Maqasid al-Shariah as a Parameter for Islamic Countries in Screening International Treaties Before Ratification: An Analysis

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ABSTRACT

Research into *Maqasid al-Shariah* (objectives of Islamic Law) has been conducted since the era of al-Juwaini and al-Ghazali. Islamic scholars today try to accommodate the application of *Maqasid al-Shariah* in a plethora of complex and complicated issues. Generally, the essence of *Maqasid al-Shariah* is to avoid evil and uphold public interest. *Maqasid al-Shariah* is important because the law or rules (*hukm*) will only be effective among Muslims and acceptable in the eyes of God if they are made within the purview of *Maqasid al-Shariah*. As members of the modern world community, it is inevitable that Islamic countries will need to participate in international treaties. However, there are several provisions in international treaties that may not commensurate with *Maqasid al-Shariah*. Islamic countries that tend to uphold the principles of *Shariah* have to ensure that every law, including international treaties, observes the principles of *Maqasid al-Shariah* in order to make such laws effective and acceptable as mentioned above. This paper, therefore, aims to analyse the essence of *Maqasid al-Shariah* and use it as a parameter for Islamic countries to participate in international treaties. This parameter can be a guideline for Islamic countries as to whether to consent, reserve or object to provisions in international treaties.

Keywords: *Maqasid al-Shariah*, parameter, public interest, consent to be bound, international treaties

INTRODUCTION

The substance of law is not a simple word without spirit. There is always wisdom behind the law that needs to be dug out and observed. Any law is made with the purpose to be served. Likewise, Islamic law is also fuelled by its objective to be achieved by...
the human being and blessed by Allah (S.W.T). Some of the divine regulations are comprehended through their objectives, such as the implementation of Zakah with its objective to help the poor and needy. However, other regulations require deep thinking to understand their objective, such as the prohibition against eating pork and the wearing of gold by men. The effort of Islamic scholars has enabled us to recognise certain objectives of these divine injunctions as intended by the lawgiver. We also have to bear in mind that there are some divine rules whose objectives will remain incomprehensible to us, for example, the question of the number of rakaat in obligatory daily prayers. The objective of Islamic law (known as Maqasid al-Shariah) is a very important subject in the eyes of Islamic scholars in understanding and studying legal texts. They have even deduced some indispensable objectives attached to the divine sanction, and these objectives have been imperative parameters for their issuing of legal decrees through ijtihad. In addition, these objectives also could be the parameters, not only for the individual scholar, but for the government in drafting national and international policy. By observing Maqasid al-Shariah, the government of Malaysia may protect the interests of Islam as a religion of the Federation (as stated in Article 3 of the Federal Constitution) and Muslims as the core and dominant citizens.

Maqasid al-Shariah as a Parameter

The term Maqasid al-Shariah is derived from two Arabic words, which are maqasid and al-shariah. Maqasid is a plural word which means ‘aims’ (Majma’, 2004), ‘purposes’ or ‘goals’ (Jasser, 2008). Therefore, al-Shariah refers to what is prescribed by Allah S.W.T for His creation in the form of religious duty. When the words maqasid and al-Shariah are combined the term connotes whatever objectives that are aimed to be achieved by the Al-Quran and al-Sunnah through instructions, prohibitions and permissions (al-Qaradhawi, 2012).

There are three phenomenal types of Maqasid al-Shariah as introduced by Imam al-Haramayn al-Juwayni (Muhammad, 2007), which are al-Maqasid al-Dhoruriyyah (the essential objectives), al-Maqasid al-Hajiyyah (the complementary objectives) and al-Maqasid al-Tahsiniyyah (the embellishment objectives). This categorisation is unequivocally embraced and accepted by Muslim jurists and has become the focal point for them in discussing Maqasid al-Shariah. ‘Essential objectives’ refers to the aims that are to be achieved for the religious and material well-being of individuals where otherwise life would be chaotic and destructive in this world and the hereafter. ‘Complementary objectives’ refers to the aims to remove hardship and severity in life, where such hardship and severity are not to the extent of turning life chaotic and destructive. The last type refers to beautifying and refining the customs and conduct of the people.

Furthermore, according to Imam al-Ghazali, Maqasid al-Shariah revolves around five principles or objectives, namely, protection of religion, life, intellect, lineage
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and property (Muhammad, 2007). Some quarters have said that these objectives are the extended categorisation for the Maqasid al-Dhoruriyyah while others have said that these five principles are actually the methodology to find and establish the Maqasid al-Dhoruriyyah.

The said five principles are critically and widely examined by classical and contemporary scholars, who have stated that the principles are not exhaustive as there are many essential (dhoruriyyah) aspects that need to be protected as an integral part of the objectives of Shariah. For instance, dignity is an objective that is protected by the divine ruling that finds false accusation (al-qazf) a major sin and serious offence. However, the prominent maqasid scholar Sheikh Tohir Ibnu A’shur did not regard this protection of dignity as a Maqasid al-Dhoruriyyah because in his opinion this aspect does not claim the level of dhoruriyyah. In his opinion, dhoruriyyah is restricted to the physical, sensible and visible only when life depends on it; therefore, dignity is not included in this understanding of maqasid (al-Qaradhawi, 2012).

