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**SHARIAH AND RELIGIOUS FREEDOM: REVISITING 1945
CONSTITUTIONAL DEBATE**

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SHARIAH AND RELIGIOUS FREEDOM: REVISITING 1945 CONSTITUTIONAL DEBATE

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Abstract: In this this article, I discuss the constitutional debate in 1945 on the conceptions of religious freedom and its relation to sharia. I argue that the framers of 1945 Constitution wanted the application of shariah within the limits of individual freedom of Muslims and non-Muslims. They agreed it would apply only to Muslims. However, they, particularly, secular groups set non-coercive measures as a limit for state authority in the application of shariah. They preferred the state not enacting policy or law that has the intention or effect of coercing Muslims to practice sharia, particularly in the area of human relations with God.

Abstrak: Dalam artikel ini, saya mendiskusikan perdebatan konstitusional pada tahun 1945 tentang konsep kebebasan beragama dan hubungannya dengan syariat Islam. Saya berargumen bahwa para perumus Undang-undang Dasar 1945 menginginkan penerapan syariat dalam batas-batas kebebasan individual warga Muslim dan non-Muslim. Mereka setuju bahwa penerapan syariat hanya berlaku untuk Muslim. Namun mereka, khususnya kelompok sekuler, menginginkan negara menerapkan hukum Islam dengan tanpa kekerasan. Mereka lebih memilih agar negara tidak membuat kebijakan atau aturan yang bertujuan atau yang mengakibatkan pemaksaan terhadap Muslim untuk melaksanakan syariat, khususnya dalam urusan hubungan manusia dengan Allah.

Keywords: *Sharia, religious freedom, coercion, and Constitution.*

Introduction

During the formulation of the constitution in 1945 before the Independence of Indonesia, the founding fathers sharply debated the position of shariah. Many studies have focused on the issues related to shariah debated by Muslim and secular nationalists but without giving any particular emphasis on the issue of religious freedom.¹ Other addressed the conceptions of state by both camps.² This article, therefore, will discuss the debate with a particular emphasis on the conceptions of religious freedom. If shariah applies in Indonesia, the questions are: To whom shariah applies? How is the status of non-Muslims? If shariah applies only to Muslims to what extent the state may apply shariah (e.g. coercive)? If a Muslim and non-Muslim commit a shariah criminal offense together, what law applies for the non-Muslim?

The constitutional debate in 1945, before the Jakarta Charter was deleted on August 18 from the Preamble of UUD 1945,³ is the appro-

priate place for studying the shariah and religious freedom for at the time there was an agreement on its application. In addition, it is interesting to see what kind of compromise they achieved (then cancelled) regarding the issue of religious freedom if shariah is applied in the newly independent Indonesia.

During 1945 constitutional debate to form new Indonesia state, Muslim groups struggled for Islamic state. Meanwhile, other groups wanted the state separated from religion.⁴ Failing to form a full pledged Islamic state, Islamic groups, in an ideological sense, agreed the formation of the state at least based on the obligations of the Muslim subjects to practice shariah. However, they also lost to secular groups in the latter.⁵ The focus of their political thought was the duties of Muslim subjects, not their rights as citizens. To them, the government exists to implement God's law or to enforce religious obligations. The fundamental nature of the clash between the advocates of the Islamic state and

the secular state of Indonesia is well articulated by Hooker when he says: “the absolute claim to prescribe a system of obligation for believers which Islam makes by its very nature clashes with the principle of secularism.”⁶

At the time the phrase, “*dengan kewajiban menjalankan syariat Islam bagi pemeluknya*” (with the obligation for Muslims to carry out shariah) was incorporated into the constitution. It was as an add-on to the first principle of the national ideology *Pancasila* that states “*Ke-Tuhanan*” (Godhead). These “seven words” later became known as *Piagam Jakarta* (Jakarta Charter).⁷ It casts a religion, particularly Islam, in the language of obligation or duties.

