The Urgency to Incorporate Maqasid Shari'ah as an Eludication of 'Benefit' as a Purpose of Law in Indonesia's Legal Education

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Abstract: The Indonesian legal system is a religious one. However, there is strong traces of secularism in the legal education in non-Islamic universities. This article observes the teaching of purposes of law in the 'Introduction to Jurisprudence' course (ITJ) at the top law schools in Indonesia, particularly on the 'Purposes of Law' Chapter via the most used textbooks. It finds that there is little space for religiosity there especially on one of the main purposes of law according to all the textbooks: 'utility' primarily based on Jeremy Bentham's utilitarianism theory. It is argued that the current approaches to utility is a secular approach which does not conform to the character of Indonesia. This article argues further that the Maqashid Al-Shari'ah is more appropriate to explain 'utility' in context of the Indonesian legal system, and should take its place among the 'purposes of law' chapter in the Indonesian legal education.

1 INTRODUCTION

Is it not strange when a nation has a religious legal system, but a secular legal education? There is no question that Indonesia is a religious nation. The first pillar of the State Ideology i.e. Pancasila is *Ketuhanan Yang Maha Esa* (Belief in the One and Only God). Further, the entire Pancasila itself was greatly a contribution of the Muslims and Islamic teachings (Rohman, 2013). From such ideology, a religious legal system was established. The 1945 constitution is religious, starting from its preamble (see para 3-4), and key provisions such as Article 29 and 28J. Then, the entire statutory regulations and all legal products and any judicial decisions will always start by mentioning *Ketuhanan Yang Maha Esa*.

This is a manifestation of the character of the Indonesian society which is Religio-Magis. The term religio-magis means that Indonesians are religious and spiritual by nature, and believe in an 'unseen world' and that it affects the material world (Wiranata, 2005). This is a direct contradiction towards secularism which holds a worldview that the material world is all there is (Al-Attas, 1993 dan Cox, 2013). However, secularism is one of the intellectual hegemonies imposed by 'The West' via colonialism (Daud, 2013) with Indonesia as one of the victims.

Centuries of Dutch colonialism eroded the pre-existing established legal traditions in Indonesia including Islamic law (Ramlah, 2012). Although, in time, the Indonesian legal system managed to keep and develop parts of the Islamic tradition in its legal system, as mentioned earlier and further in the establishment of the Religious Court and others such as the Islamic Banking Act etc.

However, the legacy of secularism remains in Indonesia's legal education, and this paper aims to help de-secularize it. This paper observes the Introduction to Jurisprudence (ITJ) course which sets the foundation of law students' understanding of the concept of law, taught at the first semester. A previous study has observed the 'Classification of Norms' chapter and found that it establishes a secular mindset to perceive the law: 'legal norms' and 'religious norms' are separate (Muhammadin and Danusatya, 2018).

Continuing the aforementioned study, this paper explores the 'purposes of law' chapter of ITJ. More particularly, this paper further focuses on the 'purpose to achieve benefit' theories used in the ITJ

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textbooks. It is found that that this, too, inclines towards a secular understanding of law and does not conform to the religious character of the Indonesian society and legal system. As an alternative solution, this paper proposes to include the Maqashid Al-Shari'ah in the 'purpose of law' chapter of ITJ. This inclusion will help conform to the religious character of the Indonesian society and legal system. Hopefully, also, this is one more step towards the de-secularization of Indonesia's legal education.

2 METHOD

This paper uses a literature research, analyzing the purpose of law which involves the nature of law and formulation of legal doctrines. As this paper intends to observe the teaching of the 'purpose of law' chapter in the ITJ course in Indonesian law schools, then the most used textbooks by the top law schools in Indonesia (according to the rankings of the Ministry of Research and Higher Education) would be the object of observation. This paper chooses three textbooks, i.e. *Pengantar Ilmu Hukum* by Sudikno Mertokusumo (Mertokusumo, 2006), *Menguak Tabir Hukum* by Achmad Ali (Ali, 2015), and *Pengantar Ilmu Hukum* by Peter Mahmud Marzuki (Marzuki, 2008), from which to compare from. Other than that, relevant literature will be used as tool to analyze.

