

The Existence of Religious Norm in the Formulation of Local Regulations in Indonesia

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Abstract

The problem of this academic research was why religious norm must be the source material of local regulations. Meanwhile it is known that Indonesia is a national country which based on Pancasila and the Constitution 1945. To answer this problem, this study tried to assess the significance, position and function of religious norms for the regulation of religion. The results showed that the religious norm has significance in the formation of local regulations because this process is part of the democratization process in exploring the basic spirit of national state in the country, so eventhough the State of Indonesia is not a religious state, but the Pancasila state has accommodating attitude toward the existence of norms religion as one of the sources of positive law as stated in the first principle of Pancasila and the Constitution 1945 Article 29. In Hans Helsen's theory, religious norms as a source of substantive law in local legislation is constitutional, while seen from the function, regulation of religion would have the effective power and resources to conduct because the followers of these religions have their own awareness of the legal obligations of the state and their religious duties

Keywords: religious norm, democratization, the basic spirit. and constitutional state

A. Introduction

In political reality, Indonesia constitutionally is not a religious state, thus the Pancasila-based state does not formally allow for certain religious communities to realize the full religious norms in the legal-formal level. Pancasila-based state is the national state which is not the religious state (in the sense of meaning of a particular religion) as well as a secular state (in the sense of a country that does not deal with religion at all)¹. Pancasila state gives particular attention to the norms of the religions professed by the citizens for in accordance with the principles of justice and civility. In the unique formed-attention, the religious people have the opportunity and freedom to impose their religious norms. At the same time, religious communities in Indonesia have a bond and obligation to obey and enforce the national (legitimated laws procedurally passed by the people's representatives). Some of the leaders of religion in 1945 and 1950, in BPUPKI, PPKI and Constituent have been tried to fight for the formalization of certain religious norms (read: Islamic law) through the legal-formal way to make religious norms as the state's base, but the final decision about the base and the state constitution which was set did not accept the idea of a religious state or a legal obligation to run a religious laws totally for its adherents. The founders and decision makers of the state of Indonesia has set this country as a unitary and national state with Pancasila as the basis to accommodate the plurality of religion or culture². The assertion itself of Pancasila state in the early days of the New Order made it as if it was a secular state, but by the last half of the New Order regime, it started building accommodating attitude toward religious norms, such as the birth of Act No. 1 of 1974 which regulates marriage and others even though at that time the State was centralized and authoritarian.³

¹ One said this concept as teo-democracy state. Indonesia state is not a religion state and a seculer but in the middle of the relation of religion and state. Abdul Halim, POLITIK HUKUM ISLAM DI INDONESIA, (Badan Litbang dan Diklat Depag RI, Jakarta, 2008, 35)

² Moh Mahfud MD, MEMBANGUN POLITIK HUKUM, MENEGAKKAN KONSTITUSI, (Rajawali Pers, Jakarta, 2010, 281).

³ Moh Mahfud MD, PERGULATAN POLITIK DAN HUKUM DI INDONESIA, (Gama Media, Yogyakarta, 1999, 299).

Although essentially, the Constitution 1945 was adopted from Joint Stock State (*unitary state*), which recognizes the plurality, good local knowledge, customs, local democratic atmosphere, local wisdom, and the capacity of the government. The birth of the Reform Order which gave autonomy to the regions has provided significant changes to the system of the state / government of Indonesia generally and local government particularly.⁴

Both of theoretically and practically, decentralized systems provide more freedom and independence to local communities in the planning and decision making, especially in the interests of local communities, therefore the meaning of decentralization often being the trigger in the formation of religious and wisdom-like local laws, so the system is as if it can reduce the sense of justice for the public. While the purpose of granting regional autonomy is to enhance the role and function of regional legislatures to empower, develop initiative and the creativity of the community.⁵ The paradigm shift from centralized government systems (New Order) to a decentralized government system (Reformation Era) also affects the rights and obligations and authority of each government structure, both at the central and local which one of the vision in the social and culture is to "build social harmony while maintaining local values that are considered conducive"⁶

In a decentralized era, there are norms that affect a person's procedure to act and behave. The developing norms in Indonesia are customary norms, religious norms and moral norms. Norm differences can be seen, for example, in the norms of customary law in Indonesia. Customary norms always apply in accordance with the customs of society, for example in the tradition of inheritance that follow matrilineal descent system (matrilineal) in the Minangkabau region. Similarly, religious norms have evolved so rapidly after decentralized systems which are characterized by the birth of a number of religious regulations in some areas.⁷

