

## Syariah regional regulations in Aceh and Banjar Indonesia: An aspect of religious freedom

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Rusniah Ahmad<sup>1,\*</sup>, Zainal Fikri<sup>2</sup>, Rohizan Halim<sup>1</sup>

<sup>1</sup> Pusat Pengajian Undang-Undang (School of Law), UUM College of Law, Government and International Studies, Universiti Utara Malaysia, 06010 UUM Sintok, Kedah, Malaysia

<sup>2</sup> Universitas of Banjarmasin, Kayu Tangi, Pangeran, Banjarmasin Utara, Kota Banjarmasin, kelurahan 70124, Indonesia

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### ABSTRACT

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This article examines the nature of regional regulations on Friday prayer in Aceh and Banjar, South Kalimantan. It argues that the nature of such bylaws cannot be explained solely in terms of Islamic law because there are other norms which served as the bases. They are secular ideological values of respect and freedom. Following Menski's kite model of law as a methodological tool, this study analysed the hybrid combination of those norms.

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## 1. Introduction

In Indonesia, at national level enacted syariah laws on *haji*, *zakat*, and Islamic bank is not something new. However, all these laws do not replace any existing law as *haji* and *zakat* are not covered by any other previous law 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<sup>1</sup> started effectively in 1999, a number of provinces such as West Sumatra, South Sulawesi, South Kalimantan and other regencies and cities have implemented the Syariah regulations. These Syariah regional regulations (popularly called *Perda Syariat* or *Peraturan Daerah Syariat*)<sup>2</sup> are issued by both local legislative and executive bodies at the

\* Corresponding author.

E-mail address: [rusniah@uum.edu.my](mailto:rusniah@uum.edu.my) (Rusniah Ahmad)

<sup>1</sup> 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 [1].

<sup>2</sup> *Perda* or *Peraturan Daerah*, literally regional regulation, refers to laws passed jointly by local legislatures and heads of provinces, regencies, or cities. Different from other regions, Aceh since 2001 used the term *Qanun* for regional

regional level: provinces, regencies and cities. They are a joint-product of both bodies. In general, these Syariah regulations designed to govern three aspects of public life: (1) social 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 [2]. Almost all the regulations fall within the category of law with offences and sanctions. However, they are not *hudud*-based laws.<sup>3</sup>

Although the government has enacted many areas of Islamic law into state legal system at national and local levels, there are no clear rules and consensus for the implementation of Syariah [2,3]. Among internal Muslims there are no clear conception for determining: (1) which areas of Syariah that require the involvement of the state and those that 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 Syariah should be transformed (e.g. civil law, criminal law, administrative law, public law). Other problems are the acceptability by non-Muslims if Syariah applies to them too and the conformity of Syariah with the rule of law, constitutional and human rights.

Since its enactment and implementation syariah regulations have been criticised by human rights activists, women activists, and certain quarters of Muslims and non-Muslims citizens. They argue that the regulations are not in conformity with international standards of protection of fundamental rights, particularly with regard 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 [2,5-7].

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 Syariah 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 [7]; for further information on this event, see [9-11].

Criticisms also came from out of the House. This legislative action was criticized by the Communion of Indonesian Churches (*Persekutuan Gereja-Gereja di Indonesia-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 Syariah regulations were not contrary to the Constitution or *Undang-Undang Dasar 45* (UUD 45) [12,13].

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*);

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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.

<sup>3</sup> The term *hudud* refers to fixed punishments for certain crimes in Islamic law.

d. Presidential Regulation (*Peraturan President*);

e. Regional Regulation (*Peraturan Daerah*).<sup>4</sup>

A normative rule of lower level within the hierarchy may not be contradictory against a rule at a higher level.<sup>5</sup> Regional regulation may not be contradictory to higher regulations and laws above.<sup>6</sup> Legislation of Syariah into regional regulations should conform to the rule of law. Every law including regional regulations must protect human rights.<sup>7</sup>

The institutions in charge of dealing with contradictory legislation are the Constitutional Court and the Supreme Court [14]. 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*).<sup>8</sup> 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 [15].

