

**COMPARATIVE STUDY OF THE THEORY OF
ABŪ HĀMID AL-GAZALĪ'S MASLAHAH AND JEREMY BENTHAM'S
UTILITY**



**A BACHELOR THESIS
SUBMITTED TO FACULTY OF SYARI'AH AND LAW
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR OBTAINING SARJANA DEGREE IN ISLAMIC LAW**

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ABSTRACT
Comparative Study of The Theory of
Abū Hamīd al-Ghazālī's Maslahah and Jeremy Bentham's Utility

Writer thinks that *maslaha mursalah* is defined as utility, Maslaha can serve as a basis for rulings if it is supported by some legal proof such as *Al-quran, Sunnah, and Qiyas*. *Maslaha* is the same concept as utility found in the legal etymology which we can understand from this exploration that such as: first, the happiness sought here depends on human desires or reason. The pursuit of such happiness may or may not coincide with the form of benefit/*Manfa'ah* intended by the *shari'ah*. Second, the emphasis on the form of happiness will always be on the collective utility. Third, Pursuit of pure utility may ultimately lead to the economic analysis of law which may or may not suit the goals of the *Shari'ah*. both come, then, from philosophical different civilization. In the modern era, some philosophers always discuss both concepts on justice and human rights discourse. So writer is interested to do comparative study of both concepts.

In this research, the writer uses analytical content used to analyze the idea of Abū Ḥāmid al-Gazālī in *Mustaṣfa* book and idea of Jeremy Bentham in book of *Introduction to the principle of legislation and morals*. In the theoretical framework, the writer uses philosophical approach. Meanwhile, writer analyzes the concept by using description and critical evaluation in philosophical approach. By using description and critical evaluation writer can compare both concepts and find the similarities or differences comprehensively. Then writer get the excess and weakness from critical evaluation.

From this research, *Maslahah* is actually an expression for the acquisition of *manfa'ah* (benefit) or the repulsion of *madarraḥ* (harm). *Maslahah* expressed that acquisition of *manfa'ah* and the repulsion of *madarraḥ* represent human goals, but *Maslahah* the preservation of the aims of the *Shari'ah*. we see that it is very different from the understanding of utility/ benefit. Three things are obvious from the statements: first, Pursuit of human goals and the principle of utility based on human reason is not what by means *maslahah*. Second, *Maslahah* is the securing of goals or values that the Lawgiver has determined in the *Shari'ah*. Third, Goals determined for the *Shariah* by the lawgiver may or may not coincide with values of human reason. And both concepts have no sense of justice *as fairness* and human rights, and both fall into dictator majority. Both ignore individual rights and freedom of choice.

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masalah and Jeremy Bentham's utility

could be submitted in a partial requirement to obtain a bachelor degree in Islamic Law. Thus, it could be immediately tested.

Thanks a lot for being available and understanding, may this bachelor thesis be useful, amin.

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TRANSLITERATION

The system of Arabic transliteration used in this thesis is based on Joint Circulating Letter of Minister of Religious Affairs and Minister of Education and Cultural Affairs of Republic of Indonesia No. 158/1987 and 0543b/U/1987.

A. Single Consonant

Arabic Letters	Names	Letters of Latin	Assertions
ا	alif	not symbolized	not symbolized
ب	ba	b	be
ت	ta	t	te
ث	ṣa	ṣ	es (with point on top)
ج	jīm	j	je
ح	ḥā'	ḥ	ha (with point below)
خ	khā'	kh	and ha
د	dāl	d	de
ذ	ẓāl	ẓ	zet (with point on top)
ر	rā'	r	er
ز	zai	z	zet
س	sin	s	es
ش	syin	sy	es and ye
ص	sād	ṣ	es (with point below)
ض	dād	ḍ	de (with point below)
ط	ṭā'	ṭ	te (with point below)
ظ	ẓa'	ẓ	zet (with point below)
ع	'ain	‘	comma reversed from above
غ	gain	g	ge
ف	fā	f	ef
ق	qāf	q	qi
ك	kāf	k	ka
ل	lām	l	'el
م	mīm	m	'em

ن	nūn	n	'en
و	wāwū	w	w
ه	hā'	h	ha
ء	hamzah	'	apostrophe
ي	yā	y	ye

B. Double Consonant Caused by *tasydfid*, Written in Double

شخصية	written	syakhsyiyyah
مودة	written	mawaddah

C. *Ta' Marbūtah* on The End of Word

1. Written by *h* if Read in *Sukūn*

رحمة	written	raḥmah
سكينة	written	sakīnah

(This stipulation is not required on Arabic words that has been assimilated into English language e.g. zakah etc, except if the original word is wished)

2. When followed by article 'al' and the second word is separated thus it's written by *h*

حاشية الباجوري	written	<i>Hāsyiah al-Bājūri</i>
----------------	---------	--------------------------

3. If *ta' marbūtah* lives by using *fatḥah*, *kasrah* or *ḍammah* thus it's written by *t* or *h*

بداية المجتهد	written	Bidāyah/ Bidāyat al-Mujtahid
---------------	---------	------------------------------

