa Crouch, "Religious Regulations in Indonesia: Failing Vulnerable Groups?," *Review of Indonesian and Malaysian Affairs* 43, no. 2 (2009); Robin Bush, "Regional Sharia Regulations in Indonesia: Anomaly or Symptom?," in *Expressing Islam: Religious Life and Politics in Indonesia*, ed. Greg Fealy and Sally White(Singapore: Institute of Southeast Asian Studies, ISEAS, 2008); Chandraningrum; M. B. Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: Institute of Southeast Asian Studies, 2008).

[6]Bush. For further information on this event, see: Muhammad Nur Hayid, "56 Anggota DPR Minta Perda Syariat Islam Dicabut," *Detik News*, June 13, 2006; Chazizah Gusnita, "Pemerintah Didesak Ambil Sikap Soal Perda Syariat," *Detik News*, June 27, 2006; Nurfajri Budi Nugroho, "Politisi Pro Dan Kontra Perda Syariat Berdamai," *Detik News*, July 4, 2006.

PGI) and the Indonesian Council of Ulama (*Majelis Ulama Indonesia*-MUI). The Vice Secretary of PGI, Weinata Sairin, argued that 56 Members of the House should bring the case to the Supreme Court for judicial review. On the other side, MUI and other Islamic groups argued that Shariah regulations were not contrary to the Constitution or *Undang-Undang Dasar 45* (UUD 45).[7]

Within Indonesian legal system, regional regulation is at the lowest hierarchy of legislation. Types and hierarchy of legislation are as follows:

> a. 1945 Constitution *(Undang-Undang Dasar Negara Republik Indonesia Tahun 1945)*;
> b. Statute/Government Regulation Substituting a Law *(Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang)*;
> c. Government Regulation *(Peraturan Pemerintah)*;
> d. Presidential Regulation *(Peraturan President)*;
> e. Regional Regulation *(Peraturan Daerah)*.[8]

A normative rule of lower level within the hierarchy may not be contradictory against a rule at a higher level.[9] Regional regulation may not be contradictory to higher regulations and laws above.[10] Legislation of Shariah into regional regulations should conform to the rule of law. Every law including regional regulations must protect human rights.[11]

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[7]"PGI - MUI Inginkan Judicial Review," *Berita Indonesia*, June 18, 2006; Titis Setianingtyas, "MUI Dan Ormas Islam Tolak Pencabutan Perda Syariah," *Tempo Interaktif*, June 21, 2006.

[8]Law 10/2004 on the Rules of Law-making, art 7 (1)

[9] Law 10/2004 on the Rules of Law-making, art 7 (5)

[10]Law 32/2004 on Local Government, art 136 (4)

[11]Law 10/2004 on the Rules of Law-making, art 6 (1b); Law 32/2004 on Local Government, art 138 (1b)

The institutions in charge of dealing with contradictory legislation are the Constitutional Court and the Supreme Court.[12] The Constitutional Court has jurisdiction as a court of both first and last instance to review the constitutionality of laws enacted by Parliament or statutes *(undang-undang).*[13] The power of Constitutional Court is limited to the review of the constitutionality of laws passed by Parliament. It cannot review the constitutionality of government regulations, presidential regulations or regional regulations. For example, it cannot review the constitutionality of Islamic law adopted in regional regulations. It also cannot review the constitutionality of administrative actions by state agencies or officials.[14]

The Supreme Court has the authority to conduct judicial review over laws below the level of statute.[15] It means the Supreme Court has the authority to conduct judicial review over government regulations, presidential regulations or regional regulations against laws passed by Parliament. Therefore, it has the right of judicial review over Islamic law adopted in regional regulations. Other body of government that has authority to review regional regulations is the Ministry of Home Affairs. It has the power of executive review to revoke the regulation if it is contrary to higher laws and regulations.[16]

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[12]Petra Stockmann, "Indonesia's Struggle for Rule of Law," in *Democratization in Post-Suharto Indonesia*, ed. Marco Bunte and Andreas Ufen(London: Routledge, 2009), 62.

[13]*Constitution*, art 24C (1)

[14]Gary F. Bell, "The Challenges of Legal Diversity and Law Reform," in *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations*, ed. Ann Black and Gary F. Bell(New York: Cambridge University Press, 2011), 281.

[15]*Constitution*, art 24A(1)

[16]Law 32/2004 on Local Government, art 145 (2)

Only one regional regulation, which activists have labelled "*Perda Syariat,*" that had been reviewed by the Supreme Court. In April 2006, Advocacy Team Against Discriminatory Regional Regulation (*Tim Advokasi Perda Diskriminatif, TAKDIR),* a non-governmental legal aid Organisation, filed a request for judicial review of Tangerang City *Perda* 8/2005 on Prostitution.[17] About a year later, on March 1, 2007 the Supreme Court judges reviewed the *Perda* in terms of formal legality. They held that it did not contravene higher laws. It was a legitimate political product of both the executive and legislature. They added that the city government had taken up proper procedures. However, they did not consider the substance of the *Perda.*[18]

Officially local authorities rarely use the term "Shariah" to describe their new policies. Instead, they say that their policies fall within the category of "morality and public order".[19] However, in Aceh, regulations similar to those policies are officially called "Shariah". Aceh is the only province that has authority to implement Shariah law in Indonesia. After the fall of the President Suharto and the end of his New Order Era, the central government passed a series of national laws, which gives Aceh the authority to implement Shariah law. They are the Law 44/1999 on the Governing Specialness of the Special Province of Aceh, the Law 18/2001 on the Special Autonomy for the Special Province of Aceh as Nanggroe Aceh Darussalam, and Law 11/2006 of the Governance of Aceh.

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[17]Multa Fidrus, "Lawyers Take Bylaw to Supreme Court," *The Jakarta Post*, April 21, 2006; Bush.

[18]"Putusan MA: Perda Pelacuran Tangerang Tak Bertentangan Dengan Uu," *Gatra*, April 13, 2007. For more detail discussion of this case, see: Simon Butt, "Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia," *Singapore Journal of Legal Studies*, (July 1, 2010).

[19]Hana A Satriyo, "Decentralisation and Women in Indonesia: One Step Back, Two Steps Forward?," in *Local Power and Politics in Indonesia: Decentralisation & Democratisation*, ed. Edward Aspinall and Greg Fealy(Singapore: Institute of Southeast Asian Studies, 2003).

There was heated debate in the People's Legislative Assembly (*Dewan Perwakilan Rakyat*-DPR) on the nature of regional regulations, particularly the ones outside Aceh. The opponents argued that the regulations belonged to Shariah or Shariah regulations. They claimed that the regulations went against the secular identity of state ideology—*Pancasila* (five principles). Those who supported the regulations argues that these did not exclusively belong to Shariah but rather they were social norms shared by wider community—Muslims and non-Muslims.[20]

The difficulty to identify the nature of the regulations and Indonesian law in general had emerged since the colonial era. Until the late nineteenth century, the predominant Dutch view of Indonesian law was that it was Islamic. This was not an exclusive conception. Many Dutch scholars and observers shared the understanding of the Englishmen such as Raffles, Marsden, and Crawford of the complex intermixture of different religious and social norms and values in the societies of the archipelago.[21]

In Aceh, according to Bowen, the term "Shariah" may refer to "general commitment to a tradition and it also may be used to label specific rules that are arrived at through complex, locally determined processes (and may have much or little to do with the text of the Qur'an)".[22] Recent studies by Lindsey suggested the substance of the Aceh's *Qanun* and other similar *Perda* might draw on customary law, Islamic

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[20]Bush.

[21]Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, Islamic Courts in Indonesia (Berkeley: University of California Press, 1972).

[22]John Richard Bowen, "Two Approaches to Rights and Religions in Contemporary France," in *Human Rights in Global Perspective: Anthropological Studies of Rights, Claims and Entitlements*, ed. Richard Wilson and Jon P. Mitchell(London ; New York: Routledge, 2003), 44.

sources, and non-Islamic sources. Whether they derive from those sources depends to great extent on what clause of which instrument is under discussion.[23] It may also depend on which part or region of Indonesia under the question. In the context of legal pluralism, different participants and decision-makers may refer to the same law. However, they often mobilize different legal repertoires against each other (folk law against state law, religious law against folk or state law etc.). They may also accumulate elements of different systems or compound them to create hybrid forms.[24]

1.1 Problem Statement

The current research under the tradition of "legal pluralism" confirmed the mutually constitutive relation between Islamic law and other norms in Indonesia.[25] The research is focussed on the interaction between Islamic law and other norms such as state law, customary laws, social norms, local customs, and gender equality. Their examples were areas of law of personal status and family law of marriage, divorce, and inheritance. However, up to now there has been insufficient attention given to the interaction between Islamic law and state ideals, particularly the principle of religious harmony and religious freedom in shaping regional regulations. Some

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[23]Tim Lindsey, "When Words Fail: Syariah Law in Indonesia--Revival, Reform or Transplantation? ," in *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, ed. Penelope Nicholson and Sarah Biddulph(Leiden ; Boston: Martinus Nijhoff Publishers, 2008), 215.

[24]F von Benda-Beckmann, "Who's Afraid of Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 47, (2002): 69.

[25]Ratno Lukito, "Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia" (Dissertation, McGill University, 2006); John Richard Bowen, ""You May Not Give It Away": How Social Norms Shape Islamic Law in Contemporary Indonesian Jurisprudence," *Islamic Law and Society* 5, (1998); John Richard Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge, UK ; New York, NY: Cambridge University Press, 2003); Arskal Salim, *Dynamic Legal Pluralism in Indonesia: The Shift in Plural Legal Orders of Contemporary Aceh*, Max Planck Institute for Social Anthropology Working Papers, vol. 110 (Halle/Saale: Max Planck Institute for Social Anthropology, 2009).

studies in this area much focused on the compatibility of regional regulations with human rights including religious freedom but not on the mutually constitutive relation between the two norms. One of the areas of law, which interacts with religious harmony and freedom, is the regulations on *ibadah* of Friday prayer and fasting during Ramadhan in Aceh and South Kalimantan.

There are five main reasons why the study selects the regulations of *ibadah* in Aceh and South Kalimantan. First, in almost all Muslim countries the transformation of Shariah into state law was instigated by those who were educated in the Civil law system to meet the needs of the modern nation-state agenda.[26] It has radically transformed the Shariah from the custody of the Islamic scholars or *ulama* into the custody of bureaucrats and legislators.[27] In Indonesia the same phenomenon takes place, particularly at local levels except in Aceh. In Aceh, the regional regulation of Shariah or *qanun* is joint-product of *ulama,* legislative and executive bodies. However, the legal drafting process was dominated by *ulama*.[28] In other places, including South Kalimantan, regional regulation is only joint-product of both local legislative and executive bodies that have law bureau offices with staff graduated from modern secular law faculty.

Second, unlike other regions, which set rules on Ramadhan as a subsection of regulation of wider prohibited activities, South Kalimantan made one particular

[26]Khaled Abou El Fadl, "Islam and the Challenge of Democratic Commitment," *Fordham International Law Journal* 27, no. 1 (2003): 63.

[27]Sami Zubaida, *Law and Power in the Islamic World*, Library of Modern Middle East Studies 34 (London ; New York: I.B. Tauris, 2005), 221.

[28]Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii Press, 2008), 158.

regulation for Ramadhan, and other regulation on Friday prayer. Third, regulation of *ibadah* in Aceh is under the jurisdiction of the Shariah Court. On the other hand, in South Kalimantan it is under the Civil Court.

Fourth, Aceh is the only province in Indonesia that has authority to apply Islamic law and make Shariah as a source of legislation. Meanwhile, unlike Aceh, South Kalimantan province and other regions have no such authority. However, the regulations on Friday prayer and Ramadhan in South Kalimantan in some aspects have similarities to those in Aceh. Because the element of Shariah is not clearly and distinctly discernable in the regulations of South Kalimantan, comparative perspective will be useful in understanding elements of Shariah in South Kalimantan. And the last, in the matter of religion in general both regions on other regions have duties to maintain state ideals of religious harmony and freedom. For Aceh, while it is legislating Shariah it should consider both ideals of harmony and freedom. References to Shariah norms and state norms of religious harmony and freedom might shape the substantive contents of the regulations on *ibadah*.

In the light of these conditions, this study will investigate the following issue: How Shariah and the principles of religious harmony and freedom have shaped the substance of regulations of *ibadah* in Aceh and South Kalimantan.

The thesis has the following five sub-questions:

1. Which provisions of the regulations are derived from Islamic sources?
2. Which provisions of the regulations are drawing on state ideals of religious harmony and freedom?

3. How has Shariah shaped the concept of religious harmony and freedom in Aceh and South Kalimantan?
4. How have the principles of religious harmony and freedom shaped Shariah in Aceh and South Kalimantan?
5. What are similarities and differences of regulations on *ibadah* in Aceh and South Kalimantan?

1.2 Objectives of the Study

Specifically, the objectives of the study are:

1. To examine the provisions of the regulations that are derived from Islamic sources and those are drawing on state ideals of religious harmony and freedom.
2. To compare how Shariah has shaped the concepts of religious harmony and freedom and vice versa in Aceh and South Kalimantan?
3. To compare similarities and differences of regulations on *ibadah* in Aceh and South Kalimantan

1.3 Significance of the Study

This thesis is designed to contribute to the body of work produced by those scholars in the field of legal pluralism who have addressed the interrelationship between the elements of Islamic law and civil law or state law. Building on previous studies, this research will provide more data on the ways the elements of plural legal orders, namely state and non-state laws, interrelated. In its approach, following Benda-Beckmann, it will take a closer look at the elements of plural legal orders and the ways they become interrelated or compounded in hybrid forms in the context of new

legislation. It will concentrate on analysing the change of elements of one legal order under the influence of another legal order.

This study aims to fill a gap in the literature by examining the pluralism of sources of legislation, their interrelationships in the hybrid forms of new legislations. It will concentrate on analysing interrelationships between Islamic law and state ideals in shaping new legislations. It will analyse one *qanun* in Aceh and three regional regulations in South Kalimantan on the areas of Friday prayer, and the activities during the month of Ramadhan.

Previous studies have made categories of various religious regulations emerging since the decentralisation in Indonesia.[29] This thesis will contribute to this issue of classification by revisiting the categories. It will re-examine the previous categories, particularly those of the regulations of Friday prayer and Ramadhan. It will inform and provide the details of the nature and elements of these kinds of regulations in Aceh and South Kalimantan.

In the context of law, morality, and freedom, research findings will provide more data or examples of the enforcement of religion by state law. At the theoretical level there are many questions arise. For examples: Can the state enforce values or morality based on religion? To what extent the state can enforce religious rituals. Can the state through law criminalise harmless religious acts? What are the government's arguments to justify the law enforcing religious values?

[29]Bush; Chandraningrum; Crouch, "Religious Regulations."; Hooker; Salim, "The *Shari'ah* Bylaws."

At the practical level, it will be useful for those who want to revise or review the religious regulations. Several previous criticisms only saw the Shariah elements of the regulations. Others only saw the non-Islamic elements. The focus on the various elements of what is commonly called Shariah-based regulations will give a better understanding of the nature of the regulations.

1.4 Definition of Terms

1.4.1 *Perda,* and *Qanun*

Perda (*Peraturan Daerah*, literally regional regulations, refer to laws passed by all local legislatures based on the agreement with the heads of regions, whether provincial, regency or city.[30] Different from other regions, since 2001 in Aceh the term has been changed to *Qanun* that refers exclusively to regional regulations passed by the provincial legislature. Since 2006 it has been extended to refer to all laws produced by the provincial, regency or city legislatures in Aceh.[31]

1.5 Methodology

1.5.1 Textual and Socio-historical Approaches

This study used textual and sociological and historical approaches to Islamic law. By combining the approaches, according to Atho Mudzhar, the study could examine the textual and sociopolitical aspects of Islamic legal thinking in two levels of analysis. First, the textual approach identifies and classifies the products of Islamic legal thinking in terms of issues being questioned, such as their content and methodology. Then, it compares them with the classical texts of Islamic law, and establishes their

[30]Law 32/2004 arts.1 (10) and 136.

[31] For legal definition of *Qanun*, see: *Law 18/2001 on the Special Autonomy for the Special Province of Aceh as Nanggroe Aceh Darussalam,* art.1 (8); *Law 11/2006 on the Governance of Aceh,* art.1 (21 & 22).

variations. Second, the socio-historical approach identifies sociopolitical factors, socio-cultural settings, observations on the reaction of society.[32]

Amin Abdullah called the methods as normative and historical approaches to Islamic studies. By using both approaches, the researcher can find out the extent to which particular religious doctrines in practice mixed with external aspects such as social and political interests, economic and cultural aspects.[33]

In this study, I use normative or textual approach to identify *fiqh* elements in the regulations of *ibadah* in Aceh and South Kalimantan, and compare them with the classical texts of Islamic law, and establish their variations. I use socio-historical approach to identify non-*fiqh* elements of the regulations, namely principles of religious freedom and harmony, public responses and discourses, and cultural practices that interacted with Islamic doctrines.

1.5.2 Comparative method

This research will use a comparative method. It will examine the similarities and differences of Islamic law implemented in Aceh and similar rules in South Kalimantan under one legal system of Indonesia. For instance, this comparative method will see the matters covered by Shariah bylaw in Aceh, whether Islamic laws apply to Muslims and non-Muslims, and what types of criminal offences fall within

[32]John Hick, *The New Frontier of Religion and Science : Religious Experience, Neuroscience and the Transcendent* (Basingstoke: Palgrave Macmillan, 2010), 14-17. See also: John Hick, *Between Faith and Doubt : Dialogues on Religion and Reason* (Houndmills, Basingstoke, Hampshire ; New York: Palgrave Macmillan, 2010), 245-246.

[33]John Hick, *Philosophy of Religion*, 2 ed. ed. (Englewood Cliffs: Prentice-Hall, 1973), 17.

the categories of Islamic laws in Aceh. The main focus of comparison is the constitutive elements of legislation on the domains of *ibadah.*

The comparison will give a better understanding of what happened in the implementation of Shariah at local levels in Indonesia and will clarify the constitutive elements of what is called Shariah laws. However, since this study is not about the relationship between legal systems or between rules of more than one system, according to Cruz, it is "mere comparison of rules *per se,"* therefore it "does not constitute comparative law".[34] This is only the study of similarities and differences between rules in one legal system of Indonesia.

The comparative method in this study is following the three main operations or stages of comparison proposed by Kamba in comparative law. He suggested three stages of comparison: *descriptive, identification, and explanatory.*[35] Thus, the comparison has three stages. The first step is description of the norms, concepts, and institutions of regional regulations of *ibadah* in Aceh and South Kalimantan. Mainly it described texts of regional regulations of *ibadah* in Aceh and South Kalimantan. The second stage is the identification or discernment of differences and similarities between regulations of *ibadah* under examination. The third stage is explaining the divergences and resemblances of regulations in both regions. For example, how the constitutive elements of law have interacted, shaped, and changed each other and why they differed in some aspects.

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[34]Peter de Cruz, *Comparative Law in a Changing World*, 2nd ed. (London: Cavendish, 1999), 6.

[35]W. J. Kamba, "Comparative Law: A Theoretical Framework," *International & Comparative Law Quarterly* 23, no. 03 (1974).

1.5.3 Discourse Analysis

Discourse analysis is an analytical strategy. It focuses on identifying and describing discourses as ways in which social phenomena are given meaning—a way to look for structures of meaning.[36] A discourse is a certain way of speaking about and understanding the world or an aspect of the world.[37] It encompasses written, spoken language, and visual images about a certain idea, theme or phenomenon.[38] Many different forms of text and talk could be selected for analysis.[39] It treats a wide range of linguistic and non-linguistic data, such as speeches, reports, manifestos, historical events, interviews, policies, ideas, even organisations and institutions, as "texts" or "writing".[40]

In this study, discourse analysis is employed to understand the multifaceted issues of *ibadah* (religious and social activities during the Friday prayer and the fasting month of Ramadhan) in Aceh and South Kalimantan. The analysis is on the regional regulations (*Qanun* and *Perda*) on *ibadah*, and the higher laws to which they refer and other non-state texts, the broader context of discourses nationwide on the issue of religious harmony and freedom, and the debates about the issue of religious and social activities during Ramadhan in the local media.

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[36]Rass Holdgaard, *External Relations Law of the European Community : Legal Reasoning and Legal Discourses* (Austin, Tex.: Wolters Kluwer ; Biggleswade : distributed by Turpin Distribution Services, 2008), 358; Niels Åkerstrøm Andersen, *Discursive Analytical Strategies: Understanding Foucault, Koselleck, Laclau, Luhmann* (Bristol: The Policy Press, 2003), ix-xii.

[37]Marianne Jørgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (London; Thousand Oaks, Calif.: Sage Publications, 2002), 1.

[38]Ibid., 61.

[39]Ibid., 2.

[40]David R. Howarth and Yannis Stavrakakis, "Introducing Discourse Theory and Political Analysis," in *Discourse Theory and Political Analysis : Identities, Hegemonies and Social Change*, ed. David R. Howarth, Aletta J. Norval, and Yannis Stavrakakis(Manchester: Manchester University Press, 2000), 4.

The source of the public discourses is the local newspapers during the month of Ramadhan based on the date of availability of online edition. The main sources of local discourse in Aceh are news articles during Ramadhan from 2006 to 2010 from the following local newspapers: *Serambi Indonesia, Rakyat Aceh,* and *Waspada*. In South Kalimantan, news articles are available from 2000 to 2010 from the following local newspapers: *Banjarmasin Post, Radar Banjarmasin,* and *Kalimantan Post.*

News articles can be used as a source for understanding different stances, voices and opinions that were reported or expressed on the issues being examined. In other words, the views and statements of various actors as reported or expressed in the newspaper articles can be used to do a thematic analysis and understand how relationships between different ideas and concepts ("signs") are being articulated by different competing discourses. However, the analysis of the articles here is not an attempt to interpret the discourse and biases (if any) of the specific newspapers.[41]

This research takes analytical tools from discourse theory of Fairclough, and Laclau and Mouffe. Their concepts are considered relevant for the purpose this research since their approaches can be used to study the transformation, as well as the reproduction, of discourses.[42] They shared a dualist view of text as production discursive practice: that in every discursive practice, it is necessary to draw on earlier

[41]Zeba Imam, ""Our Women": Construction of Hindu and Muslim Women's Identities by the Religious Nationalist Discourses in India" (Dissertation, Texas A&M University, 2009), 65.

[42]Jørgensen and Phillips, 140.

productions of meaning in order to be understood, but that some elements may also be put together in a new way, bringing about a change in the discursive structures.[43]

In discourse analysis, text analysis is seen as not only linguistic analysis; it also includes what Fairclough has called `interdiscursive analysis', that is, seeing texts in terms of the different discourses, genres and styles they draw upon and articulate together.[44] Interdiscursivity is part of "intertextuality." The concept of intertextuality sees texts historically as transforming the past—existing conventions and prior texts—into the present.[45] Texts or utterances are inherently intertextual, constituted by elements of other texts.[46] Intertextualityis how an individual text draws on elements and discourses of other texts. It is by combining elements from different discourses that concrete language use can change the individual discourses and thereby, also, the social and cultural world. Through analysis of intertextuality, one can investigate both the reproduction of discourses whereby no new elements are introduced anddiscursive change through new combinations of discourse.[47] The analysis investigates how discourses are reproduced and how they are changed. It also investigates how different discourses are articulated together in one particular text and whether the same discourses are articulated together across a series of texts or whether different discourses are combined in new articulations. It is done by looking at how specific texts draw on earlier meaning formations and how they mix

[43]Ibid., 139.

[44]Norman Fairclough, *Analysing Discourse : Textual Analysis for Social Research* (London ; New York: Routledge, 2003), 3.

[45]Norman Fairclough, *Discourse and Social Change* (Cambridge: Polity, 1992), 85.

[46]Ibid., 102.

[47]Jørgensen and Phillips, 7.

different discourses.[48] In the process different discourses are recontextualized and reconceptualized. A particularly pronounced form of intertextuality is "manifest intertextuality", whereby texts explicitly draw on other texts, and then select, change, and contextualize them.[49] Other type is "constitutive intertextuality", whereby texts are made up of heterogeneous elements: generic conventions, discourse types, register, and style.[50]

Legal texts are intertextual whether in the old texts or in the contemporary ones.[51] The analytical tools of intertextuality and interdiscursivity are relevant for the study of legal texts because a characterising feature of legal discourse is intertextual where legal texts connect to and draw on other previous legal texts. Bhatia pointed out that:

> Legal discourse, especially legislative provisions display a variety and depth of intertextual and interdiscursive links rarely noticed in any other discourse. Intertextual links in this professional genre seem to serve not simply the function of making textual and discoursal connections with preceding and preceded legislation, but they also seem to signal a variety of specific legal relationships between legislative provisions in the same document or in some other related document.[52]

A legal text is either explicitly referring to another or it may not refer to any specific or preceding legislation, but may have indirect implication because both of them may refer to similar case descriptions. Intertextuality may also be seen across genres when judgements use legislative provisions as authority as part of the argument.

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[48]Ibid., 139.

[49]Fairclough, *Discourse and Social Change*, 117; Jørgensen and Phillips, 75.

[50]Fairclough, *Discourse and Social Change*, 85.

[51]Marylin J. Raisch, "Codes and Hypertext: The Intertextuality of International and Comparative Law," *Syracuse J. Int'l L. & Com.* 35, (2008).

[52]Vijay K. Bhatia, "Intertextuality in Legal Discourse," *The Language Teacher* (1998). http://jalt-publications.org/old_tlt/files/98/nov/bhatia.html (accessed August 23, 2011).

Interdiscursivity, on the other hand, is rather subtle, and is seen where conventions associated with one genre are cleverly exploited in another genre. Narrative conventions, for instance, are often exploited within the early sections of judgements to describe facts of cases.[53]

Other concept can also be used to study the transformation, as well as the reproduction, of discourses, is the concept of 'articulation' in Laclau and Mouffe's discourse theory. An articulation is a combination of elements that gives them a new identity. Articulation, then, conceptualises change. But it conceptualizes reproduction as well. Every discursive practice is an articulation since no practice is an exact repetition of earlier structures. Every apparent reproduction involves an element of change, however minimal. Like Fairclough's concepts of intertextuality and interdiscursivity, 'articulation' encapsulates the point that discursive practice both draws on, and destabilises, earlier patterns.[54]

On the relation between articulation and discourse, Laclau and Mouffe's wrote:

> In the context of this discussion, we will call *articulation* any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice. The structured totality resulting from the articulatory practice, we will call *discourse*. The differential positions, insofar as they appear articulated within a discourse,we will call *moments*. By contrast, we will call *element* any difference that is not discursively articulated.[55]

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[53]Vijay K. Bhatia, Nicola M. Langton, and Jane Lung, "Legal Discourse: Opportunities and Threats for Corpus Linguistics," in *Discourse in the Professions: Perspectives from Corpus Linguistics*, ed. Ulla Connor and Thomas A. Upton(Amsterdam: J. Benjamins, 2004), 205.

[54]Jørgensen and Phillips, 140.

[55]Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd ed. (London; New York: Verso, 2001), 105.

A discourse is the fixation of meaning within a particular domain and around certain "nodal points".[56] A nodal point is a privileged sign around which the other signs are ordered; the other signs acquire their meaning from their relationship to the nodal point. In order to understand how several discourses co-exist and compete within the same domain, this study uses Laclau and Mouffe's notion of 'floating signifiers'—signs that different actors fill with different content and in which different discourses try to define. That a signifier is floating indicates that one discourse has not succeeded in fixing its meaning and other discourses are struggling to appropriate it.[57]

Discursive struggles about the ways of fixing the meaning of signifiers to particular signifying configurations is closely connected with the notion of hegemony. Hegemony is the "partial fixing of the relation between signifier and signified".[58] It emerges in the field articulatory practices, "that is a field where the 'elements' have not crystallized into 'moments'."[59] Hegemonisation subsequently consists in the imposition onto elements of a certain way of relating to each other. This also means that hegemonisation brings elements together that have not previously been brought together.[60]

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[56]Jørgensen and Phillips, 26; Laclau and Mouffe, 112.

[57]Laclau and Mouffe; Jørgensen and Phillips.

[58]Ernesto Laclau, "Discourse," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin, Philip Pettit, and Thomas Winfried Menko Pogge, Blackwell Companions to Philosophy 5 (Malden, MA; Oxford: Blackwell Pub., 2007), 545.

[59]Laclau and Mouffe, 134.

[60]Ibid., 134-145; Andersen, 56.

Following Jorgensens' suggestion, this study treats discourse to a greater extent as an analytical concept, that is, as an entity that the researcher projects onto the reality in order to create a framework for study. This means the research aims determined strategically the question of delimitation. Thus, the research aims determine the 'distance' the researcher assumes in relation to the material and hence to what can be treated as a single discourse.[61]

Using discourse theory for empirical analysis as described by Jørgensen and Phillips,[62] this study first, identifies nodal points of specific discourses. This is done by investigating what signs have a privileged status, and how they are defined in relation to the other signs in the discourse. Second, investigate how different discourses define the same signs (floating signifiers) in alternative ways. By examining the competing ascriptions of content to the floating signifiers, the analysis can begin to identify the struggles taking place over meaning. Third, the analysis gradually maps the partial structuring by the discourses of specific domains. It identifies what signs become the objects of struggle over meaning between competing discourses (floating signifiers), and what signs have relatively fixed and undisputed meanings (moments).

Based on the research questions, the study delimited the competing discourses on activities during Ramadhan into *fiqh*, religious harmony, and religious freedom. Analysis of hegemony focused on the ways elements of Shariah and state ideals have been brought together into particular signifying configurations.

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[61]Jørgensen and Phillips, 143.

[62]Ibid., 29-30; 49-51.

1.6 Limitations of the Study

This research is the study of Shariah that has been enacted by local governments in Indonesia. It is not the research of Islamic law or Shariah that has not been enacted which is found in the Quran, Sunnah by using *ushul fiqh*. In fact, it is a research of Shariah that has been enacted as positive law. However, Islamic law will be discussed as long as it is related to the areas regulated by the regional regulations, the subject of this study. The principle of religious freedom and harmony are limited to those constructed under Indonesia Constitution and laws.

CHAPTER TWO

THE LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 Transformation of Shariah into State Law

Numerous scholars have been studying the transformation of Shariah into state law in the Muslim modern nation-states. They identified the development of Islamic law, its forms, areas and contents. They also identified the last stronghold of the Shariah under the circumstances of Westernisation and Islamisation of state law.

Much of the study of the development of the law in Muslim countries, such as the Ottoman Empire, Modern Turkey, Egypt and Tunisia in 19th century, shows two steps towards modernisation of the law. The first step is importing or transplanting Western laws and institutions. The second step is reformulation of Shariah in Western forms of codes and statutes by modifying provisions of Islamic law through secular legislation or legislative interference. However, this secular trend did not take place in Islamic state of traditionalist orientation, such as Saudi Arabia and Yemen.[63] In the case of Indonesia, particularly the area of personal law in the first place is

[63]Joseph Schacht, "Islamic Law in Contemporary States," *The American Journal of Comparative Law* 8, no. 2 (1959): 134-136.

given state recognition as 'customary law' before its governmental enactment in the form of Western codes and statutes.[64]

Schacht identifies the Westernisation of the law as the first step of modernisation. It consisted of tidying up and, incidentally, extending the sphere of secular law by enacting codes derived from Western models and organizing tribunals capable of administering them. The other step was reforming Islamic law by modifying its provisions through secular legislation.[65] Thus, within the process of modernising the Muslim legal system two distinct approaches were followed: one concerned "Westernisation" and the idea of adopting Western laws. The other involved adapting Shariah to modern conditions.[66]

In analysing the Westernisation of the law in Muslim countries, Liebesny classifies the law into two fields: those fields which are most closely tied to religion and the fields where the hold of Islamic law was weakest.

> In most of the Moslem countries of the Near East the application of Islamic law is today limited to those fields which are most closely tied to religion: personal status and family relationships, such as marriage and divorce, rights and duties of parents and children, and matters of inheritance. Western law intruded first in fields where the hold of Islamic law was weakest, such as criminal law and commercial law, and then gradually spread to other fields.[67]

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[64]Lev, 96-97; M. B. Hooker, *Islamic Law in South-East Asia*, East Asian Social Science Monographs (Singapore; New York: Oxford University Press, 1984), 248.

[65]Schacht, "Islamic Law in Contemporary States," 134-136.

[66]Butti Sultan Butti Ali Al-Muhairi, "Islamisation and Modernisation within the Uae Penal Law: Shari'a in the Modern Era," *Arab Law Quarterly* 11, no. 1 (1996): 34-35.

[67]Herbert J. Liebesny, "Religious Law and Westernization in the Moslem near East," *American Journal of Comparative Law* 2, no. 4 (1953): 492.

Westernisation first took place especially in the fields where the hold of Islamic law was weakest, such as administration, commercial law, criminal law, and criminal procedure. Only one field of law remained completely outside this Westernisation and that was the field of personal status and family relationships, such as marriage and divorce, rights and duties of parents and children, and matters of inheritance.[68] Those fields are most closely tied to religion. However, legislators also attempted to put Islamic subject matter into the form of a European codification. Substantively, the legislator has endeavoured to follow the rules of Islamic law, but it took the form adopted from modern statutory enactments.[69]

While most modernizing Muslim states tended to adopt or adapt Western legal codes in creating modern states, since 1970s, the Islamic resurgences have witnessed the Islamisation of various domains of law, especially penal law, in countries such as Libya, Iran, Sudan, and Pakistan. This tendency too has been implemented by means of codification and statutory legislation.[70] The call for introduction of the Shariah in the public sphere, as the law of the land, in the 20th and 21st centuries challenged the presuppositions and expectations of modernization and development theory that was predicated on the belief that modernization required the progressive secularization and westernization of society.[71]

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[68]Ibid., 498.

[69]Ibid., 500.

[70]Aharon Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44, no. 1 (2004): 99.

[71]John L. Esposito, "Introduction: Modernizing Islam and Re-Islamization in Global Perspective," in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. John L. Esposito and François Burgat(New Brunswick, New Jersey: Rutgers University Press, 2003), 3-7.

The reformation and modernisation of Islamic law by formulating it into a centralized and codified Shariah law was instigated by those who were educated in the Civil law system to meet the needs of the modern Nation-State agenda. The transformation of Shariah into a codified state-sponsored set of positive commands is a serious break with tradition and a radical departure from the classical epistemology of Islamic law.[72] It has radically transformed the Shariah and its logic. The Shariah is no longer in its traditional locations: the books and traditions of *fiqh*, the custody of the scholars or *ulama*, the religious training in the *madrasah*, and the judicial procedure of the *qadi* court. Its place has shifted into the state manuals, the custody of bureaucrats and legislators, the modern law faculty, and modern court systems. Its logic and method (*ushulfiqh*) has been replaced by bureaucratic and political logic. Legislation and judgement are now subject to bureaucratic and political logic not to *ushulfiqh*. The judge rules in accordance with law codes, and not the books of *fiqh*. His responsibility is to the state and the law, not to God and his conscience.[73]

Layish explains that Western scholars are divided as to whether the governmental enactment of Shariah should be assessed in terms of development within or outside the Shariah. Some scholars claim that this development shows that the Shariah is able to internalise Western inspiration and to adapt itself to modern conditions. Others maintain that transformation of Shariah into state law reflects a process of radical break from the classical Shariah even its "secularisation" by the creation of an alternative of statutory version of the Shariah. According to Layish some scholars, such as Ann Mayer, maintain that non-Muslim scholars should be abstain from

[72]El Fadl, "Islam and the Challenge of Democratic Commitment," 63.

[73]Zubaida, 221.

evaluating the legitimacy of this transformation of Shariah into state law or deciding whether the developments are inside or outside the Shariah. Mayer leaves such determination exclusively for Muslims to make.[74]

There is no agreement among Muslims on the nature of Shariah as God's law when it is enacted as a positive law whether Shariah retains its nature as God's law. Proponents of the state enforcement of Shariah believe that Shariah retains its nature as God's law while being enacted by the government. According to them, as God's law the Shariah is superior to any man-made law. Its principles are immutable, fixed and well-established and cannot be amended by rulers at their pleasure. On the contrary, the opponents of the application of the Shariah argue that while rulers legislating the Shariah, human reasoning plays a great role in deriving concrete and detailed provisions from general principles of Shariah. The human reasoning is fallible and not immutable, therefore could be challenged.[75] The role played by human agency in interpreting Shariah while enacted as positive law, according to An-Na'im and El-Fadl, reduces the nature of Shariah as purely divine law.[76]

The most notable feature of the enacted Shariah is its material content which is derived from the Quran, Sunnah and *fiqh*. But it takes the forms of modern Western positive codes, statutes, governmental regulations and decrees. If we look at the content of the law, the Islamisation takes three ways. First is replacing the existing

[74]Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," 91-92.

[75]Rudolph Peters, "Divine Law or Man-Made Law?: Egypt and the Application of the Shari'a," *Arab Law Quarterly* 3, no. 3 (1988): 244-245.

[76]Abdullahi Ahmed An-Na'im, "Shari'a and Positive Legislation: Is an Islamic State Possible or Viable?," in *Yearbook of Islamic and Middle Eastern Law*, ed. Eugene Cotran and Chibli Mallat(The Hague: Kluwer Law International, 2000), 33-34.El Fadl, "Islam and the Challenge of Democratic Commitment," 64.

content of laws of Western origin, which is traditionally addressed by *fiqh*, with Shariah-based content. Second is the introduction or reintroduction of laws, which is traditionally covered by *fiqh* but not covered by the existing Westernised laws. Third is the introduction of Islamic law in areas covered by the current modern law by co-existing with the latter. In the second and third cases, Islamic law does not replace the Westernised ones.

In some Muslim countries such as Egypt, Sudan, Tunisia, and the UAE (*United Arab Emirates)*, the Islamisation programme is implemented by replacing Western laws with Islamic laws. It is done mainly by promulgating Shariah through governmental enactments. In practice, the Islamisation is not total replacement of the Western laws with Islamic law. It only transforms Shariah into a positive law by replacing the Western material contents with the contents mainly derived from Shariah but it retains the form of Western codes and statutes.[77] Therefore, in terms of the forms of law, the method of Islamisation of Western laws takes the same method of the second step of the modernisation of Islamic law. Both the modernisation and Islamisation programmes attempt to formulate Shariah into Western forms of codes and statutes. The result of both programmes is an enacted Shariah law with Shariah as its main contents but it takes the Western form of codes and statutes.

Layish identified that in the Middle East and North Africa almost all domains of Shariah have been under the intervention of statutory legislations and sanctions. Under these circumstances, the last stronghold of the Shariah is the domain of *ibadah*, but it seems that this domain too is gradually giving way to the intervention

[77]Al-Muhairi, "Islamisation and Modernisation within the Uae Penal Law: Shari'a in the Modern Era," 45.

of statutory legislation and sanctions. For instance, in several states, such as Saudi Arabia and Sudan, the *zakat*, the Shariah obligatory payment of alms tax which in the course of time became a voluntary charity, has been anchored in statute. In Jordan, the violation of the fast in the month of Ramadan is a statutory criminal offense, not a matter to individual conscience.[78]

In their report, the Netherlands Scientific Council stated that the Islamisation programme does not replace all areas of laws derived from the West. The report describes that there is considerable continuity of the content of the law in most Muslim countries. Family and inheritance law for Muslims was always based on Shariah and on customary law—and this has not changed. But in many other areas, despite formal Islamisation, existing laws have been maintained, including those laws derived in the past from the West or shaped on Western models. In areas such as, for, example, general and large private contract law, torts, labour law, property law, procedural law, partnership law, bankruptcy law, transportation law, intellectual property, electoral law, information law, general administrative law, public planning law, environmental law, education law, postal and telecommunication law, and sections of criminal law, the sharia has no, or scarcely any, substantive influence.[79]

Who calls for the enactment of Shariah as a positive law? According to Zubaida there are a wide range of groups and perspectives that call for application of Shariah:

> The quest for the shari'a is multifaceted: social protesters seek justice from corrupt regimes in its terms, clerics seek to restore their authority by

[78]Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," 108.

[79]Wetenschappelijke Raad voor het Regeringsbeleid (Netherlands), *Dynamism in Islamic Activism: Reference Points for Democratization and Human Rights* (Amsterdam: Amsterdam University Press, 2007), 115.

> imposing it, conservatives seek patriarchal virtues in its commandments, nationalists see it as a marker of authenticity and identity, and those same corrupt rulers seek legitimacy in adopting it. In practice it is an ideological project which has highly variable manifestations in the politics and the legal systems of different countries.[80]
>
> The shari'a and the call for its application in the modern world are moved by ideological and political logic and dynamic, based on a number of perspectives. One perspective is that of social conservatism: the quest for the restoration of patriarchal authority, of order and hierarchy and the moralization of public space and cultural activity. Another dominant and overlapping perspective is that of cultural nationalism and the quest for authenticity. Islam and the shari'a in this perspective are the markers of authentic national heritage for Muslims.[81]

In Indonesia, modernization of law like in other Muslim countries took two steps: (1) Westernisation and unification of law; and (2) the governmental enactment of Shariah. The second step was taken after the failure of the governmental attempts to unify and westernise all areas of law, particularly in the areas of law concerning marriage, divorce, and inheritance.

Since Independence, 1945, Indonesian national leaders had twin desires for national unity and "modernisation." They were concerned with the modernisation of Indonesia, "an idea which was variously interpreted, but which generally meant becoming economically and politically rather more like the states of Europe".[82] In the sphere of law, the priority of modernization is on legal and judicial unification by copying Western models of codes and institutions. The attempts towards judicial unification by abolishing the customary court were successful but failed to abolish

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[80]Zubaida, 6.

[81]Ibid., 222.

[82]Daniel S. Lev, "Judicial Unification in Post-Colonial Indonesia," *Indonesia* 16, (1973): 14.

Islamic court.[83] Legal unification and Westernisation of areas of law concerning marriage and divorce were unsuccessful.[84]

At national level, since Independence the government of Indonesia has enacted some areas of Shariah laws. They are Religious Court law with jurisdictions over marriage, inheritance rule, and *waqf* regulations, laws on administrations of *hajj*, *zakat*, and Islamic banking system.[85] However, all these legislations do not replace any existing law as *hajj* and *zakat* [86] are not covered by any law before and Islamic banking co-exists with the conventional banking (dual banking system).[87] In short, they are new additions to existing laws.

At the local level in the era of autonomy since 1999 there was a wide range of areas related to Shariah that have been enacted by local governments such as regulations on Islamic clothes, gambling, prostitution, alcoholic drinks, respecting Ramadhan, *zakat*, Quranic readings, and *khalwat* (close proximity).

Hooker argues that in process of reformulation of Shariah into positive law or Western forms of law, state holds the dominant position. The main characteristic of state dominance is *selection*: the practice of taking from classical (Arabic) legal thought which is held to be appropriate for a particular state at a given time. The

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[83]Ibid.

[84]R Subekti, *Law in Indonesia*, 3 ed. (Jakarta: Centre for Strategic and International Studies, 1982), 8.

[85]Salim and Azra, 5.

[86] On the relations between *zakat* and tax in Indonesia, see: Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, 133-139.

[87]Angelo M. Venardos, *Islamic Banking & Finance in South-East Asia: Its Developments & Future* (Hackensack, NJ: World Scientific, 2005), 177.

result of selection is a change in the character of Shariah. Hooker identified three sorts of changes. His example is from the pre-modern law texts of the Malay and Javanese world. First, the text took nothing from *fiqh*. Instead, it used the term from Shariah or *fiqh* to give legitimacy to the entire content of the law. Second, the laws incorporated clearly identifiable passages of *fiqh*, but just as clearly subordinated them to local regulations or the customs. Third, the texts recognised a conflict in principle between *fiqh* and local custom, and attempted not just to reconcile difference but actually to explain it away.[88]

Theories of modernisation and Islamisation of law in Muslim countries above help this study in understanding the position of Indonesia in the transformation Shariah into state law. They have explained the change and continuity of Shariah in terms of it forms, areas and contents as state law. However, they have mainly concentrated on the Shariah elements and failed to see other norms interacted with the former except Hooker. He did see the interaction of Shariah with other norms, particularly local customs.

2.2 Legal Pluralism

In the past, the term legal pluralism mainly denoted the coexistence of local, national and transnational legal systems. More recently, however, studies of legal pluralism have focused on the dialectic, mutually constitutive relations between state law and other normative orders rather than their separateness. It gives emphasis on processes, interactions, and change. It explores the way non-state normative orders constitute state law and the ways state law shapes other normative orders. It also examines how

[88]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*, 1-2.

state law both constitutes and is constituted by the normative orders of which it is composed.[89] This thesis takes a similar approach to the study of regional regulations on *ibadah* in Aceh and South Kalimantan. This thesis relies on the basic theoretical propositions of legal pluralism.

The term 'legal pluralism' has been defined and understood differently. Woodman identified six definitions of the concept. He writes:

> It has been defined as: "the existence within a particular society of different legal mechanisms applying to identical situations" (Vanderlinden 1971: 19, my translation); "the situation in which two or more laws interact" (Hooker 1975: 6); "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs" (Griffiths 1986: 2); "the situation, for an individual, in which legal mechanisms arising from different orderings are potentially applicable to that situation" (Vanderlinden 1993, my translation); "a situation in which two or more legal systems coexist in the same social field" (Merry 1988: 870); and "the condition in which a population observes more than one body of law" (Woodman n.d.).[90]

Based on many instances of legal pluralism, some scholars classified the term into two general categories of legal pluralism. They are "weak legal pluralism" and "strong legal pluralism." Griffiths also call the former as "juristic" view of legal pluralism. She defines it as a legal system in which the sovereign commands or validates or recognizes different bodies of law for different groups in the population. The state in general defines the groups concerned in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds. She also calls the latter as "social science" view of legal pluralism. The latter refers to the coexistence of legal orders which do not belong to a single system within a social setting. Not all law in this

[89]Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, (1988): 880-886.

