

EXISTENCE OF LOCAL LEGAL PRODUCTS THAT NUANCED OF SHARI'A IN INDONESIA

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ABSTRACT

The existence of local legal products that nuanced of shari'a in Indonesia is rampant in the reform era. The establishment of local legal products that based on shari'ah is an effort to formalize shari'ah Islam in the life of the nation. But its existence has caused controversy because of the sectarian nature and its potential to violate human rights such as discriminatory and restriction to civil liberties. Therefore, it is necessary to structuring local legal products that nuanced of shari'a, even if it leads to an anulment, in order to improve the quality of implementation of local autonomy in Indonesia.

Keywords: local legal products; local autonomy; shari'a;

A. INTRODUCTION

Implementation of regional autonomy in Indonesia go hand in hand with openness and democratization that started since the reform era. Enactment of Law Number 22 of 1999 On The Local Government can be regarded as the starting point of the implementation of regional autonomy in Indonesia which authorizes the regional to manage its own government or household affairs based on the needs and characterization of each region.

In the conduct of government affairs, local government authorized to issues policies in the form of legislation, ranging from the local regulation (Perda), local head of government regulations (Perkada), and number of other regulations which are known as local legal product. The existence of local legal products as an instrument for the implementation of government affairs are crucial as the juridical basis for the local government in implementing development and improvement of people's welfare.

From a number of local legal products ever issued in the implementation of government affairs, there are some local regulations in which the substance are related to the religious norms (Islamic law). Especially regulations relating to public morality, such as ban of gambling or prostitution, the obligation to wear Islamic dress and others. Local legal product that contained religious norm are called local legal products that nuanced of shari'a.

In a broader meaning, local legal products that nuanced of shari'a include all the regional rules that publicly bind, issued by the Local Government and directly based on

texts and religious teachings, as well as the values and spirit of a particular religion (Islam). Included in the products of this law is the Local Regulation (Perda), Circular (SE), Decree (SK), Regulation Regents/Mayors (Perbup/Perwal), Village Regulations (Perdes), and so forth (Ihsan Ali-Fauzi dan Saiful Mujani (ed), 2009: 30).

The phenomenon of the implementation of shari'ah-nuanced local regulation can be found in a number of region such as: Solok, Padang, Bulukumba, Tangerang, Tasikmalaya, Bima, Indramayu, and others. The existence of local legal products that nuanced of shari'a, especially local regulation can be divided into several categories, namely (Ibid: 31-32):

First, local regulation which regulates the morality of society in general. Local regulation of this type is concerning all religions. This type of regulation, primarily represented by the anti-prostitution and adultery local regulation, are exist almost in all regional and acquire the generic name as "anti-immoral local regulation".

Second, local regulation associated with fashion of clothes, such as the obligation to wear hijab. In contrast to the first category, local regulation of this type is typical of Islam, so that people will easily identify it as local regulation that shariah-nuanced.

Third, local regulation related to "religious skills", such as the necessity to become Quran Literate as in Indramayu, Bulukumba, and other regional. At a certain level, local regulation that regulate the obligation to study at Madrasah Diniyah Awwaliyah can be classified into the types of local regulation concerning the "skills of religion". This type of local regulation are also very typical of Islam so that the domination of the "interests of Islam" are very obvious.

Fourth, to complete the above categories, at least one type of category of local regulation could be added, namely the local regulation about punishment (hudud), such as the application of caning in local regulation (Qanun) in Aceh and even up to the level of some village regulations in Bulukumba are fall under this category.

The question arises why the formation of local legal products that nuanced of shari'a are so rampant in the reform era when regional autonomy and decentralization applied in Indonesia. In addition, the application of local legal products that nuanced of shari'a also raises the debate along with the emergence of a number of other issues, namely:

First, whether the local government has the authority to establish local regulations based on norms or certain religious doctrines. Whereas, based on the Law Number 23 of

2014 On The Local government, matters pertaining to religion is the authority of the Central Government.

Secondly, if this matters associated with the diversity religious beliefs in Indonesia, question arises whether Islamic law regarded as the state law (local legal products that nuanced of shari'a) is something that can be justified? Because there was a concerned that it would lead to violations of Human Rights (HAM) in the form of discrimination and imposition of religious norms (Islamic law) that already become a state law, applied for all citizens including to those who have different faith or religion.

