

Maqashid Al-Syari'ah And Legal Maxims (Qawa'id Al-Fiqhiyyah) As Source Of Medical Action

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Abstract

Tulisan ini bermaksud menjelaskan tentang maqashid al-syari'ah dan qawa'id al-fiqhiyyah sebagai sumber dan pedoman dalam tindakan medis. Maqashid al-syari'ah adalah tujuan sebuah pensyari'atan yang tidak lain adalah untuk mencapai kebaikan (mashlahah) di dunia dan akherat. Kemashlahatan manusia akan tercapai dengan memperhatikan lima hal pokok (*ushul al-khomsah*), yaitu penjagaan terhadap agama (*hifdz al-din*), penjagaan terhadap jiwa (*hifdz al-nafs*), penjagaan terhadap keturunan (*hifdz al-nasl*), penjagaan terhadap akal (*hifdz al-aql*), dan penjagaan terhadap harta benda (*hifdz al-mal*). Tindakan medis ketika menghadapi sebuah dilemma dan “kebingungan” menentukan suatu nilai tindakan, maka dapat merujuk kepada prinsip maqashid al-syari'ah ini, yaitu kemashlahatan. Perbuatan mana yang mengandung kemashlahatan atau kemashlahatannya lebih banyak atau kemashlahatan yang sesuai dengan syari'at, maka itulah yang dipilih. Lebih lanjut, dalam implementasi teori maqashid al-syari'ah, tindakan medis juga bisa merujuk pada kaidah-kaidah jadi yang diambil dari al-Qur'an, al-Sunnah, yang disebut dengan kaidah fiqh (*qawa'id al-fiqhiyyah*). Ada lima kaidah dasar fiqh yang disepakati ulama, yaitu “segala sesuatu tergantung niatnya” (*Al-umuru bi-maqasidiha*), “bahaya itu harus dihilangkan” (*Ad-dararu yuzal*) keyakinan tidak dapat dikalahkan dengan keraguan (*Al-yaqinu la yazulu bish-shakk*), kesulitan dapat menarik kemudahan (*Al-mashaqqatu tajlib al-taysir*), dan kebiasaan itu menjadi sebuah hukum. (*Al-'addatu muhakkamatun*).

Key words: maqashid al-syari'ah, mashlahah, and qawa'id fiqhiyyah.

A. Introduction

Islamic Law is comprehensive being a combination of moral and positive laws. It can easily resolve ethical problems that secularized law, lacking a moral religious component, cannot solve. Many contemporary ethical issues in medicine are moral in nature and require moral guidance that can be provided only from religion. The Law is the expression and practical manifestation of morality. It automatically bans all immoral actions as *haram* and automatically permits all what is moral or is not specifically defined as *haram*. The approach to ethics is a mixture of the fixed absolute and the variable. The fixed and absolute sets parameters of what is moral. Within these parameters, consensus can be reached on specific moral issues. Ethical theories and principles are derived from the basic Law but the detailed applications require further *ijtihad* by physicians.² Islam has a parsimonious and rigorously

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² Omar Hasan Kasule, *Medical Ethico-Legal Issues: An Islamic Perspective*, Presented article at a training workshop on medical ethics at Nairobi on 26th July 2008.

defined ethical theory of Islam based on the 5 purposes of the *maqasid al shari'ah* (mashlahah) and its level. The five purpose are preservation of religion (*hifdz al-din*), preservation of life (*hifdz al-nafs*), preservation of progeny (*hifdz al-nasl*), preservation of intellect (*hifdz al-aqli*), and preservation of wealth (*hifdz al-mal*). The level of *maqasid al shari'ah* (mashlahah) are *mashlahah mu'tabarah*, *mashlahah mursalah*, and *mashlahah mulghah*. Any medical action must fulfill one of the above purposes if it is to be considered ethical. Another principle can be used in medical action is Legal maxims (*qawa'id al-fiqhiyah*), which contains five general principles, are “Harm must be eliminated” (*Ad-dararu yuzal*) and “Acts are judged by the intention behind them” (*Al-umuru bi-maqasidiha*) “Certainty is not overruled by doubt” (*Al-yaqinu la yazulu bish-shakk*), “Hardship begets facility” (*Al-mashaqqatu tujlab at-taysir*), and “Custom is the basis of judgement” (*Al-addatu muhakkamatun*).