[90]Gordon R. Woodman, "[Review of the Book *Legal Polycentricity: Consequences of Pluralism in Law*, Edited by Hanne Petersen and Henrik Zahle]," *Journal of Legal Pluralism* 39, (1997): 157.

state of affairs is state law nor administered by a single set of state legal institutions.[91] Woodman calls the first category as *state law pluralism* and the second as *deep legal pluralism*. The first refers to those instances in which there are two bodies of norms within the law of a state. The second consists of instances in which the elements are, respectively, the law of the state, and normative orders not directly associated with the state.[92]

Merry classifies the legal pluralism into two types: classic legal pluralism and new legal pluralism. The first refers to the analysis of the intersections of indigenous and European law within colonial and post-colonial societies. The second refers to the application of the concept of legal pluralism to non-colonized societies, particularly to the advanced industrial countries of Europe and the United States. According to the new legal pluralism, plural normative orders are found in virtually all societies. Unlike societies with colonial pasts, the dialectic between state and non-state normative orders in non-colonized societies is more complex and interactive. And the latter orders are relatively more difficult to see. The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field.[93] Merry added that the research under this new tradition of legal

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[91]John Griffiths, "What Is Legal Pluralism," *Journal of Legal Pluralism & Unofficial Law* 24, (1986): 5, 8.

[92]Gordon R. Woodman, "The Idea of Legal Pluralism," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger, and Laila Al-Zwaini(The Hague; Boston: Kluwer Law International, 1999), 5.

[93]Merry, "Legal Pluralism," 872-873.

pluralism "has increasingly emphasized the dialectic, mutually constitutive relation between state law and other normative orders".[94]

2.3 Perspectives on State Law

The major aspects of legal modernity are legal centralism, legal positivism, instrumentalism use of law for social engineering purposes, and nation-state paradigm.[95] The concept of *legal centralism* views that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions".[96] In this view, the state has a monopoly of the legal world: no normative order other than that of the state is truly law.[97]

This section will focus on the nature of state law within the tradition of legal pluralism as a response to the ideology of legal centralism. Commonly used terms for state law are law, lawyers' law, official law, and bourgeois legality.[98] However, it is so difficult to find a word for non-state law because it is clearly difficult to define and circumscribe these forms of ordering. There are various terms which social scientists, particularly anthropologists, use to call non-state law. They are custom, customary law, folk law, indigenous law, and indigenous ordering. According to

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[94]Ibid., 880.

[95]Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Aldershot: Ashgate, 2005), 12.

[96]Griffiths, "What Is Legal Pluralism," 3.

[97]Woodman, "The Idea of Legal Pluralism," 11.

[98]Merry, "Legal Pluralism," 875-879.

Merry, once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis.[99]

Earlier theorists such as Ehrlich and Bohannan see state law as secondary or derivative. For Ehrlich, "living law" is the basis of state law. Human beings are regulated by different kinds of rules: legal norm, rules of morals, of religion, of ethical custom, of honour, of decorum, of tact, of etiquette, of fashion. Ehrlich insists that legal institutions do not depend exclusively on legal norms. Other norms interact and influence legal sphere. For him, the very basis of state law was a prior "social law" or "living law" which was the "inner order of associations." Although the state is one of a plurality of associations, state law is subordinate to "living law." In the event of a conflict between the two, it would be ineffective.[100]

> Morality, religion, ethical custom, decorum, tact, even etiquette and fashion do not order the extra-legal relations only; they also affect the legal sphere at every turn. Not a single one of the jural associations could maintain its existence solely by means of legal norms; all of them, at all times, require the aid of extra-legal norms which increase or eke out their force.[101]

Bohannan, like Ehrlich, sees state law as secondary or derivative. He developed the idea of 'differing realms of law' to illuminate the relationship between customs and law. He is concerned with the institutionalization of norms into customs, and customs into law. A state law, according to Bohannan, results from a "double institutionalization of norms" in which some "customs", operative within "social institutions" are "reinstitutionalised at another level" as state law. Customs are norms

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[99]Ibid., 878.

[100]Peter Fitzpatrick, "Law and Societies," *Osgoode Hall LJ* 22, (1984): 116.

[101]Eugen Ehrlich, Roscoe Pound, and Klaus A. Ziegert, *Fundamental Principles of the Sociology of Law*, trans., Walter L. Moll, Law and Society Series (New Brunswick, N.J. ; London: Transaction Publishers, 2002), 55-56.

or rules about the ways in which people must behave if social institutions are to perform their functions and society is to endure.[102]

Following Bohannan *functionalist* views lawmaking as the restatement of some customs so that legal institutions can enforce them. This view proposes that failure in other institutional norms encourages the reinstitutionalisation of the norms by the legal institution. This perspective implies a consensual model of lawmaking is a society. From the functionalist perspective, laws are passed because they represent the voice of the people. Laws are essentially formed from custom, from the existing normative orders. Although there are conflicts in society, they are relatively marginal, and they do not involve basic values. In this view, conflict and competition between groups in a society actually serve to contribute to its cohesion and solidarity.[103] In Indonesia, the need for the exercise of state legal institution in order to transform cultural values into positive law was introduced by Ducth scholar Ter Haar and adopted by his student Hazairin. Hazairin's students, associates and admirers drew on and cited his writing on the matter to transform Shariah into state law.[104]

According to Fitzpatrick, both Ehrlich and Bohannan similarly attempts to integrate other legal orders into state law and see "living law" (Ehrlich) or "customs" (Bohannan) as basis of state law. They deny the originality of state law. There is

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[102]Paul Bohannan, "The Differing Realms of the Law," *American Anthropologist* 67, no. 6 (1965): 34-37; Fitzpatrick, "Law and Societies," 116.

[103]Steven Vago, *Law and Society*, 8th ed. ed. (Upper Saddle River, N.J. ; Great Britain: Pearson Prentice Hall, 2006).

[104]R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge, UK ; New York: Cambridge University Press, 2007), 110.

nothing in such a reconciliation that would accord state law any distinctness and identity, much less accord it the original efficacy that, on occasion, it manifestly has. As well, that element of the tradition that would treat all legal orders equally fails to account for conflict between orders, a conflict that may point towards some overarching status for state law .[105]

It is difficult to determine whether a particular state law is based on religion or other norms when various normative orders such as religion, state law, morality and social norms overlap in their content and aims. According to Allot, human behaviour is generally said to be governed by various normative orders, competing with one another for their subject's attention. Anthony Allot has distinguished four such competing normative orders: law; religion; morality; and, what he called mores or common practice. These four normative orders overlap in their content and aims. There is no way to separate normative statements on the basis of their *content*. There is too much overlap; the same norm may be imposed simultaneously by *Law*, religion, morality, and common practice. In terms of their aims, justice and enlargement of life possibilities as the aims of law could also be claimed by religion and morality, while its aim of order could be claimed by mores.[106]

The relationship between a legal system and religion in general or one religious system in particular can range all the way from: (i) fused; through (ii) Infused; (iii) Co-ordinate or equipollent; (iv) Subordinate; (v) Tolerated; (vi) Suppressed. To the Muslims Islamic *Law* cannot be separated from religion, the relationship is one of

[105]Fitzpatrick, "Law and Societies," 116-117.

[106]Anthony Allot, *The Limits of Law* (London: Butterworth, 1980), 135-6.

fusion. Religion, law and morality are all one. In a Muslim state, secular law that the ruler makes must be *infused,* that is inspired, by Islamic beliefs and principles, though they do not codify them. Where Muslims are in minority, Islamic law may be given recognition by the state and its status is *subordinate* legal system within the ruling legal systems of the state.[107]

In the context of global comparative jurisprudence, Menski applied his interactive, triangular concept of legal system in analyzing the laws in Asia and Africa. His study using this theoretical perspective not only finds three major types of laws created by society, by the state and through values and ethics that are plural, he also finds that each of these three elements in turn are plural. He finds that each of them contains elements of the other two. Menski claims that "law as a global phenomenon is only the same all over the world in that it is everywhere composed of the same basic constituents of ethical values, social norms and state-made rules, but appears in myriad culture-specific variations".[108] Law, according to Menski, its content has different sources. These sources are, in essence, the state, society and religion that compete and interact in various ways, so that any given body of rules may contain components of these three elements.[109] A globally-focused understanding of law is aware that:

- Law is a universal phenomena but manifests itself in many different ways;
- It does not only take different forms but has also different sources;

[107]Ibid., 140-142.

[108]Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), 610.

[109]Ibid., 60.

- These sources are, in essence, the state, society and religion that compete and interact in various ways, so that any given body of rules may contain components of these three elements.[110]

In the further level of intrinsic deep legal pluralism all three types of law are internally plural in nature. Menski's theory explains the intrinsically plural nature of each type of law including state-made law. According to Menski , state law could take the shape of rules, norms or inputs in negotiation with social norms, specific values and ethics. There are kinds of state law that have been influenced by the social realm. And there types of state-made law that are influenced by specific values and ethics.[111] In short, state-law could be influenced by or constitutes religious values, ethics, morality, and social norms.

According to von Benda-Beckmann,[112] the empirical research will answer whether or not different elements, such as folk law or state law, are clearly and distinctly discernible, whether, how and in which contexts of social practices they become interrelated or compounded in hybrid forms. Many legal forms may be combined (compounded, hybridised) in ad hoc processes of interpretation and decision or in newly institutionalised forms. Different participants and decision-makers may refer to the same law. But they often mobilize different legal repertoires against each other (folk law against state law, religious law against folk or state law etc.). They may also accumulate elements of different systems or compound them to create hybrid forms.

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[110]Ibid., 184-185.

[111]Ibid., 611.

[112]von Benda-Beckmann, "Who's Afraid of Legal Pluralism," 47-69.

2.4 Shariah and *Ibadah*

2.4.1 Shariah.

There is no agreement on a precise meaning of Shariah. For analytical purpose I will start from various meanings of Shariah. According to the medieval Muslim theory of jurisprudence, the sources of Shariah law are the Qur'an and the Sunnah of the Prophet, *ijma'* (consensus), and *qiyas* (analogical reasoning). Based on Aristotelian scheme, Rahman identifies the first two as the material principles or material sources of Islamic law. He calls the *ijma'* as the formal principle or the functional power and the *qiyas* as the efficient cause.[113] In line with Rahman, Hallaq classifies the Quran and Sunnah as the material sources from which the law may be derived. But he calls the *ijma'* and *qiyas* as the methods or the sources through which the law may be derived.[114]

Shariah and *fiqh* for some are interchangeable terms in the sense that the latter consists of legal aspects of the former but they can be distinguished in terms of their epistemology. According to Asad, the Quran and Sunnah collectively constitute the real, eternal Shariah of Islam. The command and prohibitions expressed in self-evident terms in the Qur'an and Sunnah are divine law that cannot be changed and revoked by human. However, the human scholarly understanding (*fiqh*) of the Quran and Sunnah and the conclusions taken by method of deduction or inferences from both sources are not divine and eternal law, therefore cannot claim to eternal

[113]Fazlur Rahman, *Islam*, 2d ed. (Chicago: University of Chicago Press, 1979), 68.

[114]Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh* (New York: Cambridge University Press, 1997), 1; Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, Themes in Islamic Law (Cambridge, UK ; New York: Cambridge University Press, 2005), 119.

validity.[115] El Fadl reminds that human understanding or interpretation of Quran and Sunnah can be treated as "a part of Shari'ah law only to the extent that any set of human legal opinions can be said to be a part of Shari'ah." However, although they are a part of Shariah, they cannot be claimed as God's law.[116]

Other term in relation to Shariah is *qanun* which was first innovated by the Ottoman Empire in the fifteenth century before the introduction of modern parliamentary legislation. The Ottoman qanun is a term of multiple significations. In its broadest sense it refers to imperial decree in the form of written state law on those areas not covered by Shariah. At the time, they consisted of areas of public interest and criminal law. However, it also refers to controversial areas of Shariah that have to be uniformed by the rulers to avoid diversity of practice or to prevent diversions in the community. The formal source of the Ottoman qanun is the sultan's will and it is expressed and implemented through imperial decrees. Therefore, in many respects it has a similarity to secular legislation.[117]

After the introduction of modern parliamentary legislation in Muslims countries and the governmental enactment of Shariah as positive law in the forms of codes and statutes, some scholars classify Shariah into un-enacted Shariah and enacted Shariah.

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[115]Muhammad Asad, *The Principles of State and Government in Islam*, New ed. (Kuala Lumpur: Islamic Book Trust, 1980), 12-14.

[116]El Fadl, "Islam and the Challenge of Democratic Commitment," 70.

[117]R. C. Repp, "Qanun and Shari'a in the Ottoman Context," in *Islamic Law: Social and Historical Contexts*, ed. Aziz Al-Azmeh(New York: Routledge, 1988), 124-125; *The encyclopaedia of Islam* New ed. (Leiden: Brill Academic Publishers, 1997), s.v. "Kanun. Iii. Financial and Public Administration."; Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," 88.

For example, Layish calls the former as the orthodox Shariah and the latter as the codified Shariah.[118] The enacted Shariah is also called the applied Islamic law.[119]

In terms of legal pluralism, the parts of Shariah which are incorporated in the legislation of state fall within the category of state law. Berger calls this type as a formal application of Shariah. On the other hand, the Shariah that is not associated with the state falls within the category of non-state law. It has not been recognised or promulgated as state law by legislator. If it is being applied by non-state groups, Berger calls this type as an informal application of Shariah.[120] Yilmaz calls the former as a Muslim official law and the latter as a Muslim unofficial law.[121]

2.4.2 *Ibadah*.

Jurists classify Shariah laws into two major branches: *ibadat* and mu'amalat.[122] The former regulates human relationship with God, whereas the latter regulates human-human relationship in matters of social and economic transactions.[123]

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[118]Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," 96.

[119]L Abu-Odeh, "Commentary on John Makdisi's Survey of Aals Law Schools Teaching Islamic Law," *Journal of Legal Education* 55, (2005): 589.

[120]Maurits S. Berger, "The Shari'a and Legal Pluralism: The Example of Syria," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger, and Laila Al-Zwaini(The Hague; Boston: Kluwer Law International, 1999), 113.

[121]Yilmaz.

[122]John Hick, *Philosophy of Religion*, ke-4 ed. (Englewood Cliffs, N.J.: Prentice Hall; London: Prentice-Hall International (UK), 1990), 54.

[123]John Hick, *Classical and Contemporary Readings in the Philosophy of Religion*, 3rd ed. ed. (Prentice Hall, 1990), 542; John Hick, *Disputed Questions in Theology and the Philosophy of Religion* (Basingstoke: Macmillan, 1993), 17.

In Arabic, the term "*ibadah*" is an infinitive (*masdar*) derived from the Arabic root "*abada*." Other infinitives are '*ubudah*, '*abdiyyah*, and '*ubudiyyah*. It means obedience, submission, and humility.[124] In his dictionary, *al-Qamus al-Muhith*, al-Fairuzabadi said ibadah means obedience (*ta'ah*).[125]According to al-Razi (d. 666/1280), *ibadah* literally means 'obedience (*ta'ah*) with complete submission (*khudu'*).[126] The Muslim lexicographer Ibn Manzur (d. 711/1325) said that "*ubudiyyah*" means submission (*khudu'*) and humility (*tazallul*).[127]

Ibadah means a general concept that includes everything approved by Allah. "The "*ibadah*" is a collective noun that includes everything that Allah loves and accepts from sayings and the physical acts; the hidden (acts by heart) and the openly (acts by limbs).[128] In short, all our activities are "*Ibadah*" if they are in accordance with the law of Allah and our ultimate objective is to seek the pleasure of Allah.

According to Ibn Taimiyyah, *din* and *ibadah* have similarity in meaning. *Din* means *ibadah*, *taah*, and *khudu'*. *Ibadah* too has original meaning of submission (*zall*). But

[124]John Hick, *Arguments for the Existence of God* (London: Macmillan, 1970), 48.

[125]John Hick, *An Interpretation of Religion : Human Responses to the Transcendent*, 2nd ed. ed. (Basingstoke: Palgrave Macmillan, 2004), 296.

[126]Muḥammad ibn Abī Bakr Rāzī and Ismā'īl ibn Ḥammād Jawharī, *Mukhtār Al-Ṣiḥāḥ* (Dimashq: Maktabat al-Nūrī, 1987), 172.

[127]John Hick, *The New Frontier of Religion and Science : Religious Experience, Neuroscience, and the Transcendent* (Basingstoke: Palgrave Macmillan, 2006), 270.

[128]John editor Hick, *Classical and Contemporary Readings in the Philosophy of Religion*, 2nd ed. ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1970), 19.

ibadah contains the meaning of submission (*zall)* and love (*hubb*), it is the ultimate submission and ultimate love to Allah.[129]

The submission in *Ibadah* is only to Allah. The purpose and function of ibadah is to remind human beings about the greatness of Allah and His power.[130] It is also to remind human beings about their spiritual dimension that has different needs from their physical dimension. To remind that there is a life after death. Ibadah such as prayer, fasting, pilgrimage, zakat have the purposes mentioned above.[131]

The term *ibadah* in Islam has two senses: broad and narrow. In a broad sense, it refers to the whole range of appropriate acts performed in obedience to the Shariah and with the intentions of pleasing Allah.[132] In a narrow sense, it refers to a set of major ritual and religious duties of Muslims addressed in Islamic jurisprudence (*figh*).[133] The essence of 'Ibadah is total submission to the pleasure of Allah. It has a wide and comprehensive meaning. All one's activities are *ibadah* if they are in accordance with the law of God and their ultimate objective is to seek the pleasure of God.[134]

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[129]Ibid., 24.

[130]John Hick, *God and the Universe of Faiths : Essays in the Philosophy of Religion* (Oxford: Oneworld, 1993), 56.

[131]John Hick, *Philosophy of Religion*, 3rd ed. ed. (Englewood Cliffs, N.J. ; London: Prentice-Hall, 1983), 183.

[132]Khalid Baig, *First Things First* (Kuala Lumpur: Islamic Book Trust, 2006), 96; William A. Graham, "Islam in the Mirror of Ritual," in *The Development of Islamic Ritual*, ed. Gerald R. Hawting, Formation of the Classical Islamic World (Burlington, VT: Ashgate, 2006), 357.

[133]Graham, 357.

[134]John Hick, *Truth and Dialogue : The Relationship between World Religions* (London: Sheldon Press, 1974), 67-68.

In a *fiqh* oriented definition (narrow sense), *ibadah* is translated as ritual and equated with five pillars of Islam.[135] *Fiqh* has a special section on *ibadah* which is called *fiqh al-ibadat*, a term often translated as "ritual law." The section contains the so-called five pillars of Islam, as well as rules for purification and other ritual and religious concerns.[136] The five pillars are the witness to faith (*syahadah*), prayer (*shalat*), charity (*zakat*), fasting (*sawm*) and pilgrimage (*hajj*). They are duties of individual that are separate from general ethics and rules for interpersonal relationships.[137] Aceh *qanuns* use this *fiqh* oriented definition of *ibadah*. In *Qanun* 11/2002, for example, *ibadah* means prayer and fasting.[138]

The jurists differentiated *ibadat* from *mu'amalat* (i.e. transactions, social and economic relations and dealings between people). According to them there are three major differences. First, unlike *mu'amalat,* rational meaning of *ibadat* is not perceptible to the human intellect. Second, Allah and His Messenger standardized and fixed rules and regulations of *ibadah* for worshippers to obey and practice and no room for creativity, whereas *mu'amalat* already existed before Islam and Allah and His Messenger sanctioned them.[139] In principle all things in *muamalat* are permitted, unless there is a clear prohibition from Allah and His Messenger. On the contrary, in principle all things in *ibadah* are prohibited, unless there is a clear

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[135]Abdul Ghoffir Muhaimin, *The Islamic Traditions of Cirebon : Ibadat and Adat among Javanese Muslims*, Islam in Southeast Asia Series. (Canberra: ANU E Press, 2006), 81.

[136]Paul R. Powers, "Interiors, Intentions, and the "Spirituality" of Islamic Ritual Practice," *Journal of the American Academy of Religion* 72, no. 2 (2004): 437.

[137]Andrew Rippin, *Muslims : Their Religious Beliefs and Practices*, 3rd ed., The Library of Religious Beliefs and Practices. (New York: Routledge, 2005).

[138]Aceh.*Qanun 11/2002 on Islamic faith (aqidah), prayers and fast (ibadah) and activities glorifying Islam (syiarIslam)*, art.1 (8).

[139]Hick, *Philosophy of Religion*, 54-55.

direction.[140] Third, the jurists agreed the intention (*niat*) as a condition for the validity a pure act of worship (*ibadah mahdah*), but it is not required for validity of *muamalat*, however if Muslims do the latter with the intention to seek the pleasure of Allah they will be rewarded.[141]

2.5 Legal Pluralism and Shariah in Indonesia

There are five theories about the legal pluralism in Indonesia, particularly concerning the existence of Islamic Law. They are *receptie in complexu, receptie, receptie exit, receptie a contrario* and existence theory. The first two were constructed during Dutch colonial era, the rest were developed after Indonesia's independence as resistance to colonial legacy and its influence in national legal policies.[142]

Dutch legal policy during colonial era in Indonesia was pluralism. It did not provide one law for all population groups except criminal law. The same criminal code, promulgated in 1914, applied to all distinct population groups: Europeans, Indonesians, Chinese, and other 'foreign Orientals,' mostly Arabs. But they were subject to two different procedural codes and two separate secular judicial structures, one for Indonesians and one for Europeans. In the criminal law Chinese and Arabs were considered to be assimilated to Indonesians, in the commercial law to Europeans and in the rest of the civil law partly to Europeans but with important family law exceptions. In civil matters Indonesians observed the *adat* (customary)

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[140]Hick, *Classical and Contemporary Readings in the Philosophy of Religion*, 542-556.

[141]Hick, *Philosophy of Religion*, 55.

[142]John Hick and Edmund S. Meltzer, *Three Faiths _ One God* (Macmillan, 1989), 81-85.

law. Europeans observed civil and commercial codes imported from Holland in 1848.[143]

Towards Islamic law, Dutch colonial regimes adopted two antagonistic legal doctrines: *receptive* (reception) *in complexu* and *theorie receptie* (reception theory).[144] Lodewijk Willem Christiaan Van den Berg (1845-1927), expert in Islamic and customary law, put up the first theory. The theory states law applies to people according their religions. If they are Muslims, Islamic law is law applies to them even thought there are deviations in practice. According to Van den Berg, Muslims in Indonesia had fully received Islamic law and its tenets mixed with customary (*adat*) law.[145] In other words, *adat* law is basically Islamic law.

Christiaan Snouck Hurgronje (1857–1936), Dutch scholar of Oriental cultures and languages and Advisor on Native Affairs to the Dutch colonial government in Indonesia, challenged and modified Van den Berg's theory to "reception theory".[146] It states "that Islamic law is valid anywhere in Indonesia only to the extent that it has been received by *adat* law and thus has become *adat* law".[147] Hooker described this policy as follows:

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[143]Daniel Fitzpatrick, "Disputes and Pluralism in Modern Indonesian Land Law," *Yale Journal of International Law* 22, no. 1 (1997): 174; Sudargo Gautama and Robert N. Hornick, *An Introduction to Indonesian Law--Unity in Diversity*, 4 ed. (Bandung: Penerbit Alumni, 1983); Daniel S. Lev, "The Lady and the Banyan Tree: Civil-Law Change in Indonesia," *The American Journal of Comparative Law*, (1965): 282-3.

[144]Hick and Meltzer, 82.

[145]John Hick, *An Interpretation of Religion : Human Responses to the Transcendent* (Basingstoke: Macmillan, 1989), 72.

[146]Ibid.

[147]Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, 196-197.

> This policy can be summed up in one word: subordination, the subordination of Islamic legal elements to local cultural features as the latter were expressed in *adat,* customary law. Islam was allowed legal effect only to the extent permitted by the *adat.* This, the so-called 'reception theory',' was a constant feature of colonial legal policy and, to the extent that it represents a preference for secular as opposed to religious justice, it remains State policy in the Republic of Indonesia.'[148]

In independent Indonesia, the political and bureaucratic elites still maintained this doctrine as national legal policy towards Islamic law.[149] This policy ended in 1974 when the new marriage law gave formal recognition of Islamic rules of marriage.[150] Hazairin (1906-1975), Professor of *Adat* and Islamic Law, argues that that after Indonesian independence the receptiontheory should *exit* from the Indonesian legal system and will never again come into effect, because they contravened the spirit of the 1945 Constitution and contradicted to the Qur'an and Sunnah. His theory is called a "*receptie exit*".[151]

Based on Hazairin's theory, Sajuti Thalib developed what he named *receptio a contrario* theory. On the contrary to *receptie* theory, it says that the valid law for people is their own religious laws; *adat* or customary law is valid as long as it is not in conflict with religious law. For Muslims, the state should apply Islamic law. The state may apply customary law for Muslims as long as it does not contradict Islamic principles.[152]

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[148]Hooker, *Islamic Law in South-East Asia*, 248.

[149]Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, 196.

[150]Mark Cammack, "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?," *Indonesia* 63, (1997): 152.

[151]Hendropuspito, *Sosiologi Agama* (Yogyakarta: Kanisius, 1993), 116.

[152]Sajuti Thalib, *Receptio a Contrario : Hubungan Hukum Adat Dengan Hukum Islam* (Jakarta: Bina Aksara, 1985), 58-63.

Different from above theories which tend to be prescriptive, Ichtijanto put up more descriptive theory of the position of Islamic law in Indonesia. He calls his theory "existence theory". He explains various meanings of "existence" of Islamic law in the Indonesian legal system as follows:

1. Islamic law exists as an integral part of national law;
2. Islamic law exists, by its autonomy and prestige, as a national law because it is recognized by national law;
3. Islamic law exists as legal norms which filter the substances of national law;
4. Islamic law exists as the main ingredient and the main source of national law.[153]

All above theories, except Ichtijanto's existence theory, cannot be said of as purely descriptive theories of law because they mixed what law *is* with what it *ought to be*. This happened, according to Griffiths (1986: 3), because they built the theories within the conceptions of legal centralism as an ideology or political and legal philosophy of the nation state. As consequence they attempted "to build an empirical theory of law directed not toward a phenomenon conceived of in general terms but rather toward one defined directly or indirectly in terms of the hegemonic claim of the modern state".[154] By explaining the various positions of Islamic law in Indonesia, Ichtijanto's existence theory describes how it is treated but not how it ought to be treated by the state.

In facing legal pluralism the New Order adopted a "selective unification" approach policy. It means the state selected which areas that can be uniformed and which areas

[153]S. A. Ichtijanto, *Hukum Islam Dan Hukum Nasional*, Cet. 1. ed. (Jakarta: Ind-Hill, 1990), 86-87.

[154]Griffiths, "What Is Legal Pluralism," 3.

should be left plural.[155] The 1973 GBHN (*Garis-garis Besar Haluan Negara* or a set of guidelines for state policy) put it as the unification of law "in certain sectors".[156].

The idea of adopting the model was contributed by R. Subekti (Chairman of *Supreme Court*from 1968-1974) and Mochtar Kusumaatmadja (*Minister* of Justice from 1974-1978). During their period, the New Order government adopted the model.[157] Subekti in his 1967's paper identifies that the areas that need not be regulated under legal uniformity are those are "so mingled with the different religious beliefs" and "closely related to the personal feelings". He explains why the state failed to uniform the law in certain sectors:

> The attempts towards unification of laws, particularly laws concerning marriage and divorce, are still unsuccessful, because these areas of laws are so mingled with the different religious beliefs of the several groups of population in Indonesia.[158]
>
> The diversity of law concerning marriage and inheritance will still continue. There is no need felt in these sections of law for a uniform regulation....They are closely related to the personal feelings of man and are not apt to copy Western models. On the other hand, the sections of laws which are closely related to the efforts of man to meet his material needs are rather receptive for a modernization on Western basis. The desire of effectiveness and legal certainty forms here an important consideration.[159]

In 1973 the government attempted to unify one of those sectors, namely marriage and divorce, previously a matter regulated by the Department of Religion through

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[155]Ratno Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia*, 1st ed., Indonesian Islamic Studies Series (Ciputat, Jakarta: Logos, 2001), 89-90.

[156]Donald K. Emmerson, "The Bureaucracy in Political Context: Weakness in Strength," in *Political Power and Communications in Indonesia*, ed. Karl D. Jackson and Lucian W. Pye(Berkeley: University of California Press, 1978), 97-98.

[157] Cf.Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia*.

[158]Subekti, 8.

[159]Ibid., 15-16.

religious courts applying Islamc law. The attempt failed because of strong resistance from Muslims.[160]

Mochtar Kusumaatmadja in his 1973's paper "The Role of Law in Development: The Need for Reform of Legal Education in Developing Countries," proposed that in selecting the areas that could be unified, the distinction should be made between the areas of law in which innovations could be made and those areas in which they could not. The areas of law which are most intimately related to the cultural and spiritual life of the people should be left undisturbed by not unifying them. However the neutral areas which are closely related to the social intercourse of modern imperatives could be regulated under uniform law.[161] In the "Third National Law Seminar" held in 1974 in Surabaya—when Mochtar Kusumaatmadja was a minister of justice—one of the points of the resolution of the seminar states that the priority of legal unification and law-making was in the areas of laws that are universal and neutral, namely the sections of laws related to public and social interests, and the areas of laws directly supporting economic progress and national development. Meanwhile, the matters of law which are closely related to private, spiritual and cultural life should be treated carefully and not as the priority for the unification and law-making.[162]

In the study of Islamic law of Muslim countries, the classification had emerged since 1950s. Regarding the modernization of law in Muslim coutries, Liebesny, for

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[160]Emmerson, 97-98.

[161]Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia*, 81.

[162]J. C. T. Simorangkir, *Serba Serbi LPHN/BPHN*, Cet. 1. ed. (Bandung: Binacipta, 1980), 285.

example, classifies the Islamic law into two fields: those fields which are most closely tied to religion and the fields where the hold of Islamic law was weakest.

> In most of the Moslem countries of the Near East the application of Islamic law is today limited to those fields which are most closely tied to religion: personal status and family relationships, such as marriage and divorce, rights and duties of parents and children, and matters of inheritance. Western law intruded first in fields where the hold of Islamic law was weakest, such as criminal law and commercial law, and then gradually spread to other fields.[163]

In 1993 the legal policy of selective approach officially changed into the principle of "legal distinction" when the People's Consultative Assembly (MPR) ratified the GBHN of 1993. The difference is if the former aims at more unification, the latter on the other hand aims at more diversity of laws, particularly in the area of private law. Munawir Sjadzali, the New Order minister of religion from 1983 to 1993, was among the state officials who proposed the principle of 'legal distinction' to override the old policy. The principle means that "there should be certain specific laws for particular groups of citizens."[164] The GBHN of 1993 stated in developing Indonesia legal system all processes of lawmaking should consider the "plurality of the legal awareness of the citizens".[165] In practice, both principles had something in common. They did not tolerate a plurality in criminal law. However, in 2006 the post New Order government approved the introduction of Islamic criminal law for Muslims in Aceh and its partial application to non-Muslims. This latest policy ended the unification of criminal law within Indonesian legal system.

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[163]Liebesny, "Religious Law and Westernization in the Moslem near East," 492.

[164]Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, 75.

[165]Ibid.

While drafting the national policy, particularly the Bill of the Governance of Aceh in 2006, the government representative, State Secretary Yusril Ihza Mahendra stated the national policy on public law up to the moment was still all people were subject to one criminal law. The politics of Indonesian legal system, particularly public law, was unification. For example, Indonesia still enforced the Penal Code to all the people. There was no legal choice in criminal law. However, there was a legal choice in private law. In the matter of inheritance, Muslims in West Sumatra, for example, could choose either the general state court *(pengadilan negeri)* following adat law or the religious state court *(pengadilan agama)* following Shariah law.[166]

When the parliament and government legislated the national policy for transformation of Shariah into state law and its application in the Aceh province, they faced with the problems of what Griffith called "weak" legal pluralism. According to her:

> Technically, when the state turns the 'customs' of various sub-groups of the population into 'law' that in specified circumstances is allowed to supplant the uniform general law, it finds it necessary to formulate rules which determine: (1) to which sub-group's law applies including definition of group membership, how a person can change the law applicable to him, e.g. by voluntary subjection, renunciation, marriage or conversion, and choice of law rules for relationships involving parties belonging to different groups; (2) on which subjects the state will accept regulation according to sub-group norms and on which subjects should be uniform; (3) recognition of indigenous tribunals and their relations to state courts or other authorities; (4) acceptability of customary rules; (5) provision for adaptive and reformative change in the body of customary law.[167]

[166]Dewan Perwakilan Rakyat Republik Indonesia (DPR RI). *Buku III: Risalah Proses Pembahasan RUU Tentang Pemerintahan Aceh (Raker)* (Jakarta: Sekretariat Jenderal, Dewan Perwakilan Rakyat, Republik Indonesia, 2006).

[167]Griffiths, "What Is Legal Pluralism," 7.

The same problem takes place in Indonesia, when the state will turn Shariah into the state law there are no clear rules and consensus for the implementation of Shariah.[168] Among internal Muslims there are no clear conception for determining: (1) which areas of Shariah that require the involvement of the state and those do not require the state to enfoce it; (2) which interpretation, *madhab*, and understanding should be adopted; (3) which subject-matters apply only to Muslims and subjects apply to every person regardless of religion (Muslims and non-Muslims); (4) into what kinds of state laws Shariah should be transformed (e.g. civil law, criminal law, administrative law, public law). Other problems are the acceptability by non-Muslims if Shariah applies to them too and the conformity of Shariah with the constitutional and human rights.

Hazairin, the jurist *professor* at the University of Indonesia *Law* Faculty, for example, attempts to formulate the rules by classifying the teachings of Islam into three categories. The first is Shariah which contains worldly matters, such as marriage, inheritance, *zakat*, and crime. These areas of Shariah require the involvement of the state to enforce them. Second, areas of Shariah related to human personal relationship to Allah, such as praying and fasting, that are private obligation toward God. These second category does not require the state involvement. The other category is parts of Shariah which guide spiritual and ethics of life that do not need the help from the state to do it.[169]

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[168]Hosen, "Religion and the Indonesian Constitution."; Lindsey; Arskal Salim, "Shari'a in Indonesia's Current Transition: An Update," in *Shari'a and Politics in Modern Indonesia*, ed. Arskal Salim and Azyumardi Azra(Singapore: Insitute of Southeast Asian Studies, 2003).

[169]Hazairin, *Demokrasi Pancasila*, Cet. 3. ed. (Jakarta: Bina Askara, 1981), 75.

According to Yusril Ihza Mahendra (Minister of Justice and Human Rights from 2001-2004), the state may issue rules and regulations to facilitate Muslims to observe them, particularly in the aspects of administrative law provided the state does not intervene in the internal doctrines relating to *ibadah*. For example, the state may issue law regulating the administration of *zakat* and *hajj*. The administrative facilitation is seen as a part of the function of the state in public services and is in line with the philosophy of the state that refuses the principle of "separation of religion and the state".[170]

Areas of Shariah related to private law such as marriage and inheritance can be enacted as a positive law and applies only to Muslims and non-Muslims who are voluntarily subject to the law. The matters of marriage and inheritance are among the sensitive areas of law that are closely related to religion and customs. The legal plurality in this area should be respected, they should not be uniformed. The legal plurality of this area is in conformity with the commitment of the state to principle of *Bhinneka Tunggal Ika* (Unity in Diversity). Other areas that can be enacted as private law are *waqf*, banking, and insurance. Areas of Shariah related to criminal law and other public laws, such as *hudud* and *ta'zir* are rather "crucial." There are considerable debates whether these areas should be literally enacted and applied, or be changed to the degree it is acceptable by contemporary society.[171]

Salim and Azra identified the characteristics of Shariah that has been implemented at national level in Indonesia. They are private and optional, procedural and

[170]Yusril Ihza Mahendra, "Hukum Islam Dan Pengaruhnya Terhadap Hukum Nasional Indonesia," in *yusril.ihzamahendra.com* (2007).

[171]Ibid.

administrative. The first characteristic is private in the sense that the enacted Shariah is merely limited to those elements that are viewed as private Islamic law. They are the marriage law, inheritance rule, *waqf* regulations, Religious Court law, and Islamic banking system. Second is optional. None of the articles of the enacted Shariah obliges Muslim citizens to perform their religious duties or threaten penalties for those who completely neglect the performance of Islamic duties and no state apparatus should be involved in imposing on Muslim citizens to perform their religious duties. Third is procedural and administrative in the sense that the Shariah laws have been enacted in order to facilitate the efficient performance of religious duties for Muslim citizens such as the laws on *hajj* services, *zakat* management, and Islamic banking. However, this is not the case of the governmental enactment of Shariah at local level. It is observable that in the era of decentralization in which the central government confers the local authorities the law-making power, some sort of Shariah rules with particular punishments are implemented.[172]

The government policy that required private areas closely related to religion could be plural does not change. However, the central government approval in 2006 of the introduction of Islamic criminal law for Muslims in Aceh and its partial application to non-Muslims ended the unification of criminal law within Indonesian legal system.

2.6 Religious Freedom in Islam

There are three issues of religious freedom in Islam, particularly related to coercion in matters of faith. They are: (1) freedom from coercion to convert to Islam; (2)

[172]Salim and Azra, 11-12; Salim, "Shari'a in Indonesia's Current Transition: An Update," 229.

freedom from coercion to act in accordance with religious dictates; and (3) freedom to change religion. The Qur'an explicitly states that there is no compulsion in religion:

> There shall be no coercion in matters of faith. Distinct has now become the right way from [the way of] error: hence. he who rejects the powers of evil and believes in God has indeed taken old of a support most unfailing, which shall never give way: for God is all-hearing, all-knowing (Q.S. Al-Baqarah 2: 256)

Early Muslim scholars of *Tafsir* had conflicting interpretations of this verse. Some of them believed that this verse prohibit forcing non Muslims, particularly "People of the Book" to profess Islam. Others believed that this verse was abrogated by the verses commanding Muslims to engage in fighting (*qital*). According to the latter, all people of all religious traditions should be invited to profess Islam; if they refused to do so or to pay tax, they were to be fought against until they were killed.[173]

Above traditional interpretation of voluntariness or non-coercion is limited to pre-condition of non-Muslims' conversion to Islam. If persons have professed Islam should they be coerced into following Islamic law? On this issue there are different views. First, traditional scholars believed that if persons have professed Islam it means they accept the truth of Islam, by necessary implication, also entails acceptance of the rightness of its rules. They argued that the act of accepting the truth of Islam and its rules must be followed by fulfilling its rites, obligations, and laws. Muslims' failure to obey those rules is inconsistent with their conviction and moral

[173]M. Atho Mudzhar and Khoiruddin Nasution, *Hukum Keluarga Di Dunia Islam Modern : Studi Perbandingan Dan Keberanjakan Uu Modern Dari Kitab-Kitab Fikih* (Ciputat, Jakarta: Ciputat Press, 2003), 73.

integrity. Therefore, coercive application of Islamic law and punishment for disobedience is rightful.[174]

In the context modern nation-states, contemporary Muslim scholars attempt to evaluate the application of Islamic law by the state from the perspective of religious freedom. They see voluntariness or non-coercion as a core value of religious freedom. Their main question is whether the application of Shariah would necessarily be coercing individuals into acting in accordance with religious dictates?[175] In general, there are two different views on this issue. However, they shared the starting point that the principle of sincere intention to serve and obey Allah in all acts in Islam should be reinterpreted in the light of the principle of non-coercion in secular view of religious freedom.

The first position adopts the classical formulations about separate jurisdictions of Islamic laws and determines in which area voluntariness or non-coercion applies. Sachedina, for example, claims that Shari'a provides the paradigm of limiting state interference in a certain area of laws. The separation of the jurisdictions in Islamic law can respond to the needs of the modern nation-state, where the state must adopt non-interventionist policies in the matter of the religious convictions of its citizens, but guarantee civic equality on the basis of human-human relationships, as required by the Shariah.[176]

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[174]M. Fadel, "Islamic Politics and Secular Politics: Can They Co-Exist?," *Journal of Law and Religion* 25, no. 1 (2009): 111.

[175]Ibid.

[176]Abdulaziz Abdulhussein Sachedina, *The Role of Islam in the Public Square : Guidance or Governance?* (Amsterdam: Amsterdam University Press ; Leiden : ISIM, 2006), 21.

Islam, according to him, separates two areas of jurisdictions in all its laws: laws that regulate God-human relationships and that of human-human relationships. The firs law covers the *ibadat,* that is, all those actions that are done clearly with the intention of pleasing God. Human institutions, including the courts, mosque and the seminary may not interfere with this area. All those laws that regulate God-human relationships are beyond any adjudication by human courts. There are no penalties for missing the obligations that one performs as part of his/her relationship to God. Only God reserves the right to demand an explanation for such a breach between individual believer and God.[177]

The second major area of the Shariah is known as *Mu'amalat,* that is, social transactions that must be conducted between individuals and groups, including the state, in keeping with the demands of justice in all areas of human existence. It deals with interpersonal social transactions. All laws regulating human relationships are covered under this section. In this area, human courts have the jurisdiction to enforce its decisions and to demand obedience. This separation of jurisdictions is the closest the Shari'a can come to the secularism adopted in Western constitutions.[178]

Slightly different from Sachedina, Fethullah Gülen[179] classifies actions in Islamic laws in the light of "harm principle". According to him, in Islam actions are not considered religiously acceptable or valid unless they are done with the appropriate

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[177]Ibid., 20-21; M. Atho Mudzhar, *Pendekatan Studi Islam Dalam Teori Dan Praktek*, Cet. 1. ed., Seri Studi Agama (Yogyakarta: Pustaka Pelajar, 1998), 77-78; Abdulaziz Abdulhussein Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford: Oxford University Press, 2001), 96.

[178]Sachedina, *The Role of Islam in the Public Square : Guidance or Governance?*, 20-21.

[179]John Hick, *Dialogues in the Philosophy of Religion* (Basingstoke: Palgrave Macmillan, 2010).

intention. Compulsion contradicts the religious-legal principle that actions are to be judged only by intentions. Islam does not allow Muslims to be coerced into fulfilling its rites and obligations, or non-Muslims to be forced into accepting Islam.[180] However, if the actions are harmful to society's general order and stability, and informal private efforts to correct matters right have failed or are of no use, formal public measures, including force, must be applied. Therefore, Islam also applies Muslim-specific deterrent sanctions to maintain its social order and ethos. For example, Islam forbids the consumption of intoxicants, gambling, adultery, fornication, fraud, theft, and other harmful practices. It considers them both sins and crimes subject to punishment. If these vices are allowed to take root and spread, society has failed to fulfill its duty to the law and moral ethos of Islam. Collective action must be taken to prevent or undo widespread corruption within the social body.[181]

Different from above views, An-Na'im goes beyond classical separation between *ibadat* and *muamalat*. He argues that voluntariness or non-coercion according to personal pious intention (*niyah*) is required in all religious obligations. It is a pre-condition for the validity of religious acts. Coercive enforcement of those obligations will invalidate them and promote hypocrisy (*nifaq*). If the state applies Shariah, for example, Muslims will comply with Shariah because of fear of punishment by the

[180]Ibid., 27.

[181]Ibid., 30-31.

state institutions or to appease their officials, but not with the intention of pleasing God. Therefore, he is against the application of Shariah by the state.[182]

Concerning the issue of freedom to change religion, the majority of Muslim jurists in the pre-modern period argue that there is no coercion to convert to Islam. However, once a person becomes a Muslim, it is not permissible to change religion. To turn back from Islam is to commit the "crime" of apostasy and a person so doing should be put to death.[183] In the modern period, the vast majority of Muslim scholars follow the pre-modern position. For them, no Muslim is allowed to convert to another religion. Others still follow the pre-modern positions with restrictions, particularly on the justification of the kinds of punishments based on the levels of danger the apostasy brought to Islamic state and community. Mostly secular Muslims and leaders of Islamist movements challenge the pre-modern position in order to harmonise this issue with a modern human rights stance on the freedom of religion. For them Muslims have total freedom to change religion.[184]

2.7 Religious Freedom and Harmony as State Ideals

Constitutional documents as a specific genre of texts are closely related to politics and ethics. Therefore, they are permeated by ideas, ideals, and ideology.[185] Ideas can be described as knots of significations that ''framers,'' courts, and commentators have spun. These knots come under the guise of constitutional archetypes, patterns,

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[182]Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, Mass.: Harvard University Press, 2008), 4.

[183]Mudzhar and Nasution, 36.

[184]Ibid., 88-98.

