



## CHAPTER I

### INTRODUCTION

#### A. Background of Study

In his age Umar bin Khattab determined not to execute the hand cut penalty against thieves considering people on such season were in hunger and poverty that happened in every places because of harvest failure. Many of legal verses in their *asbabun nuzul* are pertaining social circumstance and become 'illat of why have those been determined. Indicating that, 'urf of local society motivates the determination of law.<sup>1</sup>

In the *ushul fiqh*, 'urf is one of the sources to construct the law. To Abdul Wahab Khallaf, 'urf means something known commonly in society and becomes tradition.<sup>2</sup> It becomes urgent element to be accounted with containing the basic needs and what had

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<sup>1</sup>Amiur Nurrudin, *Ijtihad 'Umar bin Al-Khaththab*, (Jakarta: PT. Rajawali Pers, 1991), 150.

<sup>2</sup>Abdul Wahhab Khallaf, *Ilmu Ushul Fikih*, (Jakarta: Pustaka Amani, 2003), 117.

been approved in society. Therefore, *Ulama* claim that the tradition is considered as law that has to be preserved as long as it does not contradict with Sharia.

Islam had intensively been performing supervision on local tradition such as the prohibition against alcoholic drinks. The prohibition was not applied directly yet revealed gradually in order to prepare society's circumstances to receive the Sharia. In fact, *Syari'* determines to preserve necessary tradition that assumed appropriate with Sharia for example the preservation on commercial tradition.

However, the law that had been established over Arabic society through revelation cannot be separated from the prophet role as mediator who is dependable on local traditions. In addition, many of Koran's verses use the general terms indicating that the later explanation is given over second mandator after God. Therefore, prophet Muhammad tried to construct the law, that has not been certainly described in Koran's legal verses neither quantities nor qualities, through local custom parameter. Hence, Islamic Jurisprudence scientists formulate the jurisprudence theorem (*al-qawa'id al-fiqhiah*) *al-'aadatu muhakkamah* as the parameter of Islamic legislation in accordance with surah Al-Baqarah verse 228 :

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْنَ بِالْمَعْرُوفِ

"And women shall have rights similar to the rights against them, according to what is equitable (*ma'ruf*)" (Al-Baqarah : 228).

*Al ma'ruf*, that is, interpreted as custom which is become standardized quality to measure the value of justice in society. It reflects society's circumstance that is embodied into rules of customary law. As also acknowledged in Islam that there are several rules of law in customary law that show no further explanation, neither evidence indicating on its admission nor evidence on its canceling. The concept is known as *al-mashlahat al-*

*mursalah* term in Islamic law literature. That is, one of the methods to construct the law concerning public welfare which is the Syari' does not confirm it nor proscribe it. Therefore, it is appropriate to be related with the concept of "*adl-dlاراaru yuzaalu*" that is necessitate to avoid whatever heads to *adl-dlarar* or disadvantage.

The living law which exists in society has dynamically developed and changed, sometimes in certain place and time is considered advantageous yet disadvantageous. Thus, in order to synchronize it with the remaining law then it has to be systemized and codified.

Imperialism entered to Indonesia and had ruled for approximately 350 years. Its arrival brought the newest and freshest nuance of legal culture and helps national legal system to identify and to compile the legal sources including Islamic law that began to be codified in the brink of 20<sup>th</sup> century. For example, the formulation of Stbl 1882 Num. 152 as derivation of Gibb's comprehension upon Islamic law or its prominent term is *the theory of receptio in complexu*. Lodewijk Willem Christian Van den Berg, an Islamic law expert and also a man who promoted *the theory of receptio in complexu*, that used to be applied in Indonesia, had found that Indonesian society had already been approving the authority of Islamic law thoroughly. He tried to codify the Islamic law through regulation that gave full authority over religious court, to judge.

The using of "to codify" term refers to the concept of civil law legal system that becomes worldly famous after French Revolution 1789 under Napoleon order. In this concept, court is manifestation of the code that is Islamic Code or Islamic Canon. Therefore, the code is created by the legislature's enactment according to the civil law legal system and indeed necessitated to consider the living law that exists in society.

