Religion and Constitutional Practices in Indonesia: How Far Should the State Intervene the Administration of Islam?

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Paper presented in the Conference on “Religion and Constitutional Practices in Asia” Organized by the Centre for Asian Legal Studies (CALS), National University of Singapore (NUS) and the International Centre for Ethnic Studies (ICES), and co-sponsored by Konrad-Adenauer-Stiftung-Ltd (KAS)
Abstract: This research project will focus on cases of state intervention in the administration of Islam in Indonesia in order to assess norms which could be used to define the extent to which state intervention in the administration of religion is constitutional in Indonesia. This is indispensable given the un-dichotomous nature of state and religion in Indonesia. More and more religious matters, especially Islam, have been regulated and administered by the state and, lately, include the public outcry against the government using hajj (pilgrimage) funds to build infrastructure. In addition, scholars have seen the constitutional practices in Indonesia become more Islamic, or at least prioritizing Islam than other religions, but yet overlooked the (un)-intended consequences of this subtle constitutional recognition of Islam to Muslims. This contribution will assist us to comprehend the big picture by looking at the ideal of constitutional arrangement on religion in Indonesia as well as contexts and factors prompting the current practice of prioritizing Islam.

I. INTRODUCTION

Even though Muslims are majority in Indonesia, the Indonesian Constitution does not make any reference to Islam as ‘a’ or ‘the’ national religion whose doctrines must be complied by the state. Particularly, shari`a is not mentioned as a source of legislation. Any effort to bring shari`a – i.e. the Jakarta Charter’s seven words “with the obligation for adherents of Islam to practice Islamic law” – backs into the Constitution has failed in Indonesia.1 Instead of Islam, Indonesia adopts Pancasila (five fundamental principles) as the state ideology. The first principle of Pancasila “Belief in Almighty God” depicts the state’s recognition on the formal role of religion in national life.

The state therefore is not wholly separated from religion since the outset of the Indonesian Republic in 1945. While religious affairs have been allowed to become a personal matter of each religious adherent, their administrations have been carried out by the government through the Ministry of Religious Affairs established on 3 January 1946. The Ministry takes care of not only Islamic affairs but also that of five religions recognized by the state i.e. Catholicism, Protestantism, Hinduism, Buddhism, 2 and, lately, Confucianism. With regards to the shari`a, some elements of Islamic jurisprudence concerning of marriage, divorce, inheritance, waqf (Islamic trust), and hibah (gifts) have been absorbed into positive law in Indonesia through the decisions of religious courts, which have existed since the Dutch colonialism.3 Despite the fact, state intervention in the administration of religion has often become a bitter debate not only in the parliament but also among the community. This especially when there is a policy and a law that is deemed to privilege certain religious denomination (read: Islam), or, from Indonesian Muslims’ perspective, a policy and a law that will affect Muslims in Indonesia or which subject matter is governed by shari`a. A case

1 Latest effort was during the constitutional reform period 1999-2002, the United Development Party’s (PPP) and the Crescent Moon and Star Party’s (PBB) proposal to amend article 29 by reinserting the “seven words” of the Jakarta Charter failed. Muhammadiyah and Nahdlatul Ulama (NU) which pushed the agenda of Islamic state in 1955 through Masyumi party, now see formal adoption of shari`a into the Constitution as unnecessary. This stance was reflected in the parliament by two parties connected with both Muhammadiyah and NU, i.e. the National Mandate Party (PAN) the National Awakening Party (PKB). Both parties rejected the proposal to include shari`a to article 29. See See Nadirsyah Hosen, “Religion and the Indonesian Constitution: A Recent Debate,” 36(3) Journal of Southeast Asian Studies, (2005) at 419-420, 425-427.
2 Deliar Noer, Administration of Islam in Indonesia (Ithaca, N.Y.: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978), 8.
in point, in the early history of Indonesian independence, is harsh rejection against the draft bill of Marriage Law in 1973.⁴

Now, after the establishment of Indonesian Constitutional Court in 2003, Indonesian citizens can challenge the constitutionality of state laws enacted by the parliament to the Court. So far as cases implicating Islam are concern, I categorize them⁵ into the constitutionality of state law which (1) intertwines with shari’a interpretation; (2) intervene the administration of Islam; and (3) intervene the administration of religion in general in Indonesia. Category one mainly concerns of judicial review of provisions of the Marriage Law that ranges from polygynous marriage restriction to interreligious marriage restriction. Meanwhile, category two relates to the questions of jurisdiction of shari’a court; bureaucratization of Hajj (pilgrimage), management of zakat (obligatory alms-giving), and halal product certification. As for category three, blasphemy law becomes the test case of neutrality of Indonesian constitution towards religions.

This development, then, prompts some instrumental questions as to whether this vague constitutional recognition of religion has prevented or prompted the government from engaging in policies or promulgating laws that discriminate particular religions or their adherents in Indonesia. Scholars have observed that the state, by means of the Ministry of Religious Affairs during the authoritarian New Order regime 1966-1998, has engaged in practices that discriminate other recognized religions,⁶ minority group such as non-recognized religions, adherents to traditional/mystical beliefs, and sects of a recognized religion which is deemed to be deviant.⁷ The Ministry of Religious Affairs is also deemed to have been used by the Islamists to further the agenda of Islamic state by incorporating shari’a into the state policy and law.⁸

This article therefore focuses on cases of category two (administration of Islam) because, as mentioned above, cases category three (the administration of religion) has gained wide attention from the scholars.⁹ Little has been done on cases of category two especially on the management of zakat (obligatory alms-giving), bureaucratization of Hajj (pilgrimage), and certification of halal products. As for cases of state law/policy intertwined with shari’a interpretation, some notable works have been done by scholars,¹⁰ and they will assist in probing the question of how far should the state intervene the administration of Islam in Indonesia.

This paper seeks to investigate whether there is any specific trend of ‘constitutional practices’ (judicial decisions, the state’s and the society’s conceptions of what is

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⁵ This is not a clear-cut division as to some cases, e.g. on the judicial review of the Marriage Law, may overlap between the interpretation of shari’a and the administration of Islam. See Alfir, “Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia,” 10(2) Asian Journal of Comparative Law (2015), 191-212.
⁶ For the inter-religious relationship conflict between Islam and Christian and the discriminative policy of the state/the Ministry of Religious Affairs, see e.g. Melissa Crouch, Law and Religion in Indonesia: Conflict and the Courts in West Java (London, New York: Routledge, 2014).
⁷ For the background of the state/Ministry of Religious Affairs’ policy on recognized religions and its negative impact deviant sects in Islam, especially Ahmadiyah group, see Alfir, “Religious Liberty in Indonesia and the Rights of “Deviant” Sects,” 3(1) Asian Journal of Comparative Law (2008), 57-82.
⁹ In addition to footnote 5, 6, and 7, see also Melissa A. Crouch, “Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law”, 7(1) Asian Journal of Comparative Law (2012), 1-46, for in-depth investigation of blasphemy law cases in magistrate courts and Constitutional Court.
‘constitutional’) in order to assess norms which could be used to define the extent to which state intervention in the administration of Islam is constitutional in Indonesia. This is indispensable given the un-dichotomous nature of state and religion in Indonesia. More and more religious matters, especially Islam, have been regulated and administered by the state and, lately, include the use of Hajj (pilgrimage) funds to build infrastructure. In addition, scholars have seen the constitutional practices in Indonesia becoming more Islamic, or at least prioritizing Islam than other religions, but yet overlooking the (un)-intended consequences of this subtle constitutional practices of recognizing Islam against Muslims in Indonesia. This contribution will assist us to comprehend the big picture by looking at the ideal of constitutional arrangement on religion in Indonesia as well as contexts and factors prompting the current practice of prioritizing Islam. Yet, to give the contextual background, it also looks at following questions: (1) what is treated in practice as ‘the constitution’ when it comes to issues involving religion in Indonesia, (2) what is the impact of vague constitutional recognition of religion on constitutional law and development in Indonesia.

II. CONSTITUTIONAL PROVISIONS AND BACKGROUND

A. Religion-State Identification: Secular, Religious, or Islamic?

Prior to its independence on August 17th, 1945, Indonesia had experienced a polemic about ideological basis of state between those who sought to have Islam as the ideology of the state and those who opposed it. The debate in the committee of the preparation of independence was so intense that Soekarno, the then first President, finally proposed five principles called Pancasila to become state ideology as the alternative to an Islamic state.11 The Pancasila consists of five guiding principle in nation’s life and state policy. They are: first, belief in the Almighty God; second, just and civilized humanity; third, the unity of Indonesia; democracy, guided by the wisdom inherent in unanimity achieved through consultations among the people’s representatives; and fifth, social justice for the whole of the Indonesian people.