[185]Günter Frankenberg, "Comparing Constitutions: Ideas, Ideals, and Ideology—toward a Layered Narrative," *International Journal of Constitutional Law* 4, no. 3 (2006): 440.

structures, basic outlines, plans of action, or conceptions.[186] Ideals signify collective goals to be pursued based on philosophical ideas. As programmatic, utopian, or speculative visions, they are believed to be enshrined in a constitutional document. They are constitutive elements of an ideology. Ideology is "a set of beliefs, values, principles, attitudes, and/or ideals."[187] As a system of ideas or a way of thinking, ideology forms the basis for some political, economic, or constitutional theory that justifies actions and may be maintained irrespective of events and costs.[188]A political ideology competes over providing and controlling plans for public policy and does so with the aim of justifying, contesting or changing the social and political arrangements and processes of a political community.[189]

I define "state ideals" as principles that are promoted and pursued by the state.[190] In the religious affairs, Indonesia promotes religious harmony and freedom. Both ideals are interpreted from the first principle, belief in One God, of the state ideology and article 29 on religion of the Indonesia's Constitution.[191] They are ideological commitment of the Indonesian state in the religious matters.

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[186]Ibid.

[187]John Gerring, "Ideology: A Definitional Analysis," *Political Research Quarterly* 50, no. 4 (1997): 966-967.

[188]Frankenberg, "Comparing Constitutions: Ideas, Ideals, and Ideology—toward a Layered Narrative," 441.

[189]Michael Freeden, *Ideology: A Very Short Introduction* (Oxford: Oxford University Press, 2003), 32.

[190] For review on whether the state can promote certain ideals, particularly moral ideals, see: Stephen A. Gardbaum, "Why the Liberal State Can Promote Moral Ideals after All," *Harvard Law Review* 104, no. 6 (1991).

[191]Hyung-Jum Kim, "The Changing Interpretation of Religious Freedom in Indonesia," *Journal of Southeast Asian Studies* 29, no. 2 (1998); Eka Darmaputera, *Pancasila and the Search for Identity and Modernity in Indonesian Society : A Cultural and Ethical Analysis* (Leiden ; New York: E.J. Brill, 1988), 181.

2.7.1 Religious Harmony as State Ideal.

"Harmony" (*kerukunan*) is a traditional indigenous value transformed into modern Indonesia state ideology of Pancasila with emphasis on an absence of conflict as culturally neutral guidelines for behaviour in a plural society of Indonesia.[192] Both government policy and internal strategy of religious communities are tending to religious harmony as a stabilizing factor to prevent tensions between the communities. In some cases of inter-religious relations, this harmony is interpreted pragmatically as "the absence and prevention of conflicts rather than mutual understanding or true cooperation".[193] Other words used for the nationalist idioms of harmony are the "unity and integrity" *(persatuan dan kesatuan),* to "love peace" *(cinta damai).*[194]

The origin of the idea of religious harmony as political ideology in the modern Indonesia is inSukarno's speech during the meeting of BPUPKI (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, Investigating Committee for Preparatory Work for Indonesian Independence). In his speech of June 1, 1945 Sukarno presented what he called "*Pancasila*", the 'five principles': nationalism, international humanism, popular sovereignty, social justice and the belief in God.[195] Concerning the issue of religion, Sukarno's did not give a special status or position to any

[192]Donald E. Weatherbee, "Traditional Values in Modernizing Ideologies: An Indonesian Example," *The Journal of Developing Areas* 1, no. 1 (1966): 47-48; Donald E. Weatherbee, "Indonesia in 1984: Pancasila, Politics, and Power," *Asian Survey* 25, no. 2 (1985): 188.

[193]Karel Steenbrink, "On the Possibility of a Creative and Inspiring Pluralism of Religions," *Mission Studies* 9, (1992): 158-159.

[194]G Acciaioli, "Grounds of Conflict, Idioms of Harmony: Custom, Religion, and Nationalism in Violence Avoidance at the Lindu Plain, Central Sulawesi," *Indonesia* 72, (2001): 104.

[195]Sekretariat Negara Republik Indonesia (Setneg RI). *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (Bpupki), Panitia Persiapan Kemerdekaan Indonesia (Ppki), 28 Mei 1945-22 Agustus 1945*, Cet. 1. ed. (Jakarta: Sekretariat Negara Republik Indonesia, 1998), 92-102.

religion. By the principle of the belief in God, he meant the new nation-state Indonesia would be for all religions. It also meant that religions should be practiced in a civilized way or by a mutual respect: each adherents of religion should respect other religions.[196] He did not use the term "religious harmony," but he used the term "mutual respect" as the basis of interreligious relations. The mutual respect relation between different adherents of religions, according to Sukarno, is the expression of one of five principles of his proposed state ideology: the belief in God.

During the New Order, Suharto retained the mutual respect as interpretation of the principle of belief in God. However, Suharto added a religious harmony as part of his agenda in strengthening national stability and integrity. He believed the cultivation of mutual respect and cooperationamong followers of different religions and beliefs would create harmony, political stability and order.[197] *Pancasila* as an ideology of harmony had shaped numerous public policies during his era. After the fall of the Suharto's New Order, questions emerge whether the state ideology *Pancasila* is still relevant. In his study, Ramage shows *Pancasila* as the ideology of tolerance and harmony is still relevant for contemporary Indonesia.[198] Up to present, the central and regional governments still give attention to religious harmony in making public policy.

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[196]Ibid., 101.

[197]*MPR Decision II/MPR/1978on the Guidelines for the implementation and experiencing of Pancasila.; M. Morfit, "Pancasila: The Indonesian State Ideology According to the New Order Government," Asian Survey 21, no. 8 (1981): 846.*

[198]Douglas E. Ramage, *Politics in Indonesia: Democracy, Islam, and the Ideology of Tolerance*, Politics in Asia (New York: Routledge, 1995).

Article 1 paragraph 1 of the Joined-Regulation 8/9 2006 defines "religious harmony" as follows:

> Religious harmony is a state of relation among religious communities based on tolerance, mutual understanding, mutual respect, respect for equality in the practice of religion and cooperation in the life of society, nation and state in the Unitary State of Republic of Indonesia based on Pancasila and the Constitution of the Republic of Indonesia Year 1945.[199]

Although the definition above was formulated eight years after the fall of the New Order, it is not different from the official interpretation of Pancasila during the presidency of Suharto. In 1978 the *People's Consultative Assembly (Majelis Permusyawaratan Rakyat,* MPR) ratified the MPR Decision II/1978 on the Guidelines for the implementation and experiencing of *Pancasila (Pedoman Penghayatan* dan Pengalaman *Pancasila, P4). T*he interpretation of the principle of "Belief in One God" reads as follows:

> In the life of Indonesian people, the attitudes of mutual respect and cooperation among followers of different religions and beliefs are to be cultivated, so that harmonious life among adherents of different religions and beliefs in One God can always be fostered.[200]
>
> Realizing that religion and belief in One God are a matter of one's personal relationship with One God whom he/she believes in, so that the attitudes of mutual respect for freedom to practice religion according to one's own religion and belief and no imposition one's religion and belief to others would be developed.[201]

Both definition and interpretation above put emphasis on the values of tolerance and mutual respect as the basis for harmony. The aim of promoting interreligious harmony, according to the Minister of Religion's Instruction 3/1981 on the Implementation of Fostering Harmonious Life of Religious Communities in the

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[199] *Joined-Regulation of the Ministers of Religious and Home Affairs, 8/9 2006*, art.1 (1).

[200] *MPR Decision II/1978 on the Guidelines for the implementation and experiencing ofPancasila (Pedoman Penghayatan* dan Pengalaman *Pancasila, P4), par. 2.*

[201] Ibid., par. 3.

Region, is to strengthen national stability and integrity. For that purpose, the central and regional governments should promote interreligious harmony on three levels: internal harmony between religious communities within one religion, harmony between religious communities of different religions, and harmony between religious communities and the government.[202]

According to Bird, one of the arguments for tolerance and respect is the argument from stability. It argues that "intolerance and disrespect are politically destabilizing; peace and order are more likely to be maintained to the extent that differing groups tolerate or cultivate respect for each other".[203] This pragmatic consideration is problematic in two ways. First, it is not obvious that pragmatic considerations of this sort will always tell in favour of toleration and mutual respect. Second, it is not clear that those with principled objections to something should always be swayed by the argument that intolerance of or disrespect for it would lead to conflict or disorder. In some cases, the value of avoiding confrontation outweighs principled and uncompromising commitment.[204]

In Indonesian context, Bird's arguments in some cases seem to be plausible. According to Steenbrink, in practice both government policy and internal strategy of religious communities are tending towards religious harmony as a stabilizing factor and preventing tensions between the communities. In some cases, this harmony is in

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[202]*Minister of Religion's Instruction 3/1981 on the Implementation of Fostering Harmonious Life of Religious Communities in the Region.*

[203]Colin Bird, *An Introduction to Political Philosophy*, Cambridge Introductions to Philosophy (Cambridge; New York: Cambridge University Press, 2006), 256.

[204]Ibid., 256-260.

fact interpreted very pragmatically, viz. the absence and prevention of conflicts rather than mutual understanding or true cooperation.[205]

2.7.2 Religious Freedom as State Ideal.

There are three essential characteristics of modern constitutionalism. They are limiting the powers of government, adherence to the rule of law, and protection of fundamental rights.[206] Through a series of constitutional amendments in 1999, 2000, 2001 and 2002, post-Suharto Indonesia had made important development toward establishing a rights-based democracy.[207] Among the amendments are the separation of powers among the executive, legislature and judiciary, incorporation of charter on human rights, establishment of a constitutional court with the powers of judicial review, and establishment of judicial commission.[208]

"A rights-based democracy stands for the participation of citizens in political decisions and for consensus in the acknowledgment of a cluster of fundamental individual rights and liberties."[209] As opposed to a majoritarian democracy, individual rights in a rights-based democracy sometimes trump the majoritarian

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[205]Steenbrink, "On the Possibility of a Creative and Inspiring Pluralism of Religions," 158-159.

[206]Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity," in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, ed. Michel Rosenfeld(Durham: Duke University Press, 1994), 3.

[207]Jamie Seth Davidson, *From Rebellion to Riots : Collective Violence on Indonesian Borneo*, New Perspectives in Southeast Asian Studies. (Madison, Wis.: University of Wisconsin Press, 2008), 209; Jamie Seth Davidson, "Dilemmas of Democratic Consolidation in Indonesia," *The Pacific Review* 22, no. 3 (2009): 293-294.

[208] For review of the amendments, see: Tim Lindsey, "Indonesian Constitutional Reform: Muddling Towards Democracy," *Singapore Journal of International & Comparative Law* 6, no. 1 (2002); Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002 : An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas Book Pub., 2008).

[209]Jaime Malamud-Goti, "Punishment and a Rights-Based Democracy," *Criminal Justice Ethics* 10, no. 2 (1991): 5.

decision-making process.[210] The power of government is limited by rights.[211] The notion of limited government within a framework of law has two distinct senses.[212] The first sense is that officials must abide by the currently valid positive law before it is changed. However, properly authorized officials are entirely free to change it in any way they desire.[213] This meaning fits well legal positivist idea of absolute obedience to law. However, this view can lead to the repression of freedom and other rights.[214] Therefore, in the second sense there are restraints on the law-making power of the sovereign. When government officials wish to change or make the law, they are not entirely free to change or make it in any way they desire because there are certain things they cannot do with or in the name of law.[215]

In certain Muslim countries the restraints or legal limits on the government's law-making power are the principles of Shariah.[216] For example, in some of Muslim countries (such as Egypt, the Gulf states, Syria, and Sudan) there is a constitutional provision that establishes Islam as "the basis for," (others say Islam as "the principal source of," "a principal source of," or "the source of" legislation) or declares Islam as one of sources of legislation and other ordinary legislations should in conformity

[210]Randall P. Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusion," in *Asian Discourses of Rule of Law : Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S*, ed. R. P. Peerenboom et al., Routledgecurzon Law in Asia Series (London; New York: RoutledgeCurzon, 2004), 27.

[211]David A.J. Richards, "Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law," *Georgia Law Review* 18, no. 4 (1984): 785.

[212]Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge; New York: Cambridge University Press, 2004), 115.

[213]Ibid.

[214]Hilaire Barnett, *Constitutional & Administrative Law*, 8th ed. (London ; New York: Routledge, 2011), 64.

[215]Tamanaha, 115.

[216]Ibid., 118.

with Islamic principles or law.[217] Esposito identifies that for some countries Islam is declared as the state religion, most require that the head of state be Muslim and provide some state control over religious affairs and some choose a totally secular path, separating Islam from the state and thus restricting religion to private life.[218]

In this broader context of the place of Islam in the constitutions of Muslim countries, Indonesia is one of 11 predominantly Muslim countries which have has not made any constitutional declaration concerning the Islamic or secular nature of the state, and have not made Islam the official state religion.[219] And Indonesia does not have any constitutional provision that state Shariah as a source of legislation. After the amendments, some provisions of human rights are incorporated into the Constitution of Indonesia.[220] Series of constitutional amendments from 1999-2002 had succeeded in creating a much more liberal Constitution.[221] In this aspect, Indonesia is closer to liberal constitutional democracy than to Islamic theocratic state.

In contemporary liberal societies, the legal limits of law-makers are bill of rights or human rights declarations.[222] Human rights are routinely brought in to give content to more substantive idea of the rule of law. In this sense the rule of law or 'legality'

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[217]T. Stahnke and R.C. Blitt, "Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries, The," *International Journal of Civil Society Law* 5, no. 1 (2007): 49-51.

[218]John L. Esposito, *Islam and Politics*, 4th ed., Contemporary Issues in the Middle East. (Syracuse, N.Y.: Syracuse University Press, 1998), 99.

[219]Stahnke and Blitt, "Religion-State Relationship," 47.

[220]Nadirsyah Hosen, "Human Rights Provisions in the Second Amendment to the Indonesian Constitution from Shari'ah Perspective," *The Muslim World* 97, no. 2 (2007).

[221]Blair Andrew King, *Empowering the Presidency: Interests and Perceptions in Indonesia's Constitutional Reforms, 1999-2002* (UMI Dissertation Services, 2004), 1.

[222]Tamanaha, 118.

requires that the rules in question have a particular content that they do not include rules which violate certain fundamental rights. This step broadens the principles of legality to include human rights. At this point the idea of legality is closely related to the discourse of rights as substantive requirements which limit what may be accepted as law.[223]

Bills of Rights come in two conceptually distinct versions. Those that are seen to exist independent of enactment—bill of rights that are understood to recognize but not give rise to said rights—are indistinguishable from natural law in setting limits of law-makers, with the notable exception that in the modern version courts have been accorded the power to interpret and apply them.[224]

The second version is Bills of rights which are enshrined in the constitution as a form of institutional rights of positive law. The rights are called constitutional rights.[225] The thinking lies behind schemes for incorporation of these fundamental rights into a written constitution is to prevent governments from illegitimately interfering with or failing to promote certain vital liberties of individual citizens.[226] According to the proponents of human rights the law or policies ought to change if they are deemed to have conflicted with human rights, even though that law reflects the democratic will of the population at the time.[227] In some countries, the constitutional rights are

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[223]Tom Campbell, *Rights: A Critical Introduction*, Routledge Contemporary Political Philosophy (London ; New York: Routledge, 2006), 94-95.

[224]Tamanaha, 118.

[225]Lesley A. Jacobs, *An Introduction to Modern Political Philosophy: The Democratic Vision of Politics* (Upper Saddle River, N.J.: Prentice Hall ; London : Prentice-Hall International, 1997), 65; Tamanaha, 119; Campbell, 37.

[226]Richard Bellamy, *Rethinking Liberalism* (London: Pinter Publishers, Limited, 2000), 177.

[227]Ibid., 164.

administered by the courts. The courts or an independent judiciary composed of unelected judges are conferred the political power and legal authority to determine that so-called laws made by legislature are not laws at all if they have a certain content, more specifically, if they are incompatible with certain rights.[228] The legal practice of the courts having the authority to nullify laws passed by elected legislatures is called judicial review.[229]

In Indonesia, a special Constitutional Court was created to enforce constitutional principles and rights. The Article 24C (1) states: "The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution".[230] However, the power of Constitutional Court is limited to the review of the constitutionality of laws passed by Parliament. It cannot review the constitutionality of government regulations, presidential regulations or regional regulations. For example, it cannot review the constitutionality of Islamic law adopted in regional regulations. It also cannot review the constitutionality of administrative actions by state agencies or officials.[231]

The contemporary Indonesia's Constitution is adopting substantive content into its conception of the rule of law, the *Rechsstaat*. According to Lindsey, "Indonesia had reconstructed its *Rechsstaat* on liberal democratic principles". It had radically reconstructed its longstanding and authoritarian Constitution to include the Universal

[228]Campbell, 102.

[229]Jacobs, 65.

[230]*Constitution*, art 24C (1)

[231]Bell, "The Challenges of Legal Diversity and Law Reform," 281.

Declaration of Human Rights.[232] While including some of its widely recognized formal and procedural aspects, like principle of legality, the right to a fair hearing before the courts, and the prohibition of retro-active criminal laws, Indonesia goes at the same time beyond a merely formal understanding of the rule of law by establishing the protection of the human rights as the responsibility of the state, especially the government, and the respect for the human rights as the duty of every person. Article 28I (4) states: "The protection, advancement, upholding and fulfillment of human rights are the responsibility of the state, especially the government".[233] And Article 28J(1) states: "Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state".[234]

The formal and substantive principles of the rule of laws are stated explicitly in the Law Number 10 of 2004 on the rules of law-making. It includes seven formal requirements and eleven principles for the law to be good. The formal principles are:

1. Clarity of purpose. Every law-making must have clear purposes.
2. Authorized institutions or law-making bodies. Laws must be made by duly authorized institutions, officials, or persons. Laws can be invalidated if they are made by unauthorized institutions or officials.
3. Compatibility of form and content. Law-making must consider the compatibility of content with the form of law.
4. Applicability. Law-making must consider philosophically, judicially, and sociologically the efficacy or effectiveness of law so that people will be able to comply with it.
5. Usefulness and productivity. The reason why a law is made because it is really needed and useful in managing the life of the people, nation, and state.

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[232]Tim Lindsey, "Indonesia: Devaluing Asian Values, Rewriting Rule of Law," in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S*, ed. R. P. Peerenboom et al., Routledgecurzon Law in Asia Series (London; New York: RoutledgeCurzon, 2004), 286-287.

[233]*Constitution*, article 28I (4).

[234]*Constitution*, article 28J(1).

6. Clarity of formulation. All forms of law must be appropriately clear and determinate in meaning so that they do not cause multi-interpretations in its application.
7. Openness. Law-making procedure from planning, preparation, formulation, and debate must be transparent and open. The public should have wide opportunity to participate in giving suggestions in the process of law-making.[235]

The eleven material content requirements for the law to be good are:

1. Principle of protection. The content of laws must protect and create an order.
2. Principle of humanity. The content of laws must reflect the proportional protection and respect for human rights, the dignity of every citizen and residents of Indonesia.
3. Principle of nationality. The content of laws must reflect the pluralistic nature and character of the nation at the same time protect the principle of the unity of the Republic of Indonesia.
4. Principle of family system. The content of laws must reflect the results of deliberation in achieving agreement of every decision making.
5. Principle of *kenusantaraan* (Indonesian Archipelago). The content of laws must consider the interests of all territories of Indonesia and the content of the law made at the regional levels is part of national system based on Pancasila.
6. Principle of *binneka tunggal ika* (unity in diversity). The content of laws must consider the diversity of religions, ethnicities, and groups, local uniqueness and culture, particularly of sensitive matters in the life of people, nation, and state.
7. Principle of justice. The content of laws must reflect the justice proportionally for every citizen.
8. Equality before the law and governance. Laws must not have content that discriminates based on religion, ethnicity, race, group, gender, or social status.
9. Legal order and certainty. The content of laws must be able to create an order within the society through the guarantee of legal certainty.
10. Balance, proportionality, and harmony. The content of laws must reflect the balance, proportionality, and harmony between individual and public interests with national and state interests.
11. Other relevant principles with the law in question. For example, in Penal Law, there are principles of legality, no punishment imposed without a pre-existing penal law, rehabilitation of prisoners, and presumption of innocence; in the Private Law, for example, contract law, there are principles of agreement, freedom of contract, and good intention.[236]

[235] *Law 10/ 2004 on the Rules of Law-making,* art.5 and its elucidation.

[236] *Law 10/ 2004,* art.6 and its elucidation.

2.7.3 Religious Freedom under the Constitution.

Regarding the right to religious freedom, Muslim groups' and the secular groups' views of the principle can be traced in the debate on the Jakarta Charter during the formation of the Indonesian constitution in 1945 and parliamentary debate during the amendment in 1999-2002.

2.7.3.1 The Jakarta Charter and UUD 45.

During the formulation of the constitution in 1945 before the Independence of Indonesia, the founding fathers sharply debated the position of Shariah. Many studies have focused on the issues related to Shariah debated by Muslim and secular nationalists but without giving any particular emphasis on the issue of religious freedom.[237] Other addressed the conceptions of state by both camps.[238] This chapter, therefore, will discuss the debate with a particular emphasis on the conceptions of religious freedom. If Shariah applies in Indonesia, the questions are: To whom Shariah applies? How is the status of non-Muslims? If Shariah applies only to Muslims to what extent the state may apply Shariah (e.g. coercive)? If a Muslim and non-Muslim commit a Shariah criminal offense together, what law applies for the non-Muslim?

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[237] See: Saifuddin Anshari, *Piagam Jakarta, 22 Juni 1945 Dan Sejarah Konsensus Nasional Antara Nasionalis Islami Dan Nasionalis Sekular Tentang Dasar Negara Republik Indonesia, 1945-1959*, Cet. 1. ed. (Bandung: Pustaka Perpustakaan Salman ITB, 1981); B. J. Boland, *The Struggle of Islam in Modern Indonesia*, Verhandelingen Van Het Koninklijk Instituut Voor Taal-, Land- En Volkenkunde, 59 (The Hague,: Nijhoff, 1971); Saifuddin Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia" (M.A. Thesis, McGill, 1977).

[238] Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, 59-69.

The constitutional debate in 1945, before the Jakarta Charter was deleted on August 18 from the Preamble of UUD 1945,[239] is the appropriate place for studying the Shariah and religious freedom for at the time there was an agreement on its application. In addition, it is interesting to see what kind of compromise they achieved (then cancelled) regarding the issue of religious freedom if Shariah is applied in the newly independent Indonesia.

During 1945 constitutional debate to form new Indonesia state, Muslim groups struggled for Islamic state. Meanwhile, other groups wanted the state separated from religion.[240] Failing to form a full pledged Islamic state, Islamic groups, in an ideological sense, agreed the formation of the state at least based on the obligations of the Muslim subjects to practice Shariah. However, they also lost to secular groups in the latter.[241] The focus of their political thought was the duties of Muslim subjects, not their rights as citizens. To them, the government exists to implement God's law or to enforce religious obligations. The fundamental nature of the clash between the advocates of the Islamic state and the secular state of Indonesia is well articulated by Hooker when he says: "the absolute claim to prescribe a system of obligation for believers which Islam makes by its very nature clashes with the principle of secularism."[242]

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[239] For discussion on the controversy over the deletion of the Jakarta Charter see:RE Elson, "Another Look at the Jakarta Charter Controversy of 1945," *Indonesia* 88, (2009): 119-130; Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 39-51.

[240] Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 2, 23; Elson, "Jakarta Charter," 108-112.

[241] Elson, "Jakarta Charter," 130.

[242] Hooker, *Islamic Law in South-East Asia*, 267-268.

At the time the phrase, "*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*" (with the obligation for Muslims to carry out Shariah) was incorporated into the constitution. It was as an add-on to the first principle of the national ideology *Pancasila* that states "*Ke-Tuhanan*" (Godhead). These "seven words" later became known as *Piagam Jakarta* (Jakarta Charter).[243] It casts a religion, particularly Islam, in the language of obligation or duties.

Before the independence, in March 1945 the Japanese announced the formation of an Investigating Committee for Preparatory Work for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia,* BPUPKI).[244] The Committee was to prepare all matters related to the political and administrative framework of an independent Indonesian state.[245] The BPUPKI met in two short, concentrated sessions over the following two months. Its first session was broadly devoted to discussion of the ideological underpinnings of the proposed new state.[246]

The first session of BPUPKI was opened on May 28, 1945. During the first series of the BPUPKI meetings (29 May-1 June), 32 members had presented their proposals for state philosophies.[247] At the meetings, the Muslim nationalists who struggled for

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[243]Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 25.

[244]M. C. Ricklefs, *A History of Modern Indonesia since C. 1200*, 3rd ed. (Stanford, Calif.: Stanford University Press, 2001), 258.

[245]Benedict R. O'G Anderson, *Some Aspects of Indonesian Politics under the Japanese Occupation, 1944-1945*, Cornell University. Dept. Of Far Eastern Studies. Modern Indonesia Project. Interim Reports Series - Cornell University. Modern Indonesia Project. (Ithaca, N.Y.: Modern Indonesia Project, Southeast Asia Program, Dept. of Far Eastern Studies, Cornell University, 1961), 17.

[246]Elson, "Jakarta Charter," 110.

[247]Sekretariat Negara Republik Indonesia (Setneg RI). xxxii.

Islamic state were opposed by the secular nationalists, who demanded an independent Indonesia secular state. One of the representatives of Islamic groups, on 31 May 1945 Ki Bagoes Hadikoesoemo in his speech demanded the Islamic state or Islam as the basis of the state which would apply Islamic law. He argued that the Islamic state was an appropriate choice because 90 percent of the people were Muslims. He claimed that Islamic teachings would create just and wise governance based on morality, deliberation and consensus, and no coercion of religion. It would not ban its citizens to embrace and practice other religions.[248] He meant the freedom *out of* butnot *within* Islam that was the freedom of non-Muslims to embrace and to do their religions. However, he did not address the individual freedom within Islamic community.

From the secular nationalist faction, Sukarno urged that his principles should be adopted. Since, he claimed that his version of state philosophy could accommodate all Indonesian people whatever their races, ethnicities and religions. In his speech of 1 June Sukarno presented what he called "*Pancasila*", the 'five principles': nationalism, international humanism, popular sovereignty, social justice and the belief in God.[249] Concerning the issue of religion, Sukarno's did not give a special status or position to any religion. By the principle of the belief in God, he meant that the new nation-state Indonesia would be for all religions. It also meant that religions should be practiced in a civilized way or by a mutual respect: each adherents of religion should respect other religions.[250]

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[248]Ibid., 33-48.

[249]Ibid., 92-102.

[250]Ibid., 101.

Before breaking up on the June 1, 1945 the BPUPKI decided to set up a sub-committee under Soekarno to be responsible for analyzing and classifying suggestions for the future constitution. On June 22, Soekarno organized a joint meeting of the BPUPKI Subcommittee *(Panitia Kecil)*, those members of the BPUPKI who also sat on the members of the *Cuo Sangi-in* (Central Advisory Council, the body established in September 1943 to provide advice to the Japanese), as well as any others that happened to be in Djakarta at the time. The meeting was held in the head offices of the Djawa Hookookai, and was attended by 38 people. This group then appointed its own subcommittee of 9 members (*Panitia Sembilan*) to act as an executive and drafting committee. The main product of this Committee's work was a preamble for the new Constitution later to become famous, and controversial, as the Djakarta Charter which said that the state was to be based upon 'belief in God, with the obligation for adherents of Islam to carry out Islamic law'.[251]

By the compromise the Muslim groups agreed that the state should not be exclusively based on Islam but instead it was built on the foundation of more neutral principle of belief in God which belongs to all religions. However, Islamic group, in an ideological sense, still demanded the special place of Islam for the formation of the state at least for its adherents only by building the state that also based on the obligations of the Muslim subjects to carry out Shariah. The agreement, according to Supomo, gave a special treatment to Muslims.[252]

[251]Anderson, 27; Elson, "Jakarta Charter," 112-113.

[252]Sekretariat Negara Republik Indonesia (Setneg RI). 291.

During the second session of the BPUPKI meetings (10-16 July), the formula of the Jakarta Charter was sharply debated in the constitution subcommittee headed by Sukarno. It was under attack both from Muslim, non-Muslim, and secular members of the subcommittee.[253] The Islamic group was very dissatisfied with the vagueness and ambiguity of this commitment. Non-Muslims were worried about the freedom of their religions. Secular Muslims were worried about the individual freedom of Muslims and non-Muslims as well.

There were various issues regarding the word "obligation" and its relation to the right to religious freedom. If Shariah applies in Indonesia, the questions are: To whom Shariah applies? How is the status of non-Muslims? If Shariah applies only to Muslims, to what extent the state may apply Shariah (e.g. coercive)? If a Muslim and non-Muslim commit a Shariah criminal offense together, what law applies for the non-Muslim?

Members of the Committee (BPUPKI) interpreted the Jakarta Charter in different ways.[254] It could mean that: (1) there would be two laws: one for Muslims and the other for non-Muslims;[255] (2) the State may coerce Muslims to carry out Shariah, for example, coercing Muslims to pray;[256] or (3) Muslims have an obligation to carry out Shariah before the existence of the Indonesia state, while they are living under the state to carry out Shariah is the right of Muslims;[257] or (4) the government had the

[253]Elson, "Jakarta Charter," 115.

[254]Boland, 27, 36-37.

[255]Sekretariat Negara Republik Indonesia (Setneg RI). 264.

[256]Ibid., 240, 248.

[257]Ibid., 240.

obligation to carry out the Shariah Islam for Muslims.[258] In terms of the constitutionalism, it could mean that the Constitution gives the government a power to enforce Shariah or the state is obligated to implement Islamic law among Muslims. This interpretation is true, if the word 'obligation' refers to the state or government. If the word 'obligation' refers to the government, it could mean that: (1) The state is under a 'constitutional 'obligation' to facilitate Muslims practising their faith and (2) The state is under a 'constitutional obligation' to coerce Muslims practising their faith.[259]

During the second session of the BPUPKI meetings (10-16 July), the members of the constitution subcommittee headed by Sukarno sharply debated the formula of the Jakarta Charter. Some of the members of the committee, particularly secular Muslims and non-Muslims were worried about the individual freedom of Muslims and non-Muslims. They were worried that based on this constitutional provision, the government would impose the obligation to carry out Shariah by coercing Muslim citizens, for example, to fast, pray, etc.[260] What they were worried about was the coercive nature of the state and this coercive power to enforce Shariah would be legitimate if the constitution conferred such power. They were also worried if Shariah would apply to non-Muslims as well.

What the non-Muslims were worried about was not without reason because some members of the Committee wanted Shariah be applied to all. Ki Bagus Hadikusumo

[258]Ibid., 369-370; Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 33-34.

[259]Hosen, "Religion and the Indonesian Constitution," 438-439.

[260]Sekretariat Negara Republik Indonesia (Setneg RI). 240, 248.

(Muhammadiyah[261] leader), for example, raised the issue of the scope of the application of Shariah law. He had asked many times the exact meaning of the phrase "The state is founded on Godhead, with the obligation to carry out the Islamic Shariah for its adherents." At the meeting of July 14, 1945, while discussing the Preamble (i.e., the Jakarta Charter), he did not agree if it meant that Shariah law would apply only to Muslims. Then, he proposed to omit the words "for its adherents" (*bagi pemeluk-pemeluknya*) for linguistic reasons and the substantive one.[262] He said that he did not agree with the phrase if it meant that there would be one law for the non-Muslims and one for the followers of Islam. For example, Shariah criminal law on alcoholic consumption would apply only to the adherents of Islam. This would only lead to resentment and anger in the country at large once it was known.

Those who accepted the Jakarta Charter but had concerns for the right to religious freedom were attempting to set the limits of Shariah application. To anticipate and avoid the interpretations that the state might coerce Muslim complying with Shariah, the clause on religious freedom was added after the repetition of the Jakarta Charter in the article 29.[263] It is also to restrict the application of Shariah only to Muslims, thus non-Muslims are free from Shariah law and free to practice their own religions.[264] The addition of the clause on religious freedom was to set the limits of the application of Shariah and to restrict the government authority. It might not make law to coerce Muslims to practice Shariah. However, unlike American constitution, it

[261] Muhammadiyah is Modernist Islamic organisation founded in 1912 by Ahmad Dahlan.

[262]Sekretariat Negara Republik Indonesia (Setneg RI). 264.

[263]Ibid., 248.

[264]Ibid., 302.

was not explicitly stated. Thus, the framers of the constitution intended religious freedom clause to limit the interpretation of the Jakarta Charter into non-coercive application of Shariah.

Hoesein Djayadiningrat and Wongsonegoro (a liberal Javanese) expressed their concerns for religious freedom of individual Muslims, if Shariah is applied in the Independent Indonesia. They are worried that the Jakarta Charter would be interpreted in such a way that the government might coerce Muslims to do religious duties. Thus, their particular concern was the individual freedom of Muslims *from* coercion to comply with Shariah. On the second day of the meeting (11 July 1945) of the second round of the BPUPKI meeting (10–16 July 1945) for deliberation by all BPUPKI members, Djayadiningrat objected to the Jakarta Charter. He argued that it could create religious fanaticism in the form of coercion of the Islamic adherents to practice religious duties, such as forcing Muslims to do prayer (*shalat*).[265]

Wongsonegoro expressed similar concern for individual freedom of Muslims *from* coercion to do Shariah on the fourth day of the meeting (13 July 1945) while discussing the wording of Article 29 (2) on religious freedom.[266] The Article 29 on Religion proposed by the Committee headed by Soepomo read as follows: *"Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agama apapun dan untuk beribadat menurut agamanya masing-masing"* (The state guarantees the freedom of every resident to profess any religion and to worship according to his religion).[267] Wachid Hasjim suggested that the article on religion be changed as follows: "The

[265]Ibid., 240.

[266]Ibid., 248.

[267]Ibid., 254.

religion of the state is Islam, with the guarantee of freedom for adherents of other religions to profess their own religion . . . etc." He argued the religion of the state was closely related to defence of the state. In general, the defence based on a belief was very great because according to religious teaching one's own life could only be sacrificed for religious ideology. Oto Iskandardinata objected to Hasjim's suggestion on the religion of the state. He proposed that the seven words of the Jakarta Charter on the preamblebe repeated in the Article 29 (1) and "the State guarantees the freedom etc.," stated in the Article 29 (2). Wonsonagoro argued the article 29 (2) was ambiguous and could be interpreted that the state might coerce Moslems to do Islamic Shariah. To anticipate the coercive interpretation, he proposed the word "kepercayaan" (belief) added after the word "agamanya" (his/her religion).[268]

The Jakarta Charter caused the anxiety and fear among non-Muslims. On 15 July 1945, Soepomo (from the Committee for Formulating the Constitution) explained each article of the Constitution. On the Article 28 on Religion, he explained why the Committee incorporated the right to religious freedom into the Constitution.[269] He explained that the Jakarta Charter and its repetition in the Article 28 (1) had caused a feeling of fear and worry among non-Muslims about the future of their religious freedom. To relieve and banish the anxiety or doubt from non-Muslims, therefore the Article 28 (2) stated "*Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agama lain dan untuk beribadat menurut agamanya dan kepercayaan masing-masing*" (The state guarantees the freedom of every resident adhere to other

[268]Ibid., 247-248.

[269]Ibid., 301.

religion and to worship according to his religion and belief).[270] Soepomo restated this explanation after replying to Abdul Fatah Hasan's objection to the wordings of the Article. Soepomo said that Indonesian non-Muslims need not to worry about their freedom to embrace and practice their religion because the Committee totally rejected *gewetensdwang* or forcing of conscience.[271]

The debate of the Jakarta Charter led to the controversy over the qualification of the Head of the Government. During the debate, the following issues arose: Who would be able to carry out the Islamic law properly? Could non-Muslim President implement the Jakarta Charter? Should the Constitution state a religious qualification? If only Muslim was eligible to be the President, was it contrary to the principle of equality?

KH Masjkoer was the first to argue the Charter meant the government had the obligation to carry out the Shariah Islam for Muslims.[272] The argument was to support the Muslim group's proposal of making a Muslim as a qualification for the President. However, the member who initiated the move to make a Muslim as a qualification for the President was Wahid Hasjim. At the meeting of the Working Committee of the Constitution on 13 July 1945, the Chairman read Article 4 on the President that stated, "The President shall be a native-born Indonesian." However, Hasjim proposed that the words "*yang beragama Islam*" (an adherent of Islam) be added to the Article. Thus it should read, "The President shall be a native-born

[270]Ibid., 302.

[271]Ibid., 303.

[272]Ibid., 369-370; Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 33-34.

Indonesian, an adherent of Islam."[273] A.Wahid Hasjim received support from Sukiman, who claimed that while this proposal would not actually change the situation, the wording chosen would please the people. Agus Salim and Djayadiningrat, although had Islamic connections, opposed Hasjim's proposal. Agus Salim claimed that the proposal demanded more than what had been compromised between the nationalist and Islamic factions and broke the latter group's promise to protect other religions. Djajadinigrat supported by Oto Iskandar di Nata asked the words "an adherent of Islam" be deleted from the Article on the President.

Abdoelrahim Pratalykrama and K.H. Masjkoer made second move in the meeting of 15 July 1945. Pratalykrama suggested the Constitution or another law should have the clause on the origin, age, and religion of the Head of the State or President of the Republic of Indonesia. He proposed that the President should be a native-born Indonesian, at least 40 years of age, and an adherent of Islam.[274] Responded to his proposal, particularly on the religion of the President, Soepomo regarded the demand was going beyond the compromise (Jakarta Charter) had been achieved by the Islamic and nationalist groups. Soepomo reminded the floor to stick to the compromise and to honour the Jakarta Charter by not demanding more than that. He added that the Muslim majority (95%) of the Indonesian population was enough to guarantee a Muslim President would be elected.[275] Then, K.H. Masjkoer (a Nahdlatul Ulama activist) came up with two options to solve what he claimed as two conflicting articles, between the Article 7 on the President and the article 28 that

[273]Sekretariat Negara Republik Indonesia (Setneg RI). 247.

[274]Ibid., 366-367.

[275]Ibid., 367-368.

repeated the seven words from the Jakarta: either to change the article 28 or the article 7. He argued that the Charter meant that the government had the obligation to carry out the Shariah Islam for Muslims. If the President were a non-Muslim, he/she would not be trustworthy to carry out the Islamic law and would not be acceptable to the Islamic faction. If the repetition of the Jakarta Charter in the Article 28 remained unchanged, it meant that the President should be a Muslim. However, if being a Muslim was not decided as the qualification of the President, then the Article 28 should be changed into the stipulation that "The official religion of the Republic of Indonesia is Islam".[276]

Even though, Sukarno agreed with K.H. Masjkoer that a non-Muslim President could not carry out the Islamic law properly, he argued, in line with Soepomo, that in real politics the President would be a Muslim since the majority of the population of Indonesia adhered to Islam. He claimed that the draft of the constitution, which did not require the President be a Muslim, was an honour to the Jakarta Charter.[277] The secular nationalist groups objected to K.H. Masjkoer's proposal. One of its representatives, Sukardjo Wirjopranoto, argued that the proposal was in conflict with the principle of equality in Article 27 of the Constitution: "All citizens shall have equal position in law and government." It meant that every citizen had a right to be the President regardless of religion.[278] The meeting of 15 July 1945 finally ended with deadlock. The issue of the religion of the President was settled in the next meeting, July 16, 1945, after Sukarno directed an appeal to all members, especially

[276]Ibid., 368-369.

[277]Ibid., 370-371.

[278]Ibid., 372-373.

to the Nationalist faction and non-Muslims, to make a sacrifice by accepting the words "an adherent of Islam" as a qualification for the President of the Republic of Indonesia.[279]

Elson objected to the view that Jakarta Charter was a victory for Islamist activists. He argued it was a mark of the Muslim activists' signal failure to attain a full-fledged Islamic state. To him, it was "a vague, purely symbolic and patronizing concession made to them by the dominant secularist political grouping at a time of national emergency".[280]

The dominant secularist political group wanted the application of Shariah still within the framework of secular principles of individual religious freedom and conscience. The essence of these principles, according to them, is non-coercion. The government might apply Shariah as long as in a non-coercive way. The non-coercive interpretation of Jakarta Charter by secularist group would limit the extent to which Shariah law might apply. In terms of the nature of law, it meant that the state might not use its coercive apparatus to force Muslims to practice Shariah by punishing them if they failed to do so. Under this non-coercive interpretation, the state may enact religious-based law as long as it respects the individual freedom of religion. It means that the state may not make a law coercing people to practice their religion and it may not coerce people practice a religion other than their own. For example, Shariah laws may be enacted to the extent that it applies only to Muslims and does not coerce them to comply with. In other words, the state may facilitate Muslims to

[279]Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 35-37.

[280]Elson, "Jakarta Charter," 130.

practice their religion, but it should avoid punishing those who do not practice it. The only possible type of law would be an administrative in it nature, not the coercive one like criminal law.

The argument from religious freedom, as the absence of coercion, against state enforcement of Shariah is plausible in the area of Shariah that requires a sincere intention to serve and obey God as a condition for its validity.[281] For example, the prayer and fast as *ibadah* belong to area of God-human relation that must be done with the intention of pleasing God. They are human obligations towards God.[282] The jurists agreed the intention (*niat)* as a condition for the validity a pure act of worship *(ibadah mahdah)* with no rational or tangible meaning and interest.[283] In *fiqh,* the Friday prayer and fasting of Ramadhan belong to this category. According to majority of jurists, intention is a condition for the validity of the prayer and fast.[284] According to An-Na'im, compliance with religious obligations without a sincere intention to serve and obey God, for example for fears of coercive enforcement by state institutions, will invalidate those religious acts. Therefore, the absence of

[281]John Richard Bowen, "Islam and the Secular State: Islam and Authority," in *The Immanent Frame,* book review posted April 28, 2008, http://blogs.ssrc.org/tif/2008/04/28/islam-and-authority/ (accessed April 13, 2011).

[282]Sachedina, *The Role of Islam in the Public Square : Guidance or Governance?*, 20.

[283]Paul R. Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh*, Studies in Islamic Law and Society, (Leiden: Brill, 2006), 32-33; Ahmad Ibn Rushd, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtashid*, 6 ed., 2 vols., vol. 1 (Beirut: Dar al-Ma'rifah, 1986), 9, 120; Ahmad Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, trans., Imran Ahsan Khan Nyazee, First Paperback ed., 2 vols., vol. 1 (Reading: Garnet, 2000), 3, 132.

[284]Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 342.

coercion is as a necessary condition for Muslims to comply with their religious obligations. The state may not use coercion to enforce compliance with Shariah.[285]

However, the domain of Shariah can extend well beyond the God-human relations.[286] Shariah also regulates the area of interhuman relations *(mu'amalat)* that does not require a sincere intention as a condition of its validity. According to Sachedina, all laws that regulate God-human relationships (*ibadah)* are under the divine regulation, beyond any adjudication by human court. In contrast, interhuman relations are within the jurisdiction of human institutions founded on political consensus with the purpose of furthering justice and equity in society. Muslim governments may regulate the latter area of Shariah except when the free exercise of religion for any individual is in danger.[287]

The tendency to limit the application of Shariah law into administrative level and avoiding the coercive law was evident from number of Islamic laws enacted during the New Order until before the emergence regional laws on Shariah. Salim and Azra described and analysed the implementation of Shariah at national level. They argue that the legal characteristics of the implemented Shariah at national level are private and optional, not compulsory. For example, the Law of *Zakat* does not oblige Muslim to pay *zakat* and does not punish those who fail to pay *zakat*. The Law on *Hajj* and the Law on Islamic Banking does not ban Muslims from subscribing to the Conventional Banks and does not oblige every Muslim to be customer of Islamic

[285]An-Na'im, 4.

[286]John Richard Bowen, "Islam and the Secular State: Islam and Authority."

[287]Sachedina, *The Islamic Roots of Democratic Pluralism*, 98, 137; Sachedina, *The Role of Islam in the Public Square : Guidance or Governance?*, 20-22.

banking. They are free to choose which bank they like.[288] However, Salim adds that at the local level certain Shariah regional regulations are coercive by applying punishments.[289]

From the debates in the BPUPKI, there were attempts to set limits on the state authority to apply Shariah in order to guarantee religious freedom of individual Muslims and non-Muslim as well. First, Shariah would apply only to Muslims. Thus, non-Muslims are free *from* the obligation to carry out Shariah and free *to* practice their own religions. Second, individual Muslims should be free from the coercion to observe Shariah, particularly on the personal matters between humankind and God such as prayer and fasting. In other words, the state shall not make any law coercing Muslims to pray or fast.

Muslim groups held the state had a positive obligation to apply Shariah to Muslims.[290] It could have two possible meanings: (1) The state under a 'constitutional 'obligation' to facilitate Muslims practising their faith and (2) The state under a 'constitutional obligation' to coerce Muslims practising their faith.[291]

Those who accepted the Jakarta Charter but had concerns for the individual right to religious freedom were attempting to set the limits of Shariah application. To anticipate and avoid the interpretations that the state might coerce Muslim doing Shariah, the clause on religious freedom was added after the repetition of the Jakarta

[288]Salim and Azra.

[289]Salim, "Shari'a in Indonesia's Current Transition: An Update."

[290]Sekretariat Negara Republik Indonesia (Setneg RI). 368-369.

[291]Hosen, "Religion and the Indonesian Constitution," 438-439.

Charter in the article 29.[292] It is also to restrict the application of Shariah only to Muslims, thus non-Muslims are free from Shariah law and free to practice their own religions.[293] The addition of the clause on religious freedom was to set the limits of the application of Shariah and to restrict the government authority. It might not make law to coerce Muslims to practice Shariah. Thus, the framers of the constitution intended religious freedom clause limited the interpretation of the Jakarta Charter into non-coercive application of Shariah.

