

## Contemporary International Treaties Seen From the Principles of *Maqasid Ash-Shariah*

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### **ABSTRACT**

Along with the times, the pattern of human interaction continues to evolve. Finally the human communication penetrates the boundaries of nation and state. The pattern which forms the inevitable urgency produces an International Treaties. However, an international treaty in Islam could be accepted if it is in line with Islamic Law, then it is processed into Maqasid Ash-Shariah. This research includes two important issues, “Islamic relation and global society” and “the existence of Maqashid principles in contemporary International Treaties”. This research is normative juridical legal research. It used a conceptual approach, comparative and statutory. From this discussion, it is concluded that the contemporary international treaties mostly contains Maqasid Ash-Shariah principles, even a product of an international agreement can be accepted even though the agreement was not initiated by an Islamic country or Muslims.

**Keyword:** *Internatonal Treaties; Maqashid Ash-Shariah; Islamic Law.*

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## **INTRODUCTION**

Today the existence of Islamic society seems to be getting brighter, so that the entire spectrum related to human mobility must be considered as carefully as possible, both in the national and international scope. Islamic law in certain settings, such as worship procedures, is static, that is because from one point of view, Islamic law is not allowed to be changed because it is based on revelation that is *qadim*. However, in certain settings, especially in the social sphere, legal interpretations can change according to changing times and times, because one of the characteristics of Islamic law is universal. (Ishaq, 2017) The universality

(Syumuliyah) of Islamic law gives a signal that the principles of Islamic law can even be adapted in the field of study outside the field of Islam, including international law, especially international treaties.

International treaties become references for countries or subjects of international law to resolve various cases that occur in the atmosphere of international relations. So, the terminology of international treaties is an agreement entered into between members of the community of nations and aims to bring a certain legal order into effect. (Situngkir, 2018) Therefore, this fact makes the relevant parties obliged to carry out the agreement as stated in the agreed international treaty.

Regarding the concept of the agreement itself, the Qur'an accommodates its position specifically "*O, you who have believed, fulfill [all] contracts*" (QS. Al-Maaida: 1). In this era, international treaties are accepted as the main and essential source of international law regarding relations between states. Because, almost most of the dictums of relations between countries are contained in the products of international treaties. With international treaties also, the rights and obligations between countries that bind themselves in an agreement become clear, as desired by the parties fairly (Dewi & Made, 2018), so that the country's *khittah* can be realized while building bilateral and multilateral relations, proof of the concept of social and humanitarian fraternity (*al-ukhuwah al-ijtima'iyah waal-insaniyah*) (Hamidah, 2015) or in the Aristotelian tradition known as the *Zoon Politicon*.

*"O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted"* (QS. Al-Hujurât 49:13).

God in the creation of nations and tribes was certainly not meant to favor one colony and debase another colony in terms of creation (Mirhan, 2015), but so that humans know each other, in the sense of fostering human relations. Therefore, along with the development of the times, the term contemporary international treaty is known which is actually the embodiment of human nature (*sunnatullah*) which will always be bound to each other.

Abu Ishaq al-Shatibi formulated five objectives of Islamic law, namely to maintain 1) Religion (*hifzu ad-deen*); 2) Soul (*hifzu an-nafs*); 3) Mind (*hifzu al-aql*); 4) Descendants (*hifzu an-nasab*) 5) Property (*hifzu al-maal*). The formulation of Abu Ishaq al-Shatibi is an extraction from Islamic teachings as well as *taswir* from the universality of Islamic law which is then the goal of Islamic law is known as *Maqasid Ash-Shariah*. *Maqasid Ash-Shariah* holistically portrays Islamic law that is able to be assimilated in all nations and times, so that contemporary materials such as international treaties must pass through the *Maqasid Ash-Shariah* filtering, so that the Islamic community can accept the products it produces and make it easier to detect each agreement, whether it intersects with the transcendent principle of religion or not. As an inducement, the meaning of nurturing the soul (*hifzu an-nafs*), is referring to the daily needs of humans such as health and nutrition, quality of housing, forgiveness, as well as adequate food and clothing. In general, all human beings work hard to fulfill these basic needs. In addition, all human actions are to protect themselves and their families and are not meant to do harmful actions that can endanger themselves or other parties (Maheran Zakaria, 2014). Therefore, if an international treaty does not contain elements of fulfilling human rights globally, or even contradicts and harms other parties in addition to benefiting individuals and groups, it is clear that the agreement is rejected from the principle of *Maqasid Ash-Shariah*. Allah says in “*He is with you wherever you are. And Allah, of what you do, is Seeing*”. (Muayyad, 2015) (Q.S. Al-Hadid : 4) So that muamalah activities, including international treaties, cannot be separated from the value of monotheism.

