

MAQĀṢID AL-SHARĪ‘AH: A LITERATURE REVIEW

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Abstract: At the core of the question of *maqāṣid* is the conception of the engagement of the community with the revelation. From this core, one can gain perspective on the *uṣūl al-fiqh* and *maqāṣid* approaches. The former does not provide priorities and does not address directly the pressing concerns that are overwhelming contemporary societies – it focuses on ‘form’ at the expense of ‘substance’. For the latter, the issue of methodology is important – how are the goals of the law ascertained? Finally, the author looks at key contributions of the *maqāṣid* approach, which opens the door to applications into areas typically beyond the scope of the *uṣūl al-fiqh*, such as civilisational renewal.

The Importance of the *Sharī‘ah*

As I researched this article on *maqāṣid*, I began to see the scholarship on *maqāṣid* as very much springing from fundamental values and conceptions of what law in Islam really is. As a result, I had to ‘step back’ numerous times to capture the full picture. The question of *maqāṣid* is fully the question of how we are to understand the revelation. So, to begin at the beginning, we may choose, then, a thirteenth-century report of a dream that shows the fundamental importance of *sharī‘ah* for Muslims.

I saw in a dream a clear way, even, with a soft light. I saw on the right of this way and on the left trenches and canyons and arroyos all with thorns that could not be penetrated because of their constriction and the ruggedness of the terrain and the many thorns, and the darkness that was there. I saw all the people stumbling about blindly, having left the clear, easy way. On the way was the Messenger of Allah and a small, plain group. He was looking at who was behind him, and there, in the community following, but on the path, was Shaykh Abū Ishāq Ibrāhīm b. Qarqūr, the *ḥadīth* scholar, an excellent master of *ḥadīth*, joined by his son, who understood from Prophet that he was telling him to call to the people to return to the path. Ibn Qarqūr raised his voice and spoke out calling – there was no one urging or urged – “Come to the path! Come to the path!” He called but no one responded, and no one returned to the path.¹

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Algorithms and Self-Reference

This clear path is what Muslims seek, and it is what Muslims mean by the *sharī'ah*. The directions and signposts for the clear path are similarly assumed to be clear. Let us look at two such instructions which function as algorithms, and thus are instructions that apply universally, and not simply to a particular, historical happenstance. In the passage just before the dream account above, we find this:

The *sharī'ah* is a clear path, a path of the fortunate ones and a path of good fortune, who walks on it is saved and who leaves it is destroyed. Messenger of Allah, when there came down his *ta'ālā* word, "This indeed is a direct path (*ṣirāṭī mustaqīm*)" [Qur'ān 6:153], traced a line in the earth and then traced lines on the right side of the line and on the left, then he put his finger on the original line and said, reciting, "This indeed is a direct path, so follow it and do not follow the (other) courses" [Qur'ān 6:153]. And he pointed to these lines he had drawn to the right of the original line and to its left, "as they will scatter you from *his* course" [Qur'ān 6:153], and he pointed to the direct line.²

This is an algorithm for finding the middle path.³ Another algorithm is described by 'Ā'ishah as follows and has a positive and a negative dimension.

The Messenger of Allah never chose between two things, one being easier than the other, except he chose the one easiest; except if it were offensive, and if it were offensive, he was the farthest of anyone from it.⁴

These algorithms are situational: finding the middle of a plurality of courses, choosing the easiest alternative, and recognising when something is offensive. Other algorithms are self-referential, as is the Prophet's instruction "Skip what disquiets you for what does not disquiet you", which is associated with a spiritual practice called *wara'*. A saying associated with this is: "I never found anything easier for me than *wara'*; everything that grated⁵ at all in myself, I left it."⁶ Often paired with the above is the instruction, given to Wābṣah, sitting before the Prophet when he "put his fingers together and tapped them on my chest and said, 'Wābṣah, take a *fatwā* (*astafīa*) from your heart, and take a *fatwā* from yourself', three times; 'goodness is what eases the self and offence is what grates on yourself and casts suspicion in your chest, even if you ask for an opinion (*aftāka*, cf. *fatwā*) from the people and they give you an opinion'.⁷

Part of this sense of ease is to be restful (Ibn al-'Arabī uses the word *mustarīḥ*) with the commands that were given without requesting additional commands, found in the key text, "Shed off of me what I left off of you (*dharūnī mā taraktukum*)."

