

# THE MORAL OFFENSES PROVISIONS IN THE MALAYSIAN STATE SHARIA CRIMINAL ENACTMENT: AN ANALYSIS DIMENSION OF MAQASID SYARIAH

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**ABSTRACT:** *Morality functions as a mirror and reflects the personality of an individual. Good morals are usually wreathed with faith and devotion to God. Thus, the inner thoughts and moral character of the Muslims should be based on religious beliefs across a wider domain in line with the philosophy of ad-din in Islam. The demands of protecting the blood lineages are strongly recommended in the knowledge discipline of Maqasid al-Syariah. For the sake of preserving the maqasid syariah framework and principles, moral misconducts are coded and stated clearly in the state criminal enactment in Malaysia such as close proximity, premarital sex, indecent behavior in public, and many more. Partially structured interviews are carried out in order to obtain data and see the extent of the data obtained through content analysis is accurate with the current reality. This research is able to identify the extent of the existing provisions related to morality that fulfill the Maqasid Syariah requirements. The findings obtained help towards improving the moral-related provision in the existing Sharia Criminal Enactment and the enforcement of the sharia criminal laws that are in line with the demands of preserving the Maqasid Syariah.*

**Keywords:** Morality, Sharia crimes, enforcement, maqasid al-Syariah and ethics.

## 1. INTRODUCTION

Islam is the perfect and comprehensive lifestyle that Allah SWT has conveyed the mandatory orders to comply in order to guide humankind in executing their responsibility as leaders on earth. There is a specific purpose or objective behind every law conveyed. The purpose or objective is called as maqasid. Every law conveyed through the Prophet Muhammad is a blessing to the universe by giving security to humankind both during life on earth and the afterlife by doing and listening to all forms of orders and good deeds as well as avoid all the bad and forbidden deeds as explained in verse 107 of Surah al-Anbiya' which means:

"And We do not send you, unless (as) a blessing to the universe".

The responsibility of a Muslim is to maintain to the best of their ability the five objectives of the Syariah which is widely understood to include the importance of life, religion, property, intellect, and lineage. The responsibility of maintaining the objectives of the syariah should not be underestimated and must be fully understood by every Muslim.

## 2. MAQASID AL-SYARIAH: THE DEFINITION

Literally, maqasid Syariah consists of two words which are maqasid and Sharia. The word maqasid (مقاصد) is the plural form of the word maqsad (مقصد) which means principles, target, source, justice and moderation. Meanwhile, Sharia means the path towards a water source that is a metaphor for a path towards the life source. According to its term, Sharia is the law set by Allah SWT for His devotees as stated in the al-Quran in Al-Jathiyah; 18:

"Later We create you law and rule from the (religious) matter. Therefore, follow said law and do not follow the desires of the ignorant"

The word "maqasid" or 'maqasid' means "meaning" or "purpose" in English. The origin of the word in Arab is qasdun. This word has various meaning and among it is heading, direction, walking straight or breaking. The word al-qasd refers to the word cane. Cane provides many benefits to human which helps and guide them to walk. The plural form of al-maqasid is al-maqasid. A Muslim scholar, Islam Ismail

al-Hasani, when debating the maqasid al-syariah theory or "final objective" of the Islamic law is to relate the meaning of "heading" with the al-maqasid term. He said in his book:

"The calling towards al-qasadiyyah (objectives or law purposes) is the first role of Islamic laws. It guides and carries the actions of a human to an action that is made by someone with the intention that is in line with the demands of Allah S.W.T. when enforcing it upon humans"

Therefore, in short, the Maqasid Syariah can be interpreted as a Sharia objective or purpose. According to Wahbah al-Zuhaili, Maqasid Syariah is defined as legal values and targets that are hidden in the whole or majority of its principles. These values and targets are seen as a Sharia purpose and secret that are set by the al-Syari' in every principle determination. Al-Qardhawi explained that it functions as a textual purpose and principles to realize good human relationships in the form of orders, restrictions or obligatory for individuals, families, race and humankind. This meaning can also be understood as lessons that become a purpose in establishing laws as set by Allah for His devotees. According to al-Syatibi [1] stated that: "Sharia is beneficial for humans on earth and the afterlife." Therefore, it is clear that the purpose for every law is to bring goodness for humankind and prevent harm. This has caused the Maqasid Syariah to become one of the important elements in Islam. Imam al-Ghazali has outlined five Sharia objectives [2] are discussed below.