Despite the Pancasila, some Muslim leaders in the committee kept trying to have their demand on formal recognition of shari‘a by the state accommodated. They proposed an addition to the preamble of the Constitution, known as Jakarta Charter, on 22 June 1945, in which the seven words were added to the formulation of the First Principle of the Pancasila “… with the obligation for adherents of Islam to practice Islamic law”. This addition then made reference to the enforcement of Islamic law in Indonesia for Muslims.12 The seven words were dropped from the preamble of the Constitution on 18 August 1945, a day after the proclamation of Indonesian independence due to objections from Christians, Hindus, and secular nationalists about the implications of state enforcement of Muslim law on non-Muslim communities.13

The first principle of Pancasila is then incorporated into the Constitution of article 29 which deals with religion. Pursuant to the first principle of Pancasila, article 29(1) reads “the state shall be based upon belief in the almighty God,” and article 29(2) reads “the state guarantees all persons the freedom of worship, each according to their own beliefs.” The Pancasila and the 1945 Constitution of Indonesia have become the basic philosophy and law of the public policy in Indonesia. The Pancasila was not formularized in vacuum. It was prepared prior to the independence of Indonesia in 1945 by a committee whose members

12 See Alfitri, supra note 5, at 9-10.
have different agenda on what should become the basis of state ideology, viz. Islam, socialism or liberalism. The *Pancasila* therefore was a product of compromise among competing ideologies which are harmonized according to the attributes of the nation. The first principle (belief in the Almighty God), for example, was formalized to accommodate between the demand of Muslim groups who want to have a formal role of Islam in Indonesia by making the state enforce the *shari`a* for Muslims and the objection of non-Muslim groups to Islam as the religion or the law of the land because this would be considered as a discrimination against their own faiths. By making belief in the almighty God as the first foundation of nation’s life, the state then guarantees the right of citizens to freedom of religion, i.e. to embrace and to observe their religion.

According to Hazairin, the fundamental principle in article 29 can be interpreted in three ways. First, all laws in force in Indonesia must not conflict with the religious doctrines of religions which are adhered by people in Indonesia. Second, the state shall facilitate the implementation of the religious doctrines of all religions in Indonesia provided that the state’s intervention is instrumental for the running of those religious doctrines. Third, in Islamic case, *shari`a* which does not require the intervention of the state for its implementation, such as five-times-daily prayer or fasting during Ramadan thus become the matter of individual Muslim own consciousness to implement. This interpretation is to give space to all followers of recognized religions in Indonesia to freely carry out their religious obligations in accordance with their beliefs. However, when the doctrines of a religion requires the state’s role in its implementation, then such doctrines must be set in a current applicable laws and regulations in Indonesia.

Asyyaukani, who examined the development and changes of Islamic political thoughts of Muslims in Indonesia, argued that this kind of interpretation of article 29 have been adopted by some government officials as well as Muslims leaders and groups in Indonesia, especially in the late era of Soeharto regime in the 1990s. This situation is as the result of the model of polity built by the new order regime of Soeharto through a friendlier stance with respect to the Muslims’ politics provided that Muslims leaders and groups were ready to work with the government. This experience later transformed into a utopia of Muslims in Indonesia on the relationship between Islam and the state. The foundation of this model of polity is the justification of *Pancasila* as state basic ideology because it is considered not to be contradictory to Islamic values. With regards to state-religion relation, it rejects both secularism and Islamic state; instead, it aspires to the unification of state and religion. This aspiration is thus manifest in a belief that state’s intervention is instrumental for the

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14 For the Indonesian founding fathers’ discussions on the *Pancasila* and why it must be adopted as the state ideology instead of Islam, socialism/communism, and liberalism see the minutes of deliberations of the Investigative Agency for Efforts to Prepare Indonesia’s Independence (BPUPKI), 28 May – 1 June 1945 in Sekretariat Negara Republik Indonesia, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) – Panitia Persiapan Kemerdekaan Indonesia (PPKI) 28 Mei 1945 – 22 Agustus 1945* (Jakarta: Sekretariat Negara RI, 1995), 8-127.

15 Hazairin (1906-1950) is an Indonesian legal scholar who was trained under the Dutch scholarship of customary law (*adat*). He served as Minister of Home Affairs (1953-1955) during the first President Soekarno reign. In his academic career at *Universitas Indonesia*, he was a professor in customary law (*hukum adat*) as well as Islamic law. His work on *hukum adat* and Islamic law in Indonesia has become classic for he proposed a new interpretation of Islamic law, especially in the sphere of family law, which fully regards the socio-legal context of Indonesia. He called this proposal as *mazhab hukum nasional* or national madhhab of Islamic law. See R. Michael Feener, “Muslim Legal Thought in Modern Indonesia: Introduction and Overview” in *Islamic Law in Contemporary Indonesia: Ideas and Institutions*, eds. R. Michael Feener and Mark E. Cammack (Cambridge, Massachusetts: Harvard University Press, 2007), 14-26.

application of religious doctrines because they would not be accomplished perfectly without state’s protection and supervision. In the context of law, one can witness the “Islamization” of Indonesian laws, or as some have called it the “Indonesianization of Islam,” as more and more “Islamic” state law issued by the Parliament or other state formal institutions.

The Ministry of Religious Affairs is deemed to be the agent of this Islamization of Indonesian laws. Asyyaukanie’s depiction of the Indonesian Muslims’ utopia finds its justification in the promulgation of zakat and hajj administration law. The promulgation of Law Number 38 of 1999 concerning Zakat Management happened after the downfall of President Soeharto’s authoritarian regime. The proponent of zakat administration by the state had to wait until this time because the changes to national politics had become more accommodating to the Muslims in the wake of factionalism within Parliament showing an increasing tendency toward Islamization. Further, the MORA attempted continuously to have Islamic law promulgated in Indonesia, and it saw this transition time as the right moment to force through zakat legislation. This linked back to perceptions by some leaders of the MORA that Muslims had been treated unjustly during the preparation of Indonesian independence. In their view, Muslims constituted the majority within the Indonesian population, but were defeated by minority’ objections to Shari’a implementation in Indonesia. The MORA forced through the Zakat Management Bill after President Habibie signed the Bill on Hajj Service on May 3, 1999. The Zakat Law Bill was not originally in the agenda of legislation of Parliament. Seeing the political transition impact on Muslims and available time for proposing another Bill because the Bill on Hajj Service was assented earlier from the schedule, the MORA seized this opportunity by proposing the Zakat Law Bill. The MORA finalized its bill on zakat management and obtained a letter of permission to initiate legislation from the State Secretary on May 15, 2003. The Bill was presented to the Legislature on June 24, 1999 and deliberation began on July 26, 1999. The process was unusually quick and there was no motion from the factions within Parliament to reject the bill. In the history of debating Islamic legislation in Indonesia, nationalist-secularist factions such as the Indonesian Armed Forces faction and the Indonesian Democracy Party faction always harshly criticized any Islamic legislation and tied it to the issue of restoration of the

17 See Luthfi Assyaukanie, Islam and the Secular State in Indonesia (Singapore: Institute of Southeast Asian Studies, 2009), 97-128. In his book edited from his dissertation at the University of Melbourne, Luthfi Assyaukanie aimed at finding out why Muslims in Indonesia rejected the idea of nationalism but then accept it; why they demanded an Islamic state but refuse it lately; why the idea of secularism begins to be accepted by Muslims. He used Indonesian Muslims’ utopia (ideal model of polity) as his unit of analysis. According to Assyaukanie, Islam in Indonesia has changed to a more pluralist and democratic system of polity as Indonesian Muslims become more pragmatic and rational. This can be seen, inter alia, from the failure of Islamic political parties to win the general elections contrast to other major Muslims countries; instead, secular-nationalist parties won them. There are three models of polity of Islamic political thoughts which represent Muslims’ utopia on how should Islam and the state relate in Indonesia, viz. Islamic democratic state (IDS), religious democratic state (RDS), and liberal democratic state (LDS). As the IDS has failed as and the RDS faces dilemma and contradiction in its paradigm, e.g. acceptance to pluralism and openness but strong dependent on the state, Assyaukanie argued that the future of democracy in Indonesia lies on LDS polity because it is the only model of polity that can guarantee democracy, pluralism, liberalism, freedom, and gender equality.