A man asked, "Each year [*hajj*], Messenger?" He was silent, until he was asked three times. Then he said, "Had I said yes, it would have been; but as you are able." Then he said, "Shed from me what I leave off of you, because they were destroyed, who came before you, by the quantity of their questions and their oppositions against their prophets. So when I command you something, do what you are able; when I forbid you from something, let it go."⁸

Ibn al-‘Arabī’s comment on this statement is that “he disliked the question and faulted it. Allah! May we, and you (the audience), understand the wisdom of the law (*maqāṣid al-shar‘*); and do not veil us from its outward (wisdom) and its inward (wisdom).”

This suggests an outward (material) and inward (spiritual) dimension to the laws spoken as well as the unspoken area (“he was silent”). And above, we saw how key texts had the format of an algorithm, and how they necessarily had an element of situation or self-reference. The engagement of the revelation always has an individual, direct aspect. Because of this aspect, Muslims did not think that the *shar‘ah* disappeared when they travelled outside of Muslim societies individually. However, the lack of a supportive community was seen as detrimental to one’s worldly life, and the relatively modern phenomenon of minority Muslim communities has called forth an expanded legal discourse to deal with new situations. Often discussed under the rubric of *dār al-islām*, scholars generally believed that the benefit a Muslim community provided the individual was so vast and deep that one would not contemplate living outside of such a community permanently, and especially not women and children. We will return to this idea in the next section when we look at the *fiqh*. In transition to that section, we may consider the individual and community aspect to be merged in the following sense. The Muslim community recognised its value for the individual, from providing men a place for Friday prayers to mapping spaces for men and women; from regulating market transactions to alleviating poverty; from teaching children to restoring relationships. The “system” was sustained by knowledgeable people, in areas such as medicine, spirituality, law, and sciences. But the revealed instructions create such a system, where the system may be invisible to the individual, they are also targeted at the individual directly, as in the verse, “but say, We accept *islām* (*aslamnā*), as not yet has faith entered your hearts” (Qur’ān 49:14). The first stage is entering into a system; the second is to engage directly with the instructions, such that faith enters hearts.

The *Uṣūl al-Fiqh*

It may be fruitful to examine the *uṣūl al-fiqh* trans-historically – not historically, and one hopes not ahistorically. If we consider the interface of a community of believers

and revelation, we may notice themes that persist across history. We may find, for example, that the idea of analogy not only has its history, with the polemics of the second and third centuries A.H., and with its role in scholasticism later as it related to Greek logic, but a community-revelation dynamic as well.

In a trans-historical dynamic, we can see major arguments that persist over time. How does the community follow the Qur'ān and the Messenger? One answer is that of the 'people of Medina'. The idea was that over the years with the Messenger they had been trained well. When questions arose, they could draw on this training to provide answers. The school of Imam Mālik uses this basis of authority and refers back to this community and their practice. Closely related is the idea that communities themselves have answers to questions under the rubric 'customary practice' ('urf, 'ādah). Another answer is analogy (*qiyās*), that the community can answer questions by taking a text and considering how the new situation 'looks like' the textual situation. A third answer is to exert one's rationality to provide an answer, called *ijtihād al-ra'y*. This approach is associated with Abū Ḥanīfah. To recap, authority may be vested in new answers by reference to the people of Medina, to customary practice, to analogy, or to rational consideration. The assumption here is that the revelation had been somehow integrated into the community, especially the knowledgeable members.

In dynamic contrast with these approaches is one which seeks to answer all questions with an external, textual authority. This approach may be called *ḥadīth*. The felt need for textual answers created a vacuum into which *ḥadīth* poured; historically, the proliferation of these purportedly textual answers pushed scholars to devise elaborate techniques to categorise, evaluate, and use *ḥadīth*.

Mixed with this need for textual answers is the idea that language is fluid and changes with societal changes. The solution is to anchor a text with its original, Arabic context, anticipating that words such as 'apostate', 'adulterer', 'people of the Book', as examples, will have meanings that change over time and space. This approach is associated with al-Shāfi'ī.

The importance of knowing the specifically Arabic revelation is seen in the efforts of lexicographers such as Ibn Manẓūr (d. 1311) to describe that language of the Arabs up until the death of the Prophet. It was assumed that after that, any contemporary Arabic usage would not be authoritative.

