

SOCIAL JUSTICE UNDER PERSPECTIVE OF PHILOSOPHY OF LAW AND MAQÂŞID AL-SHARÎ'AH

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Abstract: Justice in the philosophy of law becomes a core which must be met through the existing law. Aristotle asserted that justice as the core of the legal philosophy can be understood in terms of numerical equality and equality of proportion. He also distinguished the type of justice into distributive justice and corrective justice. Meanwhile, John Rawls asserted that the enforcement of justice has a social dimension or well-known with social and reciprocal benefits. In Islam, justice is discussed as a matter of theology of divine justice that later emerged the two schools of thought; Mu'tazilah and Ash'ariyah. In addition, the theory of justice is also a fundamental theme in the philosophy of Islamic law, particularly in the discussion of *maqâşid al-sharî'ah* which asserts that Islamic law is regulated to create and protect the social benefits to mankind. The theory of social benefit was initially introduced by Imam al-Ḥaramayn al-Juwaynî then developed by his student, al-Ghazâlî. The next Islamic legal theorist that specifically discussed about *maqâşid al-sharî'ah* was 'Izz al-Dîn b. 'Abd. al-Salâm of Shafî'ah. And the discussion about *maqâşid al-sharî'ah* in a systematic and clear way was carried out by al-Shâṭibî of Malikîyah in his book *al-Muwâfaqât*. In addition, al-Ṭûfî also provides radical and liberal views about the theory of social benefit.

Keywords: Social justice, philosophy, Islamic law, *maqâşid al-sharî'ah*..

Introduction

The evolution of Islamic law, which universally plugs within that of philosophy, spheres around certain cases arise frequently on the space. Among these tribulations, the most difficult to discuss is the one in relation with the case of justice of law. This is because the official authorized institution is supposed to be righteous though it, in fact, is not like ordinarily expected.

Justice can possibly be understood comprehensively if it is positioned as the condition targeted by the law itself. The attempt to create justice of law is a dynamic process that needs more time. The complicated effort is frequently dominated by certain political authorities. One might consider justice as either an idea or an absolute reality. On the other hand, the other people assume that knowledge and understanding about law can partially be acquired by means of philosophically and unreachable mode. Some people regard that justice is the consequence of religion paradigm or that of philosophy about universe in general. So that, justice might generally be divined into certain term.¹ Consequently, the discussion of justice was historically long within the history of philosophy of law itself. It also occurs in the philosophy of Islamic law where the theory of justice, commonly named by the superior theory (*maṣlahah*), is eventually unstoppable topic to discuss by many philosophers of Islamic jurisprudence (*uṣūl al-fiqh*) particularly when they talk about the purpose of Islamic law (*maqāṣid al-tashrī*² or *maqāṣid al-sharī'ah*).³

Even, the case of justice is a part of theology, particularly related to the spiritual justice and human's responsibility which emerged at least the two Islamic thoughts known as Mu'tazilah and Ash'ariyah. On this paper of the discussion, writer focuses on the question of justice through the philosophical and Islamic perspective. Under the Islamic perspective, writer is going to elucidate Aristotle's theory of justice and

¹ Carl Joachim Friedrich, *Filsafat Hukum Perspektif Historis*, terj. (Bandung: Nuansa dan Nusamedia, 2004), 239.

² Superior and justice theory are the core of the Islamic law. Such terms are signed by so many of verses of al-Qur'an which contained of superior and justice theory. Among them are QS. al-Nisâ' [5]: 135, QS. al-Mâidah [7]: 8, QS. al-An'âm [8]: 90, and QS. al-Shûra [42]: 15.

³ Theo Huijbers, *Filsafat Hukum within Lintasan Sejarah*, 196.

that of John Rawls. Under the perspective of the philosophy of Islamic law, writer uses the spiritual theory of Mu'tazilah and Ash'ariyah as well as the theory of purpose of Islamic law (*maqāṣid al-sharī'ah*) as the main topic of the social justice under the Islamic law. Hopefully this paper might be an alternative argumentation to jurists in Islamic Religious Court to propagandize for the values of justice in answering the current problems.

The Theory of Justice within the Perspective of the Natural Law

The development of the theory of natural law since Socrates' period to Francois Geny's had been considering that the moral value of justice was the most essential of law (the core of law). The theory of natural law is more adjusting to "the search for justice". Concerning with the topic of the discussion, there are various theories and social righteous. These theories include right and freedom, possibility of authority, income and prosperity. Among the theories might be mentioned as Aristotle's theory of justice is in his enormous work "nicomachean ethics" and John Rawls' theory of social justice in his book "a theory of justice".⁴

1. The Ethics of the Theory of Justice

The view points of Aristotle⁵, particularly about the theory of justice, are mostly loaded from his works *nicomachean ethics*, *politics*, and

⁴ In *A Theory of Justice*, Rawls attempts to reconcile freedom and equality in a principled way, offering an account of "justice as fairness". Central to this effort is his famous approach to the seemingly intractable problem of distributive justice.

⁵ Aristotle was born in 384 BC, in Stagira, near Macedonia at the northern end of the Aegean Sea. His father, Nicomachus, was the family physician of King Amyntas of Macedonia. It is believed that Aristotle's ancestors had been the physicians of the Macedonian royal family for several generations. Having come from a long line of physicians, Aristotle received training and education that inclined his mind toward the study of natural phenomena. This education had long-lasting influences, and was probably the root cause of his less idealistic stand on philosophy as opposed to Plato. Aristotle's father died when he was a boy, and Aristotle was left under the care of his guardian Proxenus. Aristotle agreed with Plato that the cosmos is rationally designed and that philosophy can come to know absolute truths by studying universal forms. Aristotle's writings were preserved by his student Theophrastus, his successor as leader of the Peripatetic School. Theophrastus' pupil Neleus and his heirs concealed the books in a vault to protect them from theft, but they were damaged by dampness,

rhetoric. However, among these books, *nicomachean ethics* is containing the most discussions of justice. He wrote that law can only be related to the perspective of justice. The most important outlook of Aristotle is that justice is supposed to be comprehensively viewed as a mean of egalitarian and equality. Aristotle made a significant differentiation between numerical egalitarian and proportional egalitarian. The numerical egalitarian places all humans as a unit. It means that all humans are equal under the law without looking at social strata. While, proportional equality of law provides an opportunity to apply the law based on the capability, private establishment and psychological circumstance of every one. These kinds of the classification invite so many debatable as well as interpretable cases of justice. In addition, Aristotle distinguishes justice into two main forms; *distributive justice* and *corrective justice*.⁶

Distributive justice is on going to public law and corrective justice is currently operated on civil law and criminal law. Both of distributive and corrective justice have the same problem of egalitarian and similarity. Consequently, they can merely be comprehended within each framework of which. The most essential matter in the area of distributive justice is that the similar reward is equally provided for the similar establishment. At the same time, the most essential matter in the area of corrective justice is that there is inequality caused by, for instant, the disobedient to the mutual disagreement by the communities.