The Degree of State Support

Theoretically, according to Sapir, the degree of support the state provides to religion range from no support at all, equal support, preferred but non-coercive support, and coercive support—direct and indirect.⁸ The state gives no support at all to religion if it requires full privatization of religion and separates between religion and state. It also proscribes the state to provide financial support to religious institutions and activities, even when the state uses neutral criteria and does not have any intention of advancing religion. Its aim is to establish a civil public order where religion may not even be acknowledged.⁹

The state provides equal and neutral support if it neither encourages nor discourages religion. The state should minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or non-observance. This practically requires that religion is to be left as wholly to private choice. The acknowledgement of religion is permitted as long as the state remains neutral and does not endorse and prefer any specific religion or religion in general. The government cannot utilize religion as a standard for action or inaction. Neutrality takes two forms: formal and substantive. Formal neutrality would permit the state to support religious institutions as long as it supports all institutions and not to religious institutions alone. On the other hand, substantive neutrality, in most cases, will often require support and that religion be singled out for special treatment.¹⁰

A state gives preferred but non-coercive support, if it singles out religion in general or any religious denomination as more valuable than other options. A state should not, however, take action, or enact policy or law, that has the intention or effect of coercing people to accept any specific religion or religion in general. The state may prefer religion financially, symbolically, or through any other possible means, the state should avoid intervention resulting in favouring religion in general, or any specific religion, to the extent that it makes it much harder for people to remain nonreligious or to avoid practicing a religion other than their own.¹¹

The state applies coercive support if it persuades persons or compels them by force to do their religion or other religions. In the narrow interpretation, coercion is only recognized when a person is compelled by force or threat to do something that he would not otherwise do. In the broad interpretation, any state intervention resulting in favouring religion in general or any specific religion, and that makes it much harder for people to remain nonreligious or to avoid practicing a religion other than theirs, is considered as coercive support.¹²

Freedom of religion as a right is one of fundamental components of first generation of human rights. Freedom of religion is also recognized as a liberty in the sense that it is an important part of citizen’s rights as a participant in the political process enshrined in the constitution. The concepts of “human rights” and “civil liberties” are interchangeable and overlapping. However the two concepts can be distinguished. They are overlapping in the sense that some of what is described as a ‘civil liberty’ is also recognized as a ‘human right’. They are different, first according to the Hohfeldian analysis a ‘liberty’ is only one meaning of the concept of rights. Second, human rights are more fundamental than civil liberties in the sense that the former provide the overall framework of freedom within which the latter can operate.¹³

In a vision of political morality, the real advantage of having a right is what it means to people other than the right-holder, specifically, those against whom the right is held. Here, right is approached from the perspective of those

against whom the right is held. This perspective emphasizes that an important function of rights in political morality is that rights set constraints on what governments can do and that rights narrow the range of possible goals they can pursue or even can sometimes set. Those rights constraint the ways the government and other can treat the citizens. If freedom of religion is right, for example, what is its significance held against the government? What does the right to freedom of religion mean to the government? Dworkin's image of rights as trumps is powerful because it emphasizes that in politics, rights function to restrict rather than to motivate ordinary political decision-making. Rights in this sense are valuable because they constrain government rather than because of what they mean to the right-holder.¹⁴

From an analytical perspective, there is no agreement whether liberty has two concepts or single concept. Berlin distinguishes between two concepts of political and social freedom, the negative and the positive: "freedom from" and "freedom to".¹⁵ Negative freedom is the absence of coercion or interference from other people.¹⁶ Coercion is when other people prevent you by force from acting in a certain way or force you to act in a certain way.¹⁷ Positive freedom is.¹⁸

The enforcer may be an individual, or may be collective as in the case of laws passed by the state. This negative conception of liberty could be seen in a threat or law forbidding an action. Threats and laws restrict liberty despite the fact that we are able to defy them. A person faced with a threat or law forbidding him from performing an action, is unfree, not because he cannot perform the forbidden action or because he may be deterred from doing so, but because he cannot perform it with impunity. That is to say, before the threat of law was issued, he was free to perform the act in question without penalty; but now that the threat or law has been issued, he is no longer able to perform the act without penalty.¹⁹ The condition of unfreedom also occurs if law obliging a person to do an action. Before the law was issued, there was availability of choices for a person to do or not to do. The obligation coerces him to do the act if he does otherwise he will be punished.