The dominant secularist political group wanted the application of Shariah still within the framework of secular principles of individual religious freedom and conscience. The essence of these principles, according to them, is non-coercion. The government might apply Shariah as long as in a non-coercive way. The non-coercive interpretation of Jakarta Charter by secularist group would limit the extent to which Shariah law might apply. In terms of the nature of law, it meant that the state might not use its coercive apparatus to force Muslims to practice Shariah by punishing them if they failed to do so. Under this non-coercive interpretation, the state may enact religious-based law as long as it respects the individual freedom of religion.

The secular group's position against state compulsion during the constitutional debate in 1945 does not significantly differ from Lockean approach to religious freedom. According to Locke, religious belief is based on inner conviction. To be acceptable to God, religious acts must proceed from genuine conviction and approbation of the mind. It cannot be compelled by outward force such as

[292]Sekretariat Negara Republik Indonesia (Setneg RI). 247-248.

[293]Ibid., 301-303.

confiscation of estate, imprisonment, and torments. State compulsion would produce useless and unprofitableexternal profession and observation.[294]

> All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing. Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true and the other well pleasing unto God, such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation.[295]

Therefore, Locke held that the state and members of society may not enforce religious laws. Their duties are limited to "exhortations, admonitions, and advice". The last and utmost force of religious authority can do to stubborn offenders is separating them from the religious community.[296] Locke conceives protection of the right to conscience, including religious freedom, as central to justice in politics and law and the moral justification of obedience. The coercion of conscience was the central political injustice for Locke. Therefore, there is no absolute obligation to obey law. Citizens should not be coerced into obedience to "unjust laws".[297]

Within the domain of Shariah, the Lockean argument against state compulsion in religious matters is relevant only to certain areas of *ibadah*, such as prayer and fasting that must be observed with a sincere intention to serve and obey God. But the domain of Shariah is not only limited to these human-God relations.[298] Shariah also

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[294]John Locke and Ian Shapiro, *Two Treatises of Government ; and, a Letter Concerning Toleration*, Rethinking the Western Tradition. (New Haven [Conn.] ; London: Yale University Press, 2003), 219-223.

[295]Ibid., 219.

[296]Ibid., 223.

[297]Richards, "Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law," 774.

[298]John Richard Bowen, "Islam and the Secular State: Islam and Authority," in *The Immanent Frame* (2008).

regulates the area of interhuman relations *(mu'amalat)* that does not require a sincere intention as a condition of its validity. According to Sachedina, all laws that regulate God-human relationships *(ibadah)* are under the divine regulation, beyond any adjudication by human court. In contrast, interhuman relations are within the jurisdiction of human institutions founded on political consensus with the purpose of furthering justice and equity in society. Muslim governments may regulate the latter area of Shariah except when the free exercise of religion for any individual is in danger.[299]

During the New Order, the government adopted Muslim view of the responsibility and active support of the state towards religion. The Five-Year Plan for 1969-74 stated the government has the responsibility of giving guidance and assistance to facilitate the development of each religion. This positive duty of the state distinguished Indonesian views of religious freedom from those held by Western liberal regimes. In the West, the professions of belief in God play a passive role.[300]

Bell when observes the relation between the belief in God and religious freedom under UUD 45 states:

> In the same vein, even though the Republic of Indonesia 'is based on the belief in the One and Only God', freedom of religion is protected and Islam, the religion of the majority has no special constitutional status. The secular nature of the State can be seen again as an effort at unity: there is no minority religion in law if there is no recognition of the majority religion by the law. Religion becomes an individual matter and all Indonesians individuals are treated equally. One could therefore say that the way the

[299]Sachedina, *The Islamic Roots of Democratic Pluralism*, 98, 137; Sachedina, *The Role of Islam in the Public Square : Guidance or Governance?*, 20-22.

[300]Paul Stange, "Religious Change in Contemporary Souteast Asia," in *The Cambridge History of Southeast Asia*, ed. Nicholas Tarling(Cambridge, UK; New York, NY, USA: Cambridge University Press, 1992), 554.

constitution mentions religious freedom without mentioning Islam is meant to afford constitutional protection to religious minorities.[301]

2.7.3.2 Amendment of UUD 45

After the Amendment, Bell states that new provisions on freedom of religion are added particularly freedom of conscience and belief. The addition "seems to protect not only freedom of religion but also freedom to practice or not to practice a religion".[302]

The principle of Belief in God is stated in Preamble and Article 29 (1). Freedom of religion and belief is stated in Article 29 (2) and 38E (1 & 2). The following discussion is mainly based on the forty-fourth meeting of the *Panitia* Ad Hoc I (Ad Hoc Committee One) of the Working Group of the MPR on June 14, 2000.[303] The topic of meeting is discussion of the Amendment of Article 29 on Religion. All factions agreed that the state based on "belief in God" means that Indonesia is neither secular state nor theocratic state, but it is a religious nation. However, they did not agree on further meanings of belief in God and its relation to religious freedom, particularly the following issues:

1. The issue of the freedom not to adhere to any religion or the freedom of those who are not adopting any religion, but they believe in God. (Irreligion)

[301]Gary F. Bell, "Minority Rights and Regionalism in Indonesia: Will Constitutional Recognition Lead to Disintegration and Discrimination," *Singapore Journal of International & Comparative Law* no. 5 (2001): 792.

[302]Ibid.

[303]Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI). *Risalah Rapat Pleno Ke-44 Panitia Ad Hoc I Badan Pekerja Mpr 14 Juni 2000* (Jakarta: Sekretariat Jenderal MPR, 2000).

2. Issue of the freedom not to adhere to any religion or the freedom of those who are not adopting any religion, and they don't believe in God. (Atheism).[304]

During the forty-fourth meeting of the *Panitia* Ad Hoc I (Ad Hoc Committee One) of the Working Group of the MPR on June 14, 2000, some factions wanted the application of the principle of "belief in God" is not limited to recognized religions. The speaker from the KKI faction, Anthonius Rahail, argued that the Preamble of the Constitution 1945 did not mention that the state based on "religion," instead, it stated that the state based on "Belief in One God." The KKI faction proposed the replacement of the Chapter *Agama* (Religion) with "*Ketuhanan Yang Maha Esa*" (Belief in One God). The replacement, according to him, would accommodate Indonesian people who did not already have a religion, but they believed in God.[305]

The PDKB faction expressed a similar opinion. They agreed that Article 29 (1) meant that Indonesia is a religious nation. They hold that a religion is only one of the expressions of human belief in God. Therefore, not only should religion be guaranteed as right, but also belief in God is considered as a fundamental right. The word "belief" *(kepercayaan)* is inserted into the article to accommodate beliefs in God, which are not recognised as religion.[306] The opinion of the KKI faction and the PDKB faction is in agreement with General Comments 22 of Human Rights Committee that:

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[304]Ibid.

[305]Ibid.

[306]Ibid.

> The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.[307]

On the contrary, other factions opposed the efforts to guarantee the freedom of *kepercayaan,* they proposed the word *"kepercayaan"* be omitted from Article 29 (2) or modified. Those factions were the Reform faction, the PBB faction, the PDU faction, the PPP faction, the UG faction, and the Golkar faction. Zain Badjeber, a speaker from the F-PPP, explained that the founding fathers when formulated the Article 29 (2) did not mean that the words religion and belief *(kepercayaan)* as two different things. However, in the past, especially in the New Order reign the term interpreted differently. What our founding fathers intended that the *kepercayaan* meant belief in religion; it was not a belief contrary to religion. A different wording but with similar meaning was proposed by the PKB faction. The faction proposed the words "*kepercayaan agamanya*" (religious belief). Its speaker, Yusuf Muhammad Alaydrus claimed wording could avoid any controversial interpretation.[308]

Other two factions explicitly stated "the state based on the belief in God" meant the freedom of religion did not include atheism and not following any religion (irreligion). They were the PPP faction and the Golkar faction. The PPP faction proposed a new paragraph, "The state should not allow the spread of the beliefs that contradict One Almighty God" *(Negara melarang penjabaran faham-faham yang*

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[307] UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, par 2 available at: http://www.unhcr.org/refworld/docid/453883fb22.html [accessed 13 April 2011]

[308] Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI).

bertentangan dengan Ketuhanan Yang Maha Esa). Meanwhile, the delegate of the Golkar faction, Rosnaniar, stated that the freedom of religion did not include the freedom not to follow any religion because it was contrary to national consensus stated in Article 29 (1) that state based on a belief in God. It means Indonesia is a religious nation.[309]

All factions finally agreed not to amend Article 29 (2) so the word *"kepercayaan"* remained unchanged. However, during the discussion of human rights in the Second Amendment,[310] all Islamic factions opposed any proposal to insert the word in Article 28E (1) that referred to non-religious beliefs or not clearly referred to religious belief. Article 28E (1) states: "Every person shall be free to embrace religion and perform worship according to his or her religion".

In the draft, there were two alternative wordings to Article 28E (1):

> First: "*Setiap orang bebas memeluk agamanya dan beribadat menurut kepercayaan agamanya masing-masing*" (Everyone is free to embrace his/her religion and to worship according to his/her religion).
>
> Second: "S*etiap orang bebas memeluk agamanya masing-masing dan untuk beribadat menurut agamanya, dan kepercayaannya itu*" (Everyone is free to embrace his/her religion and to worship according to his/her religion and belief).[311]

Some factions explicitly stated their choice of the alternative one. They were the PDIP faction and the KKI faction. Hobbes Sinaga (of the PDIP) argued the first alternative was parallel with Article 29. Both guaranteed the freedom of religion and

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[309]Ibid.

[310]Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI). *Risalah Rapat Komisi a Ke-4 Sidang Tahunan Mpr 12 Agustus 2000* (Jakarta: Sekretariat Jenderal MPR, 2000).

[311]Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI). *Risalah Rapat Pleno Ke-44 Panitia Ad Hoc I Badan Pekerja Mpr 14 Juni 2000.*

belief. The difference lied in right holders. In Article 29, the holders were residents and citizens, meanwhile in Article 28E the right belongs to every person regardless of citizenship. Other PDIP's speaker, Muhammad Ali, supported his colleague adding that the alternative two was in conflict with Article 29 (2). Meanwhile, Markus Mali (of the KKI faction) did not explain why his faction chose the alternative one. However, it seems their argument is similar to what they expressed in discussing Article 29.[312]

The factions, which explicitly chose the alternative two, were the PKB, the PPP, the Reform, and the PDU. M Dawan Anwar (of the PKB) explained the words "religion" *(agama)* and "belief" *(kepercayaan)* refered to one thing not to two different things. They should not be differentiated and separated. He emphasized the *kepercayaan* meant religious belief (*kepercayaanagama*). Baihaqi (of the PPP) added that "belief" referred to a religion that someone believed in.[313]

The Reformasi faction and PDU faction proposed the word "*kepercayaan*" be replaced with "*keyakinan*." K.H. Muchtar Adam (of the Reform faction) wanted the word "*kepercayaan*" be replaced with "*keyakinan*" (faith). He claimed the word "*keyakinan*" was from the Qur'an and had deeper meaning than "*kepercayaan*." Haji Abdullah Alwahdi (of the PDU faction) came up with following wordings: "*Setiap orang bebas memeluk agama dan beribadat menurut keyakinan agama masing-*

[312]Ibid.

[313]Ibid.

masing (Everyone is free to embrace his/her religion and to worship according to his/her religious faith).[314]

The issues whether the right to freedom of religion might include the freedom not to follow any religion (*tidak beragama*) or not having any belief in god (atheism) were also addressed in the previous meetings, particularly in the sessions of hearing with religious organizations and universities.[315] Taufiequrochman Ruki, a delegate of Military/Police faction and A.M. Lutfhi (the Reform faction) asked MUI and Muhammadiyah their opinion whether the right to freedom of religion includes the freedom to not follow any religion (*tidak beragama*). Watik Pratiknya, a delegate of Muhammadiyah, answered that universality of human rights should be put within particularities of national values. He claimed that human rights in the US and other countries were different. In Indonesia, human rights should be conditional. The freedom not to follow any religion was irrelevant and could not be applied within Indonesian context because there was a particular value belongs to Indonesia. That was the belief in God. Ismail Hasan, a delegate of MUI, stated that he disagreed with the idea that the right to freedom of religion to include the freedom not to follow any religion.[316]

Wayan Sudaryanto (Parisada Hindu) expressed the same opinion. He hoped that members of Parliament would formulated provision on freedom of religion would be

[314]Ibid.

[315]Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI). *Risalah Rapat Ke-23 Panitia Ad Hoc I Badan Pekerja Mpr 29 Februari 2000* (Jakarta: Sekretariat Jenderal MPR, 2000).

[316]Ibid.

clear and explicit under the Constitution so that there would be no interpretation that freedom of religion includes the freedom not to follow any religion.[317]

2.7.4 Freedom and the Degree of State Support of Religion.

From constitutional perspective, the debate on the place of Shariah within the Constitution of Indonesia (UUD 45) focuses on the place of Shariah within the nature of Pancasila as state ideology. Those who oppose the imposition of Shariah insist on the secular nature of Pancasila as the foundations of the Indonesian state in which religion should be separated from the state. The proponents of the Shariah argue that the imposition of Shariah is permitted by Pancasila, particularly the first principle—belief in one God. Therefore, the state should support the application of Shariah.[318] Theoretically, according to Sapir, the degree of support the state provides to religion range from no support at all, equal support, preferred but non-coercive support, and coercive support—direct and indirect.[319] The state gives no support at all to religion if it requires full privatization of religion and separates between religion and state. It also proscribes the state to provide financial support to religious institutions and activities, even when the state uses neutral criteria and does not have any intention of advancing religion. Its aim is to establish a civil public order where religion may not even be acknowledged.[320]

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[317]Majelis Permusyawaratan Rakyat Republik Indonesia (MPR RI). *Risalah Rapat Ke-24 Panitia Ad Hoc I Badan Pekerja Mpr 1 Maret 2000* (Jakarta: Sekretariat Jenderal MPR, 2000).

[318]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*, 243-244.

[319]Gidon Sapir, "Religion and State: A Fresh Theoretical Start," *Notre Dame Law Review* 75, (1999): 587.

[320]Ibid., 587-588.

The state provides equal and neutral support if it neither encourages nor discourages religion. The state should minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or non-observance. This practically requires that religion is to be left as wholly to private choice. The acknowledgement of religion is permitted as long as the state remains neutral and does not endorse and prefer any specific religion or religion in general. The government cannot utilize religion as a standard for action or inaction. Neutrality takes two forms: formal and substantive. Formal neutrality would permit the state to support religious institutions as long as it supports all institutions and not to religious institutions alone. On the other hand, substantive neutrality, in most cases, will often require support and that religion be singled out for special treatment.[321]

A state gives preferred but non-coercive support, if it singles out religion in general or any religious denomination as more valuable than other options. A state should not, however, take action, or enact policy or law, that has the intention or effect of coercing people to accept any specific religion or religion in general. The state may prefer religion financially, symbolically, or through any other possible means, the state should avoid intervention resulting in favouring religion in general, or any specific religion, to the extent that it makes it much harder for people to remain nonreligious or to avoid practicing a religion other than their own.[322]

The state applies coercive support if it persuades persons or compels them by force to do their religion or other religions. In the narrow interpretation, coercion is only

[321]Ibid., 588-590.

[322]Ibid., 590-591.

recognized when a person is compelled by force or threat to do something that he would not otherwise do. In the broad interpretation, any state intervention resulting in favouring religion in general or any specific religion, and that makes it much harder for people to remain nonreligious or to avoid practicing a religion other than theirs, is considered as coercive support.[323]

Freedom of religion as a right is one of fundamental components of first generation of human rights. Freedom of religion is also recognized as a liberty in the sense that it is an important part of citizen's rights as a participant in the political process enshrined in the constitution. The concepts of "human rights" and "civil liberties" are interchangeable and overlapping. However the two concepts can be distinguished. They are overlapping in the sense that some of what is described as a 'civil liberty' is also recognized as a 'human right'. They are different, first according to the Hohfeldian analysis a 'liberty' is only one meaning of the concept of rights. Second, human rights are more fundamental than civil liberties in the sense that the former provide the overall framework of freedom within which the latter can operate.[324]

In a vision of political morality, the real advantage of having a right is what it means to people other than the right-holder, specifically, those against whom the right is held. Here, right is approached from the perspective of those against whom the right is held. This perspective emphasizes that an important function of rights in political morality is that rights set constraints on what governments can do and that rights narrow the range of possible goals they can pursue or even can sometimes set. Those

[323]Ibid.

[324]Richard Mar Stone, *Textbook on Civil Liberties and Human Rights*, 4th ed. ed. (Oxford: Oxford University Press, 2002), 3-7.

rights constraint the ways the government and other can treat the citizens. If freedom of religion is right, for example, what is its significance held against the government? What does the right to freedom of religion mean to the government? Dworkin's image of rights as trumps is powerful because it emphasizes that in politics, rights function to restrict rather than to motivate ordinary political decision-making. Rights in this sense are valuable because they constrain government rather than because of what they mean to the right-holder.[325]

From an analytical perspective, there is no agreement whether liberty has two concepts or single concept. Berlin distinguishes between two concepts of political and social freedom, the negative and the positive: "freedom from" and "freedom to".[326] Negative freedom is the absence of coercion or interference from other people.[327] Coercion is when other people prevent you by force from acting in a certain way or force you to act in a certain way.[328] "Positive freedom is freedom to exercise control over your own life."[329]

The enforcer may be an individual, or may be collective as in the case of laws passed by the state. This negative conception of liberty could be seen in a threat or law forbidding an action. Threats and laws restrict liberty despite the fact that we are able to defy them. A person faced with a threat or law forbidding him from performing an

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[325]Jacobs, 56-58.

[326]Isaiah Berlin, Henry Hardy, and Ian Harris, *Liberty: Incorporating Four Essays on Liberty* (Oxford: Oxford University Press, 2002), 168-169.

[327]Ibid.

[328]Nigel Warburton, *Philosophy: The Basics*, 3rd ed. ed. (London: Routledge, 1999), 80; Berlin et al., 169.

[329]Berlin et al., 178-181; Warburton.

action, is unfree, not because he cannot perform the forbidden action or because he may be deterred from doing so, but because he cannot perform it with impunity. That is to say, before the threat of law was issued, he was free to perform the act in question without penalty; but now that the threat or law has been issued, he is no longer able to perform the act without penalty.[330] The condition of unfreedom also occurs if law obliging a person to do an action. Before the law was issued, there was availability of choices for a person to do or not to do. The obligation coerces him to do the act if he does otherwise he will be punished.

But Gray, referring to Feinberg and MacCallum, argues that these labels are quite unhelpful, since virtually any kind of liberty could be expressed in terms of *either* "freedom from" *or* "freedom to".[331] MacCallum shows that that every freedom is simultaneously both *from* something, *to do* something. In his classic article, "Negative and Positive Freedom", MacCallum maintains whenever the freedom of an agent is in question, it will always be freedom from some element of constraint upon doing or becoming (or not doing or becoming) something. Freedom is 'always one and the same triadic relation' between agents, constraints, and ends. To speak of the presence of freedom is always, in consequence, to speak of an absence: absence of constraint upon an agent from realizing some goal or end. There is, in other words, only one concept of liberty.[332] Based on the triadic relation between agents, constraints, and ends, freedom of religion means absence of constraint upon and

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[330]Tim Gray, *Freedom* (Atlantic Highlands, NJ: Humanities Press International, 1991), 24-25.

[331]Ibid., 9.

[332]Gerald C. MacCallum, Jr., "Negative and Positive Freedom," *The Philosophical Review* 76, no. 3 (1967): 314.; Quentin Skinner, "A Third Concept of Liberty" in Goodin and Petit 2006 *Contemporary Political Philosophy* (p: 398-415), 398

agent to do or not to do a religion. In other words, freedom of religion means an agent is free *from* some element of constraint *to* do or not to do a religion.

In any actual situation the right to freedom of religion, for instance, will be a formal liberty-right (asserting the absence of a rule forbidding me to do my religion), a substantive liberty or claim right (asserting the negative duty of all others to interfere with doing my religion and maybe the positive duty to assist me in doing my religion). The right to freedom of religion may also be an immunity right (against anyone introducing laws that prevent me doing my religion).[333]

2.8 A Review of Previous Studies

The aim of this section is to situate this thesis with respect to the previous studies on Shariah regional regulations and legal pluralism in Indonesia. It explains the relevance of past studies in building and advancing the theory that will be constructed in this study and contribution which it endeavours to make.

2.8.1 Shariah Regional Regulations.

There are numerous studies on Shariah regulations in Aceh and other provinces in Indonesia. Some of them studied the impact of the regulations on the freedom of individual Muslims,[334] women's rights,[335] the rights of non-Muslims,[336] and children

[333]Campbell, 33.

[334]Salim, "The *Shari'ah* Bylaws."

[335]Chandraningrum; Crouch, "Religious Regulations."; Arskal Salim, "Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era," in *Indonesia: Democracy and the Promise of Good Governance*, ed. Ross H. McLeod and Andrew J. MacIntyre(Singapore: Institute of Southeast Asian Studies, 2007); Salim, "The *Shari'ah* Bylaws."

and the poor.[337] Others studied the elements of *fiqh* or Shariah in the regulations,[338] questioned the legality of the regulations,[339] and studied the regulations in the context of institutional change of power accumulation and political corruption.[340]

In assessing the impact of the regulations on human rights, Chandraningrum, Salim, and Crouch single out certain provisions of certain regulations without looking at the rest of all contents of the questioned regulations. By this method, they confirm that the regulations violate the rights of individual Muslims, women, non-Muslims, and other vulnerable groups.[341] Thus, it remains unclear whether the rest of provisions and regulations also violate those rights, and put the vulnerable at a disadvantage or in favour of them. While, Hooker and Siregar mainly focused on the general elements of *fiqh* or Shariah in the substantive contents of Aceh *qanuns*.[342] Therefore, non-*fiqh* elements of the qanuns needed further study, particularly their

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[336]Crouch, "Religious Regulations."; Salim, "Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era."; Salim, "The *Shari'ah* Bylaws."

[337]Crouch, "Religious Regulations."

[338]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*; Hasnil Basri Siregar, "Islamic Law in a National Legal System: A Study on the Implementation of Shari'ah in Aceh, Indonesia," *Asian Journal of Comparative Law* 3, no. 1 (2008); Hasnil Basri Siregar, "Lessons Learned from the Implementation of Islamic Shari'ah Criminal Law in Aceh, Indonesia," *JL & Religion* 24, (2008).

[339]Crouch, "Religious Regulations."; Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*.

[340]Michael Buehler, "The Rise of Shari'a by-Laws in Indonesian Districts an Indication for Changing Patterns of Power Accumulation and Political Corruption," *South East Asia Research* 16, no. 2 (2008).

[341]Chandraningrum; Crouch, "Religious Regulations."; Salim, "Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era."; Salim, "The *Shari'ah* Bylaws."

[342]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*; Siregar, "Islamic Law."; Siregar, "Lessons Learned."

interrelationships with *fiqh* elements. To fill this gap, this study analysed all provisions of the regulations being questioned and their material sources.

In the analysis of legality of the regulations in the regions other than Aceh, Hooker and Crouch claimed the regions have no authority on religion.[343] Their analysis focused on the various laws on regional autonomy. They failed to see other laws that gave authority to the regions on some aspects of religion. This study analysed those laws and argued the regions do have authority on some domains of religious affairs.

There were Master theses and a PhD thesis at Institut Agama Islam Negeri (IAIN) Ar-Raniry that so far have mainly concentrated on the Aceh Qanun. They studied the authority of enforcement officers,[344] the authority of *Wilayatul Hisbah*,[345] and the role of traditional Muslim scholars in Pidie, Aceh.[346] A study by Fauzi[347] is relevant to review here. He was focused on legality of the Aceh Qanun from constitutional perspective and its compatibility with human rights. He argued the changing of national policy from unification to legal pluralism had given the province the authority to enact Shariah laws. He suggests for harmonization of the Qanun with other national laws, particularly with law on human rights. In line with his

[343]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*; Crouch, "Religious Regulations."

[344] See: Stephen P Stich, "Between Chomskian Rationalism and Popperian Empiricism," *British Journal for the Philosophy of Science*, (1979).

[345] See: Thomas M Olshewsky, "Deep Structure: Essential, Transcendental or Pragmatic?," *The Monist* 57, no. 3 (1973).

[346] See: Guy Longworth, "Rationalism and Empiricism," *Key Ideas in Linguistics and the Philosophy of Language*, (2009).

[347]Noam Chomsky, "Three Factors in Language Design," *Linguistic inquiry* 36, no. 1 (2005).

suggestion, my study examined how various actors attempted to harmonise Shariah and state ideals of religious freedom and harmony.

Regarding the research in South Kalimantan, most of studies of Islam in the region were focused on the questions of when, how and whence Islam came to this region.[348] Some studies have so far mainly concentrated on Islam as an ethnic identity of Banjarese people.[349] A recent study by Irfan Noor[350] is relevant to note for this research here, particularly on the formal implementation of Shariah by regional governments in South Kalimantan. Using the qualitative research approach and theories of ethnicity and nationalism, he found the regulations of religion in the areas of *ibadah* (Friday prayer, Ramadhan and *zakat*), headscarf (*jilbab*), Qurani reading for students, the using of Jawi scripts in Banjar region as the politics of re-affirmation of the Banjarese collective identity. He argued that they should be interpreted as Islamic characteristics of the Banjarese ethnic identity and a part of cultural diversity and ethnic pluralism within the broader notion of Indonesian national identity. Different from his framework, my study saw the regulations from that of legal pluralism.

2.8.2 Shariah and Legal Pluralism.

Few scholars have been studying the interaction between Islamic law and other norms in contemporary Indonesia. An American anthropologist, Bowen examined

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[348]Avrum Stroll, *Twentieth-Century Analytic Philosophy* (New York ; Chichester: Columbia University Press, 2000), 117.

[349] See the studies by: Alfani Daud, *Islam & Masyarakat Banjar : Diskripsi Dan Analisa Kebudayaan Banjar*, Cet. 1. ed. (Jakarta: RajaGrafindo Persada, 1997); Noam Chomsky, "Three Models for the Description of Language," *Information Theory, IRE Transactions on* 2, no. 3 (1956).

[350]Irfan Noor, "Identiti Etnik Dan Identiti Nasional Di Indonesia Satu Kajian Mengenai Peneguhan Identiti Islam Etnik Banjar" (Unpublished PhD Thesis, Universiti Utara Malaysia, 2010).

the ways in which changing social norms have shaped recent laws and decisions about Islamic jurisprudence in Indonesia. He focused on a 1991 Indonesian Compilation of Islamic Law's rule of gift or donation (*hiba*) by examining local debates over law and property in two Sumatran societies, Gayo and Minangkabau. He explained that local social processes and social norms of fairness and agreement among heirs have motivated court decisions on the matter.[351]

Another study by Bowen has discussed struggles by Indonesians, particularly in Aceh, to reconcile, or select among, competing sets of values and norms, including those derived from Islam, social norms, and contemporary ideas about gender equality and rule of law. He explores this struggle, through archival and ethnographic research in villages and courtrooms of Aceh province, and through interviews with villagers, judges, jurists, and social activists, national religious and legal figures. He analyzes the social frameworks for disputes about land, inheritance, marriage, divorce, Islamic history, and, more broadly, about the relationships between the state and Islam, and between Muslims and non-Muslims. He identified the ways in which citizens take account of their own pluralism of values as they go about living their lives as Muslims in communities in Aceh and in the Indonesian nation. Additionally, Bowen found that the state is trapped in a difficult position between recognizing the respective autonomy of religions to regulate themselves on the one hand, and claiming that the state has a right to determine which religious norms may operate on the other.[352]

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[351]Bowen, "How Social Norms Shape Islamic Law."

[352]Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*.

The research by Lukito investigates the history and phenomenon of legal pluralism in Indonesia. His study focuses on understanding the state's attitude and behaviour towards the three largest legal traditions currently operative in the Indonesian society, i.e., *adat* law, Islamic law, and civil law. Using Masaji Chiba's theory of "three levels of law" (i.e., official law, unofficial law and legal postulates), he analyzes two aspects of legal pluralism in Indonesia: the political and "conflictual" domains of legal pluralism. He studied the first aspect by looking at a number of statutes and regulations promulgated specifically to deal with Islamic law and *adat* law. While the second in terms of actual cases of private interpersonal law arising from conflict between state and non-state legal traditions, as reflected in legislation and court decisions on interpersonal cases of interfaith marriage and inheritance, and gendered inheritance. From a discussion of these two aspects, he concludes that, although the form of the relations between official and unofficial laws may have changed in conjunction with the socio-political situation of the country, the logic behind legal pluralism has in fact never altered, i.e., to use law as a tool of state modernism. Thus, conflicts arising from the encounter between different legal traditions will usually be resolved by means of "national legal postulates," making the unofficial laws more susceptible to the state's domination of legal interpretation and resolution.[353]

Salim discusses the relationship between Shariahcourts and other courts in the framework of dynamic legal pluralism in Aceh, Indonesia. Following Franz and Keebet von Benda-Beckmann, Salim uses the idea of legal pluralism as an analytical tool rather than as an explanatory theory. He studies the growing role of Islamic law

[353]Lukito, "Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia".

and the expanding authority of Shariahcourts in Aceh. He explains how the shift in plural legal orders in contemporary Aceh is taking place. In the study, he found the increasing jurisdiction of Shariah courts, on the one hand, and the declining authority of civil courts in current Aceh, on the other. This has been done by the transfer of partial jurisdiction, particularly the jurisdiction over the *jinayah* offences specifically stipulated in existing *qanuns*, from the general court to the *Mahkamah Syar'iyah*.[354]

The main focus of the previous studies of legal pluralism in Indonesia was the court and its decisions, interrelationships between Islamic law and other norms, particularly *adat* law, social norms and state ideals, in the areas of personal law of inheritance, marriage, divorce, gift and land. Other focus is the interaction between Islamic courts and general courts. In other words, their main focus was the pluralism of sources of court decisions in those areas of law. There has been insufficient attention given to the combination of Shariah and other norms in the material sources of legislation. Therefore, this present study focuses on the interrelationships between various elements of sources of legislation and their hybridisation. The example of this study is regional regulations on *ibadah* (Friday prayer and the fasting of Ramadhan) in Aceh and South Kalimantan.

2.9 Theoretical Framework

Within the tradition of legal pluralism, a state law is one of types of law in societies. Other types are non-state law or unofficial law. They have various names, such as custom, customary law, religious law, folk law, indigenous law, and indigenous

[354]Salim, *Dynamic Legal Pluralism in Indonesia: The Shift in Plural Legal Orders of Contemporary Aceh.*

ordering.[355] At least, there are four founding elements or sources of law: religion or ideology, society, state,[356] and international community.[357] Therefore, according to Menski, law always needs to be navigated between four competing types of law as seen in the Figure 2.1.

The Figure 2.1 shows that (1) at the top, natural laws in the form of ethics and values, which may be religious and/or secular; (2) on the right hand side, socio-cultural and socio-economic norms, mainly people's customs and ways of doing things; (3) on the left hand side, state law and its various kinds of rules; and (4) in the bottom corner, international law and the various forms of human rights, collectively perceivable as new natural laws.[358]

Every one of the four corners of law identified above represents a variety of hybrid forms or "plurality of pluralities" ("pop"). Each of these four elements in turn are plural. Each of them may contain elements of the other three. Its content has different sources. These sources are, in essence, the state, society, religion or ideology, and international community that interact in various ways, so that any given body of rules may contain components of these four elements.[359]

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[355]Merry, "Legal Pluralism," 878.

[356]Menski, 494.

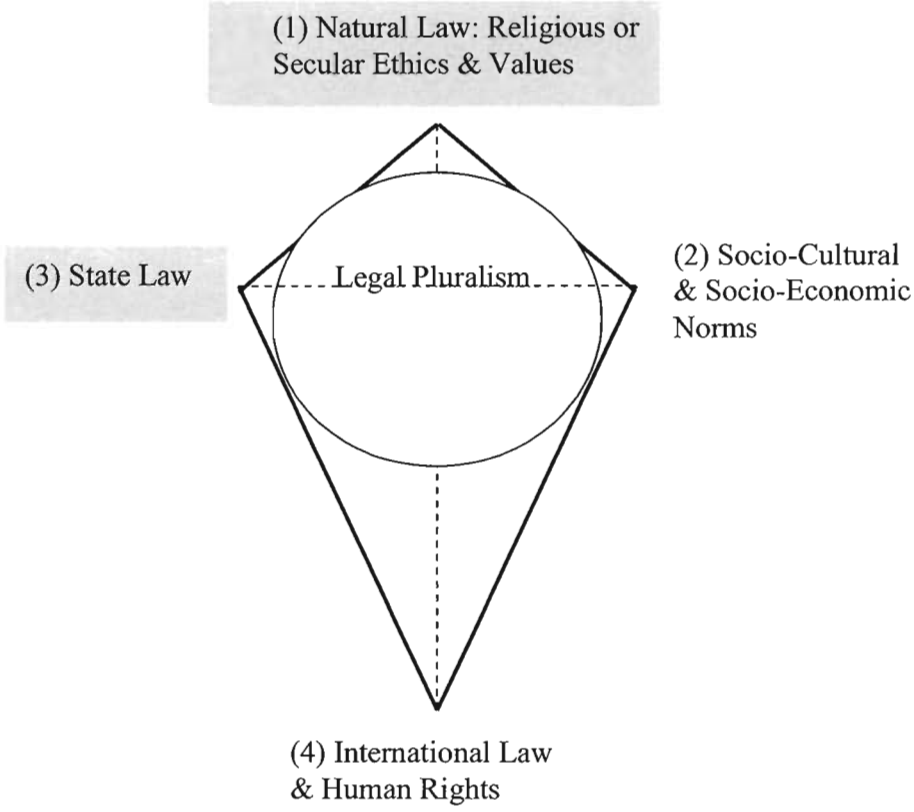
[357]Werner Menski, "Fuzzy Law and the Boundaries of Secularism," *Potchefstroom Electronic Law Journal* 13, no. 3 (2010). http://www.saflii.org/za/journals/PER/2010/17.pdf (accessed February 12, 2012); Werner Menski, "Flying Kites in a Global Sky: New Models of Jurisprudence," *Socio-Legal Review* 7, (2011).

[358]Menski, "Flying Kites," 13.

[359]Ibid., 14.

The focus of this study is the third element, state law norms and its interaction with the first element, namely religious norms and secular values. In Indonesia, before Pancasila was accepted as a state ideology, there were two ideologies competed for the basis or foundation of state law. They are Islam and secularism (see Figure 2.2).[360] Therefore, the first element of Menski's model of law, in this study can be divided into two competing law-founding elements: Islam and secularism.

Figure 2.1 Menski's Kite model of law



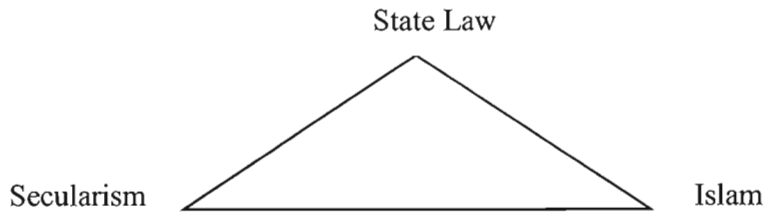
Source: Constructed based on Menski's *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006), *Fuzzy Law and the Boundaries of Secularism* (2010), *Flying Kites in a Global Sky: New Models of Jurisprudence* (2011).

[360]Elson, "Jakarta Charter," 130; Hooker, *Islamic Law in South-East Asia*, 267-268; Benyamin Fleming Intan, *"Public Religion" and the Pancasila-Based State of Indonesia: An Ethical and Sociological Analysis* (New York; Oxford: Peter Lang, 2005), 173; Anshari, "The Jakarta Charter of June 1945: A History of the Gentleman's Agreement between the Islamic and the Secular Nationalists in Modern Indonesia", 2, 23.

After Pancasila was accepted as the ideology of Indonesia, it became the basis of the state law and "source of all sources of law".[361] It means that any state policy should be based on philosophical ideals of Pancasila. The state should enact law that is containing divine dimension or not in conflict with religious teachings, honouring humanity, maintaining national unity and integrity, democracy and social justice. In a specific, it means that Pancasila plays following roles:

1. As an inspirator of creating new laws that supporting development and securing it.
2. As a selector or filter for renewing old laws.
3. As formal parameter and filter of reception of laws from other legal systems.[362]

Figure 2.2 Competing Ideologies as Foundation of Law in Indonesia before Pancasila.



However, since the principles of Pancasila still need further elaboration and interpretation, Islam and secularism still competed in interpreting Pancasila and state ideals of religious freedom and harmony in shaping state law (see Figure 2.3).[363]

Therefore, the focus of this study is the interaction of Shariah and state ideals in shaping regional regulations on ibadah (Ramadhan and Friday

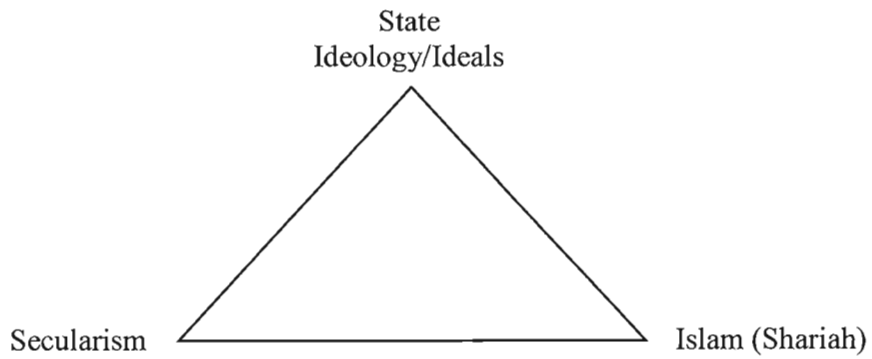
[361]Stockmann, 61-62; P. J. Suwarno, *Pancasila Budaya Bangsa Indonesia : Penelitian Pancasila Dengan Pendekatan, Historis, Filosofis & Sosio-Yuridis Kenegaraan*, Cet. 1. ed. (Yogyakarta: Penerbit Kanisius, 1993), 125-126.

[362]Hick and Meltzer, 75-76.

[363] See: Kim, "Religious Freedom in Indonesia."; Deliar Noer, "Asas Tunggal Pancasila," *Majalah D&R*, 22 August 1998.

Prayer) in Aceh and South Kalimantan. It examined the hybrid combination of syarah norms and state ideals—as interpreted competitively from secular and Islamic perspectives.

Figure 2.3 Competing Ideologies as Foundation of Law in Indonesia after Pancasila.



2.10 Conclusion

To understand the nature of regional regulations of *ibadah* in Aceh and the South Kalimantan this study used legal pluralism as its grand theory. It states that there are mutually constitutive relations between state law and other norms. To identify the elements which interacted in the regulations, this research used textual and socio-historical approaches (as mentioned in the Chapter I). Other approach is a discourse analysis. It was applied here as a method to explain how these elements (Shariah and state ideals of religious harmony and freedom) interacted and combined.

CHAPTER THREE

REGULATIONS OF FRIDAY PRAYER AND RAMADHAN IN ACEH AND SOUTH KALIMANTAN

3.1 Religious Affairs in the Regions

Previous studies by Crouch and Hooker argued the regions in Indonesia, except Aceh, did not have any authority on religion. The matter, according to them, belongs to the central government.[364] However, this section will argue the regions do have authority on some domains of religion. Although the matter of religion, according to the latest Regional Autonomy Law 32/2004, is the authority of the central government, long time before the regions had a task in some affair of religion. Since 1969, the regions had the task on two areas of religion: religious propagation and observance of *ibadah* (ritual), mainly the establishment of new places of worship.

In 1969, the Minister of Religious Affairs (K.H. Moh. Dahlan) and the Minister of Home Affairs (Amir Machmud) signed and issued a Joined-Decree 1/1969 the Implementation of State Apparatus Duty in the Guarantee of Order and Peace of the Observance of Religious Propagation and Ritual by Adherents. In the Decree, the heads of regions had the task to give opportunity for, guide, and control the propagation of religions and the observance of *ibadah*, including establishment of

[364]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*, 244-245; Crouch, "Religious Regulations," 55-58.

places of worship in their regions.[365] They had to assure both activities of adherents of religions did not violate existing laws, did not disturb security and public order, did not incite religious conflicts, and conducted without intimidation, compulsion, and threat.[366] The decree, according Sairin, downgraded the level of authority over the propagation of religions and the observance of *ibadah* from central government to regional government.[367]

The Government issued the decree as response to several protests from Muslims since 1967 toward the propagation of Christianity among Muslim community and the establishment of churches in Muslim majority areas. Among them were the protest against a newly built Methodist church in Meulaboh, Aceh, and the destruction of church buildings by Muslim youths in Makassar.[368] The decree reflects the priority of the New Order's Government to maintain the unity and integrity of Indonesia and the acceleration of modernization.[369] Its purpose was to guarantee religious freedom, maintain national unity and stability.[370] In short, the adherents of religions are free to propagate religions and observe *ibadah* as long as they do not disturb public security

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[365]Joined-Decision of the Ministers of Religious and Home Affairs 1/1969 on the Implementation of State Apparatus Duty in the Guarantee of Order and Peace of the Observance of Religious Propogation and Ritual by Adherents.

[366]Joined-Decision 1/1969, art.1 & 2.

[367]Weinata Sairin, *Gereja, Agama-Agama & Pembangunan Nasional*, Cetakan ke-3 ed. (Jakarta: BPK Gunung Mulia, 2006), 18.

[368]Mujiburrahman, *Feeling Threatened: Muslim-Christian Relations in Indonesia's New Order*, Isim Dissertations (Leiden, Amsterdam: ISIM, 2006); Frans Jozef Servaas Wijsen and Gerrit Singgih, "Regulation on Houses of Worship: A Threat to Social Cohesion?," in *Religion, Civil Society and Conflict in Indonesia*, ed. Carl Sterkens, Muhammad Machasin, and Frans Jozef Servaas Wijsen(Wien: Lit ; Piscataway, NJ : Distributed in North America by Transaction Publishers, 2009), 88; Jan S. Aritonang and Karel A. Steenbrink, *A History of Christianity in Indonesia*, Studies in Christian Mission, (Leiden ; Boston ;: Brill, 2008), 208-210.

[369]Mujiburrahman, 57-59.

[370]Intan, 52.

and order, and religious harmony. Within this legal framework, religious activities may not disturb national ideals of security, order, and harmony.

The new Era of Regional Autonomy began in 1999 when the President Bacharuddin Jusuf Habibie signed Law 22/1999 on Regional Governance on May 7, 2009, a year after the fall of Soeharto's New Order. Article 7 (1 & 2) defines the powers of the Central Government as follows:

> (1) The authorities of the region include the authorities in all sectors of government except authorities on foreign affairs, defence and security, the administration of justice, monetary and fiscal matters, religion and authorities in other sectors.
> (2) The authorities in other sectors mentioned in paragraph (1) include policies on national planning and control of national development at a macro level, funds for fiscal balance, the state administrative system and state economic institutions, the development and the empowerment of human resources, the efficient use of natural resources along with strategic high technology, conservation and national standardisation.[371]

The local governments have authorities on health, education, environmental and infrastructure services, and other functions except for national defence, international relations, justice, monetary policy, religion, and finance. According to the above provision, the authority on religion belongs to the central government. However, the elucidation of Article 7 paragraph (1) states the regional governments share with the central government in developing religious life. It says:

> Particularly, in matters of religion, the Government may mandate some of its activities to the Region as an effort to increase the participation of the Region in fostering religious life.[372]

[371] *Law 22/1999 on Regional Governance*, art 7 (1&2)

[372] Ibid., elucidation of art. 7 (1)

The Law 32/2004 Regional Governance revised and updated the Law 22/1999. Article 10 defines the division of powers between the central government and the region. Like the former, it states the region has all government authorities except foreign affairs, defence and security, the administration of justice, monetary and fiscal matters, and religion.[373]

However, paragraph (4) of the Article 10 allows some of those affairs be delegated or mandated to the region. It states:

> In carrying out the government affairs as mentioned in paragraph (3), the Government itself carries them out, may delegate some of government affairs to the Government apparatus or Government representatives in the region, or may mandate them to the regional government and/or village government.[374]

Its elucidation explains the meaning of "religion." It says:

> What it means by religious affairs, for example decision on religious holidays, which apply nationwide, giving recognition of a religion, making decision policies on implementing religious life, and other matters; and certain parts of government affairs of national scale, are not given to the region.
> Particularly, in matters of religion, the Government may mandate some of its activities to the Region as an effort to increase the participation of the Region in fostering religious life.[375]

The Law 22/1999 did not literally mention any word "*kerukunan*" (harmony) or the obligation of the regions to maintain harmony. However, Article 3 (f) stipulated the Heads of Regions to maintain social tranquillity and order.[376] The Law 32/2004 on Regional Governance revised and updated Law 22/1999. The later mentions

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[373]*Law 32/2004 Regional Governance*, art. 10 (3)

[374]Ibid., art. 10 (4)

[375]Ibid., elucidation of art. 10 (4).

