

Regulation of Regional Government on Halal Tourism Destinations in West Nusa Tenggara Province after Constitutional Court Decision Number 137/PUU-XIII/2015

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Abstract-The present study is initiated by the proliferation of a very broad authority of Regional Government in forming Regional Regulation that is not in line with the synchronization and harmonization function of optimal legislation. Each party has a strong argument in maintaining a regulation on religion. As a result, it contributes to a multi-interpreted, conflicted, and disobedient legal situation to the law that finally creates disharmony between one rule and another. A normative legal research is the type of the present study. It accentuates a literature study with the focus on the study of the principles of law, systematic system of law, legal study and legal history. A descriptive research is also included in the present research. The conclusion that can be seen from the present is that, *first*, decentralization of tourism management after the Constitutional Court Decision Number 137/PUU-XIII/2015 gives an authority to Regional governments in legal products making with a very broad extent. The present study expects a change in the substance of Regional Regulation of West Nusa Tenggara Province Number 2, 2016 concerning *Halal* Tourism and it is hoped that Regional Government of the Regencies/Cities in West Nusa Tenggara Province will immediately issue the Regional Regulations so that the maximum contribution of tourism to Regional Own-source Revenue in sports and leisure venue levies sectors can be achieved.

Keywords- Regional Regulation, Decentralization, Welfare State.

I. INTRODUCTION

The implementation of regional autonomy is closely related to the authority of Regional governments in making and implementing law and regulation in the form of Regional Regulation. It is the attribution and delegation of Article 18 of the Constitution of the Republic of Indonesia 1945 and Law Number 23, 2014 concerning Regional Government. Due to the enactment of regional autonomy in Indonesia, regions have gained considerable authority to autonomously form regional regulation, both relating to fiscal policy and the order of regional communities life.[1]

On the other hand, the existence of Regional Regulation has become the implementation of a representative system in policy making at the level of Regional Government. It is seen as the lowest ranking regulations in the order of law and regulation issued by

the Regional House of Representatives and the Head of Regional Government. Its contents and manufacture cannot deviate from the prevailing statutory system. [2]

Regional regulation often overrides formal juridical technical issues, which negate the position of Regional regulation so that the regulation at the implementation level often causes problems, such as inconsistency or disharmony and over regulation. Adopting the term suggested by Richard Susskind, such regulation is called hyper regulation or known as legal obesity and over regulation. As a result, President Joko Widodo (Jokowi) asked the Minister of Home Affairs to remove the problematic three thousands regional regulations without conducting review and justice. [3]

The government's action to revoke the Regional Regulation without going through the judiciary has raised dualism of judicial review conducted by the central government (executive review) and the review by the Supreme Court. Siti Fatimah pointed out the dualism of the judicial review as a proliferation of judicial power to create a simple, fast and low-cost court, but she also acknowledged that proliferation creates inconsistencies and legal uncertainty for citizens and the implementation of state life. After realizing to ensure the realization of legal certainty, the Constitutional Court as the guardian of the constitution, guardian of democracy and examiners of the Law in Decision Number 137/PUU-XIII/2015 states that the authority of central government is a unconstitutional one in invalidating the Regional Regulation. [4]

After the decision, the government continued making an appropriate improvement to provide an ideal concept of the division of authority between the central government and regional governments. In principle, overlapping matters regarding the distribution of authority must not occur and all government affairs must be divided. In addition, the central government needs to ensure that it is not too lax or too strict in giving affairs to the Regional governments. The autonomy without supervision is clearly not in accordance with the purpose of the country's founders, but excessive oversight of the administration in regional affairs is also unexpected. [5]

One implementation of regional affairs is the tourism decentralization. It is a concurrent governmental matter which becomes an authority in selected governmental affairs. One of the selected governmental affairs includes the handing over of central government affairs to the Regional government to determine tourist attractions, strategic tourism areas, and tourism destinations. The Regional Government Regulation of West Nusa Tenggara Number 2, 2016 concerning *Halal* Tourism is closely related to the decentralization of tourism in West Nusa Tenggara Province.

