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Abū Yaʿrub al-Marzūqī and His Critique of the *maqāṣid* Theory

Abdessamad Belhaj

Institute of Religion and Society, University of Public Service, H-1083 Budapest, Hungary;
belhaj.abdessamad@uni-nke.hu

Abstract: The purpose of this essay was to examine and evaluate Abū Yaʿrub al-Marzūqī's criticism of the *maqāṣid* theory. Al-Marzūqī is mostly concerned with epistemology and ethics. He contends that the *maqāṣid* theory is insufficient to assert access to God's meaning in Islamic law, since it is based on shaky processes of knowledge, particularly that of ratiocination, *taʿlīl*. On the other hand, he challenges the *maqāṣid* jurists' authority to define the goals of the law in the absence of popular support. Additionally, he charges the *maqāṣid* jurists with endorsing political authority so that it can utilize the *maqāṣid* method to defend specific policies in the name of upholding the public interest. His primary claim is that the *maqāṣid* theory exhibits arbitrariness.

Keywords: al-Marzūqī; *maqāṣid*; ethics

1. Introduction

Abū Yaʿrub al-Marzūqī is a prominent Tunisian Muslim philosopher. He is particularly known for his nominalist philosophy (that only particulars exist, while universals are mere names without any correlating reality), a perspective that marked his views of Islamic law and ethics. So far, al-Marzūqī has produced two works on the *maqāṣid* theory, in 2006 and 2017, respectively, which, arguably, are some of its most extensive critiques. Overall, he considers this theory to be a by-product of Muʿtazilism, rejecting ratiocination, *taʿlīl*, and developing several arguments against realism and the Aristotelian background of the *maqāṣid*. Al-Marzūqī first offered an epistemological critique of the *maqāṣid* theory, insisting on the limits of human knowledge in grasping the highest objectives of law. Second, he produced an ethical critique of juristic authority and its claim to mediate (between human beings and God's intent) and justify human actions based on the purposes of law. This paper will explore al-Marzūqī's background, his approach to Islamic legal methodology, and his double critique of the *maqāṣid* theory.

The goal of this study is to engage critically with al-Marzūqī's discourse on *maqāṣid*, which is a landmark in Islamic ethics and law frequently taken for granted. Since the 1990s, the *maqāṣid* theory has enjoyed a fantastic response in Islamic thinking and ethics. The status of the *maqāṣid* theory's art is outside the purview of this essay (Opwis 2022 and Masud 2022 discuss some of the most recent debates on *maqāṣid*). To paint a broader picture of the significance of *maqāṣid* in Islamic studies, however, the *Arab Union Catalogue* provides a fascinating bibliographic tool of Arab Muslim scholars who studied the subject between 1947 and 2023: more than 1200 books were published in 18 Arab countries, with Egypt, Saudi Arabia, Lebanon, Jordan, and Morocco leading the pack. This body of literature has grown steadily each year, reaching 71 publications in 2008.¹ Unfortunately, Muslim intellectuals produced few critiques of the *maqāṣid* theory, as if this doctrine were impervious to challenge. It has also had a warm reception outside the realm of Islamic legal studies in fields like economic ethics, bioethics, politics, and other related fields. In particular, among the small group of Muslim thinkers who generated criticism of the *maqāṣid* theory, al-Marzūqī is the most prolific; he composed two works on the subject, which will be discussed in this article.