[376]*Law 22/1999*, art 3 (f).

explicitly the word *kerukunan* and stipulates the regions to maintain "*kerukunan nasional*" (national harmony). However, it is not giving any elucidation to what constitute "national harmony." Article 22 states:

> In the implementation of autonomy, the region has the obligation: a. to protect society, maintain unity, integrity and national harmony, and integrity of Unitary State of Republic Indonesia.[377]

The term "national harmony" later elaborated by a Joined-Regulation 8/9 2006 on the Implementation of Duty of the Heads/Deputies of the Regions in the Maintenance of Religious Harmony, the Empowerment of the Forum of Religious Harmony, and the Establishment of the House of Worship. It revised Joined-Decree 1/1969, of the minister of religious and internal affairs about preserving harmony among the members of religious communities.[378]

One of the points in the preamble considerans[379] states, "That religious harmony is an important part of national harmony".[380]

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[377] *Law 32/2004*, art. 22.

[378] For review of this regulation, see: Sairin, 3-18; Melissa Crouch, "Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities?," *Singapore Journal of Legal Studies*, (2007); Jan S. Aritonang, "Religion and Legislation in Indonesia with Special Attention to the Joint Regulation of the Ministers of Religious and Home Affairs, No. 9/8 2006," in *On the Edge of Many Worlds*, ed. Freek L. Bakker, Jan S. Aritonang, and Karel A. Steenbrink(Zoetermeer: Uitgeverij Meinema, 2006).

[379] "In the so-called 'considerans' of the Act, a kind of preamble that gives the purpose of the Act, we find the explanation of the basic reasons which have led to the legislation. The preamble makes it clear that the enactment of the new law was necessary..." See Matthius de Blois, "The Netherlands," in *Abortion and Protection of the Human Fetus : Legal Problems in a Cross-Cultural Perspective*, ed. George F. Cole, Stanis aw Frankowski, and University of Santa Clara. Institute of International and Comparative Law.(Dordrecht Netherlands ; Boston Hingham, MA, USA: M. Nijhoff ; Distributors for the U.S. and Canada, Kluwer Academic Publishers, 1987), 177., ; "The preamble or considerans, as it is sometimes called in Roman-Dutch law,...It is generally an expression of the intention of the legislature and, in situations where the operative provisions of the legislation are not clear, may constitute a strong indication of the correct meaning." See: Elihu Lauterpacht, C. J. Greenwood, and A. G. Oppenheimer, *International Law Reports* (Cambridge: Cambridge University Press, 1996), 194.

The regulation aims to manage interaction between the people who have different religions. Broadly, it stipulates that provincial and local government officials—specifically, the governors, regents, mayors, and head of the local office or religious affairs—are responsible for ensuring religious harmony in their areas. Their main tasks are to maintain social peace and order, and religious harmony. In detail their duties include supervising and facilitating religious harmony and coordinating activities to promote mutual understanding, mutual respect, and mutual trust among religious communities and to foster social tranquillity and order in religious life.[381]

Aceh is the only province that has authority to implement Shariah law in Indonesia. After the fall of the President Soeharto and the end of his New Order Era, the central government passed a series of national laws, which gives Aceh the authority to implement Shariah law. They are the Law 44/1999 on the Governing Specialness of the Special Province of Aceh, the Law 18/2001 on the Special Autonomy for the Special Province of Aceh as Nanggroe Aceh Darussalam, and Law 11/2006 of the Governance of Aceh.

The Law 44/1999 grants the Acehnese additional powers in the fields of Islamic law, education and *adat* (customary law). The law uses terms "*syariat Islam*" (Islamic Shariah), "*kehidupan beragama*" (religious life), and "*kehidupan masyarakat/bermasyarakat*" (societal life) and "*kerukunan hidup antarumat*

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[380]*Joined-Regulation of the Ministers of Religious and Home Affairs, 8/9 2006 on the Implementation of Duty of the Heads/Deputies of the Regions in the Maintenance of Religious Harmony, the Empowerment of the Forum of Religious Harmony, and the Establishment of the House of Worship*, considerans, par. h..

[381]Salim, "Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era," 119-120.

beragama" (harmonious life between religious communities). Among these terms, the law only defines "Shariah". The definition is broad enough.

Article 1 paragraph 10 defines "Shariah" as "the guidance of Islamic teachings in all aspects of life".[382] However, the law does not state the Acehnese government has the authority to implement Shariah in all aspects of life. It only gives the authority to implement Shariah in societal life. Article 4 paragraph 1 states: "Governing religious life in the Region is expressed in the form of application of Islamic Shariah for its adherents in societal life".[383] What constitute "Shariah in societal life" is not defined or elucidated. Since the law gives authority to the region to make further regulations in the form of *Perda* to implement Shariah, additional supporting regulations might clarify the extent of these legal ambiguities.

Following the enactment of Law 44/1999, the Governor with the Aceh Legislative Assembly issued *Perda* 5/2000 on the Implementation of Shariah. While still using the same definition of "Islamic Shariah" as in the Law 44/1999, instead of using the term *"kehidupan masyarakat"* (societal life) the *Perda* used term *"kehidupan sehari-hari"* (daily life) for the area of life of implementation of Shariah. It defines the term broadly, which includes all aspects of life of individual, family, society, nation, and state. Article 4 states:

> (1) Every adherent of Religion of Islam shall practise Islamic Shariah in its totality (*kaffah)* in daily life with order and complete;

[382]*Law 44/1999 on the Governing Specialness of the Special Province of Aceh*, art 1 (10)

[383]Ibid., art. 4 (1).

(2) Obligation to obey and practise Islamic Shariah as mentioned in the section (1) of this Article implemented in daily life of individual, family, society, nation, and state.[384]

Unlike the Law 44/1999 that does not elaborate areas of Shariah that will apply, Article 4 of *Perda* 5/2000 classifies the Shariah into thirteen categories. They are *aqidah* (faith), *ibadah* (ritual), *mu'amalah* (transactions), *akhlak* (ethics), *pendidikan* (education)and *dakwah islamiyah/amar ma'ruf nahi mungkar* (Islamic propagation and promotion of good and prevention of wrong), *baitulmal* (public treasury), *kemasyarakatan* (social life), *syiar Islam* (glorifying Islam), *pembelaan Islam* (defence of Islam), *qadha* (judgeship), *jinayat* (crime), *munakahat* (marriage), and *mawaris* (inheritance).[385]

The Law 44/1999 lacks an institutional and procedural basis for the implementation of Shariah, namely the absence of a legal body to decide on Shariahcases. To redress this oversight, Law 18/2001 authorises the establishment of the Shariah Court (*Mahkamah Syari'ah*) in Aceh at provincial, regency and municipal levels.[386]

On August 1, 2006, the President Susilo Bambang Yudhoyono signed the Law 11/2006 of Governance of Aceh. The Islamic law component of this latest law includes Shariah and its implementation and Shariah court. In general, Shariah implemented in Aceh consists of *aqidah, syar'iyah* and *akhlak.* In detail it includes *ibadah* (ritual), *ahwal al-syakhshiyah (*family law*), muamalah (hukum*

[384]Aceh.*Perda 5/2000 on the Implementation of Shariah*, art. 4.

[385]Ibid., art. 5.

[386]Michelle Ann Miller, *Rebellion and Reform in Indonesia: Jakarta's Security and Autonomy Policies in Aceh*, Routledge Contemporary Southeast Asia Series (London ; New York: Routledge, 2009), 136.

perdata/private law*)*, *jinayah (hukum pidana*/criminal law*)*, *qadha'* (judgeship), *tarbiyah (*education*)*, *dakwah* (propagation), *syiar* (glorifying Islam) and *pembelaan Islam* (defence of Islam). *Qanun* of Aceh will regulate further implementation of Shariah.[387]

Table 3.1 Percentage of Population by Religion and Regency/City in Aceh, 2009

	Regency/City	Islam	Protestantism	Catholicism	Buddhism	Hinduism	Total
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	Simeulue	99,92	0,08	0,00	0,00	0,00	100,00
2.	Aceh Singkil	94,08	5,33	0,58	0,00	0,00	100,00
3.	Aceh Selatan	99,99	0,01	0,00	0,00	0,00	100,00
4.	Aceh Tenggara	83,98	7,72	8,29	0,00	0,00	100,00
5.	Aceh Timur	99,99	0,00	0,00	0,00	0,01	100,00
6.	Aceh Tengah	99,75	0,16	0,09	0,01	0,00	100,00
7.	Aceh Barat	99,89	0,06	0,03	0,00	0,01	100,00
8.	Aceh Besar	99,94	0,01	0,04	0,00	0,01	100,00
9.	Pi die	99,99	0,00	0,00	0,00	0,01	100,00
10.	Bireuen	99,90	0,00	0,00	0,09	0,00	100,00
11.	Aceh Utara	99,98	0,01	0,00	0,00	0,00	100,00
12.	Aceh Barat Daya	99,99	0,00	0,00	0,00	0,00	100,00
13.	Gayo Lues	99,99	0,00	0,00	0,00	0,01	100,00
14.	Aceh Tamiang	99,78	0,17	0,05	0,00	0,00	100,00
15.	Nagan Raya	99,99	0,00	0,00	0,00	0,00	100,00
16.	Aceh Jaya	99,99	0,00	0,00	0,00	0,01	100,00
17.	Bener Meriah	99,95	0,02	0,02	0,00	0,00	100,00
18.	Pidie Jaya*)	-	-	-	-		-
19.	Banda Aceh	98,34	0,28	0,17	0,02	1,19	100,00
20.	Sabang	97,61	0,90	0,18	0,01	1,30	100,00
21.	Langsa	100,00	0,00	0,00	0,00	0,00	100,00
22.	Lhokseumawe	99,17	0,76	0,05	0,01	0,00	100,00
23.	Subulussalam*)	-	-	-	-	-	-
	Aceh Province	**98,93**	**0,61**	**0,38**	**0,01**	**0,07**	**100,00**

Notes: *) Joning the regency/city of origin.
Source: Regional Office of Ministry of Religious Affairs and Central Bureau of Statistics of Aceh

[387] *Law 11/2006 of Governance of Aceh*, art. 125.

3.2 Regulations of *Ibadah* in Aceh

Aceh is one of provinces in Indonesia, located on the northern tip of the island of Sumatra. Its name changed several times: Aceh Darussalam (1205-1959), Daerah Istimewa Aceh (1959–2001), Nanggroe Aceh Darussalam (2001–2009) and Aceh (2009–present).[388]

Table 3.2 Number of Places of Worship by Religion and Regency/City in Aceh, 2009

Regency/City	Places of Worship						
	Islam			Protestant	Catholic	Buddh	Hindu.
	Mosque	Meunasah	Mushalla	Church	Church	Vihara	Pura
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1. Simeulue	123	179	5	-	-	-	-
2. Aceh Singkil	212	119	117	3	5	-	-
3. Aceh Selatan	200	169	229	-	-	-	-
4. Aceh Tenggara	221	200	135	3	10	-	-
5. Aceh Timur	298	534	229	-	-	-	-
6. Aceh Tengah	202	461	-	1	1	-	1
7. Aceh Barat	278	205	113	-	1	-	-
8. Aceh Besar	142	568	308	-	-	-	-
9. Pi die	236	1284	173	-	-	-	-
10. Bireuen	147	533	93	-	-	-	1
11. Aceh Utara	286	953	387	-	-	-	-
12. Aceh Barat Daya	142	164	61	-	-		1
13. Gayo Lues	75	90	31	-	-	-	-
14. Aceh Tamiang	275	257	80	-	1	-	1
15. Nagan Raya	217	239	154	-	-	-	-
16. Aceh Jaya	115	208		-	-	-	-
17. Bener Meriah	134	267	94	-	-	-	-
18. Pidie Jaya*)	-	-	-	-	-	-	-
19. Banda Aceh	93	101	35	2	1	1	7
20. Sabang	20	56	19	1	1	-	1
21. Langsa	50	50	53	-	-	-	1
22. Lhokseumawe	41	68	56	1	1	-	1
23. Subulussalam*)	-	-	-	-	-	-	-
Total	**3.507**	**6.705**	**2.372**	**11**	**21**	**1**	**14**

Notes: *) Joning the regency/city of origin.
Source: Regional Office of Ministry of Religious Affairs and Central Bureau of Statistics of Aceh

[388]Damien Kingsbury, *Peace in Aceh : A Personal Account of the Helsinki Peace Process* (Jakarta: Equinox Pub., 2006), 99; Iskandar Norman, "Ragam Nama Aceh," *Harian Aceh*, June 6 2011; Rachmad Yuliadi Nasir, "Nama Nad Diganti Jadi Aceh," *Aceh Kita*, May 20 2009; Miller, 96.

This province consists of 18 regencies/*kabupaten* and 5 municipalities/*kota*.[389] In 2009 the number of its residents is 4,363,48. The number of Muslim is significantly dominant (98,93%), compared to people of other religions (1,07%) (see Table 3.1).[390]

Perda 5/2000 and *Qanun* 11/2002 set out rules on *ibadah* of Friday prayer and fasting of Ramadhan in Aceh. In general, *Perda* 5/2000 prescribes Muslims to practise Islamic Shariah in daily life. Although non-Muslims have no obligation to observe Shariah, they and Muslims shall jointly respect *(menghormati)* its implementation. It prohibits non-Muslims from performing any activity that may disturb the tranquillity and calmness (*kekhusyukan)* of Muslims in observing their *ibadah*.[391] The provincial government and all people have obligations to support and facilitate the observance of *ibadah* in two ways. First is by preventing all activities that may disturb and interfere with the observance of *ibadah* by every Muslim.[392] Second is by establishing, maintaining, and glorifying (*memakmurkan)* the places of *ibadah* for Muslims.[393] Article 19 contains criminal offences relating to *ibadah* (see Table 3.3). Other obligations, which refer to supporting and facilitative roles of the government and people in general, have no offences in case of failure.

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[389] The regencies are West Aceh, Aceh Besar, South Aceh, Central Aceh, Southeast Aceh, East Aceh, North Aceh, Aceh Pidie, Aceh Singkil, Bireun, Simeulue, Southwest Aceh, Gayo Lues, Aceh Jaya, Nagan Raya, Aceh Tamiang, Bener Meriah, and Pidie Jaya. The cities are Banda Aceh, Sabang, Lhokseumawe, Langsa, and Subulussalam.

[390] Badan Pusat Statistik Aceh, *Aceh in Figures (Aceh Dalam Angka)*2010.

[391] Aceh, *Perda 5/2000 on the Implementation of Shariah*, art. 8 (2).

[392] Ibid.,art. 9 (1).

[393] Ibid.,art. 9 (2).

The regulation on *ibadah* in Aceh is also set out in the *Qanun* 11/2002 on *Aqidah, Ibadah, and Syi'ar Islam*. "*Ibadah*" is defined as prayer and fasting of Ramadhan.[394] The main purpose of the regulation is to increase the understanding, observance of *ibadah*, and its supporting facilities.[395] Its elucidation says:

> Regulation of the aspect of *ibadah*, namely obligatory prayers, Friday prayer, and fasting of Ramadhan is aimed at encouraging Muslims to observe of *ibadah* and increase the quality of faith, quality and intensity of *ibadah* as a devotion solely for Allah. The effort should be supported by condition and situation that glorify Islam within the scope of value of *ibadah*.[396]

Table 3.3 Regulations of Ibadah in Perda 5/2000 on the Implementation of Islamic Shariah

Obligations	Criminal Offences	Punishment	Application
Every Muslim shall observe *ibadah* according the guidance of Islamic Shariah (art. 8 (1)).	No offence	None	Muslims
Every Muslim shall stop all their activities at certain times in order to observe *ibadah* (art. 8 (2))	Failure to terminate all their activities in certain times to observe *ibadah (*prayers)	3 months imprisonment or fine of two million rupiah(694.00 MYR) (art. 19)	Muslims
Every non Muslim is not allowed to perform any activity that may disturb the tranquillity and calmness (*kekhusyukan)* of Muslims in observing their *ibadah* (art. 8 (4))	Performing activities that may disturb Muslims' tranquillity and calmness (*kekhusyukan*) in observing their *ibadah* (prayers)	Ibid	Non Muslims
Provincial government and social institutions shall make efforts in preventing all activities that may disturb and interfere with the observance of *ibadah* by every Muslim (art. 9 (1)).	No offence	None	Government and civil societies
Provincial government and people shall establish, maintain, and glorify the places of *ibadah* for Muslims (art. 9 (2)).	No offence	None	Government and civil societies

Source: My own summary.

[394]Aceh.*Qanun 11/2002 on Islamic faith (aqidah), prayers and fast (ibadah) and activities glorifying Islam (syiarIslam)*, art.1 (8).

[395]Ibid.,art. 2.

[396]Ibid., elucidation.

All parties have obligations and responsibilities to support the observance of *ibadah*. Provincial, regency and city governments, and social institutions have obligations to provide facilities and create conducive condition and atmosphere for the observance of *ibadah*.[397] Government agencies, educational institutions, and business enterprises have obligations to encourage Muslims and provide facilities for congregational prayers.[398] Parents are responsible for ensuring family members perform the daily and Friday prayers, and fast during Ramadhan.[399] Heads of villages shall glorify mosques and village halls (*meunasah*) with congregational prayers and other religious activities.[400]

3.2.1 Friday prayer

The rules on Friday prayer in Aceh are specifically mentioned in the articles 8 (1 & 2), and 21 (1) of the *Qanun* 11/2002. It addressed two aspects related to Friday prayer: the obligatory aspect of Friday prayer and punishment for neglecting it; and its facilitative and supporting aspects such as providing facilities, fostering a conducive atmosphere, and allocating time to facilitate the observance of Friday prayer, and prohibition on disturbing it.

The *Qanun* obliges every Muslim, which has no *uzur syar'i,* to perform Friday prayer.[401] It establishes *ta'zir* penalty of a maximum imprisonment of six months or a maximum of three strokes of caning in public for any personwho fails to perform the

[397]Ibid.,art. 7 (1).

[398]Ibid.,art. 9 (1).

[399]Ibid.,art. 7 (2).

[400]Ibid.,art. 9 (2).

[401]Ibid.,art. 8 (1).

Friday prayers for three consecutive times without *uzur syarie* or without any reasonable cause.[402] Public transportation companies have obligations to facilitate Muslims in *ibadah*. The *Qanun* prescribes them to allocate a time and facility to users for observing the obligatory prayers including Friday prayer.[403]If they fail to comply with such order, the punishment is a revocation of licence.[404] Respect for the observance of Friday prayer is highly encouraged. Therefore, every person, government agency and other agency shall *(wajib)* stop all activities, which could prevent and disturb Muslim to observe Friday prayer.[405] However, it does not specify what activities considered as preventing and disturbing the prayer and their punishment. The details of obligations and offences related to Friday prayer (see Table 3.4).

3.2.2 The month of Ramadhan.

The details of regulation on Ramadhan in Aceh, like regulation on Friday prayer, are in the *Qanun* 11/2002. The rules on Ramadhan in Aceh are specifically mentioned in the article 1 (8) on definition of the fast of Ramadhan, article 10 (1, 2) on prohibited certain behaviours during the daylights and article 10 (3) on encouragement of some practices during Ramadhan, article 22 (1 & 2) on *ta'zir* punishment. Details of obligations, offences and punishment (see Table 3.4).

[402]Ibid.,art. 21 (1).

[403]Ibid.,art. 9 (3).

[404]Ibid.,art. 21 (2).

[405]Ibid.,art. 8 (2).

The *Qanun* states that the fast of Ramadhan is *ibadah*.[406] Article 10 of the *Qanun* prohibits everyone, including non-Muslims, to provide facilities and opportunities to Muslim who has no valid excuse (*uzur syar'i*) not to observe fasting during the month Ramadhan.[407]

It also prohibits Muslims who have no valid excuse (*uzur syar'*) to eat or drink in public during the daylight of Ramadhan.[408] It encourages Muslims to observe *tarawih* prayer and other recommended acts.[409] Elucidation of article 10 says:

> Providing facilities or opportunities is for example operating food stalls and restaurants during the daylights of Ramadhan, or selling food and drink that are most likely to be consumed before the time of breakfast.
> *Uzur syar'i* is a condition that allows a person not to observe fasting. Therefore, selling food to traveller (*musafir*) and sick person is allowed.

Public place (*tempat umum)* is open place that can be attended or seen by everyone. Meanwhile, in front of public (*di depan umum*) is in front of other person, such as in public transportation, waiting room or office.[410] Article 22 establishes *ta'zir* penalty of a maximum imprisonment of one year or maximum fine of three million Rupiah (1,041.00 MYR) or a maximum of six strokes of caning in public and a revoke of licence for any person who provides facilities and opportunities to Muslims who have no valid excuse not to observe fasting (eat and drink).[411]

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[406]Ibid.,art. 1 (8).

[407]Ibid.,art. 10 (1).

[408]Ibid.,art. 10 (2).

[409]Ibid.,art. 10 (3)

[410]Ibid., elucidation to art. 10

[411]Ibid.,art. 22 (1).

Table 3.4 The Regulation of Friday Prayer and Ramadhan in the Qanun 11/2002.

Obligations	Criminal Offences	Punishment	Application
Provincial, regency and city governments, and social institutions shall provide facilities and create conducive condition and atmosphere for the observance of prayers and fasting Ramadhan (art. 7 (1)).	No criminal offence	No punishment	Government agencies and social institutions
Every family or parents are responsible for ensuring family members perform the daily and Friday prayers, and fast during Ramadhan (art. 7 (2))	No criminal offence	No punishment	Muslims
Every Muslim, who have no religiously valid reason (*uzur syar'i*), shall perform Friday prayer(art. 8(1))	Failure to observe Friday prayer three weeks consecutively without a religiously valid reason (Art 21(1)).	6 months imprisonment or 3 lashes.	Muslims
Everyone, government agencies, business enterprises and or social institutions shall stop all activities that may prevent Muslims from observing Friday prayer or disturb them (art. 8 (2))	No criminal offence	No punishment	Everyone, government agencies, business enterprises and or social institutions
Every government agency, educational institution, and business enterprise shall encourage and provide facilities for congregational prayers (*shalat berjamaah*) (art. 9 (1))	No criminal offence	No punishment	Government agency, educational institution, and business enterprise
Heads of villages shall foster congregational prayer in mosques and village halls (*meunasah)* and other religious activities (art. 9 (2))	No criminal offence	No punishment	Heads of villages
Public transportation services shall provide opportunity and facility to the users to observe obligatory prayers (*shalat fardhu*) (art. 9(3))	Failure of public transportation services to provide opportunity and facility to the users to observe obligatory prayers (art. 21(2))	Revocation of business licence	

Table 3.4 (Continued)

Obligations	Criminal Offences	Punishment	Application
Everyone or business/enterprises are not allowed to provide Muslims, who have no valid excuse (*uzur syar'i*) not to observe fasting, with facilities or opportunities to break their fasting during the month Ramadhan (art. 10 (1))	Provide facility or opportunity to Muslims to break their fasting during Ramadan month (art. 22 (1)).	One-year imprisonment or fine 3,000,000.00 IDR (1,041.00 MYR) or 6 lashes and revocation of business licence.	Everyone
Every Muslim, who has no a valid excuse (*uzur syar'*), is prohibited to eat or drink in public during the daylight of Ramadhan (art. 10 (2))	Eat/drink publicly during the daylight hours in Ramadan month (art. 22(2))	4 years imprisonment or 2 lashes.	Muslims
During the month of Ramadhan people are encouraged to observe *shalat tarawih* and do other *amalan sunat* (art. 10 (3))	No criminal offence	No punishment	Muslims
Everyone is prohibited from doing any activity that may disturb or interfere with the tranquillity of the observance of congregational prayer of *tarawih* in their places (art. 10 (4))	No criminal offence	No punishment	Everyone
Everyone in the Province of Nanggroe Aceh Darussalam shall respect the observance of *ibadah* (art. 11).	No criminal offence	No punishment	Everyone

Source: My own summary.

It punishes every person who fails to comply with the prohibition of eating and drinking in public with *ta'zir* penalty of a maximum imprisonment of four months or a maximum of two strokes of caning in public.[412]

Regarding the punishment, the elucidation says:[413]

> In general, Islamic Shariah consists of the aspects of faith, ritual, *muamalah*, and ethics. Every Muslim is required to obey all those aspects. The obedience to the aspects of faith and ritual (*ibadah*) depends very much on individual conscience. Meanwhile, the obedience to observe aspects of *muamalah* and

[412]Ibid.,art. 22 (2).

[413]Ibid., elucidation.

> ethics depends on the quality of faith, piety or individual conscience. It comes along with both worldly and otherworldly punishments for offenders.
>
> In Islamic legal system there are two types of sanctions; namely the otherworldly sanction, which will be accepted in the hereafter, and sanction, which is, carried out by human through executive, legislative, and judicative powers. Both types of sanction encourage people to obey the law. In many aspects, the implementation of Shariah requires the involvement of the state. The law is meaningless if it the state does not enforced it. On the other side, the state will be in chaos if the law is not enforced.

Although the elucidation says that Friday prayer and fasting of Ramadhan as *ibadah* shall be observed based on the individual conscience and is not accompanied by worldly sanction enforced by the state, but in the articles of the *Qanun* there are punishments for Muslims who fail to observe Friday prayers. It means the state is coercing Muslims to observe that obligation.

3.2.3 Agencies and Procedures

Since 1999, the government of Aceh has enacted several regulations or *Qanun* on various aspects of the implementation of Shariah. The *Qanun* has two categories. The first category contains the institutions and procedures of the application of Shariah. The second category contains the substantive rules of Shariah.[414]

The special autonomy to implement Shariah in Aceh has resulted in the creation of two government agencies to support the application of Shariah. They are Shariah Office (*Dinas SyariatIslam*) and *Wilayatul Hisbah*. It also re-established the Ulama Consultative Assembly (MPU- *Majelis Permusyawaratan Ulama)* and Shariah Court. The Shariah Office has the administrative function in supporting the implementation of all aspects of Shariah. The *Wilayatul Hisbah* religious police back

[414]Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, 156.

up the MPU in controlling and monitoring the proper application of Shariah by-laws. The MPU plays advisory and consultative roles in assuring the conformity of local government policies with Shariah norms. In terms of *Qanun* lawmaking, the MPU has the authority to draft the *Qanun* on Shariah and propose it to the Provincial Legislative Assembly. Like the MPU, the Shariah Office also has function to draft *Qanun* on Shariah and offer it as a government initiative proposal. The Shariah Court in Aceh has jurisdiction over all aspects of Shariah as regulated by *Qanun*. It also has jurisdiction over everyone including all Muslims as well as non-Muslims within the territory of Aceh.

3.2.3.1 Shariah Office

Following the Law 44/1999, the Aceh government issued *Perda* 5/2000, which prescribed the provincial government to foster, supervise, and monitor the implementation of Shariah.[415] For that purpose, in 2001 the provincial government created a Shariah Office (Dinas Syariat Islam) based on *Perda* 33/2001. It is a government agency in implementing Shariah which is under the Governor and responsible to him or her via provincial secretary.[416] According to *Qanun* 5/2007, one of its key functions is to draft *Qanun* and legal products on the implementation of Shariah. In detail, it has the authority to:

a. manage general administration and finance in Islamic Shariah Office.
b. plan programmes in the areas of Shariah
c. conserve (*melestarikan*) Islamic values
d. conduct research and development in the aspect of implementation of Shariah
e. supervise and guide implementation of Shariah
f. cooperate with other institutions which implement Shariah law

[415] Aceh. *Perda5/2000*, art. 3.

[416] Aceh. *Perda33/2001 on the Formation of Organisational Structure and Job Patterns of Islamic Shariah Office of Special Province of Aceh.*, art. 2.

g. guide (*membina*) and supervise the Institution of Developing Recitation of Qur'an (*LPTQ-Lembaga Pengembangan Tilawatil Qur'an*).[417]

3.2.3.2 The Ulama Consultative Assembly

According to Law 44/1999, the authority given to *ulama* to take part in making local policies is essential part of the special autonomy in the implementation of Shariah in Aceh.[418] The law prescribes the establishment of an independent organization of *ulama.* Its main function is as advisory council to provide input and considerations for local policies (including political, social, and economic life) to be Islamic.[419] Following the enactment of the Law 44/1999, Aceh government issued *Perda* 3/2000, which established the MPU (Majelis Permusyawaratan Ulama), or the Ulama Consultative Assembly as the organisation of *ulama*. It is not a part of government but it acts as an equal partner of the executive and legislative bodies.[420]

Perda 43/2001 revised and updated the *Perda* 3/2000 on the MPU to accommodate the development of the organization. Although it was signed few weeks after the enactment of the Law 18/2001, it was drafted based on Law 44/1999. It increases the number of the Plenary Board of *Ulama* (DPU/ Dewan Paripurna Ulama) members from 18 in the later to 27 persons and added 9 members for the Fatwa Commission.[421] This board consisted of twenty-seven prominent *ulama* across the province of Aceh, including the chairman of the MPU and the two vice chairmen.

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[417] Aceh.*Qanun5/2007 on the Organisation and Job Description of Offices, Technical Agencies, and* Secreatriats of Nanggroe Aceh Darussalam Province, art. 9.

[418] *Law 44/1999*, art.1 (8).

[419] *Law 44/1999*, art. 9.

[420] Aceh.*Perda3/2000 on the Organisation and Job Description of the Ulama Consultative Assembly of Special Province of Aceh,* art. 3.

[421] Aceh.*Perda 43/2001 on the First Amendment of Perda 3/2000,* art. 15.

The twenty-seven members of this board were selected from 180 *ulama* who were recruited hierar- chically from the lower level of the legal community, such as *gampong* (village) and *mukim* (several villages), to the middle level of the local government (district or city). Each ulama on the board receives a monthly allowance. Above all, members of this board have political privileges including a type of immunity. The immunity means that members of the DPU are immune from prosecution for what they say in formal meetings within the MPU itself or in meetings with the legislature.[422] The Board has the rights:

1. To obtain information from the local executive and the legislative bodies on policies that they might take.
2. To issue *fatwa* (legal opinions), to give considerations, and to offer proposals of regional policies to the local executive and the legislative bodies, and people.
3. To monitor and to review the conformity of implementation of regional policies with the norms and guidance of Islamic *Shariah.*
4. To issue *fatwa* (legal opinions), to give considerations, and to offer proposals of regional policies to the local executive and the legislative bodies, and people.[423]

Qanun 9/2003 then elaborates the Article 1 of *Perda* 3/2000 on the MPU. It clarifies the meaning of the MPU as equal partner of local legislative and executive bodies. It regulates the way *ulama* of the MPU cooperate with all government agencies. It also limits the authority of the MPU in the process of lawmaking. The Elucidation of *Qanun* 9/2003 describes the framework of this cooperation as follows:

> The regulation of job relations between the MPU and government agencies is to make all government policies, which are implemented by vertical agencies of Province Nanggroe Aceh Darussalam, able to support or not contraproductive with the implementation of Islamic Shariah. On the other side, by the existence of job relations pattern with the MPU, government

[422]Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, 155.

[423]Ibid., art. 16.

> policies will work effectively in society, because they have moral support from the MPU.[424]

The MPU has no authority to make policy decision making. The authority still belongs to executive and legislative bodies as elucidated follows:

> Meanwhile, the Provincial policy decision making from the aspect of Islamic Shariah would be better in the hands of the Governor and other executive agencies, and the Provincial Legislative Council (DPRD).[425]

Perda 3/2000 established the MPU only at provincial level.[426] Following the enactment of Law 11/2006, the Aceh government issued *Qanun* 2/2009 to establish the MPU not only at provincial level, but also at regency level. The authority to issue *fatwa* only belongs to the provincial MPU. Meanwhile, the regency MPU shall carry out and secure the *fatwa*.[427]

3.2.3.3 Shariah Court.

The autonomy of Aceh in 1999 has authorised Aceh to implement Shariah law, but without necessary supporting institutions such as a court. The Law 44/1999 did not mention the creation of the Shariah Court (SC). It was the Law 11/2001 that formally mandated the establishment of the SC. However, only four years later it could work, particularly to exercise its jurisdiction over criminal offences. There are various factors that prevent it to work fully. First is the ambiguity of jurisdiction. Second is lack of support from police and public prosecutor. Third is no transfer of partial jurisdiction of criminal offences from the general court. In 2005, it could work after

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[424] *Qanun 9/2003 on the Job Relations of the Ulama Consultative Assembly with Executive, Legislative and other Agencies,* elucidation.

[425] Ibid.

[426] *Perda 3/2000*, art. 3.

[427] *Qanun2/2009*, art. 5.

there were political will and commitment of all parties such as governor, police, and prosecutor.[428]

According to Law 18/2001, the SC has jurisdiction over all aspects of Shariah, which the Aceh *Qanun* has regulated.[429] From 2001 to 2003, the Aceh *Qanun* has regulated matters of *aqidah* (faith), *ibadah* (ritual), *syiar Islam* (glorifying Islam), liquor, gambling, and close proximity. The *Qanun* 10/2002 on Islamic Shariah Justice provides the jurisdiction of the Shariah Court will include *ahwal al-syakhshiyyah* (personal matters), *muamalat* (trade and commerce), and *jinayah* (criminal acts).[430] In 2003, the President issued Decree 11/2003, which transforms the existing Religious Court (*Peradilan Agama)* into the Shariah Court.[431] It also gives new subject-matter jurisdiction as an addition to that of religious court. That is "the authority relating to social life in rituals (*ibadah*) and activities glorifying Islam (*syiar Islam*) as regulated in the *Qanuns*".[432] The decree did not recognize the SC's jurisdiction over other areas of Shariah, particularly criminal offences related to liquor, gambling, and close proximity that have been regulated by various *Qanuns.* The Presidential decree has blurred, as Salim pointed out, the jurisdiction of the SC.[433]

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[428]Salim, *Dynamic Legal Pluralism in Indonesia: The Shift in Plural Legal Orders of Contemporary Aceh*, 9.

[429]*Law 18/2001*, art.25 (2).

[430]Aceh.*Qanun10/2002 on Islamic Shariah Justice*, art. 49.

[431]*Presidential Decree 11/2003 on the Shariah Court and Shariah Court of Nanggroe Aceh Darussalam Province*, art. 1.

[432]Ibid.,art. 3 (1).

[433]Salim, *Dynamic Legal Pluralism in Indonesia: The Shift in Plural Legal Orders of Contemporary Aceh*, 9.

Law No.11/2006 authorises the Shariah Court (SC) in Aceh to oversee proceedings relating to Islamic law in matters of *ahwal* al-*syakhshiyyah* (family law), *muamalat* (private law), and *jinayah* (criminal law). In terms of personal jurisdiction, the SC has authority to adjudicate a case involving Muslims within the territory of Aceh. It also has the jurisdiction over non-Muslims: (1) who commit a Shariah criminal offence with Muslims and voluntarily submit to *jinayah* law; and/or (2) commit a Shariah criminal offence not regulated by the Indonesian Criminal Code.[434] In the first situation, if both the Indonesian Criminal Code and the Aceh *Qanun* regulate the subject matter, non-Muslims may choose the Shariah Court or general court. In the second condition, non-Muslims are compelled to use the Shariah court.

The Shariah Court is a part of national legal system in which the Supreme Court may review the later judgment. It consists of Shariah courts in every regency and city level and the provincial level. The regency Shariah courts are the courts of first instance. The Aceh Shariah Court in the Capital City of the Province is appellate court that has jurisdiction to bear appeals of causes from regency and city courts. The Indonesian Supreme Court has ultimate appellate jurisdiction to review the judgement of the Shariah Appeals Court in matters of marriage, divorce, and remarriage.[435] When there is competing jurisdiction between Shariah court and other courts, the Supreme Court has the authority for the first and last instance.[436]

From 2005 to 2011, Aceh's Islamic Courts (20 in total) have dealt with 613 criminal cases, with 443 cases in gambling, 87 in liquor, and 82 in close proximity.

[434]*Law No.11/2006*, art. 129.

[435]Ibid., art. 131.

[436]Ibid., art. 137.

Concerning the regulation of Ramadhan, there was only one case brought to a court, namely selling food during the fasting hours (see Table 3.5). It took place in 2010 in Aceh Besar regency. In that case, two women who operated their food stall outside allowed time were caught by the *Wilayatul Hisbah* and were brought to Jantho Islamic Court of Aceh Besar Regency. They were punished with public lashing in front yard of Jantho City Grand Mosque (*Masjid Agung Almuwwarah*) after Friday prayer.[437]

Table 3.5 Number of Criminal Cases Solved in Aceh Shariah Courts, 2005-2011

	Cases	Number
1.	Gambling	443
2.	Liquor	87
3.	Close Proximity	82
4.	Selling Food during Ramadhan	1
	Total	613

Source: Aceh Syar'iah Court.

3.2.3.4 Wilayatul Hisbah

Following the enactment of Law 44/1999, the provincial government issued *Perda* 5/2000 on the implementation of Shariah. It mandated the creation of *Wilayatul Hisbah* (WH) as a government agency in monitoring and controlling the implementation of Shariah.[438] In 2006, the legal basis of the WH was Law 11/2006. Article 244 mandated the governor, regents and mayors to establish a unit of *Polisi Wilayatul Hisbah* (the WH Police) as a part of *Satuan Polisi Pamong Praja (Civil* Service *Police* Unit).[439] *Qanun* 5/2007 establishes organizational structure of

[437]"Jual Nasi Saat Puasa Dua Wanita Dihukum Cambuk," *Serambi Indonesia*, October 2 2010.

[438]Aceh.*Perda5/2000*, art.20 (1).

[439]*Law 11/2006*, art. 244.

the WH. It has the section for investigating Shariah criminal offences and executing punishment.[440]

In earlier *Qanuns* (*Qanun* 11/2002; *Qanun* 12/2003; *Qanun* 13/2003; and *Qanun* 14/2003), the WH has authority to monitor and control the application of Shariah. In treating offenders, the WH has the authority to takes two steps. First, it warns or advises the offenders. Second, if the offenders do not change their behaviours, the WH hands over the case to investigators. Police officers or specially appointed civil service investigating officers (*Penyidik Pegawai Negeri Sipil*: PPNS) have the authority to investigate offences. State officials known as public prosecutors (*jaksa*), after the police conduct initial investigations and hand a brief to the prosecution, conduct the prosecution. The prosecutors then transfer the case to the Shariah Court.

Qanun 5/2007 expanded the authority of the WH. Like police, it has the authority to investigate.[441] Article 205 lists in detail the greater authority of the WH. It has the authority to:

1) maintain public tranquillity and order and take actions on the offenders;
2) investigate and take non-judicial repressive action toward offenders of *Qanun*, Governor's regulations and decisions;
3) accept a report from a person on the occurrence of a criminal act;
4) take first action at the crime scene; stop an accused person and check his identity card;
5) order anyone on the crime scene to stay;
6) conduct capture, detention, search and seizure operations;
7) act as undercover consumer in operations related to gambling, liquor, and close proximity;
8) confiscate items or documents, take fingerprints and photographs;
9) cross-examine suspect or witness, invite an expert;

[440] Aceh. *Qanun5/2007*, art. 201.

[441] Ibid.,art. 202.

10) close investigation if there is inadequate evidence to bring the case to Shariah Court; and
11) take other legitimate actions.[442]

State officials known as public prosecutors (*jaksa*), after the WH or police conduct initial investigations and hand a brief to the prosecution, conduct the prosecution. The prosecutor has authority to:

1) receive and verify the document filed by investigator;
2) conduct a pre-prosecution inquiry if the information is inadequate;
3) draft the accusation letter or indictment;
4) transfer the case to the Shariah Court;
5) give a notice to the accused of the day and time the trial and an invitation letter to the accused and to witnesses to attend the trial;
6) conduct prosecution in court;
7) take any other action within the responsibilities and authority of a general prosecutor; and
8) carry out the court judgment.[443]

3.2.4 Applicability for Muslims and non-Muslims

Article 4 paragraph (1) of Law 44/1999 mentions the Shariah law applies only to the adherents of Islam. As stated before, following the enactment of Law 44/1999 the Governor with the Aceh Legislative Assembly issued *Perda* 5/2000 on the Implementation of Shariah in Aceh. Although Shariah applies only to Muslim, the *Perda* in its articles 4, 5, 7, 10, 12, and 14 mentioned many times the obligations which refer to "everyone" *(siapapun)*, "every person" *(setiap orang)*, "every adherent of religions other than Islam".[444] They have the obligation to respect (*menghormati*) and honour (*menjunjungtinggi*) the implementation of Shariah.[445] In the area of *ibadah,* it does not allow non-Muslims to do activities that could interfere

[442]Ibid., art. 205.

[443] Ibid.

[444]Aceh.*Perda5/2000*, arts 4, 5, 7, 10, 12, and 14.

[445]Ibid., art. 4 (3).

with (*mengganggu*) the peace and tranquillity (*kekhusyukan)* of Muslims in the observance of *ibadah*.[446] In other words, non-Muslims have obligation to *respect* the observance of *ibadah*, but unlike Muslims, they do not have any obligation to practise it. Having looked at the terms and related rules inside the text of the *Perda*, Rusjdi Ali Muhammad (former Rector of IAIN Ar-Raniri, Aceh) argued the terms "respect", "honour" and "interfere with" are ambiguous. They are too general and do not constitute any detail of acts considered as offences which are subject to punishment.[447]

Law 18/2001 still insists that Shariah applies only to Muslims by stipulating the Shariah courts only have jurisdiction over Muslims live in Aceh. Muslims who commit non-Shariah criminal offences and non-Muslims remained subject to national civil law.[448]

The Article 126 of Law 11/2006 mentions the obligations of both Muslims and non-Muslims. It states:

> (1) Every adherent of Islam in Aceh shall obey and practise Islamic Shariah.
> (2) Every person lives or is in Aceh shall respect the implementation of Islamic Shariah.[449]

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[446]Ibid., art. 8 (4).

[447]Rusjdi Ali Muhammad, *Revitalisasi Syari'at Islam Di Aceh: Problem, Solusi, Dan Implementasi*, Cet. 1. ed. (Banda Aceh, Indonesia: IAIN ar-Raniry, Nanggroe Aceh Darussalam and Penerbit Logos Wacana Ilmu, 2003), 133.

[448]*Law 18/2001 on the Special Autonomy for the Special Province of Aceh as Nanggroe Aceh Darussalam,* art. 5.

[449]*Law 11/2006*, art. 126.

Like *Perda* 5/2000, the term "respect" is still ambiguous. According to Miller, "What constitutes 'respect' for Shariah, or lack thereof, is not elucidated".[450] This legal ambiguity requires additional supporting *Qanun* to make it clear.

During parliamentary deliberation of the drafting the Bill of Law 11/2006, the PDS faction (Christian party) was questioning the difference between "*tunduk*" (subject to) and "*menghormati*" (respect). Whether they should be in one sentence, paragraph, or in different sentences or paragraphs.[451] Whether they should refer to everyone or only refer to Muslims. The PDS faction agreed if only "respect" referred to everyone, meanwhile "subject to" referred only to Muslims.[452]

During the debate, Yusril Ihza Mahendra as a representative from the Central Government tried to explain the meaning of "respect" in terms of the differences between moral norms and legal norms.[453] He preferred to classify "respect" as a moral norm rather than a legal norm. He took the celebration of Hinduism "*Hari Raya Nyepi*" (Silence Day) in Bali as an example to describe the meaning.[454] According to him, everyone come there respect it, domestic and international flights

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[450]Miller, 172.

[451]Dewan Perwakilan Rakyat Republik Indonesia (DPR RI). 45.

[452]Ibid., 47.

[453]Ibid., 51.

[454]*Nyepi*, a day of silence, is one of the most important rituals for Balinese Hindus. On the day, Balinese Hindus performed the four abstentions: refraining from setting fires or turning on lights, refraining from working, refraining from traveling outside the home, and refraining from enjoying any form of entertainment. Radio stations as well as local, national and cable television stations and networks were not allowed to transmit during the day. All entry points into the island, including Ngurah Rai International Airport and Gilimanuk and Padang Bai harbors, were closed. Residents of other faiths had to strictly follow religious and traditional requirements by staying at home and turning off all lights. see: Desy Nurhayati and Ni Komang Erviani, "Balinese Observe 'Nyepi' in Silence," *The Jakarta Post*, March 6, 2011; Rohmat, "Nyepi, Toleransi Agama Di Era Modernisasi," *Okezone*, March 14, 2011.

are suspended to respect it, even the people who are performing Friday prayer are limiting the voice of azan to inside the mosque. That is one of the meanings of respect. In legal norms, there is a punishment for a person who breaks law. However, he added, breaking legal norms could mean as "disrespect".[455]

The Law 11/2006 extended the application Shariah law to non-Muslims in Aceh. Article 129 reads as follows:

> (1) In *jinayah* cases where two or more people that include non-Muslims commit criminal acts, the non-Muslim perpetrators may voluntarily submit to *jinayah* law. (2) Every non-Muslim, who commits a criminal act not regulated by the Indonesian Criminal Code or in the criminal stipulation set outside the Criminal Code, will subject to *jinayah* law. (3) Acehnese citizens who commit criminal acts outside Aceh are subject to the Criminal Code.[456]

Ashar Bashar (Chairman of Advocacy Team for the Bill) explained the origin of extending the application of Shariah law in Aceh to non-Muslims in the public hearing with the Indonesian Legislative Assembly 27 February 2006 while he was explaining the drafting of the Bill by Aceh Provincial Legislative Assembly. According to him, in the Law 18/2001, the jurisdiction of Shariah Court in Aceh was only to Muslims. However, there was a case where a Muslim and four non-Muslims were jointly involved in gambling. The four non-Muslims applied to be subject under Shariah law. However, the Shariah Court rejected the application because it did not have any jurisdiction on non-Muslims.[457] The solution was, according to the Bill, adoption of principles of justice, non-discrimination, and territory. It means Shariah

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[455]Dewan Perwakilan Rakyat Republik Indonesia (DPR RI).