D. Short Vowels

ـَ	fatḥah	written	a
فعل	-	written	fa'ala

ا	kasrah	written	i
ذکر	-	written	zukira
ُ	ḍammah	written	u
يذهب	-	written	yazhabu

E. Long Vowels

1	fathāh + alif جاهية	written	ā jāhiliyyah
2	fathāh + ya' dead ميتة	written	ai maitah
3	kasrah + ya' dead كريم	written	ī karīm
4	ḍammah + wawu dead فروض	written	ū furūḍ

F. Double Vowels

1	fathāh + ya' dead بينكم	written	ai bainakum
2	fathāh + wawu dead قول	written	au qaul

G. Consecutive Short Vowels in a Word Separated by Apostrophe

أأنتم	written	A'antum
اعدت	written	U'iddat
لئن شكرتم	Written	La'in syakartum

H. Article Alif +Lam

1. If it's followed by letter of *qomariyyah*, thus it's written by "l"

القرآن	written	Al-Qur'ān
القياس	written	Al-Qiyās

2. If followed by letter of *Syamsiyyah*, thus it's written by the letter of *Syamsiyyah*, with omitting the letter of *l (el)*

السماء	written	As-Samā'
الشمس	written	Asy-Syams

I. Arranging Words in a Sentence

Written by the arranging:

ذوى الفروض	written	Zāwi al-furūd
اهل السنة	written	Ahl as-sunnah

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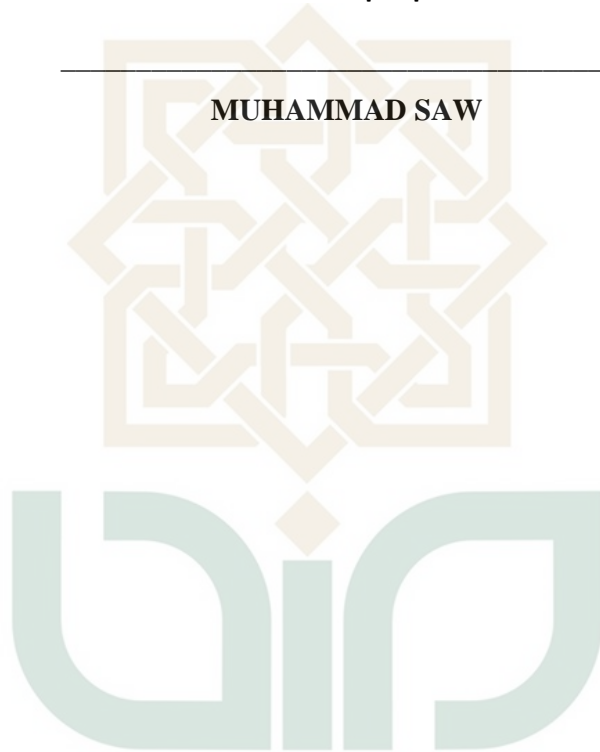
MOTTO

خير الناس انفعهم للناس

The best people are the most useful

For other people

MUHAMMAD SAW



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DEDICATION

Alhamdulillah,

this bachelor thesis is completed as an academic scientific work.

I dedicate this work to:

My dad and mom:

Saifur Rijal and maesaroh

My brothers:

Khairul Fata, Khusnul Khotimah,

Halimatus sa'diyah, Dina Shofiy

Akmala, Ummi Niza' Nabilah, and all my families

My almamater UIN Sunan Kalijaga and all knowledge

lovers all over the world

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بسم الله الرحمن الرحيم

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أما بعد

All praise and glory allways be to Allah the only owner of greatness, glory, and majesty, who grants mercy, guidance and forgiveness to all of us although we forget to ask, so we could keep the faith, Islam, and Ihsan, as well as commitment as young generation to always be thirsty for knowledge.

Invocation and peace hopefully always be poured to Prophet Muhammad SAW, along with his families, friends, and people who grasp adamantly and firmly to the teachings he had brought up to the end of time.

This bachelor thesis is structured to meet the final assignment given by the Faculty of Syari'ah and Law as one of many conditions that must be met to obtain a bachelor degree on the field of Islamic Law.

I realize that the bachelor thesis could not be structured thoroughly and completely without any support, guidance, and prayer from the people around, who gived wisdom and experience to me so far. Therefore, I rightly have to thank to:

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6. Everyone makes sense in my life that I could not mention one by one.

I also realize that this bachelor thesis is less perfect and more deficient, so that I hope that the readers would be prepared to render suggestion, advice, and wise critique to patch insufficient part in this thesis. Eventually, may this bachelor thesis can be savored to improve treasure of Islamic knowledge. Amin.

Yogyakarta, Dzulhijjah 14, 1431 AH
November 10, 2010 AD
Sincerely Yours,

Saifullah
SIN: 05360012

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CHAPTER I

INTRODUCTION

A. Background

Legal philosophy correlates to evolution of philosophy as whole. Its emergence is repeatedly around the certain problems. So that it becomes the discourse of social welfare (public interest) in correlation to law. Because order of law or legislation ought to be welfare of public society or public interests, but application is often not real or obvious.