According to Aristotle, *distributive justice* more focuses to distribution, honor, wealth and other things which can be acquired within the society. By evading *rational verification*, it has been obvious

moths and worms. The books were found around 100 BC by Apellicon, who brought them to Rome. In Rome, scholars took interest in the works and prepared new editions of them. The writings of Aristotle that we have today are based on this collection. Overall, Aristotle wrote three types of works: dialogues or other works of a popular character, collections of scientific data and observations, and systematic treatises. His philosophy can be divided into four main areas: (1) Logic; (2) Theoretical Philosophy, including Metaphysics, Physics and Mathematics; (3) Practical Philosophy, such as Ethics and Politics; and (4) Poetical Philosophy, covering the study of poetry and the fine arts.
<http://www.gradesaver.com/author/aristotle/>

⁶ Friedrich, *Filsafat Hukum*, 24.

that Aristotle's view point is that the distribution of property and other valuable goods should be conducted in line with the custom of certain community, because the fair distribution might be suitable with the righteous value under the community. It means that the fair distribution is currently based on whom the law provides for and the object of which.⁷

On the other hand, corrective justice more focuses on correcting and evaluating the improper matters occur within the community. In this case, if the wrongdoing conducted by someone, corrective justice tries to provide an adequate compensation to the suffered people. If the criminal act is done, so the appropriate punishment will certainly be given to the doer since the injustice conduct can firmly cause the inequality which has been fashioned formerly. The main function of corrective justice is how to reconstruct the equality. From the discussion above, it is clear that corrective justice is the area of court while distributive justice is on the hand of government.⁸

In constructing his argumentation, Aristotle stresses the necessary of the differentiation between the legal punishment based on the character of the case and that of the human's character in general. This distinction should not be intermingled between the positive law which has been established in institution and traditional law. Aristotle viewed that the last two evaluations can be the source of the consideration based on certain community. While, another similar decision, although manifested in the form of legislation, remains the natural law if it can be obtained from the general nature of humans.⁹

2. Justice as a Social Fairness

In his book "A Theory of Justice"¹⁰ Rawls¹¹ explained that the theory of social justice as the *difference principle* and the *principle of fair*

⁷ Friedrich, *Filsafat Hukum*, 25.

⁸ Friedrich, *Filsafat Hukum*, 7.

⁹ Friedrich, *Filsafat Hukum*, 26-27.

¹⁰ *A Theory of Justice* is a work of political philosophy and ethics by John Rawls. It was originally published in 1971 and revised in both 1975 (for the translated editions) and 1999. In *A Theory of Justice*, Rawls attempts to solve the problem of distributive justice (the socially just distribution of goods in a society) by utilizing a variant of the familiar device of the social contract. The resultant theory is known as "Justice as Fairness", from which Rawls derives his two principles of justice: the *liberty principle*

equality of opportunity. The core of the difference principle is that the social and economic differences should be set to provide the greatest benefits for those who are mostly disadvantaged.

The term of social-economic within the principle of difference leads to inequality in the prospects for getting the essential elements, they are; welfare, income, and authority. Meanwhile, *the principle of fair equality of opportunity* shows those who have the least chance to reach the prospect of prosperity, income and authority. These are to be given a special protection. Rawls' work on the theory of the principles of justice, is particularly functioning as an alternative to the theory of Benthamism, Hume, Bentham and Mill.¹²

and *the difference principle*. In *A Theory of Justice*, Rawls argues for a principled reconciliation of liberty and equality. Central to this effort is an account of the circumstances of justice, inspired by David Hume, and a fair choice situation for parties facing such circumstances, similar to some of Immanuel Kant's views. Principles of justice are sought to guide the conduct of the parties. These parties are recognized to face moderate scarcity, and they are neither naturally altruistic nor purely egoistic. They have ends which they seek to advance, but prefer to advance them through cooperation with others on mutually acceptable terms. Rawls offers a model of a fair choice situation (the original position with its veil of ignorance) within which parties would hypothetically choose mutually acceptable principles of justice. Under such constraints, Rawls believes that parties would find his favoured principles of justice to be especially attractive, winning out over varied alternatives, including utilitarian and libertarian accounts. See http://en.wikipedia.org/wiki/John_Rawls.

¹¹ John Bordley Rawls (February 21, 1921-November 24, 2002) was an American philosopher and a leading figure in moral and political philosophy. He held the James Bryant Conant University Professorship at Harvard University. His *magnum opus*, *A Theory of Justice* (1971), was hailed at the time of its publication as “the most important work in moral philosophy since the end of World War II“, and is now regarded as “one of the primary texts in political philosophy“. His work in political philosophy, dubbed Rawlsianism, takes as its starting point the argument that “most reasonable principles of justice are those everyone would accept and agree to from a fair position.” Some of the important of Rawls' works are *A Theory of Justice* (1971), *Political Liberalism* (1999), *The John Dewey Essays in Philosophy* (1993), *The Law of Peoples: with “The Idea of Public Reason Revisited”* (1999), *Lectures on the History of Moral Philosophy* (2000), *Justice as Fairness: A Restatement* (2001), *Lectures on the History of Political Philosophy* (2007), *A Brief Inquiry into the Meaning of Sin and Faith* (2010), and some others. http://en.wikipedia.org/wiki/John_Rawls

¹² Political philosopher John Rawls draws on the utilitarian insights of Bentham and Mill, the social contract ideas of John Locke, and the categorical imperative ideas of Kant. His first statement of principle was made in *A Theory of Justice* where he

Rawls argued that in a society governed by the principles of Benthamism, people will lose their self-esteem, and besides that the service for the mutual development will be disappear. Rawls also argues that this theory is actually harder than what is considered as a normal condition by society. It may be asked to sacrifice for the sake of public interest, but can not be justified that this attempt is firstly requested from the people who are less fortunate in society. According to Rawls, a situation of inequality must be regulated properly. So, it might be the most profitable segments of the most vulnerable society.