Although the protection of dignity may not be included because of this reason, it is still argued that the five objectives of Shariah are not exhaustive as there are many dhoruriyyah or essential aspects that need to be protected as promoted by the Al-Quran and al-Sunnah directly and implicitly. Among others is the protection of people’s freedom, the protection for equal status before the law and others.

It is submitted that the said five objectives can be a basic guideline that is inclusive by nature in term of interpretation. For example, the protection of dignity may be included under the protection of lineage because the wisdom behind the divine ruling on qazf is also to cleanse one’s lineage, which is one of the five objectives mentioned above. The five objectives are to be a comprehensive and holistic guideline in any matter so as not to infringe on the Shariah or Maqasid al-Shariah. The Al-Quran and the hadith have shown how the divine ruling protects the five objectives as follows:

1) Punishment of apostasy is to protect the religion.
2) Ruling on qisas is a mechanism to protect life.
3) Punishment of adultery is a tool to protect lineage.
4) Punishment of theft is a way to protect property.
5) Punishment of drinking liquor is to protect intellect.

Therefore, it is indisputable to say that the five objectives also can be a very beneficial parameter for the government that intends to uphold Islamic values in drawing up rulings or policies. The five objectives are also very useful for the government in dealing with international matters. As a government it has to deal and engage with neighbouring countries and the international community where it may be required to enter into agreements or sign treaties. However, international treaties will always not guarantee the protection
of Shariah as intended by an Islamic government. Some treaties may benefit the country while others may not. Some international treaties clearly clash with Shariah rulings. When treaties contradict Shariah, Islamic countries may reject them. For instance, the freedom to change one’s religion as provided for in Article 18 of the Universal Declaration of Human Rights states that:

*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*

In addition, Article 18 of the International Covenant on Civil and Political Right provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Freedom of religion is guaranteed in Islam but the freedom to change religion by a Muslim is not tolerated by Islam. This is one of the main things that seems not suited to the Islamic principles.

However, sometimes international treaties do not seem to directly infringe upon the principles of Shariah but the objectives of Shariah tend to be neglected. Such tenets of an international treaty would be filtered through the five objectives of *maqasid al-shariah*. For example, Article 21 of The Convention on the Rights of the Child recognises and allows child adoption:

*States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:*

a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents,
relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;
b) Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;
c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

This is blanket recognition and permission without considering the issue of the religion of the child and the potential adopting parents. There will be a problem when the potential adopting parent is non-Muslim and the child is from a Muslim family. This situation may affect the sensitivity of the Muslim society with regards to the dignity of Islam in a Muslim-majority country. The article is superficially commensurate with Islam on the issue of permissibility of child adoption but by giving blanket permission it may affect one of the objectives of Shariah, that is, protection of religion. However, sometimes a ruling may seem not to infringe directly on the principles of Shariah but it neglects the objectives of Shariah. Such a situation would need to be examined in the light of the five objectives of Maqasid al-Shariah.

The treaty is futile if it does not serve the objectives of Shariah. Therefore, in order to prevent a treaty from becoming non-Shariah or Maqasid compliant, it has to be screened through the five objectives. The five objectives are a parameter for the filtering and screening of international treaties in order to prevent Islamic countries from ratifying treaties that potentially disregard Shariah and its objectives.

If a treaty clearly infringes the objectives of Shariah it may affect government policies of Islamic countries that seek to uphold Shariah and it may affect the lives of Muslim citizens in terms of religion, life, intellect, lineage and property.

Maqasid al-Shariah as a Parameter for the Screening of International Treaties Related to Religion

There are several objectives of Shariah relating to religion that an international treaty must not preclude:
1) Propagation of the religion of Islam
2) Enjoining good and eliminating evil
3) Implementing Islamic-based education
4) Eradicating apostasy and deviant teaching
5) Islamic scholarship
6) Islamic framework for freedom of speech, expression and others

Maqasid Al-Shariah as a Parameter for the Screening of International Treaties Related to Life

There are four objectives of Shariah relating to life. The aim to protect life is common to all countries or communities. The international treaty must adhere to the following:
1) Guaranteeing the life of the people.
2) Prohibition of suicide
3) Preventing self-destruction
4) Maintaining health of the individual and society

Maqasid Al-Shariah as a Parameter for the Screening of International Treaties Related to Property

Sheikh Tohir Ibnu A’shir lined up several objectives in property dealings that must be taken into consideration by the government before adopting an international treaty (Tohir, 2001). The objectives are:
1) Circulation of wealth
2) Clarity of laws related to property possession and ownership
3) Fairness in property ownership

CONCLUSION

Maqasid al-Shariah plays an important role in guiding government that seek to uphold Shariah principles. Government policies must not only adhere to Shariah principles but serve its objectives because implementing Shariah without serving its objectives is futile. These policies include the ratification of international treaties. Therefore, international treaties must also observe the Maqasid al-Shariah before being adopted by an Islamic government. A Maqasid al-Shariah-compliant treaty will preserve a government’s aspiration to implement Shariah values in all its policies.
REFERENCES