The Supreme Court has the authority to conduct judicial review over laws below the level of statute.<sup>9</sup> 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.<sup>10</sup>

Only one regional regulation, which activists have labelled "*Perda Syariah*," that had been reviewed by the Supreme Court. In April 2006, Advocacy Team Against Discriminatory Regional Regulation (*Tim Advokasi Perda Diskriminatif, TAKDIR*), a legal aid Non-Governmental Organisation (NGO), filed a request for judicial review of Tangerang City *Perda* 8/2005 on Prostitution [16]. 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* [17,18].

Officially local authorities rarely use the term "*Syariah*" 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 "*Syariah*". Aceh is the only province that has authority to implement syariah law in Indonesia. After the fall of 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 Syariah 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.

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 Syariah or Syariah regulations. They claimed that the regulations went

<sup>4</sup> Law 10/2004 on the Rules of Law-making, art 7 (1)

<sup>5</sup> Law 10/2004 on the Rules of Law-making, art 7 (5)

<sup>6</sup> Law 32/2004 on Local Government, art 136 (4)

<sup>7</sup> Law 10/2004 on the Rules of Law-making, art 6 (1b); Law 32/2004 on Local Government, art 138 (1b)

<sup>8</sup> *Constitution*, art 24C (1)

<sup>9</sup> *Constitution*, art 24A (1)

<sup>10</sup> Law 32/2004 on Local Government, art 145 (2)

against the secular identity of state ideology—*Pancasila* (five principles).<sup>11</sup> Those who supported the regulations argues that these did not exclusively belong to Syariah but rather they were social norms shared by a wider community—Muslims and non-Muslims [1-7].

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 [2,3,5,6-8,10,13,17,19,20].

In Aceh, according to Bowen, the term “Syariah” 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)” [21]. Recent studies by Lindsey suggested the substance of the Aceh’s *Qanun* and other similar *Perda* might draw on customary law, Islamic sources, and non-Islamic sources. Whether they derive from those sources depends to great extent on what clause of which instrument is under discussion [22]. It may also depend on which part 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 [23].

There are numerous studies on Syariah regulations in Aceh and other provinces in Indonesia. Some of them studied the impact of the regulations on the freedom of individual Muslims [5], women’s rights [2,5,6,24], the rights of non-Muslims [5,6,24], and children and the poor [6]. Others studied the elements of *fiqh*<sup>12</sup> or syariah in the regulations [25,26], questioned the legality of the regulations [6], and studied the regulations in the context of institutional change of power accumulation and political corruption [27].

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 [2,5,6,24]. 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 syariah in the substantive contents of Aceh *qanuns* [8,26]. Therefore, non-*fiqh* elements of the *qanuns* needed further study, particularly their interrelationships with *fiqh* elements. To fill this gap, this study analysed all provisions of the regulations being questioned and their material sources.

## 2. Syariah and legal pluralism

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

<sup>11</sup> *Pancasila* literally means “five principles.” It consists of (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.

<sup>12</sup> *Fiqh* is Islamic jurisprudence or legal doctrine. It literally means “understanding.”

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 [28].

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 into 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 [29].

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* (customary) 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 [30].

Salim discusses the relationship between syariah courts 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 and the expanding authority of syariah courts 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 syariah 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* (criminal) offences specifically stipulated in existing *qanuns*, from the general court to the *Mahkamah Syar'iyah* (Islamic Court) [2-5,8,12-18,20-23,25,28,30,31].

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 Syariah and other norms in the material sources of legislation. Therefore, this work examined the interrelationships between various founding elements of



legislation and their hybridisation. Following Menski's kite model of law [32] as methodological tool to analyze the plural founding elements of law, focused on two corners: the interaction and hybrid combinations of the religious norms (Syariah) and secular ideological values (respect and freedom) in shaping a state law. The subject of examination is regional regulations on Friday prayer in Aceh<sup>13</sup> and Banjar of South Kalimantan, Indonesia.