In 18 century there was the utilitarianism (school of utility) in the philosophy of western law to answer for what is the law. This theory is introduced firstly by Jeremy Bentham (1789) in the book entitled *An Introduction to the Principle of Morals and Legislation*. This theory had been popular as basic concept: *The greatest happiness of the greatest number of people*. According To Jeremy Bentham, world lays in 2 big orders that are pain and pleasure.¹

Basically the utilitarianism gives ethical Procedures for reconstruction of the law in England, especially in the field of criminal law. So Jeremy Bentham did not want to constitute the theory of abstract moral but to reformulate the concrete moral. Law has purpose to improve welfare of

¹ Jeremy Bentham, *An Introduction to the Principle of Morals and Legislation*, (Inggris: Batoche Books, 2000), 14.

citizen, not to impose commands of god or to protect the interest of natural rights.²

The utilitarianism is that we all act maximally to produce an results of happiness as much as possible to individual itself and public society in general. Thus utilitarianism is greatest ethics. According to utilitarian we must act maximally to get much goodness as possible and avoid the effects of badness as possible.³

The Utilitarianism is universal principle, because it is moral norms which produce not only the goodness for individual itself but also others as whole. It recommended attention to the interest of all party or society affected by the action, include individual itself. Different from ethical egoism, the utilitarianism is not only to individual satisfaction but also to others. Hence, it is morally the greatest-valued action.⁴

Public welfare only will be comprehended if it is sought, in position, as reality which will be implemented by law or legislation. Efforts to realize welfare of society, in legislation, are a dynamic process and ought to be fought. Thus efforts to actualize welfare society are often dominated by power fighting in dominant public structure. People can assume that public welfare is a reality, and the comprehensive understanding of it is only gotten by philosophical efforts that are very difficult and rigid. People can also assume that public welfare is a result of religious common debate or

² K. Bertens, *Etika*, 10th edition(jakarta : PT. Gramedia Pustaka Utama, 2007), 247.

³ Franz Magnis-Suseno, *Etika Dasar: Masalah-Masalah Filsafat Moral*, 21 edition (Yogyakarta: Kanisius, 2010), 123.

⁴ *Ibid.* 125.

philosophy about world in general. So people can define public interest or public welfare into one of the knowledge that is different from this conception.

Correlation between law and public welfare is a long time discourse in the history of legal philosophy. It happened also in the philosophy of Islamic law. When sources of Islamic law -*al-Qurān*, *al-Hadīf*, *Ijmā'*- can't answer the complexity of human beings and religious Texts or legal norms are limited, Hence Imam Maḥīk expounded firstly the theory recognized as *maṣlaḥah*. *maṣlaḥah* is always researched and studied by the philosophers of Islamic law (master of *uṣūl fiqh*), especially when they study *Maqāṣid asy-Syarī'ah* and ethical purpose of law.

Maṣlaḥah emerges to answer complex problems of society and accommodate the public interest, and *Maṣlaḥah*, in function, will protect utility and prevent pernicious.⁵ *Maṣlaḥah* response to change mankind from some aspects of various life, such as: social change, culture, science, economic, politic, and technology.

From the aspect of legitimacy of religious texts, *Maṣlaḥah* is divided into three categories: First, *maṣlaḥah mu'tabarah* is *maṣlaḥah* obtaining legitimacy of *shari'ah* or religion texts; Second, *maṣlaḥah mulgah* is *maṣlaḥah* obtaining rejection of *shari'ah* or divine texts; Third, *maṣlaḥah mursalah* is *maṣlaḥah*

⁵ Dr. Muhammad Muslehuddin, *Filsafat Hukum islam dan Pemikiran Orientalis*, translated by Yudian Wahyudi Asmin, second edition (Yogyakarta : Pt. Tiara Wacana, 1997). 127.

delayed or hushed by divine texts.⁶ From the aspect of interests of people, it is divided into three principles: First is *maṣlaḥah darūriyah*, It concerns fundamental interest covered five basic needs (preservation of religion, mind, property, progeny, soul); Second is *maṣlaḥah ḥajīyah*, it relates to secondary requirements of human being as supporting the first principle: Third is *Maṣlaḥah tahsīnīyah* it relates to ornamental-decorative requirement, as complementary of *Maṣlaḥah darūriyah* and *ḥajīyah*.

Imam al-Gazālī divided the purpose of *hukm*, as cited by Ahsan Khan Nyazee, into three parts: *darūriyyah*, *ḥajīyyah*, and *tawassu' wat taysir*. The categorization, that is classified into two purposes: first is the supplementary value; second is the complementary value which we called *taḥsiniyyat*. After al-Gazālī explained the division of it, He divides it into two different level. He argued that conformity (*munāsib*) is divided into two categories, Those two categories are *haqīqī aqlī* and *khiyālī iqnā'ī*. From those two categories, *haqīqī aqlī* has been compatible with sources of Islamic law, Which included *darūriyyah* and *ḥajīyah*; and *khiyālī iqnā'ī* is admitted in the mode of *taḥsīnīyyah*, which is called complementary ethics and moral norms.⁷

al-Juwaynī analyzed the *maṣlaḥah*, as cited by Dr. Muḥammad Khālīd Mas'ūd, as an extra-textual basis in the context of analogy by *'illah* (ratio-*legis*) into five categories: First is the category where its significance (*ma'na*) is rationally understandable and where it related to fundamental necessities

⁶ Dr. Abdul Karīm Zaidān, *al-Wafīz Fī Uṣūlil Fiqh*, 5th edition (Beirūt : Muassasah Risālah,1996),236.