This occurs when the two conditions are met. The first, the situation of inequality ensures the maximum for the most vulnerable groups of people. It means that the situation of the people must be as adequate as possible, so that, the highest profit that may be generated for a small group of people can be reached. The second, the inequality is tied for everyone. In this perspective, everyone is given an equal chance in their life. Under these guidelines, all the primordial differences among the people based on race, skin, religion and others must be rejected. Furthermore, John Rawls asserted that the program which has the populist dimension of justice is supposed to consider the two principles of justice, namely; providing the equal rights and opportunities of the most extensive basic liberties of everyone, and it

proposed that, “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.” A deontological proposition that echoes Kant in framing the moral good of justice in absolutist terms. His views are definitively restated in *Political Liberation* where society is seen “as a fair system of co-operation over time, from one generation to the next.” All societies have a basic structure of social, economic, and political institutions, both formal and informal. In testing how well these elements fit and work together, Rawls based a key test of legitimacy on the theories of social contract. To determine whether any particular system of collectively enforced social arrangements is legitimate, he argued that one must look for agreement by the people who are subject to it, but not necessarily to an objective notion of justice based on coherent ideological grounding. Obviously, not every citizen can be asked to participate in a poll to determine his or her consent to every proposal in which some degree of coercion is involved, so one has to assume that all citizens are reasonable. Rawls constructed an argument for a two-stage process to determine a citizen’s hypothetical agreement. See John Rawls, *A Theory of Justice* (New York: Columbia University Press, 2005), 3-4; John Rawls, *Political Liberalism* (New York: Columbia University Press, 2003), 15.

can set back to the social and economic disparities occur, so it can create the mutual benefits (reciprocal benefits) for everyone, whether they are from the lucky or unlucky people.¹³

Thus, the difference principle requires the arrangement of the basic structure of society that the prospective gap of the main things such as welfare, income and authority are reserved for the benefit of people who are mostly disadvantaged. This means that social justice must be fought for the two things; first, correcting and improving the condition of the weak inequality of the people experienced by the institutions of social, economic, and political empowerment and second, each rule must be positioned as a guide to develop the policies to correct the injustice suffered by the weak.¹⁴

The Theory of Justice within the Philosophy of Islamic Law

1. The Dialectic of Rationalists of Islam

Justice is one of God's attributes in the three monotheistic religions. In Islam, it is listed as one of the ninety-nine most beautiful names of God. Also, a number of references in al-Qur'ân urge Muslims to adhere to Justice. But so many times Muslims use the terms justice and truth interchangeably, though in reality there is a great difference between the two terms. Giving the simplest definitions to these two terminologies, "Justice" is the quality of being impartial, especially in the art of judging, while "truth" is the quality of being honest in presenting the facts. But these definitions are hardly applicable to the Islamic concept of Justice. In many cases, Justice is subject to many considerations, whether they are religious, social, or personal. Therefore, relationships are highly contextualized and thus justice is contextualized, too. Remarkably, the Islamic law has to deal with elements that do not exist in Western laws of court such as differences between men and women, religious affiliations, and cultural diversity. Muslims believe that *shari'ah* is a revelation from God. It is as sacred as al-Qur'ân itself. Since God is Just then His is the source of the Islamic Justice. This is why radical Muslims strive to implement the

¹³ John Rawls, *A Theory of Justice* (London: Oxford University Press, 1973), and has been translated into Indonesia by Uzair Fauzan and Heru Prasetyo, *Teori Keadilan* (Yogyakarta: Pustaka Pelajar, 2006), 69.

¹⁴ Rawls, *A Theory of Justice*, 69.

Islamic law in their own countries, because it is the law of Allah, universal, and eternal, and the law of Allah is better than any man-made law.

In order to understand the nature of the concept of justice in Islam, we have to examine first the concept of God's justice. Among God's characteristics are the sovereignty of God and His absolute will. As a sovereign God, He can violate His own laws and contradict His own character. Humankind, as slaves of God, is not supposed to question God or to complain. He can send a wicked person to paradise and a righteous person to hell. According to a tradition ascribed to Muhammad, when God intended to create the human race He first predetermined their characters and decided their eternal destiny.¹⁵

The Islamic notion of justice begins from the discourse about divine justice, whether the ratio of men has capability to know good and bad in upholding justice in the earth without relying on the revelation or otherwise man can only know the good and bad through the revelation of God. In this context, the theological differences among the Islamic scholars emerged. The differences are rooted from the two conflicting conceptions of human responsibility to uphold the divine justice. The discourse about the context then creates the two major schools of Islamic dialectical theology; Mu'tazilah and Ash'arîyah.

Mu'tazilah's main thesis is that human, as a free creature, is responsible before God. Furthermore, good and bad are rational categories that can be known through reason, means they are not dependent on the revelation. God has created human's reason in such a way so as to see the good and bad in an objective manner. This is a corollary of their main thesis that the justice of God depends on the objective knowledge of good and bad, as determined by the reason, if the law makers say so or not. In other words, Mu'tazilah claimed the efficacy of the reason instinct is a source of the ethical and spiritual knowledge. Thereby it establishes the form of rational objectivism.¹⁶

The Principle of Mu'tazilah is certainly getting many of oppositions. Ash'arîyah rejected the idea of autonomous human's reason as a source of ethical knowledge. They view that good and bad

¹⁵ Mumtaz Ahmad (ed), *Masalah-Masalah Politik Islam* (Bandung: Mizan, 1994), 150.

