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The Authority Of Regional Government Of Formation Regional Regulation (Perda) Shari'a

M. Galang Asmara

Law Faculty, Mataram University
Jl. Majapahit No. 62 Mataram, West Nusa Tenggara
E-mail : galangalkawoi@yahoo.com

Gatot Dwi Hendro Wibowo

Law Faculty, Mataram University
Jl. Majapahit No. 62 Mataram, West Nusa Tenggara
E-mail: -

RR. Cahyowati

Law Faculty, Mataram University
Jl. Majapahit No. 62 Mataram, West Nusa Tenggara
E-mail: -

ABSTRACT

The study, the Authority of regional government Formation of Regional Regulation (Perda) shari'a aims to assess four legal issues, namely: (1) Establish a Regional Authority Perda Syariah; (2) The criteria of Shariah legislation; (3) The procedure of Legislative Shari'ah; (4) Testing Regulation to shariah. This research is normative by using several approaches, namely: (a) Conceptual Approach (Conceptuan aproach); (B) Approaches Legislation (Statute aproach); and (c) Approach the case (Case aproach). The results of this study are expected *bermanfaat* either for the development of Science and to assist practitioners in the formation of legislation. The research results are as follows: (1) The Regional Authority to establish Sharia legislation can be found in several laws and regulations, both in the Constitution and in the implementation of such rules in the Act; (2) Criteria Sharia legislation is contained in the contents that are based on the values and teachings of Islam; (3) Procedures establishment of sharia in *praktinya* regulations following the establishment of regulations in general; (4) review of sharia regional regulation also follow the testing procedures and legislation in general. Forward *suggest* that the process of formation of Perda Syariah scholars to enroll in the area at least in the process of forming draft local regulations. Similarly, in the process of judicial review and evaluation should be based on the sources of Islamic law and involves an element of religious leaders and religious judges.

Key Words: Regulation, the Shariah, regional authority.

INTRODUCTION

Article 18 paragraph (2) of the Constitution of the Republic of Indonesia, regulates that the provincial, regency, and city government and administer their own governmental according to the autonomy principle and co-administration. To carry out the mandate of Article 18 of the Constitution of the Republic of Indonesia, the Act of Regional Government was formed, that

currently applying is the Act No.23 year 2014 on Regional Government.

After implementation of the regional autonomy, every province and regency/city has authority to regulate and manage their region in accordance with the characteristics. The opportunities provided by the regional autonomy policy were applied variously, by form the various Regional Regulations.¹ Definition of Regional Regulations in the Act No.12 year 2011 on the Formation of Legislation, is legislation formation by the Provincial/Regency/City Legislative with approval of the Governor/Regent/Mayor.

In Article 14 of the Act No. 12 year 2011 on the formation of Legislation, regulates the content of provincial and regency/city regulations containing in the context of the implementation of autonomy and co-administration and also accommodates the specific conditions of the region and/or elaboration further of the legislation. In the commentary of this Act, it is stated quite clearly, but what is not yet clear is what is meant by accommodating the specific conditions of the region, resulting in the obscurity of the norms in this.

The appearance of Sharia Regional Regulations has caused controversy in the society. The controversy can be seen in several root causes :²

1. Different views on Islam.

The difference of view in seeing Islam that implies to acceptance of the existence of sharia regulations. One side, see Islam as a living system and some, see it is a religion. For those who views Islam as a life system, it is argued that life is regulated by the only one source, that is teachings of Islam (Al-Qur'an and Sunnah), because its teachings are comprehensive, universal, and integrated in worldly and moral life.

2. Problem of legal sources

In the legal sciences literature, sources of law are the Act, customs, treaties, jurisprudence, expert opinions. The consequence of this theory is other materials cannot used as sources of law, including sources of religious teachings, as well as *ijtihad* ulama. Although, one of source is the opinion of experts, that meant by experts here is secular law experts or western law experts. Therefore, speaking of the law in the context of life, religious law is always neglected when dealing with state law. This is one of the reasons for unaccepting Sharia regulations by some.

3. Controversy between religious and nationalist cluster

¹ Ija Suntana.(2014). *Politik Hukum Islam*. Bandung : CV Pustaka Setia, p. 391

² *Ibid*, p. 397.

