

**A BREAKTHROUGH IN DEALING WITH THE PROBLEMS OF
INTERNALIZATION OF INTERNATIONAL LEGAL STANDARDS IN INDONESIA:
Towards a better protection of the right to freedom of religion and belief¹**

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abstract

Freedom of religion as part of human rights that are fundamental and may not be derogated under any circumstances. However, along with the determination of the Indonesian state to realize a democratic constitutional state, the fact is there are various forms of violations of religious freedom which the state is frequently absent or fail to prevent the violation. The emergences of various laws that tend problematic and discriminatory significantly distort it back to what guaranteed and recognized by the Constitution of the Republic of Indonesia Year 1945 as well as international agreements that has been ratified by Indonesia. In addition, it is considered to be triggered various forms of violations of religious freedom, even used as a basis for stakeholders to discriminate against minority groups, or to criminalize certain groups. Therefore, it takes both legal and non legal breakthrough to optimize harmonization and synchronization of international legal standards within various regulations in dealing with the right to freedom of religion in Indonesia.

Keywords: regulation, the right to religious freedom, harmonization, synchronization

Introduction

Since the establishment of the state of Indonesia, 1945, there is no doubt that Indonesia is a very tolerant society, respect for diversity, and uphold the motto of Unity in Diversity. Pancasila as the life of the state and society for decades been tested with all the differences owned coexistence, mutual respect and mutual respect. Even from the roaming history revealed by Mahfud MD concluded at the time of the establishment of the state of Indonesia, although the atmosphere is filled with mysticism in the fact that Islam is the majority religion in Indonesia³ but Islamic groups have no desire at all to realize the law exclusively for Muslims themselves. The concept offered by our founding fathers away from a desire to limit the freedom of other religions, other than Islam as a religion-majority that the Constitution should

¹ Paper presented in the Conference on "Religion, Democracy, and Civil Society," to be held on October 7-10, 2012, at Brigham Young University, Provo, Utah, United States.

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³ Based on data from the National Statistics May 2010, 237.6 million people in Indonesia 207.2 million (87.1%) are Muslims, 16.5 million (6.96%) = Protestant, 6.9 million (2.91 %) = Catholic, 4 million (1.69%) = Hindu, 1.7 million (0.72%) = Buddhist, 117.09 thousand (0.05%) = Khong Hu Chu, 299.6 thousand (0.13%) = another school, 896.7 thousand (0.4%) = not identified.

provide guarantees for each citizen to be free of any religion and to worship according to their religion, and their respective beliefs.⁴

But it is undeniable that during the course of this government is going, there are still some issues that indicate a waiver of the rights of citizens not to mention the right to religious freedom.

This paper does not intend to look back on the various issues related to freedom of religion in the past, but more emphasis on contemporary issues that tickles author, why in the current legal protection of human rights in Indonesia is making progress, the issue of religious freedom and warm back sticking discussed?.

Various advances in the field of human rights law in question is the first one, a number of international human rights instruments has been ratified by the Government of Indonesia. Related rights to freedom of religion, in 2005, Indonesia has ratified the *International Covenant on Civil and Political Rights (ICCPR)* of 1966 through Law Number 12 Year 2005 without reservation. Similarly, Indonesia also has ratified *the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* by Law No. 29 of 1999. Second, Indonesia's participation in various forums and international organizations is a form of earnestness Indonesia to be part of the community who want to protect, respect and guarantee human rights. On 25 November 1981, United Nations (UN)-to which Indonesia is a member-issued No.36/55/1981 UN General Assembly resolution on the *Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or belief*. This declaration supporting religious freedom widely both in the form of belief and conviction in the form of religious expression, the establishment of houses of worship, community establishment, propaganda, and the spread of ideas through various media. Third, amendment of the Constitution of the Republic of Indonesia Year 1945, which includes chapter XIA of Human Rights laydown on provisions of Article 28A-28J and beyond Chapter XIA namely Articles 28 and 29 have confirmed that human rights are part of the constitutional right of the people.⁵

⁴ See paper presented by Mahfud MD Conference of Religious Leaders in the ICRP: Affirm Religious Freedom in Indonesia, Demand Commitment President and Vice President-elect, organized by the Indonesian Conference on Religion and Peace (ICRP) on Monday, October 5, 2009 in Space Vanda II Pensions versatile, Jakarta., page 6.