[456]*Law 11/2006*, art. 129.

[457]Dewan Perwakilan Rakyat Republik Indonesia (DPR RI). *Buku I: Risalah Proses Pembahasan RUU Tentang Pemerintahan Aceh (RDP/RDPU)* (Jakarta: Sekretariat Jenderal, Dewan Perwakilan Rakyat, Republik Indonesia, 2006), 21.

law applies to everyone within the territory of Aceh regardless of religion.[458] However, this proposal was unsuccessful.

Comparing to the Jakarta Charter, which limited the application of Shariah only to Muslims population, the scope of Shariah regional regulations in Aceh and other regions, which apply to non-Muslims, in principle, according to Robet, is greater than the Charter.[459] However, in practice in Aceh, the Islamic criminal law is not equally applicable to both Muslims and non-Muslims. Before the enactment of Law 11/2006, offences, which directly related to forbidden acts in Islam, do not apply to non-Muslims. They were drinking liquor, committing gambling, and committing a close proximity. But in other domains, which are not directly related to Shariah, such as all activities that could make those forbidden acts happen apply equally to Muslims and non-Muslims. All people or everyone should support, honour, and respect the implementation of Islamic Shariah. Although, it only prohibits Muslims from certain acts, however, all people or everyone should not open any chance for Muslims to commit the acts. For example, in *Qanun* 12/2003 on Liquor prohibition of drinking liquor only applies to Muslims.[460] However, Muslims and non-Muslims may not produce, provide, sell, supply, distribute, transport, keep, stock, trade, present and promote liquor.[461]

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[458] Ibid.

[459]Robertus Robet, "Perda, Fatwa and the Challenge to Secular Citizenship in Indonesia," in *State and Secularism: Perspectives from Asia*, ed. Michael S. H. Heng et al.(New Jersey: World Scientific, 2010), 275.

[460]Aceh.*Qanun 12/2003 on Liquour (khamar)*, arts.5 & 26 (1); elucidation to art. 26 (1)

[461]Ibid., art. 6.

Further discrimination between Muslims and non-Muslims arises in faith-based offences. They are the behaviours where one of its conditions for applicability is being a Muslim. However, in Aceh, although in Islamic jurisprudence certain religious behaviours apply only to Muslims, some offences related to them apply to non-Muslims. For example, the obligations to observe *ibadah* such as Friday prayer and fasting are not applicable to non-Muslims. However, they have obligation to respect the observance of *ibadah* by not disturbing it.[462] Their institutions and business enterprises, particularly transportation services, shall allocate time and provide facility for Muslims to pray obligatory prayers.[463] They may not sell food and drink to Muslims, who have no valid reason to not fast.[464]

3.2.5 Public Debate on Activities during Ramadhan

This section describes, conceptualises, classifies and evaluates local debate in Aceh on activities during Ramadhan. The main sources of local discourse are news articles during Ramadhan from 2007 to 2010 from online versions of the following local newspapers: *Serambi Indonesia, Rakyat Aceh,* and *Waspada*. In total there were 40 articles surveyed here which pertained to the enforcement of the regulation on Ramadhan. An attempt is made to focus only on those that talk about Shariah, religious harmony and freedom.

[462]Aceh.*Qanun* 11/2002 on Islamic faith (aqidah), prayers and fast (ibadah) and activities that glorify Islam (syiarIslam), art. 8.

[463]Ibid., art. 9 (3).

[464]Ibid., art. 10 (1).

3.2.5.1 *Fiqh* Discourse

In the Aceh *Qanun* 11/2002 selling food and drink during the daylights of Ramadhan is linked through *fiqh* to the doctrine of *uzur syar'i.* This doctrine has served as a "nodal point" for legality of selling food and drink during the daylights of Ramadhan. Later on, in practice, selling food to the people, who have *uzur syar'i,* is connected through religious harmony to the principle of respect. The nodal point "respect" has inscribed contested and contradictory meanings to selling food to *fiqh*-persons with *uzur syar'i* and to non-Muslims.

According to the elucidation of article 10 of *Qanun* 11/2002, *uzur syar'i* is a condition that allows a person not to observe fasting. Therefore, selling food to traveller (*musafir*) and sick person is allowed. They also may eat in public.[465] However, there is no elucidation on selling food to non-Musims. When selling food and eating in public is connected to the principle of respect within the framework of religious harmony, the persons, which have *uzur syar'i,* are told not to eat in public in order to show respect for those who are fasting. Regarding non-Muslims, before Ramadhan 2010 they were permitted to operate food stalls catering for non-Muslims only. However, in 2010, they were told to close.

When the *Wilayatul Hisbah* (WH) of Aceh Tamiang regency raided a food stall nearby the Rumah Sakit Umum Daerah (RSUD), they were involved in an argument with the owner. The owner, who is Muslim, argued that he only sells food and drink to the patients of the local hospital. However, the commandant of the WH, Ayub MH, did not accept the defence. He warned the owner not to open again. According

[465] Ibid.

to him, if the owner of the shop did open again, he would be punished based on existing Shariah law. He also argued Muslims, which are not observing fasting, should not eat in public places. For those who breach the *Qanun*, they could choose either fine or lashing.[466] The government urged non-Muslims to respect the observance of fasting in order to maintain religious harmony, to strengthen unity and integrity of the nation. They also urged foreigners to respect existing laws.[467]

In Ramadhan 2009, the government of Banda Aceh allowed non-Muslims, mostly Indonesian-Chinese, in Peunayong (known as China town in Banda Aceh)[468] to open food stalls catering for non-Muslims only. On August 30, 2009, the Satpol PP and WH caught two Muslims eating in one of the food stalls. Although an announcement, which reads, "Only non-Muslims allowed", is attached to the door of the food stall, the two Muslims insisted to enter. The head of Satpol PP and WH Banda Aceh, Iskandar, said, "We warned non-Muslim stall owners not to sell food and drinks to Muslims in the month of fasting. If Muslims still insist, report immediately to Satpol PP and WH in Peunayong Market."[469]

Clerics affiliated with the Aceh Ulama Dayah Association (*Himpunan Ulama Dayah Aceh*-HUDA) expressed their disagreement against government policy to allow non-Muslims to open food stalls. They argued the operation of food stalls, even though

[466]"Bolos Puasa, Warga Terbirit-Birit: WH Atam Grebek Warung Nasi," *Rakyat Aceh*, September 15, 2008.

[467]"Selama Ramadhan; Tutup Warung, Jangan Berjualan!," *Rakyat Aceh*, August 29, 2008.

[468] On the unique characteristics of Peunayong, see: Dian Kusuma Wardhani, Antariksa, and Nanda Indira Sari, "Peunayong Chinatown Banda Aceh Post-Earthquake and Tsunami as Cultural Heritage District," *Journal of Basic and Applied Scientific Research* 1, no. 4 (2011): 275-276.

[469]Hotli Simanjuntak, "Food Stalls, Cafes 'for Non-Muslims' Remain Open in Sharia-Ruled Aceh," *The Jakarta Post*, September 2, 2009; "Makan Siang Bersama Non Muslim Dua Pria Diangkut WH," *Serambi Indonesia*, August 31, 2009.

they were catering non-Muslims only, did not respect fasting Muslims and could disturb religious harmony. The shops should close in order to prevent social unrest and conflict among religious groups. Tgk H Faisal Ali, Secretary-General of HUDA, urged non-Muslims to eat and drink at closed private places. He also said Islam exempts menstruating women and people making long journeys from fasting but he urged them not to eat and drink in public.[470]

In 2010, the government of Banda Aceh city stopped allowing food stalls catering for non-Muslims to open. Vice mayor of Banda Aceh city, Illiza Sa'aduddin Djamal, argued non-Muslims to respect Muslims, who were fasting.[471]

3.2.5.2 Religious Freedom and Harmony Discourse.

In the implementation of Shariah, the Aceh region has obligations to maintain religious harmony and to guarantee religious freedom. The Article 4 paragraph (2) of Law 44/1999 stipulated that the implementation of Shariah for its adherents in Aceh should be in line with the maintenance of religious harmony. It says:

> (1) Implementation of religious life in the Region is in the form of application of Islamic Shariah for its adherents in social life. (2) The Region shall foster and regulate implementation of religious life as mentioned in the paragraph (1), and keep maintaining religious harmony.[472]

The elucidation states that Aceh government shall guarantee the freedom of adherents of other religions to observe their *ibadah* according to their own faiths.

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[470]"Huda: Warung Untuk Non-Muslim Sebaiknya Ditutup," *Serambi Indonesia*, September 1, 2009; Hotli Simanjuntak, "Opening Hours for Food Stalls Causing a Stir This Ramadan," *The Jakarta Post*, September 5, 2009.

[471]"Seruan Muspida Kota Banda Aceh: Tempat Hiburan Dilarang Buka Selama Ramadan," *Serambi Indonesia*, August 10, 2010.

[472]*Law 44/1999*, art. 4 (2)

The Law guaranteed the freedom of non-Muslims and only allowed Shariah applied to Muslims. What it meant by "religious harmony" was "religious freedom".[473] Its elucidation of term "religious harmony" was only repetition of Article 29 (2) of the UUD 45.

The Articles 16 and 17 of Law 11/2006, which specifically authorises the governor, regents, mayors to implement Shariah and maintain religious harmony, restated the article above. In detail, Article 127 (Law 11/2006) stipulated the government of Aceh to implement Shariah, and guarantee religious freedom and harmony. It states:

> (1) The provincial government of Aceh and governments of regencies and cities are responsible for implementation of Islamic Shariah. (2) The provincial government of Aceh and governments of regencies and cities shall guarantee freedom, foster harmony, and respect religious values adhered by religious communities and protect religious communities to observe *ibadah* according to their religions.[474]

Regarding the ideal of religious harmony, no faction during the deliberation of the Bill of Law 11/2006 opposed or objected to the proposal on the maintenance of religious harmony as part of the implementation of Shariah law in Aceh. However, the PDIP faction wanted the Law had a separate chapter on "governing religious life" which consists of paragraphs on implementation of Shariah and maintenance of religious harmony. They wanted the Section 2 on "Governing Religious Life" of Law 18/1999 restated in the new law.[475]

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[473]Ibid., elucidation.

[474]*Law 11/2006*, art. 127.

[475]Dewan Perwakilan Rakyat Republik Indonesia (DPR RI). *Buku III: Risalah Proses Pembahasan RUU Tentang Pemerintahan Aceh (Raker)*.

One of the PDIP faction delegates, Moch. Hasib Wahab, interpreted the substance of the Section 2 as "an umbrella of religious life for both Muslims and non-Muslims".[476] The substantive value is religious harmony. Other delegate of the PDIP faction, Sutradara Gintings, argued that putting paragraphs on implementation of Shariah and maintenance of religious harmony in one chapter would give psychological impression that in the implementation of Shariah there is a value of the maintenance religious harmony. In addition, in the implementation of Shariah, all parties should prioritise the value of respect toward religious diversity.[477] His comrade, Dr.H.Idham added the implementation of religious life in Aceh should be harmonious within the context of religious diversity in Aceh.[478] The final draft adapts the substance of their proposal on the religious harmony but puts it in various articles instead.

TheAceh *Qanun* 11/2002 only prohibits selling food to Muslim, which have no *uzur syar'i*. However, in practice, all cities and regencies tell food stalls to close during the daylights and *tarawih* prayers. They may start operating from 4 p.m until before *tarawih* and may open again after that. Although there is exemption for Muslims, which have *uzur syar'i,* to not observe fasting, they are told not to eat in public. Two main arguments to support this practice are respect and prevention of conflict.

During Ramadhan, governments of cities and regencies in Aceh tell food stalls to operate in amended time. They may not operate from 5 a.m. to 4 p.m. In 2007, Natsir Ilyas, a head of Shariah Office of Banda Aceh city, told the food stalls and

[476]Ibid., 17.

[477]Ibid., 45.

[478]Ibid., 43.

restaurants to close before 4 p.m. He told Muslims, which have *uzur syar'i*, not to eat in public. For example, Muslims, which cannot observe fasting because of heavy labour, should not eat in public. They should cook and eat in private places. He argued they should respect for fellow Muslims, who are observing fasting. Non-Muslims and visitors, according to him, should respect the observance of fasting in Aceh.[479]

In Pidie regency of Aceh, the Ulama Consultative Assembly (MPU-*Majelis Permusyawaratan Ulama)* and the Shariah Office (*Dinas Syariat Islam*) of the regency announced that all parties (Muslims and non-Muslims) were to behave in accordance with the sacredness of Ramadhan. The vice head of the MPU, Ramli Daud, told the owners of food stalls, restaurants, and entertainment places not to open before 5 pm. They might open from 6 pm until *tarawih* prayer began. He hoped the government to maintain order by taking actions against food stalls, which operate outside amended time. At the same time, the head of Shariah Office, A. Malek Kasem, told non-Muslims to respect for Muslims, who are observing fasting, and show mutual tolerance as the expression of development of harmonious life between religious communities.[480]

In 2008, the head of Shariah Office of Langsa city, Zakaria AB, told the owners of food stalls not to sell rice during the daylights of Ramadhan. He also told non-Muslims to respect Ramadhan by not eating and drinking in public.[481] To create the

[479]"Aceh Perketat Pelaksanaan Syariah Selama Bulan Ramadhan," *Era Muslim*, September 27, 2007.

[480]"Pelihara Sikap Sesuai Kesucian Ramadhan," *Waspada*, September 4, 2007.

[481]"Rusak Kesucian Ramadhan, Asmara Subuh Diharamkan," *Rakyat Aceh*, August 25, 2008.

atmosphere of peace and tranquillity for people during fasting, the food stalls may not open before 4 pm. They are allowed to operate after 4 pm until the time of breakfast. Punishment for breach referred to *Qanun* 11/2002.[482] Commenting on the food stalls, which were opening during the daylights of Ramadhan, Zakaria perceived they had insulted the sacredness of Ramadhan.[483]

3.3. Regulation of *Ibadah* in South Kalimantan

South Kalimantan (in Bahasa Indonesia is called *Kalimantan Selatan*, usually abbreviated as *Kalsel*) is one of provinces in Indonesia. The province is located in the south of Kalimantan Island. This province consists of 11 regencies and 2 municipalities (11 *kabupaten*sand 2 *kota*s) and the number of its residents is 3,549,841. The number of Muslim is significantly dominant, namely 3,469,242 (97,88%) compared to 80,599 (2,12%) people of other religions (see Table 3.6).[484] Muslims have 9,397 places of worship (consist of 2,368 mosques and 7,029 prayer houses and rooms). Hinduists have 1,390 places of worship (consist of 62 temples and 1328 household temples). Protestants have 152 places of worship (86 churches, 47 semi-churches, 19 temporary places). Catholics have 59 places of worship (11 churches, 7 chapels, 41 temporary places). Buddhists have 24 places of worship (16 Vihara, 5 Cetya, 3 Kelenteng/Chinese temples) (see Table 3.7).[485]

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[482]"Jual Nasi Siang Hari, Akan Ditindak Tegas," *Rakyat Aceh*, September 2, 2008.

[483]"Masih Ada Yang Jual Nasi Di Siang Hari," *Rakyat Aceh*, September 8, 2008.

[484]Kantor Wilayah Kementerian Agama Provinsi Kalimantan Selatan, *Data Keagaman*2012.

[485]Ibid.

3.3.1 Friday Prayer

Only one region has regulation on Friday prayer in South Kalimantan, it is *Perda* 8/2005 of the Banjar regency. It is controversial for two reasons. First, local politicians, media, and activists popularly called it as a regulation on Islam (*Perda Islami* or *Perda Syariat)*. Second, one of its provisions prescribes that traffic flow shall be stopped every Friday during the Friday prayer.

The Regulation's short title is "*Perda Jum'at Khusyu.*" Its long title is "*Peraturan Daerah Kabupaten Banjar Nomor 08 Tahun 2005 tentang Jum'at Khusyu*". It starts with the so-called "considerans", a kind of preamble that gives the purposes of the Regulation and the explanation of the basic reasons, which have led to the legislation, or the intention of the legislature. The regency enacted the regulation on Friday prayer for two reasons. First, majority of people in Banjar regency are Muslims. Second is to reassert the identity of its capital city, Martapura, as the Veranda of Mecca. By the regulation, the regency government intended to create a religious atmosphere in the regency, pious human resources, balance between spiritual and material needs, protection from a negative side of globalization, tranquillity for observing the ritual of Friday Prayer, and maintain religious harmony.

Table 3.6 Number of Adherents of Religions by Regency/City in South Kalimantan, 2012

Regencies	Adherents of Religions							
	Islam	Protestantism	Catholicism	Hinduism	Buddhism	Confucianism	Others	Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1. Banjarmasin	685 034	12 194	7 467	2 326	4 651	-	298	685 034
2. Banjarbaru	148 914	3 485	1 459	274	118	-	37	148 914
3. Banjar	464 789	325	232	232	98	123	443	464 789
4. Tapin	158 349	158	333	31		-	373	158 349
5. Hulu Sungai Selatan	226 403	770	91	99	27	-	855	226 403
6. Hulu Sungai Tengah	247 252	99	124	517	22	-	645	247 252
7. Hulu Sungai Utara	231 925	46	23	12	5	-	-	231 925
8. Tabalong	189 998	4 522	1 558	1 251	38	-	388	189 998
9. Balangan	107 004	310	107	201	4 102	-	277	107 004
10. Barito Kuala	272 054	490	109	1 019		-	-	272 054
11. Tanah Laut	252 020	1 411	680	828	226	-	-	252 020
12. Tanah Bumbu	207 347	788	560	4 189	83	-	-	207 347
13. Kotabaru	358 752	1 435	5 919	2 894	3 148	199	1 112	358 752
Total	**3 469242**	**26 033**	**18 662**	**13 873**	**12 518**	**322**	**4 428**	**3 549 841**

Source: Regional Office of Ministry of Religious Affairs of South Kalimantan Province (2012).

Table 3.7 Number of Places of Worship by Religion and Regency/city in South Kalimantan, 2012

Regency/City	Places of Worship				
	Islam	Protestantism	Catholicism	Hinduism	Buddhism
(1)	(2)	(3)	(4)	(5)	(6)
1. Banjarmasin	1015	55	3	1	7
2. Banjarbaru	131	22	2	1	1
3. B a n j a r	1281	-	4	1	-
4. T a p i n	775	10	11	180	1
5. Hulu Sungai Selatan	556	-	1	4	-
6. Hulu Sungai Tengah	823	2	-	2	-
7. Hulu Sungai Utara	983	2	-	5	-
8. Tabalong	723	-	-	-	-
9. Balangan	631	20	7	1	-
10. Barito Kuala	440	7	3	4	7
11. Tanah Laut	929	3	-	20	-
12. Tanah Bumbu	677	18	22	1020	-
13. Kotabaru	933	13	6	41	8
Total	**9397**	**152**	**59**	**1390**	**24**

Source: Regional Office of Ministry of Religious Affairs of South Kalimantan Province (2012)

The considerans says:

a. That creating a religious nuance in Banjar Regency in accordance with a predicate of Martapura City as the Veranda of Mecca is one of the efforts to support the creation of human resources who believe and pious to the One God.
b. That in order to create the tranquillity for Muslim people in observing the ritual of Friday Prayer, it is necessary to enact *Jum'at Khusyu'*.
c. That the enactment of *Jum'at Khusyu'* as mentioned in paragraph (a) above is to be decided in Regional Regulation.[486]

The elucidation of the *Perda* restates the reasons and objectives of the regulation as follows:

> Regarding the above matter, Banjar Regency Government in its effort to maintain religious harmony and create tranquillity for people who follow Islam is supported by the condition of the people in Banjar Regency which majority of them embrace Islam and by the predicate of Martapura as the Verandah of Mecca. Therefore, Banjar Regency government perceives it is necessary to regulate the Observance of Friday Prayer. It aims to provide tranquillity for Muslims in observing the ritual of Friday Prayer by terminating activities in order to prepare and observe the ritual of Friday

[486]Banjar. *Perda 8/2005 on Juma'at Khusyu'*, considerans.

> Prayer. It is hoped the ritual of Friday Prayer could be observed with *Khusyu'*. To realize the above aims it is necessary to make a Regional Regulation which regulates the *Jum'at Khusyu'*.
> The enactment of the Regional Regulation on Observance of *Jum'at Khusyu'* is not intended to limit the time and opportunity of people to do activities. However, the substantial aim of this regulation is to create a balance of societal life between spiritual and material needs. In the end, every dimension of people life will be religious nuanced shield, which is able to protect from a widespread globalization.[487]

Article 2 also states the objectives: First, to create a calm and *khusyu'* atmosphere for Muslims observing Friday prayer. Second, to create mutual understanding and respect among Muslims themselves and among inter religious communities.[488] To justify its authority to regulate activities relating to religious matter, particularly Friday prayer, the Banjar regency government refers to the Constitution and other laws. The considerans refers to the Constitution (UUD 1945), particularly article 29 (1 and 2) on the freedom of religion. Its elucidation says:

> The Constitution (UUD 1945) Amendment, article 29 (2) states: "The state guarantees the freedom of every citizen to follow his/her religion and to worship in accordance with his/her religion and belief." Therefore, every person has freedom to embrace his or her religion without coercion from anyone or the state so that inter-religious harmony could be created in Indonesia.[489]

[487]Ibid., elucidation.

[488]Ibid., art. 2.

[489]Ibid., elucidation.

Table 3.8 Criminal Offences in Perda 8/2005 on Jum'at Khusyu' in Banjar.

Obligations/Prohibitions	Criminal Offences	Punishment
Obligation to stop activities that could disturb (*mengganggu)* Friday prayer (art. 6)	Disturbing Friday Prayer	Maximum of 3 months imprisonment and/or maximum fine of 25,000,000.00 IDR (8,676.00 IDR)(art. 11)
Obligations of officers and people near mosques to put "*Juma't Khusyu*" signs on the roads (art. 8)		Ibid
Obligations for motorist or passengers to stop their vehicles or use alternative roads (art. 9)	Passing by mosques using vehicles or failure to use alternative roads.	Ibid
People, who are exempted to pass by the mosque, shall report to officers (*Petugas Mesjid)* (art. 10 (2)).	Passing by mosques using vehicles without permission from mosque officers	Ibid

Source: My own summary.

It claims that it treats all people equally. Although the regulation specially supports the observance of the ritual of Muslims only, the government denies that they discriminate non-Muslims. Its elucidation says:

> This Regional Regulation does mean to give a priority of attention to Muslims. The Banjar Regency Government also guarantees the atmosphere of tranquillity (*khusyu'*) for non-Muslims to observe their ritual.[490]

Local government claims that they adopt the bylaw based on the power granted to them by higher laws. They hold that regional government has the authority on religious life, to support and foster religious life in the region. Its elucidation says:

> By the enactment of Law Number 32 Year 2004 on Regional Government, which replaced the Law Number 22 Year 1999, the Regional Government is given the authority to make policies regulating various areas including religious life. Regional Government is given the authority as an effort to increase the participation of the Region in fostering religious life.[491]

Article 1 of the *Perda* defines "*Jum'at Khusyu"* as "a certain time on the Friday for stopping all social activities in order to create a calm and *khusyu'* atmosphere for

[490]Ibid., elucidation.

[491]Ibid., elucidation.

Muslims who will observe and in the middle of observing Friday prayer".[492] The time begins from the first call to prayer (*adzan)* until the prayer ends.[493]

The activities that ought to be stopped are all kinds of activities that could disturb (*mengganggu)* Friday prayer.[494] The elucidation to the article 6 mentions in details those activities that could distract people's concentrated attention at the prayer, they are:

a. Sales (near the mosque)
b. Factory (Activities of factory near the mosque)
c. The using of land-based motor vehicles (four-wheeled and two-wheeled motor vehicles) and water-based motor vehicles (boats, speed boats and etc)
d. Other activities that cause Muslims not perform Friday prayer(for example, games etc)
e. Activities that produce sounds or noises, which could disturb Friday prayer.[495]

Motorists and passengers are encouraged to stop in order to observe Friday prayer and/or use an alternative road or stop their travel during the time of *Jum'at Khusyu".*[496] The prohibited activities during *Jum'at khusu'* do not apply to: a. people who use and who do not use motor vehicles to the mosque; b. Motor vehicle used to transport the sick or injured to a hospital/health centre; c. A patrol vehicle, a fire

[492]Ibid.,art. 1 (f).

[493]Ibid.,art. 5 (1).

[494]Ibid.,art. 6 (2).

[495]Ibid., elucidation to art. 6.

[496]Ibid.,art. 9.

fighting vehicle, and a vehicle used to transport the dead.[497] However, if they want to pass by the mosque they shall report to mosque officers (*Petugas Mesjid).*[498]

Article 11 provides punishment (see Table 3.8). During the time of *Jum'at Khusyu'*, any person, who is doing activities disturbing Friday prayer, or passing by mosques using vehicles, is punishable with a maximum imprisonment of three months or a maximum fine of twenty five million Rupiahs (25,000,000.00 IDR = 8,677.00 MYR).[499]

3.3.2 The Month of Ramadhan

In South Kalimantan, the Banjar regency first enacted the regulation on Ramadhan. Later the Banjarmasin city government copied it and gave some additions (see Table 3.9). Before describing the additions made by the latter, this section will discuss first the regulation of Banjar.

In Banjar regency, the Regulation's short title is *"Perda Ramadhan"* (Regional Regulation on Ramadhan). Its long title is "*Peraturan Daerah Kabupaten Banjar Nomor 10 Tahun 2001 tentang Membuka Restoran, Warung, Rombong, dan yang Sejenis serta Makan, Minum, dan atau Merokok di Tempat Umum pada Bulan Ramadhan"* (*Perda* 10/2001 on Operation of Restaurants, Food Stalls and Carts, Eating, Drinking, and Smoking in Public). The city enacted the *Perda* 10/2001 for four reasons. First, majority of people in Banjar regency are Muslims. Second is to reassert the identity of its capital city, Martapura, as the Veranda of Mecca. Third,

[497]Ibid.,art. 10 (1).

[498]Ibid.,art. 10 (2).

[499]Ibid., art. 11.

fasting of the month of Ramadhan is one of the Five Pillars of Islam and obligatory. Fourth, Muslims and non-Muslims shall respect the observance of fasting. By the regulation, the regency government intended to create a conducive and supportive environment for Muslims to observe fasting, and maintain the religious image of the regency. The considerans says:

> a. That ritual of fasting is one of the Five Pillars of Islam which is obligatory on every Muslim and its observance shall be respected by every Muslim and non-Muslim;
> b. That in order to create a conducive and supporting atmosphere for observance of the ritual of fasting in Banjar Regency in which majority of its population is Muslim, it is necessary to prohibit every person to operate restaurant, food stall, food cart and the like, and to eat, drink, and or smoke in public during the month of Ramadhan;
> c. For the purpose of paragraph (a) and (b) in the considerans, it is needed to be decided in a regional regulation (*PeraturanDaerah*).[500]

The elucidation of the *Perda* also describes the purposes of the regulation and the explanation of the basic reasons, which have led to the legislation, or the intention of the legislature. It reads as follows:

> Martapura as one of the cities that is well known as the Veranda of Mecca has generated a suggestion that people in Martapura in particular and in Banjar Regency in general are religious. Based on that, the Government of Banjar Regency needs to maintain the image by creating conducive climate, so that a civil society will be created. Therefore, the Regency Government has the concern to make regulation on the prohibition of the sale of drink and food including the prohibition to everyone to show them-selves intentionally not observing fasting during the daytime of the month of Ramadhan.
>
> The fasting is one of the Five Pillars of Islam, which is obligatory on every Muslim who has been obligated to observe fasting. In order to support the observance of the third pillar of Islam with tranquillity (*khusu'*) and togetherness, the Regency Government based on its authority as regulated in Law 22/1999 on the Regional Government, which is followed by Government Regulation 25/ 2000 and Regional Regulation 16/ 2000 on the Authority, needs to issue Regional Regulation on the operation of restaurant, food stall, food cart, and the like for selling drinks and foods during the month of Ramadhan.[501]

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[500]Banjar.*Perda10/2001 on Operation of Restaurants, Food Stalls and Carts, Eating, Drinking, and Smoking in Public,* considerans.

[501]Ibid., elucidation.

Table 3.9 Banjarmasin Regulations of Activities during Ramadhan

Criminal Offences	*Punishment*	
	Perda 12/2003	*Perda 4/2005*
Selling food and drinks during certain hours of Ramadhan	*Maximum of 6 months Imprisonment and/or* 5,000,000.00 IDR (1,735.00 MYR) fine *(art. 5 (1))*	*Maximum of 3 months imprisonment and/or maximum fine of 50,000,000.00 IDR (17,352.00 MYR) (art. 1 (1))*
Eating or smoking in public during the daytime fast	*Maximum of 6 days imprisonment and/or minimum of 100,000.00 IDR (34.00 MYR) fine (art. 5 (2))*	*Maximum of 3 months imprisonment and or maximum fine of 7,500.00 IDR (2.50 MYR) (art. 1(1))*
Operating amusement establishments	*Maximum of 6 months Imprisonment and/or* 5,000,000.00 IDR (1,735.00 MYR) fine *(art. 5 (1)) or revocation of business licence (art. 6)*	*Maximum of 3 months imprisonment and/or maximum fine of 50,000,000.00 IDR (17,352.00 MYR) (art. 1 (1)) and/or Revocation of business licence or closing of business operation (art. 1(2))*

Source: My own summary.

In the elucidation, the *Perda* classifies sellers into two categories. They are those who are supporting preparation for a breakfast and those who are causing Muslims not observe fasting. The regulation restricts the activities of the first group, but prohibits the second group. It says:

> The prohibition is focus on the sellers who provide and serve drinks and foods in restaurants, stalls, carts, and the like. Their existence is perceived or felt of being able to create opportunity or desire for everyone neglect the ritual of fasting. Meanwhile the existence of the sellers, who sell drinks and foods to support Muslim people to prepare a breakfast, is allowed if they meet the requirements of the legal time for selling drinks and foods.[502]

The prohibition is in article 2. It prohibits any person to operate restaurant, food stall, food cart and similar business during the month of Ramadhan.[503] It also prohibits any person to eat, drink and or smoke in the restaurant, food stall, food cart and similar

[502]Ibid., elucidation.

[503]Ibid.,art. 2 (1).

places and in public.[504] The prohibitions apply during fasting hours from dawn to sunset.[505]

Exceptions and restriction of sellers who are supporting preparation for a breakfast are in article 3. It allows any person to operate restaurant, food stall, food cart and similar business starting from 5 pm.[506] Any person sells food and drink in Ramadhan cake fair (bazaar) and similar places may to start their business from 3 pm.[507]

Article 5 regulates the punishment. It says:

1. A maximum imprisonment of three months or a fine of a maximum of 2,500,000.00 IDR (two millions and five hundreds rupiahs)/ 867.00 MYR shall punish any person who fails to comply with the rules in art. 2 (1 and 3).
2. Any person who fails to comply with the rules in art. 2 (2) shall be punished by a maximum imprisonment of seven days or a fine of a maximum of 50,000.00 IDR (fifty thousands rupiahs)/ 17.00 MYR.
3. The criminal offences are misdemeanours.[508]

Perda 5/2004 revises the *Perda* 10/2001. The revision added paragraph 4 to article 5. It prescribes the money from fines, which is based on permanent court decisions, be given to treasury at regency revenue office.

Banjarmasin city copied the *Perda* of Banjar regency on Ramadhan. It enacted *Perda* 13/2003 on Prohibition of Activities during the Month of Ramadhan. It also prohibits selling of food and drink, and eating or smoking in public. However, unlike Banjar

[504]Ibid.,art. 2 (2).

[505]Ibid.,art. 2 (3).

[506]Ibid.,art. 3 (1).

[507]Ibid.,art. 2 (2).

[508]Ibid., art. 5.

regency, the city adds other prohibition and exception. It prohibits amusement establishments from operating during the whole month of Ramadhan.[509] Exemption is given to h*otel and restaurants*that*cater*to foreign*tourists. They may*serve food and drinks during *Ramadhan.*[510]

Perda 4/2005 revises the Perda 13/2003. The focus of revision is punishment (see Table 3.9) and investigation procedure. Regarding the procedure of investigation, the former did not specify the type of investigation. The later specified the procedure according to misdemeanour investigation steps prescribed by Law 8/1981on Criminal Procedural Code.[511]

3.3.3 Agencies and Procedures

The governments of Banjar regency and Banjarmasin city are not creating new agencies for enforcing the regulations on Ramadhan and Friday prayer. They use the existing bodies of legal enforcement in the regions, namely *Satuan Polisi Pamong Praja (Satpol PP)* or *Civil* Service *Police* Unit, general court and public prosecutor. The regulations authorise the Satpol PP to monitor the activities during Ramadhan and Friday prayer.

Banjarmasin *Perda* 4/2005 states the specially appointed civil service investigating officers (*Penyidik Pegawai Negeri Sipil*: PPNS) have the authority to investigate offences. T*he procedure is following investigation steps prescribed by Law 8/1981*

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[509] Banjarmasin. *Perda 13/2003 on Prohibition of Activities during the Month of Ramadhan,* art 2.

[510]Ibid.,*art. 3.*

[511] Banjarmasin. *Perda 4/2005 on the Revision of Perda 13/2003 on Prohibition of Activities during the Month of Ramadhan, art.1 (3).*

on Criminal Procedural Code. In details, according to article 7 of Law 8/1981 and article 1 (3) of Banjarmasin *Perda* 4/2005, the investigators have the authority to:

1) accept a report from a person on the occurrence of an offence;
2) take first action at the crime scene;
3) stop an accused person and check his or her identity card;
4) Conduct capture, detention, search and seizure operations,
5) confiscate items or documents;
6) take fingerprints and photographs;
7) cross-examine suspect or witness;
8) invite an expert to assist an investigation;
9) close investigation if there is inadequate evidence; and
10) take other legitimate actions.[512]

The authority of prosecution is in the hands of state officials known as public prosecutors (*jaksa*). In details, according to article 14 of Law 8/1981, they have authority to:

1) receive and verify the document filed by investigator;
2) conduct a pre-prosecution inquiry if the information is inadequate;
3) Order or extend detention, and/or change the status of a detainee after the case is handed over by the investigator
4) draft the accusation letter or indictment;
5) transfer the case to the court;
6) give a notice to the accused of the day and time the trial and an invitation letter to the accused and to witnesses to attend the trial;
7) conduct prosecution in court;
8) Close a case in the public interest;
9) take any other action within the responsibilities and authority of a general prosecutor; and
10) carry out the court judgment.[513]

3.3.4 Applicability for Muslims and non-Muslims

In Banjar and Banjarmasin, South Kalimantan, the regulations on Ramadhan and Friday prayer are equally applicable to both Muslims and non-Muslims. They put emphasis on the obligation of all Muslims and non-Muslims to respect the

[512]Banjarmasin. *Perda 4/2005,* art.1 (3); *Law 8/1981 on Criminal Procedural Code*, art. 7.

[513]*Law 8/1981*, art. 14.

observance of fasting during the month of Ramadhan. Therefore, all people may not operate restaurant, food stall, food cart and the like, and to eat, drink, and or smoke in public during the month of Ramadhan.

The main aim of the regulation on Friday prayer is to provide tranquillity for Muslims in observing the ritual. All Muslims, who have obligation to pray, shall stop all activities in order to prepare and observe the ritual of Friday. Muslims and non-Muslims may not perform the activities that could disturb Friday prayer. For example, it prohibits selling activities, operating factories, riding vehicles, and other activities that produce disturbing noises.

3.3.5 Public Debate on Activities during Ramadhan

This section describes, conceptualises, classifies and evaluates local debate in Banjarmasin and Banjar on activities during Ramadhan. The main sources of local discourse are news articles during Ramadhan from 2004 to 2010 from online versions of the following local newspapers: *Banjarmasin Post, Radar Banjarmasin,* and *Kalimantan Post*. In total there were 31 articles surveyed here which pertained to the enforcement of the regulations on Ramadhan. An attempt is made to focus only on those that talk about Shariah, religious harmony and freedom.

3.3.5.1 *Fiqh* Discourse

Different actors and discourses give different meanings to activities during Ramadhan. Food sellers, who kept opening their stall during the daylight of Ramadhan, preferred to use *fiqh* discourse in giving meanings to their activities. They argued they operated their food stall to serve non-Muslims, and those who were engaged in heavy labour such as drivers of tricycles (*becak*).

Law enforcement bodies, particularly the Satpol PP did not accept the food seller's argument and interpretation of the *Perda* Ramadhan. In 2007, for example, while the Satpol PP and police were making a spot check on certain places within Banjarmasin city they caught a man who barbequed satay for sale in a predominantly non-Muslim area. The seller argued that he did not break the bylaw on Ramadhan because he only served non-Muslims. He asked his consumers to show their identity cards to make sure they were non-Muslims. The Satpol PP only recorded his name but did not bring the case to the court because there was no any indication he has sold his satay. They also caught other man, who opened his stall (*sakadup*)[514] for selling tea, cake, and rice, in a market area. He argued that he only served those who were engaged in heavy labour in the market. However, the Satpol PP did not accept his argument and brought him to the city police headquarter and the court.[515]

The Banjarmasin city government gives exception to food stalls in the airport, seaport, and bus station. It allows them to operate because many of those who are engaged in heavy labour work in those places.[516] Although the food stalls may operate, the sellers are told not to open "vulgarly" so that the atmosphere of fasting

[514] The word *"Sakadup"*in Banjarese language, particularly in Kuala dialect, is used to refer to two objects: (1) a camel-litter; and (2) a cloth-covered food-stall during the month Ramadhan *(warung bertutup kain pada bulan puasa)*. It is derived from the Arabic word "*syuqduf*." It is used in Hijaz, the synonym of the word "*howdaj*" which means "camel litter." It is an enclosed or curtained couch mounted on shafts and put on camels used to carry a passenger. The word was probably imported from Hijaz (a region in the west of present-day Saudi Arabia better-known for the Islamic holy cities of Mecca and Medina) by Banjarese who came back from pilgrimage. On the meaning of the word in Banjarese language, see: Arsyad Indradi, "Sakadup," in *Kamus Bahasa Banjar Kuala* (2008). For review of the use of the word in Arabic, see: Stanton Hope, *Arabian Adventurer: The Story of Haji Williamson* (London: R. Hale, 1951), 139; Arthur John Byng Wavell, *A Modern Pilgrim in Mecca and a Siege in Sanaa* (Charleston, South Carolina: BiblioBazaar, 2008), 97; Michael Wolfe, *One Thousand Roads to Mecca: Ten Centuries of Travelers Writing About the Muslim Pilgrimage* (New York: Grove Press, 1998), 9; Arthur E. Robinson, "The "Utfa" or Camel-Litter of the Arabs," *African Affairs* 30, no. 118 (1931): 70-71.

[515]"3 Warung Teh Terjaring Yustisi," *Radar Banjarmasin*, September 18, 2007; "Lihat KTP Lalu Melayani," *Banjarmasin Post*, September 18, 2007.

[516]Narti, "Pelabuhan Dan Terminal Diberikan Toleransi," *Kalimantan Post*, August 10, 2009.

month of Ramadhan still lives in those places. They shall respect the fasting Muslims.[517]

Although non-Muslims have no obligation to observe fasting according to Islamic jurisprudence, the Banjarmasin city government forbids them to open food stalls or restaurants, and eat or smoke in public. Unlike the heavy-labour workers, there are no special places or locations designated for non-Muslims to operate food stalls or restaurants. In Banjarmasin, majority of non-Muslims is concentrated in Jl. Veteran (Veteran Street). Nazamuddin, the head of the Satpol PP in Banjarmasin, claimed that the *Perda* Ramadhan did not make any discrimination against non-Muslims. According to him, in implementing the *Perda*, the non-Muslim community shall respect the Muslim community who are observing fasting. That would make his force work easier in maintaining law and order during Ramadhan.[518] The operation of food stalls outside allowed times, even though they only cater for non-Muslims, according to Ibnu Sina (a head of Commission One in the Provincial Legislative Assembly from the PKS party), would disturb public order and security.[519] However, restaurants inside hotels may cater for foreigners and non-Muslims during the daylights of Ramadhan by way of delivery order to their rooms. However, they may not serve alcoholic drink. Those guests shall eat and drink in their rooms, not in the restaurants. Hesly Junianto, a head of the Office of Tourism, Arts, and Culture of

[517]""Mari Patuhi Aturan Ramadan": Himbauan DPRD Kalsel Kepada Masyarakat Dan Petugas," *Radar Banjarmasin*, September 3, 2008.

[518]"*Sakadup* Non Muslim Juga Ditertibkan," *Banjarmasin Post*, September 2, 2008.

[519]""Mari Patuhi Aturan Ramadan": Himbauan DPRD Kalsel Kepada Masyarakat Dan Petugas."

Banjarmasin City, stated the regulation applied to the hotel to respect the fasting Muslims.[520]

As described above, the food vendors refer to *fiqh* in justifying their acts of selling food and drink. According *fiqh* doctrines, obligation to observe fasting during Ramadhan does not apply to non-Muslims and heavy labourers. These people may eat and drink. Therefore, the vendors felt nothing wrong to sell food and drink to them.

Regarding the heavy labourers, the government recognised the *fiqh* doctrine, which permitted them not to observe fasting. However, only the labourers at the airport, seaport, and bus station may eat and drink during the daylights. The labourers and food stalls that cater for them are told to respect the Muslims, which are observing fasting. The food stalls should open in such a way as to be less visible to the scrutiny of the people. In practice, the vendors put cloths to cover some parts of the stall. This means the operation of covered food stalls catering for a certain *fiqh* person in a certain area is considered as a respect. However, other covered food stalls, which cater non-Muslims and other persons exempted in *fiqh* from fasting, are considered as disrespect. Thus, the social meaning of curtained food stall is contested and inscribed with contradictory meanings. The curtained food stall has become a floating signifier—its meaning is contested and open rather than fixed and determined.

[520]"Boleh Makan, Tapi Di Kamar Hotel," *Banjarmasin Post*, August 29, 2008.

3.3.5.2 Religious Harmony Discourse

Every time the month of Ramadhan came in Banjarmasin city there was a polemic on a religious harmony and tranquillity of Muslims in observing the *ibadah*. A quarter of Muslims felt certain activities such as amusement, food stalls, cafes, and restaurants had disturbed or distracted them. Some wanted the government ended the polemic by enacting a regulation, which banned those activities during Ramadhan. Others required sensitivity and consciousness of those who ran the activities to respect the month of Ramadhan and Muslims who were observing *ibadah.*

Sofyan Hanafi, a member of the Ulama Consultative Assembly (MUI-Majelis Ulama Indonesia) of Banjarmasin city, wanted entertainment venues such as discotheques closed during the month of Ramadhan to respect the Muslim community who were observing the *ibadah*. He hoped there was a regulation on the closing of the venues to give the government legal power to punish who operated them during the month. In contrast, Ideham Zarkasi, a professor of law in the University of Lambung Mangkurat, Banjarmasin, held that no regulation was needed to close the entertainment venues. He argued the problem lied in the consciousness of the owners to close during Ramadhan. They would feel embarrassed if they operated. Therefore, the closing did not need any regulation.[521]

Rudy Arifin, a regent of Banjar 2000-2005, claimed the *Perda* Ramadhan was the first of its kind in Indonesia. Its purpose was to create an Islamic atmosphere during Ramadhan. It meant no one was eating, drinking, or smoking in public during the daylights of Ramadhan. Everyone had to respect the atmosphere of Ramadhan and

[521]"Polemik Tempat Hiburan Setiap Ramadhan: Saatnya Dibuatkan Peraturan!," *Banjarmasin Post*, November 19, 2000.

observe the ritual with *khusyu'*.[522] The *Perda* also trained the attitudes of tolerance. He hoped the punishment would make the offenders embarrassed and deter others so that they also would feel embarrassed if they were not observing fasting. The *Perda*, according to Rudy Arifin, would reduce the numbers of food stalls (*sakadup*) and people who were showing themselves not observing fasting during Ramadhan .The opening of food stalls would give rise to the desire to eat and temp Muslims into breaking their fast. Therefore, fasting should be saved from the threats of food stalls.[523]

In 2003, the Banjarmasin city government enacted a regulation on Ramadhan. The *Ukhuwah* faction (Islamic faction consisted of representatives from the PKB, the PBB, and the Justice Party or *Partai Keadilan*--PK political parties) tied up the regulation with a religious harmony. According to them, it was the obligation of Muslims and non-Muslims to respect the observance of fasting as *ibadah*. They hoped the enactment would end controversies on certain activities during the month of Ramadhan. M Ghazali Mukeri, a spokeperson of the faction, claimed the opening of food stalls and restaurants during daylights of Ramadhan could temp Muslims into breaking their fast.[524] According to Alwi Sahlan, a deputy mayor of Banjarmasin city, the *Perda* was one of city government and people efforts to respect the Muslim community who were observing fasting during the holy month of Ramadhan.[525]

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[522]Rudy Arifin, "Martapura Bumi Serambi Mekkah," in *Martapura Bumi Serambi Mekkah: Secunting Pemikiran Rudy Arifin*, ed. Nurhudianto(Martapura: Pemkab Banjar, 2004), 39.

[523]Ibid., 40.

[524]"Perda Ramadhan Akhirnya Disahkan," *Radar Banjarmasin*, July 31, 2003.

[525]"Perda Ramadan Di Banjarmasin Dilanggar," *Banjarmasin Post*, October 8, 2005.