Let us now take up a fairly recent *fiqh* issue, that of a woman leading the congregational prayers with men, in order to see how these ideas work in practice. The first response is 'no, that is not the way Muslims have acted over the centuries'. If one wants to challenge this response, the way to challenge is to say that the established practice is based on a context that has now changed. This idea of context is one we shall return to throughout this article. Using the idea of integrity in the first three approaches listed above, the first argument is that the Muslim community,

and especially its knowledgeable members, integrated their understanding of the revelation and believed, from that position, that women do not lead prayers. There is within this position no search for an external textual authority, as the fourth approach requires.

A second response is from this external textual authority (the ‘fourth approach’). Here the technical proficiency of the *fiqh* scholars is brought to bear. One argument will start with the instruction to Umm Waraqah to lead the members of her household, and scholars will debate whether that meant that men in the household were led in prayer, or they would go to the mosque for prayers, or whether the only man present was a bondsman. No conclusive result emerges from here. Then, an argument might address “the best rows for the women are the last and the worst are the first”. This is a clear text for position, and the argument could be made that *imāmah* meaning leadership is linguistically the same as *amāmah* meaning ‘in front’. The possibility of a woman leading from the middle, behind the men, might avoid this argument. Some scholars discuss allowing the woman to lead for optional prayers if she is the most versed in the Qur’ān, and they discuss whether she should be related to the men, or elderly, and so on. Another argument might connect *imāmah* to *amīrah* using “the nation will not prosper whose affairs are governed by a woman”. This argument then has to evaluate Abū Bakrah’s position as *ḥadīth* transmitter, with many different evaluations offered over the centuries.

We can see that the search for context is very important and very involved. The linguistic focus too is very complicated and technical. The context will be addressed in the next section.

The textual focus is not only complicated and technical. Developments of the last century, and especially the last two decades, have strained or broken the connection between definitions of words today and words that would have an Islamic textual referent. The strain is seen in the legal position in Malaysia, for example, where a Muslim man may not marry a woman generally defined as Christian. As we saw, al-Shāfi‘ī wanted to anchor words in their Arab, historical context. The ‘People of the Book’, then, are only the People of the Book who were so during the Prophet’s lifetime, which in practice now would include perhaps some St-Thomas-Christians of Kerala. If however, ‘People of the Book’ is defined linguistically and not simply historically, as was the practice for most Muslim communities, inter-marriage becomes common. For the first centuries of their encounter, Muslims considered Indians to be people of a Book – the Laws of Manu – with a Prophet, Noah. But even with texts, ‘Umar suspended marriage with Jewish women, as he suspended corporal punishment for stealing during a time of famine.

This is the arena of reason and revelation. Robert Crane situates these two this way, as the

perennial issue of the Mutazillite contention that reason trumps faith versus the Salafi position that faith trumps reason, both of which are extremist forms of error. The development of methodologies, such as the maqasid, has been designed to show that both extremes are wrong since there can be no conflict between the Qur'an and human reason. The elevation of either one to an absolute, independent of the other, is shirk al khafi or hidden idolatry. This is the meaning of this particular warning, made in various contexts throughout the Qur'an, "Do not set up any deity side by side with Allah".⁹

From this insight, neither revelation applied without reason nor reason applied without revelation is secure. There is no preventing word drift, and no refuge in reading the text without reason.

Then there are words that have no linguistic connection to an Islamic referent. For example, we can envision a consensus among Muslim scholars that genetically modified organisms fall under the clear text of "make no change in the creation of Allah" (Qur'an 30:30), especially when the dangers have been well-documented.¹⁰ Although this verse was mainly interpreted as referring to changes in the religion (*dīn*) of God, many interpreters included Ibn 'Abbās' statement that it included changes to animals, such as castration.¹¹ The problem of new words is not confined only to very recent history, as Ibn 'Āshūr in the twentieth century found many scholars erring with neologisms. He wrote:

Here, some scholars erred greatly, for example, the *fatwā* of some of them to kill the magician (*mash'widh*) by describing them nominally as sorcerers (*sahḥār*), closing their eyes to the real meaning of *sihr* (sorcery) which the Lawgiver connects to the penalty of death. Part of the scholar's responsibility when he speaks about sorcery or is asked about it is that he explain or clarify the attribute and true nature of it, and not to make a *fatwā* as soon as the word 'sorcery' is mentioned, saying, "Kill the sorcerer and do not accept his repentance," for that is a serious matter.