### 3. Regulations of 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.<sup>14</sup> It establishes *ta'zir*<sup>15</sup> penalty of a maximum imprisonment of six months or a maximum of three strokes of caning in public for any person who fails to perform the Friday prayers for three consecutive times without *uzur syarie* or without any reasonable cause.<sup>16</sup> Public transportation companies have obligations to facilitate Muslims in *ibadah* (ritual acts of worship). The *Qanun* prescribes them to allocate a time and facility to users for observing the obligatory prayers including Friday prayer.<sup>17</sup> If they fail to comply with such order, the punishment is a revocation of licence.<sup>18</sup> Respect for the observance of Friday prayer is highly encouraged. Therefore, every person, government agency and other agency shall stop all activities, which could prevent and disturb Muslims to observe Friday prayer.<sup>19</sup> However, it does not specify what activities considered as preventing and disturbing the prayer and their punishment.

Similar regulation on Friday prayer was enacted in South Kalimantan in 2005 that is *Perda* 8/2005 of the Banjar regency. Although it is not officially called as "Syariah regional regulation", local politicians, media, and activists popularly called it as a regulation on Islam or Syariah law.

Article 1 of the *Perda* defines "*Jum'at Khusyu*"<sup>20</sup> as "a certain time on the Friday for stopping all social activities in order to create a calm and tranquil atmosphere for Muslims who will observe and in the middle of observing Friday prayer".<sup>21</sup> The time begins from the first call to prayer (*adzan*) until the prayer ends.<sup>22</sup> Article 2 states the objectives: First, to create a calm and tranquil atmosphere for Muslims observing Friday prayer. Second, to create mutual understanding and respect among Muslims themselves and among inter religious communities.<sup>23</sup>

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<sup>13</sup> Aceh is one of provinces in Indonesia, located on the northern tip of the island of Sumatra. It is the only province that has to implement syariah law in Indonesia.

<sup>14</sup> *Ibid.*, art. 8 (1).

<sup>15</sup> *Ta'zir* is a discretionary and corrective punishment for committing the prohibited acts or for omitting the obligatory acts.

<sup>16</sup> *Ibid.*, art. 21 (1).

<sup>17</sup> *Ibid.*, art. 9 (3).

<sup>18</sup> *Ibid.*, art. 21 (2).

<sup>19</sup> *Ibid.*, art. 8 (2).

<sup>20</sup> The term *Jum'at* is an Indonesian word derived from Arabic *jumu'ah* for the Friday prayer. The word *Khusyu'* means tranquility or concentration in observing the rituals.

<sup>21</sup> *Ibid.*, art. 1 (f).

<sup>22</sup> *Ibid.*, art. 5 (1).

<sup>23</sup> *Ibid.*, art. 2.

The activities that ought to be stopped are all kinds of activities that could disturb Friday prayer.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> The prohibited activities during the time 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 fighting vehicle, and a vehicle used to transport the dead.<sup>27</sup> However, if they want to pass by the mosque they shall report to mosque officers.<sup>28</sup>

Article 11 provides punishment. During the time, 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).<sup>29</sup>

#### 4. Syariah basis

In Indonesia, before Pancasila was accepted as a state ideology, there were two ideologies competed for the basis or foundation of state law. They were Islam and secularism [33-36]. After Pancasila was accepted as the ideology of Indonesia, it served as the basis of the state law. However, Islam and secularism still compete in interpreting Pancasila, particularly its doctrines of state ideals of religious freedom and harmony [37].

Aceh is the only province that has authority to implement Syariah 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 Syariah 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.