Birth of religious-like local regulations can not be separated from the conducive political climate as set forth in the amended Article 18 paragraph (6) of the 1945 Constitution regulating the establishment of the authority and mandate of Law No. 12 of 2008 which regulates the effective local government with paying attention of principles of democracy, equality, justice, and rule of law in the system of the Republic of Indonesia. However, the emergence of a number of religious local regulations which is rampant in some areas has led to fears for some members of Indonesian parliament who are 56 people. They are worried about the birth of religious regulation can make this country as the religious state⁸. From the anxiety, the researcher needs to study the significance, position and function of religious norms in the formation of local regulations in Indonesia. It is because regulation of religion has become factual phenomenon in national life and government in Indonesia.

B. Methodology

The research approach used law theory of Hans Kelsen.⁹ In theory and coating classes of this law, law theory of Kelsen mentioned dynamics into two: *First*, the vertical of law norms that include dynamics level from top to bottom or from bottom to top. In this vertical dynamics, a law norm is valid, sourced and based on the rule of law on it, law norm in above is valid, sourced, and based on the rule of law on it, and so forth until the rule of law which is being the basis of all legal norms under which called *grundnorm*. Similarly, the dynamics of top-down put *grundnorm* (basic norm) as the source and basis of the rule of law under, under the rule of law has always been the source and basis of the rule of law under, and so on.¹⁰

⁴ Jasim Hamidi et. all, OPTIK HUKUM; MENGGAGAS PERATURAN DAERAH YANG RESPONSIF DAN BERKESINAMBUNGAN, (Prestasi Pustakarya, Jakarta, 2011, 47).

⁵ Jasim Hamidi et. all, OPTIK HUKUM; MENGGAGAS PERATURAN DAERAH YANG RESPONSIF DAN BERKESINAMBUNGAN, (Prestasi Pustakarya, Jakarta, 2011, 48)

⁶ Moh Mahfud MD, MEMBANGUN POLITIK HUKUM, MENEGAKKAN KONSTITUSI, (Rajawali Pers, Jakarta, 2010, 223).

⁷ Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: PROSES DAN TEKNIK PEMBENTUKANNYA, (Kanisius, Yogyakarta, 2007, 19-20).

⁸ Abdul Hadi Damanik, SHW, DAERAH BERGERAK, PUSAT MENCAK-MENCAK,

http://ahmaddamanik.multiply.com/journal/item/4?&item_id=4&view:replies=reverse&show_interstitial=1&u=%2Fjournal%2Fitem diakses 19 September 2012

⁹ Bernard L Tanya, Yoan Simanjuntak, dan Markus Y Hage, TEORI HUKUM: STRATEGI TERTIB MANUSIA LINTAS RUANG DAN GENERASI, (CV Kita, Surabaya, 2007, 148).

¹⁰ Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: JENIS, FUNGSI, DAN MATERI MUATAN, (Kanisius, Yogyakarta, 2007, 23).

This research was normative legal research that examined basic norms of religion as source of law in the formulation of local regulations, particularly regulations relating to the enforcement of religious local regulations and its position in the legal system in Indonesia.¹¹ Normative legal research methods used to study the concepts of law or applicative regulations as positive law.¹²

C. Result and Discussion

Hierarchy of Religion Norm in the Region Regulatory

Norm is a standard that must be followed by a person in relation to one another or to the environment. The word "norm" is derived from the Latin or "rule" in Arabic, while the Indonesian language called "pedoman, patokan atau aturan" ("guidelines, standards or rules"). The word "norm" originally meant the elbow-to-elbow, which is perpendicular to the benchmark in size or shape or outline of the desired angle. In its development, the norm is defined as a measure of or benchmark for someone to act in society, so that the essence of the word norm is any rule that must be obeyed by someone in the act. Soerjono Soekanto and Purnadi Purbacaraka argued that the rule is a rule of thumb, size or guidance in behavior or attitude in life. Therefore, the norm would be formed if there is more than one person, because the norm is functioned to regulate someone how to behave towards others, or to the environment, so that norms can only arise and be found in the association of human life. Each norm contains commands called *Das Sollen* (*ought to be*) and the Indonesian language defined by the term '*hendaknya*' (*'should'*).¹³

Norm comes from the word *nomos*, which means the value and then being narrowed its meaning to the rule of law. In Arabic, *Qa'idah* means the size or value of the gauge. Norms or rules (rules) is the institutionalization of good values and bad in the form of regulations containing the permissibility, suggestions, or orders. Either suggestion or command can contain rules that are positive or negative, so it includes suggestions norms for doing something or recommendation not to do something, and commands norms to perform or order not to do something.¹⁴