But Gray, referring to Feinberg and MacCallum, argues that these labels are quite

unhelpful, since virtually any kind of liberty could be expressed in terms of either "freedom from" or "freedom to".²⁰ MacCallum shows that that every freedom is simultaneously both *from* something, *to do* something. In his classic article, "Negative and Positive Freedom", MacCallum maintains whenever the freedom of an agent is in question, it will always be freedom from some element of constraint upon doing or becoming (or not doing or becoming) something. Freedom is 'always one and the same triadic relation' between agents, constraints, and ends. To speak of the presence of freedom is always, in consequence, to speak of an absence: absence of constraint upon an agent from realizing some goal or end. There is, in other words, only one concept of liberty.²¹ Based on the triadic relation between agents, constraints, and ends, freedom of religion means absence of constraint upon and agent to do or not to do a religion. In other words, freedom of religion means an agent is free *from* some element of constraint *to do* or not to do a religion.

In any actual situation the right to freedom of religion, for instance, will be a formal liberty-right (asserting the absence of a rule forbidding me to do my religion), a substantive liberty or claim right (asserting the negative duty of all others to interfere with doing my religion and maybe the positive duty to assist me in doing my religion). The right to freedom of religion may also be an immunity right (against anyone introducing laws that prevent me doing my religion).²²

The Jakarta Charter

Before the independence, in March 1945 the Japanese announced the formation of an Investigating Committee for Preparatory Work for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, BPUPKI).²³ The Committee was to prepare all matters related to the political and administrative framework of an independent Indonesian state.²⁴ The BPUPKI met in two short, concentrated sessions over the following two months. Its first session was broadly devoted to discussion of the ideological underpinnings of the proposed new state.²⁵

The first session of BPUPKI was opened on May 28, 1945. During the first series of the

BPUPKI meetings (29 May-1 June), 32 members had presented their proposals for state philosophies.²⁶ At the meetings, the Muslim nationalists who struggled for Islamic state were opposed by the secular nationalists, who demanded an independent Indonesia secular state. One of the representatives of Islamic groups, on 31 May 1945 Ki Bagoes Hadikoesoemo in his speech demanded the Islamic state or Islam as the basis of the state which would apply Islamic law. He argued that the Islamic state was an appropriate choice because 90 percent of the people were Muslims. He claimed that Islamic teachings would create just and wise governance based on morality, deliberation and consensus, and no coercion of religion. It would not ban its citizens to embrace and practice other religions.²⁷ He meant the freedom *out of* but not *within* Islam that was the freedom of non-Muslims to embrace and to do their religions. However, he did not address the individual freedom within Islamic community.

From the secular nationalist faction, Sukarno urged that his principles should be adopted. Since, he claimed that his version of state philosophy could accommodate all Indonesian people whatever their races, ethnicities and religions. In his speech of 1 June Sukarno presented what he called "*Pancasila*", the 'five principles': nationalism, international humanism, popular sovereignty, social justice and the belief in God.²⁸ Concerning the issue of religion, Sukarno's did not give a special status or position to any religion. By the principle of the belief in God, he meant that the new nation-state Indonesia would be for all religions. It also meant that religions should be practiced in a civilized way or by a mutual respect: each adherents of religion should respect other religions.²⁹

