



CHAPTER IV

ANALYSIS AND DISCUSSION

A. The Emergence Background of Local Regulation Number 2 about Old Age Prosperity

Local Government is the embodiment of decentralization system of Republic Indonesia government that begun to apply since UUD 1945 amendment. The local autonomy subject as brought within decentralization concept has been the direct order from UUD 1945 Article 18 Verse 5 that is necessary to regulate further. The decentralization itself has been the displacement authority from central to local in the united state system of Republic Indonesia in term of embodying the local autonomy through Local Government jurisdiction. Thus, at its perform order, it is necessary to exist of certain code to formulate specifically the will of such article 18 verse 5.

The Central Government has published the Code Number 10 Year 2004 about Legislation Making that is become technical manual in local legislation making and strictly followed in every process of legislation making. At such regard, the Local

Government has been the executor of local autonomy policy based on Code Number 32 Year 2004 about Local Government.

In year 2009 the Local Government of Probolinggo has produced the Local Regulation about Old Age Prosperity. And like another regulation commonly the Local Regulation about Old Age Prosperity has yet attached with sociological *das solen* and *das sein* factors that motivate the emergence of Local Regulation about Old Age Prosperity. Such as what have listed in regulation's *konsideran* at letter a. Stating that, in term to increase the prosperity extent of the old ages then Local Government, Probolinggo in particular, has the obligation to optimize the existing potentials that is originated primarily from the old ages themselves without reducing their rights and obligations as citizen. It is expected for such to have achieved such justice sense and prosperity in each layer of society. In addition, at letter b has it also been explained that the lack of service which available in present day is inaccessible to fulfill the life requirement that is day by day keep increasing. The service on this matter is the needs of food, clothing, and housing which are to be the essential requirements to survive living and also the needs for religion and social.

By studying such *konsideran*, then the Local Government of Probolinggo feels the need to establish regulation which is able to fulfill the essential requirements such as what have been directed at letter c Local Regulation's *konsideran* of Old Age Prosperity.

Indonesia is the law based of the state. As such, what is stated in UUD 1945 Article 1 Verse 3 in Chapter I Form and Sovereignty of The State. That is, the law is in the higher place of state and national life. A concept of where the statute that is stipulated through the higher authority, has prevailed hierarchically in capacity of national scale mother of law. Such burden must fully be born by the institution below as the constitution executor. How and what attempts should have been done to apply such regulation and

statute in local scale? In other word, as *ius constituendum* of the Code about Old Age Prosperity Number 13 Year 1998 that has been published by central government is the inspiration next to as legal basis to the publication of Local Regulation of Probolinggo about Old Age Prosperity which has before been regulated in the first place at the county level in Local Regulation of Eastern Java County Number 5 Year 2007 about Old Age Prosperity.

For such above is also explaining how Local Regulation must first to obtain jurisdiction from higher regulation or equal with or which order to legislate such regulation. Without abandoning the local identity, the implementation of Local Legislation Program as embodying attempts of democratically sovereign system will optimally be executed with main priority to compose the Local Regulation Draft.

B. Local Legislation Program As Planning Instrument Of Regulation Making Program

Normatively, in Article 1 Verse 10 of Code Number 10 Year 2004 cited, that: "The legislation making is the process of regulation making which basically begins from planning, preparing, composing method, formulating, discussing, legitimating, enacting (the law), and publishing". Based on the understanding, so the planning is of course the early step which must be done in every law making, including also the Local Regulation.

In the study of law making such term as the planning is introduced more with the term of "Legislation Program". According to Article 15 of Code Number 10 Year 2004 about Legislation Making, the Legislation Program consisted of National Legislation Program (prolegnas) and Local Legislation Program (prolegda). In Article 1 Verse 9 and 10 of Code Number 10 Year 2004 cited, National Legislation Program is an instrument planning of regulation making program that is to be composed accordingly planned, integrated, and systematic. Whereas Local Legislation Program is an instrument planning

of Local Regulation making program that is to be composed accordingly planned, integrated, and systematic.

In article 15 cited:

In order for legislation making can be performed, as planned, so the legislation making needs to be performed according to National Legislation Program. On such National Legislation Program determined the priority scale which is appropriate with the developing legal requirement of society. For such intent, then within National Legislation Program is containing the long term legislation program, mid term, or annual term.