¹⁶ Ahmad (ed), *Masalah-Masalah*, 154-155.

has been previously determined by God. And it is quite arrogant to judge God based on the categories given by Him to direct human life. Based on the concept of Mu'tazilah, however, there is no way within the bounds of ordinary logic to explain the power relations of God with human action. More realistic to say that everything that happens is the result of His will, without explanation or justification.¹⁷ However, it is important to distinguish between human actions are responsible and the movements attributed to the natural laws. Human responsibility is not a result of free elections and a function, which according to Mu'tazilah, determine how to act is generated. But, God is the one who created solely the actions directly. However, in recent action, a quality of voluntary action is superseded by the will of God, which makes a person as a representative of voluntary and responsible. Therefore, human responsibility is the result of the divine will which is known through the guidance of revelation. If not, the values have no basis other than the will of God concerning the values.¹⁸

The Ash'ariyah's conception of the ethical knowledge is known as theistic subjectivism, which means that all ethical values depend on the provisions of the will of God expressed in the form of the eternal and unchanging revelation. Both theological stances are based on the interpretation of the verses of al-Qur'an, which have complex views about the role of human responsibility in realizing the divine will on earth. On the one hand, al-Qur'an contains verses that support Mu'tazilah to emphasis on full responsibility for human guidance in answering the call of nature and revelation. On the other hand, some verses of al-Qur'an also have passages that could support the view of Ash'ariyah about the omnipotence of God who did not give humans a role in responding to divine guidance. After all, al-Qur'an considers the decision and the omnipotence of divine guidance in the matter.

Indeed, the concept of natural or universal guidance has implications much broader than demonstrating the existence of the will in the soul of human's capacity, and proven human responsibility in developing a keen sense of moral and spiritual perceptions and motivation, which will bring to the enforcement of justice in the earth. It appears that al-Qur'an considers all mankind as one nation

¹⁷ Ahmad (ed), *Masalah-Masalah*, 156.

¹⁸ Ahmad (ed), *Masalah-Masalah*, 156.

connecting with the universal guidance before special guidance through the prophets sent down. And thus, it is assumed that they are all jointly responsible for upholding justice: *Man is the race that one, so God sent the prophet, as a giver of glad tidings and a warner, and he lowered with them the Book of premises is true, to give a decision between people about things which they differed.*¹⁹

Under the universal guidance, then it can be discussed about the basics of natural-moral human behavior in al-Qur'ân. The verses are referring to a universal moral character and objectivism of making all human beings are treated equally and are equally accountable to God. In other words, moral commandments are clear based on the common human nature and considered as an independent of particular spiritual beliefs. Despite all the practical guidance ultimately comes from the same source, namely from Allah, it is important to emphasize in the context of al-Qur'ân that the theistic notion of justice becomes relevant to the available social order.

Since it logically generates a universal objective justice ingrained in the human soul. In a very important verse, al-Qur'ân acknowledges the objective character and the universality of justice which is equated with good deeds (moral virtues), that overcome people of different religion-society and warn mankind to perform good deeds. “For every people among you (religious congregation), We give the rules and the ways (of conduct). If Allah will, He made you one people (based on rules and the way it is), but, (he did not do so). God tests you against His gift to you. Therefore, compete (among each other) in doing good. Because it is Allah you will all return, and He will tell you (the truth) about what you have differences”.²⁰

Against a clear assumption in this paragraph that all humanities must strive to uphold a certain scale of justice, which is recognized in an objective, no matter the differences in religious beliefs. It is interestingly enough that the ideal man, mentioned as a moral virtue, is combining religious with perfect resignation. “In fact, he who surrendered to Allah while he was doing good, then his reward on the side of his Lord, and no concern for him, nor he will grieve”.²¹

¹⁹ QS. al-Baqarah [2]: 213.

²⁰ QS. al-Mâidah [5]: 48.

²¹ QS. al-Baqarah [2]: 112.

Clearly, here we have a clear basis to distinguish between objective justice and theistic, where objective justice is further strengthened by the action of religious obedience to God. In the field of objective universal justice, human is treated equally and takes the same responsibility to answer the universal guidance. Anyway, the moral responsibility of all human at the level of universal guidance is what makes it reasonable to say that al-Qur'ân shows something in common with western ideas about natural law, which is a source of positive justice in a society based on the consent and not by the official action.

Since al-Qur'ân recognizes the theistic and the objective justice, so, to term of natural justice in the sense used by Aristotle namely as a product of natural forces is better than social forces. Acknowledging to Aristotle's views, scholars often equate the divine justice and natural justice. But, unlike the natural law experts who pay attention to the relations of the community justice, jurists' are likely to concentrate their efforts on the concept of justice in relation to the will of God and correlate to human's fate. They view that divine justice is the final destination of the revelation of Islam, which is initially expressed in the form of the sacred of Islamic law (*sharī'ah*).²²

2. Social Justice and *Maqâṣid al-Sharī'ah*

One of the important and fundamental concepts of the subject in the philosophy of Islamic law is the concept of *maqâṣid al-sharī'ah* (purposes of Islamic law), which assert that Islamic law is ruled to achieve and maintain the superior theory of benefit to mankind. This concept has been recognized by the scholars and therefore they formulate a very popular rule, "where there is the superior theory of benefit, there will absolutely be laws of God."²³ According to Masdar F. Masudi, The theory of the superior theory of benefit is similar to the theory of social justice in the term of philosophy of Islamic law.²⁴

²² Ahmad (ed), *Masalah-Masalah*, 157-162.

²³ Muḥammad Sa'īd Ramaḍān al-Būṭī, *Ḍawâbit al-Maṣlahah fī al-Sharī'ah al-Islâmīyah* (Beirut: Mu'assasah al-Risâlah, 1977), 12.

²⁴ Masdar F. Mas'udi, "Meletakkan Kembali Maslahat Sebagai Acuan Syari'ah" *Jurnal Ilmu dan Kebudayaan Ulumul Qur'an* No.3, Vol. VI, 1995, 97.