3 FINDINGS AND DISCUSSIONS

The idea of 'purpose of law' is to identify what the law is aimed to achieve, so that therefore law would later be understood and interpreted in a way so that it achieves such aim. In the ITJ Course, this is generally taught the same way in different textbooks, albeit some differences in ways of explanation. They all usually come down to three general purposes of law i.e. achieve: justice, benefit, and certainty(Ali, 2015; Marzuki, 2008; Mertokusumo, 2006).

3.1 Purposes of Law in the ITJ Course: Achieving 'Benefit'

This paper focuses more on the second purpose of law i.e. to achieve benefit. The textbooks mostly explain this with Jeremy Bentham's theory of utilitarianism. Sudikno Mertokusumo, for example, argues that the main purpose of law is to achieve order and balance (Mertokusumo, 2006, p. 77) and there are three theories to explain how to achieve that purpose. Utilitarianism is Mertokusumo's second theory on purposes of law (the first theory is 'theory of ethics' or 'justice') (Mertokusumo, 2006, p. 80). He explains generally what utilitarianism is (i.e. to achieve happiness to as much people as possible), then notes how this theory lack balance – albeit not elaborating why he thought so.

The third and last theory on purpose of law according to Mertokusumo, however, is 'combined-theory'. It seems that the purposes of law under this category of theories would combine the two other theories (i.e. justice and utility). Under this third heading, he cites a number of theories: (a) law must achieve order and justice depending on the character and era of the society, and (b) law must achieve interpersonal and intrapersonal peace, and to achieve the purpose of the nation which is to provide happiness and prosperity towards the society (Mertokusumo, 2006).

Peter Mahmud Marzuki proposes four purposes of law: benefit, morality (justice), peace/welfare, and certainty of law (Marzuki, 2008). In explaining utility as a purpose of law, Marzuki relates Bentham's utilitarianism with Weber's high efficiency and productivity as a society's need. He emphasizes how the scholars explain that utilitarianists would see that a legal system is a means towards an effort to increase an efficient allocation of resources (Marzuki, 2008). He notes that, other than to fulfill physical/material needs, law must more importantly fulfil 'human existential' needs (which relates to 'justice' as another purpose of law) (Marzuki, 2008).

Marzuki's third purpose of law is to achieve 'peace/welfare' which can also, to some extent, be categorized as 'benefit' under the scope of this paper. Citing Thomas Hobbes who argues that the purpose of law is to achieve order, Marzuki explains that peace and welfare can be achieved when the law regulates fairly. What he means by 'fair' is that the law regulates all the interests to be protected in a good balance so that everyone can achieve their share as much as possible (Marzuki, 2008).

Achmad Ali explains the theories of purposes of law by categorizing the eras of the theories. The first era is the 'conventional' theories, i.e. ethics (justice), benefit, and normative-dogmatic (certainty of law) (Ali, 2015). Particularly on benefit as purpose of law, Ali is very critical towards utilitarianism. He argues that not all forms of happiness can be accepted because: priorities must be made so that not all happiness are accepted, and that happiness

does not always satisfy the society's sense of justice so it must be balanced also with considerations of justice (Ali, 2015). In essence, according to Ali, utilitarianism cannot stand alone as a purpose of law.

The second era on theories of purposes of law according to Ali is the modern theories. The mod ern theories rely on Gustav Radburch's view that law –at the same time—has three purposes: justice, benefit, and certainty (Ali, 2015) which may be applied in a fixed hierarchy between the three, or no-fixed hierarchy so that different cases may necessitate different priorities. Ali also cites an 'Eastern purpose of law' theory, which holds peace as the main purpose of law. Under this theory, for example, criminalization can be avoided if the victim and perpetrator has managed achieve an amicable settlement (Ali, 2015).

3.2 Man, Polity, Civilization, and Diin

It is very difficult to truly analyse the extent of proper 'benefit' without first exploring the nature of man, polity, and civilization. Surely, it is common sense that any theory of 'benefit' should be consistent with that nature. This subsection in particular explains the collision between two worldviews, i.e. secular and religious, where the fundamental difference in explaining 'benefit' is the position of *diin* or religion.