⁵ Human rights as expressly stated in the Constitution it is recognized as the people's constitutional rights. See Ashidiqi, Jimly, Constitutional Rights of Women and Enforcement Challenges, paper presented at the National Consultation Public Dialogue and National Commission for Women "Women and the Constitution in the Age of Regional Autonomy: Challenges and attitudinal Together". Jakarta, 27 November 2007. Can be accessed through http://jimly.com/makalah/namafile/8/HAK_KONSTITUSIONAL_PEREMPUAN.doc

Article 28E and Article 29 paragraph (2) of the 1945 Constitution expressly guarantees the freedom of religion and belief. In fact, Article 28 of the 1945 Constitution affirmed religious liberty may not be eliminated under any circumstances. These provisions indicate the constitution that guarantees freedom of religion as a valid principle. Right to religious freedom is a right that should not be contested by the state. Other legal instruments that guarantee freedom of religion is the Law Number 39/1999 on Human Rights. Article 4 of the law states that the right to life, the right not to be tortured, the right to personal freedom, thought and conscience is a human right that must not be reduced under any circumstances and by anyone. In article 22, paragraph 2 states that the state guarantees the freedom of all people embrace their own religion and to worship according to their religion or belief. Fourth, in the realm of policy in 2011, the government finally issued a National Action Plan on Human Rights (*Rencana Aksi Nasional Hak Asasi Manusia - RANHAM*) for the period 2011-2014. Fifth, the existence of institutions such as human rights in Indonesia (National Human Rights Commission / KOMNASHAM) and the Court of Human Rights and other NGOs engaged in human rights become an integral part of the efforts to ensure the protection of human rights in Indonesia.

In fact, some progress made by Indonesia mentioned above is not enough to guarantee the exercise of freedom of religion without infringement. In a note KOMNASHAM least during January to November 2007, it can be noted that there have been 135 cases of violations of religious freedom. From 135 events, recorded 185 violations in 12 categories.⁶

A report commissioned by the one of Indonesia NGO namely ELSAM criticize that in 2011 the right to freedom of religion and belief is still deteriorating. ELSAM noted there are at least 63 cases of violation of the right to freedom of religion or belief is done in various forms such as discriminatory policies, arson, burning of house churches, assault, act of omission by the authorities, etc. A violation of freedom of religion or belief, it is most often done by the local government, as an institution which should provide protection for all its citizens, without exception. This of course raises a question mark, if the level of recognition and the constitution has provided very strong guarantees on the right to freedom of religion, why are there different forms of violation of the right to freedom of religion as proposed by the National Human Rights Commission and NGOs working in the field of human rights. What exactly is behind?

⁶ See 2007 Annual Report KOMNASHAM, accessed by author on January 11, 2009 at <http://komnasham.or.id>

According to the opinion writer, there are several causes that lead to acts of violence or violation of the right to freedom of religion. But the most prominent of which was first proposed, the failure of internalization of international human rights law norms into the various national laws and local products that have not been socialized well in practical life in the community. Internalization of international human rights law norms into national law is limited to the highest legal norms that are Constitution of the Republic of Indonesia Year 1945 and some of the particular Act, but the majority of law made by the legislature yet human rights dimension. This is evident from the amount of the Laws proposed to judicial review to the Constitutional Court of the Republic of Indonesia because it is against the constitution. Second, the constitution guarantees the right to religious freedom is half-hearted. Third, the existence of laws that no human rights dimension used as a source for the birth of regulation at the level below it, resulting in the implementing regulations are also problematic and discriminatory. Fourth, the concept of autonomy has been inaccurately interpreted so that there is a trend of regional regulatory authority area outside the region and potentially violate human rights especially the right to freedom of religion. Fifth, the country's silence about the proliferation of products made by local law beyond its authority local governments that tend to violate the constitutional rights of the people especially the right to freedom of religion. Various problems mentioned above will be examined one by one in this paper and then think about a way out of the most effective and relevant.

Problem internalization of international human rights law in term of the right to freedom of religion

Legal implications of the Indonesia ratification of international treaties is that Indonesia bound and subject to the content of the agreement as part of the national legal system. That is, the various laws that have been there, but the substance has not been in line with the principles contained in the covenant is a legal product should be revised or revoked. Second, the law-making body should heed the principles contained in the covenant in drafting or creating new legislation. The norms that exist in the instrument should be adhered to and used as a barometer in making laws and regulations in Indonesia. It departs from the Law Number 24 Year 2000 concerning Article 13 of the Vienna Convention requires that any international treaty ratified by the state must be included in the piece that binds all citizens of Indonesia.⁷ Understand the

⁷ Implicit in the concept 13 of Law No. 24 of 2000 is influenced by the thought of Mochtar Kusumaatmadja who accept the theory of monism with primacy of international law, international law means putting higher position than national law ". Although it was recognized that the Act does not expressly stated so. Agusman, Damos Dumali. Legal