Third, how important or what is the urgency to apply local legal products that nuanced of shari'a? During this time the reasons to promulgate local legal products that nuanced of shari'a is due to the concerns about the decline in morality of society and how the society distance themselves from the values of Islam, so the local government produce local legal products that nuanced of shari'a as a legal basis to take action in order to overcome these problems. This reason is arguably rhetorical because it is still in the form of assumption and not a sociological phenomenon of a general nature (Wasisto Raharjo Jati, 2013).

Based on these issues, the existence of local legal products that nuanced of shari'a is very important and interesting to be studied and analyzed, especially with regard to reason or basis of its formation as well as the implications of its existence. In addition, from the legal aspect, the presence of local legal products that nuanced of shari'a should be reviewed from the constitutionality and legality aspect, especially from vertical and horizontal synchronization, and based on the principles of good legislation. Furthermore, the existence of local legal products that nuanced of shari'a is important to be reviewed, whether it is still relevant to be maintained or it should be revoked in order to maintain the structure of local legal products in the implementation of regional autonomy in Indonesia.

B. PROBLEM STATEMENTS

Based on the above background, the problem in this article are as follows:

1. Why at the reform era when the regional autonomy has been implemented, many local legal products that nuanced of shari'a has emerged in Indonesia?
2. What is the implication of the existence of local legal products that nuanced of shari'a in the implementation of regional autonomy in Indonesia?

3. How does the arrangement should be done to local legal products that nuanced of shari'a in the implementation of regional autonomy in Indonesia?

C. RESERACH METHODS

This research was conducted with normative juridical approach, the research done by researching library materials or secondary data. This study focused on the assessment of the general principles of law, especially the principles of good legislation and the level of vertical and horizontal synchronization of legislation in studying the formation and substance of the various local legal product that nuanced shari'a and its implications.

D. RESEARCH RESULT AND DISCUSSION

1. The formalization of Islamic Shari'ah.

To understand and explain the surge in the formation of local legal products that nuanced shari'a in the reform era, then it is important to learn about the historical aspect of Shari'ah, especially as part of the formalization of Shariah or Islamic law in the life of the nation. The efforts to formalize Shariah in Indonesia has been going on since a long time, arguably even since the preparation and early independence era, continued in the era of liberal democracy in the 1950s, the Old Order, New Order, until the reform era. The efforts to formalize sharia in every era has its own way, shape and dynamics and has always been adapted to the current situation. According to Denny Indrayana, the efforts to formalize islamic shari'ah in Indonesia can be divided into, at least, three phases, namely (Denny Indrayana, 2010: 95-97):

The first phase, "constitutionalization" of Islamic law. This phase occurs three times in the constitution-making process in 1945, 1956-1959 and 1999-2002, when the relationship between Islam and the state had always been an unfinished debate. According to Zuhairi Misrawi, the debate mainly concern about the concept of "syariat state " versus "secular state". Shari'a State itself often referred to as "Islamic state". Although, definition about Islamic state have many faces. In 1945, "constitutionalization" of Islamic law resulting in "Jakarta charter" that famously known by its seven words: "with the obligation to implementation shari'a Islam for its adherents". These seven words of the Jakarta Charter, originally, was part of the Preamble of the Constitution, finally eliminated by the initiative of Mohammad Hatta.

In the years of 1956-1959, an attempt to re-make Islam as the state principle and to established the seven words of the Jakarta Charter into the Constitution that created

by the “Konstituante” was failed after President Soekarno issued a Presidential Decree of 5 July 1959. Finally, at the time of the 1945 amendments in 1999 -2002, another attempt to established the seven words of the Jakarta Charter took place, mainly supported by PPP and PBB, but rejected again due to the lack of political support in the Assembly and also the lack of support from the people.

The second phase, formalization of Islamic law by the national legislation, especially with the enactment of Law Number 1 of 1974 On The Marriage. In principle, Law about Marriage mostly adopt the values of Islamic law and the effort to adopt Islamic law increasingly prevalent in the late 1980s and in the 1990s. Among the laws that exist that nuanced of Islamic values includes: Law Number 3 of 2006 On The the Amendment of the Law Number 7 of 1989 On The Religious Courts; Law Number 13 of 2008 On The the Hajj; Law Number 38 of 1999 On The Zakat Management; and Law Number 21 of 2008 On The Sharia Banking. Formalization of Islamic law continues with the enactment of Law Number 44 of 1999 On The Specialty of Aceh Region as Nanggroe Aceh Darussalam Province and the later was amended by Law Number 11 of 2006 On The the Government of Aceh. The Law on the Government of Aceh is the main entrance to the formal implementation of Islamic law in one province, namely Aceh. Furthermore, as a continuation of the application of Islamic law, Courts of Shari'a was established in Aceh.