Halal Tourism is a tourist visit activity with tourism destination and industry that prepares tourism products, services and management facilities that should meet the *shariah*. Article 5 of the Regional Regulation requires the conventional tourism industry to provide *qibla* direction in hotel rooms, information in nearby mosques, places of worship for Muslim tourists and employees, information on halal or non-halal products, separated ablution places between men and women, supporting facilities to pray and separated places between men and women and make it easy to purify.

Halal tourism is a tourist visit activity with tourism destinations and industries that meet the *sharia* elements in Lombok and Sumbawa, West Nusa Tenggara Province. It has many natural and cultural riches and prospects for tourism development. Its geographical existence which is located near Bali, as a barometer of Indonesian tourism, creates and provides its own advantages in the distribution of foreign tourists since East Lombok Regency, West Nusa Tenggara Province is considered to be the first tourist destination in West Nusa Tenggara Province. This can be seen from the number of tourist visits to the Province of Bali in 2017 (i.e. 5,697,739 people), while 4,500,300 people were noted in the same year in West Nusa Tenggara Province.

The increase in tourist visits, according to Burhan Bungin, is due to the brand seen by tourists, which has stimulated purchases. *Halal* Tourism in West Nusa Tenggara is recognized and has received awards as *the world's best halal beach resort, the world's best halal honeymoon destination and the world's best halal tourism website*. Regarding its potential destinations, West Nusa Tenggara Province shall have the prerequisites to be a developed, affluent and prosperous province. This is in line with what Richard A. Posner suggests that the increase in tourist visits will bring wealth maximization closer (the theory of maximizing prosperity). Also, the increase has certain impacts on efficiency and economic value. Efficiency means the ability to buy and fulfill goods and services, while value is defined as the ability to pay. This value turns into a function of meeting the distribution of income and welfare in society. [6]

However, East Lombok Regency is included in underdeveloped (poor) regencies in fact, and this can be

seen in Presidential Regulation of the Republic of Indonesia Number 131, 2015 concerning Provision of Backward Regions in 2015-2019. In addition to being a backward region, the Directorate General of Regional Financial Development Data of the Ministry of Home Affairs of the Republic of Indonesia 2017, the Regional Own-source Revenue of East Lombok Regency is still below the national average of Rp 2,000 billion, that is Rp 1.450 billion. Meanwhile, the Presidential Regulation of the Republic of Indonesia Number 32, 2011 concerning the Master Plan for the Acceleration and Expansion of Indonesia's Economic Development 2011-2025 states that the tourism and food sector is a leading sector of NTB Province's regional income. This position seemed to strengthen Murdoko's statement that the regulation of *halal* tourism is objected to maintain the existence of religion and regional integrity and pragmatism of power. The present paper focuses on the issue if the regulation on *halal tourism* after Constitutional Court Decision Number 137 / PUU-XIII / 2015 of West Nusa Tenggara Province has set out the principles of *lex superior derogat legi inferiori* (higher legal regulations govern the lower ones).

II. RESEARCH METHOD

The type of the present study used in this article is normative legal research. It places more emphasis on literature study consisting of research on legal principles, legal systematics, law synchronization, legal history and legal comparison. The present study was also descriptive in nature, that is, analyzing the principles of *lex superior derogat legi inferiori* (higher legal regulations govern the lower ones) in the Regional Government Regulation on *halal* tourism in West Nusa Tenggara Province after Constitutional Court Decision Number 137/PUU-XIII/2015. [7]

