



CHAPTER II

THEORITICAL FRAMEWORK

A. Legal Qualities between Islamic Law and Canon Law

a. Islamic Law

When reformation issues mix with Islamic law concept, vagueness appears within its translation into another literature outside the Arab. Such vague reveals as in following terms *droit musulman* in French, *islamistise recht* in Dutch, *islam bakuku* in Turkey, and *hukum islam* in Indonesian. Hereby, the *Hukum Islam* term is almost precisely translated from the term of *Islamic Law* in western literature. In fact, neither in the Koran nor Islamic literature of law mentioned Islamic law term specifically except sharia, fiqh, divine law, or its derivation.⁴

Amir Syarifuddin points out, in order to understand the definition of Islamic law, is necessary to know first the word "hukum" in Indonesian dictionary and then it will

⁴Abdul Halim Barkatullah and Teguh Prasetyo, *Hukum Islam*, (Yogyakarta: PT. Pustaka Pelajar, 2006), 3.

lean upon "Islam". The definition of law is simply "The rules of human behavior which approved by a group of society; ordered by people who are given the authority by society; prevail and bound to entire member." When the word law to be related with the word Islam or *syara'*, then Islamic law will mean "the rules to be based on divine revelation and prophet tradition about *mukallaf* behavior which is acknowledged and convincingly binds all Moslem". If the definition relates to the fiqh of Arab literature, then the term of Islamic law will implied as in the fiqh.⁵

Joseph Schacht states that, *Islamic law* is the whole sayings of God (*Khitab Allah*) that regulate the life of Moslem individual in all aspect. Meanwhile, Muhammad Muslihuddin claimed that "Islamic law is divinely ordered system, the will of God to be established on earth. It is called Shari'ah or the (right) path. Qur'an and Sunnah (traditions of the prophet) are its two primary and original sources". Both Islamic law definitions as mentioned above appears to be near with the *syara'* or Islamic sharia.⁶

Islamic legal system has its own qualities and completely different from another legal system that exist in this world. Hasbi ash-Shiddieqy said that Islamic law possesses three characters, namely, *first, takamul*, means perfect, round, and finish. In other word that Islamic law modifies people into a round complete stipulation, despite in various nations and tribes, however they are always in an unbreakable unit, intact, harmony and dynamic. *Second, wasathiyah* (moderate), that Islamic law takes a center path, the path that is balance and not overweight in one of both sides, neither right-weight of focusing on spiritual side nor left side of emphasizing on matter. Islamic law is always harmonizing between reality and ideal. *Third, harakah* (dynamic), that Islamic law has the ability to move and develop, has a soul and able to modify itself to be harmonious with the advancing and developing era. Islamic law is dispersing from wide and deep

⁵Abdul Mannan, *Reformasi Hukum Islam*, (Jakarta: PT Raja Grafindo Persada, 2006), 60.

⁶Ibid., 61.

source, that gives a number of positive law for human being and used in every place and time.⁷

In addition to qualities owned by Islamic law as mentioned above, Yusuf al-Qardhawi added another quality; *first*, Islamic law is abridging and omitting difficulties; *second*, focusing on graduality of time or in phases; *third*, went down from ideal value into reality in emergency situation; *fourth*, omitting and disappearing everything that suffers or disadvantage; *fifth*, cannot omit the disadvantage by disadvantage; *sixth*, the specifically (*khas*) disadvantage is used for generally disadvantage; *seventh*, the light disadvantage is used to repel the bigger disadvantage; *eight*, in the forcing situation is allowed or being extended to be having a forbidden deed; *ninth*, what is allowed in forcing situation is measured according to what is necessary; *tenth*, shutting the source of destruction is come first before inviting the advantage.⁸

b. Canon Law

The word *qanun* is derivation from Greece term turning to Arabic through Suryani, that is translated as “measuring tool”, and afterward to be “*qa'idah*” (principle). In Arabic verb “*qanun*” what is implied “to make law and to legislate”. And so canon (*qanun*), can be meant the law, rule, regulation, statute, and code. There are several terms synonymous with canon, namely; (1) *hukm*, plural *ahkam*; (2) *qa'idah*, plural *qawa'id*; (3) *dustur*; (4) *dhabitah*, plural *dhawabith*; (5) *rasm*, plural *rusum*.⁹

In the term usage, Mahmassani mentioned that the canon comprises three senses:¹⁰

1. Compilation of regulation or code. The term is used such as Penalty Canon of Utsmani, Personal Canon of Lebanon, etc.

⁷Ibid., 63.