universality of human rights gained after launched by the United Nations (UN) is characterized by the acceptance of the Universal Declaration of Human Rights (Universal Declaration of Human Rights) on December 10, 1948 as an important instrument in protecting human. Later in the UDHR in 1966 followed by two international treaties, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economical and Social and Cultural Rights (ICESCR), which makes the provision of the Universal Declaration legally binding, provide a more detailed explanation on the right rights are protected, and provide procedures to be followed by the implementation of member states.⁸ Related to the right to freedom of religion, as a country that ratified the ICCPR through Law Number 12 Year 2005, based on Article 2 (1) ICCPR, stated that: "Each State Party undertakes to respect and to Ensure to all individuals within its territory and subject to its Recognized jurisdiction the rights in the Covenant, without discrimination of any kind '. That is, the Indonesian state has an obligation to protect civil and political rights as citizens of the rights recognized in the CCPR without discrimination.⁹ Indonesia also agreed to show support and respect for the rule of law run right to freedom of religion as enshrined in Article 18 of the ICCPR. It has certain core values that must be protected by freedom of religion if Governments or belief (as a universal standard) is to be respected. These core values constitute a set of minimum standards that are internal freedom, external freedom, non-coercion, non-discrimination, rights of parents and guardians, corporate freedom and legal status, the limits of permissible restriction on external freedom, and non derogability.¹⁰

However, the various international human rights instruments ratified by the Government of Indonesia is still a dead texts and yet optimally internalized into legal products in developing legislation and has not been widely used as a basis for the judge to decide a case. Minimum standards that should be realized after Indonesia's ratification of the ICCPR failed to be realized

Status of International Treaties in National Legal Affairs, Review Of Practice Perspective Indonesia, Indonesian Journal of International Law, Volume 5 Number 3 April 2008. <http://jurnal.pdii.lipi.go.id/admin/jurnal/5308488504.pdf>

⁸ See David Weissbrodt, in Peter Davies, 'Human Rights, Bunga Rampai, A. Rahman (ed)., Yayasan Obor Indonesia, Jakarta 1994

⁹ Manfred Nowak, The International Covenant On Civil and Political Rights, Raija Hanski and Markku Suksi, An Introduction to the International Protection of Human Rights, A Textbook, second revised edition, Institute for Human Rights, Abo Akademi University, 2004.

¹⁰ Tore Lindholm, W. Cole Durham, Jr. Bahia G. Tahzib Lie, Eds., *Kebebasan Beragama atau Berkeyakinan; Seberapa Jauh? Sebuah Referensi tentang Prinsip-Prinsip dan Praktek*, Kanisius, Yogyakarta 2010. Diterbitkan atas kerjasama BYU International Central for Law and Religion Studies, Provo, Utah, USA; The Norwegian Centre for Human Rights University of Oslo Norway; dan The Royal Norwegian Ministry of Foreign Affairs.

because there is no regulation which was considered problematic, discriminatory and did not have a human rights dimension.¹¹

Why does this happen? The principle of universality of human rights is still getting a lot of disagreement both among the legislators as well as in the community. Lack of understanding of the legislators linked the concept of "state duty" to protect the right of every citizen is equal and non-discriminatory, to be one of the causes of the strong principle of particularity with the advanced voice and ignore the majority of the minority vote. Therefore the resulting legal products still discriminatory. Resistance circles including some lawmakers and law enforcers also the wider community to understand the universality of human rights has been placed understand relativity as a more precise understanding in the protection of human rights.¹² Understand relativity believes that human rights can not be enforced equally in every region or a country. This will greatly depend on social, economic, political and culture of a country.¹³ Got it tries to contrast Islam with human rights, as stated by Samuel P. Huntington that puts human rights as a Western product that is not compatible with non-Western cultures.¹⁴ Meanwhile, the notion of universality assume that means universally accepted human rights applies to any person wherever he is regardless of differences.¹⁵ This means that human rights apply to Muslims and non-Muslims, minority and majority, male and female, young and old, etc.

Failure to internalize norms of international human rights law in Indonesia appears on the desire to keep enacting Section 156 (a) of the Criminal Code PNPS junto Article 1 of Law No. 1/PNPS/1965 jo 5/PNPS No. 1969 on abuse and blasphemy in the middle of the pros and cons. The lawsuit for judicial review of the NGO, the Constitutional Court through its decision No.. 140/PUU-VII/2009 still strengthens the validity of the Act. Chairman of the Constitutional Court Mahfud MD considers that the existence of this law is still needed so that the abuse of the right to religious freedom can overcome. If the Constitutional Court in favor of the applicant to withdraw and cancel the Law no. 1 PNPS it will cause loss or ensuring public protection

¹¹ From the results of the study suggested that the number of test cases that went to the Constitution Court of Republic of Indonesia the Year 2008-2010 by February 24, 2010 as a whole there are 184 (seratur eighty-four) cases. See Pratiwi, Cekli Setya, Wajah UU Pasca Uji Materiil Mahkamah Konstitusi (Menggugat Pemegang Kekuasaan Legislasi, Mendorong Tegaknya Konstitusi dan Terwujudnya The Rule of Law)", Journal Constitution of Constitutional Studies Center Faculty of Law, University of Muhammadiyah Malang, Volume III No. 1, June 2010. Halaman 96.

¹² Said Aqiel Siraj, *Islam Kebangsaan, Figh Demokratik Kaum Santri*, Pustaka Ciganjur, Jakarta, 1992.