The present study used secondary data by applying legal materials obtained from literature study of primary legal materials, secondary legal materials and tertiary materials. The research tools for fecondary data collection were books relating to the theory and concept of research objects, related articles, scientific writing literatures and so on through literature study. The data were analyzed using a qualitative analysis and presented in a descriptive form. Qualitative analysis was performed through categorization based on the research problems and data collection. Qualitative analysis is defined as qualitative normative assessment to assess the data collected from secondary data (through literature study) and whether or not the implementation is in accordance with the existing theories and rules, so it can measure the level of effectiveness of its implementation. [8]

III. FINDINGS AND DISCUSSION

1. Decentralization of Regional Government Regulation on Tourism Destination after Constitutional Court Decision Number 137/PUU-XIII/2015

Law of the Republic of Indonesia Number 10, 2009 concerning Tourism has several terms related to travel (*wisata*), tour (*pariwisata*) and tourism (*kepariwisataan*), while English has a single term called tourism. *Wisata* is a travel activity carried out by a person or group of people by visiting certain places for recreational purposes, personal development in the interim period. Further, *pariwisata* is a variety of tourist activities and is supported by various facilities and services provided by certain community, entrepreneurs, Central Government and Regional Government. While *kepariwisataan* is a whole activity related to *pariwisata* and is multidimensional and multidisciplinary in nature which emerges as a manifestation of the needs of each person and country, as well as interactions between tourists and Regional community, fellow tourists, Central Government, Regional Governments and Entrepreneurs.

Law of the Republic of Indonesia Number 23, 2014 concerning Regional Government states that government affairs are divided into absolute, concurrent and general. Absolute government affairs are ones that are of the central government, including foreign policy, defense, security, justice, monetary and national fiscal and religious affairs, while the division of concurrent affairs is divided into two, namely obligatory government affairs relating to basic services, as well as non-related obligatory government affairs with basic services and choice government affairs. One of the selected governmental affairs includes the handing over of central government affairs to the Regional government to determine tourist attractions, strategic tourism areas, and tourism destinations.

The affair is accompanied by the authority of the Regional government to form legal products in the form of Regional regulations. This is a form of law that gives authority to regions in regulating and managing their own regional affairs. After the Constitutional Court Decision No. 137/PUU-XIII/2015, the authority of Regional governments in forming legal products is very broad. Adapting the term suggested by Mochtar Kusuma-Atmadja, lawmakers shall collaborate with legal implementers to produce regulations that are able to serve public interest, shall not be in full and authoritarian control, and hence the enactment of the Regional Regulation must be in accordance with the existing legal rules. [9]

Richard A Posner emphasized the principle of efficiency in social decision making, efficiency in Posner's glasses related to increasing one's wealth without causing harm to others, and thereby changing the rule of law can increase efficiency if the profits of the winning party outweigh the losses of the losing party and the winning party can compensate losses for the losing party so that the losing party remains better. The regulation aims to provide justice and social welfare. The justice said by Posner is a justice that exceeds distributive and corrective one. Further, John Rawls defines justice as

a reflective equilibrium, namely the coupling between rational reflection and intuition (a sense of justice) that is a meeting point between intuitive beliefs and theoretical construction so that justice shall be measured rationally, and a sense of justice on one side can fulfill intuitive beliefs in the sense of justice. [10]

2. *Quo Vadis of Halal Tourism Policy in West Nusa Tenggara Province*

Decentralization is not the slightest urgency to make religion as a part that must be brought into the public sphere. The emphasis in decentralization relies on the aspects of regional administration that is expected to empower and to bring its services closer to the community. In general, the objectives of decentralization are more focused on developing regional resources so that they are more independent and no longer rely on the Central Government. [11]

If the argument arising to the emergence of a religious affairs regulation is then aimed at accommodate the representation of the majority religion, Satjipto Raharjo then argued that the existing understanding of the regulation is an expression of the literal view of religion, which defines religion merely from its literal meaning or text-booked oriented meanings. Amin Abdullah points out that the regulation making with religion nuance would make it like a barrier between religion and science, where both seemed to be an independent entity and cannot be met, has its own territory in terms of object, formal, and material aspects, research methods, truth criteria, roles played by scientists to their organizing institutions. Furthermore, he offers an integrative-interconnection paradigm that seeks to reduce these tensions without fusing each other but trying to bring them closer and relate them so that they can meet one another. [12]