⁸Ibid., 64.

⁹Qodry Azizy, *Hukum Nasional*, (Jakarta: PT TERAJU, 2004), 75.

¹⁰Ibid., 76.

2. The term that is synonymous with the law. So we may use on Canon Science as same as Legal Science, British Canon is as same as British Law, Islamic Canon is as same as Islamic law.

3. Statute. The difference between third definition and the first is that, the first one is more general and includes many things, whereas the last third is just for specific problem. For example, the Marriage Canon is just the same as Marriage Statute. But canon in this sensing can only be the law in *mu'amalat* concerned, not *'ibadat*, and may have jurisdiction which implementation dependable on the state. As term that possesses definition synonymous with the statute then the canon can have the power and authority into possession to its implementation, just like statute. That is, existed execution and law enforcement while having already to be judge decision in court. The state has made it available with equipment and tool to enforce the legal decision, just. This means have difference with fiqh's character which implementation is more voluntary in quality and commonly based on responsibility sense or sanction in afterlife.¹¹

Or in other sense that, canon is the statute claimed on Islamic law contained within for either all part or in part, and still using the procedure of Islamic legal discovery, such as the using of *istihsan*, *'urf* or *mashlahah* and *siyasah syar'iyah* causes. Thereby, the legal provision that exists within has become Islamic values in quality at the side; and possesses authority supported by the state in other side. In practice, rarely not the nuance of *siyasah syar'iyah* is somehow too noticeable, which attachless from political interest in its time. When the canon is being theorized such as this, then we may know in Indonesia the Code Num. 1 Year 1974 about Marriage has published.¹²

¹¹Ibid., 77.

¹²Ibid., 80.

B. *Al-Mashlahat Al-Mursalah*

In Arabic version *mashlahah* (plural *mashalih*) is synonymous with the word ”*manfa'ah* (benefit)” and opposed to the word ”*mafsadah* (destruction)”. Allegorically, the word can also be used for action containing benefit. The word benefit itself always translated into *ladzdzah* (tasty feeling) and attempt to obtain or to defend. In sharia discussion, the word *mashlahah* could be used as term to express specific definition, regardless of its real meaning. Whereas *mashlahah*'s meaning is to take advantage or to reject *mudllarat* (destruction).¹³

Mashlahah definition within term conception could be determined from *ushuliyyin* discussion (experts of *ushul fiqh*) while discussing *munasib* (such term that relates with ‘*illat* issue or law causality) and when discussing *mashlahah* as legal evidence. According to Al-Khawarizmi that, what have been implied from *mashlahah* is maintaining the purpose of Islamic law by rejecting disaster or destruction that is to be doubtful from human. As also known, that the purpose of Islamic law is to preserve religion, morality, soul and descendant. Thereby every law ruling that implied to preserve thus five *syara'* purpose, by avoiding either from destructive things or dangerous, known as *mashlahah*. According to this definition can be known that something defined as *mashlahah* is Islamic law as barometer not ratio.¹⁴

Al Ghazali explained that according to its source, *mashlahah* means something that invites advantage or benefit and to omit destruction which essentially is to preserve the *syara'* purposes within law making. From above conclusion appears to have differences between *mashlahah* in linguistic definition and *mashlahah* in legal definition.¹⁵ The difference revealed from *syara'*'s purpose angle that becomes reference.

¹³Abdul Mannan, *Op Cit*, 261.

¹⁴*Ibid.*, 262.

¹⁵*Ibid.*

Mashlahah in linguistic definition refers to human needs fulfillment and because contained definition to follow the lust or human desire.¹⁶

Observing from emergently evident within legal establishment, that *mashlahah* consists of three kinds, namely; *first, mashlahat dlaruriah* (the essentials), the *mashlahah* and its existence that is very necessary for human life. In other word, that human life will be meaningless if one of five principles does not exist. *Second, mashlahat hajiyah* (the complementary), is the *mashlahah* that its need extent of human life does not near the *dlaruri* level. Its *mashlahah* form is indirectly accessible to need fulfillment of human life. *Third, mashlahat tahsiniyah* (embellishment) is the *mashlahah* that the need of human life is not on the *dlaruri* level, nor on *hajii* level, however the need must be fulfilled in term of perfection and beauty of human life. *Mashlahah* within *tahsini* form is also related with five principles of human needs.¹⁷