¹³ Boer Mauna, *Hukum Internasional, Pengertian, Peranan dan Fungsi Dalam Era Dinamika Global*, Alumni bandung, 2000, hal. 60-61.

¹⁴ Ann Elizabeth Mayer, 'Universal versus Islamic Human Rights', *A Clash of Culture or a Clash with a Construct?*, Michigan Journal of International Law, Vol.15 No.2 Winter 1994.

¹⁵ Christian Tomuschat, *Human Rights, Between Idealism and Realism*, Oxford University Press, 2003.

(general prevention) against any person as guaranteed by the constitution, because in the future or a person or group of people who deliberately misuse and / or blasphemy then that person may not be convicted, or deed into action is allowed or prohibited, or more pointedly any person or group of people can be copied or arbitrary conduct abuse and / or blasphemy. Consequently, according to the government, there will be action-vigilante society or a particular group of people against another person or group of persons deemed to abuse and / or defamation of religion, as law enforcement officers to be losing ground or reference to legislation to prevent state above-mentioned circumstances.

According to the author, Mahfud opinion can be justified in the context of avoiding a legal vacuum for the actions of abuse of freedom of religion that are external (external freedom). However, be wary if the law is used to limit freedom of religion that are internal (internal freedom) then obviously the Indonesian government has ignored its international obligations to protect, respect and guarantee human rights particularly the right to freedom of religion.¹⁶ The authors argue that the Constitutional Court's decision that reinforces the application of Law No. 1/PNPS/1965 jo 5/PNPS Act of 1969, contrary to the obligation of the state as a participant of the ICCPR in particular the obligation to respect the right to freedom of expression (Article 19), right to freedom of religion (Article 18) and the right to equal treatment and non-discrimination (Article 2, 26 and 27). Under Article 2 (2) CCPR and the International Law Vienna Convention on the Law of Treaties 1969, Article 2 (1) (b) and Article 15, Indonesia is obliged to follow up either through legislation or its implementation. As a party to the ICCPR which also did not make a reservation, Indonesia should fully comply with existing obligations under the ICCPR and should not use national law as a tool to justify the violation of international treaties (Article 27 of Viena 1969). Besides, the presence of Act No. 1/PNPS/1965 jo 5/PNPS Act of 1969 is also unconstitutional because they conflict with the Constitution of the Republic of Indonesia Year 1945, namely the right to freedom of religion and worship (Section 28E), the right to freedom of religion and worship is a right that cannot be subtracted -reduce under any circumstances (Article 28) and the state has the obligation to guarantee the right of everyone to religion and to worship according to their religion and their beliefs (Article 29).

¹⁶ See General Comment No.22 (48) of the United Nations Human Rights Committee provides normative substance to Article 18 of the ICCPR

Half-hearted guarantees the right to freedom of religion

After the amendment of the Constitution of the Republic of Indonesia Year 1945 for 4 (four) times, recognized by many that the Indonesian constitution after amendments further ensure the protection of human rights. Since the amendment to the second in 2002, human rights guarantees in the 1945 Constitution is actually spread in various Article, namely Article 18B (2), 26, 27-28, 28A-J, 29, 31-32, 33-34, 30 so that after the amendment of the Constitution of the Republic of Indonesia Year 1945, guarantees and recognition of human rights as part of the constitutional rights of the people is much more complete and better. But on his way after about 10 years of the amended Constitution of the Republic of Indonesia Year 1945 was implemented, several provisions in Constitution of the Republic of Indonesia Year 1945 were ambivalent and interpretations affecting the implementation of the protection of the rights of religious freedom in Indonesia. Indonesia will of the state guarantees freedom of citizens to profess any religion or belief is guaranteed in the constitution and various laws and regulations as implementing rules of the constitution. Article 29 Paragraph (2) states that: "The State guarantees the freedom of each citizen to embrace religion and beliefs of each", and Section 28E (1) Constitution of the Republic of Indonesia Year 1945 states that: "Everyone has the right to freedom of belief believe, states of mind and attitudes, according to his conscience."¹⁷ To realize the will of the constitution issued Law No. 39 Year 1999 on Human Rights which in Article 22 states: "Everyone has the freedom of thought, conscience and religion." ICCPR has become part of the positive law which binds all citizens of Indonesia. In Article 18 it is stated that:

1. Every country has the right to freedom of thought, conscience and religion. This right includes freedom to religion or belief and freedom at its option, either individually or jointly with others, whether in public or private, to run the AAMA and belief in worship, observance, practice and teaching.
2. No one can be forced so impaired their freedom to adopt or establish religion or belief of his choice.
3. Freedom to manifest one's religion or belief can only be restricted by law and are necessary to protect public safety, order, health, or morals or the rights and freedoms of others.

¹⁷ Constitution of the Republic of Indonesia Year 1945

4. State parties to the present Covenant undertakes to respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in accordance with their own convictions.

