

Removing Dual-Discourse (National and Sharia Law) in the Formulation of Region's Policy in Jember

Menghapus Wacana Ganda (Hukum Nasional dan Syariah) dalam Perumusan Kebijakan Daerah di Jember

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Abstract

This article aim to explore the differences between Sharia Jurisprudences and secular/modern state formulation of law. Yet, Islam as a major religion in Indonesia had dominant roles to construct regulation based on their beliefs in Islamic teaching. Besides that, Moslem society also could respond to the un-universal law if it is compatible with Islamic values through social and political movements. Therefore, this article also will define what Islamic regulation point of view and embedded beliefs of Moslems written inside the regulation. This article will be conducted by qualitative research model and approached by social-phenomenological perspective. This article concludes that based on maqasid al sharia there are not dichotomies of Islamic regulation or modern/secular law in Indonesia, especially in Jember (the object of study) caused the formulation of this regulation was based on Islamic law process and substantive teleological to become Moslem society in Indonesia.

Keywords: *The Dichotomy of Local Regulation, Islamic Jurisprudence, Sharia Maqasid*

Introduction

The central government's authority of autonomy and derivation against region to create their discourse based on the local value caused some issues. One of them is the springing up of the region's rule which is based on the logic of major identity in the region. Like the Islamic basis in Java and Aceh, or another religion outside Java (Wahid, 2011). The existence of this rule is not wrong, but it also does not right at all. In fact, the region's discourse is manifest from the society's aspiration or we can also say that as "politicization" by certain clusters to preserve their domination in the region. Then, the discourse of the

region could be implemented if the society and the political consistency could run consecutively.

The factual example from the region's compromise and the region's policy is what has been executed by Daerah Istimewa Aceh. In this area, since reformation was rolled out, it has already had regulations (qanuns) which are based on the products by using the previous *ijtihad* ulama 'fiqh (Nainggolan, 2017). Finally, it is followed by other areas, such as in Pamekasan District Madura through the term of "Gerbang Salam", South Tangerang District, and other areas that are widely understood by Sharia Regional researchers in Indonesia (Muntoha, 2007). Meanwhile, the government's response to the process of forming this Sharia Regional Regulation varies, which in principle, the government simply calculates aspects of universality and equality of treatment to existing minority groups. Although, sometimes, the government also breaks religious-nuanced regulations on the grounds that they do not comply with the above regulations or are considered to result in horizontal conflicts in society (Na'imah, 2018).

In essence, the author merely wants to say that the existence of a Sharia nuanced regional regulation has become a trend of legal sociology in Indonesia after post-reformation. However, the question is, is it true that the formulated Sharia Regional Law (PERDA) is in accordance with the ideology of nationality and the general rules of law in Indonesia? Do, the Regional Law Products (PHD) formulated by the government in a participatory manner already represent the values of sharia itself? This last question is what the authors will do to elaborate on the two models of regional from a religious perspective. It means that the authors make the object of Islamic law based PHD such as the prohibition of *khamr*, Islamic religious education, and other regional regulations, as research objects. Moreover, the writer would like to explore Islamic values in general PHD, such as local regulations on cultural heritage maintenance, regional regulations on disabilities, regional regulations on settlements, or regional regulations for workers. One of the regions that has implemented double regulations is Jember district.

In the process of this study, the authors determined District Jember as one of the places to be studied. The reason for choosing District Jember cannot be separated from the research results of Ali-Fauzi and Saiful Mujani which stated that.

Based on the survey in Jember, it has been explained that the perception of the form of the state is quite clear. The respondents explained that there is a huge majority of Indonesia's Muslim

population, do not state the reason that Indonesia is an Islamic country so that almost all of respondents stated that Indonesia is not an Islamic country. When respondents were asked the question of whether there was agreement from them if government regulations based on Islamic teachings were adopted in Indonesia, the support for the constitution is arguably quite consistent. From these questions, only 24.0% (2007) and 36% (2008) agreed, and many of them rejected 68.0% (2007) and 64% (2008). There were no significant changes in the first and second surveys. What has changed is those who initially did not answer (8.0%) in the first survey then gave an agreeing answer in the second survey (Ali-Fauzi & Mujani, 2009, p. 12).

"Apart from these arguments, the writer has for some time conducted a study related to the construct of fiqh/reasoning ijtihad in Jember District and public services. In 2016, the co-author Muniron conducted research entitled "Reconstruction of Disability Fiqh and Its Implementation for Public Services in Jember Regency" (Muniron & Muhaimin, 2016).

This study describes the fiqh construction of the emergence of Regional Regulations on the Protection of Persons with Disabilities which were formed and discussed by the DPRD together with the Regional Government of Jember Regency. The informants of this study came from various stakeholders who have the authority and authority to translate the regional regulation on a practical level, including the Head of the Ministry of Religion office, the Social Service, the Regional Work Service, as well as religious and community leaders. In this study, the authors conclude that there is a terminology of ijma '(collective agreement) that every citizen, regardless of the conditions, has equality and equality in the fulfilment of his rights. Therefore, every local government must protect and fulfil the rights of all citizens, including people with disabilities. This is considered as a crucial thing to do since there are lots of disabled communities spread around the Jember regency (Muhaimin & Wahab, 2017).

The research found out an important thing on how various public policies were made where the students took a role in it. The writer also found there are three typologies of how these political students play their role inside a boarding school environment. These three typologies are conservatives, moderate, and progressive. To support this statement, the writer had looked out more into local regulation discussed from 2017 to the day when the term of Regent and Vice Regent of Jember has ended in 2020. In those times, there were 15 local regulations planned to be discussed according to the schedule.