Observing from effort intent to pursue and to establish the law, the *mashlahah* is also known as *munasib* or *mashlahah*'s harmonious with legal purpose. *Mashlahah* within *munasib* sensing is divided into three kinds, namely; *first, mashlahat mu'tabarah*, the *mashlahah* that is accounted by *syara'*, it means that within this case there is a clue from *syara'*, either directly or indirectly indicating to *mashlahah*'s existence as reason to establish the law. *Second, al-mashlahat al-mulghah*, also known as unacceptable *mashlahah*, namely *mashlahah* that is considered goodness by ratio but *syara'* does not explain it and there is clue of its refusal. *Third* the *al-mashlahat al-mursalah* or also called *istishlah* is what the ratio considered as goodness, which in line with *syara'* legal purpose, to establish the law but does not exist *syara'*'s clue to be considered nor clue to refuse.¹⁸

¹⁶Ibid., 263

¹⁷Ibid., 264.

¹⁸Ibid.

The *mashlahat mursalah* consist of two words which both connections are within *mawshuf* form (adjective) or indicating specifically that has been in part of *mashlahah*. Concerning *mashlahah* definition is what has been explained above, either etymologically or terminologically. Whereas *mashlahah* understanding is similar to *mutlaqah* that means independent. In other word neither exist certain proof to cancel nor to confirm. In *ushul fiqh* discussions, *mashlahat mursalah* (singular form) or *mashalih mursalah* (plural form) is used each other alternately.¹⁹

Wahbah Zuhaili stated that what he has implied with *mashlahat mursalah* is several characters that matches with behavior and with *syara*'s purpose. However, it does not exist current evidence to prove nor to abort, and by having the law to be established will achieve the advantage and repel the damage from human. Meanwhile, Muhammad Sa'id Ramdan al-Buti explained that the essence of *mashlahat mursalah* is every benefit that include within *syara*' purpose (Islamic law maker) with inexistence of evident to confirm nor to abort. According to both definitions here about this *mashlahat mursalah* is emphasized more by Ahmad Munif Saputra that what he has implied with *mashlahat mursalah* is the *mashlahah* that in line with *syara*' practice and neither exist certain evidence to confirm nor to abort, such as Abu Bakr's verdict to codify the Koran and his initiative appointing Umar ibn al-Khattab as the next caliph after his death. It has been the matching action with sharia purpose, his opinion does not based on the Koran, hadith nor on the *ijma*' because is indeed not exist evidence to be referred instead merely based on *mashlahat mursalah*.²⁰

Based on definitions about *mashlahat mursalah* could be concluded: *first*, *mashlahat mursalah* is something what deemed a good according to ratio which considerately enable to embody goodness or to avoid destruction for human being.

¹⁹Ibid., 265.

²⁰Ibid., 266.

Second, what best according to ratio is also matching and compatible with *syara*'s objective within law establishment. *Third*, what deemed good according to ratio and compatible with such *syara*' objective is not exists a *syara*'s clues to be acknowledged. Thus, the *mashlahat mursalah* is justified to be used if such *mashlahat mursalah* does not oppose to common principles and have felt urgent by society.²¹

In an article listed in journal of law that published by UII Yogyakarta, Aroma Elmina Martha stated that the inventor of the theory of *mashlahat mursalah* is Imam Malik, and he submitted three conditions which adhered within theory of *mashlahat mursalah* namely; *first*, that the problem should be considered with must be something pertaining transaction concerned until include inside interpretation on ratio basis. *Second*, such regard must not something in relation with sharia enthusiasm and not against one of the sources. *Third*, such interest is materialistic (essential and urgent) not the *tahsini* (intends to perfection). The *dlaruri* type encompasses the preservation on religion, life, ratio, lineage and wealth.²²

Hasbi ash-Shiddieqy clarified that *mashlahat mursalah* could be used as legal evidence if such *mashlahat mursalah* is *mashlahat haqiqiah* that is acknowledged and considered as *mashlahah*'s *ahlul halli wal 'aqdi* which the established laws are indeed inviting benefit for human being and definitely rejecting destruction from human. Hence, *mashlahah* must be something in common and it clearly cannot be the *mashlahah* that could not be approved by *syara*'. Furthermore, Hasbi ash-Shiddieqy stated that using *mashlahah* as legal source is essentially supported by Islamic law experts, even fourth *madzahib* used it. There just only two schools, namely Malikiyah and Hambaliyah that made it into a standing evident by the term *mashlahat mursalah* and *isthishlah*.²³

²¹Ibid., 267.

²²Ibid., 268.

²³Ibid.