Before breaking up on the June 1, 1945 the BPUPKI decided to set up a sub-committee under Soekarno to be responsible for analyzing and classifying suggestions for the future constitution. On June 22, Soekarno organized a joint meeting of the BPUPKI Subcommittee (*Panitia Kecil*), those members of the BPUPKI who also sat on the members of the *Cuo Sangi-in* (Central Advisory Council, the body established in September 1943 to provide advice to the Japanese), as well as any others that happened to be

in Djakarta at the time. The meeting was held in the head offices of the Djawa Hookookai, and was attended by 38 people. This group then appointed its own subcommittee of 9 members (*Panitia Sembilan*) to act as an executive and drafting committee. The main product of this Committee's work was a preamble for the new Constitution later to become famous, and controversial, as the Djakarta Charter which said that the state was to be based upon 'belief in God, with the obligation for adherents of Islam to carry out Islamic law'.³⁰

By the compromise the Muslim groups agreed that the state should not be exclusively based on Islam but instead it was built on the foundation of more neutral principle of belief in God which belongs to all religions. However, Islamic group, in an ideological sense, still demanded the special place of Islam for the formation of the state at least for its adherents only by building the state that also based on the obligations of the Muslim subjects to carry out shariah. The agreement, according to Supomo, gave a special treatment to Muslims.³¹

During the second session of the BPUPKI meetings (10-16 July), the formula of the Jakarta Charter was sharply debated in the constitution subcommittee headed by Sukarno. It was under attack both from Muslim, non-Muslim, and secular members of the subcommittee.³² The Islamic group was very dissatisfied with the vagueness and ambiguity of this commitment. Non-Muslims were worried about the freedom of their religions. Secular Muslims were worried about the individual freedom of Muslims and non-Muslims as well.

Religious obligation and freedom.

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

Members of the Committee (BPUPKI) interpreted the Jakarta Charter in different ways.³³ It could mean that: (1) there would be two laws:

one for Muslims and the other for non-Muslims;³⁴ (2) the State may coerce Muslims to carry out shariah, for example, coercing Muslims to pray;³⁵ or (3) Muslims have an obligation to carry out shariah before the existence of the Indonesia state, while they are living under the state to carry out shariah is the right of Muslims;³⁶ or (4) the government had the obligation to carry out the shariah Islam for Muslims.³⁷ In terms of the constitutionalism, it could mean that the Constitution gives the government a power to enforce shariah or the state is obligated to implement Islamic law among Muslims. This interpretation is true, if the word 'obligation' refers to the state or government. If the word 'obligation' refers to the government, it could mean that: (1) The state is under a 'constitutional 'obligation' to facilitate Muslims practising their faith and (2) The state is under a 'constitutional obligation' to coerce Muslims practising their faith.³⁸

During the second session of the BPUPKI meetings (10-16 July), the members of the constitution subcommittee headed by Sukarno sharply debated the formula of the Jakarta Charter. Some of the members of the committee, particularly secular Muslims and non-Muslims were worried about the individual freedom of Muslims and non-Muslims. They were worried that based on this constitutional provision, the government would impose the obligation to carry out shariah by coercing Muslim citizens, for example, to fast, pray, etc.³⁹ What they were worried about was the coercive nature of the state and this coercive power to enforce shariah would be legitimate if the constitution conferred such power. They were also worried if shariah would apply to non-Muslims as well.

What the non-Muslims were worried about was not without reason because some members of the Committee wanted shariah be applied to all. Ki Bagus Hadikusumo (Muhammadiyah⁴⁰ leader), for example, raised the issue of the scope of the application of shariah law. He had asked many times the exact meaning of the phrase "The state is founded on Godhead, with the obligation to carry out the Islamic shariah for its adherents." At the meeting of July 14, 1945, while discussing the Preamble (i.e., the Jakarta Charter), he did not agree if it meant that shariah law would apply only to Muslims. Then, he

proposed to omit the words "for its adherents" (*bagi pemeluk-pemeluknya*) for linguistic reasons and the substantive one.⁴¹ He said that he did not agree with the phrase if it meant that there would be one law for the non-Muslims and one for the followers of Islam. For example, shariah criminal law on alcoholic consumption would apply only to the adherents of Islam. This would only lead to resentment and anger in the country at large once it was known.