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The *maqāṣid* theory refers to a set of ideas (such as “public interest”, “protection of higher objects”) and methods (such as “induction” and “utility reasoning”) that have been taken from the late Islamic legal theory literature known as *maqāṣid al-sharīʿa*, which was most completely developed by Abū Ishāq al-Shāṭibī (d. 790/1388) in his *al-Muwāfaqāt*. Early 20th century reformists in Egypt and Tunisia rediscovered this legal literature (Muḥammad ʿAbduh (1849–1905) and al-Ṭāhir ibn ʿAshūr (1879–1973) deserve credit for this). It was afterwards adopted by Muslim jurists and intellectuals throughout the Muslim world. The goal of the *maqāṣid* theory is to establish a normative foundation for Islamic law, with the goal of human welfare as the ultimate end. Based on three types of universal premises—necessities, basic needs, and embellishments—this theory’s central claim is that the safeguarding of public interest is the primary goal of Islamic law. To preserve these fundamental requirements, Islamic law establishes regulations regarding rituals, marriage, divorce, inheritance, business transactions, and education. It also lays out the ways to achieve human well-being through Islamic law (Masud 2022).

It is outside the scope of this article to provide a general contextualization of current debates on *maqāṣid* in Islamic ethics and law in terms of the intellectual and socio-political circumstances that underpin these ideas, since it is a case study and a part of the special issue on *A Critique of the Modern Discourse of maqāṣid* (which will also cover elements of reception and hopefully contextualization). It is sufficient to include two contextual details concerning the interlocutors of al-Marzūqī on *maqāṣid* here. First, in his first work on the topic *Ishkāliyyat tajdīd uṣūl al-fiqh* (*The Question of Renewing Islamic Legal Theory*), he engages in a discussion with Muḥammad Saʿīd Ramaḍān al-Būṭī, the renowned Syrian Sunni Muslim scholar (1929–2013), who was a leading proponent of the *maqāṣid* theory and an official Sunni religious authority in Syria.² He saw in al-Būṭī a target for his critique of the mainstream religious discourse associated with the authoritarian regimes. Second, he was dissatisfied with the Islamist experience in the Arab world following the Arab Spring, which in his opinion proved to be just as detrimental as the instrumentalization of *maqāṣid* by the authoritarian states, and this dissatisfaction served as the inspiration for his 2017 book *Shukūk ʿalā naẓariyyat al-maqāṣid* (*Doubts on the maqāṣid Theory*).

2. Abū Yaʿrub al-Marzūqī: His Life and Works

Muḥammad al-Ḥabīb al-Marzūqī, known as Abū Yaʿrub al-Marzūqī, was born in Tunisia in 1947; he was trained in Paris in philosophy, especially Islamic and Greek philosophies. He obtained a doctorate in philosophy from the Sorbonne University in 1991, a degree in law from the University of Paris IV, and a degree in German philosophy from the University of Paris I. He taught philosophy at the Faculty of Humanities and Social Sciences in Tunis from 1980 to 2002 and from 2005 to 2007. From 2002 to 2005, he taught philosophy at the International Islamic University in Kuala Lumpur, Malaysia. Besides his academic work and media appearances, al-Marzūqī attempted a brief political adventure as a representative of the Islamist political party Ennahda (2011–2012) in Tunisia. However, he resigned and has distanced himself from politics since then.³

To date, al-Marzūqī has published over 23 works on the themes of philosophical, religious and political reform. His reformist project can be broken down into two main phases: 1. An early phase (1985–2006) that focused on reforming Islamic philosophy, attempting to reconcile philosophy and religion on the basis of an integrated epistemology. In 1985, he published *al-Ibistimūlūjiyyā al-badīl: muḥāwala fī fiqh al-ʿilm wa-mirāsīh* (*The Alternative Epistemology: An Essay in the Theory and Practice of Science*). In 2001, he published his book *Waḥdat al-fikrayn al-dīnī wa-l-falsafī* (*The Unity of the Philosophical and Religious Thoughts*). In this early period of his intellectual trajectory, al-Marzūqī paid particular attention to discussing epistemological revitalization in the fields of philosophy of history and metaphysics.⁴