Several related studies on the application of sharia law have been carried out in the last ten years. In the case of Saudi Arabia Souryal (1988) explored about the role of shariah law in deterring criminality in Saudi-Arabia. Therefore Ali (1985) explained about the Islamic law and crime in the Saudi Arabia context. Research about justifications, challenges and constitutionality of the penal aspects of sharia law in Nigeria conducted by Taiwo (2008). Black (2008) give a perspective about accommodating shariah law in Australia's legal system. Meanwhile Daniels (2009) reviewed about the book Muslims and tolerance; Non-Muslim

minorities under shariah in Indonesia. Investigation about the challenge for social studies Educators: teaching about Islam, Jihād, and Sharia Law conducted by Moore (2012). Grami (2014) researched about debate on religion, law and gender in post-revolution Tunisia. Meanwhile, some studies about the sharia law also conducted by Menchik (2014); Revkin (2015); de Kroon (2016); Bowe & Hoewe (2016); Nurunnabi (2018); Ibrahim et al (2019); Al-Astewani (2020); and Panjwani (2020). The previous studies focus only on how shariah law implemented on the Saudi Arabia, Nigeria, Tunisia. Some research explore about perspective about accommodating the shariah law in Australia legal law system. Therefore, these recent studies want to investigate how sharia law implemented in the context of dual discourse in Jember, Indonesia.

Research Method

This research is emphasizing on the understanding of Islamic law perception to construct a new law product, especially every regulation made by Regional Representative Council and Jember Local Government from 2016 to 2017. Taylor Bogdan Qualitative Approach, cited by Lexy J. Moleong used in the research process is the procedure taken from descriptive data (Moleong & Surjaman, 1989). This research named as explorative research has the purpose to solve the problem accurately throughout the deep research process to explore the perspective of Islamic Law in producing local regulations in Jember Regency from 2016 to 2017.

Sugiyono (2010) stated that the collection data process should have done with the three main techniques such as observation, interview using a semi-structural method, and documentation. The Interview is used to gain data about views and perspectives of Islamic Law. While gathering information, this research is using the purposive sampling technique (Sugiyono, 2010). The ones who act in giving the information are those who sit in the Regional Representative Council from 2014 to 2019. The other people included are also those who took the role in organizing the regulations from the creation of academic material, discussion, public test, and every citizen who received the benefit out of this regulation-making.

Observation technique is one of the methods used where the writer is observing the field and the phenomenon directly, still this is called passive observation eventually. Throughout the process, the writer had gone through two steps. The first was observing

what is on the field and looked out on how the regulations were made in 2016 and 2017. The second was tracking down the mental condition of institution included to gain data related to the regulations making. This process is done simultaneously using documentation technique where data collected is proven credible and valid.

In the next step, the researcher investigates the data or documents for the reinforcement to answer the first research issue that can be found in various media; online, printed, and electronically which are correlated with the dynamical regulation formation in Jember and other regions as a comparison. The supporting data in the form of theory, concept, developing opinion, and thought of experts in constitutional law are important as well. While, the documentation technique is used for investigating the data in the form of transcriptions, notes, books, newspapers, magazines, meeting minutes, agenda books, research journals, and so forth. This technique is also carried out by observing and analysing some expanding news in some media according to the discussed issue.

In the analysing process, this study uses a qualitative descriptive analysis proposed by Miles and Huberman in Moleong (1989). According to them, the descriptive analysis includes three analysis components; they are data reduction, data presentation, and conclusion or verification. Those components are implemented interactively by assembling the data collection process as one cycle. Practically, the activity starts from reducing the collected data (interview result, field notes, and documentations), data presenting and verifying the data (concluding), and ends with creating the abstract as well as the interpretation in the discussion section.

To ensure the data validation, this study implements, triangulation of sources, methods and times, peer discussions, increased persistence, and extension of observations. Through this sequence of techniques, the data credibility can be found by checking the data consistency obtained by interviewing the informant. The data obtained through observation also can be compared to the data obtained through interviews and documentation (Bungin, 2006). The other technique, especially the extension of participation, is used in the process of double-checking the degree of saturation.

Discussion

National law and *Nalar istinbath of Sharia* Regional Regulation in Indonesia

Through the previous explanation, the construction of the post-reform *Sharia* has headed many fragmentations on some developing regulation in society. Robert W. Hefner (2011) has an idea that the existence of *Sharia* Regional Regulation can run well interlocked with national law. In other perspectives, *Sharia* Regional Regulation has a function to control public morality in a wider coverage based on each religion. Meanwhile the national law borders and protects the religious interest or the society itself, as well as control the society's peace and equality. This notion, as for Arskal Salim as cited on Hefner (2011), is the most realistic matter for Indonesian people, in which there is a strong desire from society so that religions can bring colors into citizen life. *Sharia* Regional Regulation that comes up is a kind of a public response to a religion existence within the country itself.

Slightly different from those two previous statements, Mahfud MD (1997) and his previous researcher's results stated that the country relational model and their legal products are determined by legal political configuration. This can be done by analysing the legal system and by examining the emerging legal products. As an illustration, a country with an authoritarian system has legal products that lead into "centripetal", revolving on a single authority. Concerning Islam, consequently, the Islamic Law *Istinbath* results must consider and obey the concept, devices, and interests of the country. In this kind of situation, there is no space for parallelism in Islamic law in regulating the system of a country. However, if the democratic system is used as a system configuration of its country, consequently Islamic law and interests of the country are capable to go hand in hand together. The adopted theory of the system relation of a country, the law, and the political dynamics become an explanation towards the substance-correlative examining process between *Nalar istinbath* of Islamic law and its products on one side, and national law in another side.

Based on Mahfud MD's excerpt (Saleh & Mustika, 2015, p. 19), Pancasila had become the centre of any law sources which possessed ruling criterion to guide its constitution establishment and political law. The pact was consisted of, creating civilized religious tolerance, creating social justice, protecting this nation (Indonesia), creating democracy and nomocracy simultaneously. Furthermore, Mahfud stated that Indonesia should not enact laws from one of the existed nation's religions as its basis. Yet, the nation is obligated to protect all religious parties in any form.