Those who accepted the Jakarta Charter but had concerns for the right to religious freedom were attempting to set the limits of shariah application. To anticipate and avoid the interpretations that the state might coerce Muslim complying with shariah, the clause on religious freedom was added after the repetition of the Jakarta Charter in the article 29.⁴² It is also to restrict the application of shariah only to Muslims, thus non-Muslims are free from shariah law and free to practice their own religions.⁴³ The addition of the clause on religious freedom was to set the limits of the application of shariah and to restrict the government authority. It might not make law to coerce Muslims to practice shariah. However, unlike American constitution, it was not explicitly stated. Thus, the framers of the constitution intended religious freedom clause to limit the interpretation of the Jakarta Charter into non-coercive application of shariah.

Freedom of Individual Muslims.

Hoesein Djayadiningrat and Wongsonegoro (a liberal Javanese) expressed their concerns for religious freedom of individual Muslims, if shariah is applied in the Independent Indonesia. They are worried that the Jakarta Charter would be interpreted in such a way that the government might coerce Muslims to do religious duties. Thus, their particular concern was the individual freedom of Muslims *from* coercion to comply with shariah. On the second day of the meeting (11 July 1945) of the second round of the BPUPKI meeting (10-16 July 1945) for deliberation by all BPUPKI members, Djayadiningrat objected to the Jakarta Charter. He argued that it could create religious fanaticism in the form of coercion of the Islamic adherents to practice religious duties, such as forcing Muslims to do prayer (*shalat*).⁴⁴

Wongsonegoro expressed similar concern for individual freedom of Muslims from coercion to do shariah on the fourth day of the meeting (13 July 1945) while discussing the wording of Article 29 (2) on religious freedom.⁴⁵ The Article 29 on Religion proposed by the Committee headed by Soepomo read as follows: "*Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agama apapun dan untuk beribadat menurut agamanya masing-masing*" (The state guarantees the freedom of every resident to profess any religion and to worship according to his religion).⁴⁶ Wachid Hasjim suggested that the article on religion be changed as follows: "The religion of the state is Islam, with the guarantee of freedom for adherents of other religions to profess their own religion . . . etc." He argued the religion of the state was closely related to defence of the state. In general, the defence based on a belief was very great because according to religious teaching one's own life could only be sacrificed for religious ideology. Oto Iskandardinata objected to Hasjim's suggestion on the religion of the state. He proposed that the seven words of the Jakarta Charter on the preamble be repeated in the Article 29 (1) and "the State guarantees the freedom etc.," stated in the Article 29 (2). Wongsonegoro argued the article 29 (2) was ambiguous and could be interpreted that the state might coerce Moslems to do Islamic shariah. To anticipate the coercive interpretation, he proposed the word "kepercayaan" (belief) added after the word "agamanya" (his/her religion).⁴⁷

The freedom of non-Muslims.

The Jakarta Charter caused the anxiety and fear among non-Muslims. On 15 July 1945, Soepomo (from the Committee for Formulating the Constitution) explained each article of the Constitution. On the Article 28 on Religion, he explained why the Committee incorporated the right to religious freedom into the Constitution.⁴⁸ He explained that the Jakarta Charter and its repetition in the Article 28 (1) had caused a feeling of fear and worry among non-Muslims about the future of their religious freedom. To relieve and banish the anxiety or doubt from non-Muslims, therefore the Article 28 (2) stated "*Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agama lain dan untuk beribadat menurut*

agamanya dan kepercayaan masing-masing" (The state guarantees the freedom of every resident adhere to other religion and to worship according to his religion and belief).⁴⁹ Soepomo restated this explanation after replying to Abdul Fatah Hasan's objection to the wordings of the Article. Soepomo said that Indonesian non-Muslims need not to worry about their freedom to embrace and practice their religion because the Committee totally rejected *gewetensdwang* or forcing of conscience.⁵⁰

Freedom to change religion.