There are various definitions that have been given by scholars in Islamic Jurisprudence about the term 'maqasid'. Ibn Asyur defined it as "All the definitions that can be seen in the laws sanctioned in its entirety or in the most part." Al-Qadi I'yad defined 'maqasid' as "avoiding harm". He said, "to judge in order to avoid hard is compulsory". For Ibn Al-Arabi, he characterized it as "avoiding distress or *masyaqqah*". Ibn Al-Arabi said; "It is unnecessary (forbidden) to burden someone with something he cannot bear" [3,4].

### (A) RELIGIOUS PRESERVATION (*HIFZ AL-DIN*).

Islam arrives to free the mind and human faith from the clutches of superstitions, hypocrisy, and shirk. Islam invites humans to place their faith in the One True God, Allah

S.W.T. and matters related to the faith (*rukun iman*) as well as staying away from shirk elements by explaining the various guidelines to show piety to Allah S.W.T. Imam Raisuni stated the maqasid that preserves the religion comprises of three components which are Islam, Faith, and Mercy, which is sourced from the Quran and explained in hadiths. It is perfected through three methods which are preaching through encouragement and threats, jihad against those who oppose the religion as well as eliminating the weaknesses that arise, covered, or completed [5]. It matures and provides an in-depth appreciation of religious laws and conditions in our lives. It is also important to include it in an effort to resist any opposing teachings that deviate from Islam such as heresy, blasphemy, and taking the implementation of obligations set. Matters related to worship are always referred back to *maqasid*. When there is no religion, the world becomes a waste, and humans are controlled by desire. This will cause destruction [6].

#### **(B) SOUL PRESERVATION (HIFZ AL-NAFS).**

The law of maqasid is to protect and preserve the soul (life) and body. Therefore, Islam made it compulsory for every individual to preserve their safety and at the same time forbids any act that can threaten your life and others as explained in Al-Maidah: 32, Al-An'am: 151.

Life must be preserved by every individual. Hence, in the context of the organization, the question of safety must be prioritized. This includes the prioritization of the safety element at the workplace or in an area. All activities that can compromise or threaten the lives of humans must be avoided. Besides, Islam strongly suggests qisas punishment to any criminals that commit murder of the soul or hurt another human being physical. If proven to be guilty, the criminal must be executed or hurt in the same way as the victim. This showed that Islam very much appreciates human values and the ultimate principles of human destiny. No other humans can take another human's life or cause them bodily harm.

#### **(C) MIND PRESERVATION (HIFZ AL-'AQL).**

Taking care of the mind and thought is one of the objectives of Islamic law. Through these privileges, humans are given the status as caliphs to prosper the earth according to the will and orders of Allah S.W.T. Through it, Humans exploit all the graces of nature for the well-being of humankind. In line with this purpose and so that the mind can function well, Islamic law has stressed the importance of learning and mastering knowledge as can be understood Al-Alaq: 1.

Hence, the mind and the thought must be preserved as it is Allah's most precious gift to human beings. The mind and thought are blessings from Allah SWT to help differentiate humans from other creatures. The mind not only must be preserved but also must nurture its functions for the goodness of humanity. Islamic Law is also in the effort to ensure sanity and mental strength by forbidding any form of actions that can compromise brain functions. For example, all elements that can damage the mind are forbidden in Islam including alcohol imbuement, drug abuse, and thinking of matters beyond the limitations of the human mind.

#### **(D) LINEAGE PRESERVATION (HIFZ AL-NASB).**

The concept of preserving lineage is stressed in the Maqasid Syariah in order to ensure the continuity of the human population so that they will continue to expand healthily and

strong, with good morals and pious. This can be done through the settings of family lives by providing education and love to children so that they have refined values and improve intelligence adequately.