In secularism, there is no true place for religion. Secularism is not merely a political stance, but an entire worldview which separates the material or empirical world from the metaphysical one and ignoring the relevance of the latter (Al-Attas, 1993; Cox, 2013). This is closely linked with scientism, which is a theory that states that knowledge only (or primarily) is obtained from sensory or empiric experience (Elliot Sober, 2010). This cannot be separated from August Comte's (d.1857) who argues that the most advanced level of man is when he utilizes knowledge only from positively tested through objective verification, free from anything metaphysical (Comte, 1998; Kumar, 2006).

However, as Elliot Sober notes, such a view is always painfully limited to see and analyze what can be observed materially (Elliot Sober, 2010). The truth is that many others exist as a truth beyond empirical and material realities, such as morality and intuition (Johnson, 2013) subjective consciousness (Chalmers, 2010), and others (Tzortzis, 2016). Therefore, secularism will forever be woefully incomplete and lack holistic nature at an epistemological level and includes the same weakness in every knowledge derived from it (Husaini and Kania, 2013). Especially, as will be explained in the following paragraphs, in the position and importance of diin or religion which secularism ignores. Much especially in Indonesia, where scholars have noted the characteristics of the Indonesian people as religio-magis as explained in the introduction of this paper.

Syed Naquib Al-Attas explains that a man exists with a dual nature, where "…he is both a body and soul" (Al-Attas, 1995). The latter clearly being beyond the material realms of reality and beyond what secularism may comprehend or consider. Al-Attas further explains that there are two levels of human souls, i.e. the higher rational soul (al-nafs al-natiqah), and the lower animal soul (al-nafs al-hayawaniyyah), where the former should rule –but not destroy—the latter (Al-Attas, 1993). While the latter inclines to fulfil worldly biological needs, the former inclines to search and worship God intimate relation as a form of spiritual happiness (Al-Attas, 1995).

Therefore, to fulfil the true needs of a man, one must not only fulfil the worldly materialistic needs but also that of the spiritual needs. This is where diin comes in. The word diin is usually translated as 'religion', but the true word covers more than a mere theological concept of God's existence. From the Arabic word al-diin rooting from the trilateral dal-yaa-nuun, numerous interrelated derivative meanings can be found such as 'religion', 'a particular law/statute', 'a way/course/manner of conducting/acting', 'indebted', and so much more (Mukhtār, 2008). And, in fulfilling the human soul inclination to worship God, diin comes with total submission (istislam) to God (Al-Attas, 1995). This show how diin is very central.

When man organizes themselves into a society and inevitably with a political structure, they become a polity. The Arabic term Madinah needs to be discussed here. While the word literally means 'city', where there is a ruler, the word Madinah in Arabic has its roots derived from the word diin as well (the word 'ruler' is also termed as dayyaan which also roots from diin) (Al-Attas, 1995; Faris, 1979). And this is why, as mentioned also in the Introduction, the entire legal system and statutory regulations and other legal products in Indonesia always mentions Ketuhanan Yang Maha Esa.

Further, the ideal goals of a utopian society as a civilization is usually termed as 'civil society'. Indonesia has its own concept of 'civil society' which is borrowed from an Islamic concept called 'masyarakat madani' or Madani society. It must be seen how there is an important relation between man, polity, and civilization here. A man organizes himself into a polity and aspires to advance civilization towards a certain ideal, which is to achieve the 'civil society' or Madani society.

Therefore, there has to be a certain connectivity between all those variables.

The term 'civil society' in the Western concept is secular and therefore does not include the fundamental nature of man, therefore to say that 'civil society' and Madani society are synonymous (as some, like Nurcholis Madjid claim) is incorrect (Alatas, 2010). The word 'Madaani' in Arabic refers to the people of Madinah (at the time of Prophet Muhammad), and –alike the word Madinah—is derived from the root word diin (Manzhur, 1414).

In fact, even the word 'civilization' in Arabic is tamaddun which, also, is derived from the word diin (Al-Attas, 1995). This shows that the concept of an ideal Madani society cannot be merely set by Western standards of tolerance, democracy, and 'nation state' as writers such as Nurcholis Madjid proposes (Alatas, 2010). It has to also include especially the true nature inclination of the human soul to worship his God. All this shows how diin is central and should be at the heart of understanding the nature and need of a man either individually, when organized in a polity, and in viewing the utopian civilization. Diin is the centre of what bonds man, society, and governance as one integral unit (Muhammadin and Danusatya, 2018). No theory of achieving 'benefit' can truly be complete when it does not incorporate diin. Therefore, secularism (and its derivatives), would miss out on a very important element.