Whereas the fragmental-authoritative view has placed two legal constructions that are still applied and developed in Indonesia very detachedly. The religion-law sourced only

regulates private scopes (ritual and habitual), yet religious problems do not need any interventions from the nation. This is almost precisely the same as a secular country system – a system that places religion in private scopes and separates both (religion and law) in public scopes – which both are still using relational study output. The Turkey reformation was an exemplary role after secular system country through Kemal Pasha Attaturk. Then, other important roles are either America or other secular countries applied to this system.

The religious-secular notions mean separating religious matters from law and politics. This notion did truly ever arise in Indonesia. It was fulfilling any public discussion or general postulate in the early reformation movement. The notion about no Islamic parties, the Islamic movement, Islamic law formalization, and other Islamic aspects was truly ever buzzed by Nurchalis Madjid. Eventually, the notion was hard to be implemented. It was caused by Indonesia's fully committed to Pancasila ideology as its nation's life. Later, this ideology became the top-notched point notion and struggle of Muslims in Indonesia's independence era. However, this constitution establishment accommodates all plural society interests initially.

In this middle, tugging of war from those views, “third way thinking” emerges to place the most predominant living laws as law sources in Indonesia or other modern countries. Hollenbach, in Nadirsyah Hosen as cited on Saleh & Mustika (2015) as the most rational concept after Islamic law relations, political system and legislation from a country. He stated that:

“The differentiation of religious and various dimensions of public life has a different connotation than does separation’...Religious influence in public and even political life occur, however, everywhere state and Church are institutionally distinct. Thus, there is a third alternative to integralism (church-state unity) on one hand and the privatization of religion on the other. In this third alternative, religious communities can have an impact on public life, while at the same time, free exercise and non-establishment of religion are fully protected.” (Saleh & Mustika, 2015, p. 19)

Nadirsyah Hosen as cited on Saleh & Mustika (2015) responded and emphasized those notions to several countries, religion-nation relation trends lead to accommodative and integrative. He covered:

“I will argue that the Indonesian, Malaysian, and Singaporean cases provide a model of a relationship between state and religion. The model offers a link between multiculturalism and legal pluralism, in which sharia law is adopted into a secular legal system. Legal pluralism would operate by default, because Muslims would be free implement Shari’a in their daily lives, as an extension of their constitutional rights to freedom of religion....there are spaces for religion to play in the public

sphere, but at the same time there also limitations, whereby religion should not ask for more, as the Indonesian experience with constitutional amendment has revealed. What we would see is a religious pluralism community which seeks mutual cooperation to acknowledge and preserve the harmonious existence of religion and state without necessarily being in favour of their intermixing” (Hefner, 2011).

The two statements above showed that the most rational and contextual choices to present the substance of Islamic law that can walk together in harmony with positive/national law are integralism and accommodation. The next problem is which of the two variables is the determinant factor and deserves to be the steering values and normative procedure. In sum, whether the legal norms that are the result of the social contract of society must follow the procedures and mechanisms of religious law or vice versa, the law that comes from religion must follow the common sense, logic, approach, and procedure of the social contract of society.

Answering that question, Abdul Halim offered the concept of a constitutional configuration, which means paying attention to the dynamics of the political configuration and the dynamics of the legal legislation process in Indonesia. It is conducted to ensure the proportion of Islamic law or *al-siyasah al-syar'iyah* (political fiqh). In his review, he conveyed.

“... Then in the context of Islamic law in Indonesia, the constitutional theory and accommodation theory are very relevant to advance the findings of this study; namely a theory that says; "The state has a constitutional obligation to accommodate and to make Islamic law as the reference for the national law." Thus, all statutory products born by the state must be in line with the universal values of Islamic universal values and Islamic legal values or at least these laws and regulations are not contradictive with Islamic law which is believed by the community and by the nation of Indonesia.” (Ibrahim et al., 2019)

From the quotation or statement above, the legislation formed by this multi-religious state should go through the following process; first, carrying out its shari'a dimension which is coherent to the legislation that will be made, by examining the opinions of ulema from various schools of thought (*Mazhab*) through tracing various classical books, then the opinions of Indonesian ulema, contemporary Islamic legal thoughts, fatwas and opinions of the Indonesian Ulema Council, the results of jurisprudence, and other materials that can enrich the construction of legal values in Indonesia. Second, observing and studying social and political issues that develop without denying the idea of implementing Islamic law in a *kaffah* way from a social movement, because the fact says that the ideology is not only a monopoly of Islamic political parties, the aspirations of a community that is concerned about

realizing Shari'a-based legal products, and taking into account the dialectic of community activities that have absolute-dominant social power, (as happened in Papua and Aceh, pen). Even though these ideas and thoughts will eventually collide with the state ideology, namely Pancasila. Third, it is necessary to increase the volume and the quality of the dissemination of the results of the study of the Islamic political studies model and its character and procedures in a more coherent manner.

Using ethnographic and anthropological perspectives, Robert W. Hefner gave a slightly different opinion. He stated that an Indonesian context is a form of a "striking parallelism system of Islamic law and national constitution". This means the dialectic of accommodation and integration in Indonesian style is a derivative form of politics of multiculturalism, pluralism, and religious beliefs that grow and develop in Indonesia. Consequently, there are two models of ideas related to legal relations in Indonesia that always decorate his journey. The author has an assumption that Robert W. Hefner has the same view as Arskla Salim. In his description, there are often products that cause a variety of interpretations among Muslims. He stated the following:

"Arskal Salim and Robin Bush have observed, the content of some 45 percent of these regulations is not based in any strict sense on the shari'a or Islamic jurisprudence (fiqh). Acting in the name of public morality rather than Islamic law, the bylaws tighten controls on gambling, women's movement, and the consumption of alcohol. Notwithstanding their nonsectarian phrasing, they were widely perceived as shari'a-inspired, not least because their most ardent proponents included an alliance of conservative pro-shari'a groups, often working in collaboration with local branches of the semi-governmental Council of Indonesian Ulama (Majelis Ulama Indonesia, MUI). In the post-Soeharto era, the MUI had acquired a reputation for staking out anti-liberal positions on questions of doctrine, religious education, and interreligious relations. The council's growing conservatism in part reflected the fact that in the early post-Soeharto period it had attempted to counter the influence of liberal Muslim groupings by, for the first time, recruiting representatives of hardline Islamist organizations like the Indonesian Council of Jihad Fighters (Majelis Mujahidin Indonesia, MMI). However, as MUI officials themselves acknowledged, the anti-liberal turn was also related to the leadership's determination to dispel the reputation the council had acquired during the Soeharto era of being insufficiently independent of the government" (Zaini, 2016).