Islam stresses the lineage case aspect since it ensures the preservation of life and body. Besides, the connection between blood ties based on Islam to its followers ensures the formation of families, societies and subsequently, creating a strong and united country [7]. With the cultivation of good individuals that will benefit the community with the attitude of wanting to defend the weaker race, caring and willing to help each other. In fact, Islam also ensures the continuity of the human race until the end of time.

Islam has set carefully thought out principles in order to preserve the benefits of the human race, such as;

- a) Islam upholds the laws of marriage starting with partner selection, solemnization, spouses and children as well as their education, familial relationships, and divorce.
- b) Islam has also forbidden the act of fornication, sodomy, rape, and other despicable acts like lecherous acts, insults, molestation, and so forth. Besides, Islam restricts paths towards sins like restriction on exposing aurah, uncontrolled interaction, and the need to enter a house or personal space of an individual [8].

Preservation of lineage is important in Islam. It is proven in Islamic history when the Prophet Muhammad has adopted a child named Zaid bin Haritsah. The child is seen as part of the prophet's lineage by the community at that time. Later, Allah bestowed the Quranic verses through the surah al-Ahzab verse 4 and 5 that commented on their act of including the adopted child as part of the Prophet's lineage as below:

*Meaning: "Allah does not create two hearts in one's body, and He does not you're your wives as your mother and He does not make your adopted children as your own. Therefore, it is just words without meaning. And Allah said only the truth. And He shows the true path. Call them (your adopted children) by (using) their father's name, that is fairer to Allah, and if you do not know their fathers, (call) them as your brothers of faith and masters. There is no sin on you if you wronged him but, (there is the sin) for acts that you have intentionally done. And Allah is all merciful and forgiving".*

The above verse explained that lineage is a blessing granted by Allah and it is one of the five Maqasid Al-Syariah [9].

The Maqasid is an objective that is wished to be achieved through law for the importance of humankind. There are five Maqasid Al-Syariah that is related to humans (*dhururiyat al-khamsah*) which the first one is to preserve religion, life, lineage, mind and property. All five are basic Islamic principles. Preserving lineage is one of the basic principles and it proves the importance of preserving the purity of lineage in Islam. There are several items that are outlined in preserving lineage according to the Maqasid Al-Syariah. In order to preserve lineage, hudud must be sentenced to adulterers and those who accuse someone of committing unlawful sex. This is because sexual relations out of wedlock will conceive a child and if a married woman engages in sexual relations with a man who is not her husband,

confusion may occur in the patrilineage of the baby which will cause bad repercussions in the future.

In addition, lineage must be preserved to uphold the dignity and prevent the humiliation of the family as well as the child itself. This is because a child with unknown lineage or born out of wedlock is hard to be accepted by society and is always look down upon. Although their status as illegitimate children or with unknown lineage, they do not ask to be born that way [10].

### **(E) PROPERTY PRESERVATION (HIFZ AL-MAL).**

Preserving and owning property is one of the purposes of maqasid. It cannot be denied that perfect life for a human is closely related to the owning and possessing of property. Realizing this, Islamic law has outlined the rules and laws specific to the property. It is discussed widely in its own discipline and field known generally as commercial transactions. This field has outlined certain procedures starting with the efforts to own, possess, and spend on a property. For example, in order to obtain property properly, Islam has formulated property ownership methods such as sale, rental, and so on. However, in order to secure the property owned, Allah forbids the theft and instructed the hudud law enforcement as well as forbidding us from taking the property belong to orphans. Property ownership is done through the advised method and approach. In this matter, for instance, Islamic law promotes sales and forbids usury. Besides, in the effort to own property, other than usury, Islam too has forbidden gambling, bribing, and measurement fraud.