3.3 Maqashid Al-Shari'ah as a Purpose of Law

In Islamic Jurisprudence or Uîul al-Fiqh, *Maqashid Al-Shari'ah* is one of the legal theories to understand the law from a purposiveness perspective. The general idea is that the *Al-Shariʿah* (or God's rules) has certain aims and purposes (*maqasid*) which is to realize benefit or interest of the people (*maslaha*), essentially by promoting benefit and removing harm (Ali, 2014, p. 517; Ismail, 2014, pp. 5–6). Therefore, *maslaha* becomes the *'illah* (cause) of legal rules. This far, *Maqashid Al-Shari'ah* may seem to serve a similar purpose to utilitarianism. However, the approach it takes would be different.

Ibn Ashur defines Maqashid Al-Shari'ah as the purposes (al-ma'ani) and wisdoms (al-hikam) considered by the Lawgiver in all or most of the areas and circumstances of legislation, which are not confined to a particular type of the Maqashid Al-Shari'ah commands (Ashur, 2006). 'Alim uses term 'hadf' that he means Maqashid Al-Shari'ah purposes (maqasiduha) which are to be achieved by legislation of the rules/laws in the form of masalih (benefits/welfares) for humankind both in this world and the hereafter either by the way of promoting benefits and removing harm (Alim, 1994). Ibn Abd al-Salam relates maslaha with the obtaining enjoyments (al-ladzzah) and happiness (al-afrah) in here and the hereafter (Abdal-Salam, 1994).

The Maqashid Al-Shari'ah divides maslahat into two categories, i.e. benefits of the hereafter and benefits of the world, further divided into five essentials i.e. in order of preference: preservation of religion, life, reason, progeny and property (Al-Atawneh, 2011; Al-Ghazali, 1971; Al-Shatibi, 1997). On the five essentials, there is a discourse on whether or not the essentials are limited to those five. Some scholars like Ibn Taymiyyah, Al-Qarafi, Al-Qardhawi, and others, argue that there could be more than five, such as preservation of honor, fulfilment of trustworthiness, justice, and others (Attia, 2008; Duderija, 2014; Zahrah, 1957). On the other hand, other scholars such as Imam Ghazali, Fakhr al-Din al-Razi, al-Āmadi, and Imam Shatibi limit the scope of maqasid in five essentials (Attia, 2008), so that everything else are actually derivatives of the five essentials.

Maslaha is further put into three levels, which are: imminent necessities (al-dharurat), ordinary necessities (al-hajat) and luxuries (al-tahsiniyat), considered together with the order of the five essentials (Munir, 2017; Naim, 2016). Also, there is a division between individual and collective necessities. With all these classifications, the different classifications and levels would interact with each other, sometimes necessitating preference of one over the other depending on the situation (Nyazee, 2003). This is how Maqashid Al-Shari'ah operates as a cause of the law in achieving benefit.

However, within all the aforementioned classifications of essentials, scholars generally agree that the preservation of religion (hifz al-din) is the most paramount and is the soul of the other essentials, despite differences in how they are elaborated in concept and application (Al-Ghazali, 1971; Naim, 2016; Nyazee, 2003). After all, the general idea of maslaha is guided by the Al-Shariʿah (God's law, i.e. the Qur'an and Sunnah), and anything against it is rejected (Al-Ghazāli, 1324). This is because, in the worldview of Islam, true success is achieving paradise in the hereafter (Quran, 3: 185). It is also important to also live well in the world (Quran, 67:15), while making the world as a means to achieve paradise (Al-Jawziyah, 2010).