Religious cluster represented by people with a background in Islamic education. Thus, the nationalist cluster represented by those with a Western education background. Although currently the dividing wall between Islamic students and public education has begun to fuse.

4. Study of Islamic law that is Theoretical

In various educational institutions in Indonesia, the study of Islamic law is virtually theoretical. Studied Islamic law is not often found in reality, except concerning the laws of special worship such as prayer, fasting, zakat and hajj. However, in the field of muamalah elusive reality of Islamic law. As the field of inheritance, economic, political, criminal etc.

From the above, addressing the controversy about Sharia regional regulation, the differences in viewing Islam implications for the acceptance of the existence of Islamic legislation. Anybody see Islam as a system of life and some viewed solely as a religion.

From the background description related to local government authority in the formation of Sharia regional regulations, the legal issue that arises are the local government authority to formation Sharia regional regulations, Sharia regional regulation criteria, procedure of formation and review of Sharia regional regulations.

METHOD

Type of this research is normative legal research. Also called doctrinal³ research, Uses three approaches, statute approach, conceptual approach, case approach. Sources of legal material in this research are primary legal materials, secondary, and tertiary. The technique of legal materials collecting in this study was carried out through the study of literature on legal materials, both primary legal materials, secondary legal materials, tertiary legal materials or non-legal materials. Searching for materials by tracking legal material through internet media.⁴

ANALYSIS AND DISCUSSION

The authority of the Regional Government to formation the Sharia Regional Regulation

The Legal Basis for the formation of Sharia Regional Regulations is regulated in

³ Ronny Hanitijo Soemitro. (1983). *Metodologi Penelitian Hukum*. Jakarta : Ghalia Indonesia, P.24

⁴ *Ibid.*.p.160

Article 14 of the Act No 12 year 2011 of Formation of Legislation, that states: "The content of Provincial Regional Regulations and Regency/City Regulations contains in the context of implementing regional autonomy and co-administration and accommodating of the regions specific conditions and/or elaboration of Legislation further".

The presence of a nuanced regional regulation on Islamic Shari'a is not only interesting because of the pros and cons, but also the struggle for ideas behind these regulations. Regional regulations as a product of public policy cannot be separated from a political process that can be motivated by various kinds political idealization adopted by general policy makers in which there are many values not only collectively but also individually have to considered as the basic norms of shared life. Sharia regional regulations appear in several regions. The following is data on regulations including Sharia-compliant local regulations issued by several regions.

From the provisions of Article 14, it show the Regional Regulation other than as an instrument implementing regional autonomy and co-administration and accommodating of the regions specific conditions. Specific conditions that included society needs for the implementation of Islamic law and related based on customary laws to govern life.

Criteria of Sharia Regional Regulation

The existence of the Sharia Regional Regulation so far is still dilemmatic, in terms of concept and implementation. There are people consider that the Sharia Regonal Regulation is unnecessary, but also those who consider that is important in maintaining the moral of the society. Although, the juridically formal does not apply constitutionally, but the existence of sharia regional regulations is still existance. Even the Sharia regional regulation itself tends to be politicized rather than enforcing. Generally the content of the Sharia Regional Regulation is basically asRegional Regulation whose contents as mentioned above, only the difference lies in the nature of the rules that are guided by Islamic Shari'a.

Sharia Regional Regulations Formation Procedure

The formation of regional regulation is the authority of the Head of Regional together with the local legislative, as initiative Regional Head, and the initiative of the local legislative.

Regional head initiative

The head of unit work of the regional apparatus compiled a draft regulation.

Discussion of the Draft Regional Regulation focused on the principle issues concerning the object will regulate, the range and direction of the arrangement. Team leader reports on the development of the draft Regional Regulation and/or the problem to the Regional Secretary to obtain direction. The draft regulation that has been discussed should get the initial coordination and submit the draft to the Regional Head through the Regional Secretary. The Regional Secretary can changes and/or improvements the draft. The results of the revision of the Draft Regional Regulation re-submitted to the Regional Secretary after coordination by the head of the law bureau or the head of the legal department and the head of the relevant regional apparatus unit. Is submitted to legislative to discussed. In the context of discussing the draft with legislative, an Assistance Team was formed, chaired by the Regional Secretary or officials appointed by the Regional Head with the secretariat in the law bureau or the legal department.