The third phase, namely the adoption of Islamic law into the local regulation. The application of islamic law into the local regulation was increased after the reformation process since 1998 and has grown lately. The effort to formalize Islamic law was open even wider when the concept of decentralization was regulated by Law Number 22 of 1999 On The Local Government. Broader interpretation about regional autonomy under the Law about Local Government is interpreted vary in each region, one of which is by the reincarnation of local identities that were suppressed by New Order. Formation of local legal products that nuanced of shari'a is one example of the application of the reincarnation of local identity which claims that Islamic law is historically and culturally have entrenched and become part of the living law in the community. The region which have applied local legal products that nuanced of shari'a including South Sulawesi, Aceh and other areas.

Formalization of shari'a (islamic law) through local regulation shows that, in the reform era, the formation of the local legal products could not be separated from

ideological-formalistic efforts (political Islam) to apply Islamic law in Indonesia. Especially when the door of freedom has open after the fall of the Suharto regime, marked by the euphoria of democracy and political liberalization. Political expressions that were once constrained, including "political Islam", finds their space back. As ever predicted by William Liddle that in the more open political climate, a more formalistic (scripturalism Islam) will appear, considering they have the political resources in an effort to disseminate issues and their demands through organizations, media, and their access to politicians (Burhanuddin (ed), 2003:53).

Besides the "ideological-formalistic" character, the widespread adoption of local legal products that nuanced of shari'a in the reform era also caused by electoral political interests that used political elites in the region to gain the support of "the Islamic masses" at the time of local elections. The use of Shari'ah formalization issue was an attempt to gain political support, although it was driven more by political interests with the claim that it is of people's aspirations.

Other than through legal-formal political attempts, formalization of Islamic law was also done through means of non-formal with a propaganda carried out by the Community Organisations of Islam, such as the Islamic Defenders Front (FPI), Hizbut Tahrir and a number of other groups which emphasized the importance of shari'ah which not only operates in a private scope for Muslims alone, but also the overall matters, including its application in the public space. They were very aggressively campaigns to apply Islamic Shari'ah and invite the public to pressure and influence government policy both at the central and regional levels to issue Islamic law-based legislations.

Viewed from the practice-empirical side, the intensity of the struggle for the idea of formalization of Islamic law in Indonesia has been succeeded. For example accommodation of the elements of Islamic law, the fiqh of worship, family law (ahwal syahsiyah), Jurisprudence Muamalat, hudud, Qisas and ta'zir criminal, all these elements have actually absorbed into various laws that are not only at the level of the central government but also to the level of Local Government. For more details, these can be seen in the table below on the implementation of Islamic sharia formalization in the positive law in Indonesia (Zudi Setiawan, 2008: 85-86):

