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The Objectives of Islamic Law: The Promises and Challenges of the Maqāṣid al-Sharīʿa

Walid Ghali

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The principal objectives of the Manchester Journal of Transnational Islamic Law & Practice (MJTILP) are to provide a vehicle for the consideration of transnational forms of Islamic law and practice. Transnationalism in Islamic law is taken broadly as communications and interactions linking Islamic thoughts, ideas, people, practices and institutions across nation-States and around the globe. In recent times, research in Islamic law has shaped narratives based on nation-States, demographics, diasporic communities, and ethnic origins instead of developing around a central core. Contemporary issues of Islamic law are increasingly linked to geographical locations and ethnic or parochial forms of religious beliefs and practices. Expressions like American, European, British, Asian and Arab Islam have widely gained acceptance.

Despite the growing importance of dialogue to develop shared understandings of issues facing Islamic law and proposing coordinated solutions, the contemporary research and scholarship has not developed harmoniously and remains piecemeal and sporadic. Researchers and practitioners of Islamic law are drawn from a wide variety of subjects and come from various regions of the world but have insufficient institutional support for sharing information and comparing experiences. Innovation in various strands and paradigms of Islamic law and practice is stifled because there are limited spaces where evolutionary, collaborative and interdisciplinary discourses can take place. This in turn hampers the ability to build on past research and record best practices, negatively impacting a consistent and orderly development of the field. There is a need to constitute a world community of Islamic law scholars based on interactions and aspirations moving across linguistic, ethnic, geographical and political borders.

The MJTILP is inspired by the need to fill these gaps. It provides a platform to legal and interdisciplinary scholars and researchers for critical and constructive commentaries, engagements and interactions on Islamic law and practice that are built upon configurations in contemporary contexts. It welcomes contributions that look comparatively at Islamic law and practice that apprise and inspire knowledge across national boundaries whether enforced by a State or voluntarily practiced by worldwide Muslim communities. We are equally interested in scholarships on encapsulated cultural worlds, diaspora, identity and citizenship that are embedded and circumscribed by religious ties. As it has been the practice of the journal since its establishment in 2005, it also has a specific interest in issues relating to the practice of Muslim States in international law, international law issues that may concern Muslim countries, and all aspects of law and practice affecting Muslims globally.

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The Objectives of Islamic Law: The Promises and Challenges of the Maqāṣid al-Sharīʿa Edited by Idris Nassery, Rumee Ahmed, and Muna Tatari, Epilogue by Anver Emon, Lexington Books, London, 2018, 312 p. ISBN: 9781498549936

Walid Ghali*

Maqāṣid al-Sharīʿah (Objectives of Islamic law) is a trending subject in Islamic law and its applications. It can easily be said that no other legal device has received as much attention nor generated as much excitement inside and outside the Muslim world. In its simplest, *Maqāṣid* is supposed to offer a way to derive and apply Islamic law in the contemporary world using an ancient methodology without being constrained by historical practice. Here comes this rich volume as essential contributions of collective chapters that engage in the debate and provide direction for the future. As it appears from the subtitle, the book comes into two parts, *"the promises and challenges,"* which offer an exciting dialogue between proponents and opponents of *Maqāsid.*

The promises part [chapters 1-7] is led by the *Maqāṣid* model's advocates who believe in the potential for the *Maqāṣid* to fashion Islamic law in the mould of justice and equality. For instance, the first two chapters by Mohamed Hashim Kamali and Jasser Auda outline the contours of the *Maqāṣid* as a legal tool. It includes a rich presentation of definitions of Maqāṣid and related terminologies such as *Ḥikma* (Wisdom) *and 'Illa* (Cause), and *Maṣlaḥa* (interest). Kamali then moves to provide a taxonomy of *Maqāṣid* with some clear examples to illustrate each type. This section is slightly overwhelming for those unfamiliar with some essential technical terminology such as *Usul al-Fiqh, and Shariʿah.* The identification of *Maqāṣid* from Qur'an and Sunna is another significant part of this chapter and sheds light on how the *Maqāṣid* was theorized in the first place. "[Over] one thousand places the Qur'ān either directly or indirectly and in the diverse manner of expressions identifies the rationale, purpose, benefits, and consequences of its rulings." (p. 20).