⁷ Imrān Aḥsān Khan Nyazee, *Theories of Islamic Law : The Methodology of Ijtihad*, (Islamabad, Pakistan: The International Institute of Islamic Thought, 1994), 218.

(*darūrī*) which is inevitable; the Second category concerns what is in general needs (*al-ḥājjah al-‘āmmah*), but below the level *darūriyyah*; Third is the belongs to neither of above,, but rather concerns something which is sublim (*al-mukarramah*); Fourth category is similar to the third category, yet, in the terms of priorities; fourth comes latter; the fifth category concerns those *usūl* whose significance (*ma’na*) is not obvious, and is not demanded by *darūrah*, *ḥājjah*, and also *mukarramah*.⁸

Maṣlaḥah and utility has the same fundamental principles in the study of legal philosophy. Its principles always discuss about ethical purpose of law. Law is created for the sake of public society. Therefore, both concepts are method of legal philosophy giving contribution to criticize the law and legislation. Consequently, both give formulation standard of ethical evaluation to law and legislation.

Both concepts emerged from different civilization. *Maṣlaḥah* emerged from Muslim people binding strongly to civilization of text. It means, law, emerged in Muslim society, is a interpretation of texts of al-Quran and as-Sunnah. Beside Islamic law is still influenced by theological aspects. Whereas utilitarianism emerged among secular European people, Law is created from the construction of idea and experienced reality *an sich* without binding with aspects of religious theology.

⁸ Dr. Muḥammad Khālīd Mas’ud, *Filsafat Hukum Islam dan Perubahan Sosial*, translated by Yudian Wahyudi Asmin, first edition (Surabaya : Al-Ikhlās, 1995), 156.

Therefore, writer is interested to write and study both concepts with some considerations: first, both concepts have the same questions about for what the law is made, what standards are applied in legislation. Both concepts are basis of legal epistemology emerged from different civilization and having significant similarities and differences from the aspect of the forming of law.

B. The Problems of the Study

1. What is the Concept of *Maslaha's* Abū Hāmid al-Gazālī and Jeremy Bentham's utility?
2. What are the similarities and the differences of both concepts?
3. How are implications of both concepts to justice and human right?

C. Objectives and Significances

By taking attention to the subject matter, hence exploration of this bachelor thesis aims to objectives:

1. To understand the concepts of *Maṣlahah's* Abū Ḥāmid al-Gazālī and Utility's Jeremy Bentham.
2. To know the differences and the similarities of both concepts.
3. To know the implications of both concepts to justice and human rights.

By seeing the objectives of this research which will be reached, writer hopes the significances:

1. To give scientific contribution to the thinking expansion, especially in the field of legal philosophy and *Uṣūl Fiqh*.
2. To encourage other researcher to develop Research of *uṣūl fiqh* and legal philosophy. And writer hopes researchers to study of *uṣūl fiqh* and legal philosophy more detail and comprehensive.
3. To give comprehensive understanding about both concepts, especially in the context of justice and human rights. Also to encourage the legislator and official government to use terms of utility and *maṣlaḥah* based on basic values of justice and human rights.

D. Literature Review

In fact, there is no the comparative study of both concepts written and studied specifically, but many jurist of *uṣūl fiqh* and legal philosopher have been written separately *maṣlaḥah* and utility. Actually, it is no the new study. Because many muslim jurists or experts of *uṣūl fiqh*, legal philosopher and intellectual have studied both concepts. The study will research especially *maṣlaḥah* and ethical purpose of law, as it looks like research of bachelor thesis written by Ahmad Kamal (examination on 5 august 2003) entitled *The Concept of Maqāṣid asy-Syarī'ah between al-Gazalī and asy-Syātibī*. In his bachelor thesis, he researched both the conceptions of *maṣlaḥah* in Islamic rule which the same is based on rationality and *ḥikmah*. Purpose of the

forming of law takes goodness and prevents badness. But in the research of this bachelor thesis, writer gave fundamentally the methodological differences from both the figures to determine principles or purpose of *shar'*, al-Gazalī applied the theory of conformity (*munāsib*), while as-Syātibī expressed inductive collaboration which discussed extensively what became principles of al-Gazalī. writing of bachelor thesis emphasizes on *socio-historical* for the mode of ideas of al-Gazalī and Syātibī.⁹