3.4 Maqasid al-Shari'ah vs Utility in the ITJ Course

Utilitarianism is a theory attributed to the English jurist and philosopher Jeremy Bentham (1748-1832), and is one of the widely used theory on purpose of law. Bentham believed that all systems – legal systems included—should be evaluated with the principle of utility which obeys three axioms: 1) The society's interest in the sum of the interests of the members of society; 2) That every man is the best judge of his own interest; 3) and that every man's capacity of happiness as a great as any other's (Eldin, 2013). To Bentham, the purpose of the law is the law can give a guarantee of happiness to new individuals of people, as his 'fundamental axiom' dictates: "It is the greatest happiness of the greatest number that is the measure of right and wrong" (Bentham, 1977; Burns, 2005)

The main problem with Bentham's theory roots even as deep as his own axioms. For example, axiom 2 (every man is the best judge of his own interest) – which is a popular assumption by much of the common-folk—is clearly based on empiricism. After all, it is hard to find anyone experiencing about a person more than her/himself. It has been explained in Section III.B how empiricism is a very limited perspective, unable to consider the metaphysical reality which is a fundamental part of man. Yet, this is expected of Bentham as an atheist and as secular positivist who felt very strongly against religion and believed it to be an enemy to human happiness (Crimmins, 1986).

This is not to mention how it is difficult to truly compare the happiness of different unique individuals (Veenhoven, 2010), especially how the empiric method cannot observe the subjective consciousness as also touched in Subsection B, where the experience of happiness lies. In fact, happiness is truly a religious-spiritual experience therefore a mere empiric approach to it can never touch its essence (Al-Attas, 1995). As explained in Section III.B also, the higher soul of a man can only be satisfied when it fulfills its purpose to worship her/his God.

Therefore, utilitarianism can never ultimately fulfill the benefits towards the society which it promises. It does not provide the apparatus required to consider the need of God, much less towards a society which its character and legal system puts the belief in God on the highest and fundamental esteem like Indonesia. On the contrary, the *Maqashid Al-Shari'ah* does put *hifz al-diin* as an important apparatus which is the most primary one and is the soul of other essentials of the law. It provides the instrument from which to apply religious spirituality in understanding and applying the law towards a religious society, which utilitarianism can never do (Setia, 2016).

The aforementioned is a direct display of compatibility of the *Maqashid Al-Shari'ah* towards the soul of the Indonesian society legal system. There is a reason why it is *Ketuhanan Yang Maha Esa* which is the first pillar of Pancasila, and always mentioned at the header of all products of law. The main religious organizations, such as Nahdlatul Ulama in their *Deklarasi tentang Hubungan Pancasila dengan Islam* Scholars have even argued that Pancasila, which is the state ideology and source of all sources of law, is essentially a contemporary application of the *Maqashid Al-Shari'ah* (Acac, 2015).

In terms of morality, Bentham's theory is value-neutral and knows no other indicator but pleasure and happiness versus pain and displeasure caused to others while sanctioning legislation and criminalization (Bentham, 2000). This train of thought will only result in a subjective morality meaning that there is no absolute truth (Arif, 2016), and the ignorance towards true objective and a universal morality. This means that numerous immoralities may be lawful if the people like it. Such a train of thought is acceptable under utilitarianism, while a people who believe that there are universal and objective moral issues will not agree with this. Minority opinions are subjugated merely by virtue of being a minority and utilitarianism justifies this.

On the contrary, *Maqashid Al-Shari'ah* answers this problem. The belief in God leads to a universal objective morality and makes it epistemologically possible. When Euthyphro's dilemma "Is something morally good because God commands it, or does God command it because it is morally good?" (the former: is God therefore a tyrant? The latter: is there a higher law binding God –thus He isn't 'Almighty') is settled by the Islamic response: God, as a defining character of Himself and His commands, is good (Akhtar, 2008; Tzortzis, 2016). Through *hifz al-diin,* universal objective morality originating from God as believed by the religious society can be introduced in legal reasoning in understanding the laws.

With utilitarianism, the jurist cannot truly understand or accommodate religiosity in religion-based laws. A true testament to this is the debate concerning the religious blasphemy laws. In the Indonesian Constitutional Court Judgment No. 84/PUU-X/2012, para 3.13 displayed a very utilitarian response of the Judges to justify criminalizing religious blasphemy, i.e. decriminalizing it may cause social disorder (Crouch, 2011). While the court's view may not be entirely incorrect, it does not truly capture the true

purpose of the blasphemy laws. Further, an equally secular view would then respond that this is the character backwards society as per Comte's law of three stages which puts religiosity as the most primordial stage of man (Comte, 1998). Note also that Bentham's student and fellow utilitarianist John Stuart Mill seems to agree with Comte on this (Kumar, 2006). Such view was actually sounded by the Office of the United Nations High Commissioner for Human Rights in response to the Jakarta Governor blasphemy case in 2017 (OHCHR, 2017). This is not an explanation that befits the true nature of blasphemy laws and its place in a religious society.