Related to the above, Auda focuses on *maqāṣid al-sharīʿah as* a system of values that has several theories and classifications. He argues that *ijtihād* should be vital to policy and methods before calling for the application of the *sharīʿah* in Muslim societies. To support his claim, Auda also mentions some contemporary scholars who introduced new, universal *Maqāṣid* that are directly induced from the scripts rather than from the body of fiqh (jurisprudence) literature in the schools of Islamic law. Examples such as Rashid Rida (d. 1935), Al-Ṭahir Ibn ʿĀshūr (d. 1907), Mohammad al-Ghazālī (d. 1996), Yusuf al-Qaradawi (1926—) and Ṭaha al-Alwani (1935—).

* Associate Professor at Institute for the Study of Muslim Civilisations, Aga Khan University, London, Walid.ghali@aku.edu

The two following chapters [3-4] moves to discuss the immediate relevance of *Maqāṣid* to key Islamic concepts. Muhammad Khalid Masud discusses the *Freedom of Religion* in diverse societies. To him, diversity, mentioned as *ikhtilāf* in the *Qur'ān* as a sign of divine creation and sustenance, includes references to the phenomena of change and continuity in nature, multiplicity in life forms, and differences of colors and languages and levels of understanding among humans. The *Qur'ān* invites the attention of scholars to deliberate on this diversity (Q 2:213, 3:22, 30:22, 5:48, 10:99, and 11:118). He makes more in depth analysis of *Maqāṣid* according to scholars such as al-Shatibi. While Masud focuses on freedom of religions, Idris Nassery elaborate on human dignity. He outlines a constructive concept of the protection of human dignity based on the *Maqāṣid* theory and to determine two main criteria for defining human dignity. The only way for us to grasp the different objectives of the *Sharīʿah*, as components of a joint objective linked to preserving the dignity of the children of Adam. Moreover, building on this Universalist understanding of human dignity, would be a productive and critical way of referencing the Islamic tradition and translating these considerations to topical issues in connection with human rights or other challenges that arise from technological advancement.

The last three chapters in the promises focus on how leading thinkers theorized the *Maqāṣid* to significant effect. This is an excellent method showing how different scholars dealt with Maqāṣid in different models. Muḥammad Shaḥrūr's *tartīl* method presented by Adis Duderija is an example of connecting *maqāṣid* to *Qur'ān-sunnah* hermeneutics concerning the question of Islam's relationship with the Religious Other. In so doing, Duderija described the delineating features of Shaḥrūr's understanding of the concepts of al-islām and al-īmān and the types of ethics associated with them. Shahrur believes that many verses promote religious harmony, justice, fairness and peace, commitment to the rule of law that does not discriminate based on gender, race, religion or ethnicity.

Another great name in the field of *Maqāṣid* is Ibn ʿĀshūr's, who is covered in chapter six by Felicitas Opwis. Ibn ʿĀshūr utilizes the concept of the purposes of the law (*Maqāṣid al-Sharī'a*) to incorporate mechanisms of legal change in a fashion that bridges tradition and modernity. A striking feature of Ibn ʿĀshūr's interpretation of *Maqāṣid* is that he expressly distinguishes them from the discipline of legal theory (*ʿilm uṣūl al-fiqh*). He exclaims that these are two different sciences that discuss different topics, use different methodologies, and have distinct epistemologies, which is regarded as an innovative approach. Ibn ʿĀshūr's thought provides an Islamic modernist approach to legal change, embracing modernity yet conveying authenticity.