B. Maqashid al-Syari'ah (Maslahah) as a Guide in Bioethic Problems

The term ‘maqashid’ (plural: maqāshid) refers to a purpose, objective, principle, intent, goal, end, telos (Greek), finalité (French), or Zweck (German). Maqāshid of the Islamic law are the objectives/purposes/intents/ends/principles behind the Islamic rulings. For a number of Islamic legal theorists, it is an alternative expression to people’s ‘interests’ (mashālih). For example Al-Qarafi linked mashlahah and maqashid by a ‘fundamental rule’ that stated: ‘A purpose (maqashid) is not valid unless it leads to the fulfilment of some good (mashlahah) or the avoidance of some mischief (mafsadah). Therefore, a maqashid, purpose, objective, principle, intent, goal, end, or principle in the Islamic law is there for the ‘interest of humanity.’³

Literally, *maslahah* means ‘benefit’ or ‘interest’, ‘welfare’, or ‘advantage’; or (المنفعة) in Arabic. Within the range of *usul al-fiqh*, the *masalih* (plural of *maslahah*) are considered to be of three broad categories, from the viewpoint of the availability of any textual reference.⁴

Not surprisingly, the *usulists* have read many meanings into this simple word and have consequently defined it in several ways. Al-Shatibi, for instance, defines *maslaha* as "all that concerns or promotes the subsistence of human life, the completion of man's livelihood, and the acquisition of all that his physical and intellectual qualities require of

³ Jaser Audah, *Maqashid al-Syari'ah as Principle of Islamic Legal theory* (New York), 1.

⁴ M. Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic text society, 2003), 351.

him.⁵ Moreover, al- Ghazali (d. 550/1111), a Shafi'i jurist, offers a stricter meaning by defining it as an expression that denotes the quest for *manfa'ah* (the useful) and the removal of *madarraḥ* (the harmful) with the aim of preserving *maqasid al-syari'ah* (the objectives of the law).⁶ These objectives consist of five essential values, namely: religion, life, intellect, lineage and property. Hence, any measure that protects these values falls under the scope of *maslaha*, and anything that violates it is considered *mafsadah*. Thus, by stipulating that the *maslaha* must align itself with the objectives of the *Shari'ah*, al-Ghazali seems to confine the role of human choice to the more solution of judicial problems.⁷

The concept of *maslaha* are classified into three categories. They are the *darūriyyat* (essential),⁸ *hajiyyat* (appropriate)⁹ and *tahsiniyyat* (embellishments).¹⁰ All the rulings in the *Shari'ah* aim at the realization of these *maslaha*, according to their degree of importance. Hence, the *dharūriyyat* stand in the foremost position since people's lives depend upon them, and since their abandonment will ultimately lead to hardship. As such, this kind of *maslaha* should be protected against any real or unexpected threat that may undermine its position.¹¹

Necessities (*daruriyyat*) are further classified into preservation of religion (*hifdz al-din*), preservation of life (*hifdz al-nafs*), preservation of progeny (*hifdz al-nasl*), preservation of intellect (*hifdz al-aqli*), and preservation of wealth (*hifdz al-mal*). These necessities were considered essential matters for human life itself. There is also a general agreement that the preservation of these necessities is the 'objective behind any revealed law,' not just the Islamic law.¹²

⁵ Abū Ishaq al-Shatibi, *Al-Muwafaqat fi Usul al-Ahkam*, 4 Vols. (Cairo: Matba'at al-Madani), II, p.16-17

⁶ Muhammad Ma'ruf ad-Dawalibi, *al-Madkhal Ila Ilmi al-usul al-Fiqh* (T.t.p: Dar al_kutub al-Jadid, 1965), p.409

⁷ Abū Hamid Muhammad b. Muhammad al-Ghazali, *Al-Mustasfi min 'Ilm al-Usul*, 2 Vols. (Beirut: Dar 'Ulum), I, p. 286-7.

