

The Formation Of Regional Regulation Based on Sharia in the Framework of Indonesian Law System.pdf

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THE FORMATION OF REGIONAL REGULATION BASED ON SHARIA IN THE FRAMEWORK OF INDONESIAN LAW SYSTEM

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ABSTRACT

The formation of Regional Regulations Based on Sharia is closely related to the opening of opportunities through regional autonomy (Decentralization), the permanent aspiration of some Islamic groups to incorporate Islamic law into national law, in some regions in Indonesia, the observations of researchers found no less than 200 Sharia-Based Local Regulations by the Regional Government with a variety of reasons behind the law published. Therefore, this research try to find: (1) What is the essence of formation of regional regulation based on sharia; (2) How the establishment of regional regulations on based Sharia within the framework of Indonesia's national legal system; (3) How is the concept of establishing regional regulations based on sharia in accordance with the ideals of the Indonesian nation? Using a philosophical approach, conceptual approach and approach to legislation. Analysed using state theory of Pancasila Law, Legal Idea Theory, Normal Hierarchy Theory and Unitary State Theory. This research is normative research.

Keywords: Establishment, Regional Regulation, Sharia, Indonesian Legal System.

INTRODUCTION

After the implementation of regional autonomy which is marked by the enactment of Law Number 22 of 1999 replaced by Law Number 32 of 2004 replaced also by Law Number 23 of 2014 on Regional Government, every province and regency/city have a very large authority to arrange and manage the area according to the characteristics of each region. Opportunities given by the regional autonomy policy are translated vary by region. One of the translations used is to make various Regional Regulations in which there are Sharia-based Regional Regulations (Ija, 2014).

The rise of the Sharia Regulation is closely related to the following, the opening of opportunities through regional autonomy (decentralization) and the permanent aspiration of some Islamic groups to incorporate Islamic law into national law. Because the effort to include the seven words in the Jakarta Charter in the 1945 amendment did not succeed, the tendency shifted to the regional level through the formation of a Regional Regulation (Utang, 2010).

The movement demanding the implementation of Islamic Sharia in Indonesia shows the assumption that the reformation of Islamic society or Islamization can take place with the laws, institutions and instruments of the State. Similarly, the application of Sharia is seen as a solution to overcome all sorts of problems faced by regions such as crime and prostitution (Ni'matul, 2014). Regardless of the pros and cons of sharia regulations, a sharia-based regulation is emerging almost in all regions of Indonesia. In Tempo's record, up to 2011, there are at least 150 sharia-based regulations in Indonesia (Baskoro, 2010).

METHOD

This type of research is normative legal research or also called doctrinal research (Ronny, 1983). Normative legal research is a study that lays law as a norm system building. The system of norms is about the principles, norms and rules of legislation, court decisions, agreements and doctrines (teachings) (Mukti & Yulianto, 2013). Peter Mahmud Marzuki said "*normative legal research is a process to find a rule of law, legal principles and legal doctrines that answer the legal problems encountered. Normative legal research is conducted to generate arguments, theories or new concepts as prescriptions in solving problems encountered*" (Peter, 2005).

RESULT AND DISCUSSION

The Nature of the Formation of Region Regulation Based on Syaria in Indonesia

The nature of the formation of the Regional Regulation is the implementation of the 1945 Constitution, the Law and other laws and regulations, namely Pancasila, Article 18 paragraph (6) of the 1945 Constitution, Article 236 paragraph (1) Law Number 23 of 2014 on Regional Government, Law Number 12 of 2011 on the Establishment of Legislation and Regulation of the Minister of Home Affairs Number 80 of 2015 on the Formation of Regional Law Products. The Unitary State of the Republic Indonesia is a country based on law, (*rechtsstaat*) it is appropriate in the explanation of the Constitution of the Republic of Indonesia. Therefore, the entire establishment of legal norms must be in accordance with applicable law. Similarly, the establishment of Sharia-based Regional Regulations must also be in accordance with the applicable law, as a consequence of the law's recognition as the basis of our state.