Maqâsid al-sharî'ah is derived from the word *maqâsid* means intend, objective, middle, and fair.²⁵ The second element is *sharî'ah* means the road to the springs, custom or sunnah, the path toward the ultimate source of justice.²⁶ In the context of Islamic law, *sharî'ah* means the laws that God prescribed for His slaves, whether in terms of al-Qur'ân or the al-Sunnah.²⁷ Al-Raysûnî said that *sharî'ah* means Islamic law which is practiced within the concept of '*aqîdah*, legislation, morals, or muamalah.²⁸ Terminologically, *maqâsid al-sharî'ah*²⁹ has variety of equivalent words. Scholars of *usûl al-fiqh*, al-Shâtîbî, often used the terms such as *maqâsid al-sharî'ah* (aims or purposes of law), *al-maqâsid al-shar'iyah fî al-sharî'ah* (objectives contained in the law of *sharî'ah*), and *maqâsid min shar'î al-hukm* (goals of Islamic law).³⁰ Al-Shâtîbî confirmed that *maqâsid al-sharî'ah* is the provision of Islamic law that aimed to realize the benefit of people in the world and the Hereafter.³¹ "Al-Bannani, al-Ghazâlî, al-Âmidî interpret *maqâsid al-sharî'ah* by reaching the benefit and avoiding the *mafsadah*.³² Al-Fâsî added that *maqâsid al-sharî'ah* is the ultimate goal to be achieved by the *sharî'ah* and the secrets behind each of the provisions of Islamic law.³³

The core of the concept of *maqâsid al-sharî'ah* is to realize the good and avoid the evil or the attractive benefits and to refuse the harm. A term of commensurate to the core of *maqâsid al-sharî'ah* is including the superior theory of benefit (*maşlahah*) because the

²⁵ Fayruz Abadi, *al-Qâmûs al-Muḥîṭ* (Beirut: Muassasah al-Risâlah, 1987), 396.

²⁶ Louis Ma'luf, *al-Munjid fî al-Lughah wa al-A'lâm* (Beirut: Dâr al-Mashriq, 1986), 632.

²⁷ QS. [42]: 13, QS. [45]: 18. See also an explanation given by Fazlur Rahman. *Islam* (Chicago: University of Chicago, 1979), 108.

²⁸ Abdul Wahab Khalaf, *Ilm Ushûl al-Fiqh* (Kairo: Dâr al-Quwaitiyah, 1968), 32.

²⁹ Abû Ishâq al-Shâtîbî, *al-Muwâfaqât fî Uşûl al-Aḥkâm*, V. I edited by Muhammad al-Khadar Husein al-Tulisi (ttp.: Dâr al-Fikr, tth.), 4-5.

³⁰ Asfari Jaya Bahri, *Konsep Maqasid Syari'ah Menurut al-Shatibi* (Jakarta: Raja Grafindo Persada, 1996), 1-2.

³¹ The key word of *maqâsid al-sharî'ah* is *maşlahah* or benefit for mankind. See Muhammad Khalid Mas'ud, *Filsafat Hukum Islam dan Perubahan Sosial*, terj. Yudian W. Asmin (Surabaya: Al-Ikhlâs, 1995), 225. See also Al-Shâtîbî, *al-Muwâfaqât*, 2.

³² 'Umar b. Şâlih b. Umar, *Maqâsid al-Sharî'ah 'inda al-Imâm al-Shâtîbî 'Araḍan wa Dirâsatan wa Taḥlîlan* (Damshîq: Dâr al-Fikr, 2000), 45.

³³ Ilall al-Fâsî, *Maqâsid al-Sharî'ah al-Islâmîyah* (Rabat: Maktabah al-Wahdah al-'Arabîyah, t.th.), 50.

stipulation in Islamic law should be geared towards the social benefit. To understand the nature and role of *maqâṣid al-sharī‘ah*, the following will be described in brief about the superior theory of benefit (*maṣlahah*).

Imam al-Haramayn al-Juwaynî, an expert of the theory of the Islamic jurisprudence (*uṣūl al-fiqh*), emphasized the importance of the first understanding of *maqâṣid al-sharī‘ah* in establishing Islamic law. He expressly said that a person can not be said to be able to set the law in Islam, before he had understood the true purpose of God’s commandment and prohibitions.³⁴

Furthermore, al-Juwaynî elaborated the further *maqâṣid al-sharī‘ah* in relation to the reason of law (*‘illah*) and divided into three sections, namely: primary (*al-ḍarūrīyah*), secondary (*al-hâjīyah*) and tertiary (*al-taḥsinīyah*).³⁵ Thus, basically al-Juwaynî divided the purposes of Islamic law into three kinds, namely *al-ḍarūrīyah*, *al-hâjīyah* and *al-taḥsinīyah*.

The thought of al-Juwaynî was later developed by his student, al-Ghazâlî. In this context, al-Ghazâlî explained more about the purpose of Islamic law in connection with the discussion.³⁶ The superior theory of benefit (*maṣlahah*), according to him, is to preserve religion, life, intellect, lineage and wealth.³⁷ The above five kinds of the superior theory of benefit (*maṣlahah*) for al-Ghazâlî are on the priority and sequence different when viewed from the side of their goal, namely ranking of primary, secondary and tertiary. From the description, it is clear that the theory of *maqâṣid al-sharī‘ah* has already started to show its shape.³⁸

The thinker and the theorist of Islamic law which specifically addresses the following *maqâṣid al-sharī‘ah* is ‘Izz al-Dîn b. ‘Abd. al-Salâm from among Syafī‘ah. He tried to emphasize and elaborate the concept of the core of the superior theory of benefit (*maṣlahah*) in the

³⁴ ‘Abd. al-Mâlik b. Yûsuf Abû al-Ma’âli al-Juwaynî, *al-Burhân fî Uṣûl al-Fiqh* (Kairo: Dâr al-Anṣâr, 1400 H.), 295.

³⁵ al-Juwaynî, *al-Burhân*, 295.

³⁶ Abû Hâmid al-Ghazâlî, *al-Mustasfâ min ‘Ilm al-Uṣûl* (Kairo: al-Âmiriyah, 1412 H.), 251.