This statement explicitly predicts that the debate of crucial issues, such as 'centrifugalism' of policies related to Islamic politics, or vice versa, rules or policies that regulate the life of Muslims through democratic values will always color the journey of the Indonesian nation. The prediction said.

“...for the future of shari‘a politics in Indonesia, the truly decisive matter. It is not the breadth of theological or jurisprudential divides that presents the greatest challenge to Indonesian Islam in the post-Soeharto period. It is the task of building a political, legal, and public-ethical framework with sufficient legitimacy and reward to continue to bring people to a democracy-reinforcing center. Notwithstanding the violence of the early post-Soeharto period, the results of Indonesia’s elections suggest that such a framework is slowly taking form. The consolidation of this cultural and institutional framework will depend on the state’s ability to deliver on the promise of prosperity and justice for most citizens. The state’s efforts in this sphere will also be key to Muslim reformists’ efforts to take the shari‘a to the center rather than the fringes of national politics, demonstrating that democracy and the shari‘a are indeed compatible.” (Zaini, 2016)

The statement emphasizes that to find an ideal form of how Islam and its teachings can be embodied in formulating national law in order to develop the nation and country, is the responsibility of all members of society.

In paradigmatic review, as stated by Zaini Rahman as stated on Muhajir (2017), there is a polarization in the merging of shari'a or fiqh and the democratic system in Indonesia into several forms; *First*, all rule makers must consider the aspect of distinction in protecting human rights, and not merely as a form of freedom. *Maqasid sharia* is the basis for the paradigmatic law in Indonesia. Second, the participation of the public, both Muslim and non-Muslim, in formulating the rules of Islamic law and national law must be increasingly active and intensified. It must not be unbalanced, because it influences public reasoning and morality in society, which cannot be fully recorded without the active participation of all these groups. Third, to make the scope of fiqh reasoning broader, so that it can find absolute justice as its foundation. These three things can lead to the harmonization of Islamic law with national law and the transformation can be carried out properly.

In Afifuddin Muhajir's view, this country and its government have been established using divine spirit. However, the form of God's authority shown through the holy book is still described globally and shows only the main points. Simply, the formulation of the constitutional system under God's commandment through the holy book has been delegated to humans to do so. It considers the reality and context in society. Thus, what is called an Islamic state is not identical with the concept of a theocracy based on God's authority which is not described more concretely in its implementation. The proper equivalence is the concept of theo-democracy, which is a concept that brings together the aspect of divinity (theocentric) and humanity as the implementer (anthropocentric) at an integrated and harmonious way. This is valid evidence that shari'a law is based on divinity because it is based

on God's commandment through His holy book, both implicitly and explicitly (Muhajir, 2017).

From the explanation above, the implementation of Islamic *syari'at* (*tathbiq sharia*) in Indonesia is the same as the effort to establish the legal rules based on the identity and the culture of Indonesia. However, many national legal materials still use western laws, and after being studied, their enthusiasms are not different from several or one of the ulama's opinion in the *fiqh* school. So, this legal material can be called Islamic law. However, to form and to implement it automatically is called the implementation of Islamic *syari'at*.

Afifudin Muhajir strengthened the frame of thought by giving an example of the obligation to register the marriage in the office of religious affairs. Meanwhile, in *fiqh*, marriage registration is not the requirement or pillar of marriage. However, the benefit from the obligation is to protect the lineage and the inheritance rights of children. Both *Ulama* (cleric) and *Umara'* (leader) worked together to formulate the obligation, although it is not directly from the Al-Qur'an or Hadith. The obligation is based on the obligation to follow *ulil amri*. Afifudin also gave an example of society's obligation to obey the traffic signs. Explicitly, the proposition about the obligation is not found, but that is the government's effort to protect societies from life-threatening danger (*hidz al-nasl*), so every citizen must obey the regulation. Those explanations stated that the substance of *sharia* must have a dominant proportion in the implementation of Islamic law. If *sharia* is realized as an "organism" that lives and becomes the savior from the shackles and snare, it will lead to the realization of justice and benefit. In Islamic teaching, the understanding of *Sharia* which is not placed in particular (*juz'iy*) will reduce the tension of tiring debates about the formalization of *syari'at* (Riyanto, 2012).

1. The Dynamics of *Sharia* and *Non-Sharia* Regional Regulation in Jember

The basic rule of the formation of regional regulation is law No. 12 of 2011 on the formation of law and regulation, the law No. 23 of 2014 on the regional government, and the Minister of Home Affairs Regulation No. 80 of 2015 that explained it technically and practically. The procedures for making regional regulation are explained by Gutmen Naiggolan as the legal bureau of the Ministry of Home Affairs can be seen in the chart below:

Chart 1. The Systematic Chart of The Procedures in Forming The Regional Regulation Based on The Minister of Home Affairs Regulation No. 80 Of 2015



PHD: Regional legal product

Penetapan, penomoran, pengundangan, dan autentifikasi: determination, numbering, invitation, and authentication

Pemantauan dan pelaporan: monitoring and reporting

Penyebarnya: deployment

Based on the chart, to arrange the regional legal product, some important steps must be followed; the substance to be governed is the authority required by the laws above it., the regional management responsibility, and the mapping of problems that will be faced by the region in the future, for the examples: the social changes that exist in the environment, the opportunity to collaborate with a non-governmental organization, and the anticipation of disasters in the region. From the chart, it explained who has the authority to make it. Regional legal product is divided into two, the regional legal product on the executive initiation (Governor, Regent or Mayor) and the regional legal product on the initiation of Regional House of Representatives.