### **3. ANALYSIS OF MORAL OFFENSES IN THE SHARIA CRIMINAL ENACTMENT**

Islamic law has outlined the things that must be avoided and cannot be done by every individual in order to protect themselves. Islam is a beautiful religion that puts its followers first as such the maqasid or purposes of the Syariah should also be based on righteousness. Acts that are thought of as offenses that can damage themselves have been provided for example, in the Selangor Sharia Criminal Enactment 1995, Federal Territories Sharia Criminal Offense Act 1997, Perak Sharia Criminal Enactment 1992, Melaka Sharia Criminal Offense Enactment 1991, Sabah Sharia Criminal Offense Enactment 1995 & Penang Sharia Criminal Offense Enactment 1996. The actions taken by legal bodies in drawing up such offenses that is in line with the Maqasid Syariah principles. Among the offenses are:

#### **1. Premarital Sex**

Fornication refers to sexual relations between men and women out of wedlock. It is a term is used to refer sexual relations between unmarried individuals and also those who are married. It is considered as fornication when there is penetration or in other words, the entry of the penis into the vagina must occur in order to be sentenced to the offense. In Malaysia, the punishment sentenced for premarital sex in all states provided maximum sentencing of a fine not more than RM 5000 or imprisonment not longer than 3 years or caning, not more than six strokes or any combination of the above [11]. This sentencing in general and do not consider whether the accused is chaste or not.

A premarital sex offense is among the major offenses listed and the most common cases to occur. Religious Enforcement Officers are especially strict in enforcing the provision in

preventing social discrepancies from occurring. To quote the statement given by the Senior Judge at the Kota Bharu Sharia High Court, he stated that the number of premarital sex cases reported is increasing every year [12]. In another aspect, there is also an opinion that said premarital sex is considered as an offense based on the spirit as well as the intentions of the lawmaker. For example in Kelantan, the term 'fornication' is used. It shows that Kelantan wishes to achieve the definition of hudud which is different from other states that use the term 'premarital sex'. A Religious Enforcement Officers in Penang stated [13]:

*"We in Penang are more ta'zir while in Kelantan they are more inclined towards hudud...it is its spirit..."*

#### **2. Incest**

Incest is a sexual act involving men and women who are believed to have unlawful relations in order to be married in Islam. In the fiqh point of view, this ban is not because of lineage and blood ties but also through affiliation and breastfeeding [14]. Since it is as serious of an offense as fornication, therefore lawmakers have decided upon maximum sentencing equivalent to the ones set for fornication. In Perak [15] and other states, the punishment for incest by couples who are forbidden from getting married forever is more severe compared to those who are temporarily banned. It must be stressed here that incest in the context of the Malaysian Sharia Criminal Enactment refers to the act that is committed voluntarily by both parties. If it is not consensual, the offense will be categorised as rape [16]. Incest offense is rarely enforced and acted upon by Religious Enforcement Officers. This is because this offense is in the Penal Code. Therefore, if there is any complaint received, the Religious Enforcement Officers will submit it to the Malaysia Royal Police since the sentencing will be made under the Penal Code which is more severe. In addition, there are several legal issues in enforcing this section [17].

#### **3. Prostitution**

Prostitution refers to an individual who offers to engage in unlawful sexual relations with the purpose of receiving payment for such services. Prostitutes or individuals who pay for sex that are assumed to fornicate can be sentenced for hudud according to Islamic law since it involves premarital sex. Those who are involved indirectly can be sentenced to severe ta'zir sentencing.

Besides a provision regarding offenses of becoming a prostitute, the enactment of the state has the provision for criminal responsibility of husbands who pimped out their wives and parents or guardians who pimped out their children or child under their care. Most states provided maximum sentencing for prostitution except in Malacca that sets a fine of not more than RM 3000 or imprisonment no longer than 2 years.

It is difficult to enforce a provision related to prostitution. It is because there are difficulties to convict in court. Based on the statement made by a Perak Religious Enforcement Officer, the bargaining element must be proved in order to strengthen the evidencing element for prostitution. One of the methods that can be used to prove it is through impersonation. However, this method receives criticism from a few religious scholars [18].