There are two issues in the regulations of Friday prayer, which directly related to Syariah doctrines. They are the obligation of prayer and prohibition of all activities 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.<sup>30</sup> 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*. It establishes *ta'zir* penalty of a maximum imprisonment of six months or a maximum of three strokes of caning in public for any person who fails to perform the Friday prayers for three consecutive times without *uzur syarie* or

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<sup>24</sup> Ibid., art. 6 (2).

<sup>25</sup> Ibid., elucidation to art. 6.

<sup>26</sup> Ibid., art. 9.

<sup>27</sup> Ibid., art. 10 (1).

<sup>28</sup> Ibid., art. 10 (2).

<sup>29</sup> Ibid., art. 11.

<sup>30</sup> Aceh. *Qanun* 11/2002, art. 21 (1).

without any reasonable cause.<sup>31</sup> In this 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 fully following *fiqh* doctrines. In *fiqh*, some jurists limited the prohibition to sale [38]. Others extended the prohibition to all activities that distract Muslims from the efforts to Friday prayer [39]. 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 categories. Thus, *fiqh* allows women, travellers, and non-Muslims to perform any activity as long as they do not involve whom the prayer is obligatory. In contrast, the regulations in Aceh and Banjar make no exception to women, travellers, and non-Muslims.

## 5. Other bases: Respect and freedom

In the implementation of Syariah, the Aceh region has obligations to maintain religious harmony and to guarantee religious freedom. Article 4 paragraph (2) of Law 44/1999 stipulated that the implementation of Syariah 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 Syariah 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.<sup>32</sup>

The elucidation states that Aceh government shall guarantee the freedom of adherents of other religions to observe their religions according to their own faiths. The Law guaranteed the freedom of non-Muslims and only allowed Syariah applied to Muslims. What is meant by “religious harmony” was “religious freedom”.<sup>33</sup> Its elucidation of term “religious harmony” was only repetition of Article 29 (2) of the Indonesian Constitution.<sup>34</sup>

The Articles 16 and 17 of Law 11/2006, which specifically authorises the governor, regents, mayors to implement Syariah and maintain religious harmony, restated the article above. In detail, Article 127 (Law 11/2006) stipulated the government of Aceh to implement Syariah, 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 Syariah. (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 worship according to their religions.<sup>35</sup>

In addition to Syariah, Aceh *Perda* and *Qanun* justify and base their existence on respect for the others' observance of religious rituals and religious freedom. In general, Article 4 (3) of *Perda* 5/2000 obliges everyone domiciled in Aceh to respect the implementation of Syariah. Although, the meaning of “respect” is not elucidated, the following articles on rituals (*ibadah*) give a clue to the meaning.

Every non-Muslim is not allowed to perform any activity that may disturb the tranquillity and calmness of Muslims in observing their rituals.<sup>36</sup>

<sup>31</sup> Ibid., art. 21 (1).

<sup>32</sup> Law 44/1999, art. 4 (2)

<sup>33</sup> Ibid., elucidation.

<sup>34</sup> UUD 45, Art. 29 (2): “The State guarantees the freedom of every citizen to follow his/her religion and to worship in accordance with his/her religion and belief.”

<sup>35</sup> Law 11/2006, art. 127.

<sup>36</sup> Aceh. *Perda* 5/2000, art. 8 (4).



Provincial government and social institutions shall make efforts in preventing all activities that may disturb and interfere with the observance of rituals by every Muslim.<sup>37</sup>

Thus, “to respect” means, “to not disturb.” Punishment for performing disturbing activity is three months imprisonment or fine of two million rupiah.<sup>38</sup> However, the articles do not specify in details the activity that disturbs the observance of rituals.

The obligation of everyone to respect the observance of rituals 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 suspend all activity that could prevent and disturb Muslim to observe Friday prayer.<sup>39</sup> However, like the *Perda 5/2000*, it does not specify what activity considered as preventing and disturbing the prayer and their punishment.