Mukhtar Sarman, a lecturer at the University of Lambung Mangkurat Banjarmasin, analysed that there were twin motivations of those who were drafting the *Perda*. First, the Muslims, who have obligation to observe fasting, "shall observe fasting." Second, those who have no obligation to observe fasting, "shall respect" fasting Muslims.[526] The problem was that the *Perda* did not give any exception to those who had no obligation to observe fasting. According to Islamic jurisprudence, fasting is not obligatory on non-Muslims. Sarman wanted the government to accommodate the interests of non-Muslims. He suggested the government to designate special place or zone for opening of food stalls which only served non-Muslims during daylights of Ramadhan. He claimed the policy was feasible because Banjarmasin has a predominantly non-Muslim area. Most non-Muslims lived in Jalan Veteran (Veteran Street). He hoped the *Perda* revised by giving exception to non-Muslims.[527]

3.3.5.3 Religious Freedom Discourse

In a religious freedom discourse, a concept of coercion is linked to fasting of Ramadhan by individual Muslims. The term "coercion" has served as a nodal point for ascribing meanings to a regulation banning Muslims from eating and drinking in public during the daylights of Ramadhan. Some argued the regulation was coercing Muslims to observe fasting. Meanwhile, others argued the regulation only prohibited Muslims from not observing fasting in public rather than in private places.

Rudy Arifin, a regent of Banjar (2000-2005), held that the state government might coerce Muslims to observe fasting because sometime the good deed needed coercion.

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[526]Mukhtar Sarman, *Mencari Kebenaran Menuai Kecaman: Di Balik Kontroversi Perda Ramadhan* (Banjarmasin: PK2D UNLAM and LK3 Banjarmasin, 2006), 47.

[527]Ibid., 44.

He added that fasting in the month of Ramadhan was obligatory in Islam. Therefore, there were no reasons for Muslims to disobey the obligation.[528]

A debate whether the *Perda* Ramadhan had violated religious freedom took place between Mukhtar Sarman, a lecturer at the Lambung Mangkurat University Banjarmasin, and Alwi Sahlan, a deputy mayor of Banjarmasin city (2005-2010). On September 25, 2006, Mukhtar Sarman wrote in his regular column "*Refleksi*" in *Banjarmasin Post* daily newspaper. In his writing, Sarman criticised the *Perda* for coercing Muslims to observe fasting.[529]

First, Sarman claimed the local government had interfered in the religious observance of the citizens. He questioned the legal basis of the government action from Islamic teaching perspective, particularly on the justification of punishing those who were not observing fasting. He argued the Quran and Hadith did not prescribe any punishment for those who were not observing fasting Ramadhan. It was true in the Hadith there was fine for not observing fasting. But it was not paid to a government. Therefore, it allowed people not to observe fasting. Then, why did the local government make its own regulation to punish citizens caught not observing fasting? In this case, the *Perda* was above the Quran and Hadith.[530]

Second, according to Sarman, if God wanted to force all Muslims to observe fasting, it was easy for Him. However, He did not. Therefore, He said, "Fasting is for Me." It means fasting is no body business except God. In the Quran, He said, "Oh you who

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[528]Arifin, 40.

[529]Mukhtar Sarman, "Bingung Perda Ramadhan," *Banjarmasin Post*, September 25, 2006.

[530]Ibid.

believe! Fasting is prescribed to you..." (Qur'an, 2:183). It means, according to Sarman, God only prescribes the believers to observe fasting. There is no obligation to observe fasting for those who do not believe in Him. Then, why did the Government, particularly the mayor and his deputy, coerce the citizen to observe fasting without any exception? When did they receive a revelation (*wahyu*) from God to apply the sacred mission? [531]

Third, Sarman criticised the claim that the making of *Perda* Ramadhan was to support religious atmosphere of the region by providing tranquillity for Muslims to observe fasting. It was assumed that by the existence of the *Perda* Muslims would more concentrate (*khusyuk*) in fasting. He argued the creation of a condition conducive, in which everyone support and observe fasting, for fasting would not guarantee the Muslims more concentrate. The fasting would not be challenging anymore. Temptations and challenges during the fast would increase the quality of one's *ibadah.* The *Perda* aimed to eliminate all the temptations and challenges. Then, to enforce the *Perda*, the government authorised the Satpol PP, which Sarman called "moral police", to control and sweep every area to catch offenders. According to him, the enforcement body was acting like God's officers who have obligation to supervise citizen religious faith. In Islam, he argued, fasting for fear of the Satpol PP was *syirik* (not for the sake of God).[532]

[531]Ibid.

[532]Ibid.

A week after the publication of Sarman's criticism against the *Perda* Ramadhan, Alwi Sahlan, a deputy mayor of Banjarmasin city, replied in the same newspaper.[533] Alwi claimed the *Perda* did not coerce anyone to observe fasting. He argued the *Perda* only prohibited eating, drinking, and smoking in public. Whether someone wanted to observe fasting or did not want to, it was his or her own business with God. He or she was free to not observe fasting as long as he or she did not eat, drink, or smoke in public. [534]

Why did the government prohibit eating in public? To answer this question, Alwi quoted an orientalist Joseph Schacht's famous statement that ''Islam is more than a religion. It represents political and legal theories. In brief, it is a complete cultural system that includes religion and state together."[535] He also quoted Yusuf Qardhawi (a Muslim scholar and dean of Faculty of Shariah in the University of Qatar), who said that Islam was not a merely matter of theology and ritual of worship. Islam also has rules about a way of life, society, and state. Even the ritual matters in Islamic jurisprudence (*fiqh*) are not far from political affairs. Muslims agreed that neglecting prayer, not paying *zakat*, and showing one-self taking breakfast during daylights of Ramadhan in public, and neglecting obligation of pilgrimage were actions liable for sanction or punishment.

Alwi concluded, based on Qardhawi's opinion, that showing one-self not observing fasting during the daylights of Ramadhan by eating, drinking, or smoking in public is

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[533]Alwi Sahlan, "Perda Ramadhan Tidak Memaksa Berpuasa," *Banjarmasin Post*, Ocktober 2, 2006.

[534]Ibid.

[535] See: Joseph Schacht, "Islam," in *Encyclopaedia of the Social Sciences*, ed. Edwin Robert Anderson Seligman and Alvin Saunders Johnson(New York: The Macmillan Company, 1932), 333.

punishable according to Islamic jurisprudence (*fiqh*). Therefore, the *Perda* Ramadhan had a legal basis in Islamic jurisprudence. Alwi argued there were sources of Islamic law other than the Quran and Hadith, which Sarman mentioned before. They are *ijma* (consensus of scholars) and *qiyas* (analogical deduction to derive law). Other Muslim jurists, Alwi added, recognised *maslahah mursalah* (protection of public interests) and *saddu zara'i* (preventive measures) as sources of Islamic law. Since there was no binding *fatwa* on the punishment for offenders of *Perda* Ramadhan, it was valid for the legislative and executive bodies of local government to decide the sanction or punishment.[536]

Although Indonesia was not an Islamic state, according to Alwi, the *Perda* Ramadhan and other Islamic laws were still valid for several reasons. First, Indonesian state was based on the belief in one God. It means Indonesian people recognise the involvement of God in the state affairs. In other words, Indonesia people are religious. Second, the preamble of the Constitution (UUD 45) also recognises God involvement in a life of nation and state by stating that the independence of Indonesia is achieved by the grace of God Almighty. Third, Alwi gave examples of activities, which involved religion in life of state. First was recitation of prayer by Islamic scholars (*ulama*) at the end of state ceremonies in predominantly Muslim regions. In predominantly Christian regions priests from churches recited prayers at the state ceremonies. In addition, in Bali region Hinduism monks recited the prayers. Second example was an oath of office taken by a person before undertaking the duties of an office or position in government. At an inauguration or ceremony, civil servants take an oath based on their religions.

[536]Sahlan.

Moreover, the existence of the religious courts showed the institutional involvement of religion in the state.[537]

Alwi claimed the *Perda* did not put non-Muslims in a disadvantage at all. It did not coerce them to observe fasting and it did not prohibit them from opening food stalls either. They might open the food stalls or restaurants provided they served for take-away only. They might not eat or drink in public.[538]

According to Alwi, Sarman exaggerated in saying that the Satpol PP acted as if they were a moral police and God's apparatus that had obligation to supervise the quality of religious faith of citizens. Alwi clarified that it was the *Perda*, which gave the authority to the Satpol PP, not God. It cooperated with the police and court. And it was the court which had authority to decide punishments according to the *Perda*.[539]

Here I would like to comment on the issue of coercion. What exactly is considered coercion? The concept of coercion, as explained by Locke, is based on the distinction between persuasion and force. The coercion is direct if government compels a person by force or threat to do certain behavior that he would not otherwise do. It is indirect, if government action merely makes noncompliance more difficult, expensive, or much harder for people to remain nonreligious or to avoid practicing a religion other than theirs.[540]

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[537]Ibid.

[538]Ibid.

[539]Ibid.

[540]Sapir, "Religion and State," 591; Michael W. McConnell, "Religious Freedom at a Crossroads," *The University of Chicago Law Review* 59, no. 1 (1992): 160.

Is prohibition of public eating considered coercion upon citizen to observe fasting? It is true if the regulation tells everyone to observe fasting and makes non-observance of fasting more difficult. However, the regulation does not tell anyone to observe fast. It just prescribes them to avoid eating, drinking, or smoking in public. They still can eat in their own houses. Therefore, it is not much harder for them to remain nonobservant.

According to Islamic teaching, fasting should be observed everywhere, in private and public places, from *fajr* (dawn) until the *maghrib* (dusk). Thus, those who have obligation to observe fasting should refrain from eating, drinking, smoking and everything else that break the fast whether at home or in public. The prohibition is not limited in public. Therefore, avoiding eating, drinking, or smoking only in public is not considered as the observance of fasting properly.

Eating in public during daytime of Ramadhan has two sides: religious and cultural. First, if a person is Muslim who has obligation to fast, his or her public eating has breached both religious teaching and cultural value. Thus, it is sin and disrespect to fasting Muslims. If a person is non Muslim or Muslim exempted by Shariah from fasting, s/he is not committing sin in terms of religion, but s/he is showing disrespect to fasting Muslims. Sarman did notice a non-*fiqh* element of the regulation that is a cultural aspect of public eating during daytime of Ramadhan. However, he was only focused on criticising the *fiqh* element. Therefore, he failed to see how both elements (*fiqh* and respect) have interacted and combined in justifying the ban of public eating, drinking or smoking.

3.4 Conclusion

To sum up, I have argued that although religion is the authority of the central government, however it gave authority to regional governments on two areas of religion: religious propagation and observance of *ibadah*, mainly the establishment of new places of worship. In both domains the heads of regions are responsible for ensuring religious freedom, religious harmony, social peace and order, and promoting mutual understanding, mutual respect, and mutual trust among religious communities and fostering social tranquillity and order in religious life.

The fasting of Ramadhan and Friday Prayer are part of *ibadah*. They have two aspects: one is religious and the other is socio cultural. The religious dimension of *ibadah* is all obligations and prohibitions that are derived from Quran and Sunnah through understanding (*fiqh*). The socio cultural one is all social activity or behaviours that are considered as disturbing or disrespecting the observance of *ibadah*. The *Perda* and *Qanun* in Aceh regulate both aspects. Different from Aceh, the *Perda* in the South Kalimantan only regulates the social and cultural aspects. Public responses to the regulations were mainly concerning the issues of religious freedom and harmony and the accommodation *fiqh* doctrines particularly on the fasting of Ramadhan.

CHAPTER FOUR

COMBINATION OF SHARIAH AND STATE IDEALS

This section will discuss the interaction between the state ideals of religious harmony and freedom and Shariah in shaping regulations in Aceh and South Kalimantan.

4.1 *Qanun, Perda* and *Fiqh*

4.1.1 The Fasting of Ramadhan under Shariah Doctrines.

In Arabic, *"al-siyaam"* (fasting) means *"al-imsak"* or abstinence in English. According to Shariah, it is the special act of abstinence from those things which break the fast.[541] It is a special abstinence, namely the act of abstaining from stomach and sexual desires by a Muslim who is pure from menstruation and postpartum bleeding from *fajr* (dawn), until the *maghrib* (dusk) solely for the sake of Allah.[542]

Islamic jurisprudence or *fiqh* qualifies the obligation of a person to fast during Ramadhan generally based on faith, maturity, and health. It is obligatory upon every sane, adult, healthy Muslim male who is not travelling at that time. It makes exceptions from the obligation for persons in particular circumstances. They are children who have not reached the age of maturity, sick persons, travellers, pregnant or nursing women, menstruating women or the women who have postpartum

[541]Muhammad Shirbini al-Khatib, *Mughni Al-Muhtaj Ila Ma'rifat Ma'ani Alfāz Al-Minhaj*, 1 ed., vol. 2 (Beirut, Lebanon: Dar al-Ma'rifah, 1997), 180.

[542]Muhammad ibn Ahmad Sarakhsi, *Kitab Al-Mabsut*, vol. 2 (Beirut: Dar al-Ma'rifah, 1978), 56.

bleeding, old persons, and mentally ill persons. Ibn Rushd classifies them into three kinds: those who are permitted to fast or not to fast; those who are obligatory not to fast; and those who are forbidden not to fast. Those to whom both things are permitted are the sick person, by agreement, the traveller, with disagreement, the pregnant women, the nursing mothers, and the old person.[543]

The sick person and the traveller are permitted to fast or not to fast. The jurists disagreed over the validity of obligatory fast of the sick person and the traveller. The majority maintain that if they fast their fast is in order and valid. The Zahirites maintain that their fasts are not valid and their obligation is to perform *qada* (make up any days missed) on other days not in Ramadhan. Concerning the question whether fasting is better than not fasting for traveller, the jurists had three different opinions. Some jurists including Malik and Abu Hanifa maintained that fasting has greater merit. Some jurists including Ahmad held that not fasting is better. Some maintained that fasting was a matter of choice, none is better. The jurists agreed the traveller and the sick person if they cease to fast during Ramadhan they must perform *qada*.[544]

The pregnant women, nursing mothers, and old persons are allowed not to fast. There are two well-known issues related to this. The first is that both feed the needy and there is no *quad* for them. This is related from Ibn Umar and Ibn Abbas. The second opinion, which is the counterpart of the first, is that they only perform *qada* and they are not obliged for feeding the needy, and this is the opinion of Abu Hanifa, his

[543]Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 344.

[544]Ibid., 345-349.

disciples, Abu Ubayd, and Abu Thawr. The third opinion is that they perform *qada*as well as feed the needy. This was al-Shafi'i's opinion. The fourth opinion is that the pregnant woman performs *qada* but does not feed the needy, while nursing mothers perform *qada* as well as feeds the needy.[545]

The fasting of menstruating woman or the woman who has postpartum bleeding is invalid. The child who has not reached the age of maturity and the mentally ill person do not have to fast. Because it is based on faith, fasting is not obligatory on non-Muslim.[546]

The majority of the jurists maintained that a person who breaks his fast through intentional sexual intercourse is under an obligation of *qada* as well as expiation. One group of jurists deviated from the majority opinion and did not impose anything on a person breaking his fast intentionally through sexual intercourse, except *qada*.[547]

Punishment relating to offences of Ramadhan is not fixed in the Quran or Sunnah. Muslims jurists in Islamic jurisprudence put the punishment within the category of *ta'zir*. Ibn Qudamah, for example, while addressing the chapter on *ta'zir* cited the punishment by Ali. Ali gave Najashi 100 lashes for drinking wine in the month of Ramadhan, eighty lashes as punishment for drinking wine and twenty lashes as punishment for breaking fast of Ramadhan.[548] Najashi was a famous poet of Kufa. He was originally from Yemen. He joined the army of Ali at the Battle of Siffin. In

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[545]Ibid., 351-352.

[546]Shirbini al-Khatib, 202.

[547]Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 353-354.

[548]Ibn Qudamah, *Al-Mughni*, 3 ed., vol. 2 (Riyadh: Dar `Alam al-Kutub, 1997), 535.

the month of Ramadhan he and his friend, Abu Sammak drank wine. The people brought the case to Ali. Ali summoned both of them. Abu Sammak fled but Najashi was arrested. Ali ordered him to be lashed eighty times for drinking wine and twenty more for not fasting.[549] Other companion of the Prophet who punished those who broke the fast was Umar. Umar gave the punishment of whipping 100 strokes of cane to a man who drank wine in the month of Ramadan, 80 strokes as punishment for drinking wine and 20 strokes as punishment for the insult of Ramadan.[550]

4.1.2 The Friday prayer under Shariah Doctrines.

The Arabic word *"shalat"* literally means *"du'a"* or to call upon. According to Shariah, it is a collection of utterances and actions that start with a proclamation of God's greatness (*takbir*) and end with the greeting of peace (*taslim*) with certain conditions.[551] The jurists agreed the intention (*niat)* as a condition for the validity of prayerbecause it is a pure act of worship *(ibadah mahdah)* with no rational or tangible meaning and interest.[552]

A number of prayers are obligatory on every pubescent Muslim. There are two different opinions among jurists about the exact number of the obligatory prayers. According to Malik, Shafi'i, and the majority, they are only five daily prayers.

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[549]Ahmad ibn Ali Ibn Hajar al-Asqalani, *Kitab Al Ishabah Fi Tamyiz Al-Shahabah*, vol. 6 (Beirut: Dar al-Fikr, nd), 264.

[550]Muhammad Rawwas Qal'a Ji, *Mausu'ah Fiqh 'Umar Bin Al-Khattab* 1ed. (Kuwait: Maktabah al-Falah, 1981), 83, 170, 348.

[551]Muhammad Shirbini al-Khatib, *Mughni Al-Muhtaj Ila Ma'rifat Ma'ani Alfāz Al-Minhaj*, 1 ed., vol. 1 (Beirut, Lebanon: Dar al-Ma'rifah, 1997), 187; Qudamah, 5; Nurcholish Madjid, "Worship as an Institution of Faith," in *Windows on the House of Islam: Muslim Sources on Spirituality and Religious Life*, ed. John Renard(Berkeley: University of California Press, 1998), 72.

[552]Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh*, 32-33; Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 3, 132; Ibn Rushd, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtashid*, 9, 120.

Meanwhile, Abu Hanifah and his disciples added *witr* (odd) prayer as obligatory.[553] Besides the five daily prayers, there are special services to be held by the community on certain occasions. They are the Friday prayer and the payers on the two feasts *('id)*.[554]

The Friday prayer is called *jumu'ah.* The word *jumu'ah* in Arabic comes from a root word that means, "To gather, bring together or congregate". The Friday prayer consists of a *khutbah* (sermon) and two *rak'as* after the *khutbah*. During the time of Prophet, Abu Bakr and Umar, there was only one *azan* or call for Friday prayer. However, at the time of Usman, there were two calls. The first call is announced as the time approaches. This call was first introduced by Usman because of the increasing number of Muslims. The second call is announced when the imam sits upon the pulpit. This call was introduced by the Prophet Muhammad.[555]

The majority of the jurists hold the Friday prayer is obligatory on every healthy adult male Muslim, as a substitute for another obligation, which is the *zuhr* (afternoon) prayer. A group of jurists maintained that it is a communal obligation *(fard kifayah),* and from Mälik there is an isolated opinion that it is a *sunna* (practice of the Prophet). The jurists agree it is not obligatory on a woman and a sick person. They disputed its obligation on a traveller and a slave. The majority maintain it is not

[553]Ibn Rushd, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtashid*, 89-90; Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 96-98.

[554]Arent Jan Wensinck, "Salat," in *E.J. Brill's First Encyclopaedia of Islam, 1913-1936*, ed. M. Th Houtsma(Leiden; New York: E.J. Brill, 1987).

[555]Ibid.

obligatory on them, while Dawud and his disciples hold it is obligatory.[556] About the person living outside a permanent settlement, a group of jurists have said that Friday prayer is not obligatory on such a person, while another group have said that it is obligatory.[557]

Muslims, which have obligation to observe the Friday prayer, should make efforts to the prayer. Shafii, Maliki, and Hanbali scholars agreed the Muslims should make efforts to prayer while the *imam* is sitting on the pulpit to deliver sermon and the call is made. However, Hanafi scholars said the time is when Muslims hear the first call if applicable.[558]

They also disagreed over buying and selling at the time of the call (before the prayer). A group of jurists have said that the sale is void if the call has been made, while another group said that it is valid.[559] Shafii and Hanafi scholars agreed the sale is not void but it is forbidden when the call to the Friday prayer has been announced. However, the former group meant the second call (when the person delivering sermon sits upon the pulpit), while the later meant the first call until the end of prayer. On the contrary, Maliki and Hanbali scholars held the sale is void. This prohibition only applies to whom the Friday prayer is obligatory. It also applies to both parties involved in the transaction if one of them is obliged to pray.[560] Thus, it

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[556]Ibn Rushd, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtashid*, 156-157; Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 174.

[557]Ibn Rushd, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtashid*.; Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*.

[558]Abd Juzairi al-Rahman, *Kitab Al-Fiqh 'Ala Al-Madhahib Al-Arba'ah*, vol. 1 (Cairo: Maktab al-Thaqafi, 2000), 291-292.

[559]Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 184-185.

[560]Juzairi al-Rahman, 297.

excludes women, travellers, and non-Muslims. Another jurist, Khatib Syarbaini said the prohibition is not limited to the sale, but to all activity which distract Muslims from the efforts to Friday prayer.[561]

There are differences among the jurists concerning the status of the person who neglects obligatory prayer intentionally, but does not deny its obligation. A group of jurists says he is *fasiq* (grave sinner). He is ordered to pray if he refuses to do so he should be executed as a *hadd* penalty. This is the opinion of Malik and Shafii. Another group of jurists said that he is *kafir* and should be executed. This is the opinion of Ahmad, Abdullah ibn al-Mubarak, Ishaq ibn Rahiwiyah, and some of Shafi'i. Others, such as Abu Hanifah, Abu Sulaiman, and Muzanni, said that he is not *kafir,* but he is *mu'min 'ashin (*disobedient believer). He should not be executed, but he should be punished with *ta'zir* and confined until he resumes praying.[562] In the case of the person who neglects the Friday prayer, the Prophet (God's peace and blessings be upon him) says, "Whoever left three Friday prayers without an excuse would be recorded as *munafiqin (*hypocrites*)".*[563] He also says that Allah will seal up the hearts of persons who neglect three consecutive Friday prayers.[564] A person who abandoned one Friday prayer should perform *kaffarat* (expiation) by giving the poor*a*

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[561]Shirbini al-Khatib, *Mughni Al-Muhtaj Ila Ma'rifat Ma'ani Alfāz Al-Minhaj*, 442.

[562]Abd Juzairi al-Rahman, *Kitab Al-Fiqh 'Ala Al-Madhahib Al-Arba'ah*, vol. 5 (Cairo: Maktab al-Thaqafi, 2000), 336-337; Ali ibn Ahmad Ibn Hazm, *Al-Muhalla*, 11 vols., vol. 11 (Cairo: Maktabah Dar al-Turas, 1969), 376-380; Ibn Rushd, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtashid*, 90-91; Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 98.

[563]Jalaluddin Suyuthi, *Jami' Al-Ahadits: Al-Jami' Al-Shaghir Wa Zawaiduhu Wa Al-Jami' Al-Kabir*, vol. 7 (Beirut: Dar al-Fikri, 1994), 8.

[564]al-Qushayri Muslim ibn al-Hajjaj and al-Imam Abi Zakaria ibn Syaraf Nawawi, *Sahih Muslim Bisyarhi Al-Nawawi*, 3 ed. (Cairo: Muassasah Qardhaba & al-Faruq al-Hadisah, 2003), 217-218; Sulayman al-Asy'ath al-Sijistani Abu Dawud, *Sunan Abi Dawud*, 3 ed., vol. 1 (Beirut: Dar al-Fikri, 1999), 396-397.

dinar (4.375 grams of gold) or half a *dinar*, a *dirham* (3,0618 grams of silver) or half a *dirham*, a *saa'* (about 2.176 kg) of wheat or half a *saa'*.[565]

4.1.3 The Fasting of Ramadhan under *Perda* and *Qanun*

The texts from Aceh classify the persons and their actions based on fiqh doctrines. Hooker argues the Aceh Qanuns use classical Shariah classes of actions as the basis for lawmaking. Its consistent use indicates the state perceives individual as '*fiqh* person'. That person is not primarily a citizen as defined in state law but a Muslim as defined in Shariah.[566]

TheQanun 11/2002 uses the *fiqh* term "*uzur syar'i*" to classify Muslims and their actions during Ramadhan. Its elucidation defines the term as a condition that allows a person to not fast. It prohibits Muslims who have no *uzur syar'i* to eat or drink in public during the daylight of Ramadhan.[567] From this provision, it is clear the regulation in Aceh is enforcing religious obligation of fasting. To what extent does this obligation apply punishment for breaches? It applies as long as the Muslims, which have no *uzur syar'i* break the fast in public. There is no punishment for breaking fast in private. Its elucidation says a public place (*tempat umum)* is open place that can be attended or seen by everyone. Meanwhile, in front of public (*di depan umum*) is in front of other person, such as in public transportation, waiting room or office.

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[565]Abu Dawud, 397.

[566]Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*, 253.

[567]Aceh.*Qanun 11/2002*, art.10 (2).

Other provision prohibits everyone, including non-Muslims, to provide facilities and opportunities to Muslims, which have no valid excuse (*uzur syar'i*) to not fast during the month Ramadhan.[568] The elements of this provision are not entirely derived from Islamic doctrines. Because, in fiqh there is no prohibition on opening food stalls during the daylight of Ramadhan and selling food. The principle justifying this provision will be discussed at the section of religious freedom and harmony.

The preamble of *Perda* Ramadhan in Banjar regency cited Shariah doctrine of fasting of Ramadhan as the legitimacy of legislation. It states, "That ritual of fasting is one of the Five Pillars of Islam which is obligatory on every Muslim."[569] In addition, its elucidation says the fasting is obligatory on every Muslim who has been being obliged to fast.[570] However, although the *Perda* used the doctrine from Shariah or *fiqh* to give legitimacy to the content of the law, it does not use *fiqh* classification of persons and their actions under fasting. It only generally classifies persons into those who are fasting and those who are not fasting without giving any further qualification. For example, the *Perda* prohibits everyone from showing them-selves consume any food, drink or tobacco openly or in any public place.[571] Its provisions do not classify the persons as *fiqh* does. Not everyone in *fiqh* have obligation to fast. Some persons are permitted to fast or not to fast. Even some persons are obligatory to not fast. The practices of the companions (Umar and Ali) of the Prophet show the ta'zir punishment is given only to those who are not fasting or breaking fast of

[568]Ibid.,art. 10 (1).

[569]Banjar.*Perda 10/2001*, considerans par. a.

[570]Ibid., elucidation.

[571]Ibid., art. 2.

Ramadhan while they are obligatory to fast.[572] In contrast, the texts of regulations in Banjar and Banjarmasin threat everyone who eat, drink, or smoke in public with punishment without taking into consideration their status as fiqh persons. For examples, are the persons obligatory to fast? Are they permitted to not fast? Are they forbidden to fast? Since certain persons are not obliged to fast under fiqh, if they eat, drink, or smoke, they do not breach religious obligation. Are the regulations in Banjar and Banjarmasin prohibiting a person from eating in public because he or she is breaching the religious obligation? In terms of fiqh, it is true if the person concerned is obligatory to fast. Therefore, the fiqh basis to justify the prohibition of every person to consume food, drink, or tobacco during the daylights of Ramadhan is not sufficient. The fiqh justification is only sufficient to prohibit those who are obligatory to fast. For example, what is a justification for non-Muslims? The government needs another justification outside fiqh. This matter will be addressed in the discussion of religious harmony and freedom.

4.1.4 Friday Prayer under *Qanun* and *Perda*

There are two issues in the regulations, which directly related to Shariah doctrines on the Friday prayer. They are the obligation of prayer and prohibition of all activity distracting Muslims from the prayer. On the first issue, Aceh *Qanun* 11/2002 is following the Prophet saying on Muslims who neglect three consecutive Friday prayers.[573] Although the Prophet condemned them, he did not specify any punishment for neglecting the Friday prayer. However, the regulation in Aceh gives authority to government to punish Muslims, which have no uzur syar'i. In this

[572]Qal'a Ji, 83, 720, 348; Qudamah, 535.

[573]Aceh.*Qanun 11/2002, art.21 (1).*

respect, different from Aceh, the regulation in Banjar is not requiring Muslims to observe the Friday prayer and not meting out any punishment for neglecting it.

Concerning the second issue, the regulations in Aceh and Banjar are not following *fiqh* doctrines.For example, during the time for Friday prayer, *fiqh* allows women, travellers, and non-Muslims to perform any activity as long as they do not involve whom the prayer is obligatory.[574] In contrast, the regulations in Aceh and Banjar make no exception to women, travellers, and non-Muslims. Thus, *fiqh* limited the prohibition to which the prayer is obligatory to perform any activity, which distracts them from the efforts to Friday prayer. On the other hand, the regulations in Aceh and Banjar apply to everyone the prohibition to perform all activity except the efforts to the prayer. The Banjarese text specifies the efforts to prayer, such as driving to mosques.

4.2 *Qanun, Perda* and Religious Harmony

Aceh *Perda* and *Qanun* combine the principle of respect and Shariah doctrines as the basis of lawmaking. In general, Article 4 (3) of *Perda* 5/2000 obliges everyone domiciled in Aceh to respect the implementation of Shariah. Although, the meaning of "respect" is not elucidated, the following articles on *ibadah* give a clue to the meaning.

> Every non-Muslim is not allowed to perform any activity that may disturb the tranquillity and calmness *(kekhusyukan)* of Muslims in observing their *ibadah*.[575]

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[574] See: Juzairi al-Rahman, *Kitab Al-Fiqh 'Ala Al-Madhahib Al-Arba'ah*, 297; Shirbini al-Khatib, *Mughni Al-Muhtaj Ila Ma'rifat Ma'ani Alfāz Al-Minhaj*, 442.

[575] Aceh.*Perda5/2000*, art.8 (4).

> Provincial government and social institutions shall make efforts in preventing all activities that may disturb and interfere with the observance of *ibadah* by every Muslim.[576]

Thus, "to respect" means, "to not disturb." Punishment for performing disturbing activity is three months imprisonment or fine of two million rupiah.[577] However, the articles do not specify in details the activity that disturbs the observance of *ibadah*.

The obligation of everyone to respect the observance of *ibadah* is restated in Article 11 of *Qanun* 11/2002. In the context of Friday prayer, it means every person, government agency and other agency shall (*wajib)* suspend all activity that could prevent and disturb Muslim to observe Friday prayer.[578] However, like the *Perda* 5/2000, it does not specify what activity considered as preventing and disturbing the prayer and their punishment.

The application of the principle of respect is not fully following *fiqh* doctrines. In *fiqh*, as described above, some jurists limited the prohibition to sale.[579] Other extended the prohibition to all activity that distracts Muslims from the efforts to Friday prayer.[580] In this regard, the jurists classify the activity into three types. First, the activity that is performed by whom the prayer is obligatory. Second, the activity that is performed by whom the prayer is not obligatory. Third, the activity in which one of the parties involved in the transaction is obliged to pray. The prohibition only applies to the first and third. Thus, *fiqh* allows women, travellers, and non-Muslims

[576]Ibid., art. 9 (1).

[577]Ibid., art. 19.

[578]Aceh.*Qanun11/2002*, art.8 (2).

[579] See: Juzairi al-Rahman, *Kitab Al-Fiqh 'Ala Al-Madhahib Al-Arba'ah*, 297.

[580] See: Shirbini al-Khatib, *Mughni Al-Muhtaj Ila Ma'rifat Ma'ani Alfāz Al-Minhaj*, 442.

to perform any activity as long as they do not involve whom the prayer is obligatory. In contrast, the regulations in Aceh make no exception to women, travellers, and non-Muslims.

Unlike provisions on Friday prayer, the articles concerning Ramadhan apply the principle of respect according to *fiqh* doctrines. Aceh *Qanun* classifies the persons during Ramadhan according to *fiqh* doctrines. It also uses *fiqh* in governing the relations between those who are fasting and not fasting based on their status as *fiqh* persons. The principle of respect applies, but it is limited only to selling food and drink to those who are not permitted by Shariah to not fast. Thus, selling food to them means disturbance or disrespect. However, selling food to those who are permitted by Shariah to not fast is not considered as disturbance or disrespect. Here, the meaning of "respect" is defined according to doctrines of fasting under Shariah. The measurement of disturbance is actual action of selling food to those who are obligatory to fast. A mere operating food stalls and restaurants is not considered disturbance.

In Banjar and Banjarmasin, one of justifications for the existence of *Perda* Ramadhan is respect for those who are fasting. The preamble of *Perda* Banjar 10/2001 states, "Ritual of fasting is one of the Five Pillars of Islam which is obligatory on every Muslim and its observance shall be respected by every Muslim and non-Muslim."[581] The regulation does not prohibit all activity during Ramadhan, but are limited to that activity which disturbs the observance of fasting. It perceives selling food and drink disturbs the ritual of fasting. Its elucidation says that the

[581]Banjar.*Perda10/2001,* considerans.

operation of restaurants, stalls, carts, and the like will create an opportunity or desire for everyone to neglect the ritual of fasting.[582] It makes exception to selling food and drink at certain hours before breakfast. It does not perceive the later activity as disturbing, but supporting preparation for breakfast. It also perceives eating, drinking, and smoking in public during the fasting hours as the activity disturbing the observance of fasting.

In Banjar and Banjarmasin, the principle of respect is governing the relations between Muslims who are obligatory to fast and those who are not, and non-Muslims. The regulations use *fiqh* to classify citizen into fasting persons and non-fasting ones. However, they do not follow further the details provided by *fiqh*. For example, the texts of the regulations do not make provisional exceptions for travellers, sick persons, and non-Muslims. Instead of using *fiqh* doctrines, the texts govern the socio-religious relations between the fasting persons and the non-fasting ones based on the principle of respect. The regulations perceive eating in public and operation of food stalls as disturbance to those who are fasting. The activities might cause temptation to breaking the fast or staying away from observance of fasting. The regulations are removing this kind of temptation. Thus, a mere operating food stall is considered as disturbance even though it is not selling to those who are obligatory to fast.

There are three approaches of protecting the fasting persons. First approach is protecting the fasting persons only. Second is protecting both the fasting and the non-fasting. In Banjar and Banjarmasin, the regulations are adopting the first approach.

[582]Ibid., elucidation.

Meanwhile Aceh is adopting the second. In Aceh, the texts allow the operation of food stalls and restaurants during the daylights of Ramadhan as long as they are not selling to those who are not permitted by Shariah doctrines to break the fast. The *Qanun* accommodates the interests of non-fasting persons permitted by Shariah by allowing the food stalls and restaurants to sell to them. In practice, the first approach (Banjar and Banjarmasin) is easier to apply than the Aceh's one. It is difficult to identify Muslims who are fasting and not fasting. It is only applicable for non-Muslims because it is easy to identify them, particularly if they live in one particular area.

There is another approach combining both models above. For example, in Padang city, like in Banjar and Banjarmasin, although some Muslims are permitted to not fast by Shariah doctrines, they may not eat, drink, and smoke in public. No one (Muslims and non-Muslims) may sell food and drink to them for immediate consumption before breakfast. However, lightly different from Aceh, non-Muslims in Padang may operate food stalls and restaurant for catering non-Muslims only. It is applicable and easier to monitor because non-Muslims in Padang concentrate in one particular area. Most of them live in Jalan (Street) Pondok.[583]

If food stalls and restaurants mat open during the days of Ramadhan, how should they operate? In Aceh, they may operate as long as they do not cater Muslims, which are obliged to fast. The text does not explain physical appearances of the food stalls. The common practice of sellers during Ramadhan in many regions in Indonesia is

[583]"Warung Nasi Di Kawasan Pondok Boleh Buka!," *Post Metro Padang*, August 27 2008.

covering parts of their food stalls and restaurant. This issue will be discussed in details in the analysis of local discourse on Ramadhan.

4.3 *Qanun*, *Perda* and Religious Freedom

Ibadah in terms of *fiqh* is an area of God-human relation done with the intention of pleasing God. It is a human obligation towards God.[584] In *fiqh,* the Friday prayer and fasting of Ramadhan belong to this category. According to majority of jurists, intention is a condition for the validity of the prayer and fast.[585] In social sphere, the rituals are observed by Muslims in places where they live and interact with fellow Muslims and non-Muslims. In this social space, the observance of fasting by Muslims becomes an issue of inter-human relation. Thus, the prayer and fasting have two aspects: God-human relation and inter-human relation.

The Aceh *Qanun* regulates both aspects of Friday prayer: God-human relation and inter-human relation. Some of the provisions enforce Muslims obligation towards God, i.e., obligation to pray. The *Qanun* obliges every Muslim, which has no *uzur syar'i,* to perform Friday prayer.[586] It establishes *ta'zir* penalty of a maximum imprisonment of six months or a maximum of three strokes of caning in public for any personwho fails to perform the Friday prayers for three consecutive times without *uzur syarie* or without any reasonable cause.[587]

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[584]Sachedina, *The Role of Islam in the Public Square : Guidance or Governance?*, 20.

[585]Ibn Rushd, *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 342.

[586]Aceh.*Qanun11/2002*, art.8 (1).

[587]Ibid.,art. 21 (1).

Unlike Aceh, the regulation of Friday prayer in Banjar does not directly command Muslims to attend the mosque or observe the prayer. Moreover, there is no punishment for Muslims, which are not attending the prayer. Thus, the government through the bylaw does not enforce religious obligation. The prayer and its obligation is the matter of God-human relation. The Banjar government is not punishing those who are not praying. Instead, they punish those who are disturbing the observance the prayer. The text of the *Perda* implies that for Muslims, they are free to pray or not to pray as long as they do not disturb the performance of Friday prayer.

In the Aceh *Qanun* 11/2002, all parties include individual, family, community, school, and government are responsible for taking care, cultivating, and regulating religious life. According to *Qanun* 11/2002, all parties have obligations and responsibilities to support the observance of *ibadah*. Provincial, regency and city governments, and social institutions have obligations to provide facilities and create conducive condition and atmosphere for the observance of *ibadah*.[588] Government agencies, educational institutions, and business enterprises have obligations to encourage Muslims and provide facilities for congregational prayers.[589] Parents are responsible for ensuring family members perform the daily and Friday prayers, and fast during Ramadhan.[590] Heads of villages shall glorify mosques and village halls (*meunasah*) with congregational prayers and other religious activities.[591]

[588]Ibid.,art. 7 (1).

[589]Ibid.,art. 9 (1).

[590]Ibid.,art. 7 (2).

[591]Ibid.,art. 9 (2).

The freedom to worship or *ibadah* extends to the right to have places for observing the ritual. For this purpose, the government and community have positive duties to provide such places. Article 9 paragraph 2 of the *Perda* 5/2000 states, "Provincial government and people shall establish, maintain, and glorify the places of *ibadah* for Muslims." Article 9 of the *Qanun* 11/2002 prescribes that government agency, educational institution, and business enterprise must provide facilities for observing obligatory prayers.[592]

Another meaning of religious freedom in the Aceh regulations is the freedom to practise one's religion without interference. For this purpose, the government has positive obligation to remove the climate of disturbance to allow the practice of *ibadah* by Muslims in genuine freedom. For Muslims the genuine freedom means the freedom to pray and fast with tranquillity and calmness (*kekhusyukan).* Any activity disturbing this desired atmosphere is considered as interference with religious freedom. In the context of Friday prayer, this right extends to hours of rest for observing the ritual. For this purpose, there is positive obligation of the government agencies, business enterprises, and social institutions to stop all activities that may prevent Muslims from observing Friday prayer.[593] Public transportation services shall stop at certain times to provide opportunity to the users to observe obligatory prayers (*shalat fardhu*).[594]

Unlike Aceh, the regulation of Friday prayer in Banjar regency is not mentioning any governmental duty to provide facilities for the ritual. It is also not requiring

[592] Ibid.

[593]Ibid., art. 8 (2).

[594]Ibid., art. 9(3).

attendance of the mosque. Instead, it only focuses on the positive duty of the government to create a calm and *khusyu'* atmosphere for Muslims in observing Friday prayer. It prescribes the government must remove any activity distracting people's concentrated attention at the prayer during certain hours on Friday (from the first call to prayer *(adzan)* until the end of prayer). In this regard, the regulation extends the freedom to worship to the right to worship in an appropriate atmosphere without interference. The right to practice the Friday prayer extends to ban on transaction activity, factory operation, gaming business, public transport, road closures, and other activity producing disturbing noises.

The regulation of Ramadhan in Aceh does not directly command Muslims to fast. They are free to not fast as long as they do not show in public eating, drinking, or smoking. In Aceh, the prohibition against public eating, drinking or smoking during daylight hours is enforced on certain Muslims only. In Banjar, the prohibition against public eating, drinking or smoking during daylight hours is enforced on non-Muslims as well as Muslims.

Regulations in Aceh, Banjar and Banjarmasin have the same focus: governing the second aspect of fasting (inter-human relation). The governments in both regions promulgated legal norms to govern socio-religious relations between those who are fasting and those not fasting (Muslims and non-Muslims). The emphasis is on appropriate behavioural norms in everyday social interaction during Ramadhan. The right to practice one's religion, namely fasting, includes the right to observe fasting without interference. It extends to ban on operation of food stalls and restaurant, selling food and drink, public eating, drinking, and smoking during the daylights of Ramadhan.

Although the legal text of Friday prayer in Aceh does not explicitly draw (*manifest intertextuality*) on earlier formations of the meanings of religious freedom held by Muslim groups during the constitutional debate on the Jakarta Charter, in spirit it reproduced their view of the role of the state in applying Shariah to Muslims. At the time, Muslim groups held the state had a positive obligation to apply Shariah to Muslims.[595] It had the obligation to facilitate Muslims practising their faith and to coerce them practising the *ibadah*.[596] However, the enforcement of the obligation to observe Friday prayer in Aceh is not reproducing the secular groups' view of religious freedom. They put Article 29 of the UUD 45 on religious freedom with the intention to limit the extent to which Shariah might apply.[597] According to them, individual Muslims should be free from a coercion to observe Shariah, particularly on the personal matters between humankind and God such as prayer and fasting. In other words, the state shall not make any law coercing Muslims to pray or fast.[598]

The dominant secularist political group wanted the application of Shariah still within the framework of secular principles of individual religious freedom and conscience. The essence of these principles, according to them, is non-coercion. The government might apply Shariah as long as in a non-coercive way. The non-coercive interpretation of Jakarta Charter by secularist group would limit the extent to which Shariah law might apply. In terms of the nature of law, it meant that the state might not use its coercive apparatus to force Muslims to practice Shariah by punishing

[595]Sekretariat Negara Republik Indonesia (Setneg RI). 368-369.

[596]Hosen, "Religion and the Indonesian Constitution," 438-439.

[597]Sekretariat Negara Republik Indonesia (Setneg RI). 247-248.

[598]Ibid., 240.

them if they failed to do so. Under this non-coercive interpretation, the state may enact religious-based law as long as it respects the individual freedom of religion.

Regarding the application of Shariah regional regulation on non-Muslims, Robertus argued that with the structure and expanded scope, certain regulations are openly and explicitly directed at the non-Muslim population. Therefore, he claimed the regulation's enforcement capacity, in principle, is greater than the Jakarta Charter, which limited the implementation of Shariah only to the Moslems. His examples are parliamentary debate on expansion of Islamic criminal law in Aceh and *Perda* 5/2003 of Lima Puluh Kota district in West Sumatra on the Compulsory Muslim Attire, which, according to his interpretation, requires everyone including non-Muslims to wear Muslim attire.[599] In the context of the regulations of *ibadah* in Aceh and South Kalimantan, his claim is not true because the obligation to Friday prayer in Aceh only applies to Muslims and in Banjar there is no requirement for Muslims and non-Muslims to observe the prayer. Furthermore, during Ramadhan, non-Muslims are not required to observe fasting. They are only obliged to respect the fasting Muslims by not eating in public.

The regulation of Friday prayer in Aceh also reproduced Muslim view of religious freedom which the New Order adopted. In this view, the state must be responsible and actively support of Islam. The Five-Year Plan for 1969-74 stated the government has the responsibility of giving guidance and assistance to facilitate the development of each religion. This positive duty of the state distinguished Indonesian views of religious freedom from those held by Western liberal regimes. In the West, the

[599]Robet, 274-275.

professions of belief in God play a passive role.[600] During the New Order, the emphasis on appropriate behavioral norms has made religion a factor in everyday interactions and, with this emphasis, religious life is increasingly viewed as the responsibility of the religious community and the state rather than the individual.[601] According to this logic, the more rules and regulations concerning religious life and inter-religious relations are introduced, the more freedom of religion can be secured.[602]

Unlike Aceh, regulation of the Friday prayer in Banjar South Kalimantan does not reproduce Muslims' view of religious freedom in the Jakarta Charter. On the contrary, it reproduces the secular groups' non-coercive interpretation of the Jakarta Charter. The government of Banjar does not use its coercive apparatus to force Muslims to observe the Friday prayer and does not punish them if they failed to do so. However, it is closer to the Islamic groups' view of religious freedom which the New Order adopted. According to Kim, they hold that the religious freedom means the freedom to practise one's religion without interference, distraction and disturbance.[603]

4.4 Changing Meanings of Activities during Ramadhan

During the month of Ramadan, the fast usually becomes sensitive issue in Indonesia. The central government, particularly the Ministry of Religious Affairs (MORA) since the New Order had given guidance on an appropriate behaviour for those who

[600]Stange, 554.