³⁷ al-Ghazâlî, *al-Mustasfâ*, 251.

³⁸ al-Ghazâlî, *al-Mustasfâ*, 251.

form of refusing the superior theory of break *mafsadah* and *maṣlahah*.³⁹ He urged that the mundane superior theory of benefit can not be separated from the three-level scale of priorities, namely: *al-ḍarūrīyah*, *al-ḥājīyah* and *al-taḥsīnīyah*.⁴⁰ Furthermore, he explained that obligation should lead to the realization of social benefit to humans, either in this world or in hereafter.⁴¹

The discussion of *maqāṣid al-sharī'ah* in particular, systematic was carried out by al-Shāṭibī from among Mālikīyah. In his book *al-Muwāfaqāt*, he spent approximately one third of its discussion about the *maqāṣid al-sharī'ah*. The discussion about the social benefit, of course, became a very important part in his writings. He expressly said that the main purpose of God has established His law is how to obtain social benefit to be applied to human life, both in this world and the hereafter. Therefore, *taklīf* in the field of law should lead to the realization of goals of Islamic law.⁴² Like the previous scholars, he also divided the order of priority and scale of the superior theory of social benefit into three orders of ranking, namely *al-ḍarūrīyah*, *al-ḥājīyah* and *al-taḥsīnīyah*.⁴³ What is defined by the superior theory of social benefit here is the concepts of al-Ghazālī, which maintains the five main principles, namely: religion, soul, intellect, lineage and property.

The concept of *maqāṣid al-sharī'ah* and the superior theory of social benefit developed by al-Shāṭibī above have actually exceeded the previous discussion of the Islamic scholars of the earlier centuries. The main concept of the superior theory of social benefit social al-Shāṭibī is earnestly to encompass the whole of the *sharī'ah* and not the only aspect which is not regulated by the stipulation of al-Qur'ān. In accordance with the statement of al-Ghazālī, al-Shāṭibī summarized

³⁹ 'Izz al-Dīn b. 'Abd. al-Salām, *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām*, Vol. I (Kairo: Al-Istiḳāmāt, t.th.), 9.

⁴⁰ 'Izz al-Dīn, *Qawā'id al-Aḥkām*, 60-62.

⁴¹ Abū Ishāq al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Vol. II (Kairo: Muṣṭafā Muḥammad, t.th.), 4.

⁴² al-Shāṭibī, *al-Muwāfaqāt*, 4.

⁴³ al-Shāṭibī, *al-Muwāfaqāt*, 5.

that God's purpose is to achieve the lower social benefit of *sharī'ah*. Even so, the concept of al-Shâṭibî is not as brave as that of al-Ṭûfî.⁴⁴

The thought of al-Ṭûfî represented the radical and liberal views on social benefit concept.⁴⁵ Al-Ṭûfî argued that the principle of social benefit can limit the specified of al-Qur'ân, Sunnah and scholarly consensus if the application of al-Qur'ân, Sunnah and scholarly consensus will be troublesome for mankind.⁴⁶ However, the scope and field of the superior theory of social benefit of al-Ṭûfî is characterized as *mu'âmalah*.⁴⁷ Since the beginning of the Islamic law did not really have any other purpose except for human benefit. The standard phrase that Islamic law was announced for the inner happiness of man, worldly and the happiness of the hereafter, fully reflects the social benefit. However, the excessive attachment to the passage, as promoted by the schools of orthodoxy, has made the principle of social benefit is just an empty jargon, and the Islamic law, which in the beginning was the balanced road, has become a way for himself.⁴⁸

The law must be based on something which is not called the law, but more fundamental than the law. That is a system of value that was consciously adopted as a set of belief that must be fought for social benefit, it is justice. Legal grounding for the legal process can only be understood in a formal context, for example through analogical reasoning (*qiyâs*). However, as broadly known, analogical reasoning (*qiyâs*) is always grounded by *'illah* (the reason of law), something that has been the cornerstone of law and not the law itself. But that is the structure of Islamic legal thought so far. It, therefore, is not surprising that the world of Islamic legal thought and character traits are characterized by a very worthy questionable matter.⁴⁹ It is not surprising that the sophisticated performance of Islamic jurisprudence

⁴⁴ Nur A. Fadhil Lubis, *Hukum Islam dalam Kerangka Teori Fikih dan Tata Hukum Indonesia* (Medan: Pustaka Widyasarana, 1995), 34-35.

⁴⁵ Lubis, *Hukum Islam*, 34-35.

⁴⁶ Najm al-Dîn al-Ṭûfî, *Sharḥ al-Ḥadîth Arba'in al-Nawawîyah* within Mustafâ Zayd, *Al-Maṣlahât fî al-Tashrî'î al-Islâmî wa Najm al-Dîn al-Ṭûfî*, (Mesir: Dâr al-Fîkr al-'Arabi, 1954), 46.

⁴⁷ al-Ṭûfî, *Sharḥ al-Ḥadîth*, 31.

⁴⁸ al-Ṭûfî, *Sharḥ al-Ḥadîth*, 48.

⁴⁹ Mas'ûdi, "Meletakkan Kembali Maslahat", 94.

(*uṣūl al-fiqh*) looks to be cool, a wholly performances of Islamic jurisprudence (*uṣūl al-fiqh*) which shows less overall or engagement against the public interest.⁵⁰

Thus, it is clear that the fundamental building of the Islamic legal thought is universal social benefit or in more operational phrase “social justice”. Whatever and however the theoretical bid it is, well supported by scripture or not, can guarantee the realization of social benefit to humanity in the view of Islam, it is valid. In this case, Muslims (believers) are bound to pick it up and make it happen. Conversely, somehow the theoretical bid it is, if it does not conclusively support the guarantee of social benefit or even opens the possibility of harm in the view of Islam, is consider imperfect. And in this case, Muslims (believers) are individually or socially bound to avoid it.⁵¹