.Table 1
Implementation of Islamic Law In Positive Law

Islamic Law	Positive Law
Fiqh of worship relate with the rule of devotion from servant to God. The sanctions are in the form of sin. The matters that have been formalized is the mandatory worship, such as zakat and hajj. The state is only concerned with its management and not the validity of worship. There are also other worship, such as giving a donation, charity, read the Qur'an and endowments.	Law Number 17 of 1999 On The Hajj, Law Number 23 of 1999 On The Zakat, Law Number. 41 of 2004 On The Wakaf; The Local regulation about Zakat, Infak, Dole in Bulukumba, Lombok Timur and Aceh. Qanun Number 11 of 2002 On The Shari'a Field Worship, creed and Syiar of Islam in Aceh.
Ahwal syahshiyah: family law (private law), such as marriage, inheritance, wills, grants.	Law Number 1 of 1974 On The Marriage, Law Number 7 of 1989 On The Religious Courts, Presidential Instruction Number 1 of 1991 On The the Compilation of Islamic Law.
Fiqh Muamalat: related to the rules of business economics, sale and purchase transaction, company with principle of Islam, such as the anti-usury.	Law Number 7 of 1992 jo Law Number 10 of 1998 On The Banking and Law Number 23 Of 1999 about Indonesia Bank, that regulate BI to prepare rules and supporting facilities for the operations of Islamic bank.
Hudud: criminal actions of which the types and sanctions have been determined in Qur'an and hadith, for example adultery, accused of adultery (Qadzaf), wine (liquor), theft, murder, robbery, apostasy and rebellion.	Qanun Number 12 of 2003 On The Khamar, Qanun Number 13 of 2003 On The Gambling in Aceh, Village Regulation in Padang and Bulukumba about ziba, qadzaf, alcohol, and gambling.
Qishash: criminal sanctions in the form of a reply to an act.	Village Regulation in Padang, Bulukumba and South Sulawesi.
Ta'zir is a type of crime and the sanction determined by an authorities, aimed to educate and practice. It can be fall under the hudud laws which do not meet the optimal conditions. For example, adultery does not meet the evidence of four witnesses. Immoral actions are also often appointed as ta'zir material, such as khalwat (romance outside marriage) and pornography.	Qanun Number 14 of 2003 On The Khalwat in Aceh, The Local Regulation about Islamic dress in Bulukumba. The Local Regulation about Liquor in Pamekasan, Tangerang, and Bulukumba; The Local Regulation about Prostitution in Tangerang.

Source: Gatra, May 6, 2006 In Zudi Setiawan, 2008, Dimamika Pergulatan Politik dan Pemikiran Formalisasi Syariah pada Era Reformasi, SPEKTRUM, Jurnal Ilmu Politik Hubungan Internasional, Volume 5, Number 2, Juni 2008.

For groups that are pro to the application of Islamic law, despite its aspirations, at some level, has been accommodated in the state policy in the form of accommodation of critical elements of Islamic law into legislation, but they think it was not enough. Therefore, they continue to "Islamize" all aspects of the life of society and the state policy with the assumption that Islamic law that applied today regarded only as a "half-hearted" political product from the Government, which only accommodates Islamic law from private aspect alone. Whereas, based on their view, the application of Islamic law must be comprehensive, not only in the sphere of private law but also covers the public sphere.

To be able to realize the formalization of Islamic law as a whole not just the level of national legislation, their attention is directed also to islamize regulations at the local level. In fact, the effort of the latter are more intensively done after the

efforts of Islamize policies at the central level is not easily realized because the opposition is strong. Along with the decentralization of authority and implementation of regional autonomy, then it is considered as an opportunity to intensify the formalization of Islamic law using local legal product. With arguments on the basis of local community aspirations and concerns of moral degradation in society, the establishment of local legal products that nuanced of shari'a considered as an effective solution to overcome these problems.

The implication of the establishment of local legal products that nuanced of shari'a are now perceived as sectarian that only based on a narrow religious understanding that ignore diversity and tolerance and tend to discriminate against those who have a different understanding or belief. The problem is because local legal products that nuanced of shari'a have become the norm of positive law that its implementation are addressed to all people, so that it could lead to "imposition" of the application of Islamic law in the form of local legal products that nuanced of shari'a to the people of different beliefs (non-Muslims) under the pretext of positive law enforcement.

2. Implications of Local Legal Product That Nuanced of Shari'a.

2.1. The Sectarian Nature and the Potential of Human Rights Violations.

The existence of local legal products that nuanced of shari'a, when viewed from its substance and application, has caused a number of problems, especially related to the potential of human rights violations, civil liberties restriction, the politization of religion and harm the plurality that exists in society due to its sectarian nature. The sectarian nature of the formalization of Shariah comes from the fact that it's only oriented to dominate the regulation concerning public space by using Islamic law as the only "rules of the game" when the plural values live in the midst of the people of Indonesia. The efforts to formalize Islamic law in democratic state of Indonesia would become an obstacle to the realization of a peaceful, fair, equitable and civilized society. This raises concerns about the future of democracy in Indonesia which are based on the principle of respect for plurality.

As said by Dalmeri, the application of Islamic law in some regional by imposing local legal products that nuanced of shari'a has led to some complex problems, such as (Dalmeri, 2012: 237):

First, formalization of shari'a through a number of local legal product that nuanced of shari'a actually has reduced the role of religion as ethics and moral nation and the state into only becomes an instrument of state policy (local government), which implies the existence of such politicization of religion and drawn for political power. The nobility of religious value or spirit thus become tarnished due to its vulnerability to be politicized for the sake of political legitimacy.