19 Alfitri, supra note 66; Salim, supra note 19, at 128. Salim concluded that the MORA is one of the proponents for the Jakarta Charter, and later for Islamization of Law in Indonesia. As a matter of fact, the 1998 MPR’s decree (People Consultative Assembly) on Religion and Socio-cultural aspects only mentioned a law on hajj services would be enacted, but the MORA took the chance to force through the Zakat Law too during this transition period.

20 Salim, supra note 19, at 128, fn. 5-6. According to Salim, this shows Golkar tendency toward islamization too.
Jakarta Charter to the Constitution, such as in the case of draft Bill concerning the Religious Courts.

W. Cole Durham Jr. and Brett G. Scharffs depict the religion-state identification is like a continuum because when one reviews the world’s legal system, one quickly realize that while there are many systems for which the correlation holds true, there are many others for which the correlation does not hold. They then characterize this religion-state identification into ten institutional religion-state relationships; and I argue that none of the ten characters perfectly fit into Indonesian situation. Instead, following characters are held by Indonesia, namely: one, a country with religious status system because in Indonesia multiple religions have official status in the sense that at least portions of the religious law of differing traditions are binding on those belonging to those traditions. Two, a country whose preferred set of religions because a certain set of religions (in this case Islam) get preference. This is done by distinguishing Islam and giving it special status or privilege like the case of shari`a law in Aceh. Three, secular control regimes because the government use religion for the state’s own ends like the case of zakat and Hajj management as they will be argued below. This means that the first principle of Pancasila and the recognition of religious freedom in the constitution make Indonesia neither a secular state nor a religious state. Instead, such constitutional arrangements have made religion an important factor in the life of the nation and also in the practice of government policies and laws. With Islam as the majority religion and the tendency of most adherents to invite the state into the implementation of Islamic teachings, the government is now increasingly far in regulating the administration of Islam in Indonesia.

B. Freedom of Religion in the Pancasila State: Gap between Promise and Practice?

1. Impact on Minority Group

Despite its guarantee in the Constitution, the freedom of religion has not been fully implemented in Indonesia. The state turns out restrict or prohibit this right by redefining it in a narrower or more restrictive fashion than the general understanding of the term. The state, through the Ministry of Religious Affairs especially during the New Order regime, has defined what constitute a religion in Indonesia and ensured through its politic of “agama” (i.e. recognized religions) that the citizen follow and acceptable religious faith. The politics of “agama” is mainly implemented through the Blasphemy Law which deals with hate speech against religions in Indonesia. The Blasphemy Law (the Presidential Decree of Republic of Indonesia Number 1/PNPS/ Year 1965 concerning Prevention of Misuse and/or Religious Blasphemy) contains provisions to warn people, adherents, members and/or administrators of organizations that do things that deviate from the points of religious teachings. The decision to warn it can be taken on the basis of considerations from the Ministry of Religious Affairs, the Minister of Home Affairs and the Attorney General. If it is deemed to continue to violate, then such individual will be prosecuted and can be punished for a maximum of five years.

22 See ibid., 118.
23 See ibid., 119.
24 See ibid., 120.
and the organization may be dissolved at the same time expressed as a forbidden organization or sect.

It was in the blasphemy law that recognized religions in Indonesia mentioned; they are: Islam, Christianity, Catholicism, Hinduism, Buddhism, and Khong cu. The only reason for mentioning the six religions specifically is because it refers to the history of the development of religions in Indonesia. The six religions were also claimed to be the most common religion in Indonesia at that time. The Elucidation of Article 1 of the Blasphemy Law does not read that the law excludes other religions and, thus, they are not protected by the state or can be banned in Indonesia. Based on her studies, Crouch finds that there are at least 29 religious or minority beliefs that have been banned at the national level during the New Order period. Since post-1998 reforms, some of the forbidden religions and beliefs have been allowed to grow again. Nevertheless, there were 50 more bans issued between 1998 and 2009 that all occurred at the regional level. However, the central government also did not prevent local governments from issuing the ban, for example in the case of Ahmadiyah.

The law is increasingly being used by hardline Islamic groups and religious leaders to target and condemn certain religious sects or minority groups. According to Crouch, not more than 10 cases were brought to court during the New Order (1966-1998). However, since 1998 there have been more than 47 cases and 120 people have been convicted under the Blasphemy Law. These cases are generally happened in Java, where the most cases are in West Java Province and followed respectively in Jakarta, Central Java, and East Java. There are a number of cases that also occur outside of Java. The majority of the defendants in those cases claim to be Christians. This high number can be understood because in one particular case there are 41 Christians who are punished. For case by case, most insults are directed against Islam by those who claim to be Muslims. As for the sentence period, 13 people have been sentenced to a maximum of 5 years, 10 people have been sentenced less than one year, and 9 people have been sentenced to 3.5 years. According to Crouch, there is no predictable pattern of imprisonment in such cases, including for the verdict that acquits the defendant.

Considering its impact on freedom of religion in Indonesia, the Blasphemy Law has been submitted twice in 2009 and 2012 (the third submission is ongoing) to the Constitutional Court to be reviewed on its constitutionality. The Petitioners of 2009 are some NGOs working on legal and human rights assistance as well as individual Petitioners that include Siti Musdah Mulia (Muslim feminist), M. Dawam Rahardjo (Islamic scholars), and also Abdurrahman Wahid (former president). The petitioners of 2012 are mostly convicted blasphemy or defendants in the blasphemy trial process. Both petitions claim that the blasphemy law is contrary to the rights of religious freedom as guaranteed in Article 29 paragraph (2), Article 28E and Article 28I paragraph (2) of the 1945 Constitution. The petitioners argue that the state should not be able to intervene in the right of freedom religious. According to them, the criminal act of defamation of religion is not valid because of unwanted intervention from the state of the beliefs or beliefs of religious groups.

During the trial process, there were many parties who contributed to additional information. Among the parties supporting the preservation of the blasphemy law are the Ministry of Religious Affairs, the Ministry of Justice and Human Rights, the Council of Indonesian Ulama (MUI), Muhammadiyah, The Council of Indonesian Islamic Propagation (DDII), United Development Party (PPP), Islamic Defenders Front (FPI), Hizbut Tahrir and

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27 Crouch, supra note 7, at 9-10; Alfitri, supra note, at .
28 Ibid., at 11-12.
29 Ibid., at 13-14.
30 See Putusan Mahkamah Konstitusi, Nomor 140/PUU-VII/2009, IMPARSIAL et.al vs. the State; Putusan Mahkamah Konstitusi, Nomor 84/PUU-X/2012, Tajul Muluk et.al vs. the State.
Matakin (The Supreme Council of Confucian Religion of Indonesia). This group perceives that there is a need to defend the Pancasila as the state ideology, in which the first principle emphasizes belief in the almighty God. Thus, Indonesia is a religious state and its policies must protect recognized religions. This law is also intended to maintain social stability from inter-faith conflict and anarchy. Without the blasphemy law, it is feared that horizontal conflict, namely conflict between religious groups in Indonesia, would be easily occur.31 On the other hand, those who refuse or wish to remove the blasphemy laws include, among others, minority religious groups, groups that identify themselves as liberal and progressive Muslims, the Communion of Churches in Indonesia (PGI), and The Indonesian Bishops’ Office (KWI). According to this group the state must allow for religious diversity. They also point out that the parameters of insulting religion are unclear and this has been widely interpreted and misused. 32

The Court finally decided that the blasphemy law is constitutional, but acknowledges that there are needs for a refinement and clarity of the law, which becomes the duty and authority of the Parliament. The Court explained that Indonesia is a believing-in-God state, and not an atheist country. That is, Indonesia is between the concept of secular state and religious state, and does not separate between the relationship between religion and state. Indonesia allows for a mutual relationship between state and religion, and, thus, allows states to regulate the activities of religious groups. At the same time, the state also ensures that recognized religions have an opportunity to influence state policy. With regards to restrictions on religious freedom which are legitimized by the state, the Court points out that the restrictions on human rights are actually regulated in international law, and its application in the 1945 Constitution is different. In this context, restrictions on religious freedom can be made on the grounds of public order to avoid confusion and harm to society, thus creating a national harmony. Furthermore, the Constitutional Court also affirmed that restrictions on religious freedom can be based on religious values, a provision contained in Article 28J paragraph (2) of the 1945 Constitution.33