Under the provisions of Article 18 CCPR above, it is clear that the right to religious freedom is one of the rights that are non-derogable meaning cannot subtract the minus-fulfillment by the state under any conditions. Norms are clearly imposes a duty on the State to ensure respect for and protection of the right to religious freedom. First of all has to be guaranteed and protected by the State is an internal freedom (internal freedom) of religion, namely the doctrine concerning faith or a religion. This freedom cannot be intervened by the State. That means, the State cannot declare a stream of false religion or not, though the group is in the states so. State allowed to intervene is limited to external freedom (external freedom) of religion, which is related to the implementation. However, the intervention must be based on reason needed (necessary) to maintain public order (order public), public health or morals (public health and Morals), and the freedom and the fundamental rights of others (fundamental rights and freedom of others). Forms of intervention must be stated by law. Guidelines that should be the domain of the State should intervene.¹⁸

As one of Indonesia consistency in implementing the provisions in particular Article 18 (1) and (2) CCPR, then in the fourth amendment to the Constitution of the Republic of Indonesia Year 1945 in Article 28 Paragraph (1) states that: "The right to life, the right not to be tortured, the right freedom of thought and conscience, freedom of religion, the right not to be enslaved, the right to recognition as a person before the law, and the right not to be prosecuted on the basis of a retroactive law is a human right that cannot be minus-cut under any circumstances ". In the Article 28 (4) also affirmed the state's obligation to protect, promote, uphold and fulfill human rights. However, if we listen to Section 28J (2) Constitution of the Republic of Indonesia Year 1945 are concepts that are contrary to Article 18 (3) ICCPR. In the Section 28J (2) stated that: "In exercising their rights and freedoms everyone shall be subject to the restrictions established by law solely for the purpose of securing due recognition and respect for the rights of da freedoms of others and to meet the demands of a just based on considerations of morality, religious values, security and public order in a democratic society ".

From the contents Section 28J (2) above it is clear that the right to religious freedom can be restricted along the external restrictions are set out in the Act. This is in accordance with what is

¹⁸ Karl Josef Parsch, *Kebebasan Beragama , Berekspresi dan Kebebasan Berpolitik*, dalam Ifdal Kasim (eds.), *Hak Sipil dan Politik, Esai-esai Pilihan*, Cetakan Pertama, Juli 2002., hal. 238.

stipulated in Article 18 (3): "Freedom to manifest one's religion or beliefs may be subject only to such limitations are prescribed by law and are Necessary to protect public safety, order, health or Morals or the fundamental rights and freedoms of others ".

However, the Constitution of the Republic of Indonesia in 1945 on Article 28I (2) states that restrictions on the right to run religious freedom not only subject to the restrictions set out in the legislation but it is possible to take into account other considerations outside the law by using con-religious considerations. Offcourse, it is not relevant and not in line with Article 18 (3) ICCPR. This means that certain religions can serve as a tool to restrict a person's freedom of religion. The question that then arises is, then among the six major religions recognized in Indonesia, which religion to be used as a tool to restrict the right to freedom of religion. Then the theory would apply here is the majority of the particular theory, so majority religion that would restrict freedom of religion. Thus, entering into the religion as a means of limiting human rights is irrelevant. Vaguely Constitution of the Republic of Indonesia in 1945 has distinguished between religious freedoms that are external and internal. This, however, has not been understood by the legislators that the right to religious freedom must be distinguished between internal freedom (*freedom internum*) and external freedom (*freedom externum*). Internal freedom is the freedom to choose the internal and or a particular religion or belief is a realm of freedom which cannot be contested by anyone, including countries without exception (non-derogable rights). No one is justified in imposing his religion or belief to another person, including a person is not allowed to say it as the misguided or whatever. While external freedom is the freedom to practice or manifest his religion or belief. External freedom is the freedom that should be restricted. Vague concept that often leads to multiple interpretations in the field so that the Indonesian Ulama Council *Majelis Ulama Indonesia/MUI*) as mixing between internal religious freedom with external freedom of religion by stating the following:

Responding to the statement of the Chairman of the Indonesian Ulama Council misconduct by stating that: Test material, wrong and misplaced. Filing erroneous judicial, further Amidhan, because Indonesia does not adhere to the infinite freedom, although Article 28 (i) of the 1945 Constitution states that freedom of human rights concerns should not be limited at all. But Article 28 (j) of the 1945 Constitution, said that freedom is associated with the obligation to respect the rights of others. Three things that restrict freedom in Indonesia is religious, moral, and public order. These limits, he explains, is regulated by law. For religion, Amidhan example, its provisions cannot be clearly ruffled the teachings of other religions and *aqidah* is standard.¹⁹

¹⁹ See Tempo Interactive, Judicial Council of Ulema value blasphemy law is wrong, Monday, February 1, 2010, accessed at <http://www.tempointeraktif.com/hg/hukum/2010/02/01/brk.0.20100201.to.222,560.id.html> on February

Amidhan statement above clearly distinguish between internal and external freedom. Indeed, the provisions of Article 28J is a provision limiting religious freedom in the context of external, which allowed the restrictions.