⁸ defined as meaning 'those things which are necessary for the establishment of the benefits and interests in both religious and worldly affairs, an absence of which leads to a disordered and incomplete life.' These *darooriyaat* are essential for the perfection of life in this world and the hereafter. In short these essentials are: *ad-Deen* (Religion), *al-Nafs* (Life), *al-'Aql* (Intellect), *an-Nasl* and *an-Nasab* (Lineage), *al-Maal* (Wealth), *al-Hurriyah* (Freedom) – Added as a sixth essential by some scholars of *Maqasid*

⁹ Translated as the "needs," and defined as meaning 'those things which are needed for the protection, establishment and execution of the *darooriyaat*. They are those things which are not prescribed in isolation, rather in support of the essentials'.

¹⁰ Translated as the "embellishments," and defined as meaning 'those things which help in the completion of the essentials and whose presence is more preferable than their absence'.

¹¹ Al-Syatibi, *al-Muwafaqat*, p. 4-9.

¹² Muhammad Thohir Ibnu Asur, *Maqasid al-Syariat al-Islamiyat*, (Tunisia: Al-Syirkah Tunisiyah, 1978), hal. 13; Musthofa Zaid, *al-Maslahat fi Tasyri' al-Islami wa Najmuddin al-Thufi*, (Mesir: Dar al-Fikr al-Arabi, 1958), p. 23-25.

In the second place, stand the *hajiyat* which complement the existence of the *Masalih dharuriyah*. The last *masalih* are the *tahsiniyyah* which are also known as *kamaliyyah* (complementary), and which aim at the embellishment of people's lives. They include noble habits, ethical concepts and morality.¹³ So, in conclusion we can say that the *haajiyaat* and the *tahseeniyaat* aid the establishment of the *darooriyaat* which are the essential foundations for an ordered, civilised and successful life both in this world and the hereafter.¹⁴

The concept of *mashlahah* also are classified into *mashlahah mu'tabarah*, *mashlahah mulghah*, and *mashlahah mursalah*. *Al-mashlahah al-mu'tabarah* or benefits acknowledged by the Shari'ah are those which are vividly expressed in the Shari'ah texts, and approved its benefits. As examples, the commandment for Jihad, which is aimed to safeguard the *Deen*; and the provision of *qisas* (retaliation for murder), which aims to protect human lives; and the punishment prescribed for adultery and slander, which are to protect human dignity; the *ibadah* of *salat* (prayers) protects one from the lewdness and iniquity, are mentionable. These benefits, even if not mentioned in the texts explicitly, are deduced with analogical reasoning.¹⁵

On the other hand, *al-masalih al-mulghat* or the benefits which are rejected are also clearly mentioned in the texts, and that are disapproved in the Shari'ah. Examples can be drawn from the verse of inheritance, which prescribes that generally the share of a male (son) is as double the share of a female (sister). Though it seems to have been beneficial to provide equal shares for both parties, Almighty Allah with His profound knowledge has rejected that benefit for a greater benefit. Similarly, transactions with *riba* (interest, sometimes also used for 'usury') are also prohibited despite the fact that *riba* enables one to make profit.¹⁶

The point of discussion here, *al-masalih al-mursalah*, are those benefits which are neither mentioned explicitly in favour, nor denied outright in the textual scriptures. In a clearer definition, Khallaf mentions it as "The benefits which the lawgiver did not impose as

¹³ Muhammad Mushthafa Syalabi, *Ushul Fiqh al-Islami* (Beirut: Dar al-Nahdhah al-Arabiyyah, 1986), p. 286.

¹⁴ Abd al-Razzaq al-Sanhuri, "Wujub Tanqih al-Qânun al-Madani al-Mishri", in *Majallat al-Qânun wa al-Iqtishâd*, jilid. 6 (1963). P. 3-144

¹⁵ Muhammad Said Romdon al-Buti, *Dawabit al-Maslahat fi al-Syariat al-Islamiyyat*, (Beirut: Muassasah Risalah, 1997), p. 21; Fahr Al-Rud Al-Din Muhammad bin Umar bin Husein Al-Rozi, *Al-Mahsul fi Ilm al-Usul*, (Beirut: Dar Ilmiyyat, 1998); Muhammad Kamal Al-Din Imam, *Usul al-Fiqh Al-Islamy*, (Iskandariyah: Al-Jamiat, tt), p. 203