And some of the muftis erred when they made a *fatwā* forbidding smoking the tobacco leaf in the mouth, because when smoking first arose in the early eighth century [A.H.] and they called it *hashish*, they thought that it was the hashish that drugged the *hāshāshūn* smokers of it. Likewise when the Yemeni beans appeared called *qahwah*, some of the 'ulama' made a *fatwā* in the beginning of the tenth century forbidding infusing it, because they called it *qahwah* and that is a name for *khamr* (an intoxicant) in the Arabic language, even though the name of this bean is a corruption of a non-Arabic word 'kaffa' [café].¹²

How do we evaluate, then the principles of jurisprudence? Mohammad Hashim Kamali is clear that "in its long history of development, the methodology of *uṣūl al-fiqh* has also become somewhat burdened with technicality and literalism".¹³ As a result, "people often know the *ḥukm* (injunction) of the *sharī'ah* without knowing its *ḥikmah* (wisdom and purpose, synonymous with *maqṣad*)".¹⁴ In light of these

difficulties, he suggests an alternative route, not through the literal text but through the wisdom of the text. He says:

At a time when some of the most important doctrines of *uṣūl al-fiqh*, such as *ijmāʿ* (general consensus) and *qiyās* (analogical reasoning), and even *ijtihād* as a whole, seem to be burdened with many difficult conditions – conditions that may be difficult to apply to the climate generally prevailing in the Muslim world, *al-maqāṣid* may, as such, provide a ready and convenient alternative route to the *sharīʿah*.¹⁵

Writing in 1946, Ibn ʿĀshūr explains the need for such ‘an alternative route’. He says:

All of these [technicalities] are applications to the [the *sharīʿah*’s] field that detach from the elucidation of the general wisdom of the *sharīʿah* and its general and specific objectives in its injunctions. They constrict its field to *sharīʿah*-based terms, and to meanings constructed [analogically] on its terms, that is, analogical deduction of the reasons for injunctions.¹⁶

Kamali says, “The greater part of the issues of *uṣūl al-fiqh* do not stem from service to the wisdom of the *sharīʿah* and its objectives.”¹⁷ Extending this observation, he writes:

the methodologies of *uṣūl al-fiqh* and *ijtihād* are on the whole predicated on medieval social values, retrospective and slow to relate effectively to the modern processes of adjudication and law making [...]. The *maqāṣid* are inherently dynamic by comparison and capable of evolution in tandem with the changing conditions of society.¹⁸

The focus on private law, too, means that jurisprudence pays “scant attention to public law and governance”.¹⁹ We turn now to the possibilities for Islamic law that emerge from a *maqāṣid* approach.

Maqāṣid al-Sharīʿah

Form and Substance

If we engage the metaphor of “form and substance”, an interesting irony appears. We saw above that the external textual authority approach to understanding the revelation was concerned to put a linguistic halt to word drift. Sherman A. Jackson at a conference spoke about it this way. He said that this approach was a concern that interpretive viruses were going undetected because they had been “sublated into the realm of plain speech by peoples whose language was now that of the Arabs but whose interpretive presuppositions were emphatically not [...]. Otherwise, a command to amputate the hands of thieves might be interpreted away by those

whose inherited notions of God preempted the possibility that He might actually sanction literal amputation.”²⁰ A focus on words – on forms – however, risks losing substance entirely. By engaging the *maqāṣid*, it becomes possible to move beyond forms to substance. In his presentation, Sherman Jackson showed how it is possible and necessary to extend the desire to protect the intellect (*ḥifẓ al-‘aql*) to the larger picture of self-determinacy. Under the colonial, imperial, or modern ‘gaze’, as Foucault put it, the other has a race but the (white) speaker does not. One may provide the example of the discourse of ‘straightening hair’, where the tacit proclamation is that ‘curly’ is abnormal and ugly.²¹ In the discourse of ‘fairness’, brown skin wants to become white, meaning, normal. Jackson’s use of *maqāṣid* is an intriguing way of both identifying and rising above the constraints imposed by dominant forces. Especially in a period of global wars waged by the United States at the same time as its popular culture is dominant, such a project is very much needed.

As the substance of an Islamic order or civilisation recedes further into the past, the desire for “form” increases. But the desire for form does not engage the question of substance very well. Many Muslims want financial instruments that work like bonds and other foreign (‘Western’, ‘modern’) instruments. As an IAIS colleague, Sheila Aïnon, is currently discovering, however, there is a functional gap between the *sharī‘ah*-compliant form of some financial instruments and their implementation, or substance. In France, the *ḥijāb* becomes a form and site of contention, at the highest political levels. A proposed community centre in New York City becomes a ‘mosque’ and its location becomes ‘at Ground Zero’.