The above paradigm shows that the rules which had been held by the Islamic jurisprudence; “If a prophet’s tradition (*ḥadīth*), where the validity of the text has been proven, so that is my school of thought, conclusively needs to be revisited. This rule has been systematically moving the world of thought, especially the legal thought in Islam. In the context of Islamic law, it prefers to refer to textually of sound of verse than to substantial content. Or, in the context of the thought of the Islamic jurisprudence, it is more major or even just paying attention to the formal sound of the legal provisions rather than the demand of social benefit (read; equity), which incidentally is its soul. Instead, we need to enforce a rule; “if the demand of social benefit, justice, has become legitimate through agreement in the deliberations, so that is my school of thought.”⁵²

By offering the principle of law which puts more emphasis on substance, that is social benefit to weigh justice, it does not mean that the formal and textual aspects of the law should be ignored. The terms of formal-legal-textual legitimate, however, should be the touchstone of human behavior in a common life, if you do not want to be anarchy. However, at the same time, it must be deeply aware that the standard of legal-formal and textual is simply a way of how the ideal of social benefit and justice might be actualized in real life. This means that the

⁵⁰ Mas’udi, “Meletakkan Kembali Maslahat”, 96.

⁵¹ Mas’udi, “Meletakkan Kembali Maslahat”, 97.

⁵² Mas’udi, “Meletakkan Kembali Maslahat”, 97.

formal-textual provisions, which somehow and come from whatever source, must always be open and/or believed to be open to if the ideal of justice is necessarily modified or updated in accordance with the demand of social benefit.

If the above way of thinking is agreed, we also need to fundamentally review our understanding of the concept on the so-called *al-fiqh al-qaṭ'ī* (definite and can not be altered by *ijtihād*) and interpretable matter (*ḡannī*) which is not or less certain and may be changed by *ijtihād* in Islamic law. Recently, *al-fiqh* says that the absolute concept of the Islamic law is something which is appointed by the truly sound of either al-Qur'ân or the prophet's tradition. While, the interpretable matter (*ḡannī*) is the concept of the Islamic law which is ambiguous and containing different understanding. Indeed, *al-qaṭ'ī* (definite) in Islamic law, in accordance with the textual and definite meaning, is not volatile. Because of that, the fundamental value is the social benefit itself to weigh the value or justice as the postscript of the soul of law.

The main category of the interpretable matter (*ḡannī*) is all of the provisions of the text and the normative provisions intended as an effort to translate the definite social benefit to weigh the value or equity in real life. So, to say that *ijtihād* (legal interpretation) can not happen to the definite area, and can only be done for the predictable matter. The ideal of the social benefit and justice, as a definite matter in Islamic law, indeed, could not occur even do not need to do *ijtihād* in order to determine its legal status whether obligatory, permissible or the other determinations.⁵³

What should be interpreted by all of the abilities of interpreters is the interpretable or debatable matter (*ḡannī*), which is not certain, so that, it had to be updated constantly according to the demands of space and time constantly, namely; the first, the definition of social benefit and fairness concept, in the context of space and time where we are relative, and the second, the adequate normative framework as the embodiment of ideal-justice of the social benefit in the context of space and time. And thirdly, the adequate institutional framework for

⁵³ Mas'udi, "Meletakkan Kembali Maslahat", 16.

the means of actualizing the social benefit to weigh norms of justice, as referred to the first and second points, the social reality in question.

To facilitate the understanding of the above paradigm, it could be offered a simple illustration of the charity (*ṣakāh*) concept within *sharī'ah*. The main purpose of charity (*ṣakāh*) is clear. It is aimed to the realization of social justice and prosperity by holding the strong principle of helping the weak. In the context of charity, we need not to do *ijtihād* (legal interpretation) in order to determine the law to uphold justice as aspired by the concept of charity (*ṣakāh*) itself.⁵⁴ The condition where we are in need of conducting *ijtihād* are as the followings; the first, defining social justice and equitable distribution of welfare in the context of particular space and time, for example the social justice and equitable distribution of welfare in the context of Indonesian people recently. The second, how much burden to be borne by those who are rich (*miqdār al-ṣakāh*), on the basis of any property they own (*mahāl al-ṣakāh*), when to be paid (*waqt al-ṣakāh*), to whom and where are the real and definitive address should be distributed the benefit of the charity, and what sectors are the real and definitive have to be supported by charity funds (*maṣrāf al-ṣakāh*), etc. and the third, what institutional should be available in the socio-political realities of Indonesia that could support the realization of social justice with charity is, how the mechanism of its formation, how it works and its control.

The provision which contained in the text or in the opinion of the teachings of the scholars about these issues at the three points above is not entirely absolute. Everything is debatable and predictable interpretable matter (*ṣannī*). Therefore, they can even be inevitable to be customized, changed whenever based on the demands of justice required. For example, about *ammāl al-ṣakāh*; it is not just for today, we only impose mandatory alms levy on dates and grapes, while the coconut palm, apple, coffee, tobacco, which do not lose of their value economically are free from the obligatory of charity. It is also unfair if we determine the obligatory alms burden on the income of the agricultural sector, while the industrial sector and the services which are economically potential are also free from the obligatory of charity.⁵⁵

⁵⁴ Mas'udi, "Meletakkan Kembali Maslahat", 97-98.

⁵⁵ Mas'udi, "Meletakkan Kembali Maslahat", 98.

Similarly, it does not fit anymore according to the principle of social justice if *sabîl Allâh* (a person who joins war to protect Allah's religion) as one of the charity accepters (*mustahîk al-zakâh*), only defined by a soldier on the battlefield against the unbelievers. While the law enforcers such as police, prosecutors, judges and defense counsel are remaining outside of the orbit we put in the divine mission to enforce the order of justice. Then the result we all know, people tend to release themselves from moral demands. They themselves tend to feel free of charges. By putting them on the line *sabîl Allâh*, we have provided justification as well as caring (criticism) of our social roles and their activities, with particular reference to the divine values of justice. If the main reference of law, including the law in the view of Islam namely *sharî'ah*, is the social justice, the question that will immediately arise is how the social justice that can be defined and who has the authority to define it. No doubt, this question is very important and decisive. If we fail to answer this question, it will again imply to discuss the social justice of *sharî'ah* as a goal of law itself. Consequently, the social justice and the social benefit are merely as a jargon and nonsense.