Regulation without basic legitimacy

Besides the issue of internalization of norms of international human rights law is not optimal conducted as the basis of national legal establishment, currently in Indonesia there is a trend emerging products are problematic and discriminatory laws. Troubled mean its legal produk even in shape and unknown name even made by the agency that actually does not have the authority to create a binding legal public. Unfortunately, these discriminatory regulations are used as the basis for the state apparatus to crack down on those who are breaking the law. Discriminatory means, that legislation only applied to certain groups instead of all people. Certain groups are often targeted against the products of this law are minorities. For example, the debate about official and unofficial religion is often an issue that is quite warm in Indonesia. Explanation of Article 1 PNPS 1965 jo Act No. 5 PNPS 1969 which mentions six major religions and called the other 4 are not prohibited. This means that 6 religion that are considered important while 4 others are not important. Besides the existence Circular (SE) Ministry of Domestic Affairs Decree. 477/74054/BA.01.2/4683/95 on November 18, 1978 which states that there are five religions in Indonesia, namely Islam, Protestantism, Catholicism, Hinduism, and Buddhism. A different letter of the Minister of the Domestic Affairs with the number 77/2535/POUD issued on July 25, 1990 also stated the same thing. The provision is often used as the basis of legitimacy by certain parties to mislead other religions. The provision is often used as the basis of legitimacy by certain parties to mislead other religions. This provision is also a frequent childbirth discrimination against citizens who espoused religious beliefs are not included in the main religion or religious official. How could the minister of a country that has administrative authority to make legally binding then the public by stating the types of official religion and religion major.

Another example is the release JOINT DECISION OF THE MINISTER OF RELIGION, PROSECUTOR GENERAL AND MINISTER OF HOME AFFAIRS OF THE REPUBLIC OF INDONESIA (SKB) No. 3 of 2008 on the WARNINGS AND COMMANDS TO

17, 2010. A similar opinion was also expressed by the Chairman of the East Java MUI (KH. Abdusshomad Buchori) in the National Seminar on 'Human Rights and Sharia Implementation in the Context of Democratization in Indonesia', organized by the Faculty of Islamic Religion, University of Muhammadiyah Malang, March 21, 2009. See the KH Abdusshomad Buchori, 'Application of Islamic Shari'a and Orientation Diversity People'.

ADHERENTS, MEMBERS, AND / OR MEMBERS OF THE MANAGEMENT OF THE CHURCH AHMADIYEH INDONESIA (JAI) AND CIVIC SOCIETY. This decision contains a warning to Ahmadiyah in Indonesia to stop the spread of religious interpretation. In this decision stated that teaching is considered to deviate from the main points of Islam. The existence of LCS is often made in the public debate related to the legal basis. According to Yusril Ihza Mahendra,²⁰ SKB has no basis in legitimacy. Similarly, the opinion delivered by the Indonesian Legal Resource Center (ILRC). ILRC assess the position of the LCS weak for not being part of the hierarchy of legislation. Article 7 paragraph (1) Law no. 10 of 2004 mentions the hierarchy of legislation in the order consists of the 1945 Constitution, Law / Regulation, Government Regulation, Presidential Regulation, and Local Regulations. SKB is not even mentioned at all in the law that was enacted June 22, 2004. Therefore ILRC found LCS in general should not be binding.

Then, the presence of the Attorney General of the Republic of Indonesia Decree Number KEP004/JA/01/1994 January 15, 1994 on the Establishment of the Coordination Team for Monitoring Mystical Beliefs in Society (CLT) jo Joint Decree of the Minister of Religion and Home Affairs No. 1 of 1979 on the Implementation Procedures for Broadcasting Religion and Foreign Aid to Religious Institutions in Indonesia Article 4 of the decree mentions the prohibition against religious proselytizing others. The result is likely to spread their religious faiths in addition to religion, such as beliefs and indigenous and religious texts. If the country understand the concept of religious freedom restrictions externally, should be restrictions on the spread of such is not set in the form of decision the Attorney General or the Joint Decree of the Minister, but must be made an Act by the legislature as provided in Article 28 A of Constitution of Indonesia Republic Year 1945 jo Article 18 CCPR. Under Law Attorney, the Attorney General has no authority to make the source of binding rules of public as well as minister.

Some Local Regulations Violate Potential of Human Rights

Local regulation (so called *Peraturan Daerah/Perda*) is belied instrument in implementing a broad regional autonomy and responsibility. Regulation as a means to implement the law is a tool of regional policy in implementing regional autonomy and assistance tasks as mandated by the Constitution and Law No. 32 Year 2004 on Regional Government.²¹ The ultimate goal to improve the welfare of local communities through sustainable development. Regulation is also

²⁰ Ihza, Yusril. *Tak Ada Dasar Hukum Yang Jelas SKB Ahmadiyah*.