A big obstacle for a ‘substance’ approach is the tendency today for Muslims to define the ‘features’ of Islam by outward forms instead of substance. Wael Hallaq points out that “the utilitarian/secularist approach to legal construction... has proven to lack legitimacy in most parts of the Muslim world”.²² It is not clear yet whether the *maqāṣid* approach will convey ‘Islamic’ legitimacy to legal constructions.

In any case, the form–substance problem must be addressed. Ibn ‘Āshūr explains that to stubbornly hold on to superficialities without understanding the intent is to “expose the *sharī‘ah* to being dismissed disdainfully”.²³ One could follow the letter of the law and actually be going against the law. But how far did he take this? Aïcha El Hajjami writes that he “commendably broadened the concept of the *maqāṣid* to the principles of freedom and equality”, but he seemed to restrict it very quickly in the matter of gender. She concludes that “even the most innovative theologians of Islam have failed, in their turn, to escape the social construction of sexual relations of their age, according to which the physical and intellectual abilities of women are conclusively determined by their sex”.²⁴ When it comes to women, then, these theologians remain fairly hide-bound. Their enthusiasm for technology, on the other hand, as we shall see, knows no bounds.

Neologisms

What about new words, then? In the same way that Jackson described above, where one internalises the dominant view, urban Muslims especially have generally absorbed the dominant view of technology, and especially the idea that it is neutral. Even with issues of cloning, obvious areas where “words” are new and therefore have no literal referent in Islamic law, organisations such as the Islamic Fiqh Academy in Jeddah are unabashedly pro-technology. If possible problems are pointed out, either from environmentalists or experimental scientists, they are ignored, as Anke Iman Bouzenita points out. Somehow the words “cheap medication through genetic engineering in plants” trump all. So while the *maqāṣid* are used here in the absence of forms or words from Islamic history, they are used superficially. She says that “they take the production of cheap medication available to all as leading to the preservation of life, which is one of the essential objectives of *sharī‘ah*”. She continues to say that

what has been left out in analysis is the question, why is medication for a lot of diseases unaffordable to vast parts of the global population? The answer is quite simple indeed: because their production is monopolised in the hands of a few multinational companies who prefer their increasing profits to global health, and because these companies externalise their monopoly with a copyright of ‘their’ products. Considering these facts, would it not be closer to the mechanisms of reality and change to present the Islamic alternative to this marketed copyright phenomenon prior to giving a legal ruling based on an objective which, ironically enough, we will not see realized as long as this monopoly is in operation? [...] These problematic issues accrue from an unjust global economic system. Any innovation in the field of genetic technology will ultimately be used to serve its vital interests and the objectives of the free global market as long as the Islamic framework is not reactivated.²⁵

This dichotomy is one of Islamic values on one side and non-Islamic systems on the other. Bouzenita does not see this dichotomy resolved by placing an Islamic *maqāṣidī* approach onto a non-Islamic society. In fact, “it rather confronts us with an additional danger. The ultimate objectives of the *maqāṣid* can only be obtained by a whole-scale implementation of the same.”²⁶

As Social Science

Anke Iman Bouzenita clearly identified problems with attempting to find legal prescriptions in a society that is not Islamic. The *maqāṣid* approach does not automatically guide the scholar to the correct level or depth of analysis. As a result, it is easy for the legal scholars in Jeddah to focus on the superficial legality of genetic engineering without looking at the bigger picture of unjust, monopolistic

global capitalism. Aïcha El Hajjami's criticism was also that in gender at least the scholars are not able to transcend constrictive constructions of gender. Sherman Jackson was able to gain deep insight into how the concept of *ḥifẓ al-'aql* may be used to defend against normalised domination, but he does not suggest that the *maqāṣid* automatically led him to that insight.

In order to apply *maqāṣid* to our world today, we need to engage contemporary social sciences. This enterprise is furthered by scholars such as Wahabuddin Raes ("Maqasidic Approach to an Islamic Theory of International Relations") and Shuhaidah Md Noor and Azila Ahmad Sarkawi ("The Use of *al-Maqāṣid al-Sharī'ah* in Building an Alternative Framework of Urban Design").²⁷ Mohamed el-Tahir el-Mesawi describes this as taking the idea of *maqāṣid* as a basic framework for the understanding of human socio-historical existence. He sees this as an "opportunity to overcome the inadequacies of both the positivistic and formal approaches to the study of man and society through an integrated methodology in which the empirical and the theoretical are cast together".²⁸ A critical social scientific approach may plumb the depths of a problem, so that a *maqāṣid* evaluation would not be merely superficial.