In his second phase of intellectual activity, al-Marzūqī concentrated on religious and political thought. This political–religious turn became obvious in the years between 2007 and 2009. Thus, in 2007, he published *Shurūṭ nahḍat al-ʿArab wa-l-muslimīn* (*The Conditions of the Awakening of Arabs and Muslims*) and *al-Waʿy bi-qaḍāyā al-umma wa-bi-dawrihā fī taḥrīr*

al-insān (Awareness of the Issues of the Muslim Community and its Role in the Liberation of Man). In 2008, he published *Sharʿiyyat al-ḥukm fī ʿaṣr al-ʿawlama bayna al-uṣūliyyatayn al-ilmāniyya wa-l-dīniyya* (The Legitimacy of Governance in the Era of Globalization between the Secularist and Religious Fundamentalisms). His commentary on the Quran, entitled *al-Jalī fī al-tafsīr* (The Lucid in the Quranic Commentary), was published in 2010. The political focus of his work dramatically increased in the aftermath of the Tunisian uprising in 2011. Accordingly, he published in 2012 *Istiʿnāf al-ʿArab li-tārīkhīhim al-kawnī: thawrat al-ḥurriyya wa-l-karāma: Tūnis namūdhajan* (Arabs Resume their Global History: The Revolution of Freedom and Dignity: The Case of Tunisia), followed by other works of a similar nature.⁵

Al-Marzūqī dedicated two publications to Islamic legal theory and *maqāṣid al-sharʿa*:

1. His co-authored book with Muḥammad Saʿīd Ramaḍān al-Būṭī, the prominent Syrian Sunni Muslim scholar entitled *Ishkāliyyat tajdīd uṣūl al-fiqh* (The Question of Renewing Islamic Legal Theory), which was published in 2006. This book can be seen as the beginning of the shifting of his focus from philosophy and epistemology to religious and political thought.
2. His *Shukūk ʿalā nazāriyyat al-maqāṣid* (Doubts on the *maqāṣid* Theory) published in 2017. In the following section, I suggest first discussing al-Marzūqī’s approach to Islamic ethics and law based mainly on *Ishkāliyyat tajdīd uṣūl al-fiqh*.

3. Al-Marzūqī’s Approach to Islamic Ethics and Law

We should first try to comprehend al-Marzūqī’s legal philosophy in order to understand his critique of the *maqāṣid* theory. In general, al-Marzūqī rejects the dominant epistemology of *uṣūl al-fiqh* which is shaped by Islamic theology, *kalām*, itself deeply influenced by Aristotelian philosophy. Al-Marzūqī believes that *kalām*’s epistemology followed Greek and Muslim philosophers in adopting a realist perspective, which claims the existence of universals and particulars. Philosophical realism, which can be traced back to Plato, asserts that certain types of things have mind-independent existence, i.e., that they exist even in the absence of any mind perceiving them or that their existence is not merely an appearance in the mind of the beholder. These things can range widely, from abstract objects like numbers to moral statements to the physical world itself. Therefore, ideas exist in reality, separate from specific human experience (Craig 1998, p. 7237). Since they assert the presence of modals or divine attributes, Muslim theologians (especially Muʿtazilites and Ashʿarites) can be seen as adopting a type of metaphysical realism (Aktaş 2021, p. 55). However, research on *kalām* has mostly ignored the argument between realism and nominalism, which predominantly affects European philosophy. One of the issues is that it might be challenging to tell whether a particular theologian is a realist or nominalist. Given that they adhered to diverse schools of theology, it is even more challenging to categorize Muslim legal theorists as nominalists or realists. Furthermore, some researchers believe that al-Ghazālī, a significant member of the Ashʿarite school of Sunni theology, is a nominalist (Griffel 2009, p. 166).