Formation of Sharia-Based Regional Regulations in the Framework of the Indonesian Legal System

After the proclamation of Independence on August 17, 1945 and the enactment of the Constitution of 1945, then Pancasila serve as the source of all sources of law. However, as a result of the Transitional Provisions Article II in the Constitution of 1945 still apply parts of colonial law, with adjustments with the 1945 Constitution. In the development of law in Indonesia (positive law), including Pancasila, the 1945 Constitution, customary law system, Islamic legal system, western legal system.

Hans Kelsen stated the theory of hierarchy of legal norms. He argues that the legal norms are tiered and multi-layered in a hierarchy of order, in a sense, a lower norm applies, is sourced and based on higher norms, higher norms apply, is sourced and based on the norm cannot be traced further and it is hypothetical and fictitious, is the basic norm (Grundnorm). The basic norm which is the highest norm in a norm system is no longer formed by a higher norm, but the basic norm is “*predetermined by society*” as the basic norm which is the hanger for the norms under it, so that the basic norm is said to be presupposed (Hans, 1945; Maria, 2007).

The Concept of Formation of Sharia-Based Regional Regulation in the Ideal of Pancasila Law

The following authors will describe the intergalactic concept of the formation of sharia-based regional regulation, namely: the values of Pancasila, Strengthening the Unitary State of the Republic of Indonesia, the value of Regional Autonomy and Supervision.

First, the values of Pancasila, placed in the first position, means that the formation of Sharia-Based Regional Regulations, must be in accordance with the principles or values contained in Pancasila. In the theory of legal ideals, Pancasila is like a guiding star in the whole formation of the applicable legal norms. As a guiding star, it means that Pancasila values must be the standard in the making of Sharia-based Regional Regulation. Content material contained in Sharia-Based Regional Regulations, shall integrate the values of Pancasila. According to A. Hamid S. Tamimi, as a guiding star, the five precepts of Pancasila in its position as the legal ideals of the Indonesian people in a society, nation and state are “*guiding stars*” providing guidance in all activities, giving contents to each legislation.

The Second, Strengthening the Unitary State of the Republic of Indonesia, it means that the content of Sharia-Based Regional Regulations, should be able to strengthen the unity and integrity of the nation, and must be able to maintain Bhineka Tunggal Ika, among the pluralistic Indonesian citizens. The pluralism of culture, religious, racial, group, tribe, should be able to be translated properly by the maker of the Sharia-based Regulation in the Region, in order to create an atmosphere of community life that upholds the values of tolerance among religious people. Tolerance means respecting the differences of culture, religion, race and class to society and not forcing the will of religion, culture, race, class for others.

Third, Regional Autonomy, meaning that the formation of Sharia-Based Regional Regulation, is the authority possessed by the Regional Government to carry out the function of independence and regional freedom in regulating and managing regional affairs, which is in accordance with the characteristics of the region. In addition, the formation of Sharia-based Regional Regulations is also a form of the mandate of the law as a legal norm that accommodates local content materials, in accordance with applicable legislation.

Fourth, Supervision, meaning to the content material, as well as the formation of Sharia-Based Regional Regulations, the Central Government has the authority to supervise whether the content material and the formation of Sharia-Based Regional Regulations are in accordance with the prevailing laws and regulations, according to Irawan Soejito, (Irawan,1990) generally supervision to all activities of the Regional Government including the Decision of the Regional Head and the Regional Regulation, is an absolute consequence of the existence of a unitary state.

CONCLUSION

1. The nature of the establishment of Sharia-based Regional Regulations in Indonesia. First, implementation of the value of Pancasila First Principle “*Ketuhanan Yang Maha Esa*” and is a mandate of the applicable legislation.
2. Establishment of Sharia-based Regional Regulations within the Framework of the Indonesian Legal System. First constitutionally established, in accordance with Article 237 paragraph (2) of Law Number 23 of 2014 on Regional Government. Both Sharia-Based Regional Regulations are part of Indonesia's national legal system, because the Indonesian national legal system consists of: customary law system; Islamic legal systems including (Sharia-based Regional Regulations), western legal systems and international legal systems.
3. The concept of establishing Sharia-Based Regional Regulations in accordance with the Ideal Law of Indonesia is an intergalactic concept. This concept combines the values of Pancasila as the source of all sources of law, strengthens the Unitary State of the Republic of Indonesia, and carries out regional autonomy and is controlled through supervision by the mechanism of executive preview and judicial review.

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