Policy-Relevancy

One consequence of the 'form over substance' problem we considered above is a focus on words (especially in *uṣūl al-fiqh*) that misses substance. There is a way Muslim scholars have maintained their focus on substance, and that has been the *maqāṣid* approach. Robert Crane says this:

Ignorance of the maqasid among modernist Muslims explains why even otherwise knowledgeable Muslims have accepted the biased approach of the Orientalists and therefore have had basically nothing to say about human rights in Islamic thought other than an embarrassed 'me too'.

This defensive mindset reflects the lack of *ijtihād* as a primary goal of competency in Islamic education and relegates Muslims to irrelevance in world affairs. The 'me too' mentality implies that Islamic scholarship has nothing to offer in addressing the issues of conscience in the world. In effect, it leaves Muslims no choice but to agree with the secular fundamentalist legal systems that have come to dominate in Western culture, in which justice has been crowded out as the real meaning of 'the rule of law' and been replaced by the imposition of 'peace, freedom, and democracy' without any moral content.²⁹

The *maqāṣid* approach, then, opens up a way for the Muslim scholar to engage meaningfully in matters of legislation without being bogged down with the formalism of a narrowly-conceived Islamic jurisprudence. This approach suggests

that the wisdom of the *sharī'ah* may be applied in contemporary societies through the *maqāṣid*. Perhaps the leading proponent of this approach is Mohammad Hashim Kamali, who situates his efforts, and that of IAIS Malaysia, in the interface of the Islamic scholar and the policy-maker. There are policy studies and recommendations that are purely positivist; there are recommendations (criticisms, usually) that are only formally Islamic; his method is to bring the wisdom of Islam ascertained through the study of the *maqāṣid* to bear on issues of pressing concern. As long as 'Islam' is conceived of as a narrow list of do's and don'ts, as Robert Crane says, it will generate little interest in policy-makers. If, instead, the *maqāṣid* can be engaged to inform policy-makers, significant advances may occur. We may start to see policies that are 'Islamic' in substance but are not necessarily identified explicitly with Islam. The idea is that the 'Islamicity' of a society would be better measured by its actual implementation of *maqāṣid* than its display of formally 'Islamic features', like the number of mosques or sales of *burqahs*.

Constitution Building

This journal has reported on efforts to apply the *maqāṣid* to constitution-building, where

We have also seen a fresh emphasis on the revival of Islam and the demand of Muslim masses almost everywhere to integrate and enhance the relevant aspects of *sharī'ah* in their otherwise western-law oriented laws and constitutions. This is a demand that seeks to rectify the imbalances of colonialism and their aggressive downgrading and suppression of the *sharī'ah*. Yet the success of this exercise, and indeed of any other aspect of the constitution, would very much depend on methodical, realistic and moderate approaches toward the revival of a valuable heritage.³⁰

Having contributed to building constitutions in Afghanistan, the Maldives, and Somalia, Mohammad Hashim Kamali has been at the forefront of bringing the wisdom of Islamic law to bear on Western forms of law.

Nation-State

We started with the algorithms of Islamic instructions. These instructions have an individual and community aspect. They are situated in a community and refer to the individual self. The existence of relatively new *fiqh* of Muslim minorities shows that Muslims historically lived in Muslim communities. In many traditional societies, the connection between individual and community and law was so strong that when colonialism and nation-states destroyed the bond, the community was destroyed. If colonial or national powers allowed for a code of laws that were superficially Islamic, nevertheless, the bond or horizontal authority of the community was broken.

This horizontal authority can even be seen as the primary focus of the colonial and national onslaught. In fact, the force of vast and powerful militaries, led by the United States, is to destroy any last remnants of horizontal power. This power is so comprehensive as to be atmospheric and almost invisible. It ranges from the power to annihilate every human being on the planet to the power to enter the home and determine whether or not a child may be spanked.