To answer this question, the first, we need to distinguish between the social benefit to be "*the individual subjective*" with the social benefit to be "the social-objective". The social benefit which characterized as the individual-subjective is the social benefit related to the existential interest of someone who is independent, and separated from the interest of the others. In the social benefit according to this category, with its subjective character, is the right to determine simultaneously as a judge. Of course, it is a personal question. In this case, no force of any collective right to determine what personally and subjectively considered the social benefit by someone.⁵⁶

Meanwhile, the social benefit which is characterized as the social-objective is to involve the public interest. In this case, the authority who is entitled to provide assessment and at the same time be the judge is none other than the people concerned, through the mechanism of *shûra* to reach agreement (consensus). So, what is agreed by the many people about social benefit (the superior theory of the social benefit) through the deliberation process of defining the law is

⁵⁶ Mas'udi, "Meletakkan Kembali Maslahat", 99.

the real truth. The agreement of many people, in which we are a part thereof, is the supreme of law. If the questionable legal status or legal provisions-normative offered by the revelation (al-Qur'ân or ḥadīth), its position is as subjective material, which associated by the social benefit of an objective logic, not by the logic of power or trust. It, however, must still be brought to determine its consultative status to the institution. When we got him as part of the deal people, it serves as a law that formally and positively binds. However, if it fails to fight as an agreement, binding power, of course, it is limited to those who believe in it. And the binding power like this is merely as subjective moral nature and can not at once be formal-objective.⁵⁷

By combining both the superior theory of social benefit (*maṣlahah*) and the legal norms sourced to consensus of the institution of *shūrâ*, or decisions of the parliament in terms of the modern nationality, is not mean of perfect. Infrequently, the so-called agreement of *shūrâ* institutions, parliament, is just a manipulation outcome of the ruling elite. However, this is the challenge to be faced by Muslims as well as the challenge for human beings wherever they are located. Namely, how they can get the growth of the people's institution's deals, in which the people either directly or through their representative to express opinions and choices regarding the better order of life is more ideals in reaching the social benefit and justice.⁵⁸

Furthermore, Sayyid Quṭb, currently Muslim scientist who is associated with the rise of radicalism in the Muslim world, is also talking about the social justice within the perspective of philosophy of Islam. He had written many great works. One of them is *al-Tafsīr fī Zilâl al-Qur'ân*. Among the interesting ideas of Sayyid Quṭb is the theory of 'social justice'. He did not interpret Islam as a system of morality. He, however, concretes the social and political forces throughout the Muslim world. He claims that both Islam and politics are not in correspond. Social justice in Islam is not based on the view of the principle of social justice of western secular where religion is only responsible for educating the awareness and purification of the soul, while the laws of temporal and secular society is in charge of

⁵⁷ Mas'udi, "Meletakkan Kembali Maslahat", 99.

⁵⁸ Mas'udi, "Meletakkan Kembali Maslahat", 4.

arranging and organizing human life. Islam tries to balance between Islam as a religion and the struggle for social justice, such as the social justice among Christian, Communism and Islam. Since Islam has set the basic principles of social justice and confirmed the claims of the poor in the wealth of the rich. Islam provides a principle of justice for power and money.

Conclusion

From the discussion above, it should be noted the following conclusions: The first, justice, in the perspective of philosophy of law, becomes a cornerstone that should be met through the existing law. Aristotle asserted that justice is as the core of his legal philosophy. For him, justice is understood in the sense of similarity. It is the similarity between the numerical and proportional equality. The numerical similarity equates every human being as one unit. The similarity of proportional provides to each person what he is entitled according to his ability, achievements, and so forth. He also distinguishes the type of distributive justice and corrective justice. The first applies in public law and the second applies in both of civil and criminal law.

John Rawls, with his social justice theory, asserts that the program of formulating justice which has populous dimension must consider the two principles of justice; giving the equal rights and opportunities of the most extensive basic liberty covering the same freedom for everyone and being able to set back the social and economic disparities that occur so as to provide the mutual benefits (reciprocal benefits) for everyone, both those who come from lucky group of the people or not lucky.

The theory of justice in Islam was first discussed as a matter of theology of divine justice that emerged the two schools of thought; Mu'tazilah and Ash'ariyah. Mu'tazilah stated that humans, as free creatures of God, are supposed to responsible before God is fair. Good and bad are rational categories that can be known through reason. God has created human reason in such a way so as to see the good and bad in an objective manner. Mu'tazilah thereby upholds an objective rationalist form of thought. While Ash'ariyah says that good and bad are as what God has determined. And it is arrogant to judge God based on the categories given by Him to direct human life.

Human responsibility is not a result of free elections, but only God who created solely to actions directly. Therefore, human responsibility is the result of divine will known through the guidance of the revelation. This conception is known as theistic subjectivism. In addition, the theory of justice is also a major cornerstone in the philosophy of Islamic law, particularly in the discussion of the theory of purpose of Islamic law (*maqâṣid al-sharī'ah*) which asserts that Islamic law regulated to create and protect the superior theory of the social benefit (*maṣlahah*) of mankind.

The theory of the social benefit in this context is similar to the theory of social justice in terms of philosophy of law. This theory was firstly introduced by Imam al-Ḥaramayn al-Juwaynî then developed by his student, al-Ghazâlî. The next Islamic legal theorists that specifically discussed the theory of purpose of Islamic law (*maqâṣid al-sharī'ah*) is 'Izz al-Dîn b. 'Abd. al-Salâm from among Syafi'ah. And a systematic and clearly discussion is carried out by al-Shâṭibî from among Malikiyah in his book *al-Muwâfaqât*. In addition, al-Tufi also provides radical and liberal views about the superior theory of the social benefit (*maṣlahah*).

Sayyid Quṭb, currently Muslim scientist, is also talking about the social justice within the perspective of philosophy of Islam. He did not interpret Islam as a system of morality. He, however, concretizes the social and political forces throughout the Muslim (believer) world. He claims that both Islam and politics are not correspond. Social justice in Islam is not based on the view of the principle of social justice of western secular. Islam tries to balance between Islam as a religion and the struggle for social justice, such as the social justice among Christian, Communism and Islam.

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