## **PROBLEM STATEMENT**

From the explanation above, an important issue can be drawn. First, how is the existence of the *Maqasid Ash-Shariah* principle in contemporary international treaties? Second, what is the position of international treaties initiated by other than Islamic countries or organizations?

## **RESEARCH METHOD**

This research is a normative juridical law research (Suratman & Dillah, 2013). And using several models of legal research approaches, namely; Conceptual Approach, Comparative

Approach, and Legislative Approach (Statute Approach). The legal materials used are primary legal materials, secondary legal materials, and tertiary legal materials (Marzuki, 2014). All legal materials are collected from the literature study process and produce materials that are integrated with each other, both primary, secondary and even tertiary legal materials.

In analyzing legal materials, interpretation and construction steps are carried out. The interpretation carried out is the interpretation of religion, which is connected with the Comparative Approach and the Conceptual Approach.

## RESULT AND DISCUSSION

### *Maqasid Ash-Shariah Principle*

Etymologically *maqasid* is the plural form of *maqsad*, whose definition is intent, target, principle, intention and ultimate goal, while according to Audah, *maqasid* is defined in terms of terminology as understanding the meanings as well as the target behind the law. Meanwhile, for some Islamic law theorists, *maqasid* is interpreted as an alternative statement of the problem (benefits) (Fasa, 2016). Scope of classical *al-maqasid* is shari'a as a whole, with which *al-maqasid* does not cover the specific objectives of the law. The approach uses approaches *Qawasud Fiqiyyah* and *Uşul Fiqh*. Philosophically, the purpose of Islamic law discusses: universality (*al'amīyyah*); justice (*al-'Adl*); elimination of difficulties; nationalism (*al-qawmīyyah*); and private ownership.

Abu Ishaq al-Shatibi formulated five objectives of Islamic law, (Ma'mun, 2020) namely: First, Maintaining Religion (*hifzu ad-deen*), with which humans are not allowed to cross views with religious dictums, especially regarding their relevance to worship rituals, such as Prayer, Fasting, Hajj, Zakat and so on must be fulfilled freely. Second, Taking Care of Yourself/Soul (*hifzu an-nafs*), which refers to daily needs, such as health and nutrition, quality of housing, forgiveness, adequate food and clothing and the plenary *principle of equality before the law*. Third, Maintaining Intellect (*hifzu al-aql*), humans need to increase the knowledge section as an embodiment of fighting ignorance. Fourth, Maintaining Descendants (*hifzu an-nasab*), Sunnatullah humans need a family, Islam pays special attention to this part, because humans must be able to maintain their nobility and glory.

Fifth, Safeguarding Assets (*hifzu al-maal*) that the assets of each individual must obtain protection from all forms of possible misuse that harm one party with which there is tolerance, that protecting is a shared task.

Al-Juwaini is called the first scholar to offer the concept of *maqāṣid*, sometimes mentioning *maqāṣid al-syariah* with the term *maṣlaḥah ‘ammah* (public benefit). Meanwhile, Al-Ghazali views *maqāṣid* as *al-maṣalih al mursalah* with three levels, namely: primary/necessities (*daruriyyah*), secondary/needs (*hajiyyah*) and tertiary/luxuries (*tahsiniyyah*). Opinions of other scholars, such as al-Tufi and al-Qarafi, although the editorials are different, the intent and purpose are the same. Therefore, Auda also claims that between *maqāṣid* and *maṣlaḥah* are the same. Ushul fiqh scholars define *maqāṣid ash-shariah* as the desired goal of *syara’* in stipulating a law for the benefit of humans. So it can be said that the extraction of *Maqāṣid Ash-Shariah* is the global benefit, namely the benefit that is not selective, the benefit that is able to accommodate all interests rather than rights and obligations. According to Ibn Asur, actually Islamic law (Islamic law) comes complete with a mission for the benefit of the world and the hereafter (Fathurrahman, 2019). So the concept of *Maqāṣid Ash-Shariah*, both qualitatively and quantitatively, is to protect the benefit of each entity in the midst of human struggles. Jamaluddin Athiyyah from five basic concepts into four more specific divisions, namely individual scope guarantees, family scope guarantees, community scope guarantees, and humanitarian scope guarantees (Syamsuri & Irsyamuddin, 2019).