In the formation of regional regulation in Jember, this research only focused on two regional regulation, they are the regional regulation to control the circulation of alcoholic beverages which represent the law normativity and the interests of Islamic law and the regional regulation about the legal aid for the poor people which became the example non-*sharia* regional regulation, but it has a substantive Islamic dimension. The researcher noted that the regional regulation about the control of alcohol has existed since the New Order era, and it is based on sociological consideration. The sociological reason is the hedonism of

some people makes them disobeying religious teaching. By considering it, the head of the special committee on the alcoholic beverages' regional regulation of the Regional House of Representative in Jember stated that the discussion about this regional regulation is based on religious consideration. In Islamic law, the prohibition of alcohol is formulated through the *sharib* and *qath'i* legal proposition. However, it has economic benefits such as being an economic source and providing a job field, additional regional income, and other benefits have become the additional review in arranging the academic draft.

There are *maslahat* and *mudlarat* side in the alcohol, then the discussion focused on the small or big of the *maslahat* and the *mudlarat*. In the academic draft, several negative effects of drinking alcohol have been mentioned such as the negative action, deviant behavior, and becoming a way out for unemployed people. Those factors also became a reason for the religion to prohibit it. The discussion is focused on the formulation of regional regulation which becomes the control regional regulation, and not becomes the regional regulation that prohibits the production and the distribution of alcoholic beverages. The purpose of the regional regulation is not to maintain religious values, but it is formulated to keep the tranquillity and public policy. The integration of control, distribution, sale, and serving of alcohol is necessary to keep the tranquillity and public policy. In this case, the word "integrated" means the synchronization between the rules above and the other rules about alcohol.

Another element stipulated in this regional regulation is the selectivity of the business development permit application by the community, the obligation to localize the production, distribution, and servings. The parties who can establish a business are limited to parties whose business is under the trade department. The sales distribution is limited to specific places in hotels and tourist attractions that have obtained permits to serve drinks containing alcohol. This regional regulation also stipulates the limits and levels of mixtures allowed by considering the human body's resistance and health factors in general. Control over the limit and levels of mixtures in Islamic law consideration is in the framework of protecting the soul and mind at once, as alcoholic drinks have an addictive effect that causes addiction, nevertheless of how much or how little the consumption.

In this regional regulation discussion, PKS Faction expressed a different opinion. They rejected it if only limited to control and regulate the distribution of liquor in the Jember region. Supposedly, this regional regulation strictly prohibits alcohol from upstream to

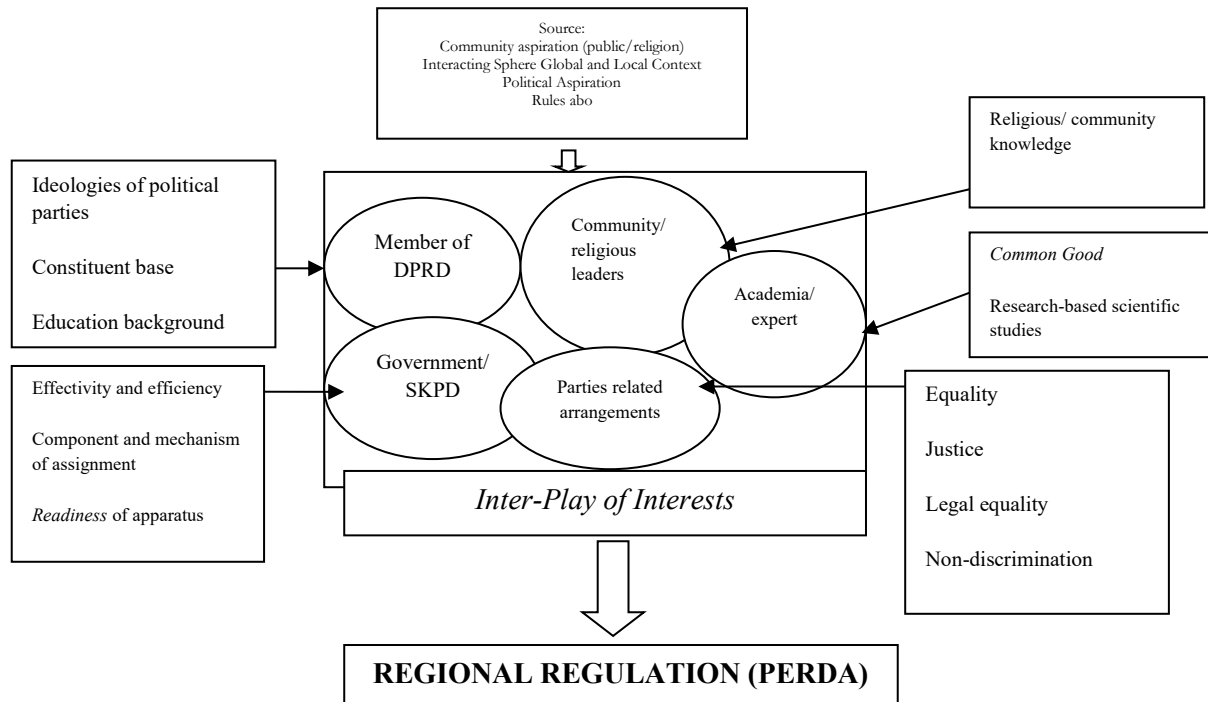
downstream, from production to servings, as in West Java Province. In responding to a trade-off on the dimension of benefit and disadvantage, KH. Sahal Mahfudh's social *fiqh* reasoning becomes a reading solution in responding to this. Social *fiqh* reasoning is an essential instrument in examining which one is more *syar'i* of the two trends, namely control reasoning still accommodating the benefit resulting, or prohibition reasoning that only considers its disadvantage element. Meanwhile, the Criminal Code only ensnares imprisonment for those who do not have the right to consume these drinks. It is agreed from there that the prohibition is unnecessarily raised because there are social and religious norms that strictly prohibited it. At the same time, it is still considering the economic benefits, from the aspects of tourism, industry, and trade.