Legislative initiative

The legislative initiative proposed at least five members from three factions (party) could submit a proposal for the draft initiative. The initiator submitted to the legislative head (the speaker) in form of a Regional Regulation Draft accompanied by a written explanation and Principal number by the house's Secretariat. The legislative was delivered to the Plenary Meeting after being considered by the Consultative Committee. In the Plenary Meeting that proposers were given the opportunity to provide an explanation on the proposal of the initiator. Discussions about a proposal by giving an opportunity to: other members to provide views; The proposers gave answers to the views of the members and the opinions of the Head of the Region. before it was decided to become an initiative of the legislative, the proposers were entitled to file changes and/or revoke them again. The discussion ended with legislative Decree accepting or rejecting the proposal of the initiative to become them initiative. The procedure for the discussion of the draft Regional Regulation on the initiative follows the applicable provisions in the discussion of the Draft Regional Regulation on the initiative of the Regional Head.

Review of Sharia Regional Regulations

With the order of replicating the model in Islamic law, the Constitution of the Republic of Indonesia Year 1945 as Indonesia written constitution, the supreme law of the country (the supreme law of the land). As the highest law, the laws which are at the lower

level must be in harmony with the 1945 Constitution of the Republic of Indonesia. The last order of Indonesian legislation as written in advance is the order of the rules stipulated in Article 7 paragraph (1) and paragraph (2) of the Act No. 12 year 2011 on the Formation of Legislation.

In the Islamic perspective, the supreme law is the Koran. According to the provisions of Article 7 paragraph (2) the Act No. 12 year 2011 on the Formation of Legislation, the regulation consists of: a. Provincial Regional Regulations are made by the provincial legislative together with the Governor; b. Regency/City Regional Regulation, made by the Regency/City legislative together with the regent/mayor;

The Imam of the Fourth Sect is Abu Hanafi (692-722 AD), Malik ibn Anas (715-801 AD), Shafi'i (722-820 AD) and Ahmad ibn Hambal (780-855 AD) even today all *ulama* agree that the Koran is the highest source of Islamic law.⁵ The Koran is the highest law in Islamic law, in national law the position can be equated with the constitution, becomes a touchstone not only against the lower level of legislation, but also against the Scriptures that were passed earlier, such as what Allah said: "And We have sent down to you the Koran by bringing the truth, confirming the previous ones, the Books (which were revealed before) and the test of the other Scriptures".⁶

However, it's related to the Sharia Regional Regulation, then the judicial review conducted by the Supreme Court must be given to the Supreme Court Justices who try in religious cases, because in the substance after all that is concerned is related to Islamic values and Shari'a. Sharia Regional Regulation testing instruments are also not higher laws and regulations but with religious teachings contained in the Koran, and hadith and *ulama* opinions.

CONCLUSION

The authority of the Regional Government to formation of Sharia Regional Regulation found in several laws and regulations, as in the 1945 Constitution which as basis for government action e found the basis for the formation of Sharia Regional Regulations in Article 18 paragraph (6) which gives authority to the Regional Government to form Regional Regulations. Then Article 18 B paragraph (1) and paragraph (2) which gives the possibility of regions for special regions to regulate their own interests. Then in the Act also found

⁵ Ahmad Sjalaby.(1961). *Sejarah Pembinaan Hukum Islam, terjemahan Abdullah badjerei*. Jakarta : Djajamurni. p 103-116.

⁶ Saudi Arabia until 1992, when the Saudi Arabia constitution was promulgated, made the Koran and Sunnah Rasullulah as the Constitution.

several provisions that can be used as the basis of authority for regional governments to form the Sharia regional regulation the Act No. 12 year 2011, Article 14. The Criteria of sharia regional regulation are situated on the charge of material containing or based on the values and teachings of Islamic law, both muamalah and worship.

The formation procedure of Sharia Regional Regulations is basically the same as the procedure for the formation of Regional Regulations in general, but considering the contents are related to the teachings of Islam, the Government consults or will ask for opinions from the *ulamas* or the *ulama* council. And review the Sharia regional regulation in fact follow the usual pattern of review the regulation

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