C. Reception in Statblaad 1882

Religious court as legal institution stands and possesses strong position in society. Islamic empires, that ever existed, has been implementing Islamic law and institutionalizing its judicature system as unseparated part with the whole government system in their jurisdiction.²⁴

Based on those views, therefore the Dutch's experts, mobilized by L. W. C. Van Den Berg, have grown opinion that the applicable law toward Indonesian people is their religious code namely Islamic law. Such theory, afterward, known as the theory of *Receptio in Complexu* to since year 1855 was supported by legislation ruling of Dutch government through article 75, 78, and 109 RR 1854 (stbl. 1855 Num. 02).²⁵

Based on the theory of *Receptio in Complexu* then, L. W. C. Van Den Berg had an opinion that Religious court is supposed to be exist. Batavia included, that became the central of colonial government. His theory is based on the customary rule since ages and as national order in legislations from the ruler of European itself, giving the possibility for such, hence, Religious court which existed before Staatblad 1882 Num. 152 is legal.²⁶

Because L. W. C. Van Den Berg is the concept maker of Staatblad Num. 152, can be said then, that the reason for such above has been the background and basic thought which lean upon historical reality, the sociological fact where eventually was given the juridical legitimation by Dutch Government to establish the Religious Court in Indonesia.²⁷

In formally juridical, Religious court as a judicature institution that is dependent on state system was considered first born in Indonesia at August 1st 1882. This birth is based on a verdict of Dutch Emperor (Koninklijk Besluit), namely King Willem III on

²⁴Basiq Djalil, *Peradilan Agama di Indonesia*, (Jakarta: PT. Kencana, 2006), 49.

²⁵Ibid.

²⁶Ibid.

²⁷Ibid., 50.

date January 19th 1882 Num. 24 that consisted in Staatblad Num. 152. where is stipulated one rule about Religious Court by the name "*piesterraden*" for Java and Madura. This court institution (*piesterraden*) is commonly known by Religion *Raad* and last by the Religious Court. The verdict of Dutch emperor was obviously applied since August 1st 1882 that is consisted in Staatblad 1882 Num. 153. Thereby could also be said that the birth date of Religious Court institution is August 1st, 1882.²⁸

Staatblad 1882 Num. 152 contains 7 articles that imply as follow:²⁹

1. In addition to each *Landraad* (District Court) in Java and Madura, it is held a Religious Court which jurisdiction is similar with *Landraad* jurisdiction.
2. Religious Court consists of; *Penghulu* that is to be assisted onto *Landraad* as the chief. At least three and at most eight *ulama* as member. They are appointed and resigned by the governor.
3. Religious Court is not allowed to make decision, except it is attended by at least three members including the chief.
4. Religious Court verdict is written along with concise reasons, it must also given the date and signed by the member who participates to make a verdict.
5. To the lawsuit parties must given the copy of verdict letter that signed by the chief.
6. Religious Court verdict must be recorded in the list that it has to be devolved to resident once in every three months to get the witnessing (*visa*) and strengthening.
7. Religious Court verdict that surpasses its jurisdiction limit or not comply on verse (2), (3), and (4) above cannot prevail.

Islamic law has been modifying the thought pattern and point of view of Indonesian society's awareness until made it into a custom and daily behavior. Aceh

²⁸Ibid.

²⁹Ibid.

stated, Islamic law is their tradition, their tradition is Islamic law. And so did in Java, its followers are extremely strong until Koran, *As-Sunna*, *ijma'*, and *qiyas* became the scientific parameter of truth and manual action. The empire and sultanate have made to influence various society of Indonesia for applying the Islamic Sharia. When the westerner, Dutch in particular, that assembled in commercial association VOC had came to Indonesia, the society had already been accepting the authority of Islamic law. Even in few decades after occupation on half of Indonesian territory, they still confessed the fact that for those native people applied its religion rulings.³⁰

Based on the fact, the experts of Dutch law make a legal codification as official manual to accomplish the legal affair for native citizen who remains within territory. Several of famous legal codifications by the time are; 1. *Compendium Freijer*, was the marriage code and heritage of Islamic law by the VOC court (*Resolutie der Indisch Regering*, date May 25th 1760). 2. *Cirbonsch Rechtboek*, it was compiled on Resident Cirebon initiative, Mr. P. C. Hosselaar (1757-1765). 3. *Compendium der Voornamste Javaansch Wetten Nauwkeuring Getrokken uit het Mohammedaansch Wetboek Mogharraer*, it is compiled for *Landraad Semarang* (1750). 4. *Compendium Indlansch Wetten bij de Hoven van Bone en Goa*, legalized by the VOC for Makassar (southern Sulawesi).³¹

In the era of Daendles government, grew common assumption telling that the indigenous law of society was Islamic law. So did Raffles, having a view that the prevailing law in Java was Islamic law (*The Koran Norm General Law of Java*). Based on history record, before Van den Berg wrote about Islam in Indonesia, particularly in Java, JEW van Nes (1850) had published the "*Boedelsscheidingen of Java Volgens de Kitab Saphi'ir*". Afterward, Prof. A. Maurenge published the adaptation of *Hanboek van*

³⁰Rahmad Rosyadi and Rais Ahmad, *Formalisasi Syari'ah Islam* (Bogor: PT. Ghalia Indonesia, 2006), 75.