Second, the policy issued by the Local Government to enact local legal product that nuanced of shari'a also took off the religious freedom of the citizens with different beliefs, because it regulates people's lives just based on the teachings of Islam. State in this regard has enter into the private matters of its people. On the other hand, by implementing local legal product that nuanced of shari'a, state has also treat religion only as an object of political policy in the pursuit of pragmatic political goals.

Third, the application of Islamic law in the local legal product that nuanced of shari'a has the potential to make religion as an instrument of power. In the context of democracy, the existence of local legal products that nuanced of shari'a in some areas are paradox with democratic values. Because a democratic country always respect the plurality and gave equal status to all citizens. While the existence of local legal product that nuanced of shari'a is against the plurality, it is even causing polarization in which people who have the "privilege" are only those who are Muslims, while the accessibility of non-Muslims will be restricted because the sectarian nature of public policy which based simply on the Islamic norms or law. The non-Muslims would also be vulnerable to be treated as "second class citizens". The rise of local legal products that nuanced of shari'a is resulting in the neglect of the issues of welfare and poverty alleviation because the euphoria of formalization of Shariah is actually not directly related to the livelihood of life of many people. It could be argued that the political element of the birth of local legal product that nuanced of shari'a is far more preponderant than an attempt to fix the well-being of a better society.

Based on the results of a study conducted by Ihsan Ali Fauzi and Mujani, the existence of local legal products that nuanced of shari'a, in particular local regulation are potentially undermine religious freedom and civil liberties. As can be seen in regulations in a number of regions and their implications in the table below (Ihsan Ali-Fauzi dan Saiful Mujani (ed), Op.Cit: 32-36):

Table 2

Category of Local Legal Product (Local Regulation) That Nuanced of Shari'ah And Its Implication

Category of Local Legal Product (Local Regulation) that Nuanced of Shari'ah	Implication
1. Local regulation that nuanced of shari'ah did not apply the principle of equal treatment before the law to all citizens. Normatively, local regulation that nuanced of shari'ah applies to Muslims only.	However, because none of the regional in Indonesia, consist wholly of muslim citizen (homogen), then the local regulation that nuanced of shari'ah clearly threatens the civil liberties of non-Muslim citizens. In addition, differences in public law in a particular region with other regions causing the residents of the region not being treated equally before the law with residents of other regions, such as the application of Islamic law in Aceh.
2. The local regulation that nuanced of shari'ah restrict the freedom to choose a religion and belief and clearly refers only to one particular mazhab from various of mazhab in Islam.	The existence of other mazhab (schools) that have a different view on a legal issue, were ignored. For example, provisions to obligate the use of headscarves for Muslim women. In Islam, there are varying opinions about the necessity of wearing headscarves for Muslim women so there should be no compulsion to wear the headscarves for women on the basis of a view of particular mazhab. Example: Local Regulation of Municipal Pasaman of Number 22 of 2003 On The Muslim and Muslimah Dressing for Students and Employees; Local Regulation of Sawahlunto regency of Number 2 of 2003 On The Muslim and Muslimah Dress.
3. The local regulation that nuanced of shari'ah restrict the freedom of a person or a group to worship according to their religion and beliefs.	The imposition of the implementation of worship based on a reference of certain mazhab is resulting in the loss of the freedom for the adherents of other mazhab to worship according to the mazhab one believes in. Even for the case of opening a food stall at noon during Ramadan, for example, generally there is no rule in Islam that forbids it. Example: The Local Regulation of Municipal Padang Number 3 of 2004 On The the Prevention, Eradication and Repression Disease of Society;. Local Regulation of Banjar Baru Number 5 of 2004 On The the Prohibition to Open stalls at noon during Ramadan. Local Regulations like these are oppresing the right of a person to work in accordance with his/her profession.
4. The local regulations that nuanced of shari'ah are discriminatory. The definition of discrimination is regulated in the Law Number 39 of 1999 On The Human Rights.	For example in Local Regulation of Head of Government of Padang Number 3 of 2004 on the Prevention, Eradication and Repression Disease of Society. Article 6 (1) : "All women are forbidden to wear clothes that can stimulate sexual desire of men who saw her in public places or in places that can be passed / crossed by the public except in areas that have been determined." Meanwhile, in paragraph (2) states: " The characteristics of clothing as referred to in paragraph (1) of this article are: a). showing parts of the body from the knees up to the chest; and b). tight or transparent to clarify the curve of the body. " The local regulation like this is limiting the space for women and restricting the freedom of women because it has been intervene too much into private areas for women to wear any clothes they're desire.
5. The local regulation that nuanced of shari'ah that regulate religious education for children.	The local regulation that nuanced of shari'ah restrict the freedom of parents to determine the education (religion) for their children. To choose education for children is a parent's right, including religious education. but many local regulations are entering the realm of education and impose a lot of things (clothes, curriculum, and entry requirements based on capacity in the field of religion) which of course threatens the right of children to gain freedom in following levels of education. For example: "Every elementary school