Beside the research of *maṣlahah* mentioned above, as far as the writer observes, there is no book which compares specifically the concepts of *maṣlahah's* Muḥammad al-Gazalī and Jeremy Bentham's utilitarianism, the related books or articles are book "*Islam Akomodatif : Rekonstruksi Pemahaman Islam yang universal*" by Dr. Abu Yasid, LL.M, published by LKiS, the book explained two aspects: (1) Characteristic of Islamic teaching (2) *Maṣlahah* as formal reference of Islamic teaching such as: definition, common character, types of *maṣlahah*. This book described briefly the difference between concept of *maṣlahah* and utilitarianism on page 4. Writer of this book expressed that utilitarianism didn't give well-balanced proportion between individual interest and majority interest. In this book also al-Gazalī explained about *maṣlahah* into 3 classifications: public interest, majority interest, individual interest.¹⁰

⁹Ahmad Kamal, *Konsep Maqasyid asy-Syariah Antara al-Gazalī dan asy-Syātibī (From Socio-Historical Aspect)*, Bachelor Thesis of The Syariah and Law Faculty : Islamic State University of Sunan Kalijaga, 2003.

¹⁰Abu Yazid, LL.M, *Islam Akomodatif : Rekonstruksi Pemahaman Islam Sebagai Agama Universal*, First Edition (Yogyakarta : LKiS, 2004), ix,4, and 97.

Then Wael B Hallaq's book, translated by E. Kusanadiningrat and Abdul Haris bin Wahid, entitled: “ *Sejarah Teori Hukum Islam*”. In this book he elaborated the history of forming of the Islamic law, the articulation of the islamic law 1 and 2, and Response of Islamic law to social reality. This book has 7 chapter, at chapter 3 explains shortly about *maṣlaḥah mursalah*, also studied problem of *Maqāṣid al-Sharī'ah* at chapter 5. Later at chapter 7 explains religious utilitarianism as alternative way from dominating the religious texts to theory of Islamic law.¹¹

While the utilitarianism has been studied by many philosophers and writers in some introductory books covered legal philosophy, ethical philosophy, history of western philosophy, science of ethic, science of law, etc. As Barten's book entitled “*Ethics*”. In This Book, Barten explained into 2 parts: classical utilitarianism and rule-utilitarianism. The classical Utilitarianism concept has two principles: *the greatest happiness and the greatest number*. This book also explored that happiness can be calculated quantitatively so-called concept of *the hedonistic calculus*. A classical Utilitarianism is called act utilitarianism. To complement insufficiency of act-utilitarianism, utilitarian philosophers offer rule-utilitarianism as alternative, which is defined by Barten as moral codes arranging our attitude.¹²

¹¹ Wael B. Hallaq, *Sejarah Teori Hukum Islam*, Translated by oleh E. Kusdiningrat dan Abdul Haris Bin Wahid, Second edition (Jakarta : PT. RajaGrafindo Persada, 2001), xi and 318.

¹² K. Bertens, *Etika*, 10th edition (Jakarta : PT. Gramedia Pustaka Utama, 2007), 247-253.

Additionally, book of utilitarianism is written by Franz Magnis-suseno, entitled ” *Etika Dasar: Masalah-Masalah Pokok Filsafat Moral* ”. This book studied problem of utilitarianism at sub-chapter 4 in chapter 8. Franz, at this book, examined that excess of utilitarianism is the rationality and universality. Utilitarianism is challenge to legal ethics, because it claims that of moral regulations to be responsible, and if it can't give advantage it could be eliminated. This book expressed about utilitarianism services as concept of rational ethic having purpose of the greatest value for happiness of man. But this book also explored lacking of utilitarianism principle which can't guaranty justice and human right.¹³

Because of no research comparing both the figures, more and more *maṣlahah* and utilitarianism, writer feels this research requires to be lifted, because of importance of their function and position as one of epistemological law in forming of rule, and main debate of *maṣlahah* and utilitarianism focus on centrally, then, how its application and implication to the interests of public society as well as how is the development of that concept in forming law is very interested to be known by some academicians and legislators, So, from this research, it is expected to get epistemological construction of both concepts as one of methodology of law.

¹³ Franz Magnis-Suseno, *Etika Dasar : Masalah-Masalah Filsafat Moral*, 21th edition (Yogyakarta: Kanisius, 2010), 124-127.

E. Theoretical Framework

When one would deal with an idea of philosophy or epistemology of science, the first frequently question is the relevant of idea or epistemology to be analytical tool to the reality. Then legal product *itself* associates closely with public life. Therefore, before we should comprehend the concept comprehensively and correctly rather than we tell about the relevance of knowledge, as the concept of *Maṣlahah*'s al-Gazālī and utilitarianism's Jeremy Bentham will be researched.

Maṣlahah is derived from word *s.l.h.* being formed of *ṣalaḥa, ṣaluḥa, salahan, ṣulūḥan, and ṣalāḥīyatan*. According to al-fayumi as cited by Kamal Mukhtar, a verb "*ṣaluḥa*" belongs to the contradiction meaning with "*fasada*" (broken). The word "*maṣlahah*" is singular form, and its plural form is "*maṣālih*" which means good and correct.¹⁴ Additionally, as noted from Izz al-Din Ibn Abd al-Salam, Kamal Mukhtar explained that *maṣlahah* into 4 parts: deliciousness and all something can provide deliciousness, happiness. In other word, also *mafsadah* is divided into four ways: sick and something that can provide sick. So it means that anything can provide maslaha, more and more *mafsadah* can cause *maṣlahah*.