Norms of law can be formed writtenly or otherwise by authorized institutions, whereas moral norms, customs and religion are not written, but grow and develop from customs that exist in society. Customs that occurred about something good and bad and which have been repeated will always correspond to the sense of justice in the community. It is different from the norms of state law that are sometimes not always correspond to the sense of justice / public opinion.¹⁵

In the Western world, the norm is usually known for three things: liability, may / halal and haram / ban. If the three kinds of rules are compared to each other can be said that the rules of religion in the narrow sense of the vertical and personal aims for the sanctity of life, the rules of morality (personal) aims to form a personal moral goodness, and interpersonal ethics rules or the rules of politeness aims to achieve the piquancy of life interpersonally. Those three principles have nature of 'volunteer, which is derived from the personal consciousness within every supporter of the rule itself and the power of his behavior grew out of the man's self (imposed from within). In contrast, the power behavior of the rule of law (*legal norm*) it imposed from outside the human self (*imposed from without*).¹⁶

In terms of purpose, the rule of law or the rule of law was focused on the ideals of interpersonal life peace. Therefore, law enforcement work "*to preserve peace*". In peace or peaceful state there is always the "*rust en orde*". "*Order*" related to public order and safety, while the "*rust*" with regard to peace and tranquility.

¹¹ Sarjono Soekanto, PENELITIAN HUKUM KUALITATIF, (Alumni, Bandung, 1998, 42).

¹² Soetandyo Wignjosebroto, "*Ragam-ragam Penelitian Hukum*" Sulistiyowati Irianto dan Shidarta (eds), METODE PENELITIAN HUKUM: KONSTELASI DAN REFLEKSI, (Yayasan Obor Indonesia, Jakarta, 2009, 121).

¹³ Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: JENIS, FUNGSI, DAN MATERI MUATAN, (Kanisius, Yogyakarta, 2007, 18).

¹⁴ Ni'matul Huda dan R Nazriyah, TEORI DAN PENGUJIAN PERATURAN PERUNDANG-UNDANGAN, (Nusamedia, Bandung, 2011, 14-15).

¹⁵ Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: JENIS, FUNGSI, DAN MATERI MUATAN, (Kanisius, Yogyakarta, 2007, 19).

¹⁶ Jimly Asshiddiqie, PERIHAL UNDANG-UNDANG, (Rajawali Pers, Jakarta, 2010, 3).

"Order" associated with external dimensions, while the "rust" on the dimension of "inner". Peaceful state which is being the final goal of the law norm lies in the balance between the "rust" and "order", ie between the inner and outer dimensions which produces a balance between order and peace, the security and peace. The purpose of peace living together also related to the task of formulating the rule of law, which is to achieve certainty, fairness, and usefulness. Any legal norms that should result in a balance between the value of (certainty), (equity), and (utility).¹⁷

There are 4 (four) norms that regulate all kinds of relationships between individuals in society namely *first*, religion norm is the norm stem from his belief of God Almighty and considers religious norms prescribed by God Almighty in the universe. Violation of the norms of religion, means violating God's commands, which will be punished in the hereafter. Examples of religious norms containing ban "you can not kill." *Second*, moral norms are norms that originate on the human conscience, the 'whispering to do goodness and not to do bad deeds. Violation of the norms of decency is a violation of his own good feelings that result in regret, for example, "You can not kill". *Third*, the norms of politeness is the norm that arise in public life, which regulates manners and behavior in social life among members of society. *Fourth*, the rule of law is the norm that serves to maintain and enforce the validity of the three norms if being violated.¹⁸

Law norms will be able to play a more precise sense of unify the nationhood in Indonesia if law norms established themselves for the happiness of society. To go in that direction, then the rule of law must be seen as a system consisting of a set of parts that relate to each other or together toward the same goal.¹⁹ In that case, the whole system of legislation must have a pyramid structure ranging from the abstract which is *grundnorm* to the concrete rules such as laws, regulations, and local regulations. According to Kelsen, how to recognize a constitutional and unconstitutional rule is through *stufenbau* logic by making *grundnorm* as major foothold.²⁰