In addition to focus on such regard, the Local Legislation Program is intended to maintain the local legislation product in unity with national legal system.

Based on such understanding at least exist four reasons of why the local legislation making is necessary to be based on Local Legislation Program (prolegda), namely:

1. For local regulation making based on priority scale is appropriate with the developing legal requirements of society.
2. For local regulation has vertically and horizontally synchronized with another regulations
3. For local regulation making is coordinated, directed, and integrated that is composed by DPRD and Local Government.
4. For local legislation product has been in unity with national legal system.

In Code Number 10 Year 2005, the subject concerning Local Legislation Program can be found in two articles, namely at Article 1 about Sensing Scope of Local Legislation Program, and Article 15 Verse 2 concerning the obligation of local regulation composing plan that it has to be done in Local Legislation Program. Such of both articles neither are entrusting further regulation about content, composing process nor Local Legislation Program's Management. In oppose to National Legislation Program which entrusted to be regulated further in President Regulation as regulated in Article 16 Verse 4 of Code Number 10 Year 2004.

Judging from such situation, there are two possibilities. *First*, the law maker gives the regulating about method and composing mechanism of Local Legislation Program to Local Government. *Second*, the law maker gives the regulating about method and composing mechanism of Local Legislation Program to a lower regulation, as regulated before with the Minister of Domestic Affairs Decision Number 169 Year 2004 about Composing Manual of Local Legislation Program.

By analogizing the composing of National Legislation Program as regulated in Code Number 10 Year 2004 and president regulation Number 61 Year 2005 about Composing Method and National Legislation Program's Management, so then the composing method of Local Legislation Program should be regulated in District's Head Regulation. Whereas the composing mechanism of Local Regulation in DPRD's environment is necessary to be regulated in the regulation of DPRD's Order.

By assuming on such, referring to President Regulation Number 61 Year 2005, the composing of Local Legislation Program can be done through the following phases:

1. The composing of Local Legislation Program in DPRD's environment
 - a. The legislation committee/commission I/commission that handle the legislation sector, is coordinating the Local Legislation Program composing;
 - b. Within coordinating the Local Legislation Program composing can ask or obtain the data and asking for opinion from society;
 - c. The composing result of Local Legislation Program in DPRD's environment is coordinated with Local Government through head of section/head of legal bureau in term of synchronizing and harmonizing the Local Legislation Program.
2. The composing of Local Legislation Program in Local Government's environment

- a. The head of bureau/division of law is asking for the planning of Local Regulation's draft making in each instance's environment to SKPD (Satuan Kerja Perangkat Daerah) which is inline with their duty and responsibility.
- b. The delivery of draft making's planning is attached with the main subject that will be regulated also its relevancy with another regulation.
- c. In regard of SKPD has composed the academic text of Local Regulation draft, so then such academic text must be attached within delivery of Local Regulation making's planning.
- d. The head of bureau/division of law are performing harmonization, rounding, and conception emphasizing of Local Regulation draft which is received with another SKPD and another concerned head of instance.
- e. The harmonizing attempt, rounding, and conception emphasizing of Local Regulation draft is directed to embodiment of conception compatibility with national policy and the already existing code along with its entire execution regulation and another relevant policy with the field that will be regulated in such Local Regulation Draft.
- f. The harmonizing attempt, rounding, and conception emphasizing of Local Regulation Draft is performed through consultation forum which is coordinated by head of bureau/division of law. In regard of such regulation draft's conception is attached with the academic text, so then the academic text became subject of discussion in consultation forum. In consultation forum can also be invited of experts from university and organization in social field, politic, profession, or another social organization according to requirement.
- g. The conception of Local Regulation Draft which has obtained the harmonizing, rounding, and conception emphasizing, by the head of

bureau/division of law must have been required the agreement beforehand to the Head of Region as Local Legislation Program that is composed in Local Government's environment before being coordinated with DPRD.

- h. In regard for head of regions needs to obtain further explanation of and/or giving direction towards conception of Local Regulation draft, the head of region has to assign the head of bureau/division of law to coordinating again the conception of Local Regulation draft with another SKPD and another concerned head of instance and the result is reported to head of region.
- i. The result of Local Legislation Program composing in Local Government's environment of head of bureau/division of law is coordinated with DPRD through commission of legislation/commission I in term of Local Legislation Program's synchronizing and harmonizing.