The second regional regulation that concerns this paper is the Regional Regulation on Legal Aid for the Poor. The discussion of this regulation is not too rough compared to the previous regional regulation discussion. It is a very concrete meeting point between religious interests and public interests, with no distinguishing element. Because of the gap in lawful treatment for the underprivileged, this regional regulation exists. At the same time, the legislation above it provides an opportunity for the Regional Government to have the authority to create a legal institution that is engaged in assisting and empowering the poor. In ideological-philosophical considerations, everyone has the same position before the law regardless of their condition and background. Therefore, the Jember Regional People's Representative Council (DPRD) through the Head of the Special Committee for the Deliberation of regional regulation, has initiated to realize community aspirations and seen the development of legal cases that befell the people of Jember. There was no debate on religious-based values in the discussion, but Islamic legal reasoning is diverse and dynamic. For example, in determining who can get legal assistance, there should be no exception for exceptional criminals who violate human values (such as violence against children). At the end of the discussion process, Islamic-based factions stated that religious values would certainly be a light on the discussion of the regional regulation.

Briefly, at the final response session, the PKB Faction conveyed the importance of this regional regulation, considering it includes efforts to protect and guarantee society equality before the law. It becomes a struggling line for parties to uphold legal justice. PKS Faction point of view emphasizes the formulation of this regional regulation is part of serving the ummah (*kebidmatul ummah*) and presenting Islamic values in society. Meanwhile, the Joint

Faction from PAN and PPP considered that this regional regulation contains and strives for equality values in the law. Moreover, this regional regulation is also consistent with the legislation above it.

Chart 2: Certain elements and DPRD power



The chart shows that certain elements and power in the DPRD may not allow monopolizing in deliberating and formulating process of the regional regulation. In the process, a regional regulation formation requires the participation of all related elements. It aims to find the harmony of all materials and their public benefits because various inputs from all components have been accommodated, and become materials to seek common ground. If a regional regulation involves many elements, both individually and institutionally, the beneficiaries and intellectuals, the formulation will be more comprehensive. Moreover, the public will assuredly accept it. Based on this point, this regional regulation does not accommodate the idea of the PKS Faction demanding a full ban because its consideration is an agreement from various elements to realize benefits for the wider community. On a philosophical basis, if there is a clash of benefits that specific and broader advantages, broad interest will win.

Therefore, it is the dynamics that occur in general regulations, religious views, or the Islamization/Shariatization of regional government regulation that can ask for the consideration of religious experts. It can also use the personal viewpoint of DPRD members, whom I believe, have a *santri* background. As it is known, there are dozens of members of the Kab. Jember, which has a religious understanding of students (read; in the Clifford Geertz categorization), plus comprehension of *pesantren*.

2. Analysis of Maqasid al Sharia on Regional Law Products

Below the authors present a table describing the two regional government regulation above formulated, discussed, and stipulated by the Jember Regency DPRD with the Regional Government:

Table 1: Sharia Reasoning and Public Benefits in Regional Government Regulation

No.	Name of Regional Government Regulation	Principle	Purpose
1	Regional Regulation on the Distribution of Liquor	Realizing public order through controlling the production, distribution, serving, or sale of alcoholic drinks, especially liquor, in a coordinated and integrated manner	The objectives and targets are to provide control and supervision of the production, distribution, differentiation, and sale of alcoholic drinks in the regions. In the framework to protecting public order: providing a legal basis for imposing sanctions on violations regulated in this Regional Regulation; provides the legal basis for licensing the sale of alcoholic beverages. Places prohibited from providing and selling are grocery stores, food stalls, youth centers, inns, terminals, schools, places of worship, and other public places.
2	Regional Regulation on Legal Aid for the Poor	Justice; Equation Openness; Efficiency; Effectiveness; Accountability	Protect and realize the equal rights of all legal aid recipients in gaining access to justice; Ensure the protection of the constitutional rights of citizens following the principle of equality before the law;

Implementing certainty in the implementation of legal aid evenly in the territory of the Republic of Indonesia;
And organizing an effective and efficient judicial system and can be accounted for publicly.

Furthermore, through data reduction techniques regarding the elements of the teleological principles of the Regional Government Regulation, this below will describe the embodiment of the meaning and dimensions of Islamic law through *maqasid sharia* in a broader spectrum by analyzing the basic assumptions of the two *istinbath* reasons of the Regional Government Regulation:

a. Sharia Nuanced Regional Regulations

To borrow KH. Sahal Mahfudh on the issue of regionalization of prostitution and with that view, the author makes an analogy of the substance of the Regional Regulation on the Control of Liquors in Jember Regency. The common point is, there are public morals that are protected by religion. But on the other hand, there is a strong current trap of violating the rules of Islamic law by the Muslim community with various motives.

This dilemma presents two equally difficult choices. The first option is to transform Islamic law into the public domain, the second option is to show the side that has not been determined by *fiqh* by taking into account other factors beyond the limits of prohibitions/obligations set by religion. Seeing the results from the discussions taken, the institution authorized the formation of regional regulation will prioritize aspects that are not strictly regulated by religion. Means a ban on the massive consumption of alcoholic beverages, a phenomenon that is prevalent in society.

Another thing that is taken into consideration is the fact that in some areas in Jember there are non-Muslim communities who do not become *khithab* of Islamic rules and do not require legislators to force themselves to make these rules on them. As a city that declares itself as a world fashion city, Jember has several world-class cultural events and is very attractive for the arrival of foreign tourists or domestic tourists. For example, the annual Jember Fashion Carnival (JFC) event can attract the attention of the international public. The arrival of foreign tourists certainly brings their values and culture, and one of them is the habit of drinking alcoholic beverages. Jember with the plantation area is also known as

an agro-tourism area, a producer of various fruits, and one of which is the raw material for concocting "intoxicating" drinks. The existence of Jember like that also can attract the arrival of foreign tourists to enjoy its natural and cultural facilities. By considering these interrelated conditions, the Islamic law's reasoning regarding the prohibition of alcoholic beverages is put in a comprehensive proportion.