If Hans Kelsen's theory is used to read a sequence of orderly system of laws in the Republic of Indonesia, the dynamics of vertical arrangements with the law of the Republic of Indonesia can be explained by the sequence starting from the Pancasila as the norm of the State which is the source and basis for the formation of legal norms in the body of the 1945 Constitution, and law norms that are in the body of the 1945 Constitution is the source and basis for the establishment of law norms in the Decree of the People's Consultative Assembly (MPR), and norms that are stated in the MPR decree is the source and foundation of the norm development in the Act, and so on down until local regulations.²¹

Hierarchy also happens in the state system of Indonesia as stated in the second amendment to the 1945 Constitution in 2000, in article 18, section 18A and section 18B which replaces Article 18. In Article 18 UUD 1945 verse (1) mentioned, the Republic of Indonesia is divided into provinces and that provincial regions and cities divided into districts, which each province, district, and the town has a local government that is regulated by law. In that case, there is a hierarchy between the provincial and district / city governments. Provincial government as the representative of the central government in the region accommodated in the form of governmental affairs concerning regional arrangements for the work area. The Law. 32 of 2004, local governments called directly as provincial and district / city in each verse²²

¹⁷ Jimly Asshiddiqie, PERIHAL UNDANG-UNDANG, (Rajawali Pers, Jakarta, 2010, 3).

¹⁸ Riduan Syahrani, RANGKUMAN INTISASI ILMU HUKUM, (Publisher PT Citra Aditya Bakti, Bandung, 2004, 7-9).

¹⁹ Zudan Arif Fakrulloh, "Peranan Hukum dalam Merekatkan Kebangsaan Indonesia", ORASI ILMIAH delivered in Dies Natalis 30th Universitas Wijaya Kusuma Surabaya, <http://jdih.depdagri.go.id/> diakses 2 September 2012.

²⁰ Bernard L Tanya, Yoan Simanjuntak, dan Markus Y Hage, TEORI HUKUM: STRATEGI TERTIB MANUSIA LINTAS RUANG DAN GENERASI, (CV Kita, Surabaya, 2007, 148); Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: JENIS, FUNGSI, DAN MATERI MUATAN, (Kanisius, Yogyakarta, 2007, 23).

²¹ Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: JENIS, FUNGSI, DAN MATERI MUATAN, (Kanisius, Yogyakarta, 2007, 24).

²² <http://www.unggulcenter.org/2010/05/10/uu-no-32-tahun-2004-tentang-pemerintahan-daerah-catatan-implikasi-positif-dan-problematika/> accessed at 30 August 2012

Dealing with the local authorities to establish local government regulations, the system hierarchy must also be applied in the establishment of local regulations, so it does not against the laws and regulations on it. In the perspective of the establishment of the law (*legislative drafting*), Ministry of Home Affairs and Regional Autonomy has given criteria of establishment of regulations that are often problematic and contrary to the rules on it as follows: a). The regulation violated the rules of formation as violating the good principles of legislation forming (regulations), b). The law is contrary to the laws and regulations that higher level, c). The law does violate the public interest, and also because of the disharmony between the laws by decree Regent / Mayor²³ Regulation cancellation of local regulations which is not in accordance with the laws of the higher regulated in Article 11 paragraph (2) letter b of Law no. 4 of 2004 in conjunction with Article 31 paragraph (1) of Law no. 5 of 2004 which stated that the Supreme Court the authority to conduct laws under the law. The reason the Supreme Court stated unlegality of legislations under the law, there are 2 (two) reasons: (1) contrary to the laws and regulations of higher, or (2) the forming did not comply with regulations. Then in Article 31 paragraph (4) Law no. 5 of 2004 stated that the legislation declared invalid has no binding force.²⁴

Meanwhile, the dynamics of the rule of law is a dynamic horizontal law which moves to sideways. This horizontal norm of law dynamic does not constitute a new law norm, but the norm moves to the side because of an analogy, the withdrawal of a rule of law for the other events that are considered similar. The instance of the drawn the analogy, the rules are meant to mention that *theft is when someone takes other people's stuff to be used or held by illegal means*. At this time the notion of 'stuff' is not only meant to 'objects' that can be taken, but also to 'electricity power', so that those who stole the 'electricity power' to be used or possessed illegally granted by such sanctions are imposed in case of usual theft.²⁵