Likewise, from lingual aspect, *maṣlahah* can be classified as follow:¹⁵

1. Utility, useful, functioned, no deformity, good, delicious, happy, fun, advantage, success in business, and its antonym is *mafsadah*.

¹⁴ Kamal Mukhtar, *Maslahah Sebagai Dalil Penetapan Hukum Islam* : In Amin Abdullah Ed, *Rekonstruksi Metodologi Ilmu-Ilmu Ke-Islaman*, First Edition, (IAIN SUKA Yogyakarta : SUKA-Press, 2003), 215.

¹⁵ *Ibid*, 217.

2. All causes, which can affect *maṣlaḥah*, are *maṣlaḥah*, and all causes, which provide *mafsadah*, are *mafsadah*.
3. Mafsadah sometime can take *maṣlaḥah* away. So all causes, which can provide *maṣlaḥah*, could be either mafsadah or *maṣlaḥah*.
4. *Maṣlaḥah* is formed physically and *roḥānī*, worldly and *ukhrāwī*, generally and specifically, spiritually and materially, etc.

Professor Nyazee had been a notion that Maslaha is the most important instrument to use in judicial thinking or Ijtihad in modern age.¹⁶ Jurists of Islamic Law have divided the purposes of law into two portions: the religious and *Dunyāwī*/worldly purposes. Furthermore some scholars such as Professor Khan Nyazee subdivided it into five categories: preservation of religion, life, progeny, intellect and wealth. According to most jurists, Nyazee told us "the essential goals of the *Sharī'ah* are to free man from his own whims and fancy, so that he may be the servant of Allah by choice."¹⁷

Nevertheless, those two interested views are drowned by the more popular and majority that the purposes of Islamic law are known by not only reason but also revelation. Al-Gazālī and Syātībī, with the latter being credited for having successfully elaborated the purposes of Islamic legal thought, stated that, purposes of law have been determined by the texts, through the process of

¹⁶ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, (Islamabad : International Institute of Islamic Thought & Islamic Research Institute, 2003), 248.

¹⁷ *Ibid*, 203.

induction (*istiqrāʿ*) rather than through deduction, this is why the *Maqāṣid* is considered *qati*/definitive.¹⁸

Prof. Hasan Hanafi expressed that of preservation of *Maṣlaḥah* and avoiding of *Mafsadah* is based on principles of realistic constitutional (*tashriʿ*) natural rule, codes of mankind, social reality, and environmental law. While he argued that it is universal rule which govern life as whole. Rules of the world will not be constituted by carnal desire (*ahwa*).¹⁹ Professor Anver Evon explains that Abdu had two principles "the first principle is that rational thought (*al Nāẓar al-ʿAqlī*) which it means for the attainment of true faith (*wasīlat al-Iman al-ṣalīh*), the second principle is that where revelation and reason are in conflict, reason should take priority (*taqdim al-ʿaql ʿalā al-syarʿ*)."²⁰ *Maṣlaḥah* mentioned above is divided into three parts. First, the type of *maṣlaḥah* has supported by divine text in favor of its consideration. Second is the type which denied by textual source. The third is the type which is neither textual legitimacy nor textual contradiction.²¹

Whereas, utilitarianism is broad study in correlating to the rule, ethic, and welfare of society. Utilitarianism, as stated by Mel Thompson, Is one of the most influential and widely theories of ethic used in ordinary "common sense" decisions. He claimed that an action should be judged according to its ability to

¹⁸ Nyazee Imran Ahsan Khan, *Theories of Islamic law*, 242

¹⁹ Hasan Hanafi, *Min al-Naṣ ila al-Wāqīʿ*, second volumes, (Mesir : Markaz al-Kitāb Lī an-Naṣrī, 2005), 448.

²⁰ Anver M. Evon, *Natural and Natural Rights in Islamic Law*, Journal of Law and Religion , 2004-2005), 9.

²¹ Muhammad Khalid Masud, *Islamic Legal Philosophy : Study of Abu Ishaq al-Shatibi's Life and Thought*, First Edition, (India : International Islamic Publisher, 1989), 153.

offer happiness, goodness, and benefit to everyone involved.²² It maintains that we should seek to develop maximally the total account of happiness in the mankind, it does not maintain that we seek to maximize our own happiness.²³ Utilitarianism is the tendency of an object or action to increase or decrease happiness. In the simplest form, utilitarianism claims that the right thing to do is likely to produce the greatest happiness for the greatest number of people in any situation where there is moral choice. Hence the best nation is of which produces the most happiness for the most people. As noted by Mel Thompson, this formulation was promoted in 1725 by Francis Hutcheson, it is the rule of assessing political powers.²⁴

Additionally the utilitarianism is divided into 2 ways: the first is act-utilitarianism which means to assess whether act is wrong or right in the effects of an individual action context. Act utilitarianism relates to assessment about pain and happiness in the context of the personal action.²⁵ It does not only allow people to do something simply because it makes them happy. The happiness of the other people included must also be taken account.²⁶ Second is Rule-utilitarianism. It states that we should be act based on statements which are judged to seek the greatest goodness in the world as possible rather than causes of the greatest badness.²⁷ It recommends to look at the consequences of having

²² Mel Thompson, *Teach Yourself: Ethics*, (New York : McGraw-Hill company, 2003), 67.