Unlike Aceh, the regulation of Friday prayer in Banjar does not directly command Muslims to attend the mosque or to 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. All parties have obligations and responsibilities to support the observance of rituals. Provincial, regency and city governments, and social institutions have obligations to provide facilities and create conducive condition and atmosphere for the observance of rituals.<sup>40</sup> Government agencies, educational institutions, and business enterprises have obligations to encourage Muslims and provide facilities for congregational prayers.<sup>41</sup> Parents are responsible for ensuring family members perform the daily and Friday prayers, and fast during Ramadhan.<sup>42</sup> Heads of villages shall glorify mosques and village halls with congregational prayers and other religious activities.<sup>43</sup>

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 rituals 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.<sup>44</sup>

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 rituals by Muslims in genuine freedom. For Muslims the genuine freedom means the freedom to pray and fast with tranquillity and calmness. 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

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<sup>37</sup> Ibid., art. 9 (1).

<sup>38</sup> Ibid., art. 19.

<sup>39</sup> Aceh. *Qanun 11/2002*, art. 8 (2).

<sup>40</sup> Ibid., art. 7 (1).

<sup>41</sup> Ibid., art. 9 (1).

<sup>42</sup> Ibid., art. 7 (2).

<sup>43</sup> Ibid., art. 9 (2).

<sup>44</sup> Ibid.

institutions to stop all activities that may prevent Muslims from observing Friday prayer.<sup>45</sup> Public transportation services shall stop at certain times to provide opportunity to the users to observe obligatory prayers.<sup>46</sup>

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 attendance of the mosque. Instead, it only focuses on the positive duty of the government to create a tranquil and calm atmosphere for Muslims in observing Friday prayer. It prescribes the government to 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.

In terms of non-coercive interpretation of religious freedom, Aceh *Qanun* requiring Muslims to attend the prayer and punishing those who fail to comply with, without having one of justifications allowed by Islam, is controversial constitutional issue. Although the legal text of Friday prayer in Aceh does not explicitly draw on earlier formations of the meanings of religious freedom held by Muslim groups during the constitutional debate on the Jakarta Charter in 1945, in spirit it reproduced their view of the role of the state in applying Syariah to Muslims. At the time, Muslim groups held the state had a positive obligation to apply Syariah to Muslims [40]. It had the obligation to facilitate Muslims practising their faith and to coerce them practising the rituals [4]. 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 Syariah might apply [40]. According to them, individual Muslims should be free from a coercion to observe Syariah, 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 [40].

The dominant secularist political group wanted the application of Syariah 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 Syariah as long as in a non-coercive way. The non-coercive interpretation of Jakarta Charter by secularist group would limit the extent to which Syariah 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 Syariah 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.

Regarding the application of Syariah 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 syariah 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 [41]. In the context of the regulations of Friday prayer 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.

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<sup>45</sup> Ibid., art. 8 (2).

<sup>46</sup> Ibid., art. 9(3).

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 professions of belief in God play a passive role [42]. During the New Order, the emphasis on appropriate behavioural 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 [37,42]. 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 [37].

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 [37].

Different from a previous study by [6], who claimed the regulation of Friday prayer in Banjar aimed to "enforce the observance of religious rituals," it is suggested that the government of the regency is not forcing Muslims to observe the prayer. The regulation contains no provision that coerces Muslims to attend Friday prayer. It should be perceived within the framework of religious harmony and freedom. In other words, it only regulates socio-religious relations between followers of the same religion, and between followers of different religions (Muslims and non-Muslims). They attempt to remove activity that may disturb the observance of Friday prayers. Following categories proposed by Salim<sup>47</sup> regulations of Friday prayer in Banjar is more related to "public order and social problems" rather than the enforcement of "religious obligations."

## 6. Conclusion

The study has shown that the substance of the regulations of Friday prayer in Aceh and South Kalimantan have drawn on Islamic basis and non-Islamic bases. They have taken elements of Syariah and state ideals and mixed them together.

A clear line between Syariah norms and other norms can be seen 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 such a 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. In additions, 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).

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<sup>47</sup> 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: [7,24]

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