The Court reaffirms the state rights to limit the freedom of religion in the case of inter-religious marriage restrictions in Indonesia. As per Law Number 1 Year 1974 concerning Marriage, a marriage is lawful if it is done in accordance with the law of each religion and its belief (article 2(1)). This marriage is then registered according to effective law in Indonesia (article 2(2)), which consequently means that a marriage contracted not in accordance with certain religious solemnization in Indonesia cannot be registered. The constitutionality of these provisions of Marriage Law were challenged in the Constitutional Court in 2014 because they are deemed to breach the Constitutional guarantees of religious freedom, right to legitimate marriage, right to legal certainty, and right to equality before the law and free from discrimination. The Court however rejected the petitions because it has no legal basis and reasoned that, on the claim of the breach of religious freedom, marriage is a form of religious ritual thus it is sacred which norms and rules on its validity have been determined by religion. Hence, it is correct to left the validity of each marriage to religious teaching, while the state simply guarantee the religious freedom by registering the marriage. The Court added that civil marriage is simply considered a cohabitation agreement. All religious leaders will judge the validity of a marriage based on religious doctrines. The civil registry of marriage is needed simply to regulate rights and obligation related to marriage property. The Court therefore considered the petition is potentially harm the marriage rule which is based

31 See Putusan Mahkamah Konstitusi, Nomor 140/PUU-VII/2009, IMPARSIAL et.al vs. the State.
32 Ibid.
33 Ibid.
on the first principle of Pancasila, namely marriage is a sacred contract which should be based on religious doctrine and not simply western civil law.34

The Constitutional Court therefore has given a considerable interpretation in the legitimacy of restrictions on religious freedom. This has important implications for the configuration of relations between religion and state. There is a compromise between state and religious leaders, in which the state is allowed to limit religious activity on the basis of "public order" and "religious values", while the state also delegates some of its authority to the religious leaders to behave as guards in defining the "right" interpretations within their religion. Given the context of Indonesian diversity and pluralism and unclear parameters, the relationship between law and religion is likely to remain a source of debate, negotiation and contestation in the future.

2. Implications on the implementation of shari‘a of Islam

Despite the accommodation to religions through the constitutional arrangement and the institution of the Ministry or Religious Affairs, the relationship between Islam and the state experienced ups and downs. Muslims had been marginalized from national politics and economic life in the final years of the Soekarno regime in the 1960s.35 When Soeharto ascended as the second President, there was a hope from Muslims that the shift in the national leadership would improve the situation of Muslims. However, Soeharto took a mixed regimen which severely controlled political Islam but had strong support for Islamic spirituality.36 In fact, any activity which affiliated to Islam politic or raised the issue of Islam and state in this period would be condemned as subversive and was often followed by military operation to eradicate it.37 Yet, at the same time, Soeharto showed great respects to Islam and always tried to identify himself with it as a strategy to gain political support from this majority population.38

After the fall of Soeharto’s authoritarian regime, the relationship between Islam and the state improved. Muslims could openly state their political view and establish associations which are endorsed by the state’s officials. This is something which was very uncommon during the Soeharto regime which lasted for more than three decades. The most significant achievement regarded by many Muslims has been the enactment of zakat management law, which was not supported by previous regime. Some Muslim leaders and groups have longed for quite some time for the administration of zakat to be regulated by the government. Finally, the Law was passed under President Habibie’s administration in 1999. The Islamisation of law in Indonesia has become more intensive since the reformation era. The process of Islamisation firstly started permeating in public arena. In early reformation era (Abdurrahman Wahid and Megawati), the process of Islamisation was more on cultural than politico-legal because Islamic legislation rarely took place. Even, the counter legal draft of the Compilation of Islamic Law of Indonesia (KHI) was turned down and shari‘a was politicized in such an issue as criminal law reformation to gain public votes. In Susilo Bambang Yudhoyono administration, the regime enacts quite productively shari‘a-based laws including shari‘a banking law, shari‘a bond, and amendments to religious court law.39

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34 Putusan Mahkamah Konstitusi, Nomor 68/PUU-XII/2014, Damian Agata Yuvens et.al vs the State.
36 Ibid, 59.
Some scholars, however, see this legal development as problematic in a pluralist country like Indonesia. Salim, for example when examining the state intervention in zakat administration, argued that any efforts to require zakat will result in further legal and political dissonances, i.e. a continuum between mild tension and direct contradiction, in the formal application of shari‘a in Indonesia. This includes inequality between Indonesian citizens because pursuant to the Law Number 38/1999 concerning zakat management, Muslims who pay zakat may be entitled to a deduction from their taxable income. Other religious adherents who give donations to their religious denominations do not have the same privilege since there is no law or regulation about it.  

With the institution of the Constitutional Court, Muslim can now challenge the constitutionality of state’s intervention against the implementation of shari‘a. Constitutional injury claims against the adoption of shari‘a into Indonesian laws – either from the proponents (e.g. they think the laws have corrupted the true shari‘a) or from the opponents (e.g. the adoption of shari‘a will discriminate non-Muslims in Indonesia) – now can be remedied through judicial proceeding in the Court. A case in point is a petition filed by Muhammad Insa claiming that the provision of polygamy’s restriction set by the Law Number 1/1974 of Marriage has restricted his freedom to worship Allah as he believed that polygamy is a type of worship in Islamic doctrine. He then demanded the Court to declare that the provision of polygamy in Law Number 1/1974 of Marriage does not comply with the Constitution and to declare that those provision null and void. This suit failed because the Constitutional Court held, inter alia, that monogamy is the marriage principle in Law Number 1/1974, but polygamy is permitted as long as it fulfills requirements that do not contradict Islamic doctrines. In framing its arguments, the Court confirmed the interpretation of Islamic marriage law provided by shari‘a expert witnesses maintaining that polygamy does not fall under the category of worship (‘ibadah) in shari‘a; instead, it is under the aegis of social relation (mu‘amalat) and its basic legal status is permissible under the five shari‘a classifications of human actions, viz. mandatory, recommended, permissible/neutral, reprehensible, and prohibited. Since the status of polygamy is permissible, statutory restrictions set up by the state – inter alia, a husband must acquire consent from his wife through the Religious Court, thus are not in conflict with the religious freedom clause because not committing polygamy does not constitute a transgression against Islamic obligations on worship. Statutory restrictions on polygamy do not contradict Islamic doctrines on marriage because they will ensure that the principle of fairness (‘adl) required for committing polygamy would be observed by the applicants. It is the obligation of the state by means of its legislation and justice system to guarantee the materialization of fairness for parties who will be affected by polygamy, especially women and children. The statutory restriction thus will promote the objective of (Islamic) marriage in Indonesia, viz. to set up a tranquil, affectionate, and merciful family (sakinah, mawaddah, dan rahmah).

Another case in point is in Suryani v. the State. The petitioner is a female worker who claimed that her constitutional right to religious freedom has been injured by article 49(1) of

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40 Salim, supra note 19, at 170.
41 viz. art. 3(1-2), art. 4(1-2), art. 5(1), art. 9, art. 15, art. and art. 24.
42 viz. art. 28B(1): i.e. right to marry and found a family, art. 28E(1): i.e. right to hold a religion and to manifest it, art. 28I(1-2): i.e. religious rights are non-derogatory, and freedom from any forms of discrimination, art. 29(1-2): i.e. the state is based on belief in the Almighty God, and religious freedom is guaranteed.
44 Fairness in polygamy is interpreted by the Court by the ability to provide maintenance for wives and children and the ability to manage time for his households.
Law Number 7/1989 as amended by Law Number 3/2006 on Religious Courts. Article 49(1) talks about the expanded jurisdiction of Religious Courts from merely adjudicating cases among Muslims on family law (marriage, inheritance, testament), gift and trust (wakf), to settling disputes on shari`a economy as well as alms tax and charities. According to Suryani, Muslims are obliged to observe shari`a fully including the Islamic criminal law – she then quoted a verse in the Koran reading about theft crime punishable with limb amputation. As a consequence, all aspects of shari`a must be enforced in Indonesia. Article 49(1) therefore has impeded her freedom to manifest Islam wholly i.e. by observing all aspects of shari`a including the Islamic criminal law. Meanwhile, if she, and Muslims in Indonesia, had to enforce Islamic criminal law by her own hand would be considered illegal. She then demanded the Court to declare article 49(1) is unconstitutional as per article 28E(1), 28I(1-2) and 29(1-2) of the 1945 Constitution, and to nullify it.