Islam is a very democratic religion, the Shari’a liberates the people to do politics, associate with the spirit of spreading the benefit of the whole world, the realization of the dictum of *Rahmatan lil ‘Alamin*, and not vice versa. With this, it should be noted that the freedom of the ummah’s political activities must be based on Islamic values. So that the ideals of benefit remain intact, the messages that will air later are messages of peace, virtue and not hostility or evil (Aji, 2015). Therefore, the relation between Islam and the global community is able to penetrate completely and produce beautiful harmony. Not only that, but Islam is also capable of working hand in hand with non-Islamic communities in various social interests and tolerance.

### **Contemporary International Treaties**

There are many terms to describe international treaties (Situngkir, 2018), including what is known today, namely, treaties or conventions. In Henry Campbell Black's *Black Law's Dictionary*, the definition of an international treaty includes:

- a. an international treaty is an agreement made between two or more independent countries with the intention of for the welfare of society
- b. an agreement, league, or contract between two or more countries or rulers, officially signed by a properly authorized commissioner, and solemnly ratified by several rulers or supreme powers of each country
- c. an international treaty is not only a law but also a contract between two countries and is mandatory, where possible, it can be interpreted as giving force and impacting all parts.

In principle, international treaties exist because of the interest in regulating the relation between subjects of international law (Putri, 2020). Contemporary international law allows each country to enter into an engagement in the form of an international agreement. Then as an effort to minimize defects in international agreements, there are several theories that support their formation, including:

1. The Will Theory (Theory of Will),
2. The Bargain Theory (Consent Theory),
3. The Equivalent Theory (Equality Theory),
4. The Injurious-Reliance Theory (Loss Theory).

Of the several theories put forward, they are holistically integrated with each other, especially when talking about the state as a subject of international law. This situation is emphasized by the general principles believed by sovereign countries regarding international treaties, including the principle of *pacta sunt servanda* (promises must be kept), the principle of good faith and the principle of reciprocity..

According to Starke, the body of international law consists of principles and rules of conduct that live and bind each state in relations between states. The law includes: 1) Legal principles relating to the implementation of the functions of international institutions and organizations in *juncto* with relations between states and their peoples. 2) The legal rules governing private interests and non-state entities, as long as the rights and obligations of each individual are agreed upon in the form of a treaty.

History records that in international law the state is positioned as the main subject, other than the state is not recognized as an international subject. However, as the times progressed, the world metamorphosed with the term “*global village*” (Sitanggang, 2021). In line with human mobility and communication that has penetrated the boundaries of the country’s territory, it is considered necessary to have an arrangement to prevent problems that might arise from these activities which in religious literacy are accommodated in the study of *Fiqh Siyasa*. The nature of mutual need becomes the urgency of each country in building international relations. Therefore, it even raises other subjects of international law, namely international organizations. By itself, if a country wants development, each country must open up to global cooperation. The good intentions of these countries are then facilitated by the awareness that international organizations have formed and the state has an important role in this relation, because the interests of the state are at the root of the formation of international organizations that focus on certain segments.

The discussion of agreements in Islam is clearly emphasized in various verses. The principle of a simple agreement has been compounded in public conversation, that a promise is a debt and a debt must be paid. In the Islamic legal system, obligations take precedence over rights, because if obligations are enforced then rights automatically follow. “*O, you who have believed, fulfill [all] contracts*” (QS. Al-Maaida: 1) dan “*And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned.*” (QS. Al-Israa: 34). The issue of international treaties, which is finally recognized as part of the sources of international law, has binding force for every country that took part in its preparation. Evidence of the commitment of each party to the agreement, as the Prophet Muhammad exemplified the formulation of the agreement between the two great camps at that time. The Muslim camp led by the Prophet Muhammad and the alliance of various tribes in the city of Mecca led by Suhail bin Amr, with whom the agreement is known as the Hudaibiyah agreement. (Djazuli, 2017)