¹⁶ Mushthafâ al-Syalabi, *Ta'lîl al-Ahkâm: 'Ardl wa Tahlîl li al-Tharîqah al-Ta'lîl wa Tathowwuratiha fi Ushûl al-Ijtihâd wa al-Taqlîd* (Kairo: Azhar, 1949), 278-384.

a rule to be implemented, and neither there is any textual indication acknowledging it nor rejecting it.”¹⁷

Further, Theory of *maqashid al-syari’ah (mashlahah)* can be applied in the case of medicine. *First*, preservation of religion (*hifdz al-din*). Essentially involves *ibadat* in the wide sense that every human endeavor is a form of *ibadat*. Thus medical treatment makes a direct contribution to ‘*ibadat*’ by protecting and promoting good health so that the worshipper will have the energy to undertake all the responsibilities of *ibadat*. *Second*, preservation of life (*hifdz al-nafs*). The primary purpose of medicine is to fulfill the preservation of life, *hifdh al-nafs*. Medicine tries to maintain as high a quality of life until the appointed time of death arrives. Medicine contributes to the preservation and continuation of life by making sure that physiological functions are maintained. Medical knowledge is used in the prevention of disease that impairs human health. Disease treatment and rehabilitation lead to better quality health. *Third*, preservation of progeny (*hifdz al-nasl*). Medicine contributes to the fulfillment of the progeny function by making sure that children are cared for well so that they grow into healthy adults who can bear children. Treatment of infertility ensures successful child bearing. The care for the pregnant woman, peri-natal medicine, and pediatric medicine all ensure that children are born and grow healthy. Intra-partum care, infant and child care ensure survival of healthy children. *Fourth*, preservation of intellect (*hifdz al-aqli*). Medical treatment plays a very important role in protection of the mind. Treatment of physical illnesses removes stress that affects the mental state. Treatment of neuroses and psychoses restores intellectual and emotional functions. Medical treatment of alcohol and drug abuse prevents deterioration of the intellect. *Fifth*, preservation of wealth (*hifdz al-mal*). The wealth of any community depends on the productive activities of its healthy citizens. Medicine contributes to wealth generation by prevention of disease, promotion of health, and treatment of any diseases and their sequelae. Communities with general poor health are less productive than healthy vibrant communities. The principles of protection of life and protection of wealth may conflict in cases of terminal illness. Care for the terminally ill consumes a lot of resources that could have been used to treat other persons with treatable conditions.¹⁸

The next implementation of *maqashid*, for example can be used in answering of In vivo insemination case. Artificial intra-uterine insemination with husband’s sperm, *talqiih sina’i dhaati* is permitted by the Law provided safeguards are taken to ensure that spermatozoa do not get mixed up in the laboratory or the clinic. The Law prohibits artificial

¹⁷ Wahbah al-Zuhaili, *Usul al-Fiqh al-Islami*, (Beirut: Dar al-Fikr, tt), p. 762

¹⁸ Omar Hasan Kasule, *Medical Ethico-Legal Issues*: 3.

in vivo insemination of a wife with donated sperm from a strange man or in vivo insemination of a strange woman with the husband's sperm because that would violate the principle of preserving lineage, (*hifdz al –nasab*).¹⁹

C. Islamic Legal Maxims (*al-qawa'id al-fiqhiyyah*) and Medical Action.

Legal maxims (*qawa'id al-fiqhiyyah*) are theoretical abstractions, usually in the form of short epithetical statements, that are expressive, often in a few words, of the goals and objectives of the *Shari'ah*. This is so much so that many '*ulama* (scholars) have treated them as a branch of the *maqasid* (goals and objectives) literature. The legal maxims of *fiqh* are statements of principles that are derived from the detailed reading of the rules of *fiqh* on various themes. The *fiqh* has generally been developed by individual jurists in relation to particular themes and issues in the course of history and differs, in this sense, from modern statutory rules which are concise and devoid of detail. The detailed expositions of *fiqh* enabled the jurists, at a later stage of development, to reduce them into abstract statements of principles. Legal maxims represent, in many ways, the apex of cumulative progress, which could not have been expected to take place at the formative stages of the development of *fiqh*. The actual wordings of the maxims are occasionally taken from the *Qur'an* or *Ahadith* but are more often the work of leading jurists and *mujtahids* that have subsequently been refined by others throughout the ages. It has often been a matter of currency and usage that the wordings of certain maxims are taken to greater refinement and perfection.²⁰