The Court turned down her claim on the unconstitutionality of article 49(1). In its holdings, especially the one that is related to the claimant’s argument of full shari`a implementation in Indonesia, the Court stated that the claimant’s argument is not in accordance with the ideological principle of Indonesia about the relationship between the state and religion because:

… Indonesia is not a state religion that is based on one particular religion, neither is Indonesia a secular state which completely separate religions from its business and surrender religious matters in full to individuals and societies. Indonesia is a state that has the principle of belief in almighty one which, in turn, will protect all religious adherents in manifesting their beliefs … national law must ensure ideological unity and integration as well as religious tolerance. Hence, national law can be the factor of integration for unifying the nation. The state services to citizens thus are not based on the majority of religious follower or ethnic group. If the matter of shari`a implementation in Indonesia is tied with the sources of national law, it can be said that Islamic law indeed be a source of national law but it is not the only one because there are other legal traditions in Indonesia that can be the sources. Therefore ... Islamic law as one source of law may be utilized together with other sources of law in order to formulate statutes which are effective as national law.

This kind of policy towards shari`a implementation in Indonesia has been described by Indonesian legal historians as the re-adoption of the Dutch colonial policy of reception theory. Salim and Azra, for example, conclude the essays (mainly on case of Islamic family law and Religious Courts law) that they edited for a book on the state and shari`a from the perspective of Indonesian legal politics with:

By controlling Islamic law, the Indonesian state has successfully instituted a new ‘reception theory’ – that the implementation of shari`a is officially legitimate only if it has been ratified as national positive law. This is true for some of the contents of shari`a that have been put into bureaucratic formulae; and its emergence into legal force is possibly only with the government’s political will.

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46 viz. art. 28E(1): i.e. right to hold a religion and to manifest it, art. 28I(1-2): i.e. religious rights are non-derogatory, and freedom from any forms of discrimination, art. 29(1-2): i.e. the state is based on belief in the Almighty God, and religious freedom is guaranteed.
49 Arskal Salim and Azyumardi Azra, “Introduction: The State and Shar`a in the Perspective of Indonesian Legal Politics,” in Shari`a and Politics in Modern Indonesia, eds. Arskal Salim and Azyumardi Azra
Accordingly, the Constitutional Court affirms that Islamic criminal law is not an aspect of shari`a which requires the intervention of the state for its implementation and, thus, must be set in a current applicable law in Indonesia. Unfortunately, the Court did not reason sufficiently on why Islamic criminal law cannot be enforced in Indonesia whereas the state set specific laws and regulations for Muslims in the matter of family law and Islamic financial law. The Court’s holding “national law can be the factor of integration for unifying the nation” will sit uneasily if it is confronted with the fact that some forms of Islamic criminal law indeed have been implemented in Aceh province. Meanwhile, not all population in Aceh province is Muslim.

Although the state recognition on shari`a is limited to the fields over which the religious courts have jurisdiction (marriage, divorce, inheritance, trusts, gifts, and Islamic finance), the administration of Islam itself in Indonesia may cover the aspects of shari`a way beyond mentioned above. This is because there has not a fine line between religious doctrines which require state’s intervention in their implementation and which do not from the vague constitutional arrangement and interpretation on religion as well as the institution of Ministry of Religious Affair. Especially when the latter tends to bureaucratize religion (read: Islam) with the justification that state’s intervention is instrumental because it is mandated by the Constitution as in the cases below.

III. BUREAUCRATIZATION OF SHARI`A: WHERE IS THE LIMIT?

Despite its general nomenclature, the Ministry of Religious Affairs has become the leading bureaucratic institution for the state’s administration of Islam in Indonesia. Its authority extend from the aforementioned aspects of shari`a recognized and regulated by the state to the process, procedure, and institutional management of Hajj (pilgrimage) and zakat (obligatory alms-giving), which are known as the fourth and fifth pillars of Islam. In addition, it still administers all levels of Islamic education from elementary to tertiary. The Ministry manages to handle all tasks of the administration of Islam with three Directorate Generals and one Agency out of nine Directorate Generals/Agencies existed; they are: Directorate General of Islamic Education; the Conduct of Hajj and Umrah (minor pilgrimage); Islamic Community Guidance; and the Organizing Agency of Halal Product Guarantee. The rest Directorate Generals are for Christian Community Guidance, Catholic Community Guidance, Hindu Community Guidance, Buddhist Community Guidance, and the Agency of Research & Development and Education & Practice. Konghucu does not have a Directorate General yet; but it is put under the auspices of the Center for Guidance and Education of Konghucu.

The Organizing Agency of Halal Product Assurance (BPJPH) is the latest efforts of the Ministry in bureaucratizing shari`a. The Agency was inaugurated on 11 October 2017 which thus ends, for now, the polemics over the authority of halal product certification between the government (the Ministry of Religious Affairs) and civil society organization or CSO (the Council of Indonesian Ulama or MUI). Previously, the state has already bureaucratized the administration of zakat through the Directorate General of Islamic Community Guidance (especially by means of its Islamic Affairs & Shari`a Development Unit for shari`a compliant auditing of CSO zakat agencies, and by means of Zakat & Waqf Empowerment

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Unit, together with the National Zakat Agency or BAZNAS, for CSO zakat agencies licensing and overseeing. It also has done that on Hajj and Umrah through the Directorate General of the Conduct of Hajj and Umrah.

This bureaucratization of shari‘a has created tension not only between the government and CSO over the authority of administration of Islam in Indonesia, but also between the state and Muslim citizens and CSO over the extent of state intervention in the administration of Islam, as well as among the state agencies due to disharmony of legislation, as can be seen in the cases below.

A. Case of Halal Product Certification

The tension between the Council of Indonesian Ulama (MUI) and the Ministry of Religious Affairs (MORA) over halal product certification occurs because the latter maintain that it falls into the Ministry authority whereas the former believes that halal certificate is a written fatwa which belongs to the Council authority. 52 The initiation of halal certificate in Indonesia was triggered by several notorious cases of the existence on non-halal substance added to consumer product in Indonesia (biscuits, flavor enhancement/MSG, toiletries, and, last but not the least, vaccines). This was investigated by university researchers who then published the finding, and, then, created public unrests. 53 Given the public concerns, the MUI initiate an agency under its auspices (LPPOM or the MUI Assessment Institute for Foods, Drugs, and Cosmetics) on 6 January 1989 to investigate a product, tested it the laboratory, and then issued a fatwa (legal edict) on the product halal-ness, as well as issued the label. This halal product certification, however, adopts a voluntary application from the company. 54

This voluntary approach to halal certification ensued for quite some time until the enactment of Law Number 33 of 2014 concerning Halal Product Assurance on 17 October 2014. The halal product certification is now mandatory in Indonesia as per article 4 “consumer products enter, distributed, and traded in the area of Indonesia must be halal certified.” Yet, Article 67 extends the deadline of mandatory halal certification for five years. The government thus carries out the halal product assurance through the BPJPH of the Ministry of Religious Affairs. Some of the process of certification viz. auditing the applicant’s products will be conducted by authorized institutes of halal examination which now there are only two, viz. LPPOM-MUI, Badan Halal NU. Next stage after the audit is to determine the halal-ness of the product through fatwa which is vested on the MUI authority whereas the issuance of halal certificate and label is the authority of the Ministry.

While the arrangement of the law solve the tension between the Ministry and the MUI over the authority of halal product certification, 55 the mandatory application of halal product will potentially trigger criticisms from the producers – small, medium, and big enterprises as well – when the law is fully implemented on 17 October 2019. The readiness of the Ministry to carry out such a big task to assure that every product distributed and traded in Indonesia halal is in questions. 56 Likewise, the Law has mistakenly vested the authority to accredit the future Halal Inspection Agencies to the BPJPH instead of to the National Committee of

54 Hosen, supra note 51, at 3.
Accreditation as per Law Number 20 of 2014 concerning Standardization and Conformity Assessment. Last but not the least, there will be resistance against the Law because it may disregard the plurality of Islamic jurisprudence with regard to the standard of halal in Islam whereas Muslims in Indonesia seeks fatwa from at least three institutions: MUI, Nahdlatul Ulama, and Muhammadiyah. What sort of authority held by the government to adopt a certain Islamic jurisprudence on the halal standard which might not be held by a producer.\(^{57}\) There will be an issue of religious freedom to manifest religion like the case of M. Insa vs the State (Polygynous marriage restriction) and Agatha Damien Yuvens *et al* vs the State (restriction of interreligious marriage).