In a hadith the Prophet Muhammad S.A.W said: “*There are three things between Muslims and infidels are treated similar and equally; (1) Whoever binds the agreement, then the promise must be perfected both Muslims and non-Muslims because the promise is for Allah, (2) whoever establishes affection, then let him relate both to Muslims and to infidels, (3) and*

*whoever is trusted to hold the trust, then let him fulfill it both to Muslims and to infidels.*” (H.R. Baihaqi). (Arsal, 2016)

Allah emphasizes that an agreement if it has been agreed between parties who wish to bind themselves to an agreement, even with infidels, must be kept as long as it does not contain an element of betrayal. *“Excepted are those with whom you made a treaty among the polytheists and they have not been deficient toward you in anything or supported anyone against you: so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him]. (QS. At-Tawbah: 4)”* Based on the dictum of the verse, *“keep the promise until the deadline”*, hints at the details of the term of the agreement, that if the agreement exceeds the agreement, it automatically ends. (Ahmad Mukri, 2018)

Then referring to one of the discussions in ushul fiqh, known as the term *mafhum mukhalafa (reverse understanding)*, specifically the dictum *“and they do not reduce anything (from the contents of the agreement) and do not (also) they help someone who is hostile to you, so against them keep their promise”*, means that if there is a reduction or one party helps the enemy of the agreement partner, the agreement can automatically be canceled, the consequences of cheating and betrayal.

Based on the provisions of At-Tawbah verse 4, in particular the dictum *‘keep the promise until the deadline’*, implies the details of the agreement period, that if the agreement exceeds the agreement, the agreement automatically ends. Then referring to one of the discussions in ushul fiqh, known as the term *mafhum mukhalafa (reverse understanding)* specifically the dictum *“and they do not reduce anything (from the contents of the agreement) and do not (also) they help someone who is hostile to you, so against them keep their promise”*, means that if there is a reduction or one party helps the enemy of the agreement partner, the agreement can automatically be canceled, the consequences of cheating and betrayal.

This study aims to explore the principles of *Maqasid Ash-Shariah* in contemporary international treaties. According to *Kamus Besar Bahasa Indonesia (KBBI)*, the meaning of contemporary is the same time; during; when; present time; nowadays. It is clear that what is meant by the principle of contemporary international treaties is the basis used today in formulating international treaties. Fundamentally, the fundamental difference between



conservative international treaties and contemporary international treaties is in their timing and arrangement. Conservative international treaties are still in simple form and administration, they only adhere to the dictum of principles in religion and culture that have not been codified. While contemporary international treaties are formulated, starting from principles and embodied in legislation that is recognized throughout the world, such as those contained in *The Vienna Convention on the Law of Treaties* (VCLT), 1969 dan *The Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations* (VCLTIO), 1986.

Indeed, international treaties are equivalent to other treaty models, considering the most fundamental principle regarding the implementation of agreements, namely the principle of *pacta sun servanda*, that agreements must be fulfilled (Situngkir, 2018). In Islam, an agreement must be based on several principles, namely, First, the Divine Principle or the Tawhid Principle. Second, the principle of ability. Third, the principle of justice (*al-adallah*). Fourth, Similarity and Equality. Fifth, the Principle of Honesty and Truth. Sixth, written principles. Seventh, the principle of good faith. Eighth, the principle of expediency and benefit (Muayyad, 2015).

Therefore, what needs to be considered is what values are contained in international treaties, that a contemporary international treaty formed between countries or international organizations must contain the principles of agreements in Islam which are then crystallized in a form of *Maqasid Ash-Shariah* principles. As for how the mechanism is returned to experts or competent ones, because the *Maqasid Ash-Shariah* principle does not discuss details, but lies at the level of norms.

M. Iqbal in his book entitled *Fiqih Siyasaah: Kontekstualisasi Doktrin Islam* stipulates several basic principles of the Qur'an regarding international law, namely: First, good and fair cooperative relations (QS. Al -Mumtahanah: 8). Second, Prioritizing peace (QS. Al -Anfal 8:61). Third, strengthen vigilance in a peaceful atmosphere (Surah Al-Anfal: 62). Fourth, war is permitted only if it is forced and for defensive purposes, not offensive (Surah Al-Hajj: 39-40). Fifth, invite others to Islam in a good way (Surah Al-Nahl: 126). Sixth, it is not permissible to impose religion on others (Surat al-Baqarah: 256) and seventh, respecting signed treaties (Surat At-Tawbah: 7). (Nasiruddin, Reni & Nurul, 2020)

Henry Campbell Black has defined international treaties explicitly, it is clear that the concept of international treaties contains noble values that are relevant to the principles of *Maqasid Ash-Shariah* even though they are not stated in detail. For example, twenty years after the Asian-African Conference in Bandung, Islamic countries agreed in an international negotiation to establish a large organization called the Organization of the International Islamic Conference (OKI).