The focus still today is on the tribe, which resists national-state authority. Zoltan Grossman says,

The so-called 'Global War on Terror' is quickly growing outside the borders of Iraq and Afghanistan, into new battlegrounds in Pakistan, Yemen, Somalia, and beyond. The Pentagon is vastly increasing missile and gunship attacks, Special Forces raids, and proxy invasions – all in the name of combating 'Islamist terrorism'. Yet within all five countries, the main targets of the wars are predominantly 'tribal regions, and the old frontier language of Indian-fighting is becoming the lexicon of 21st-century counterinsurgency. The 'Global War on Terror' is fast morphing into a 'Global War on Tribes'.

Tribal regions are local areas where tribes are the dominant form of social organization, and tribal identities often trump state, ethnic, and even religious identities. Tribal peoples have a strongly localized orientation, tied to a particular place. Their traditional societies are based on a common culture, dialect, and kinship ties (through single or multiple clans). Although they are tribal peoples, they are not necessarily Indigenous peoples – who generally follow nature-centered spiritual and cultural systems. Nearly all tribal communities in the Middle East and Central Asia have been Islamicized or Christianized, but they still retain their ancient social bonds.³¹

The problem identified by Bouzenita is then actually part of a larger problem: it is the nation-state. The divide between a society under a nation-state and one not, is, for the workings of Islamic law, absolute, but many vocal Muslim activists assume the opposite. For them, 'king' and 'leader' and 'state' are the same. When the caliphate finally disappeared in Turkey in 1924, Muslim scholars scrambled to find resolution. 'Alī 'Abd al-Rāziq argued that Islam was a religion like others, individual and personal, and that a lack of political power was not to be regretted. But it was not until the 1970s that the idea of an Islamic state took hold. One would imagine that the idea that a corporation is a person would be a hard sell, and similarly that a state could be Muslim or Islamic. Instead, the Muslims who live in societies of horizontal authority are the last holdouts and Muslims who are comfortable with the state dominate the discussion. But Wael Hallaq says, "It would be no exaggeration, I believe, to suggest that there is virtually no problem or issue in the modern legal history of Islam that does not hark back to the discord between the thoroughly indigenous Islamic/customary law and the European-grown import that was the nation-state."³²

Concluding Remarks and Recommendations

The first stage is to recognise the pervasive nature of the state.

- Then, the question becomes, what is Islamic law without Islamic order? Our ‘words’ have drifted semantically so far as to be beached. The *maqāsid* approach may be an answer if the question of context is adequately addressed.
- The approach itself does not automatically provide us insight. It does not automatically reveal the most important contextual issues – it does not by itself challenge our views of state, power, gender, and so on. But what the approach does do is provide us with an architecture that allows us to speak productively among ourselves and with others.
- The special contribution of *maqāsid* to government policy and legislation is not to implement a particular system of rules but to direct the conduct of its affairs with wisdom and to strive for the improvement of people’s welfare.

Notes

1. Ibn al-‘Arabī, *Futūḥāt* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1999), 5:101.
2. *Ibid.*, 5:101.
3. See Mohammad Hashim Kamali, *The Middle Grounds of Islamic Civilisation* (Kuala Lumpur: IAIIS Malaysia, 2010, in press).
4. “Musnad ‘Ā’ishah”, in: *al-Musnad*, no. 25,164 (Cairo: Dār al-Ḥadīth, 1994), 560.
5. The word *ḥāka* is translated here as ‘grates’. In Ibn Manẓūr’s *Lisān al-‘Arab*, under *ḥ-y-k*. we find, “Nawwās b. Sam’ān asked the Prophet about goodness and offense, and he said, ‘Goodness is fine character, and offense is what *ḥāka* [grates] in yourself and you hate that it would be proclaimed to people,’ that is, that it would make a mark in the self and become rooted. And it is reported from Shām in a *ḥadīth*, ‘offense is what *ḥāka* in the self and causes doubt in the chest, even if the people propound it [i.e., as a *fatwā*]. And Ibn al-A‘rābī said, Nothing *ḥāka* [grates] in my heart or nicks it.”
6. Ibn al-‘Arabī, *Futūḥāt*, 3:263.
7. “Musnad Shamiyyīn”, in: *al-Musnad*, no. 17,929 (Cairo: Dār al-Ḥadīth, 1994), 330.
8. Aḥmad b. al-Ḥusayn al-Bayhaqī, *Kitāb al-sunan al-ṣaḡḡir* (Beirut: Dār al-Fikr, 1992), 390.
9. Robert D. Crane, “Islamic Jurisprudence: The Role of Context as a Double-Edged Sword”, available online at http://www.theamericanmuslim.org/tam.php/features/articles/islamic_jurisprudence_the_role_of_context_as_a_double_edged_sword/ (accessed on 4 October 2010).
10. See <http://www.consumer.org.my/development/environment/482-dont-approve-field-release-of-genetically-engineered-aedes-mosquitoes> (accessed on 4 October 2010) for SM Mohd Idris’ letter against using genetically engineered mosquitoes in Malaysia.
11. For example, in Abū Ṭālib al-Makkī’s commentary, “Ibn ‘Abbās said, ‘Its meaning is, do not alter what God has created, for example animals, do not castrate them.’ He disliked animals being castrated and recited this verse.”
12. Ṭāhir Ibn ‘Āshūr, *Maqāsid al-sharī‘ah al-islāmiyyah* (Amman: Dār al-Nafā’is, 2001, first published in 1946), 347.
13. Mohammad Hashim Kamali, “Law and Ethics in Islam: The Role of the *Maqāsid*”, in: Kari Vogt, Lena Larsen, and Christian Moe (eds), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (London and New York: I.B. Tauris, 2009), 23.