**B. Case of Hajj Administration**

Hajj affairs were formerly carried out by private parties in Indonesia, but beginning the Soeharto regime, the government began to be directly involved through the Ministry of Religious Affairs under the Directorate General for the Conduct Hajj and Umrah. After the Hajj arrangement is only done by presidential and ministerial decrees, the first law on Hajj administration was passed in 1999, namely Law Number 17 of 1999. This law was later renewed in 2008 with the issuance of Law Number 13 of 2008. Under this Act, the Ministry is the sole organizer and chief coordinator of Hajj (and Umrah) in Indonesia whose responsibility to carry out the national task of the government to assist the pilgrims (Arts. 1(19), 6 and 8). Yet, private sectors of tourist travel bureaus are let handle 10 percent of the national quota and this is called special Hajj services (art. 38-41 of Law Number 38 of 2008)\(^{58}\) with the cost twice as much as the regular one.

The reason why Hajj pilgrimage is a national task because of the number of Indonesian pilgrims is very large (around 200,000 pilgrims every year), involving various government agencies and institutions, both in domestic and overseas, and related to various aspects, among others guidance, transportation, health, accommodation, and security. Besides that, Hajj pilgrimage is held in Saudi Arabia in a very time limited which, then, relate to the good name and dignity of the Indonesian nation abroad. There needs thus to make improvements on the quality of Hajj Pilgrimage as a demand from clean and good governance. In connection with this, the Hajj pilgrimage needs to be managed on a regular professional basis and accountable by the state with nonprofit principles as well as the principle of justice to gain equal opportunity for every Muslim citizen of Indonesia.\(^{59}\)

Under the new Hajj Law, candidates for pilgrims are required to register with the Organizing Committee of Hajj at the local Ministry of Religious Office (Art 5 (a)) by paying the Hajj Fee (BPIH) (Art 5 (b)). The prospective pilgrim will be on the waiting list (Art. 26) which is based on the regional quota determined by the Minister. on the contrary, the Government will be responsible for providing accommodation, transportation, health services, security and other important things to pilgrims when it is their turn to perform the pilgrimage (Arts 6 and 31-37) and the government is not allowed to charge additional this service (Art 29). BPIH is set by the government on the recommendation of the Minister of Religious Affairs and must be approved by the House (Art 21). Prospective pilgrims pay BPIH to the account of the Minister of Religious Affairs in Islamic Bank or conventional bank that has sharia banking services (Art 22 and Explanation). In 2017, the BPIH is set at around IDR 35,000,000 or USD 2,570. A candidate, however, can register for Hajj and is put

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\(^{57}\) Hosen, supra note 521, at 14-15.


\(^{59}\) Elucidation Law Number 13 of 2008 concerning Organizing Hajj; see also Hooker, supra note 56, at 205-235 for detailed information on how Hajj service is managed by the Ministry.
on the waiting list when she/he pays IDR 25,000,000; when her/his turn arrives, the Organizing Committee of Hajj will notify her/him in order her/him to pay off the BPIH. Should a candidate is unable to pay off the BPIH in the calendar year, her/his turn will be postponed and allocated to the next candidate on the waitlist.

Due to the complexity of annual Hajj pilgrimages (especially poor service in Saudi Arabia), alleged misappropriation of Hajj funds by the ministry officials, as well as the length of waiting time, the Hajj Administration Law has been brought to the Constitutional Court to be tested for the constitutionality of state power to regulate religious affairs. The petitioners claimed to have deposited the BPIH but still waiting to depart for the last few years. According to the petitioners, the monopoly of Hajj and, in particular, the existence of BPIH and the Hajj quota system (Arts 1, 21, and 22) violate their religious freedom guaranteed by Article 29 (2) of the 1945 Constitution. Their constitutional right to obey the religious obligations of performing the Hajj has been impaired by the Law. Likewise, the BPIH has been set too high to make it hard for most Muslims in Indonesia to register and has also created a very long waiting list system. This petition is then revoked by the applicant, aware of the possible impact of his lawsuit if accepted by the Court. Instead of continuing the lawsuit, the applicant shows clear support for the government's pilgrimage system because the quota system and haj requirements are established by the government of Saudi Arabia, not the Indonesian government. The Saudi Arabian government asked the Indonesian government to organize the course of the Hajj process in Indonesia. If the law is aborted and the Ministry of Commerce loses authority to perform Hajj services, then who is responsible for doing so in accordance with the provisions of the Saudi Arabian government?

The impetus of fulfilling Hajj obligation has motivated the great number of Indonesian Muslims to sign up for performing the pilgrimage, while available Hajj quotas are limited. As a result, there are an increasing number of Hajj pilgrims waiting in large numbers. On the other hand, the increase of the number of Hajj pilgrims’ waitlist has caused the accumulation of BPIH in enormous amount. The government sees that the accumulated BPIH has the potential to increase its value of benefits that can be used to support the quality organization of Hajj service, and this can be achieved only through effective, efficient, transparent, and accountable management of Hajj funds. Hence, the government sees that it is necessary to establish Law on Hajj Financial Management (Law Number 34 of 2014). It will be done in the form of investment whose value is used for quality improvement Organizing Hajj, rationality, and efficiency of BPIH, also for the benefit of Muslims. To manage Hajj Finance, this Law establishes the Hajj Financial Management Agency (BPKH) as an independent public legal entity and responsible to the President through the Minister.1 The operational costs of BPKH (salary and expenses) will be supported by the benefits of the BPIH investments (Art. 12(1) and (3)). The Law also prevents the candidate of Hajj pilgrims to withdraw their BPIH deposits; it can only be done when the candidates cancel their registration either by death or other legitimate reasons (Art. 6(4) and (5)).

The Law new arrangement on Hajj management soon is challenged to the Constitutional Court in late 2014. The petitioners felt that their constitutional rights of legal certainty [to perform the pilgrimage], the protection of property rights, and the right not to be arbitrarily taken, had been violated by the Haj Financial Management Law. This is because they feel that the deposit of BPIH is the money they should be able to take at any time. They also

60 See Minutes case on Wednesday, 4 August 2010, and Thursday, 23 September 2010; The Decision of Constitutional Court Number 51/PUU-VIII/2010, Revocation Case between Farhat Abbas and Windu Wijaya vs. the State; see also Lindsey, supra note, 116-117.
61 Elucidation of Law Number 34 of 2014 concerning financial management of hajj
objected that the operations of BPKH are charged to the BPIH deposits they pay, including from the profits derived from BPIH investments.\(^{62}\)

The Court, however, rejected the application of judicial review in all. The Court sees as more and more Muslims, especially Indonesia, who want to perform the pilgrimage every year, the royal government of Saudi Arabia has issued a quota policy for Muslims of all countries who want to perform Hajj. The consequence of the quota system, the Indonesian government applies the Hajj registration with an open Hajj saving system throughout the year which leads to a waiting list. This policy according to the court is the basis for applying the principle of justice in the implementation of the pilgrimage so that every citizen gets the same opportunity. Therefore the government has the right to determine the terms because part of its duty mandated by the constitution.\(^{63}\)

One way of controlling candidates in the waiting list is the government requires the concerned to make payment of BPIH. BPIH deposit is a means of selection of candidates who are considered capable financially or not. If it is based on the time of registration only, while it has not been able to financially, this inhibit other candidates.\(^{64}\) Because of the large waiting list and the length of waiting time, the amount of BPIH deposits become tremendous, it is necessary to arrange and manage the Hajj finance to improve financial service of pilgrimage and giving benefits to Muslims. So the Court sees it is rational if the BPKH that will manage funds efficiently and effectively in order to provide optimal benefits for pilgrims and rationalization optimal Hajj costs. Therefore, the existence of BPIH and its management bodies is constitutional and not a form of involuntary transfer of money belonging to the Hajj. This arrangement provides legal certainty and protection to the community for justice and public order.\(^{65}\) The use of BPIH for sharia-compliant investments by BPKH and BPKH operational funds from BPIH’s investment value is not contradictory to the Constitution. This is because BPKH is obliged to manage BPIH in a transparent and accountable manner for maximum benefit for pilgrims, and must report performance and finances to the public, ministers of religion and parliament every six months, and must give benefit value to deposit BPIH in steady to virtual account every pilgrim.\(^{66}\)

Disappointments on the state intervention in Hajj administration through Law Number 34 of 2014 concerning Hajj Financial Management continues. And this time is triggered by the desire of President Jokowi to invest Hajj funds to the infrastructure sector. The benefits of these investments can be used to subsidize the costs of Hajj so that it is more affordable for the society. This way has been used in other countries such as Malaysia.\(^{67}\) This was delivered by Jokowi after inaugurating members of the Supervisory Board and Member of the Hajj Financial Management Agency (BPKH) on 26 July 2017.