As it is known in the description above that international treaties are the domain of states and international organizations, then Islam fundamentally classifies this sector in the study of *Fiqh Siyasah*. Broadly speaking, the methodology used in *Siyasah Fiqh* is no different from the methods used for other fiqh segmentation, such as *Munakahat* and *Mawarist fiqh*. However, what makes the difference is that fiqh outside of *siyasah fiqh* has been clearly explained in the Qur'an and hadith, unlike *siyasah fiqh* which uses a lot of '*ilm ushul fiqh* and *qawaidh fiqhiyah*, because its implementation is not detailed in the Quran and Hadith. When referring to sources of Islamic law based on information, when the Prophet asked Muaz bin Jabal about the rules when deciding a case, it was divided into three parts. 1) use the Qur'an, then 2) if it is not contained in the Quran then refer to the Hadith, and 3) if there is no dictum in the Quran and Hadith that regulates the details of a case, then use *Ar-ra'yu* (Mind). Therefore, if there is no detail in an international treaty in the Quran and Hadith, then *Ra'yu* must be seated, prioritizing *Maqasid Ash-Shariah* and the rules of *ushul fiqh* in its formulation.

Then regarding international treaties formulated by other than Islamic countries sometimes raises pros and cons, basically agreements at any level or prepared by anyone can be carefully accepted and may be adapted or ratified even by Islamic countries or those with a majority Muslim population such as Indonesia. International treaties as a source of international law, in addition to international customs, legal principles "recognized by civilized countries", court decisions and expert doctrine as additional sources to determine the rule of law. International treaties have two formats, first, the Treaty of Contract (a closed or special treaty). Second, the Multilateral Treaty (open treaty) which means that the agreement can be participated by many countries even by countries that do not take part in the process of making the agreement. However, it is still like the initial discussion that an agreement must pass through

the *Maqasid Ash-Shariah* filtering, whose actualization provides an opportunity for reason or *ijtihad*, so that there are no defects that could potentially harm certain parties.

History records several forms of international agreements including the Universal Declaration of Human Rights (Neumayer, 2007) “*The International Covenant on Civil and Political Rights*”(ICCPR). (Wicaksono, 2016) “*The International Covenant on Economic, Social and Cultural Rights*” (ICESCR). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment “*The Convention against Torture and Other Cruel*” (CAT). “*The Convention on the Rights of the Child*” (CRC). “*The Convention on the Elimination of All Forms of Discrimination against Women*” (CEDAW).

All of the above agreements clearly contain elements of *Maqasid Ash-Shariah*, namely 1) Religion (*hifzu ad-deen*); 2) Soul (*hifzu an-nafs*); 3) Mind (*hifzu al-aql*); 4) Descendants (*hifzu an-nasab*)5) Property (*hifzu al-maal*). Therefore, the agreement is allowed to be adapted by Islamic countries, even though the agreement is not initiated by Islamic countries such as the Organization of the Islamic Conference, considering the Prophet Muhammad who agreed to an agreement made with Suhail bin Amr, the messenger of Mecca when there was a barrier to the pilgrimage.

## CONCLUSION

Whereas most of the contemporary international treaties have contained the *Maqasid Ash-Shariah* principle, as currently existing international treaties such as “*The Convention on the Rights of the Child*” (CRC) and “*The Convention on the Elimination of All Forms of Discrimination against Women*” (CEDAW). Indirectly, the agreement contains the principles of *Hifzu Nafs* (self-preservation) and *Hifzu Nasab* (maintaining descendants), therefore the agreement can be accepted by the Muslim community. Then that international treaties, even if initiated by countries or organizations outside Islam are acceptable, refers to the attitude of the Prophet Muhammad who agreed to an agreement with the Quraysh infidel community in the Hudaibiyah Agreement.

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