		<p>student, middle school, and high school students who will be completing education obliged to be good at reading the Qur'an properly and correctly" (Article 3, The Local Regulation of Bulukumba Regency of Number 6 of 2003).</p> <p>"For each graduate of elementary school and/or junior high school who will continue education at the higher level, who is not able to read of the Qur'an properly and or do not have a certificate good at reading the Qur'an, the person concerned considered to be unacceptable at the higher education level "(Article 7, The Local Regulation of Bulukumba Regency of Number 6 of 2003).</p>
6.	<p>The local regulation that nuanced of shari'ah restrict freedom to establish family of one's choice. In the matter of marriage, the state's duty is to register marriages of its citizens and not determine the validity of a marriage.</p>	<p>The local regulation like this can be an obstacle for couples getting married because requirement of marriage associated with, such as, capability to read the Qur'an as skill of religion. For example: "Every couple who will perform marriages shall be able to read the Qur'an properly and correctly" (The Local Regulation of Bulukumba Regency of Number 6 of 2003).</p>

Source: Ihsan Ali-Fauzi dan Saiful Mujani (ed), 2009, *Gerakan Kebebasan Sipil: Studi dan Advokasi Kritis atas Perda Syari'ah*, Jakarta, Nalar.

2.2. Contrary to Principles of Good legislation and Higher Legislation.

In addition to the issues and implications related to the vulnerability of discriminatory practices and the imposition of religious norms, the existence of local legal product that nuanced of shari'a is also incompatible with the principles of the good legislation stipulated in Law Number 12 of 2011 On The the Establishment Regulation Legislation. Based Article 5 of Law Number 12 of 2011, there are some principles considered as formal basis of formation of legislation, namely: the principle of clarity of purpose; the institution or the official that forming the legislation is appropriate; conformity between types, hierarchy, and substance; able to be implemented; versatility and usability; clarity of formulation; and openness. Furthermore, based on these principles, the existence of local legal product that nuanced of shari'a has a number of problems, namely:

The first, related to the principle of "the institution or the official that forming the legislation is appropriate"; This is due to the fact that the regulation relating to religious matters governed by local legal product that nuanced of shari'a is actually does not fall under the authority of local government to regulate it, but the authority of the Central Government. Because Article 10 paragraph (1) f of Law Number 23 of 2014 On The Local Government, stipulated that religious affairs is an absolute matter of government which is fall under the authority of the Central Government. Based on the division of government affairs, then to regulate

the norms of religion in local legal product that nuanced of shari'a contradict or not in accordance with the Law on Local Government. Because Local Government does not have the authority to regulate religious affairs, Central Government is the one who have the authority.

Secondly, with regard to the principles of “clarity of purpose”; each establishment of legislation should have a clear objective to be achieved. In the context of the establishment of local legal products that nuanced of shari'a, it can be argue that it does not have clarity of purpose if it is associated with the direction in the framework of strengthening the national legal system. Due to local legal product that nuanced of shari'a tends to be sectarian in nature and only based its value to certain "religious values", namely Islam in an effort to regulate public space that is multi-cultural and multi-religiosity. This causing a potential to create injustice and uncertainty to the efforts of realizing the goal of law in a democratic state of law which should protect differences and respect to diversity.