Even further, Mills' harm principle dictates that criminalization can only be done when there is harm towards another person (Gray, 1996, p. 3). Thus, this principle in addition to the secular ideology limits criminalization only to 'concrete' and 'tangible' materialistic reasons for criminalization. This does not fare well in the Indonesian ideology and legal system. However, the *Maqashid Al-Shari'ah* provides the proper apparatus to explain blasphemy laws better. With *hifz al-diin* as an essential, the concept of *ghirah* and can be introduced in context of law. *Ghirah* is a sense of self-respect and honour, from which without *ghirah* towards the religion a man is as if without religion (Al-Jawziyah, 1997). *Ghirah* towards the religion means that one's heart and soul will, by nature, be angry when the religion is disrespected (Quthb, 2002), not too dissimilar with the offense taken when one's nation's pride is insulted. In context of Islam, blasphemy is a sign of *kufr* (disbelief) and dishonours the basis of the religion which is to glorify God (As-Sa'di, 2002). Unlike the case of utilitarianism, concrete or material damage caused are not required. The damage, if one were to assume to be any, is immaterial and is on the level of values. Meanwhile, among the essences of secularism (which utilitarianism is based on) are the desacralization and the deconsecration of values (Al-Attas, 1993).

Further, Bentham's concept of rewards for 'moral acts' (i.e. inflicting happiness and pleasure) seems to only include personal satisfaction (which ceases upon death), and the commemorations by fellow citizens and future generations (which the person does not experience) (Crimmins, 1986). This means that true happiness which can be experienced as a reward for 'moral acts' are very limited within Bentham's own logic which, as he claims himself, is based on happiness.

Clearly, *Maqashid Al-Shari'ah* provides better by recognizing rewards of the hereafter. Islam teaches that deeds can be good despite being unpleasant, as stated in the Qur'an in 2: 216 "…But perhaps you hate a thing and it is good for you …. And Allah Knows, while you know not..". The verse speaks of *jihad,* but similarly there are many deeds which seem to be unpleasant but very virtuous (e.g. charity, sacrifice, *etc*) which are important in a society but utilitarianism provides no incentive for it as it recognizes no hereafter.

While Islam is the majority religion in Indonesia, all religions seem to believe in some form of hereafter and the relevance of this material life to achieve it. This is the *religio-magis* character of the Indonesian society in general, where *diin* is central in shaping a man, polity, and civilization. How curious is it to not teach and utilize any theories that do incorporates *diin,* and instead teaches and utilizes a theory that has no place for *diin*?

4 CONCLUSION

While utilitarianism is the central theory used to explain benefit-related purposes of law as elaborated in Section III.A, it fails to capture the most essential part of man. This essential part of man is religion or *diin,* which is the connecting point between man, polity, and civilization. Therefore, at best, maybe ITJ can refer to it as a mere historical or comparative view. However, utilitarianism should not be taught as a main theory to explain benefit as a purpose of law. On the other hand, the *Maqashid Al-Shari'ah* is the more appropriate theory to explain benefit as a purpose of law. While it is also a theory to explain human necessity as a purpose and cause of law, it recognizes *diin* as the central and most important soul. This is the tool needed by jurists to interpret and apply the law in accordance with the spirit and values of the Indonesian ideology. There are all the reasons to include this theory in the ITJ textbooks as a main theory to explain benefit as a purpose of law.

Indonesia is not an Islamic State and not all Indonesians are Muslims (albeit an overwhelming majority). However, it is clear that the belief in God and Islam –to some extent—is an integral part of the fabric of the society and legal system. If scholars saw it fit to transplant much of the Dutch legal systems and relevant principles into the legal system and education, it should be even more appropriate to transplant Islamic legal principles and theories. More so when these Islamic teachings, in this case the *Maqashid Al-Shari'ah,* explains and helps understand the law better within the paradigm of the Indonesian value.

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