Islamic finance has attracted enough attention to justify its introduction as a robust financial system with a unique value proposition. Younes Soualhi, therefore, studies the current practices of Islamic finance. The chapter attempts to decipher *Sharīʿah* business contracts and unlock the *Maqāṣid al-Sharīʿah* imbued therein. The emphasis was on the level of adaptation and variation needed to apply those contracts in contemporary finance. As for Islamic legal maxims, the chapter was selective of three, all of which were deemed critical in evaluating the *Maqāṣid* observance in structuring Islamic financial products. He concludes that the *Maqāṣid* are championed by all

stakeholders and observed in most of the products by the contracts used. However, some are marred by malpractices causing more harm to customers and creating a reputation risk that may hinder the development of Islamic finance. One of the main conclusions that we can emphasize is that Islamic finance is subservient to the dictates of globalization and the contemporary financial landscape, a situation necessitating the observance of reality that must be incorporated in the whole thrust of Islamic finance.

The second part [Chapters 8-14] includes dissenting voices from scholars who argue that the *Maqāṣid* have absolute limits that may well compromise their ability to realize their potential. These scholars question the taxonomy of the *Maqāṣid*, describe significant conceptual problems with particular objectives, and discuss practical impediments that constrain the application of the *Maqāṣid*. In *Reason and revelation*, Muna Tatari focuses on the objective of reason and its relation to revelation, in the quest for ethical orientation, as part of the *Maqāṣid al-Sharīʿah* debate. She highlights crucial aspects of the debate in order to point out important challenges. This chapter searched within the Islamic tradition for good arguments and views concerning contemporary questions of the definition of reason and its relationship with revelation. As part of the *Maqāṣid al-Sharīʿah* discussion, it tried to focus on ethical questions.

The development stages of the *Maqāṣid* approach in Islamic legal history presented in *The Hermeneutical Approach* by Mohammed Nekroumi indicate the dynamic nature of Islamic theology and highlight the particular significance of reconsidering tradition within a process of ethical approaches to reaching verdicts regarding social change. Based on Al-Shāṭibī's work *al-Muwāfaqāt* that highlights the issue of a socio-ethical reconsideration of Islamic law, the chapter aims to work out prospects and outlooks of a hermeneutical reconsideration of the term *Maqāṣid* in contemporary *Sharīʿah* discourse by putting Islamic ethics within its creation theology-based context. It discusses the main features of the *maqāṣid* theory regarding different influences over several centuries.

The unique character of Shāṭibī's theory stems from the fact that legislation in place up until the eighth/fourteenth century could not match that century's socioeconomic changes in Andalusia, which led to the aspiration for this legal theory to provide answers to the problems of the time and thus to adapt legislation to new social conditions. In this context, it is worth highlighting that the success of Shāṭibī's theory cannot be seen as linked to a desire for flexibility and adaptability of positive legislation. On the contrary, Shāṭibī's theory, with all its "insincerity" and its new character, was aimed at reestablishing "true legislation," legislation which had been neglected by some legal scholars on the one hand and abused excessively by some Sufis, including some legal scholars, on the other.

As a response to the promises of Islamic finance mentioned in chapter seven, Habib Ahmed raises the challenges in practices. He argues that Islamic finance practice turned out to be predominantly a prohibition-driven industry, whereby the goal is to exclude *riba* and *gharar* from financial transactions. As a result, even with the high growth rates of the Islamic financial industry, there is

a general feeling that Islamic finance has failed to fulfil the social goals of the *Sharī'ah* and is not playing the anticipated positive role in the economy. Based on this argument, Habib examines the concept of *Maqāṣid al-Sharīʿah* and its implications for Islamic banking and finance, and how these are reflected in the practice of the Islamic financial sector. After identifying the key challenges that the Islamic financial industry face to incorporate *Maqāṣid al-Sharīʿah*, he discusses ways in which these can be resolved at the conceptual and operational levels. There is a need to address the novel and contemporary ethical and social matters at micro and macro levels.