In the process of Local Regulation making, Local Legislation Program possesses a very important place. Because with the existence of Local Legislation Program, then within Local Regulation making can be found reference concerning priority scale of Local Regulation Draft's composing in long term, mid term, or short term. Beside, there is synergy between authoritative institution to establish Local Regulation, and able to quicken the process of Local Regulation making to focus on activity of composing Local Regulation Draft according to priority scale which has been decided, in addition to have controlling medium in Local Regulation making activity. With the existence of Local Legislation Program can also suppress various problem in Local Regulation making such as difficulties in budgeting process; evaluation or academic text composing, and the emergence of overlapping Local Regulation (unsynchronized) and emerging the problematic Local Regulation.

C. Applying The Theory of *Al-Mashlahat Al-Mursalah* within The Process of Local Regulation Making

Al-Mashlahat Al-Mursalah, first thought that across our mind when we read that line is questioning of what is exactly such *al-mashlahat al-mursalah*? The *mashlahat mursalah* is the advantage which is not defined or cited explicitly in the sources of Islamic law. Therefore the next question is has the process of legislation making already included within *mashlahah* (advantage) which no explicitly definition can be found in the *nash*? The *mashlahah* in Islamic sensing bound by how far of such *mashlahah* can affect into *mukallaf* life. As for result, the *ulama* have divided it into 5 main categories which are known as *al-maqashid as-syari'ah* namely: for protection towards religion, ratio, lineage, property and soul. By assuming that such 5 things are legal requirements of society then the attempts to maintain it are very necessary through supporting medium and infrastructure.

Local Government as local autonomy executor according to article 18 UUD 1945 possesses jurisdiction in forming regulation. Local Regulation is one of legal products that produced by Local Government which function as to regulating system towards legal requirement of society.

A group of individual that is called society here has for long time maintained the norm or legal principle concerning service or dedication towards parents. In his theory Hans Kelsen states that the norm is gradual and in layers within hierarchy. The lower norm prevails and originated from the higher norm, the higher norm prevails and originated from the higher norm again, so such keeps going on until it met the highest norm of all which are known as *grundnorm* or fundamental norm. In this case the *grundnorm* which possesses power or influence towards society norm indigenous to the Koran's command *Surah Al-Isra*' Verse 23 namely:

﴿ وَقَضَىٰ رَبُّكَ أَلَّا تَعْبُدُوا إِلَّا إِيَّاهُ وَبِالْوَالِدَيْنِ إِحْسَانًا ۖ إِنَّمَا يُبَلِّغُنَّ عِنْدَكَ الْكِبَرَ أَحَدُهُمَا
 أَوْ كِلَاهُمَا فَلَا تَقُلْ لَهُمَا أُفٍّ وَلَا تَنْهَرَهُمَا وَقُلْ لَهُمَا قَوْلًا كَرِيمًا ﴿١٢٧﴾

Thy Lord hath decreed that ye worship none but him, and that ye be kind to parents. whether one or both of them attain old age In Thy life, say not to them a word of contempt, nor repel them, but address them In terms of honor [QS 17: 23].

Islam has placed the treatment towards parents kindly at exalt place as shown in above verse. Such obligation is comprehended and extremely obeyed by Probolinggo's society who is mostly following NU school. From here on, the norm starts to be noticed. The Local Government is fully aware of this situation. And as an executor institution of regulation in local level the Local Government must fulfill such legal requirement.

Local Legislation Program, in simplest term namely the planning, is the early step of eight processes of legislation making. In this stage the regulation draft has already been in the text academic form. That is, where the regulation concept in its raw subject will perform the maturing and concept emphasizing in integrated forum which is called harmonizing and synchronizing the Local Regulation Draft. In regard of maturing and concept emphasizing has achieved at this level, so next is to step forward to another phase namely legalization and enactment of law.

The Local Regulation, while it will perform the legalization and enactment before, is still in drafting form or in more raw term was still shaped in academic text. When a regulation is still in this shape a very potential change probably can be happening concerning its content or subject. Thus, the question is in what form can the *mashlahat mursalah* be translated? How *maqashid shari'ah* has placed its position in Local Regulation within the changing?