³¹Ibid.

het Mohammedaansche Recht (1884). Therefore, when Van den Berg was in Indonesia, he saw the legal politic of Dutch Government along with the legal facts that exist in Indonesia. He emphasizes the political prevalence and its continuum that still moved on and formulated such prevailing law circumstance by asserting, "for native citizen prevails their religious law," which is afterward became his main thought what known well by the theory of *Receptio in Complexu*.³²

D. Formulation of Local Regulation

The Tradition of Civil Law System

The legal tradition of European Continental has been the oldest legal tradition, the most influencing and the most extending had ever been used in the world. This legal tradition applies the legal Rome as its base, which afterward splitted into two poles, namely the pole of legal German Rome, that is followed by German, and the legal tradition of legal French Rome, that is followed by more than half of European Countries along with its colony, like French, Spain, Italy, Dutch, and also Indonesia because it was once to be former colony.³³

The legal tradition of European Continental that is relying on *the code* to be its main legal base, is considered born since 450 BC, when begins to apply "The Twelve Tables" (the statute containing 12 articles) in Rome.³⁴

The Twelve Tables were made revolves around 450 BC, that is the oldest code from Rome empire, has been the main base for legal system of European Continental, including Indonesia, hence, the 450 BC considered the history birth of European Legal System. The Twelve Tables are also mentioned by "The law of The King" written on the

³²Ibid.

³³Munir Fuady, *Perbandingan Ilmu Hukum*, (Bandung: PT. Refika Aditama, 2007), 32.

³⁴Ibid.

copper plate. The Twelve Tables was composed by commission consists of 10 peoples (*decemviri*) and appointed in 455 BC.³⁵

The Twelve Tables consisted of the following contents:³⁶

TABLE I	: Judicial Procedure in the court
TABLE II	: Judicial court (continuously)
TABLE III	: Debit and Credit
TABLE IV	: Father's rights (<i>paterfamilias</i>) against the member of family
TABLE V	: Custody of the child and hereditary law
TABLE VI	: The achievement and ownership of property
TABLE VII	: Right of the land
TABLE VIII	: Action against the law and Offence
TABLE IX	: Public law
TABLE X	: Purified matter
TABLE XI	: Addition I (about marriage)
TABLE XII	: Addition II (about customary law)

The terminology of civil law has been the term that adopted from the source of civil law itself in the era of King Justinianus by the name *Corpus Juris Civilis*.³⁷ The code of *Corpus Juris Civilis* was one codification of family law that is extremely monumental in the era of Rome. It was published in Constatinopel 533 AC by Justinian, King of Rome that resided in Constatinopel.³⁸

The *Corpus Juris Civilis* is containing the following matter:³⁹

1. Law of people

³⁵Ibid., 67.

³⁶Ibid.

³⁷Ade Maman Suherman, Pengantar Perbandingan System Hukum, (Jakarta: PT. Raja Grafindo Persada, 2008), 56.

³⁸Munir Fuady, *Op Cit.*, 68.

³⁹Ibid.

2. Family law
3. Hereditary law
4. Law of property
5. Offence
6. Enriching itself without right
7. Law of contract
8. Law of compensation

The legal codification into the code has been a special character and a pride from European legal system.⁴⁰ The Rome legal system in French, for instance, has its own history, that we might recognize the *Code Napoleon*. The French position becomes strategic because the country was once to have a glorious age namely French Age after Spain and before Britain. The legal history of *French Civil Code* had been legislated in March 21st 1804 by the name *Code des Francais*. Eventually, such name was replaced to be the *Code Napoleon* in year 1807.⁴¹

The great victory of Napoleon's army brought impact on civil law system applying in various area, namely in the western of Rhine river where is to be the area of German speaking, namely Dutch, Belgium, Italy, and the city of Hanseatic. After Emperor's falling, the situation has changed with the emergence of codification effort that is similar to Civil Code in the various areas by referring to Civil Code and modifications that is adopting the local legal system.⁴²

The Dutch legal system wore the codification system as we might recognize in several code which are The Code of Family Law; The Code of Criminal Law; The Code of Commercial Law; and The Bankrupt regulation. The systematization which is worn

⁴⁰Ibid.