In addressing this dilemma, the use of *maqasid sharia* finds its relevance to position Islamic law as the highest regulation in society (ultimate law). One of the formulations of *maqasid sharia* according to Jasser Auda's view is to open the use of the logic of *fath al-dzari'ah*, in addition to what has been popularly called the opposite, namely *sadd al-dzari'ah*. With the use of *sadd al-dzari'ah*, the emphasis is on closing the door that opens the potential for prohibition by prohibiting something originally immutable.

On the other hand, *the fath al-dzari'ah* approach is the opening door to new merit or implementation of liability utilizing "toleration" as something that was originally in the scope of the prohibition. Using this *fath al-dzari'ah*, liquor control is intended as an effort to close the alcohol crime while still accommodate the other benefit and strengthen the opportunity to the authorized parties through *sadd al-dzari'ah* concept to enforce the functions-prevention effectively and efficiently.

b. Regional Regulation and Public Interest

The dynamics discussion and the academic dialectic in general regulation or public interest are very different from the regional regulation of alcoholic beverages. Both law could work in parallel because reason *sharia* has given juridical justification through the derivative of the arguments explicitly or implicitly. Reason *sharia*, especially through the *maqashid*, already talking about the values of the equality of all human beings in the fulfillment of rights, justice before the law, efficiency and effectiveness of human activities in managing their daily lives. Therefore, discussing regional regulation of legal aid for the poor and concerning public information openness, for example, can be referred to directly runway theological through the values and principles that can be formulated from religious texts, either directly or indirectly. Moreover, the *maqasid sharia* became the fundamental understanding of those religious texts. *Maqasid* is also related to the paradigm, procedures, and mechanisms of the formulation of regional regulation, which has been done with accountability and involve the active participation of all parties.

The *maqasid sharia* method in regional regulation or public interest (i.e. sublimation in ethical values and Islamic sharia principles) can be described through the following table:

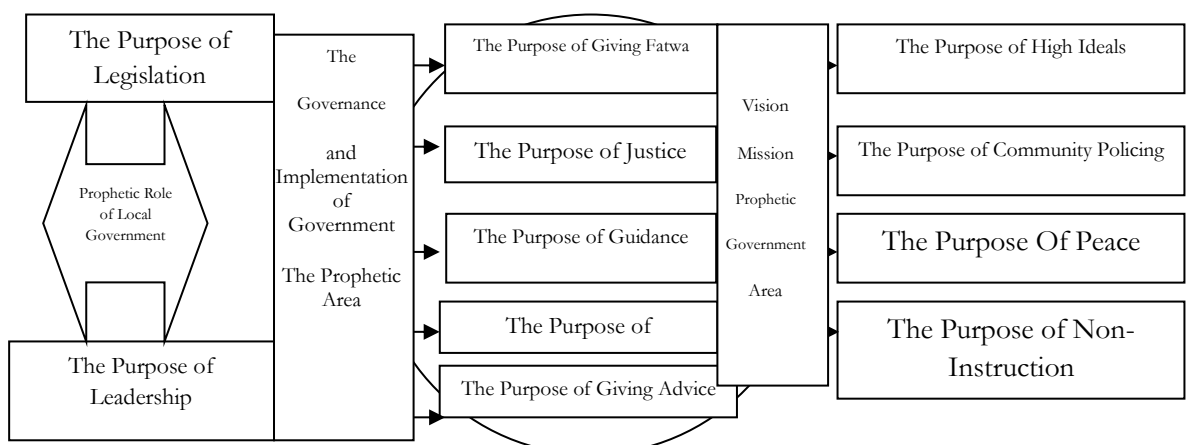
Table 2: the dimensions of *Maqasid sharia* in public interest regulation

Name of regional regulation	<i>Maqasid sharia</i> principles	Dimensions of <i>Maqasid al - Sharia</i>
Legal Aid for the Poor	<i>al-musawah</i> <i>al-'adalah</i> <i>al-shura</i>	This law protects the three human rights at once; protection of the rights of every human soul to grow and develop properly (<i>hifdh al-nafs</i>), the protection of the rights over the better future offspring in quality and guarantee of professions (<i>hifdh al-nash</i>), and protection of academic activity, freedom of opinion, and expression. (<i>hidh al-'aql</i>)

Since the author describes the decompositional sequence of both Jember regency regulations, furthermore, the authors will explain how to interpret Jasser Audah against the sharia discourse and what elements can be found to comply with the regulations.

Based on the description of al-Syathibi concerning the four elements of *maqsud al-syari* (the lawmaker intention) and further elaborated by Jasser Auda to be eight points in the Islamic sharia process. Thus, the *nalar maqashidi* is the reference for the authorized institution to make public policies and to implement them (the *taqin wa al-tanfadh* institution). Thus, the formulation process of the regional regulation is one of the implementation forms of the *maqasid kenabian* or is called prophetic law. However, these rationalizations can be seen through the scheme chart below:

Chart 3: Prophetic law based on Jasser Auda perspective



The chart above explains the regional regulation which is formed through the procedures and mechanisms that accommodate the eighth purposes contained in the elements of the local government to become part of the prophetic sharia. Thus, Regulation becomes a derivative of the Medina Charter (*Mitsaq al-Madinah*) which was created by Prophet Muhammad to regulate pluralistic society in Medina. At that time, the prophet did not impose his authority as the holder of the message to make an agreement that denied the existence of the Jewish community in Medina. What was formulated by the Prophet was taking into account the benefit and interests of the non-Muslim community in Medina.