Third, related to the principle of conformity between types, hierarchy, and substance; the formation of legislation should pay attention to the conformity of its substance according to the type and hierarchy of the legislation. Viewed from this aspect, local legal product that nuanced of shari'a potentially conflict with the higher legislation (vertical synchronization), especially with regard to human rights norms stipulated by the Constitution and the Law. This causes the local legal product that nuanced of shari'a also has discriminatory character so it can be regard as unconstitutional.

Fourth, related to the principle of “able to be implemented”; each establishment of legislation should take into account its effectiveness when it's applied in the community, both philosophical, sociological, and juridical. The existence of local legal products that nuanced of shari'a resulting in controversial reactions so that its effectiveness to be implemented are questioned. Not to mention, incompatibility of the local legal product that nuanced of shari'a with philosophical aspects, in the form of values or ideals of the nation who love and appreciate plurality; sociological aspects, such as diversity or multicultural; and juridical aspects, compliance and conformity with the higher laws and regulations, so that the existence of local legal products that nuanced of shari'a is indeed

controversial if viewed from its usefulness in regulating the life of society, nation and state.

The existence of local legal products that nuanced of shari'a , can also be seen from the principles in the substance or material basis from a good legislation, as set out in Article 6 of the Law Number 12 of 2011, namely: the principle of supervision; the principle of humanity; the principle of nationality; the principle of family; “*kenusantaraan*” principle; *Bhinneka Tunggal Ika* principle; fairness; the principle of equality before the law and governance; the principle of order and legal certainty; the principle of balance, and harmony.

Based on the principles of good legislation, especially related to the substance, the local legal products that nuanced of shari'a that created with the perspective to accommodate Islamic law, tend to ignore plurality, sectarian in nature and discriminatory to every citizen that have different religion (non-Muslims). The locally legal products that nuanced of shari'a have violated the provisions of Article 6 of Law Number 12 of 2011, particularly with regard to the principle of *kenusantaraan*, *kebhinekatunggalikaan* and the principle of equality before the law and government.

The existence of local legal products that nuanced of shari'a has been contrary to Article 5 and Article 6 of Law Number 12 of 2011 and also contradictory to Article 10 paragraph (1) f of Law Number 23 of 2014 On The Local government . Therefore, local legal products that nuanced of shari'a must be reviewed due to the conflict with the principles of formation and substance of the higher legislation. Referring to the provisions of Article 250 paragraph (1) of Law Number 23 of 2014 On The Local government which stated that the legal products such as Local Regulation shall not be contrary to the provisions of the higher legislation, public interest, and/or morality. Under these provisions, the existence of local legal products that nuanced of shari'a should be reviewed based on the mechanism of Law Number 23 of 2014 On The Local Government. The substance of local legal products that nuanced of shari'a that contradict the higher legislation are juridical defects (substance defects) or are invalid and therefore can be canceled or even annulled (*van rechtwege nietig*) (Abdul Hadi, 2014: 65-66).

Seeing the increasingly massive development of the application of local legal products with the substance of a sectarian nature which implies the existence

of potential to discriminatory practices and human rights violations, as well as contrary to the higher laws and regulations, it is necessary to immediately structuring the existence of local legal products that nuanced of shari'a in the implementation of regional autonomy in Indonesia.

3. Structuring the Local Legal Product that Nuanced of Sharia.

Article 18 paragraph (5) of the Second Amendment of the 1945 Constitution stated: "Local Government conducts the widest possible autonomy, except on the affairs which by law determined as the affairs of the Central Government." Article 18 paragraph (6) of the 1945 Constitution also stated: "Local Government has the right to regulate local regulations and other regulations to implement autonomy and assistant task".

Based on these rules, it is clear that local government has a wide authority to conduct local autonomy and establish legislation and other regulations to implement regional autonomy. However, Article 18 paragraph (5) of the Constitution of 1945, stated that: "... except on the affairs which by law determined as the affairs of the Central Government ". Thus, the Constitution of 1945 stipulates that in the implementation of regional autonomy, local governments do not have the absolute authority for its region, but there are limits prescribed by law (Muhammad Fadhly Ase: 4-5).