²³Theodore Schick, JR. and Lewis Vaughn, *Doing Philosophy : An Introduction Through Thought Experiments*,(New York : McGraw-Hill Company, 2003), 327.

²⁴ Mel Thompson, *Teach Yourself; op. cit*, 68.

²⁵ *Ibid*, 70.

²⁶ Theodore Schick, JR. and Lewis Vaughn, *Doing Philosophy, op. cit*, 328

²⁷ Prof. Dr. Juhaya S. Praja, *Aliran-Aliran Filsafat dan Etika*, (Jakarta : Pustaka Media, 2003), 66

everyone follow a particular rule and calculates the overall utility of accepting or rejecting the rule.

According to Kahneman a premises of the (strong) theory of experienced utility can be stated in a few propositions. Firstly, at every moment we are experiencing utility, meaning pleasure and/or pain (this is termed *instant utility*). Second, this utility has *quantity* and *valence*, with a neutral point on the boundary between desirable and undesirable, pleasure and pain. Third, the utility is all that makes an experience good or bad. Fourth, by integrating instant utility over a period we obtain the *total utility* for that period. Fifth, an optimal decision is one that maximizes total utility (or expected total utility). Finally, to make this a workable theory, instant utility must be measurable, up to at least an ordinal and ultimately a ratio scale.²⁸ So this premises which are called *hedonistic calculus* or measure of utility are based on circumstances: intensity, duration, certainty or uncertainty, purity, etc.

By explaining the theory *Maṣlahah* and Utilitarianism above, writer interested to use philosophical-comparative approach by using *description* and *critical evaluation* in theoretical framework. *Description* means to show the similarities and differences from both figures in terminology, argumentation, focus, basic assumption, and thinking orientation. While critical evaluation means to look for the excess and weakness each both concepts.²⁹

²⁸ Kahneman, D., Experienced Utility and Objective Happiness : In Kahneman, D. & Tversky, A. (Eds.), *Choices, Values, and Frames* (Cambridge : Cambridge University Press, 2000),15.

²⁹Dr. Anton Bakker & Drs. Achmad Charis Zubair, *Metodologi Penelitian Filsafat*, 10th edition (Yogyakarta : Penerbit Kanisius, 2002), 84.

F. Research Method

In a compilation of scientific masterpiece, the usage of method is absolutely required, besides to make it easy, the research conducts also as mode of rational and effective activity to reach optimal research result. In general research method applied in this bachelor thesis is method of analytical content used to analyze the idea of Abū Ḥāmid al-Gazālī in *Mustaṣfā* book and idea of Jeremy Bentham in book of *Introduction to the principle of legislation and morals*. Analysis, which is used, is theories in science of *uṣūl fiqh* and legal philosophy concerning correlation of law and social change and also purpose of law itself. Following complete presentation:

1. Kind of Research.

This research type is literal or *library research*,³⁰ it means, this research is based on written book, journal, and sources of data which support this research. Scanning This data is applied to the related books or literatures of legal philosophy, written by either philosopher or expert of *uṣūl fiqh* / jurist, and moreover the ethical philosophy, *uṣūl fiqh*, and the others related to this research theme.

2. Data Collection.

Method of data collection depends on type and source of data required. In general, data collection can be conducted with a few methods, it is either a alternative or cumulative character which is inter-

³⁰ Sutrisno, *Metode Penelitian Research*, first edition (Yogyakarta: Yayasan Penerbit Fakultas Psikologi UGM, 1997),14.

complementary.³¹ Method, applied in this research, has the character of bibliography and written documentation especially the related books and other written data.

3. Data Sources.

Determination of data source is based on data type which has been determined. At this step is determined primary sources and secondary source, especially the normative-philosophical research is based on source of documents or material readings. Primary sources is fundamental document related to idea of figures about both concepts in the book of *al-Mustaṣfa* as masterpiece of Abū Ḥāmid al-Gazālī and book of *An Introduction to the Principle of Legislation and Morals* as masterpiece of Jeremy Bentham. Secondary data taken away from book that supported the study of this research, either related book to legal philosophy, ethical philosophy, history of philosophy such as *fiqh*, *uṣūl fiqh*, *tarīkh tasyrī'*, etc.

4. Data Analysis.

Basically, data analysis is decomposition of data through few steps: categorization and classification, comparison and seeking away inter-correlation specifically among data about both concepts. At the first phase selects the data which has been collected and then classified according to certain category. In this research, data is classified into two

³¹ Cik Hasan Bisri, *Penuntun Penyusunan Rencana Penelitian dan Penulisan Skripsi Bidang Agama Islam*, first edition, (Jakarta: Raja Grafindo Persada, 2001), 65-66.

types: First phase, ideas of figures (Abū Ḥāmid al-Gazālī and Jeremy Bentham), both types are viewed as result of understanding of source of legal methodologies. Second phase, it is to compare the elements of difference and similarity of the both concepts.