The Relationship between *Maqāṣid al-Sharīʿah* and *Uṣūl al-Fiqh* by Cefli Ademi draws a clear distinction between *Maqāṣid* theory and traditional *uṣūl al-fiqh* (principles of Islamic jurisprudence). It provides a schematic overview of the relationship between the two disciplines based on legal history. In the final analysis, the theory of *Maqāṣid al-Sharīʿah* can be considered to be a secondary or fundamental part in the *uṣul*-based law-finding process, or even as an independent discipline. Following the above challenge and debate, Rumee Ahmed asks an important question *what comes first Maqāṣid or Shari'a?* Historical and Philosophical Critiques. At this point, we must confront the question that if the *Maqāṣid* cannot be used to derive laws, then why do prominent jurists consistently discuss and promote them? It might seem an awful waste of time and energy to repeatedly examine these five objectives if they have no positive function. Put another way; if we accept that the *Maqāṣid* were designed to defend existing laws, then we should ask what jurists are defending when they appeal to the *Maqāṣid*, who is it being defended against, and why?

In her excellent chapter, Ayesha Chaudhry touches on another challenge: the patriarchal nature of *Maqāṣid* both in their inception and application. By examining the concept of *nasl* (lineage), chapter thirteen shed light on how Islamic law has come under increased pressure to reform to reflect the gender-egalitarian beliefs of Muslims. Chaudhry invites scholars to think about reform by challenging the current limits and rethinking the whole approach in light of reform. For example, is it viable to confront the preconception of *nasl* as a principle that protects women and men's sexual and reproductive rights rather than simply a determination of paternal lineage? The proposed framework will not solve all other ethical problems from other patriarchal laws, but according to the author, it will get us started on a path of honest, self-critical engagement with the Islamic tradition.

Finally, the concept of *Islamic Minorities Law* is the focus of the last chapter. Despite the several mentions to the early and pre-modern treatment of Muslims living in non-Muslims' territories, Mouez Khalfaoui is more concerned about the contemporary situation. The chapter therefore brings an important debate about *Fiqh al-Aqalliyāt* or Islamic law pertaining to Muslim minorities living in the west. The advocates for such law use the principles of *Maqāṣid* to justify their claim, but according to the author they ignored the wider context of Muslims being living outside the Muslims majority countries (*dār al-islām*) and the relationship between Muslim and non-Muslim territories. I concur with Khalfaoui that there is a need to think about the benefits and application of minorities' law. In my viewpoint, such a law will certainly widen the gap between Muslims and

the environment they live in. Perhaps it will lead to more isolation of Muslim community. In addition, it could have been useful if the chapter refer to another challenge, which is related to the various legal perspectives in the Muslim communities living in the west (i.e. Sunni and Shi'i). This been said, the chapter covers an important subject that requires further research. Many significant points were raised such as the amalgamation of Islamic law and other legal systems in Muslim countries especially in family law. In the final analysis, Muslims are supposed to contribute to the solution of modern-day challenges rather than to focus solely on "Muslim problems." As a result, it seems that the justification of an Islamic minority's law has lost its validity if it ever had any according to the author.

A concluding essay from Anver Emon brings these critiques together under a helpful rubric, shining a light on the political work that the maqāṣid perform, the structures that they reinforce, and the social costs they incur. She reflects on the dialogue in this volume and suggests that the aspirational accounts of *maqāṣid* reflect a politics of hope. "The chapters that uphold the promise of *maqāṣid* underappreciate both the *epistemic* and the *material* gap between redressing the law of the state, with its effects on the bodies of its most vulnerable subjects, and espousing the grandiose, if not overly pious, notions of justice intellectuals invest in their *maqāṣid* endorsements." In the final analysis, the *maqāṣid* cannot deliver on their promises because of what the rhetoric of hope hides, namely the elitism and privileged status of those who have the luxury to espouse hope in *maqāṣid*. That said, these chapters illustrate the immediate relevance of the *maqāṣid al-sharīʿa* to myriad social, political, and economic issues. Whether one agrees with the *maqāṣid* approach or not, examining the role of the *maqāṣid* about these issues brings to the fore latent assumptions about justice, religion, and religious law that animate contemporary discussions about Islam and Islamic law in the modern world.