⁴¹Ade Maman Suherman, *Op Cit*, 65.

⁴²Ibid., 66.

has been the adoption of the *Code Napoleon* except, with few legal reformations that is conducted after independence period, in legally substance. Muchless of differences between Indonesian legal system and Dutch's, except in legal structure of law enforcement system, that exists fundamental differences each.⁴³

In civil law system, what legal source concerned can not be separated from the theory of power division of Montesquieu. In term of knowing the legal source in civil law system, it began from the concept of sovereign state theory either internally or externally. With thus sovereignty, state has the power "to monopoly" or known as "*state monopoly on law making*". The monopoly on law making that belongs to state is eventually injected into the power division theory that is well known as *trias politica* teaching.⁴⁴

The power to make law is laid on the hand of legislature and this institution must response on public interest that is eventually infused inside the statute. In the countries of civil law followers which is most likely to be the positivist follower has been reducing the law sensing into narrower space, that is, the statute (law is statute enacted by the legislative power). Shortly, the legal source within civil law system is consisted of statutes, regulation, and custom. Statute is a codified and ordered regulation, whereas regulation is the rulings which making has been through the power delegation from legislative to executive. The third source, custom or habit is interesting enough to be observed considering the custom is not a correct legal term in positivism world. Custom is a habit that is practiced in the society and not being infused inside statutory law (non statutory law).⁴⁵

⁴³Ibid., 61.

⁴⁴Ibid., 68.

⁴⁵Ibid.

Legal Drafting

Local Regulation is one of local identity possessing the right to regulate and to organize its autonomy. The domestic affair of a region is indigenous of two sources, namely the autonomy and assisting duty (*Medebewind*). Hence, local regulation will consist of regulation on autonomy and local regulation in assisting duty. So can be said, that local regulation in autonomy sector is the local regulation indigenous to attribution, meanwhile local regulation in assisting duty is the local regulation indigenous to delegating jurisdiction.⁴⁶

The organization on drafting mechanism of local regulation which is regulated in Code Num. 10 Year 2004 about Legislation Making has yet too general until this Code ordered its further regulation through President Regulation, until today though, the President Regulation about local regulation formulation has not yet published neither. To fill in the vacuum of regulation then detailer regulation about local regulation drafting is still referring to Kepmendagri and Otda Number 23 Year 2001.⁴⁷

The legislation right on law making according to UUD 1945 had been through the authority displacement from executive to legislative. For such is regulated in Article 20 UUD 1945 stating that "*DPR holds the authority to make law*". Whereas executive position as regulated in Article 5 UUD 1945 through President "*Has the right to submit the statute draft to DPR*". Such shifting if viewed from the pure power birth through the theory of "*trias politica*" is a sign of power original return to its rightful owner of legislative, it is the power to legislate. As the power holder to legislate then the legislative in performing the duty is given the right which eventually known to be the initiative right.⁴⁸

⁴⁶Sirojuddin, Fatkhurrohman and Zulkarnaen, *Legislative Drafting*, (Malang: PT. YAPPIKA, 2006), 115.

⁴⁷*Ibid.*, 116

⁴⁸*Ibid.*, 123.

On law making process, either involving legislative or executive, exists another right possessed by the academician to produce an academic text. According to Harry Alexander to what is implied by academic text is the early text that contains the ideas of regulation and subject content of certain sector legislation.⁴⁹

Meanwhile, in Article 1 verse (7) President Regulation Number 68 year 2005 about The Methods of Preparing Legislation Draft asserting that The Academic Text have been the text that is able to be taken responsibilities scientifically about conception containing the background, composing purpose, the objective that intends to be manifested and scope, range, object, or regulating direction of Legislation Draft.⁵⁰

Based on the opinion above, if be analyzed further indicating that the academic text making is nothing more than holistically approach attempt from the planning of legislation making. The approach is performed through research method as a first footstep to know the interest of various parties either the society's or the legislation right holder's. Yet, because its wide space scoping of approach then would be better if using the ground concept of "triumvirate" (tritunggal) in discussing the birth of legislation, that is encompassing juridical aspect, sociological and philosophical. Juridical, it meant, in order for legal product publication could walk according to purpose without causing any fluctuation among society. Sociological, it meant, in order for the legal product publication has not been contradicting against the living norms among society, for example the local custom. And philosophical, it meant in order for legal product publication has not been contradicting against the essential values among society, religion for instance.⁵¹

⁴⁹Ibid.