Indonesia as independent state acknowledged that the sources of national law as living law system comprise three kinds of law, namely; traditional law, Islamic law and

western law. Based on this the first national seminar of law, that held in Jakarta at the hall of University of Indonesia March 11<sup>th</sup> 1963, was intensely organizing the national legal system and put it at top priority by encouraging the experts and practitioner of law to perform unification and codification of law. In 1974 the first Islamic code in its regulation form has published. It was the Government Regulation Number 1 Year 1974 about marriage. The emergence of government regulation about marriage brought a new face on Islamic law and also strengthened the foothold of religious court authority in Indonesia.

From that moment the discussions of Islamic law formalization began, for instance the emergence of code of pilgrimage, the code of *wakaf*, KHI and lately KHES (Kompilasi Hukum Ekonomi Syariah) of Islamic economy. In 2004 the Code of Local Government Num. 32 year 2004 has published. It applied three years after UUD 1945's amendment in year 2001, which is one of its amendments lied on article 18 about Local Government including Local Regulation. It makes sense that this regulation becomes the mother of regulation to infuse elements or the Islamic values into Local Government before finally formalized, such as Local Regulation Num. 2 about Old Age Prosperity of Probolinggo 2009.

Probolinggo lies in 7° 43' 41" to 7° 49' 04" southern latitude and 113° 10' to 113° 15' eastern longitude with wide area 56,667 Km<sup>2</sup>. Probolinggo becomes transit area connecting towns between eastern: Banyuwangi, Jember, Bondowoso, Situbondo and Lumajang and western: Pasuruan, Malang and Surabaya. In addition, Probolinggo is a coastal area with harbor transit as one of local income sources.<sup>3</sup>

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<sup>3</sup>“Letak Geografis,”

[http://probolinggokota.go.id/index.php?option=com\\_content&task=view&id=21&Itemid=39](http://probolinggokota.go.id/index.php?option=com_content&task=view&id=21&Itemid=39), (accessed in October 18<sup>th</sup>, 2009).

According to the data published by BPS in year 2001 from total amount 181718 of citizen in capital city of Probolinggo there are 174043 of Moslem, 3068 of them are Christian, 3060 Catholic, 185 Hindus, and 1363 Buddhist. The amount will keep increasing as today in 2010. Besides, Probolinggo has included as part of Eastern Salient (area tapal kuda). It is the terminology to identify current area with the highest and deepest comprehension about Islam that much colored by NU-ism spreading and grew strong in Probolinggo.

In 2009, referring to article 18 of Ground Constitution 1945, Probolinggo has published the Local Regulation Num. 2 year 2009 about Old Age Prosperity. The regulation generally contains about the developing live extent whether in service form, aid and protection form as listed in article 8 of scope subject of Local Regulation. As another regulation ought to be in jurisprudence and legislation ruling in Indonesia, that the Local Regulation of Old Age Prosperity has been through dialectical phases or dialectical processes over social culture of Probolinggo citizen, that is Islamic law. Therefore, this research tries to investigate such dialectical phases in local legislation by assumption was it synch already with prosperity concept within *al-mashlahat al-mursalah* of Islamic law. Based on those above, this research chooses the title "THE RECEPTION OF *AL-MASHLAHAT AL-MURSALAH* WITHIN LOCAL REGULATION OF PROBOLINGGO CITY NUM. 2 YEAR 2009 ABOUT OLD AGE PROSPERITY".

#### B. Research Questions

1. How is the prosperity concept within *al-mashlahat al-mursalah* received into legislative drafting phases of Local Regulation about Old Age Prosperity?
2. How is the prosperity values of Islamic law translated into a valid linguistic statutory of Local Regulation about Old Age Prosperity?

### C. Purpose of Study

1. To know the process of drafting phases of local regulation about Old Age Prosperity.
2. To know the process of how the local regulation draft of Old Age Prosperity determined into a valid linguistic statutory.

### D. Significance of research

The research is hoped to give the knowledge contribution to State Islamic University of Malang generally and Sharia Faculty particularly.