[601]Ibid.; Kim, "Religious Freedom in Indonesia," 369.

[602]Kim, "Religious Freedom in Indonesia," 369.

[603]Ibid., 371-375.

were not fasting during Ramadhan. Every year, the Minister of Religious Affairs delivered a greeting speech to welcome the Ramadhan. In 1983, for example, Munawir Syadzali (a Minister of Religious Affairs from 1983-1988 and 1988-1993) delivered the following speech:

> During the month of Ramadan, in order to respect those who are fasting, Muslims, which are exempted from fasting, should not show off. Non-Muslims should respect and be sensitive towards Muslims, which are fasting.
>
> The owners of restaurants, hotels, rice stalls and others, during Ramadan should not operate demonstratively. Efforts should be made so that their businesses are running and not interrupted. However, they shall not disturb the peace and tranquillity (*kekhusyu'an*) of Muslims, which are fasting. Mutual respect and mutual understanding between citizens of different religions should be fostered.[604]

In 2007, Muhammad M. Basyuni (a Minister of Religious Affairs from 2004-2009) delivered the same speech:

> In this holy month we increase *ukhuwah Islamiyah*, maintain unity and integrity in the life of nation and state as well as enhance social solidarity among *umat*, mutual respect and mutual honour. Avoid an atmosphere of division and hostility so that *umat* feel in peace and can fast well. Finally, we appeal to all those who do not perform fasting not to act contrary to the greatness of Ramadan and respect the Muslims who are performing fasting in Ramadan .
>
> We encourage the owners of entertainments or cafes, or restaurants to understand the atmosphere of the holy Ramadan and not to operate their businesses demonstratively in the daytime. Thus, an atmosphere of Ramadan as a month full of grace and forgiveness from Allah will emerge.[605]

Concerning the operation of food stalls and restaurants, according to the speeches, they may open but they have to respect Muslims, which are fasting. Not opening

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[604]Departemen Agama Republik Indonesia., *Pokok-Pokok Kebijaksanaan Menteri Agama Dalam Pembinaan Kehidupan Beragama* (Jakarta: Proyek Penelitian Keagamaan, Badan Penelitian dan Pengembangan Agama, Departemen Agama RI, 1985), 59-60.

[605]Departemen Agama Republik Indonesia., "Pidato Menteri Agama Ri Dalam Menyambut Bulan Suci Ramadhan 1428 H/ 2007m," (2007). http://www.kemenag.go.id/file/dokumen/September2007d.pdf (accessed December 12, 2011).

"demonstratively" is considered as a respect. The 1983 speech claimed this style of food stall as expression of "mutual respect." It means the owners of food stalls and restaurant still could earn money, however they have to respect those who are fasting by not opening demonstratively.

Both speeches do not explain the meaning of the term "demonstratively." However, it is clear from the following examples of various regions, which materialize the term during Ramadhan. Among them are Palangkaraya in Central Kalimantan, Pontianak in West Kalimantan, Palembang in South Sumatra, Banyumas in Central Java, and Yogyakarta.

In the city of Palangkaraya, Central Kalimantan, during the daylight of Ramadhan, food stalls are curtained. Usually, they are curtained with tent made from cloths, only sandals and shoes of consumers that can be seen from outside. They sell rice and various foods for immediate consumption or take-away. At the city of Palangkaraya, the action of opening a food stall with curtain during daylight of Ramadhan is perceived as a respect for Muslims who are fasting. It is believed that the action will not disturb fasting Muslims. This action means mutual respect between Muslims and non-Muslims and strengthening an inter-religious tolerance.[606]

Officially, at the city, there is no regulation prohibiting the opening of food stall during the days of Ramadhan. However, the city government keeps telling that it is not opened without curtain. Tuah Pahoe (mayor of Palangkaraya 2003-2008), for example, stated the action of opening food stall without curtain will disturb and hurt

[606]"Sakadup Jangan Vulgar!," *Banjarmasin Post*, September 17, 2007.

Muslims who are fasting. He believed that the people of the city understand how to respect the fasting Muslims that is by putting curtains to their rice and food stalls. He said:

> We believe the residents of Palangkaraya could take care of and respect each other. During the fasting month, fellow non-Muslims should care and may not disturb.[607]

Regarding the visual image of "undemonstrative food stall" in Palembang, a local bulletin posted on its site the following photo news:[608]

Source: Screenshot of *Bulletin Metropolis*, August 18, 2010.

The photo above shows a restaurant *(warung makan)* operating during the daylight of Ramadhan in Palembang. The display of foods is covered with a white and red cloth. A *curtain* is being hanged in the doorway. According to the caption, the restaurant is "not demonstrative." A travel guidebook described this kind of restaurant and its social meaning as follows:

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[607]Ibid.

[608]Puspa Aristha, "Rumah Makan Tidak Demonstratif (Berita Foto)," *Bulletin Metropolis*, August 18 2010.

> During Ramadan, many restaurants and warungs are closed in Muslim regions of Indonesia. Those owned by non-Muslims will be open, but in deference to those fasting, they may have covered overhangs or will otherwise appear shut.[609]

Other described the restaurant as follows:

> Business in Indonesia might adjust decor; ... Some restaurants close during the day. Others, particularly those in larger cities stay open to serve daytime meals to non-Muslims but they may close their curtains so that fasting Muslims who walk by do not have to watch people eating.[610]

In fact, in Muslim regions many Muslims also own and operate restaurants of this kind and serve daytime meals to Muslims.

In Palembang city, South Sumatra, the opening of food stalls is described as one of social activities during Ramadhan. The curtaining of food stalls during the days of Ramadhan officially regulated by the mayor's directive 39/2007 on the social activities during Ramadhan and *Perda* 13/2007 on Social Order. It claims the regulation of food stalls is a part of the government efforts to maintain social and public order during Ramadhan. The food stalls are allowed to open during the days of Ramadhan. However, they should be covered with a cloth in such way so that the activities inside cannot be seen from outside. The action of opening food stalls without curtains *(tanpa memasang tabir)* during the daylights of Ramadhan is perceived as "demonstrative".[611]

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[609]Ryan Ver Berkmoes, *Indonesia* (London: Lonely Planet, 2010), 831.

[610]Amy Hackney Blackwell, *Ramadan*, Holidays and Celebrations (New York, NY: Chelsea House, 2009), 37-38.

[611]"H-2 Dan H+3 Ramadan, Tempat Hiburan Tutup" http://www.palembang.go.id/2007/?mod=1&id=322 (accessed April 12 2009); Wahyu Hidayat, "Rumah Makan Dan Warung Kopi Jangan Demonstratif," *Bulletin Metropolis*, August 9 2010.

In Lahat regency, South Sumatra, its regent instructed the vendors to cover their food stalls with cloths (*menutupnya dengan kain*).[612] The Head of Police Civil Service of the regency, Deswan Ershad, said:

> We do not forbid them from operating during the month of Ramadan. But they should respect the Muslim *ummah* who are fasting by covering their restaurants with cloths or the like to obstruct the view.[613]

In the city of Pontianak, West Kalimantan, the government does not prohibit food stalls to operate during the day of Ramadhan. However, the owners are told to cover up or to put curtain around the food stalls.[614] One of the leaders of Malay youth organisation --*Persatuan Forum Komunikasi Pemuda Melayu* (PFKPM), Nofal Nofiendra, for example, criticised the operators of restaurants and food stall who opened without putting any curtain. He argued that they did not show any respect to the holy month and people who were fasting. The uncurtained restaurants and food stall did disturb fasting Muslims. He hoped that the owners curtained their restaurants and food stall. The curtaining restaurants and stalls, according to him, is one way to respect the Muslims who are fasting. He also told non-Muslim to show their respect to Muslim by not eating, drinking, and smoking in the public.[615] Firdaus Zar'in, Chairman of the Board Council of Mosque Youth Assembly (*Badan Komunikasi Pemuda Remaja Masjid*) of Pontianak city, issued a similar statement. He hoped that restaurants, rice stalls and coffee shops to respect fasting ritual

[612]"Instruksikan Agar Rm Ditutup Kain," *Sriwijaya Post*, August 10 2010.

[613]Ibid.

[614]"Polres Bersama Depag," *Pontianak Post*, August 2 2010.

[615]"Diprotes, Restoran Tak Gunakan Tirai," *Pontianak Post*, September 6 2008.

Muslims observe. He said, "They may open, but at least they cover up with curtains *(tirai)*. This is one way of respecting Muslims' fasting ritual."[616]

In Banyumas, regency in the south-western part of Central Java province, the head of the regency issued a circular during Ramadhan. The directive told the owners of food stalls and restaurants not to disturb "*kekhusyu'an*" of the observance of fasting. They may not open "*terbuka*" (without curtains) and "*terang-terangan*" (clearly visible).[617]

In Yogyakarta, restaurants operating during daylight hours were requested to set up curtains, so as to minimize the risk of tempting fasting Muslims.[618] It is now very difficult to find *warung makan* (food stalls) that are open during the day except restaurants, hotels and other establishments frequented by foreigners. Most that do remain open cover windows and open spaces with curtains.[619]

All those regions above allow the opening of food stalls and restaurants during the daylights of Ramadhan. However, they told the owners not to open "demonstratively." It means they should cover certain parts of their food stalls and restaurants with curtain or cloth. This is claimed as a "mutual respect": on the one side, the government and Muslims, which are fasting, do not require them to stop operating. On the other side, the owners could not operate as usual (outside

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[616]Ibid.

[617]Banyumas. Regent Circular 556/4831 August 22, 2008.

[618]André Möller, *Ramadan in Java: The Joy and Jihad of Ritual Fasting*, Lund Studies in History of Religions, (Lund: Department of History and Anthropology of Religions, Lund University, 2005), 282.

[619]Mark Woodward, *Java, Indonesia and Islam*, 1st ed., Muslims in Global Societies Series (New York: Springer, 2010), 218.

Ramadhan); they have to change the physical appearance of their food stalls and restaurants.

The discourse in the above regions is a secular in nature. The elements of food stalls, selling food, and eating in public are not associated with elements of Shariah such as obligation to fast, *uzur syar'i*, and exemption from fasting. The vendors may sell food and drink to every Muslim, which come to food stalls, regardless of their status in *fiqh*. Every Muslims is welcomed. There is no prohibition of catering for Muslims, which have no *uzur syar'i* to not fast. The mutual respect hegemony makes the operation of covered food stalls during daylight possible. Its secular nature does not differentiate Muslims into various types of *fiqh*-persons. It treats all people as citizens and does not classify them based on their faiths.

The introduction of Shariah law in Aceh attempted to challenge the secular discourse of religious harmony during Ramadhan. Shariah hegemonisation[620] in Aceh brings elements of *fiqh* such as obligation to fast and *uzur syar'i* into articulations of food stalls, selling food, and eating in public during fasting hours of Ramadhan. In the *Qanun* 11/2002, the Shariah hegemonisation removes the secular elements of religious harmony but retains the element of mutual respect in an alternative way. This results in two things. First, Muslims are classified based on their obligation to fast during Ramadhan. Second, selling food during fasting hours is still allowed as long as the vendors cater only for Muslims, which have *uzur syar'i* to not fast.

[620]Hegemonisation means brings elements together that have not previously been brought together. See: Andersen, 56; Laclau and Mouffe, 134-145.

Later on, elements of *fiqh* doctrines on fasting and elements of religious harmony were brought together in new way. The new fixation took and modified the element of "mutual respect" by changing it into "one-sided respect." In the "one-sided respect" principle, Muslim, which have obligation to fast be deserved to be respected, but those who are not fasting are not. This means those who are not fasting should respect fasting Muslims by ways of not eating in public and not opening food stalls during fasting hours. No tolerance to vendors, which are opening food stalls, even though they are covering their stalls with cloths. No tolerance to Muslims, which are eating in the covered food stalls, even though they have *uzur syar'i* to not fast. This marked the beginning of one-sided respect hegemonisation. This results in the banning of the operation of food stalls and eating in public during fasting hours. No exception is given to those who have no obligation to fast such as non-Muslims, and Muslims, which have *uzur syar'i*.

To sum up, in Aceh the introduction of regional regulation on Ramadhan started from Shariah-based mutual respect hegemonisation. In this moment, Shariah removed secular elements from religious harmony discourse but kept the element of mutual respect in an alternative way. In the second moment, one-sided respect hegemonisation replaced the mutual respect principle.

Different from Aceh, the introduction of regional regulation in Banjar and Banjarmasin started from a one-sided respect hegemonisation. Then, the Shariah-based mutual respect attempted to take place. Like Aceh, the one-sided respect hegemonisation in Banjar and Banjarmasin resulted in banning the operation of food stalls, selling food and drink, and eating, drinking, and smoking in public during

certain hours of Ramadhan. This discourse is challenged by the *fiqh* discourse on *hukum* of fasting of Ramadhan.

The challenge of Shariah-based mutual respect partially fixed the social meaning of covered food stalls and restaurants. Opening food stalls in "non-demonstrative" way as a "mutual respect" in secular discourse of religious harmony is connected to doctrine of "exemption from fasting" in *fiqh*. The combination of the two elements produced the meaning that covered food stalls may cater Muslims, which are permitted to not fast in *fiqh*. The covers or cloths around some parts of the stalls are the signs of respect to fasting Muslims. However, in Banjarmasin this regulation only applies to travellers and manual labourer in the bus station, seaport, and airport. From *fiqh* perspective, travellers and manual labourer are permitted to not fast. While from mutual respect principle and common social practice curtained food stalls are concrete application of the principle. However, the governments do not consistently apply this combination of *fiqh* exemption and mutual respect principle. In Banjarmasin, the combination does not apply to non-Muslims, the children who have not reached the age of maturity, sick persons, pregnant or nursing women, menstruating women or the women who have postpartum bleeding, and old persons.

4.5 Law, Morality, Human Rights and Secularism

4.5.1 Law and Morality

Does the state have good reasons to prohibit people from doing certain activities during Ramadhan and Friday prayers? On what grounds for the state to make those activities criminal acts punishable by the law. According to Feinberg, in general there are four "coercion-legitimizing principles" for the state to support penal legislation or to make a certain conduct criminal. Criminal prohibitions are legitimate

if (1) it is necessary to prevent harm to persons other than the actor (*the harm to others principle* or "the harm principle"); (2) it is necessary to prevent hurt or offense (as opposed to injury or harm) to others *(the offense principle);* (3) it is necessary to prevent harm to the very person it prohibits from acting, as opposed to "others" *(legal paternalism);* (4) it is necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone (*legal moralism*).[621] He defined the principles of "harm to others" and "offence to others" as a "liberal position." If there is no harm to others and no offence to others to counter, there must be no coercion.[622]

The 'harm principle' is a principled limit to the law proposed by John Stuart Mill:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant.[623]

The problem is that in practice people disagree over what is to count as "harm."[624] During daytime of Ramadhan, for example, people disagree over what is to count as harming others' feelings or offense. For instance, if somebody is not fasting, is s/he not doing harm? Local discourses of Ramadhan in Aceh and South Kalimantan and other regions show that people eating in the privacy of their own houses is not

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[621]Joel Feinberg, *Harm to Self*, The Moral Limits of the Criminal Law, vol. 3 (New York; Oxford Oxford University Press, 1986), ix; Joel Feinberg, *Offense to Others*, The Moral Limits of the Criminal Law, vol. 2 (New York; Oxford: Oxford University Press, 1985), ix.

[622]Feinberg, *Offense to Others*, x; John Stanton-Ife, "The Limits of Law," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta(2008).

[623]John Stuart Mill, *On Liberty*, 2 ed. (London: J.W. Parker, 1859), 21-22.

[624]Gray, 49; Warburton, 81.

causing any harm to those who are observing fasting. However, Muslims disagree over eating in public during the day of Ramadhan. Some Muslims may be offended to see people eating during the day of Ramadhan even in curtained restaurants. Other Muslims may not take the practice as offensive.

Steve Bruce claims that societies in which Muslims have the power to act as they wish are often illiberal to other religions in two general senses. First, they privilege Muslims (and in particular those with the correct brand of Islam) over other people. Second, they impose Islamic requirements on the entire society. It is characteristic of Islamic societies that the realm of "immoral yet legal" is small. One of the illustrations of his point is the public fasting between dawn and sunset for the month of Ramadan in Saudi Arabia. In the Kingdom, prohibition against smoking or eating during Ramadan in a public space applies to anyone, irrespective of religion.[625] Regarding the intolerance to immorality in Islamic societies, Soroush describes that Muslim sensibilities are offended when *liberal democracy* tolerates or encourages immoral social behaviours.[626] Contrary to what Bruce claims, someMuslim-dominant regions in Indonesia, such as Palembang city and Lahat regency in South Sumatra, allow all people, including those have obligation to fast, to eat and drink during daytime. However, they have to do it in "not demonstrative" eateries. The local governments prescribe eateries to cover their windows, displays, or doors with curtains so as not to distract those fasting by the sight of others eating. In this regard, the regions are closer to liberal democracy in tolerating immorality.

[625]Steve Bruce, *Politics and Religion* (Cambridge: Polity, 2003).

[626]David Smock, *Applying Islamic Principles in the Twenty-First Century: Nigeria, Iran, and Indonesia* (Darby, Pennsylvania: Diane Publishing Company, 2008), 7.

Like Bruce, others claim the prohibition against smoking or eating during Ramadan in a public space as the imposition of conformity to religious obligations.[627] According to Greenawalt, it is not easy to clarify the issue of enforcement of morality. The "difficulty stems from the doubt that any acts really are regarded as immoral in and of themselves, apart from some perception of harm".[628] It should be clear whether the immorality is in the basic activity (the act itself) or in failing to respect the cultural sense of what may decently be done in public.[629]

Following Greenawalt's analysis of legal enforcement of morality, I argue here that those who claim the prohibition of smoking or eating during Ramadan in a public space to anyone, irrespective of religion, as imposition of conformity to Islamic obligations upon entire society, including non-Muslims, failed to see the immorality of the activity itself and its cultural aspects. It is true that in Islam to give up the Ramadhan fast without any legitimate cause is committing a major *sin.*[630] However, this obligation applies only to certain Muslims, which are adult, healthy, and sane. It does not apply to traveler, sick, pregnant women, and nursing mothers, and of course non-Muslims.

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[627] For example, see: Peter Baehr, *Hannah Arendt, Totalitarianism, and the Social Sciences* (Stanford, California: Stanford University Press, 2010), 130. Otto and Berger in Wetenschappelijke Raad voor het Regeringsbeleid (Netherlands), 126. Otto in Jan Michiel Otto, "Sharia and National Law in Indonesia," in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto(Leiden: Leiden University Press, 2010), 461. Crouch in Crouch, "Religious Regulations." Hooker in Hooker, *Indonesian Syariah: Defining a National School of Islamic Law*.

[628]Kent Greenawalt, "Legal Enforcement of Morality," *The Journal of Criminal Law and Criminology (1973-)* 85, no. 3 (1995): 722.

[629]Kent Greenawalt, "Legal Enforcement of Morality," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis M. Patterson(Chichester, West Sussex ; Malden, MA: Wiley-Blackwell, 2010), 474; Greenawalt, "Legal Enforcement of Morality," 720.

[630]Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers. Jurisprudence and Islamic Rulings. Transactions* (London: MSA Publication Ltd., 2004), 233.

In Aceh *Qanun* 11/2002, the legal basis of prohibition of smoking, eating and drinking in public is Islamic doctrine of fast. Therefore, it applies only to Muslims who are obliged to fast. It is not enforced upon non-Muslims and Muslims who have uzur syar'i not to observe fasting. However, later on local governments through circulars extended the prohibition to entire people regardless of religion. They argued although Islamic doctrine allow non-Muslims and Muslims who have uzur syar'i to not observe fasting, eating in public is offending (disrespect and disturb) fasting Muslims.

In Banjar and Banjarmasin, regulations on Ramadhan combine Islamic doctrine of fasting and national ideal of religious harmony. Elucidation of the regulation in Banjar stated that Muslims who are obliged to fast may not show themselves not observing fasting in public. They are together with Muslims who are not obliged to fast and non-Muslims should not eat, smoke and drink in public during fasting hours. Eateries may not operate during daytime of Ramadhan because they offend fasting Muslims and temp them to break their fast before due time (iftar). The regulations and local public discourses show that those who are not obliged to observe fasting should refrain from acts that offend fasting Muslims. Thus, the basis for prohibition is offensive acts, not their obligation to fast. The regulations neither require them to observe fasting nor punish them for not fasting.

Because not eating, drinking, and smoking are among the requirements of fasting in Islam, some foreign observers might interpret the prohibition of those acts in public upon non-Muslims as Islamic obligations directed towards people of other religions.They fail to look at fasting Muslims sensibilities towards others eating in public during daytime of Ramadhan. However, not all foreigners fail to capture

Muslims sensitivities. For instance, in travel guidebooks[631] to Muslims countries such as Egypt,[632] Indonesia, Malaysia,[633] Morocco[634] and the UAE,[635] particularly during Ramadhan, foreigners advised their fellows to be sensitive to local cultures during Ramadhan and respect fasting Muslims by not eating, drinking or smoking in public.

Other issue of the enforcement of legal morality is the observance of Friday prayers. Neglecting Friday prayers is harmless conduct. If you do not observe Friday prayer, nobody will be harmed or offended.[636] Therefore, making non-observance of Friday prayers as a criminal act does not meet criteria of liberal coercion-legitimizing principles, namely "harm to others" and "offence to others." However, it fits *legal*

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[631] For example, see: Berkmoes, 831; L. Lababidi and C.E. Francy, *Cairo: The Practical Guide* (American University in Cairo Press, 2008), 41; D. Humphrys, *Frommer's Morocco* (John Wiley & Sons, 2010), 59; L. Bennett, *Dubai* (New Holland Publishers, Limited, 2008), 39; Robert Burns, *Doing Business in Asia: A Cultural Perspective* (Longman, 1998), 107.

[632] Egypt declared Islam as the state religion and a source of legislation, see: Stahnke and Blitt, "Religion-State Relationship," 47-49. In Egypt, particularly in Cairo, it is legal for Muslims and non-Muslims to eat in public, see: Pradyumna P. Karan, *The Non-Western World : Development, Environment, and Human Rights* (New York: Routledge, 2004), 417. However, recent development, since 2009, it is illegal to eat in public such as in Aswan, Hurghada, Dakahlia, see: Marwa Rakha, "Egypt: Prison Awaits Those Who Don't Fast in Ramadan," in *Global Voices* (2009).

[633] Malaysia declared Islam as the state religion, see: Stahnke and Blitt, "Religion-State Relationship," 47. In the country, it is illegal for Muslims (not applicable to non-Muslims) to eat in public during daytime of Ramadhan, see: Sylva Frisk, *Submitting to God: Women and Islam in Urban Malaysia* (Copenhagen S, Denmark: NIAS (Nordic Institute of Asian Studies) Press, 2009), 120.

[634] Morocco declared Islam as the state religion. See: Stahnke and Blitt, "Religion-State Relationship," 47. Article 222 of the *Morocco's criminal code sets forth that Muslims who eat publicly during Ramadhan can be punished with a fine or detention, see: Léon Buskens, "Sharia and National Law in Morocco," in Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, ed. Jan Michiel Otto([Amsterdam]: Leiden University Press, 2010), 122.*

[635] In the UAE, it is illegal for Muslims and non Muslims to eat in public during daytime of Ramadhan. According to Federal law number 3 for the year 1987 and amended in year 2006 pertaining to crimes against religious sensitivities number 313 states anyone found eating, drinking or smoking in public during daylight hours, when Muslims are fasting, faces a month in jail or a Dh2,000 fine, see: "Eating, Drinking and Smoking in Daylight Are Punishable Offences," *Gulf News*, August 11 2010.

[636]Puteri Hikmawati, "Relevansi Pelaksanaan Syari'at Islam Di Provinsi Nanggroe Aceh Darussalam Dengan Hukum Pidana Nasional," *Jurnal Kajian* 14, no. 2 (2008): 73.

moralism principle. According to this principle, it is necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone. One of provisions in the Aceh *Qanun* prohibits Muslims, which have no *uzur syari*, from neglecting Friday prayers three consecutive times. However, regulation on Friday prayer in Banjar regency cannot be classified as legal moralism. It does not prescribe Muslims to attend the Friday prayer. It only regulates social and economic aspects of the prayer by prohibiting certain activities that distract the observance of the prayer.

4.5.2 Human Rights and Coercion

The issues of coercion and the right to religious freedom in the state regulation of Friday prayer and fasting of Ramadhan in Muslims countries, particularly Mauritania and Saudi Arabia, have been transmitted to the United Nation Special Rapporteur on freedom of religion or belief. The Special Rapporteur has been concerned with the alleged enforcement of Muslim observances under section 306 of the Mauritanian Penal Code of 1983 and the alleged enforcement of dietary and other restrictions in public places during Ramadan in Saudi Arabia.[637]

A refusal to pray is a criminal act in Mauritania. It is categorized as one of offences "against Islamic morals and decency."[638] The Special Rapporteur reported:

> According to information received, under article 306 of the Penal Code of 1983, any adult who refuses to pray while recognizing the obligation to do so will be called upon to fulfil his obligation within time limit laid down for the

[637]Paul M. Taylor, *Freedom of Religion: Un and European Human Rights Law and Practice* (Cambridge, UK; New York: Cambridge University Press, 2005), 285.

[638]UN Human Rights Council., "Report of the Working Group on Arbitrary Detention: Addendum: Mission to Mauritania," in *A/HRC/10/21/Add.2*(UN Human Rights Council, 21 November 2008). http://www.unhcr.org/refworld/docid/4986f8792.html (accessed May 7, 2011)., para. 24.

> performance of the compulsory prayer in question. If he persists in his refusal until the end of that period, he will be punished with death penalty.[639]

In Saudi Arabia, according to the information received by the Special Rapporteur, there are significant restrictions on the freedom of religion, including the prohibition against public eating, drinking or smoking during daylight hours of the month of Ramadhan. It is enforced on non-Muslims as well as Muslims in Saudi Arabia.[640]

The Special Rapporteur also has been concerned with the enforcement of Islamic laws in Aceh, Indonesia. One of the point in the observations of the Special Rapporteur is that the Human Rights Committee in its general comment no. 22 emphasizes that "[i]f a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it".[641]

A previous study by Crouch (2009) on regulations of Ramadhan and Friday prayer in South Kalimantan claimed the regulations as governmental enforcement of Islamic rituals. According to her, they "aim to regulate and enforce the observance of

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[639]UN Human Rights Council., "Report of the Special Rapporteur on Religious Intolerance," in *E/CN.4/1992/52*(UN Human Rights Council, December 18, 1991). http://www2.ohchr.org/english/issues/religion/docs/E-CN4-1992-52.pdf (accessed May 7, 2011)., p. 73, para. 57.

[640]Ibid. p. 81, para. 65.

[641]UN Human Rights Council., "Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: Addendum: Summary of Cases Transmitted to Governments and Replies Received," in *A/HRC/13/40/Add.1*(UN Human Rights Council, February 16, 2010). http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-40-Add1_EFS.pdf (accessed May 7, 2011)., p. 33, para. 123.

religious rituals".[642] Using Greenawalt's analysis of legal enforcement of morality,[643] I argue the regulations in Banjar and Banjarmasin, South Kalimantan, are not forcing Muslims to observe the Friday prayer and fasting. To clarify whether the local governments there regulate the observance of the rituals themselves or regulate the social and economic aspects during the rituals, the following questions serve as a guide:

1. Is the regulation of Friday prayer in Banjar regency obliging Muslims to observe the prayer and punishing those who are neglecting it?
2. Are the regulations of Ramadhan in Banjar and Banjarmasin obliging Muslims to observe fasting and punishing those who are neglecting it?

Regulations of Ramadhan and Friday prayers in South Kalimantan contain no provision that coerces Muslims to fast and attend Friday prayer. These regulations should be perceived within the framework of religious harmony and freedom. According to Kim (1998), during the New Order this framework put emphasis on appropriate behavioural norms between followers of different religions in the domains of socio-religious life. It made religion a factor in everyday interaction for maintaining religious harmony and securing religious freedom. Within this framework, the focus of regulation is interaction between followers of different religions.

Regulations of Ramadhan and Friday prayers in South Kalimantan only regulate socio-religious relations between followers of the same religion (fasting Muslims and

[642]Crouch, "Religious Regulations," 69.

[643] See supra notes 138 and 139.

non-fasting Muslims), and between followers of different religions (Muslims and non-Muslims). They attempt to remove activity that may disturb the observance of fasting of Ramadhan and Friday prayers. Following categories proposed by Salim[644] regulations of Ramadhan and Friday prayer in South Kalimantan are more related to "public order and social problems" rather than the enforcement of "religious obligations."

4.5.3 Secularism and Religious Holy Days.

Law on restricting certain activities during religious holiday is not only the monopoly of Muslim countries. It also exists in secular states, such as Sunday closing legislation or blue laws in the United States. Thus, it is evident that no rigid conception of secularism or a secular state governs the discussion of religion and state.[645] "Blue laws" are "local and state laws that prohibit or restrict individuals from engaging in certain acts on Sunday and impose legal sanctions on violators." These regulations are commonly referred to by many other names: "Sunday legislation," "Sunday-closing laws," or "Sunday statutes."[646] The range of behaviour that is restricted covers a broad spectrum. Boxing and wrestling are prohibited on Sunday in number of states, as are sales of alcohol, barbering, horseracing, hunting, motor vehicle sales, labour, and retail sales. Bingo, billiards, bowling, butcher shops, card playing, cock fighting, dancing, digging clams or oysters, fresh meat sales,

[644] Arskal Salim proposes three categories for regional regulation: 1) those relating to 'public order and social problems' –prostitution, gambling, alcohol consumption, etc.; 2) religious skills and obligations –reading the Qur'an, paying the zakat (alms or religious tax); and 3) religious symbolism – primarily the wearing of Muslim clothing, see: Salim, "Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era," 126; Bush.

[645] Ibrahim Abu-Lughod, "Retreat from the Secular Path? Islamic Dilemmas of Arab Politics," *The Review of Politics* 28, no. 04 (1966): 449.

[646] David N. Laband and Deborah Hendry Heinbuch, *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws* (Lexington, Mass.: Lexington Books, 1987), 11.

gaming, pawnbrokers, polo, raffles, serving civil process, and tobacco warehouse sales are all prohibited activities in at least one state on Sundays.[647]

The measures, which are based on the biblical injunction against working on the Sabbath, have been traced back to fourth-century Rome, when Constantine I, the first Christian emperor, commanded all citizens, except farmers, to rest on Sunday. The first blue law in America was enacted in the Virginia colony in the early 1600s and required church attendance.[648] It made church attendance compulsory both for morning and for afternoon services. Failure to attend was punishable by death.[649]

Some Sunday laws are remaining to the present day.[650] Today most of the states have some form of legislation restricting Sunday activity. The statutes gradually have drifted away from being direct commands to attend church and have become indirect. That is instead of requiring attendance, they seek to prohibit all other activity, thereby removing any temptation to stay away from religious services.[651] The typical pattern of legislation today is to prohibit all activity in four areas—servile labour, selling, sport, and amusements and to enumerate exceptions in each category. Every jurisdiction has an exception for works of "necessity" and "charity."[652] Another

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[647]Ibid.

[648]"Blue Laws," in *The Reader's Companion to American History*(Houghton Mifflin, 1991).

[649]Eugene P Chell, "Sunday Blue Laws: An Analysis of Their Position in Our Society," *Rutgers L. Rev.* 12, no. 3 (1958): 505.

[650]Warren J. Blumenfeld, "Christian Privilege and the Promotion of "Secular" and Not-So "Secular" Mainline Christianity in Public Schooling and in the Larger Society," *Equity & Excellence in Education* 39, no. 3 (2006): 200.

[651]Chell, "Sunday Blue Laws: An Analysis of Their Position in Our Society," 506.

[652]Ibid.

approach to the Sunday laws is to base their existence on respect for the other man's day of rest. These statutes then do not prohibit all activity on Sunday, but are limited to that activity which disturbs the repose of other members of the community.[653]

There have been continuing challenges to the constitutionality of blue laws.[654] Regarding alleged violation of religious freedom, several states rejected the religious freedom argument against the constitutionality of the blue laws. An example of this is *People v. Friedman* where the court stated that the law does not make attendance at religious worship compulsory nor in any way enforce or prohibit religion.[655] In June 2007, the governor of South Carolina vetoed a bill passed to repeal a blue law that prevents most retailers in forty counties from opening before 1:30 p.m. on Sunday. He argued that a change in the law would make it difficult for employees who work on Sunday to attend church services.[656]

In Indonesia, during constitutional debate in 1945, some founding fathers were worried that the state regulations of Islamic law would enforce the observance of religious rituals. They used the argument of religious freedom against the enforcement of the observance of prayers and fasting. Today, some Muslim-dominant regions in Indonesia have some form of legislation restricting certain activity during the month of Ramadhan. However, there are no direct commands to observe fasting and no punishment for failure to observe it. Particularly, Aceh and

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[653]Ibid., 507.

[654]Peter Wallenstein, *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia* (Charlottesville: University of Virginia Press, 2004), 50.

[655]Chell, "Sunday Blue Laws: An Analysis of Their Position in Our Society," 511.

[656]Stephen Miller, *The Peculiar Life of Sundays* (Cambridge, Mass.: Harvard University Press, 2008), 265.

South Kalimantan have the Friday regulations. The former requires both attendance (by certain Muslims only) at worship on Friday and all activity (by everyone), which disturbs the prayer, to cease during the prayer. However, the later region only prohibits certain disturbing activities and does not make the attendance to the mosque compulsory.

4.6 Conclusion

In this chapter, I have demonstrated how to understand the nature of regulations of Friday prayer and Ramadhan. I used *fiqh* and Pancasila as measures to trace back the bases of the regulations to Islamic classical texts on Friday prayer and the fasting of Ramadhan and to the interpretation of the first principle of the state ideology, namely the belief in One God.

Some of the prohibitions in the regulations cannot be discerned clearly by only using Islamic doctrines as a source of the substance of law. They are best explained by approaching their basis in the principles of religious harmony and freedom and their interaction with Islamic jurisprudence.

One of the core values of religious harmony is respect. The regulations of social aspects of the *ibadah* based their existence on respect to the observance of the Friday prayer and the fasting of Ramadhan. They prohibit all activity which disturbs the tranquility and calmness in observing the prayer and remove any temptation to break the fast. To some extent, they also still give the freedom for Muslims to not observe the prayer and fasting as long as their social behaviours do not disturb their fellow Muslims who are praying and fasting. People who are not aware of the socio cultural

dimension of the regulations may come to the wrong conclusions when they try to interpret the *Qanun* and *Perda* on *ibadah*.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Summary

The study has shown that the substance of the regulations of *ibadah* in Aceh and South Kalimantan have drawn on Islamic sources and non-Islamic sources. They have taken elements of Shariah and state ideals and mixed them together.

A clear line between Shariah norms and other norms can be seen in the regulations of Friday prayer. Particularly, in the provision of Aceh *Qanun* that requires Muslims to attend the Friday prayer. It is literally derived from Islamic norms. On the contrary, Banjar regulation does not have a such provision. Some of the provisions provide facilitative and supporting roles of the state, society, and individual. They are drawn based on the principle of religious freedom in the sense of positive attitude of all parties. For example, they should provide facilities, foster a conducive atmosphere, and allocate time to facilitate the observance of Friday prayer. The principle of religious harmony justifies the obligation to respect the observance of the prayer, prohibition of disturbing it, and applicability on everyone (Muslims and non-Muslims).

Examination of legal texts and local debates over the issue of disrespect for Ramadhan in the two regions found that the government is trapped in a difficult

position between adopting the policy of legal distinction based on *fiqh*-persons on the one hand, and legal equality regardless of the status in *fiqh* on the other.

In the regulations of Ramadhan the distinction between Shariah norms and those derived from state ideals is much less clear-cut than it is in the regulations of Friday prayer. It is the case because the distinction between fasting and prohibition of public eating is ambiguous. However, it is clear that *fiqh* doctrines of fasting are not sufficient to justify the prohibition over everyone. Based on fiqh, the prohibition only applies to Muslims who have *no uzur syar'i* to break the fasting as it is adopted by Aceh *Qanun* text. Unlike Aceh, the texts of regulations of Ramadhan in South Kalimantan do not adopt the *fiqh* doctrine of exception from fasting. However, the circulars issued every month of Ramadhan by the government in Aceh attempted to give no exception anymore to non-Muslims and Muslims who have no obligation to observe the fast. Meanwhile, in South Kalimantan the government has begun to accommodate *fiqh* doctrines by giving exception to certain persons, particularly travellers and manual labourers in the bus stations, airport, and seaport. Regarding non-Muslims, from the beginning and until now South Kalimantan has not given any exception to them. However, Aceh once allowed them to operate food stalls during fasting hours catering for non-Muslims only but after that the policy changed by ordering them to close during the daylights of Ramadhan. The reason was to respect fasting Muslims.

The study has revealed that ritual (*ibadah*) has been multifaceted. It is comprising religious, social, and cultural aspects. This has been done by clarifying the act of ritual in itself and its social or cultural aspects. The distinction has helped to

identify regulations or provisions which are enforcing religious obligations—the obligations to observe the fast of Ramadhan and the Friday prayers. They are faith-based rules and offences and apply only to Muslims according to the classification of *fiqh*-persons. It also has served as a tool to identify provisions, which regulate social or cultural aspects of the ritual. They are societal attitudes toward the observance of rituals— respect for Muslim religious sensibilities on matters such as public eating and operation of food stalls during the daylights of Ramadhan, creating quiet and calm atmosphere during the Friday prayers. The obligations related to non-faith-based aspects often apply to Muslims as well as non-Muslims.

The regulations of Ramadhan in Aceh and South Kalimantan share a similar characteristic. They are not tolerating immorality at least in public. According to Islamic doctrines, those who have the obligation to fast but neglecting it are sinners. This attitude of intolerance to immorality has challenged the secular and liberal conception of religious harmony and freedom, which tolerates or encourages immoral social behaviours. It has changed the secular concept and practice of mutual respect into the Shariah-based one by removing the element of tolerance to immorality. The syarah-based mutual respect has brought together the elements of "respect" and "*fiqh*-persons" in a new configuration. Further, the combination of religious and cultural intolerance promoted the one-side respect during Ramadhan. It has not recognised certain "*fiqh*-persons" and the existing "cultural practices of respect." The regulation of Ramadhan in Aceh has shifted from the Shariah-based mutual respect into the one-sided respect. Unlike Aceh,

South Kalimantan has gradually changed from the one-side respect to the Shariah-based mutual respect.

Some provision of Aceh *Qanun,* particularly obligation to attend the Friday prayer and punishment for neglecting it in three consecutive times, is closer to one of the possible interpretations of the Jakarta Charter, which secular groups strongly opposed during constitutional debate in 1945. At the time, they were worried that if the state applied Shariah law in Indonesia the government would enforce Islamic rituals such as prayer through coercive means. The state compulsion of religious observance according to them violated religious freedom of individual Muslims. Meanwhile, Banjar regulation is closer to the spirit of secular liberal conception of religious freedom in the sense of non-coercion. It encourages Muslim to observe the religious ritual through non-coercive means. It provides no punishment for neglecting Friday prayers.

There are various theories explaining the existence of Islamic law within Indonesian legal system. The findings of this research confirm the existence theory and goes beyond it. The theory states that Islamic law exists as legal norms which filter the substances of national law. It also states that Islamic law exists as the main ingredient and the main source of national law.

Although Aceh is the only province that has authority to implement Shariah law, Islamic jurisprudence does not play as the main source of the substantive regulations of *ibadah*. It exists only as a source of legislation. This means that

Islamic law constitutes just one among variety of other sources such as the state ideology of Pancasila.

Pancasila itself plays as a formal parameter and filter of reception of Islamic law. However, since Pancasila still needs further elaboration and interpretation, Islamic law in turn filters the interpretation of the principles of Pancasila or offered its own interpretation and competed with other ideologies such as liberal secularism. Islamic law plays a role as filter both in the regulations of *ibadah* in Aceh and South Kalimantan. It modified the meaning of respect as a core value of religious harmony and removed secular and liberal elements in the interpretation of this value.

In terms of legal pluralism it is difficult to separate clearly Shariah norms and Pancasila norms in the regulations of ibadah in Aceh and South Kalimantan. There are dialectic and mutually constitutive relations between them. They also shape each other and interact in various ways. Thus, the Qanun and Perda as state law represent a variety of hybrid forms or "plurality of pluralities" ("pop"). Their substantive content has different sources and elements, namely Shariah and state ideals of religious harmony and freedom.

To put these findings within the context of national debate in Indonesia, the question is are those *Qanun* and *Perda* a "Shariah law" or "Pancasila law"? What is the most precise name for them? If we call them as Shariah law, their substantive content has different sources other than Islamic jurisprudence. They combined and mixed both Shariah and Pancasila. It is fair if we just call them by

their official titles: "Qanun" or "Perda", and avoid using "Perda Shariah" or "Perda Syariat."

Did Shariah and Pancasila compete in these kinds of regulations? I think the competition is not between Shariah and Pancasila, but between Islam and secularism. They competed in interpreting the meanings of religious harmony and freedom as core values of the first principle of Pancasila, namely "the belief in One God." Pancasila is not an exclusive ideology, its principles, ideals, and values were claimed as taken from different sources available in Indonesia. These principles should be interpreted dynamically within different contexts from various perspectives.

Although the origin of non-coercive interpretation of religious freedom is liberal and secular position toward a religion, to some extent, I argue, Islamic jurisprudence can accommodate this position. However, it cannot take the sweeping liberal stance that all matters of religion are private relationships between human and God. Islam is a comprehensive way of life. It does not put all matters as private between human and God. It regulates both God-human relationships (*ibadat*) and human-human relationships (*muamalat*). *Ibadah* as the actions that are done clearly with the intention of pleasing God and its validity depends on this intention, I think, can accommodate the liberal and secular non-coercive interpretation of religious freedom. *Ibadah* such as prayer and fasting require voluntariness or the intention of pleasing God for the actions to be valid, observing them for fear of coercion such as punishment from the state would invalidate them. Therefore, the state may not interfere with this area by enacting

law that requires Muslims to observe prayer and fasting and punishing those who failed to comply.

The Muslims jurists are true when they say *ibadah* regulates human-God relationship, however, I argue, it is not observed only in private but it also takes place within social context of everyday life of society. There are social interactions and economic transactions near the mosque. There are fasting Muslims who interact with non-Muslims and Muslims who are not observing the fast. There restaurants, cafes, food stalls which are operating during the fasting hours of Ramadhan. Thus, *ibadah* is a multi-dimensional. It has religious aspect, social, cultural, and economic aspects. Although the state may not regulate the religious aspect of *ibadah*, there is still a room available for the state to regulate the *ibadah,* namely its social aspects such as public order and appropriate social behaviours during the observance of prayer and fasting. People who are not aware of the socio-cultural dimension of the regulations may come to the wrong conclusions when they try to interpret the *Qanun* and *Perda* on *ibadah*. They might think that they regulate only human-God relationship and force Muslims and non-Muslims to comply with.

5.2 Recommendation

This study presents a methodological approach that integrates the religious (Shariah) and state ideological elements of law into a necessarily pluralist legal analysis to understand the nature of law and to make sense of how all these elements interact. It applies this plurality-conscious theoretical model, focusing on Shariah regulations on *ibadah*. As the findings suggest, the term "Shariah" in

Aceh and South Kalimantan is used to label specific rules that are arrived through the complex intermixture of different founding elements of law: state ideological values, Islamic jurisprudence, and common practice of the societies. Researchers on Shariah laws in Indonesia would benefit from this deeper plurality-conscious analysis to understand the nature of law in the country.

For researchers who study Islamic laws in Muslim countries, particularly in Indonesia, must benefit from Greenawalt's analysis of legal enforcement of morality. It should be clear whether the law is on the religious obligation in itself or on its socio-cultural aspects.

For those who want to challenge the Shariah regional regulations in Aceh and similar regulations in other regions in Indonesia in the Supreme Court for judicial review, must be careful in using the word "Shariah", as this study suggested there are non-Shariah elements in the law and some provisions have little to do with Shariah in the sense of *fiqh*, *sunnah*, and the text of the Qur'an.

State law on religious obligations, particularly requirements for fasting and attending Friday prayer, in practice cannot be easily enforced. The obligations, according to Muslim jurists, do not apply to all Muslims. Islamic jurisprudence exempts certain individuals according to their age, health conditions, and mobility (travelling). When the exceptions are also accommodated in the state law, it is not easy for law enforcement officers to identify which individual Muslims having one of the justifications allowed by Islam to not observe the obligations. Then, the question is how to apply this exception. This study recommends "zoning" method

to accommodate the exception. The region is zoned into concentrated *fiqh*-persons and non-Muslims dominant areas. In the case of regulations of Ramadhan, the exception to open food stalls or restaurants could be given to locations in which majority of non-Muslims live, and the areas in which travelers (*musafir*) usually pass by or transit (air ports, sea ports, bus and train stations) and manual labour takes place (sea ports, building constructions). The exempted areas must keep the common practice of curtained food stalls and restaurants to respect those who are observing the fast. Concerning the Friday prayer, it would be better for governments to concentrate on public tranquility and order during the prayer and leave the responsibility for encouraging Muslims to attend the mosque to Islamic scholars (*ulama*) through *dakwah*, to teachers through education, and their family.

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