One example of a dynamic system of norms (*nomodynamics*) which have been applied in the decision of the head of the region is the system norms that see the effect of a norm in society, such as the religious decision of the regional head (in the form of Islamic law) in the district of East Java Pamekasan. Establishment of *Lembaga Pengkajian dan Penerapan Syariat Islam (LP2SI) (the Assessment and Application of Islamic Law)* established by Decree No. 188/126/441.012/2002 in November 2002. Birth of Regents decision could not be separated from the character of the strong religious culture in Pamekasan islands located in Madura, East Java, resided by approximately 688,380 inhabitants (SP 2000). From these data, 92% of its citizens embrace Islam with an excellent infrastructure²⁴ Since the first colonial times, the islands of Madura had contact with Islam. Therefore, it was reasonable if citizens were eager to impose religious norms (in the form of Islamic law) in all aspects of life. The potential of the people and the existence of adequate infrastructure as an opportunity to promote unity in enforcing the norms of religion (Islam) in this area, which had been preceded by: (1) a declaration to enhance the practice of religious norms on November 4, 2002, (2) climate and spirit of autonomy that allows each region to formulate development policies, (3) the birth of a new paradigm in the field of government, in which the people than as a subject of development is also a source of development information.²⁶

The fundamental reason the application of religious norms in the legislation because of the awareness of the government stating that Pamekasan race conditions in recent decades is a historical reality that is far from the ideals of religion. History of human life is now nothing more than a history of underdevelopment and backwardness. This is due to the gap between the reality with its ideals; well the gap between the theoretical religion (concepts) to religion on a practical level (*amaliyah*). Therefore, the idea of the Pamekasan government to realize the so perfect religious norms does not stop only at the level of values, the theological-dogmatic, and the level of mere faith, but will gradually be actualized at the level *amaliyah*; applied in everyday life, and transformed in motion real-movements on the people aspects and lifestyle.²⁷

²³ Isrok, "Korelasi Antara Peraturan Daerah (Perda) Bermasalah Dengan Tingkat Investasi Ke Daerah", JURNAL HUKUM No. 4/ 2009, 561; <http://law.uui.ac.id/images/stories/Jurnal%20Hukum/4%20Isro%27.pdf> accessed at 30 Agust 2012

²⁴ Ni'matul Huda, "Hubungan Pengawasan Produk Hukum Daerah antara Pemerintah dengan Pemerintah Daerah dalam Negara Kesatuan Republik Indonesia", JURNAL HUKUM No. 16/2009, 85.

²⁵ Maria Farida Indrati, ILMU PERUNDANG-UNDANGAN: JENIS, FUNGSI, DAN MATERI MUATAN, (Kanisius, Yogyakarta, 2007, 24).

²⁶ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 186).

²⁷ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 192)..

Until now, applications in moral motion visible in the form of cultural and structural. Cultural forms through very simple religious symbols, such as the movement of prayer in congregation at the beginning of time; installation of religion themed banner (Islam) in the form of veiled plea for government officials; socialization in places of education, from Nursery Schools up to College in Pamekasan, and counseling in the market related to the -market dosing and weighing. While the structural form through the establishment of pioneer groups, upgrading, education, and training, as well as the issuance of circulars and instructions to the lower level.²⁸

Religious regulations practiced in South Sulawesi in terms of the dynamic system of norms (*nomodynamics*) can be explained as follows: *First*, the religious consciousness in South Sulawesi to the implementation of the norms of religion (in the form of Islamic law) in kafah was determined by declaring enforcement of religious norms. Congress I of Muslims in the province took place on October 19 to 21, 2000. It was a milestone in the history of the emergence of any demands enforcement of religious norms. It is estimated, more than 2,300 Muslims who attended the congress approved a special autonomy for the application of religious norms in South Sulawesi. To fight the charges, it has been formed a committee called the Komite Penegakan Syariat Islam (*Enforcement of Islamic Law Committee*) (KPSI) South Sulawesi. Muslims and KPSI Congress was begun with a meeting of Islamic activists in this area in 1999. The originator were former students activist Muslim and community leaders such as Aziz Qahar Muzakar, KH *Sanusi* Baco, L.C., K.H. Djamaluddin Amin, and Prof. Dr. Abdurrahman A. Basalamah.²⁸

Politically, the Islamic activists were assessed, during the New Order ruled, Muslims are a marginalized group. Marginalization of Muslims during the order was carried out in various aspects of life, including implementation issues and Islamic faith. The fall of the New Order 1998 became the momentum of the rising of Muslims in South Sulawesi. KPSI is independent alliance vehicle to unite all Muslims potential of South Sulawesi, which aims to enforce religious norms (Islamic law), legally adopted through the formal constitutional political struggle to receive special autonomy, so that religion becomes a source of reference norms in private life, society, nation , and state.²⁹