G. Structure of This Bachelor thesis

To get optimal research the exploration has to be conducted gradually and systematically. Writer divides fundamental discussion of this bachelor thesis into five chapters, at each chapter belongs to sub-chapter becoming its detail. As for systematic of discussion is more completely as follow:

Chapter 1; the introduction explains the basic ideas. Activity of this research is based on fact or interested phenomenon such as: 1) Background; 2) the Problems of the study; 3) Objectives and Significances; 4) Literature Review; 5) Theoretical framework; 6) Research Method; 7) Structure of this bachelor thesis.

Chapter II: in this chapter, the writer express generally the concepts of *Maṣlahah* and utilitarianism covered aspect of philosophical epistemology and methodological construction.

Chapter III in this chapter, the writer explores biography Jeremy Bentham: his activity, his masterpieces and his idea about utilitarianism. Also biography of Al-Gazālī: his activity, his masterpieces and his idea about *maṣlahah*.

Chapter IV: comparative analysis: In this chapter writer analyze about *maṣlahah* and utilitarianism according to both figures. The exploration starts from differences and similarities to implication of that concept to welfare of society.

Chapter V: the conclusion: it explores conclusions the comparative study which has been explored, then writers give some suggestions to the academicians and official government.

CHAPTER V: CONCLUSIONS

A. CONCLUSIONS

Concept of Bentham's utility

The fundamental imperative of utilitarianism is: Always act in the way that will produce the greatest amount of good in the world. The enjoyable feeling we experience when a state of deprivation is replaced by fulfillment. Utilitarianism is a morally demanding position for two reasons: It always asks us to do the most, to maximize utility, not to do the minimum. It asks us to set aside personal interest.

Actions are to be judged right or wrong solely in virtue of their consequences. Nothing else matters. Right actions are, simply, those that have the best consequences. For most utilitarians, maximizing intrinsic good means maximizing happiness. We should always do what we can to maximize the overall happiness in the world. This is called *hedonistic utilitarianism*.

Concepts of Maslahah's al-Gazali

Actually law is produced to fulfil fundamental interest of human beings; it has five principles: Religion, life, progeny, Intellect, Property. And *Maṣlahah*, as methodology of law, produce law based on some considerations: fundamental interest; definitive utility; universal needs.

Maṣlahah must not contradict with clear textual evidence, because *Maṣlahah* is to prevent purpose of *shari'ah* where it is understood from al-Qur'an, Sunnah, ijma'. Actions are to judged right or wrong in life of their

theological value. Nothing else matter, right actions, fundamentally, have to be theological legitimacy.

Similarities and differences

In similarities, *Maṣlaḥah* and utility have the same considerations: both offer, in the unqualified context, equally to consent for fulfillment of human interests; both equally, in the world, attain welfare of society as whole. Both try to free from restrains of normative law and political authority. Both are, then, the same in promoting social goodness.

In differences: *maṣlaḥah* and utility have different sources. As we know that *maṣlaḥah* is influenced by religious texts in interpretation of law. Because *Maṣlaḥah* comes from textual tradition. So *Maṣlaḥah* tend to theological nature. Whereas, utility is pure thinking of ethical value, as we understood, religion itself is one of four sanctions of utility. law must be free from restrains of religious, moral, political authority. In the other world, rule must be evaluated by value of utility.

Problems with justice and human rights

Maslahah and utility which provides to establish social welfare can defeat personal interests. In this case, social welfare can be reason to eliminate individual rights and freedom. So it is not compatible with *justice as fairness*. every body, under principle of justice, has basic rights and liberty. By reason “the greatest welfare of society to the number of people”, *maslahah* and utility Practically fall into dictator majority, a mean, majority of muslim

society judge and do intervention to individual rights and minority of society, who has different interests.

B. SUGGETIONS

To know product and concept of law critically, we have to study epistemology of law itself. Because academician have responsibility to criticize and participate in development of law. Hence, before we have obedience to law, we must be study some critical epistemology of law, in order to get knowledge of law which have sense of justice. So writer suggests to academician or advocator to study some epistemology of law, include the concept of *Maṣlahah* and utility.

Writer thinks that *Maṣlahah* and utility is often used as reasons by official government and lawyer to make decision into society. Hence, writer let academician and our official government to study and research as fellow:

1. Study and research *maṣlahah* and utility comprehensively and critically. It conducts us whether law is made by legislator have sense of justice to minority and poor society or not.
2. Analyze the concept of *maṣlahah* and utility in practical, because executer of official government often use reason “the greatest welfare to the greatest society”.
3. Don’t fall into romantic thinking when we study epistemology of knowledge. So we don’t criticize the weakness of that epistemology.
4. It is important to academician to reinterpret, criticize, reformulate, re-actualize *maṣlahah* and utility in legal practice. So we all find

development and enforcement of law having sense of justice and harmony
with changing and growing up of society.



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