#### 4. Foreplay as Preparation to Engage in Premarital Sex

Foreplay as preparation to engage in premarital sex is also known as taqarrub zina. All vice behavior that can lead to unlawful fornication in Islam can be punishable depending on its severity. Among the examples of behavior that can be categorized as an offense under it including men and women sleeping together on a bed, kissing, hugging, and so on. Close proximity can only be categorized under this offense. It can also be said that all states in Malaysia provided the same sentencing for this offense which is a fine of not more than RM 3000 or imprisonment no longer than 2 years [19]. Kelantan, however, adds a caning sentencing of three strokes to that offense.

#### 5. Close Proximity

When a man has no marital ties with a woman that has no familial ties to him and are alone together in a closed area without worrying that they will be disturbed by others and they may have a chance to commit a vice, there are assumed to be in committing the offense of close proximity. It does not necessarily happen between a man and a woman since it can also happen between a man and several women [20]. Close proximity cannot be sentenced to a 'had punishment. In fact, a ta'zir sentencing is given as a lesson to the accused.

In most states, close proximity is punished with a fine not more than RM 3000 or imprisonment no longer than 2 years or both. There are enactments that have different sentencing if the accused is in close proximity with one and/or many partners [21].

#### 6. Pimping

Pimps are middlemen that act as a medium for a man and woman to engage in acts that are against Islamic Law [22]. Acts, in this context, refer to prostitution [23]. Sentencing for pimping in most states is maximum sentencing which is a fine not more than RM 5000 or imprisonment no longer than 3 years or caning not more than 6 strokes.

Pimping is not a popular offense and frequently enforced by the Islamic Department through its Enforcement Department. This is because there are problems in the evidencing burden which is difficult to do as well as lack of skills among the Religious Enforcement Officers. According to records up to 2017, there is not even one case brought to court for pimping [24].

#### 7. Indecent behavior

Indecent behavior refers to acts that are against Islamic moral values. Indecent behaviors can happen in the form of kissing or hugging between men and women. It can also be in the form of words such as saying expletives. The interpretation of indecent behaviors according to the sharia criminal offense enactment or act is very wide. According to Islamic law, there is a guide to determine an act as a moral-related offense. It is interesting to say that the moral concept in Islam is very wide [25]. Indecent behaviors referred in acts or enactments are different than close proximity since it is committed in public while the latter is committed in closed, private areas. Indecent behaviors do not specifically involve men and women but also a man or women who exposed their bodies in public. The sentencing for these offenses is the same which are a fine of not more than RM 1000 or imprisonment no longer than 6 months.

In Selangor, the 2002 JAIS Director Standing Order (Amended 2004) is specifically about the methods to handle information and complaints from the public are established. Besides, JAIS has issued out a 2003 JAIS Director Standing order to execute prevention measures of section 31 of the Selangor Sharia Criminal Enactment (No.9. 1995) which are methods to handle and manage indecent behaviors/misconducts in public. This order is enforced on 11<sup>th</sup> August 2003 [26]. The establishment of several standing orders proved the determination of authorities at the policymaker levels in order to handle social problems. It must be executed transparently and with dedication at the enforcement and execution levels without any exemption or intervention of external parties that can fail the fulfillment of the legal objectives set.

The religious enforcement officers usually faced problems with the interpretation of indecent behaviors. Therefore, there is not one legal interpretation made to explain the definition of indecent behavior. Hence, there is confusion among religious officers and the public. Tuan Rahimin Bin Bani explained that there is a need for a specific interpretation to be given about this offense in order to assist in prevention efforts [27].

#### 4. CONCLUSION

The existing Sharia law provisions are drawn up in maintaining the five basic aspects that people need in life. Legislation is the main strength of society as the community needs them to regulate the relationship between the members of society and punish those who deviate from the rules. Islam created laws that are able to control human behavior in a way that peace and justice in society continue to be guaranteed. The objectives that are wished to be achieved in the Maqasid al-Syariah principles are not only the responsibility of the Religious Enforcers but in every section of the community to play the role of their own. In the context of the construction of public morals in a country, the government also plays an important role in determining the morality of their community.

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