The research is also intended for officer or local government practitioner, Probolinggo city particularly, in order to consider sharia principles aspect within local regulation drafting.

And last for common society, the research hopefully gives a ground comprehension and how significant to put sharia principles into Local Government policy.

### E. Scope And Limitation

Research about The Reception of *Al-Mashlahat Al-Mursalah* Within Local Regulation of Probolinggo City Num. 2 Year 2009 about Old Age Prosperity is the research that tries to discuss the effectiveness of *al-mashlahat al-mursalah* theory in Islamic law when it confronted with the legal positivism of legislation tradition in Indonesia. The law making process itself has been the aspect of what such research has always been emphasized in this research, about how is Prolegda affecting the effectiveness of *al-mashlahat al-mursalah* while they are performing synchronizing and harmonizing and how Islamic law's universalism values could also be displayed through linguistic statutory that is not opposed against Pancasila's principles.

Therefore, judging from the situation above the boundaries can be established as follow:

1. This research does not investigate the affecting extent of regulation upon society's legal awareness and their practice.
2. Neither the society's response towards regulation in term of legal aware culture.
3. Nor does investigate about legal comparative between Islamic legal tradition and positive legal tradition.

#### F. Definition of Keywords

**Reception** : Is the term that usually used in the theory of *receptio in complexu*. By borrowing such term in this point will imply of reception which rooted or derived from the word *receptio* of *receptio in complexu* theory in sensing of acceptance or absorbance (to receive).

***Al-Mashlahat Al-Mursalah*** : Concisely, implied to indefinable law indicating that its inexistency remains sense to whether had or have not been in harmony with the prevailing law. To some extent it refers to the law with no textual authority can be found on its validity or otherwise.

#### G. Previous Research

According to the topic, where the research is held, there is one research that had been in the same topic as the writer has. That is, Suud Fuadi who writes a thesis entitled "The Sharia Formalization Phenomena (The Comparative Study of Local Regulation between Pasuruan Regency and Tangerang City about Prostitution Banning)."

Suud Fuadi's research presented a few numbers of polemics around the implementation of local regulation viewed from its editorial denotation. Hence, Suud



tried to reform his reasoning with popular theories at the moment and appeared to apply the thoughts on unstable fact instead of ought to be.

From few discussions of his thesis appears that the problem tried to arise is a lively thoughts regarding Sharia Local Regulation. Here forth, Suud was applying theories of Qodri Azizi combined with Syafi'e Anwar's and Rahmad Rosyadi's thought to generate what brought on differential penalty or prohibition between Pasuruan Regency and Tangerang City in each local regulation with the same topic of prostitution prohibition. In addition, such research characteristic has the quality of library based research which means focusing onto regulations comparison. Suud's Research lacks pertaining principal substance of Sharia Regulation. Also the research does lack in discussing how its substance would applied in regulation.

#### H. Organization of Study

The thesis will consist of five chapters. As general preview for reader, the first chapter will discuss primarily the purpose and the problem of why does it attracted to discuss concerning The Reception of *Al-Mashlahat Al-Mursalah* within Local Regulation of Probolinggo City Num. 2 Year 2009 about Old Age Prosperity. The chapter will begin with history of Probolinggo in how society maintains the Shariah into law enforcement. It will then goes on to how Islamic law received into normative legal system, in this case is *mashlahat mursalah*, which is historically applicable in stbl 1882.

The second chapter will be devoted to the theories discussion about how Sharia perceived in the viewpoint of law. Does it contain the tying force to apply legal system and if it did how it works? The discussion continued with general description about formulation of constitution in the central government environment and narrows forth to the local government.



The third chapter will focus on the method of research that explains the paradigm, approach and whatever relates with the sources of law. At this chapter too, the thesis will adopt the expert's theories that may guide to collect the sources of law to the very detail.

The fourth chapter contains analysis of the collected sources of law. It will be described prior according to the concept of document study. It will then explain completely about local regulation material within Islamic view. Furthermore, the analysis goes on to the Local Regulation of Old Age Prosperity to how the reception takes process.

The last chapter will be the closing. It contains the conclusion from all discussion from the question of the first chapter to analysis of fourth chapter.