The issue of freedom to change a religion, particularly among Muslims, emerged during the debate on the Article 28 section 2. The Islamic faction was worried that the section of the Article might suggest Muslims to freely change their religion. Therefore, they proposed the changing of the wordings. However, despite their disagreement with the wordings implication on the issue, they did not propose any article banning Muslims from leaving Islam.

As described before that Abdul Fatah Hasan objected to the wording of the Article 28 (2) read by Soepomo. He said that it seems to suggest that a Muslim was free to change his or her religion and to embrace other religion. Therefore, he proposed the first word "*untuk*" be substituted by the word "*yang*", and the word "*dan*" omitted. So the article read "*Negara menjamin kemerdekaan tiap-tiap penduduk yang memeluk agama lain untuk beribadat menurut agamanya dan kepercayaan masing-masing*" (The state guarantees the freedom of every resident who profess other religion to worship according to his religion and belief).⁵¹ This demand was supported by Sanoesi who argued that the words "every resident" (*tiap-tiap penduduk*) also include Muslim residents. Soepomo agreed to any change if it produced clearer meaning and interpretation. However, Latuharhary objected to the wordings from Abdul Fatah Hasan because it changed the meaning from respecting religion to respecting adherents of religion. According to Latuharhary, what the subcommittee meant was the former not the later and he was stick to the former.⁵²

Dahler came up with the following wording: "*Negara menjamin kemerdekaan tiap-tiap penduduk untuk memeluk agamanya dan akan beribadat menurut agamanya dan kepercayaannya masing-masing*" (The state

guarantees the freedom of every resident to embrace his/her religion and to worship according to his/her religion and belief). He argued the wording was to avoid the worry from Abdul Fatah Hasan and Sanoesi about the previous wording that had implicit suggestion to Muslims to change their religion freely. Hatta expressed his agreement with Dahler's wording and hoped the floor would accept it. He argued that it did not single out any religion. It mentioned all religions. Soepomo also agreed with Dahler because the later proposal was clear and not creating misunderstanding. Finally, Abdul Fatah Hasan expressed his agreement. To end the debate, Radjiman (Chairman of the meeting) read the wording from Dahler and asked the agreement from the floor.⁵³ All accepted.

Government obligation to implement shariah.

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

KH Masjkoer was the first to argue the Charter meant the government had the obligation to carry out the shariah Islam for Muslims.⁵⁴ The argument was to support the Muslim group's proposal of making a Muslim as a qualification for the President. However, the member who initiated the move to make a Muslim as a qualification for the President was Wahid Hasjim. At the meeting of the Working Committee of the Constitution on 13 July 1945, the Chairman read Article 4 on the President that stated, "The President shall be a native-born Indonesian." However, Hasjim proposed that the words "*yang beragama Islam*" (an adherent of Islam) be added to the Article. Thus it should read, "The President shall be a native-born Indonesian, an adherent of Islam."⁵⁵ A. Wahid Hasjim received support from Sukiman, who claimed that while this proposal would not actually change the situation, the wording chosen would please the people. Agus Salim and Djajadiningrat, although had Islamic connec-

tions, opposed Hasjim's proposal. Agus Salim claimed that the proposal demanded more than what had been compromised between the nationalist and Islamic factions and broke the later group's promise to protect other religions. Djajadiningrat supported by Oto Iskandar di Nata asked the words "an adherent of Islam" be deleted from the Article on the President.