14. Ibid., 24.
15. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Kuala Lumpur: Ilmiiyyah Press, 2007, 5th printing), 408.
16. Ibn 'Āshūr, *Maqāšid al-sharī'ah*, 167.
17. Ibid., 166.
18. Kamali, "Law", 24.
19. Ibid., 38.
20. Sherman A. Jackson, "Concretizing the *Maqāšid*: Islam in the Modern World", in: *Maqāšid al-Sharī'ah and its Realization in Contemporary Societies* [proceedings of the 'International Conference on Islamic Jurisprudence and the Challenges of the 21st Century', International Islamic University Malaysia, IIUM, Kuala Lumpur, 8–10 August 2006] (Kuala Lumpur: IIUM, 2006), 3:2.
21. Some of these ideas come up in the 2009 American documentary comedy film "Good Hair" by Chris Rock, especially in his conversations with Al Sharpton.
22. Wael B. Hallaq, "*Maqāšid* and the Challenge of Modernity", in: *Maqāšid al-Sharī'ah and its Realization in Contemporary Societies* [proceedings of the 'International Conference on Islamic Jurisprudence and the Challenges of the 21st Century', International Islamic University Malaysia, IIUM, Kuala Lumpur, 8–10 August 2006] (Kuala Lumpur: IIUM, 2006), 3:17.
23. Ibn 'Āshūr, *Maqāšid al-sharī'ah*, 215.
24. Aïcha El Hajjami, "Gender Equality and Islamic Law: The Case of Morocco", in: Kari Vogt, Lena Larsen, and Christian Moe (eds), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (London and New York: I.B. Tauris, 2009), 110.
25. Anke Iman Bouzenita, "*Maqāšid* and Related Legal Tools in Current Bioethical Questions – Prospects and Limits", in: *Maqāšid al-Sharī'ah and its Realization in Contemporary Societies* [proceedings of the 'International Conference on Islamic Jurisprudence and the Challenges of the 21st Century', International Islamic University Malaysia, IIUM, Kuala Lumpur, 8–10 August 2006] (Kuala Lumpur: IIUM, 2006), 3:401.
26. Ibid., 402.
27. From the 2006 IIUM conference.
28. Mohamed el-Tahir el-Mesawi, "*Maqāšid al-Sharī'ah*: An *Uṣūlī* Doctrine or Independent Discipline: A Study of Ibn 'Āshūr's Project", in: *Maqāšid al-Sharī'ah and its Realization in Contemporary Societies* [proceedings of the 'International Conference on Islamic Jurisprudence and the Challenges of the 21st Century', International Islamic University Malaysia, IIUM, Kuala Lumpur, 8–10 August 2006] (Kuala Lumpur: IIUM, 2006), 3:102.
29. Crane, "Islamic Jurisprudence".
30. Mohammad Hashim Kamali, "A New Constitution for Somalia – Workshop on 'Sharī'ah Law in Constitutions of Muslim Countries: Challenges for the Somali Constitution-Building Process' (Djibouti, 6–10 February 2010)", *Islam and Civilisational Renewal* 1, no. 4 (July 2010), 735–6.
31. Zoltan Grossman, "Return to Indian Country: The Global War on Tribes" (14 April 2010), available online at <http://coto2.wordpress.com/2010/04/14/return-to-indian-country-the-global-war-on-tribes/> (accessed on 4 October 2010).
32. Hallaq, "*Maqāšid*", 3:20.