Madinah as the capital city of Islam at that moment was lived by Moslem, Christian, and Jewish of Madinah. Therefore, the necessity was to ensure peace, discipline, and regularity of that multicultural society. The insurance was manifested through peace treaty which the core is the sincerity to put off insider interest to support communal interest. The policy of The Prophet, considering his position as the messenger of Islam to be spread and maintained, yet at the same time he did it along with protecting the existence of Christian and Jewish community. In other words, The Prophet maintained the interest and virtue of the divergent society without forcing his will to implement Islamic teaching to the two communities.

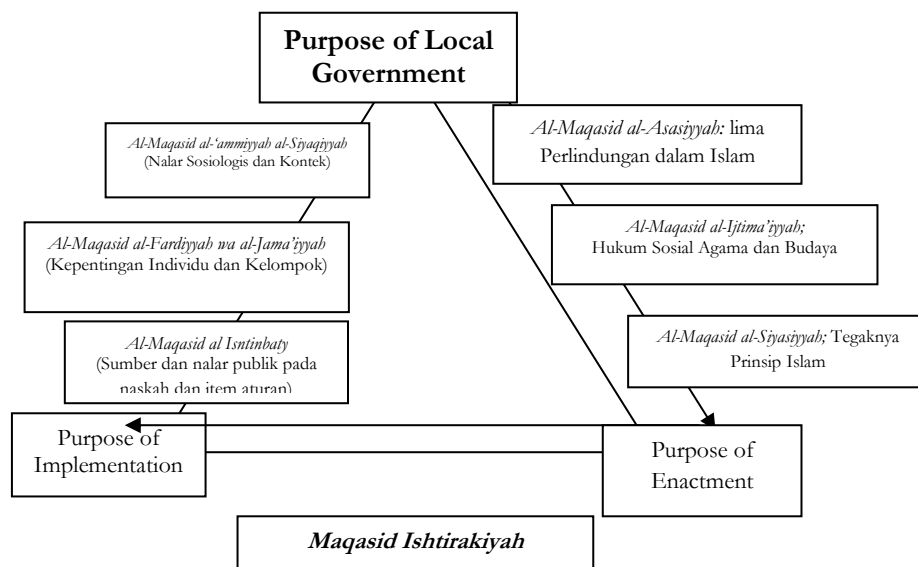
With those flow of arguments, seeing the formulation of local government regulation based on perspective of *maqasid sharia* delivers to the understanding of holistic *fiqh* theories (*kulliyah*), based on universal values, and not keeping text on its partial meaning. This way of reading can be a solution for the gap and differences among Islam followers, eliminating ideological-political boundaries of Muslim, and minimizing the gap between two substantial and formal poles of Islamic law. The ultimate goal is peaceful and productive reconciliation of followers and life (Abdillah, 2013).

Flexibility, openness, and renewal of Islamic law can be reached through *maqasid* approach—with its variety of methods—that embody core purpose of all methodological linguistic and rational basis in its formation. Effective, realistic, and participative regional regulation can actualize the peacefulness in its widest range.

More practically, *maqasid sharia* as triggering pendulum of the manifestation of concrete step towards effort of Islamic and national law integration, especially in the formation of local government regulation, is formulated in several *maqasid* steps, namely:

- a. The purpose of arrangement and formulation of regional regulation: *al-Maqasid al-Asasiyyah* (accomplishment of five protection principles of Islam), *al-Maqasid al-Ijtima'iyah* (accomplishment of law purpose with considering social, cultural, and legal aspects), dan *al-Maqasid al-Siyasiyyah* (purpose of law that consider the embodiment of Islamic universal value in public life).
- b. The purpose of the content of local government regulation; *al-Maqasid al-Fardiyyah wa al-Ijtima'iyah* (accomplishment of the purpose of law to protect individual and public peace), *al-Maqasid al-'Ammiyyah wa al-Siyaqiyah* (the purpose of law is based on contextual rationality and sociological consideration), and *al-Maqasid al-Istinbatiyah* (the purpose of law which is considering the aspect of source, methodology, and the rationality of universal values in the text of local government regulation).
- c. The purpose of implementation and enactment; *al-Maqasid al-Ishtirakiyyah wa al-taqyimiyyah* (the purpose of law with considering active participation of public in monitoring and escorting the implementation of local government regulation).

From the three *maqasid* mentioned, the theoretical constrain can be framed as the following circular triangle:



The result of this discussion is a critical note and concrete follow up actions for substantial teachings of *sharia* such as Nadirsyah Hosen, Robert W. Hefner, Mahfudh MD, Arskal Salim, Afifuddin Muhajir, and so forth. The idea of substantial essentialism of *sharia* should be manifested by objectifying Islamic teachings into public policy and moreover

national law (Hefner, 2011). The obedience of Islam believers to their God (*ta'abbudi* element) is not only stated with maintenance of *syariat* in terms of textual and formal form, but also stated by formulating rational and empirical *fiqh*, as a *syara* law based on consensus and accepted by all parties. Objectification should be dominant portion, since a good law product or public policy, at all levels, should not be instrument of majority tyranny, but the one that can accommodate interests, peace, and accepted by all circles.

Conclusion

Based on above explanation, researcher concluded several crucial matters; *first*, dichotomist conception between Islam and national law can be eliminated by reading the purpose in the process of local government regulation formulation in certain district. Second, the *maqasid* (purposes), ideally, are explained in several important pages; formulation, discussion, and enactment through assistance of central government. Third, researcher also discovered that, in fact, a product of local government regulation never misses the participation of public. Which means, public—whether they are Muslim or not—can contribute their ideas through political process run by legislators.

The formulation of this conclusion still leaves uncompleted complex tasks, because in fact: *first*, dichotomist thinking remains in the consciousness of public policy, a separated understanding between nationality and religion. *Second*, sociological-political dynamic shows how bad the seizure between internal interest and communal interest accompanying the journey of Indonesia. In the future, it is necessary to widely open critical-constructive dialogs to discuss politics of Islam follower framed by *santri* (Islamic student) politics in transformation of *fiqh* in local government regulation using the paradigm of *fiqh-ushuli*, especially based on *maqasid sharia*, to cover issues about the necessity of formal *sharia* local government regulation.

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