⁵⁰Ibid., 124.

⁵¹Ibid.

Thereby the academic text will be preserved about its neutrality as a pure discuss because merely "on scientific based" not because of guidance and government interest demand and elite politic through legal politic what they intend. Hence, the academic text is made for the "balancing pendulum" of legislation draft that is made by a parliament party along with government or otherwise, in order to be more objective and do not oppose the existing principles of jurisprudence.⁵²

Furthermore, the components had to be consisted in an academic text namely are:⁵³

1. Inventorying result of positive law
2. Inventorying result of the confronting legal affair.
3. The ideas about legal subject that will be infused inside legislation draft.
4. The ground conception, legal reason and principle that is going to be used.
5. The thought about norms that had been infused inside article form.
6. The early text idea of legislation draft
7. Legal product draft that is composed systematically: chapter by chapter, along with article by article to abridging and quickening of law procession or another drafting of legal product, furthermore by authorized institute to compose the law or another listed legal product draft.

The academic text consist of two sections, namely are:⁵⁴

A. First section format

It is the report of discussion result and research about legislation that will be drafted.⁵⁵ For example:

The academic text of legislation about....

⁵²Ibid., 125.

⁵³Ibid., 126.

⁵⁴Ibid., 127

⁵⁵Ibid.

I. Introduction

1. Background

The main thought about ascertain facts is the important reasons of legal subject which must be regulated immediately. The legislation list that is relevant and able to be the legal base for questionably legal subject regulating.

2. Purpose and benefit which intend to be achieved.

3. Approach Method

4. Organization

II. Space Scope of Academic Text

1. Common provision

Containing the terms or senses which is used within academic text, along with its meaning and each implication.

2. Subject

Containing the conception, approach and principles from legal subject that is necessarily to be regulated, along with the thoughts of suggested norms, which as could as possible to be proposed a few alternatives.

III. Conclusion and suggestion:

1. Conclusion is containing:

- a. Main resume of academic text content.
- b. The wide scope of regulated subject, and its relevancy systematically with another legislation;
- c. The legislating form related with the subject content.

2. Suggestions are containing:

- a. Is the entire academic text subject should be regulated within one legislation form or is there exist a part which should be consisted of? in performing regulation or another regulation;
- b. Proposal that is containing the scale priority stipulation of legislation's academic text composing and the least period of another legislation/legal product draft have finished procession, along with its reason/cause.

Appendix

1. Bibliography
2. Inventorying of relevant regulation and prevailed still.
3. Inventorying its legal affair.
4. Report of research result in the field (if exist)
5. The official report of academic text composing process.
6. Suggestions and written conference paper from member
7. The official report of meetings

B. Second section format

It is the early concept of legislation consisted of articles that is going to be submitted.⁵⁶

This section is the early concept of legislation or regulation product of another legislation that consists of proposed articles and already contains concrete suggestions.⁵⁷

1. *Konsiderans*

Containing the main thoughts and fact description indicating to its urgency of legal subject regulation for what it dealt with.

⁵⁶Ibid., 127.

⁵⁷Ibid., 129.

2. Legal Basis

Containing the legislation list that is necessary to be replaced and/or what is relate can also be differed to be the legal base for legal subject regulation which Academic Text is made.

3. Common Provision

Containing the terms or senses that is used in its Academic Text and its sense.

4. Subject

Containing the concept about principles and legal subject that needs to be regulated, also its norm formula and its articles that is being suggested, if possible by submitting few alternatives.

5. Penal Provision

Containing the thoughts about reprehended deed that is necessary to be prohibited by suggesting the penal sanction (if necessary)

6. Displacement Provision

It is very necessary if the legal subject in Academic Text had ever been regulated.

7. Closing

Containing the subjects as follow:

- a. Suggestion about instance or central government equipment that is relevant and because it necessary partakes in formulation and performing the legal drafting.
- b. Suggestion about short name giving of legal drafting
- c. Suggestion about the time begin of legislation after it legislated
- d. Opinion about the new legislation influence upon legislation that is; either already exist before or the legislation that is still in making progress.