Enforcement of religious norms in this area does not appear immediately today. Long before the independence of the Republic of Indonesia, this idea has been built even been done by the character named Kahar Muzakar Sulawesi. Through a very persistent struggle, he had proclaimed Islamic State of Indonesia in this archipelago state. At a guerrilla leader conference, it has been formed a constitution of the Islamic Republic Indonesia or also called the Islamic Republic of Indonesia. The Constitutional Charter was named Makalua (according to the name of the conference) .²⁹

To measure the wishes of the people and the government, it has been proved by the fact through a poll. It has been known that the public wanted the implementation of the norms of religion in this province which are supported by most people. The poll results presented in the provincial legislatures (Parliament) has also indicated that 91%²⁸ Government of South Sulawesi forms team to respond to the poll aspirations in enforcing religious norms in the province. Some proponents of religious norms establish Islamic Sharia Enforcement Committee, while some districts such as Gowa has begun enforcing religious norms among local government officials. However, the results of the poll known to a very varied range of views among adherents of different religions (non-Muslims) against the enforcement of religious norms of discourse (Islamic law).

²⁸ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 193).

²⁹ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 194).

²⁸A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 196)

²⁹ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 196).

³⁰ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 197).

³¹ A Rahmat Rosyadi dan Rais Ahmad, FORMALISASI SYARIAT ISLAM DALAM PERSPEKTIF TATA HUKUM DI INDONESIA, Nurhadi (ed), (Publisher Ghalia Indonesia, Bogor, 2006, 198).

Some argue there is no problem, there are some others who understand and some are skeptical -doubt, not even agree formally enforced. However, most view that it needs to increase socialization, tolerance, and coordination among fellow citizens.²⁹ The respondents assess autonomous system of government does not become an obstacle to the implementation of the norms of religion for adherents in South Sulawesi. To realize religious life, religious norms held by its adherents, ranging from self, family, society and the environment are substantially and formally. With the validity of religious norms is believed to be a way out for the welfare and happiness of the people and at the same exit multidimensional crisis.³⁰

Enforcement of religious norms in *kafah* is not just public discourse, but expressed in the attitude and behavior in the religious life of Muslims in everyday life. Whether this religious norms should be formalized or not, should not be too questionable. Another way to apply before the formalization of the religious norms can also be a way of cultural, substantial, and so on.³¹

Meanwhile, the system of norms static (*nomostatics*,) can be seen from the material elements / content in the norms as in Manokwari district regulation which is based on Christianity norms, *the Manokwari District Regulation No. 5 of 2006 on Prohibition of Importation, Storage, Circulation Sales and Produce And Drinks Alcoholic*. religious-nuanced regulation legalized by the consideration that the Manokwari area is the first entry of the Gospel in the land of Papua, and who is now dubbed as the Gospel City and City of Papuans Civilization, so we need to ban all activities of importation, storage, distribution and sale and manufacture of alcoholic beverages in Manokwari. Local regulations are based on the growing aspirations of the entire community in Manokwari who require removal of alcoholic beverages that have had a negative impact, such as crime, social pathology and interfere with the conducive atmosphere.³² Therefore, from the content of the material of the area regulation, Christianity -nuanced regulations has static nuance from the womb, because it has been set in an orderly judicial truth, while in terms of implementation remains dynamic because it must consider the socio-cultural aspects.

Besides the ones that Christianity norm nuanced static, two previous Islamic regulations also contain the static system of norms, which are in the content and religious norms of head and regulatory decisions in both areas Pamekasan East Java and South Sulawesi. Religious norms (in the form of Islamic law) and the contents of the cargo area and the decision of the head of local regulation has the purpose to realize the life of religious communities and nationalities, noble and has faith and devotion in accordance with the philosophy of the Indonesian state, and the preamble Pancasila , 1945.

From theory *Stufenbau* (strata rules) Hans Kelsen,³³ the decision of the head of regional or local regulations in three areas of the concept of judicial order or hierarchy-level regulatory compliance has those concepts by following the model of a pyramid structure (ranging from the abstract *grundnorm* to the concrete). Therefore, the rule of law in these three areas has the principle of legality / constitutional in accordance with *stufenbau* grounded the Pancasila as the *grundnorm* are then elaborated in the 1945 Constitution.