²¹ See Article 18 of Constitution of Indonesia Republic Year 1945.

implementing legislation higher. In this function subject to the principle of *lex superior derogat legi superior inferior* (higher regulatory position beat lower regulation) therefore regulations must not conflict with higher regulations as classes of theories proposed rule base the binding force of the law such as tiered pyramid that theory Hans Kelsen, or students that Adolf Merkl, called *stufen theorie* or *stufenbau des Recht*.²² The essences of the theory classes of this rule by Harjono as a measure of whether or not meet elements of state law. Harjono argued above trend is reasonable because the essence of the classes of the sort order or legislation is a limitation in the rulemaking is the restrictions in the legislation.²³ The governance of the conduct of government affairs authority, except for governmental affairs of the Act prescribed a matter for the Government. Government affairs under the authority of the central government, the affairs of foreign policy, defense, security, justice, monetary and national fiscal and religion (Article 10 (3) Regional autonomy is the right, authority, and duties of the autonomous regions to organize and manage their own affairs government and public interests in accordance with laws and regulations. thus clear, that if the classes of theories to interpret the law, compatible with the Article 10 (3) decentralization law, the area does not have the authority to regulate matters relating to religion or religion of the people. it is the central government and regulatory affairs with the law should be referred to in Section 28J (3) of 1945 constitution NRI. however, related to the context of the protection of the right to freedom of religion, the region should follow the applicable provisions in both the constitution and the law, which holds more high, since decentralization began in 1999 and now in 2012 (13 years) running, there is a tendency region passed a law based on a particular religion and there is a tendency of violating human rights especially the right to freedom of religion.²⁴ Besides regulations berbasis religion based on a particular religion often creates anxiety people of other faiths. Surely this can not aligned with the state's goals as stated in the Preamble of the 1945 Constitution Alenia III "protect all the people of Indonesia".

In addition to the regulations based on the Gospel of Papua, sharia laws in Nanggroe Aceh Darussalam, according to the National Commission monitoring results show that the numbers of discriminatory policies continue to grow²⁵ had increased to 282. On August 17, 2012, the

²² Satjipto Rahardjo, *Ibid.*, hlm. 276; see also Lili Rasjidi, *Dasar-Dasar Filsafat Hukum*, Bandung, Citra Aditya Bakti, 1996, hlm. 64.

²³ Harjono, *Politik Hukum Perjanjian Internasional*, Surabaya, PT Bina Ilmu, 1999, hlm. 99.

²⁴ *Tempo* May 14, 2006, till now 22 cities and counties are enacting laws that charged matter of Islamic law. There are rules that apply againts immoralilty (*anti maksiat*) others require school children to wear the hijab. Not a few areas that are still preparing similar rules. See *Tempo*, May 14, 2006, p. 26-33

²⁵ <http://www.komnasperempuan.or.id/wp-content/uploads/2009/06/catatan-tahunan-kekerasan-terhadap-perempuan-2007.pdf>

number of discriminatory policies increased drastically. In March 2009 since the first National Commission formally submit the matter to the authorities of the country in March 2009, there were 162 discriminatory policies issued by local governments increased to 282 policies. Called discriminatory because the policy limit, blocking and ignoring guarantee the fulfillment of human rights have been guaranteed in the Constitution. Called discriminatory because the policy limit, blocking and ignoring guarantee the fulfillment of human rights have been guaranteed in the Constitution²⁶

Strengthening civil society and respect for the rights of freedom of religion

Various issues raised above, shows that Indonesia still has a long homework to fix the legal system to guarantee the protection and guarantee of human rights especially the right to freedom of religion. First, the Constitutional Court Decision Number 140/PUU-VII/2009 still strengthen enforcement of Law No. 1/PNPS/1965 jo Act No. 5/PNPS/1969 should be interpreted as an effort to prevent a legal vacuum for restricting the freedom of religion that are external. Parliament as an institution that holds the power to make laws should have a high sensitivity to immediately formulate laws on inter-religious tolerance with respect to the minimum standards as set out in the ICCPR and the UN General Comment No. 22 (48) relating to the right to freedom of religion. The existence of the Draft Law on Religious Harmony being discussed by the House of Representatives, in which, there are provisions that have not been aligned with the guarantee of both freedom of religion rights contained in Section 28E of the 1945 Constitution, 29, and 28 I should soon be reviewed before the bill was approved. Therefore, the House of Representatives to listen to input from various parties regarding the advantages and the disadvantages of the draft law, so that spared from the threat of judicial review may be filed at any time by the citizens whose rights are harmed on the birth of Religious Harmony legalization bill into law later. Second, the existence of Article 28J (2) which include considerations of religion as one of the aspects that can restrict religious freedom for citizens should reset the agenda on perspective of Amendment to the Constitution of the Republic of Indonesia Year 1945. This is because in addition to being in line with the conception of Indonesia as a state law is not a religious state (see Article 1 (3) of 1945 Constitution NRI) is also incompatible with the international obligations of Article 18 (3) ICCPR rights restrictions on religious freedom is