The pilgrim funds actually have been invested since seven years ago. With the highest Muslim population, the Ministry of Religious Affairs has accumulated a 63 trillion rupiahs (5.4 billion dollars) fund from prospective pilgrims who make a 25 million rupiahs (2,000 dollars) down payment to join the 12-year waiting list for a place on the Hajj. The Ministry of Finance has started to use the fund to buy more shari‘a-compliant government bonds, or

\(^{62}\) The Decision of Constitutional Court Number 12/PUU-XIII/2015, *Sumilatun and Haq vs. the State*, pp. 4-12.

\(^{63}\) Ibid., para 3.10.2, p. 88.

\(^{64}\) Ibid., para 3.10.3, pp. 88-89.

\(^{65}\) Ibid., para 3.10.4, pp. 89-90.

\(^{66}\) Ibid., para 3.10.5, pp. 90-91.

sukuk, in order to reduce its exposure to the foreign investors who own about a third of Indonesia’s sovereign debt. Sukuk is allowed because of its shari’a compliant.

However, debates emerged soon after the President Jokowi’s speech. Leaders of the House of Representatives, the Council of Indonesian Ulama (MUI), until the government officials debated about the aspects of investment security, benefits aspects, to the suitability of investment with legislation. The polemic on the use of hajj funds for infrastructure prompt judicial review again of Law Number 34 of 2014 on Financial Management of Hajj to the Constitutional Court.

Interestingly, the MUI supports the views of regarding the utilization of the Hajj deposit fund which is included in the list of Hajj departure queues. According to MUI based on the resolution of all Indonesia MUI fatwa committees in 2012, the BPIH deposits may be managed for productive purposes, such as infrastructure projects as long as it is done according to shari’a and its benefits back to the pilgrims. The yields of such investments belong to the pilgrims included in the waiting list, among others, as an addition to the prospective Hajj fund or the deduction of the real Hajj cost. In addition, as the manager of the BPIH deposits, the government is entitled to receive reasonable or not excessive rewards. Meanwhile, when the community asks the government to set stricter requirements up in hajj registration, namely by adding a provision that the registrant is a person who has never performed the pilgrimage, with the aim to shorten the waiting time to go hajj in Indonesia which could reach 17 years since paying the deposit of BPIH 25 million, MUI did not give an opinion. The Constitutional Court, on the other hands, takes a consistent stance that the state does not interfere in determining the affairs of the faith, and argues that performing the pilgrimage more than once does not violate the Constitution. Attitudes do not want to interfere religious belief is also shown by the state (Parliament and the Constitutional Court) on the case of zakat administration in Indonesia.

C. Case of Zakat Administration

Zakat (alms tax) is a religious obligation imposed on individual Muslims because it is one form of mandatory worship in Islam. Zakat administration by the state in Indonesia is a late development compared to the demands for its introduction that stretch back to the 1950s or even earlier. In 1951, the Ministry of Religious Affairs (MORA) issued a circular letter Number A/VII/17367 dated December 8, 1951 stating that the MORA will not interfere with the zakat administration (so the government continued the Dutch colonial policy on zakat in Indonesia). Instead, the MORA simply encouraged Muslims to observe their religious obligation to pay zakat, and ensured the zakat distributed properly pursuant to shari’a. This circular letter arguably was issued in response to the demands of state intervention for zakat administration in Indonesia. The state finally accommodated the

69 See Berkas Registrasi 2225 Perbaikan Permohonan Perkara Nomor 51/PUU-XV/2017, Sholeh vs. the State.
72 About the circular letter, see Tonang, 1992: 268.
demands of some Muslims in Indonesia in 1999 through the promulgation of Law Number 38 of 1999 concerning Zakat Management.

Despite being regulated by the state, Indonesia adopted a voluntary system of zakat payment which was at odds with the demands of proponents of zakat administration by the state. If we compare this to other systems of zakat payment in Muslim countries, Indonesia’s position is not novel. Predominantly, Muslim countries take a wide variety of approaches to zakat and these can be grouped into three categories. First, some countries have no government system for zakat, and this is the most common approach. Second, we can identify countries where payment of zakat is voluntary: the government facilitates the collection and distribution of zakat in the interest of transparency and accountability with varying degrees of governmental oversight and involvement. Bahrain, Bangladesh, Egypt, Iran, Jordan, Kuwait, Lebanon, United Arab Emirates are countries which adopt this system. Third, we have countries where zakat is mandatory: zakat is treated like a tax and distributed as an analog to welfare, while zakat evasion is punishable with fines and/or imprisonment. Countries with this system are Libya, Malaysia, Pakistan, Saudi Arabia, Sudan, and Yemen.73

The real issue emerging during deliberations about Zakat Law Number 38 of 1999, as well as its drafting within the MORA, is about the question of government intervention in the implementation of zakat in Indonesia. Zakat has been observed by Muslims and then distributed to the specific beneficiaries traditionally for centuries. The beneficiaries of this direct method of zakat payment were mostly religious teachers (kyai or the leaders of traditional Islamic boarding schools). During the legislative deliberations, there was lobbying from this group, which voiced their concerns to members of parliament who are considered to represent their interests. They questioned the credibility of government to manage zakat, given heavy style of Indonesia’s bureaucracy and widespread corruption of the government. Further, they were afraid that government intervention in zakat administration in Indonesia would affect the sustainability of their organizational source of funds.74

Considering the situation, the government offered a solution in the form of two tracks of zakat collection, i.e. by government sponsored bodies called Badan Amil Zakat or BAZ and voluntary sectors called Lembaga Amil Zakat or LAZ. The concept of LAZ originally was intended for Islamic social organizations such as Muhammadiyah, Nahdlatul Ulama and so forth in order to sustain their source of social work funds. According to Mubarok, the then Director General of Islamic Society Guidance and Hajj Affairs in the 1990s, the expansion of LAZ into Islamic banks and zakat collector bodies established by the voluntary non-profit sector with no mass organization basis, thus, represented excessive development and a departure from the intention of the Zakat Law.75 The MORA’s draft thus designed the BAZ with full legal arrangements and excluded the LAZ. The LAZ advanced strong demands for acknowledgement in the Bill. According to Arskal, the MORA did not want to empower the LAZ and wanted to subordinate them as a lower structure of the BAZ, as part of its task force of zakat collection. The enacted law did finally recognize the role of LAZ but it is very limited: it becomes a subsystem of zakat collection in Indonesia.76 Lobbying by Islamic social organizations to keep zakat collection traditional was strong that is direct payments from the payers to the beneficiaries without intermediation by BAZ. Particular leaders of Islamic social organizations have enjoyed their status as zakat beneficiaries in their capacity.

75 Alfitri, supra note 66.
76 Salim, supra note 19, at 130; Lindsey, 2012a: 166.
of founder of Islamic traditional schools (pesantren) and/or religious teachers. Hence, the existence of BAZ posed a threat to their institutions or, even, their economic base.  

Another issue is the nature of zakat collection, i.e. whether it is mandatory or voluntary. The MORA in fact proposed the Bill as mandating zakat collection. The proposed article 12(1) read “the collection of zakat is organized by the government sponsored zakat agency (BAZ) by receiving or taking [zakat payment] from the zakat payers.” The State Secretariat criticized this provision because it implied coercion in the zakat collection and would unknowingly lead to the realization of the Jakarta Charter. Art. 12(1) thus was reworded with the added phrase “... upon notification by the payer.” The MORA welcomed the change but it created tension in the Legislature during the deliberation process, as one Parliament Member from the Golkar faction thought that the change made zakat agency look passive in collecting zakat. According to the Golkar faction, zakat agencies should be proactive in performing their duties in collecting zakat even without notification from zakat payers. Thus, this situation must be explained in the elucidation of the article. However, the Golkar faction’s proposal was criticized by the military faction and the United Development Party faction. The Military faction thought it would create resistance from Muslims and result in the same fate as the tax levied on the possession of televisions. The United Development Party faction maintained that zakat payment should be based on Muslim awareness, because coercion to pay zakat would taint Muslim intentions to fulfill the zakat obligation with concern for other factors such as government’ sanctions, and interfere with the legitimate religious concern of the faithful to purify themselves and their wealth. Consequently, such zakat payers would not be rewarded in the hereafter. The proposal finally was accepted because the Golkar faction was a majority in the Legislature and other factions realized that the proposal would not convert the voluntary nature of zakat payment in Indonesia to a compulsory obligation.

