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

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Abstract


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. Islam has a parsimonious and rigorously...
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 tujab 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 ‘maqshid’ (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.’

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.

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 _maslaḥa_ 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

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him. 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 madarrah (the harmful) with the aim of preserving maqasid al-syari’ah (the objectives of the law). 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.

The concept of maslaha are classified into three categories. They are the darüriyyat (essential), hajiyyat (appropriate) and tahsiniyyat (embellishments). All the rulings in the Shari’ah aim at the realization of these maslaha, according to their degree of importance. Hence, the dharüriyyat 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.

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.

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5 Abü Ishaq al-Shatiibi, Al-Muwafaqat fi Usul al-Ahkam, 4 Vols. (Cairo: Matba’at al-Madanî,), II, p.16-17
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 (Intelect), 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.
In the second place, stand the hajiyat which complement the existence of the Masalih dharuriyah. The last masalih are the tahniniyyah 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. 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.

The concept of mashlaha also are classified into mashlaha mu’tabarah, mashlaha mulghah, and mashlaha 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.

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.

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

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

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.

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, talqih 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

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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).\textsuperscript{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.\textsuperscript{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-maqa’sidhā). This principle was taken from the hadis “inama al-a’malu bi al-niyat”. Second, “Certainty is not overruled by doubt” (Al-yaqinu la yazulu bish-shak). 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

\textsuperscript{19} Ibid.
\textsuperscript{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.\footnote{Jalal al-Din al-Suyuthi, \textit{al-Asybah wa Nadza’ir}, (Beirut: Dar al-Fikr, tt).}

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 \textit{maqasid al shari’ah} (mashlahah). The five purpose are preservation of religion (\textit{hifdż al-din}), preservation of life (\textit{hifdż al-nafs}), preservation of progeny (\textit{hifdż al-nasl}), preservation of intellect (\textit{hifdż al-aqli}), and preservation of wealth (\textit{hifdż 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 (\textit{qawa’id al-fiqhiyah}), which contains five general principles, are “Harm must be eliminated” (\textit{Ad-dararu yuzal}) and “Acts are judged by the intention behind them” (\textit{Al-umuru}
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