Religious Norms in the Local Regulations in Indonesia

The amended 1945 Constitution set that local regulation as a legal form of legislation, which previously only regulated by the People's Consultative Assembly Decree. Given the foundation footing derived from the Constitution of 1945, the Regional Regulation should be able to carry out the legal ideals (*Rechtsidee*) in the development of the law laid down in the 1945 Constitution, which refers to the three characters laws, the laws of a democratic, humanitarian law and the law of social justice . Those three characters are in line with the conception of law and modern legal ideals. Those three characters of law entirely refer to human nature that has dignity, freedom and equality.³⁴ Local regulation as one of the products of local law is something that is *inherent* to the system of regional autonomy. It is as a consequence of the system of regional autonomy itself based on independence and is not a form of freedom of an independent unit of government, independence itself implies that the area has the right to regulate and manage the household affairs of his own government. The authority set here means that the area has the right to make legal decisions such legislation, the nomenclature called regional regulation. Thus, the presence or existence of local regulation to be something absolute in managing areas household affairs, in unitary state that keep putting relations and regional centers that are subordinate and independent.³⁵ With this authority, the current enforcement of religious norms, including the norms of Islamic law, the norms of Christianity and Hindu norms, the more intense.

This suggests that religious norms have an important role in legislation, including regulations that are regional / localistic. Although local religious regulations have been emerged since the constitutional reform era, but there are some who question the religious local regulation because most regulations are considered to be exclusive and elitist, not populist. In fact, local regulations are born in a democracy it should be general and include all community interests in the area. One example of religiously tinged regulations / *qanun* Islam, Hinduism and Christianity as follows:

District Regulations Sawahlunto / Sijunjung No. 1 of 2003 on Liability Smart Reading Al-Quran for School Aged Children, Employee / female employee and Prospective Bride. Regulation Islam obliges good at reading the Qur'an for school-age children, the employees / employee and bride. Primary consideration is that the national education goal is educating the nation and form a man who is faithful and devoted to God Almighty, has noble character, knowledge and skills, and healthy body and mind; implement custom Mningkabau philosophy, "*adat basandi syara', syara' basandi kitabullah*". The purpose and function of this regulation are described in these two chapters: "The Purpose of good at Al-Qur'an reading for school-age children, the employees / employee and the prospective groom is one way to know and understand the content of Qur'an correctly, so it will be able to form a Muslim and Muslimah personalities who is complete and reflect the characteristics of the quality of the whole person as contained dalam Al-Qur'an".

South Lampung Regency Regulation No. 4 of 2004 on Prohibition of Acts prostitution, prostitutes, and Gambling Prevention And Deeds Maksiat In Region South Lampung regency. Arguments misconduct ban is based on the norms of Islam, so the action is described in the term "weigh" as follows, that the misconduct is contrary to religious teachings, customs and values of Pancasila as the basis for National Development, and misconduct can be disturbing public order, safety, health, morals and values contained in the need for maintenance, so for the purpose specified regional regulation.

Gorontalo Provincial Regulation No. 10 of 2003 on the Sin Prevention. Regulation states that Islam is immoral deeds is any action that can damage joints social life and violate Islamic norms, morals and customs, which include adultery, prostitution, rape, sexual abuse, gambling, drug abuse, alcohol, pornoaksi and pomografi.³⁶

Aceh Qanun No. 7 of 2004 on the management of Zakat. Regulation Islam is explained that zakat is obligatory for Muslims who work to clean up the property and lives, is also a potential source of funds in the welfare, social justice, and the management of zakat in addition to the demands of Islamic law is also the authority of Aceh province in the implementation of the Act Act No. 38 of 1999, Act No. 44 of 1999 and Act No. 18 of 2001.³⁷

Aceh Qanun No. 13 Year 2003 on Maisir (Gambling). The scope and purpose of the prohibition and prevention as well as published in some article 2 states that gambling is all kind of activities and / or actions and circumstances that led to the betting and can lead to sin for those who bet and participating orang-orang/lembaga involved in the bet.³⁸

*Aceh Qanun No. 14 Year 2003 on Seclusion (Eminem).*³⁹ The scope and purpose of this regulation is contained in Article 2, which states: the scope of the prohibition is immoral deeds and circumstances that lead to fornication. While the goal is set out in Article 3 stated: goal is to uphold the ban nasty Islamic Shari'a and customs prevailing in the society in Aceh; protect the public from a variety of acts that damage the honor; prevent community members from committing fornication; increasing role and communities in preventing and combating the nasty deeds, and closing opportunities for moral damages. Hindu religion-based law norms are also present in Bali Provincial Regulation No. 03 Year 2005 on Spatial Plan of the Governor of Bali Bali which states that development in the area of Bali which has grown rapidly, especially in the field of tourism and small industry, has spawned a number of large-scale change and cause significant deviations, so that the³¹

³⁵Idrus A. Paturusi et. All, ESENSI DAN URGENSITAS PERATURAN DAERAH DALAM PELAKSANAAN OTONOMI DAERAH, (Cooperative research result by DPD RI and Universitas Hasanuddin Makassar, Jakarta, 2009, 52-53).