Last but not the least, it is the issue of disharmony between government agency policies on the tax deductibility of zakat payments. The MORA prepared art. 13(2) as follows: “the zakat paid to the government-sponsored agency [BAZ] is a deduction from the profit or taxable income of the taxpayer in accordance with the applicable regulation.” The MORA seemed to ignore Ministry of Finance when drafting this provision, thus, the Ministry of Finance sent an objection letter to the MORA on the following grounds: first, it would reduce the annual tax received by the Directorate of Taxation; second, it lacked regulations supporting that provision. This conflict between two ministries then was forwarded to the President Habibie. The then President welcomed MORA’s proposal and thus the provision was passed intact by the Legislature.

The replacement of Law Number 38 of 1999 with Law Number 23 of 2011 prompts us to re-examine the authority of the state to not only regulate, but also to manage, zakat in Indonesia. This is because even though the proposal from the government (the Ministry of Religious Affairs) to introduce a mandatory zakat payment in the new Law was not accepted by the Legislature, the government did succeed in reaffirming its role as the administrator of zakat in Indonesia. According to the new Zakat Law, to carry out zakat management, i.e. collection and distribution, in Indonesia, the government will set up state-run zakat agencies

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77 Alfitri, supra note 66.
78 Alfitri, Whose Authority? “Interpreting, Imposing, and Complying with Corporate Zakat Obligations in Indonesia,” University of Washington, Dissertation, 2015; see also Salim, supra note 19, at 128-129.
79 Salim, supra note 19, at 129.
80 Ibid.
81 Ibid.
82 Salim, supra note 19, at 130; Alfitri, supra note 2006: 62-63; Lindsey, 2012a: 166.
83 This resembles the situation of Law Number 38/1999 when legislature also believed that the state does not have authority to enforce a belief to its Muslim citizens.
(Badan Amil Zakat Nasional or BAZNAS) at all levels, from national to local (provinces and districts/cities) as well as zakat collector units (Unit Pengumpul Zakat or UPZ) in either sub-districts/villages, or government agencies and private companies. Meanwhile, the roles of existing non-state-run zakat agencies (Lembaga Amil Zakat or LAZ) are now subordinate to the BAZNAS and there are rigorous requirements to be fulfilled to maintain their authorized status as zakat collectors, or to establish a LAZ. The new Zakat Law also penalizes unauthorized zakat collectors which collect, distribute, or utilize zakat funds, by prescribing imprisonment and/or monetary fines for those offenses.

Originally there had been a proposal from the government to enforce the obligation of zakat in Indonesia by penalizing zakat evaders. However, this proposal was turned down by the Parliament saying that Indonesia, where Pancasila was the state ideology, lacked authority to enforce the obligations of a religious doctrine. As with the case of the Zakat Law of 1999, the Parliament confirmed the position of the state as simply regulating the administrative aspects of zakat, i.e. authorizing and supervising zakat agencies. Therefore, issues emerging during deliberation process were those related to administrative issues of zakat collection especially the appropriate role of the government in zakat administration in Indonesia simply as a regulator or both as the regulator and implementer of the system? The second attracting debate was the status of LAZ, i.e. are they equal partners in zakat collection and distribution with government, or subordinate to the state zakat agency (the BAZNAS)? Last but not least, there was debate on sanctions that should be imposed on those who act as zakat collectors but not authorized by the state.

From arguments proposed by proponents of zakat administration by the state, we know that the government and some stakeholders of zakat in Indonesia see that the state intervention as necessary because the voluntary system of zakat obligation has marginalized the zakat role in income redistribution, or because the full incorporation of zakat into the fiscal system may assist Indonesia to achieve its goal of social justice. However, proponents of state intervention in the implementation of zakat using these arguments differ in their views when it comes to the issue of the appropriate role of the government in zakat administration. The Zakat Law has violated freedom of the religion clause in the Constitution. They believe Shari`a allows Muslims to pay their zakat through whichever zakat collector that they think fit to their purpose.

The Constitutional Court, however, confirms the constitutionality of state intervention in implementing zakat in Indonesia, i.e. the BAZNAS as the national operator of zakat and, thus the coordinator among zakat agents in Indonesia. The reason is that Indonesia has the Pancasila as the state ideology, with belief in one god as the first principle. The first principle suggest that when it comes to the direction of welfare policy, Indonesia is a religious welfare state, i.e. the duty of state is to guarantee public welfare through programs that are in line with, but not limited to, religions existing in Indonesia.

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84 See art. 5(1), 16(1).of Law Number 23 of 2011 concerning Zakat Management.
85 Art. 17-20.
86 Art. 38 and art. 41.
87 This was the counter draft bill from members of Parliament. The counter draft contained no provision on sanctions for zakat evaders. It opposed the centralization of zakat by the MORA and its new body and restoring the rights of LAZ. Also, it proposed the abolition of BAZNAS and replaced it with limited body under the MORA which will only function as the regulator of zakat. See Lindsey, 2012: 172.
88 Cf. Mintarti 2012: 207. Mintarti mentioned the issue of zakat as tax credit but since the inclusion of this provision necessitates the amendment of existing tax laws concurrently with the deliberation of new zakat law, this proposal then did not emerge anymore in the following new zakat law meetings.
89 See Constitutional Court Decision Number 86/PUU-X/2012: Zakat Agencies and Zakat Payers vs. the State, pp. 90-92.
With regards to sanctions for unauthorized zakat collectors such as staff of mosques or kyai or leaders of Islamic boarding schools (pesantren), the Court confirms its constitutionality partially. Zakat is a religious obligation with a vertical dimension, i.e. worshipping Allah, but at the same time having horizontal dimensions, i.e. social justice and redistributive income. The clause of freedom to manifest one religion (article 29(2) of the Constitution) can be limited pursuant to the law. State intervention through sanctioning the unauthorized zakat collectors is actually a kind of limitation to manifesting one’s belief by channeling zakat to beneficiaries directly or through intermediaries such as kyai or mosque staff. This is done to assure the accountability of zakat management in Indonesia because it involves the utilization of public money. Since the number of zakat agents and their coverage are not reliable to force every zakat payer to channel their zakat through official zakat collectors, may hamper Muslims to manifest their belief to observe the obligation of zakat, the Court finds the provision of sanctions is cancelled (partially unconstitutional) for this reason.

In this case, the Court again reasons employing the dimensions of freedom of religion that is susceptible to limitation. It has two dimensions, i.e. internal and external. The internal dimension is to believe, while the external dimension is to manifest it. The external dimension of freedom of religion is subject to government intervention because it deals with multiple religious adherents, peace and order. (This is consistent with the Constitutional Court’s decisions on blasphemy law, i.e. the external dimension of religious freedom can be limited by means of law).

IV. CONCLUSION (on progress)

With Pancasila as the state ideology, Indonesia positions itself neither as an Islamic state nor a secular state. The state facilitates the existence of religion through a state institution that specifically handles religious administration in Indonesia. Religious administration in Indonesia does not touch the state's intervention in religious beliefs and its manifestations. However, the development of religious life in Indonesia shows that the state is increasingly interfering in religious administration, especially Islam in Indonesia. If in the case of the imposition of religious obligations such as zakat obligations can be seen the clear norm adopted by the government, i.e. the state does not intervene to impose religious beliefs on the adherents due to the nature of the absence of authority and the nature of the state of Indonesia, the cases of shari’a bureaucratization (halal product certification, Hajj administration, and zakat administration) have not showed what sorts of norms adopted by the state. There has not a fine line between religious doctrines which require state’s intervention in their implementation and which do not from the vague constitutional arrangement and interpretation on religion as well as the institution of Ministry of Religious Affair. Especially when the latter tends to bureaucratize shari’a with the justification that state’s intervention is instrumental because it is mandated by the Constitution).

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90 Ibid., pp 89-90, 94.
92 See e.g. Constitutional Court Decision Number 140/PUU-VII/2009: Imparsial et. al. vs. the State.