Abdoelrahim Pratalykrama and K.H. Masjkoer made second move in the meeting of 15 July 1945. Pratalykrama suggested the Constitution or another law should have the clause on the origin, age, and religion of the Head of the State or President of the Republic of Indonesia. He proposed that the President should be a native-born Indonesian, at least 40 years of age, and an adherent of Islam.⁵⁶ Responded to his proposal, particularly on the religion of the President, Soepomo regarded the demand was going beyond the compromise (Jakarta Charter) had been achieved by the Islamic and nationalist groups. Soepomo reminded the floor to stick to the compromise and to honour the Jakarta Charter by not demanding more than that. He added that the Muslim majority (95%) of the Indonesian population was enough to guarantee a Muslim President would be elected.⁵⁷ Then, K.H. Masjkoer (a Nahdlatul Ulama activist) came up with two options to solve what he claimed as two conflicting articles, between the Article 7 on the President and the article 28 that repeated the seven words from the Jakarta: either to change the article 28 or the article 7. He argued that the Charter meant that the government had the obligation to carry out the shariah Islam for Muslims. If the President were a non-Muslim, he/she would not be trustworthy to carry out the Islamic law and would not be acceptable to the Islamic faction. If the repetition of the Jakarta Charter in the Article 28 remained unchanged, it meant that the President should be a Muslim. However, if being a Muslim was not decided as the qualification of the President, then the Article 28 should be changed into the stipulation that "The official religion of the Republic of Indonesia is Islam".⁵⁸

Even though, Sukarno agreed with K.H. Masjkoer that a non-Muslim President could not carry out the Islamic law properly, he argued, in line with Soepomo, that in real politics the President would be a Muslim since the major-

ity of the population of Indonesia adhered to Islam. He claimed that the draft of the constitution, which did not require the President be a Muslim, was an honour to the Jakarta Charter.⁵⁹ The secular nationalist groups objected to K.H. Masjkoer's proposal. One of its representatives, Sukardjo Wirjopranoto, argued that the proposal was in conflict with the principle of equality in Article 27 of the Constitution: "All citizens shall have equal position in law and government." It meant that every citizen had a right to be the President regardless of religion.⁶⁰ The meeting of 15 July 1945 finally ended with deadlock. The issue of the religion of the President was settled in the next meeting, July 16, 1945, after Sukarno directed an appeal to all members, especially to the Nationalist faction and non-Muslims, to make a sacrifice by accepting the words "an adherent of Islam" as a qualification for the President of the Republic of Indonesia.⁶¹

The Future of Shariah in Indonesia

Elson objected to the view that Jakarta Charter was a victory for Islamist activists. He argued it was a mark of the Muslim activists' signal failure to attain a full-fledged Islamic state. To him, it was "a vague, purely symbolic and patronizing concession made to them by the dominant secularist political grouping at a time of national emergency".⁶²

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

and does not coerce them to comply with. In other words, the state may facilitate Muslims to practice their religion, but it should avoid punishing those who do not practice it. The only possible type of law would be an administrative in its nature, not the coercive one like criminal law.

The argument from religious freedom, as the absence of coercion, against state enforcement of shariah is plausible in the area of shariah that requires a sincere intention to serve and obey God as a condition for its validity.⁶³ For example, the prayer and fast as *ibadah* belong to area of God-human relation that must be done with the intention of pleasing God. They are human obligations towards God.⁶⁴ The jurists agreed the intention (*niat*) as a condition for the validity a pure act of worship (*ibadah mahdah*) with no rational or tangible meaning and interest.⁶⁵ In *fiqh*, the Friday prayer and fasting of Ramadhan belong to this category. According to majority of jurists, intention is a condition for the validity of the prayer and fast.⁶⁶

According to An-Na'im, compliance with religious obligations without a sincere intention to serve and obey God, for example for fears of coercive enforcement by state institutions, will invalidate those religious acts. Therefore, the absence of coercion is as a necessary condition for Muslims to comply with their religious obligations. The state may not use coercion to enforce compliance with shariah.⁶⁷

However, the domain of shariah can extend well beyond the God-human relations.⁶⁸ Shariah also regulates the area of interhuman relations (*mu'amalat*) that does not require a sincere intention as a condition of its validity. According to Sachedina, all laws that regulate God-human relationships (*ibadah*) are under the divine regulation, beyond any adjudication by human court. In contrast, interhuman relations are within the jurisdiction of human institutions founded on political consensus with the purpose of furthering justice and equity in society. Muslim governments may regulate the latter area of shariah except when the free exercise of religion for any individual is in danger.⁶⁹