³⁶www.djpp.depukumham.go.id

³⁷ www.djpp.depukumham.go.id.

³⁸ www.djpp.depukumham.go.id.

³⁹ www.djpp.depukumham.go.id.

⁴⁰ www.djpp.depukumham.go.id.

Balinese Government make adjustments in a dynamic spatial layout of the environment based on cultural unity Balinese Hinduism inspired, and still preserve the environment in accordance with the philosophy of Tri Hita Karana to realize just and prosperous society through the establishment of Pancasila as the Spatial Plan. In Article 19 paragraph (4), Regulation establishes criteria Hindu shrine area that includes:⁴⁰

"a. the area around the Sad Kahyangan temple with at least 5,000 m radius of the outer wall of the temple penyengker wall: b. the area around the temple shrines Dang Kahyangan with the lowest 2000 m radius of the outer wall of the temple penyengker c. the area around the temple sanctuary Kahyangan Tiga with Bhisama and/or awig awig of Pekraman local village "

Religious regulation norms of Christianity in Manokwari, *the Manokwari District Regulation No. 5 of 2006 on Prohibition of Importation, Storage, Circulation and Sale of Alcoholic Beverages And Producing*. Arguments consideration of the legalization of Christianity regulations under religious norm consideration that says that Manokwari as the first mission entry area in Papua, and who is now dubbed as the Gospel City and City Civilization Papuans, so we need to ban all activities of importation, storage, distribution and the sale and manufacture of alcoholic beverages in Manokwari. Local regulations are based on the growing aspirations of the entire community in Manokwari who require removal of alcoholic beverages that have had a negative impact, such as crime, social pathology and interfere with the conducive atmosphere.⁴¹

The birth of these regulations is an indicator that religious norms has significance in the formation of local regulations. Enforcement of religious norms in positive law to be part of the democratization process and in accordance with the spirit of the basic state. Therefore, the characteristics of the Indonesian nation has heterogenitas religious, cultural, ethnic, linguistic and other needs specific handling and can not necessarily be done by copy and paste the processes undertaken by other countries that are considered advanced. The examples in other countries can only be used as a comparison, but not the only appropriate model to use. The principle of nationality for the State of Indonesia must be realized with achievement of the welfare-based security and orderly with Indonesian values are based on the Pancasila and the 1945 Constitution.⁴²

Based on the problems above, the general religious regulations can be solved by article 29 paragraph (1) of the 1945 Constitution which insists that the Belief in God Almighty Based State, that religious norms has become a religion which has a range of regulations such common neighbor regulation of prostitution, adultery and the other is an unconstitutional religious regulations pursuant to Article 29 paragraph (1), so the regulation religion can be accepted by all religious groups, whereas religious norms that have become religious regulations that are exclusive and elitist as local regulations Moslem / Moslem or local regulations Quran reading and writing is also unconstitutional religious regulations pursuant to Article 29 paragraph (2) which gives freedom to every religious believer to do the teachings / beliefs in accordance with the norms of religion and belief, so the practice of religion-specific regulations should be specific as well accordance with their respective faiths, can not be applied universally.

Conclusion

The birth of these regulations is an indicator that religious norms has significance in the formation of local regulations. Enforcement of religious norms in positive law is also part of the democratization process and in accordance with the spirit of the basic state. Although Indonesia is not the religion state, but the State of Pancasila still recognizes the existence of religious norms as one of the sources of positive law as stated in the first principle of Pancasila and the 1945 Constitution Article 29. Therefore, the position of the norms of religion as a source of substantive law in local legislation is constitutional. In terms of function, the ones that are sourced from religious norms would have more effective and efficient behavior power for the people because they feel they have run both of legal obligation and religious duties.

⁴¹ www.djpp.depkmham.go.id.

⁴² Zudan Arif Fakrulloh, "Peranan Hukum dalam Merekatkan Kebangsaan Indonesia", ORASI ILMIAH delivered in Dies Natalis 30th Universitas Wijaya Kusuma Surabaya, <http://jdih.depdagri.go.id/> diakses 2 September 2012.

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