Actually there are two phases within the process of legislation making that is able to emplace the *maqoshid sharia*'s role and to translate the *mashlahat mursalah* to its contextual form in Local Regulation. Such phases are the composing method and discussion phase of regulation. Referring to Code number 10 year 2004 about composing method of legislation, the following below is the composing method systematically of legislation which is quoted from attachment of Code Number 10 Year 2004 about Legislation Making:

THE FRAMEWORK OF LEGISLATION

A. TITLE

B. PREAMBLE

1. The Phrase of "Dengan Rahmat Tuhan Yang Maha Esa"
2. The Position of Legislation Maker
3. *Konsideran*
4. Legal Base
5. *Diktum*

C. TORSO

1. Common Provision
2. The Subject of Regulation
3. Penal Provision (if necessary)
4. Displacement Provision (if necessary)
5. Closing Provision

D. CLOSING

E. EXPLANATION (if ecessary)

F. APPENDIX (if necessary)

Such frame-working above has been the common description of regulation that would be enacted. From the aspect of its compatibility with another regulation either vertically or horizontally the Code Number 10 Year 2004 has also established boundaries which are regulated in Article 5 namely:

In forming the legislation must have based on a fine legislation making which encompasses:

1. The clear purposes
2. The institutional or properly making organization
3. The compatibility between the type and subject content
4. The executable
5. The effectiveness and advantageous
6. The clear formulation
7. The openness

And Article 6

1. The subject content of legislation is containing principle:
 - a. Service
 - b. Humanism
 - c. Nationalistic
 - d. Kinship
 - e. Archipelagoness
 - f. Bhineka tunggal ika
 - g. Justice
 - h. Equality before the law and government
 - i. Order and certainty of law and/or
 - j. Balance, compatibility, and harmony

2. Except the principles as implied in Verse 1, certain legislation can be containing another principle which inline with field of law of legislation concerned.

Concisely, such boundaries have been the *mashlahah*'s pattern which the legislation system shown in performing the *mashlahat mursalah*'s values and *maqashid syariah*. In other word, the draft of Local Regulation about Old Age Prosperity has indirectly and deliberately accomplished one point within phases of composing method namely by determining principles, foundation, and purpose of Local Regulation which is to be the basic of all Local Regulation policies in the next articles. The universalism values of *al-mashlahat al-mursalah* what has been absorbed into article 2, 3, and 4 chapter II principle, foundation, and purpose of Local Regulation is the living law or the prevailing norm in Probolinggo society. And by abandoning this requirement the Local Government just as to not doing their role as the executor of local autonomy which takes special character of local norms into account.

The next point in composing method is in what space that this *mashlahah* or advantage can be applied? The Local Regulation about Old Age Prosperity Number 2 Year 2009 that is published by Local Government of Probolinggo has been the regulation aimed to increase the life prosperity extent of old ages. Within Chapter IV Article 8 is explained further about space scope of Local Regulation which encompasses 8 point namely:

1. Religion Service and Mental Spiritual;
2. Health Service;
3. Job opportunity Service;
4. Education and training Service;
5. Accessibility to Facility Usage, and Common Infrastructure Service;
6. Accessible facility in Service and Legal Aid;

7. Social Aid and;
8. Social Protection.

The above provision is the *mashlahah* concept at its detailer form which for all the time never been pertained in Islamic legal *nash*. Furthermore, such concept has the quality of and prevailed in local level. Therefore, the positive law has perfected the concept of *al-mashlahat al-mursalah* in Islam through more modern of legislation making system. Whereas in the classical law making method has never been composed systematically and lacks of its subject unity because of various difference between *Ulama*.

The regulation will function properly if that can be communicated with society. In term of communication or dialog between regulation and society, what has to be noticed is the medium language to deliver a message of such regulating concept so that can be perceived by each layer of society. The communication must represent the easiness access towards law which is delivered in the language of law.

The language of legislation is one of languages of law that is usually used in law making tradition. Technically, the language of legislation has been applying the practical term that possessed the oneness of meaning. In other word, it is the term that describes the object of law explicitly.

Translating the concept of *al-mashlahat al-mursalah* into a linguistic statutory has been of action of Local Legislation Program or in the phase of regulation's text academic formulation. The concept of Islamic *mashlahah* which has been absorbed in the chapter of principles, foundations, and purposes requires in technical detailer specification of what action has such *maslahah* able to be achieved through Local Regulation. So here from, the *mashlahat mursalah* position determined, namely since begins to determine the object of law in detail action form that will be regulated through Local Regulation.