²⁶<http://www.komnasperempuan.or.id/2012/09/jangan-ada-lagi-negara-harus-batalkan-kebijakan-disrkiminatif-atas-nama-agama-dan-moralitas-untuk-pastikan-tidak-ada-lagi-perempuan-menjadi-korban-salah-tangkap/>

limited external. Thus, it would not be a justification for the neglect of the principles of international law in the protection of religious freedom in the country. While the existence of a variety of products to local law (Local Rules) that exceed the regional authority should be a concern for the Ministry of the Interior to conduct testing and cancellation of various local legal products violates the rights of citizens.

On the other hand, it is also a strengthening of the civil society movement, where people are not enough to wait for the House of Representatives to make a new law to replace the law or wait long MPR amended the articles of the constitution, or waiting for the Ministry of Domestic Affairs for the existence of regulations potentially violate the constitutional rights of the people. Besides the process of forming laws and amendments to the Constitution require a long time, high sensitivity is also required of the representatives of the people. Therefore, the necessary range of programs that promote the formation of civil society in which leaders and religious leaders, community leaders and other well-educated group continuously and planned given the various interpretations and dissemination of the importance of honor, respect and protect human rights especially the right freedom of religion. Thus, if public awareness has been well established, then any bad law will not affect the behavior of the public to always honor and respect the rights of others so it is not easily provoked and reduce the impact of horizontal conflicts. In addition, it is also important in the form of provision of training for advocacy groups about the methods that can be achieved when various products are problematic legal attack. For example, giving a training on understanding of judicial review method and mechanism to the Constitutional Court or the Supreme Court. Any citizen or group of people can demand cancellation of the law when the law is detrimental to their constitutional right to the Constitutional Court. Against other regulations under the Act can also be done through the mechanism of judicial review to the Supreme Court. It also needs to continuously pushed mechanism of constitutional complaint to the Constitutional Court. When the last decision issued by the General Court in resolving matters related to the rights to freedom of religion are considered not to meet the community's sense of justice, as well as religious freedom cases affecting minorities, people can apply through the mechanism of constitutional complaint to the Constitutional Court. Although this mechanism has not been explicitly under the authority of the Constitutional Court, but because according to the Law on Judicial Power, the judge prohibited from refusing cases referred to it by reason of no laws, and that the judges of the Constitutional Court shall decide the case by ruling justly as possible. Learning from the practice of administration in Germany, the constitutional complaint has a dual function: First, the function of a recovery out of the ordinary (extraordinary remedies), which entitles citizens to

defend their constitutional rights; Second, the objective function to enforce basic law and run interpretation and construction (Alexy 2002: 254). To consider the proposed mechanism is applicable procedural law should be detailed and clear, so as not berbeturan with other legal mechanisms. In the experience of the German Federal Constitutional Court, the judicial procedure governed specifically and in detail, as one article asserts: "Any person who claims that one of his basic rights or one of his rights under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court. "(Article 90 (1), the Federal Constitutional Court Act / BverfGG).²⁷

Conclusion

The opinions of some scholars who say that the protection of human rights law in particular the right to freedom of religion in Indonesia has experienced significant progress contemplate returning. Advances law apparently only occurs at the level of the constitution, while the various international agreements in the field of the right to freedom of religion is still a dead texts and they are not optimally internalized into national law in general. The rise of violations of religious freedom in Indonesia lately precisely due to the lack of legal protection in the field of human rights because of various regulations on the lower level has been significantly distorted guarantee respect for and protection of the rights of citizens in a discriminatory way. On the other hand, the state is often absent when acts of violence are attacking minorities. Therefore, efforts should be made of them pushing amendments V of the Constitution of the Republic of Indonesia Year 1945 so in tune with the ICCPR and ICERD, and strengthening civil society to use variety of legal mechanisms that exist when people's constitutional rights have been violated.

²⁷ In more detail, the procedure for the hearing on constitutional complaints filed at the German Federal Constitutional Court can be seen in Article 90-95 (Fifteenth Section Procedure in cases pursuant to Article 13 (8a) above), the Federal Constitutional Court Act / Bundesverfassungsgerichts-Gesetz / BVerfGG, Published on 12 March 1951 (Federal Law Gazette I p. 243), as published on 11 August 1993 (Federal Law Gazette I p. 1473), as last amended by the Act of 16 July 1998 (Federal Law Gazette I p. 1823). See Herlambang Perdana W, Constitutional Rights of Citizens Following the 1945 Amendment: Concepts, Settings and dynamics Implementation, Panta Rei Law Journal, Vol. 1, no. December 1, 2007, New York: National Legal Reform Consortium

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