Based on the constraints in the implementation of regional autonomy related to Local Government authority which is limited by the authority of the Central Government, the emergence of local legal products that nuanced of shari'a shows discrepancies or contradictions in which local government has entered into domain that related to "religious affairs" that indeed fall under the authority of Central government. Formalization of Shariah by using local legal products that nuanced of shari'a as instrument has caused a number of problems in the era of regional autonomy rather than as a solution or breakthrough in order to improve the welfare of society. Starting from the issue of the application of local legal products that nuanced of shari'a which are likely to be sectarian and discriminatory in nature as well as on the conflict of local legal products that nuanced of shari'a with higher regulations.

Hence, it is necessary to structuring local legal products that nuanced of shari'a, even if it could lead to an annulment of the local legal product. In the future,

as an effort to structuring local legal products that nuanced of shari'a, there are several steps that should be taken (Ahmad Mudhar Libbi, dkk, 2013: 8):

First, the preparation and establishment of local legal product should be adjusted to the principles of the formation and the substance of good legislation as has been stipulated in the Law Number 12 of 2011 on the Establishment of Regulation Legislation. Because when the local legal products are made based on the principles of good legislation, then the resulting local legal product will be in synchronization with other legislation either vertically or horizontally.

Second, in order to create an effective, legally enforceable and aspirational local legal product, the establishment of the regulation should reflect the values of democracy, pluralism, upholding human rights and does not conflict with the higher laws and regulations. The existence of local legal products that have good quality are manifestation of good governance. Therefore, these required active participation from society in the formation of local legal products, such as providing input and response to the substance of the draft of local regulation being discussed by the Local Government with Local Parliament.

Thirdly, it is necessary to strengthen and affirm the monitoring of local legal products that nuanced of shari'a that are not in accordance with the Constitution and higher legislation. Therefore, it is necessary to perform and optimize the mechanism of executive reviewing for some local legal products that nuanced of shari'a in Indonesia when they are not in accordance with the philosophical, sociological and juridical aspects in the life of the nation. In this case the Central Government through the Ministry of Home Affairs should further improve the effectiveness of its monitoring function on local legal products that nuanced of shari'a in order to maintain synchronization with the higher legislation and to ensure the purpose of regional autonomy is in the framework of the welfare society and is not to serve legitimize political-ideological and pragmatic interest based on religion.

E. CLOSING

The existence of local legal products that nuanced of shari'a in Indonesia is rampant in the reform era due to the existence of ideological-political interests that want to formalize the Islamic Shari'a in the life of the nation as well as pragmatic interests from

regional political elite in order to gain the support of "the Islamic masses" at the time of elections.

The establishment of local legal products that nuanced of shari'a are not in accordance with the principles of good legislation. Viewed from the urgency of the establishment aspects, local legal products that nuanced of shari'a do not have a clear significance if associated with the efforts to improve the welfare of society or as a solution in improving the quality of the implementation of regional autonomy. In fact, its existence has caused controversy because of sectarian tendencies and has been considered as a means of coercion of the teachings of Islam by using the positive law against others with different beliefs so it has the potential to create human rights abuses such as discriminatory and civil liberties restriction.

Therefore, the existence of local legal products that nuanced of shari'a should be annulled as they are contradict to the higher legislation, furthermore, the Central Government is expected to use its executive review mechanism to annul local legal products that nuanced of shari'a. As for citizens who feel aggrieved over the enactment of local legal products that nuanced of shari'a, they can use their constitutional right to apply petition to the Supreme Court (MA) to annul local legal product that nuanced of shari'a that is discriminatory.

Subsequently, in order to ensure that the formation of local legal products are not only to accomodate certain political elite or groups, there is a need for efforts to increase society participation and openness of the legislation process which is very important to create local legal products that are more democratic. As it is suspected, that one of the causes of the emergence of local legal products that nuanced Shari'ah is the lack of public participation in the implementation of the legislation process and the fact that there are no openness and lack of democratic practices in the making of "political decision" by the local government and parliament. Furthermore, there is a lack of human rights approach in the legislation process in the regional level, so it creates a number of local legal products that are discriminatory because they are only based on the teachings of a particular religion or norms.

Therefore, to prevent and address the emerging issues related to the existence of local legal products that nuanced of shari'a and in order to improve the quality of legislation in the regional, it is important to ensure the implementation of supervision by the central government on local regulations that are discriminatory, increase community

participation, openness in the legislative process and the need for a human rights approach in the formation of local legal products that could create a more pluralist-democratic local legal product in order to improve the quality of implementation of local autonomy in Indonesia.

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