The Legislation Composing Framed has been the concreting result from what was already composed in academic text. Like we knew that the academic text is scientific discussing result of experts. The Academic Text is verily connected with the society's aspiration receiving process. The purpose of the academic text is to obtain the whole view about legislation draft.⁵⁸

The composing frame of regulation is not to function as formality, or merely just to beautify the out looking of regulation. The frame of regulation is actually providing a container to show the following things:⁵⁹

1. Regulation identity
2. Social context of the birth of regulation
3. Each party who is responsible to give birth of such regulation
4. The mother of regulation that related straight with it
5. Regulation content
6. Its relevancy with another regulation
7. The time when such regulation is prevail in society

In more technical terms such as regulated in UU 10/2004 each components are namely:⁶⁰

1. Title
2. Preamble
3. Torso
4. Closing
5. Explanation
6. Appendix (if necessary)

⁵⁸Ibid., 133.

⁵⁹Ibid., 134.

⁶⁰Ibid.

Furthermore, the local regulation draft (RUU) from either Head Region or DPRD's initiative be conducted a hearing or discussion in DPRD. The hearing is gradually divided into four hearings session as follow:⁶¹

1. Hearing level one (pleno plenary session/sidang paripurna)

For local regulation draft indigenous to head region then the explanation is presented about local regulation draft. In regard the local regulation draft indigenous to DPR, the explanation is delivered by chief commission or meeting manager of gathered commission or manager of special commission.

2. Hearing level two (pleno plenary session)

The hearing level two is including the general view from fraction and head region's response upon fraction's general view. In regard the local regulation draft is indigenous to DPRD's initiative, then hearing level two will be listening to head region's opinion and response from commission manager or meeting manager of gathered commission or manager of special commission over head region's opinion.

3. Hearing level three

The hearing level three is being conducted on purpose to find an agreement on either content matter or its formulations concerned. Obviously, in this practical hearing of third level is when they form the local regulation into being. At hearing level three, the three fraction's representatives and government reformulate again all agreement what would be agreed by DPRD and on hearing level three too the individual role of DPRD's fractions come to be noticed. The discussion, arguing, and deliberation are so intense and very grounding.

⁶¹Ibid., 119.

4. Hearing level four (pleno plenary session)

The hearing level four is the final being held in term of DPRD's agreement of decision voting over local regulation draft. In this hearing will also be heard:

- a. Report from commission's work result, or gathered commission or special committee
- b. Fraction's final opinion as preface of board agreement
- c. Head region's welcoming speech

The local regulation draft after being agreed is re-delivered by DPRD manager over Head Region to be determined as local regulation. Any further ado such as emplacement into region sheet is fully becomes Head Region jurisdiction.⁶²

The Theory of Sociological Jurisprudence

This theory is a theory that studies the legal influences towards society and so forth with legal approaches to society. This theory is submitted by Eugen Ehrlich who stated that exist the difference between positive law at the side, and the living law within society at other side. The positive law would posses the prevailing power effectively if containing or compatible with the living law within society. The developing law at this moment not only lies on statutory, not even on jurisprudence nor on the judge verdict, neither, but upon the society itself.⁶³

Eugen Ehrlich advised in order to live in nation and country, it must have the balance between the will to make legal reformation through legislations and awareness to recognize the reality that lives in society. Such reality namely is the *living law* and *just law* that it has been the key for his theory. Furthermore Eugen Ehrlich stated that the good positive law is the law that matches with the *living law* that is to be the *inner order* from society which is reflecting the living values therein. If intend to establish the legal

⁶²Ibid., 120.

⁶³Abdul Mannan, *Op Cit*, 22.

reformation then something must be noticed, in legislation making in order for statute can prevail effectively, is to recognize the living law within society.⁶⁴

The legal awareness of society is the values that live in society regarding the law, which includes knowing the understanding, full comprehension, obedient or submission to the law. Thereby, the legal awareness truly is the awareness or values that exist within human being about the existing law or the law that expected to be exist. Its pressure here is the society's norms, what function that intend to be applied by the law in society. So, such values have been the conception about what is assumed to be a good thing and what is assumed to be a bad thing.⁶⁵

The indicator of legal behavior is a clue to the high level of legal awareness. The proof is that who had been dealt with would obey and submit to the law. Thereby, could have been said that its high and low extent of legal awareness could be watched form obedient degree that embodies within obviously behavior pattern of people. If the law obeyed, then such thing has been an important clue that the law is effective. Yet, the next statement would be has the law succeeded to modify citizen behavior to its roots? A man who obey the law do not feel satisfied yet toward that law, he will obey the law if such law complying a legal comparability or justice. Not having a social support toward law, will cause disturbance in legal system. If this happen then exist the newly legal tendency possesses an objective to achieve social stability.⁶⁶

⁶⁴Ibid.

⁶⁵Ibid., 23.

⁶⁶Ibid.