According to Jalaludin al-Suyuthi in *Asybah Wa Nadhair*, there are five general principles of legal maxims. *First*, Acts are judged by the intention behind them (*al-umur bi-maqasidiha*). This principle was taken from the hadis "innama al-a'malu bi al-niyat". *Second*, "Certainty is not overruled by doubt" (*Al-yaqinu la yazulu bish-shakk*). *Third*, Harm must be eliminated" (*Ad-dararu yuzal*). Islamic Law completely forbids that which causes harm. That which is harmful must be completely avoided whenever possible. When it is not possible, then the lesser of two evils should be perpetrated to avoid the greater. That which brings harm on a smaller scale is to be preferred to that which visits general harm to society. Likewise, the avoidance of harm takes priority over the attainment of some benefit. *Fourth* "Hardship begets facility" (*Al-mashaqqatu tajlib al-taysir*). This principle embodies the fact that Islamic Law is built upon achieving ease and not upon imposing

¹⁹ Ibid.

²⁰ Mohammad Hashim Kamali, *Qawa'id al-Fiqhiyyah: The Legal Maxims of Islamic Law*, article in Amal Journal, International Institute of Advance Islamic Studies, Malaysia.

hardships. Whenever difficulties present themselves, the Law makes provisions to facilitate matters. The condition for such measures to be taken is that the difficulties are real and not imagined. *Fifth*, “Custom is the basis of judgement” (*Al-‘addatu muhakkamatun*). The principle that customary usage is the determining factor basically means that the customs of the people are recognized and acknowledged by Islamic Law as long as certain conditions are met. The most important of these conditions is that the custom in question does not violate the dictates of the sacred texts. Another is that the custom is indeed the prevailing practice in society and is applied in that society on a consistent basis. The third condition is that the custom must have been in effect at the time when a given activity was initially entered into without there having been any clear expression on the part of the concerned parties indicating something to the contrary. Finally, the custom must be of a nature that its application can be considered binding on the parties concerned.²¹

All Principles can be applied in many cases of medical action, like reproductive technology (assisted reproduction, contraception, abortion, sex selection, and genetic testing), end of life issues (artificial life support, euthanasia), transplantation (stem cells and solid organs), cosmetic and reconstructive surgery, post-mortem issues (embalming, cryopreservation, and autopsy). For example the principle of Hardship begets facility” (*Al-mashaqqatu tajlib al-taysir*) can be used by doctor in seeing aurat of patient. The benefit of medical care takes precedence over preventing the harm inherent in uncovering aurat. When it is necessary to uncover aurat, no more than what is absolutely necessary should be uncovered.

D. Conclusion

Many contemporary ethical issues in medicine are moral in nature and require moral guidance that can be provided only from religion. Islam as religion, has five purposes of the *maqasid al shari’ah* (mashlahah). The five purpose are preservation of religion (*hifdz al-din*), preservation of life (*hifdz al-nafs*), preservation of progeny (*hifdz al-nasl*), preservation of intellect (*hifdz al-aqli*), and preservation of wealth (*hifdz al-mal*). This maqashid can be used as ethic source of medical action. Every medical action must fulfill one of the above purposes if it is to be considered ethical. Another principle can be used in medical action is Legal maxims (*qawa’id al-fiqhiyah*), which contains five general principles, are “Harm must be eliminated” (*Ad-dararu yuzal*) and “Acts are judged by the intention behind them” (*Al-umuru*

²¹ Jalal al-Din al-Suyuthi, *al-Asybah wa Nadza’ir*, (Beirut: Dar al-Fikr, tt).

bi-maqasidiha) “Certainty is not overruled by doubt” (*Al-yaqinu la yazulu bish-shakk*), “Hardship begets facility” (*Al-mashaqqatu tujlab at-taysir*), and “Custom is the basis of judgement” (*Al-‘addatu muhakkamatun*).

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