The tendency to limit the application of shariah law into administrative level and avoiding the coercive law was evident from number of Islamic laws enacted during the New Order

until before the emergence regional laws on shariah. Salim and Azra described and analysed the implementation of shariah at national level. They argue that the legal characteristics of the implemented shariah at national level are private and optional, not compulsory. For example, the Law of Zakat does not oblige Muslim to pay zakat and does not punish those who fail to pay zakat. The Law on Hajj and the Law on Islamic Banking does not ban Muslims from subscribing to the Conventional Banks and does not oblige every Muslim to be customer of Islamic banking. They are free to choose which bank they like.⁷⁰ However, Salim adds that at the local level certain shariah regional regulations are coercive by applying punishments.⁷¹ These new phenomena of shariah regulations need a further study in the lights of non-coercive interpretation of religious freedom.

Conclusion

From the debates in the BPUPKI, there were attempts to set limits on the state authority to apply shariah in order to guarantee religious freedom of individual Muslims and non-Muslim as well. First, shariah would apply only to Muslims. Thus, non-Muslims are free from the obligation to carry out shariah and free to practice their own religions. Second, individual Muslims should be free from the coercion to observe shariah, particularly on the personal matters between humankind and God such as prayer and fasting. However, this non-coercive interpretation is not relevant to areas of shariah that regulate interhuman relations.

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NOTES

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- ⁴ Anshari, "The Jakarta Charter," 2, 23; Elson, "Jakarta Charter," 108-12.
- ⁵ Elson, "Jakarta Charter," 130.
- ⁶ M. B. Hooker, *Islamic law in South-East Asia*, East Asian social science monographs (Singapore; New York: Oxford University Press, 1984). 267-68.
- ⁷ Anshari, "The Jakarta Charter," 25.
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- ⁹ *Ibid.*, 587-88.
- ¹⁰ *Ibid.*, 588-90.
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- ²⁷ Ibid., 33-48.
- ²⁸ Ibid., 92-102.
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- ³⁰ Anderson, *Some aspects of Indonesian politics*: 27; Elson, "Jakarta Charter," 112-13.
- ³¹ Sekretariat Negara Republik Indonesia (Setneg RI). *Risalah Sidang BPUPKI*: 291.
- ³² Elson, "Jakarta Charter," 115.
- ³³ Boland, *The struggle of Islam*: 27, 36-37.
- ³⁴ Sekretariat Negara Republik Indonesia (Setneg RI). *Risalah Sidang BPUPKI*: 264.
- ³⁵ Ibid., 240, 48.
- ³⁶ Ibid., 240.
- ³⁷ Ibid., 369-70; Anshari, "The Jakarta Charter," 33-34.
- ³⁸ Nadirsyah Hosen, "Religion and the Indonesian constitution: A recent debate," *Journal of Southeast Asian Studies* 36, no. 03 (2005): 438-39.
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- ⁴⁰ Muhammadiyah is Modernist Islamic organisation founded in 1912 by Ahmad Dahlan.
- ⁴¹ Sekretariat Negara Republik Indonesia (Setneg RI). *Risalah Sidang BPUPKI*: 264.
- ⁴² Ibid., 248.
- ⁴³ Ibid., 302.
- ⁴⁴ Ibid., 240.
- ⁴⁵ Ibid., 248.
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- ⁴⁷ Ibid., 247-48.
- ⁴⁸ Ibid., 301.
- ⁴⁹ Ibid., 302.
- ⁵⁰ Ibid., 303.
- ⁵¹ Ibid., 364.
- ⁵² Ibid., 365.
- ⁵³ Ibid., 366.
- ⁵⁴ Ibid., 369-70; Anshari, "The Jakarta Charter," 33-34.
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- ⁵⁶ Ibid., 366-67.
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- ⁶⁰ Ibid., 372-73.
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- ⁶⁷ Abdullahi Ahmed An-Na'im, *Islam and the secular state: Negotiating the future of Shari'a* (Cambridge, Mass.: Harvard University Press, 2008). 4.
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