Further, it makes the application of the law rigid, conservative and seems compelling for every citizen to obey it. The actualization through Regional Government Regulation Number 2, 2016 concerning *Halal* Tourism has not yet been fully aimed at solving problems and often contradicts higher laws and regulations. *First*, the conflict of *tanah pecatu* in tourism objects, for example due to the increase in the quality and quantity of land needs that are increasing and land acquisition for development that is not followed by a set of laws and regulations, as one of the dispute resolution for the concerned parties. [13]

Second, the limited budget for infrastructure of transportations to the destination has also become the cause. The increase in tourist visits should ideally have an impact on the increase in Regional revenue from tourism sectors, especially those from hotel taxes, restaurant taxes, entertainment taxes, recreation and sports levies. The improvement is not comparable with the development of infrastructure and transportation to the destination area, hence, the development of tourism is hampered due to the

problem of physical infrastructure, the fast emergence of destinations that is not followed by adequate infrastructure speed.

Third, the increase in Regional Own-source Revenue in the tax sector was not followed by an increase in the levy in the recreation and sports sector, because the City and Regency Governments in West Nusa Tenggara Province had not yet enacted a Tourism Master Regulation. The Regional Authority in determining the Regional Regulations for Tourism should pay attention to the criteria of regional levies that have been set out in the PDRD. Article 23 A of the Constitution of the Law of the Republic of Indonesia 1945 is the basis for tax collection which mandates that taxes and other levies that are coercive for the purposes of the state are regulated by statutory regulations.

The levies must be based on laws and regulations since it provides rewards that can be directly appointed. Transfer of wealth without compensation can only be in the form of robbery, theft and seizure, therefore all taxes and other levies must first obtain approval from the people through the House of Representatives. This philosophy is the same as that of in tax regulated in England, that is, no taxation without representation and American taxation without representation is robbery. [14]

Based on human rights perspective, Regional Regulation on religion clearly contains an element of distinction for a person in direct or indirect way. The direct impacts is felt by someone from a legal provision, while the indirect impacts arises when the practice is a form of discrimination even though it is not performed in purpose. Therefore, the existence of certain law on religion clearly contradicts the principle of equality and non-discrimination since it contains an element of distinction as stated in the General Declaration of Human Rights, explicitly stating the reasons for the principles of equality and non-discrimination. [15]

It must be stressed that the issue of religion has become the authority of the central government, not the regional government. Regional autonomy needs to be understood as a freedom to implement the existing rules, not to set regulations or policies that do not have specific basis and conformity with higher regulations. In other words, one that must be regulated by the Regional Government is the further elaboration of higher legislation, that is, in the context of carrying out autonomy and assistance tasks based on the principles of decentralization and deconcentration.

IV. CONCLUSION

The conclusions in this study were: (i) the decentralization of tourism regulation after the Decision of Constitutional Court Number 137/PUU-XIII/2015 contributes a very broad authority of Regional Government in shaping legal products, hence, Mochtar Kusuma-Atmadja –which stated that the central

government should not have the character of authoritarian in the cancellation of a Regional Regulation as long as the Perda– is still in accordance with the existing legal rules. In addition to Mochtar Kusuma-Atmadja, Richard A Posner emphasized the principle of efficiency in social decisions making, Posner’s eyes associated with the increase in regional government authority in establishing regional legal products must be closer to wealth maximization (theory of maximizing welfare). (ii) extending authority also impacts on the efficiency and economic values. Efficiency means the ability to buy and fulfill goods and services, while value is defined as the ability to pay. This turns out to be the function of distribution of income and prosperity fulfillment in society. The regulation aims at providing social justice and welfare which goes beyond distributive and corrective justice.

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