As a nominalist, al-Marzūqī denies the existence of universals and believes in the existence of particulars only; this was his thesis in his important book *Iṣlāḥ al-ʿaql fī l-falsafa al-ʿarabiyya: min wāqʿiyyat Aristū wa-Aflāṭūn ilā Ismiyyat Ibn Khaldūn wa-Ibn Taymiyya* (The Reform of Reason in Arab Philosophy: from the Realism of Aristotle and Plato to the Nominalism of Ibn Khaldūn and Ibn Taymiyya) in which he endorsed a practical positive philosophy over the Greco–Islamic theoretical–universal one (al-Marzūqī 1994). I will later critically evaluate al-Marzūqī’s perspective on Islamic thought’s past. This position lacks nuance, it should be noted, as not all of *kalām* and most definitely not all of *uṣūlīs* were inspired by Greek philosophy in the same way, nor is Greek philosophy a single body of thought. In particular, al-Marzūqī considers that Muʿtazilī theology and Khārijism–zāhirism had a destructive influence on *uṣūl al-fiqh* (al-Marzūqī and al-Būṭī 2006, p. 25). According to him, these schools of thought infused a sense of rebellion and non-consensual tendencies into the Sunni *uṣūl al-fiqh*. The first is responsible for spreading esoteric interpretation in Islamic thought, while Khārijism and zāhirism diffused literalism in the Sunni realm as they claimed that religious truth lies in the apparent meaning of scripture (al-Marzūqī and

al-Būṭī 2006, p. 27). Although his affirmation of the Muʿtazilī influence on *uṣūl al-fiqh* is uncontested by historians of Islamic law (Hallaq 1997; Zysow 2013), his assumption about the esoteric impact of Muʿtazilism on Ḥanafī and Shāfiʿī legal theories is debatable. For him, even the juristic use of linguistic interpretation stems from a Muʿtazilī influence (al-Marzūqī and al-Būṭī 2006, pp. 50–51). The Ḥanafī and Shāfiʿī legal theorists who developed further *uṣūl al-fiqh* are far from being esoteric (as in promoting the latent meaning of texts), knowing that al-Marzūqī uses the term *bāṭin*, esoteric meaning, in the sense that rational truth lies in the latent meaning of scripture (al-Marzūqī and al-Būṭī 2006, pp. 50–51). That said, Muʿtazilīs were not the only ones to have practiced linguistic interpretation. The latter scholarly practice has been common among exegetes and theological schools since the second/eighth century.

Al-Marzūqī's case for the effect of Khārijism and zāhirism on Islamic legal thought is as follows: prior to the emergence of zāhirism, Khārijism, the archetype of rebellion in Islamic history, engaged in disagreements with Sunnism on the ethics of action, giving rise to an extremist subset of Sunnism known as zāhirism. It was expected that the Khārijite impact on zāhirism would extend from ethics of action to legal theory because theology—the fundamentals of belief and sources of religious authority—is where legal theory derives its principles. zāhirism, in particular, adopted from Khārijism the notion that the true meaning of tradition is its outward meaning. The Khārijite concepts of the strict implementation of Islamic law and the upsetting of the jurists' agreement were further developed by zāhirism. Later, Sunni schools, under the influence of zāhirism, came to understand Sunna as the imitation and preservation of transmitted traditions, rather than adhering to the early meaning of Sunna as the consensus of the community, arguing that transmitted knowledge is the only source of true knowledge and forcing Muslims to follow dead traditions in opposition to the Quranic call to engage in intellectual endeavors (al-Marzūqī and al-Būṭī 2006, pp. 25–30). Al-Marzūqī's understanding of the influence of Khārijism–zāhirism on *uṣūl al-fiqh* does not reflect the standard view on the matter within Islamic legal studies. Overall, in their debates, Sunni juridical schools did not take seriously the positions of Khārijism and zāhirism. The latter rejects the mainstream Sunni use of analogy, *qiyās*, as well as the Sunni position on juridical consensus, *ijmāʿ*. One can hardly imagine Sunni legal theory without its two cornerstones: juristic analogy and consensus. Al-Marzūqī bases his thesis of the supposed influence of zāhirism on Sunni legal theory on the traditionalist tendencies of the Mālikī and Ḥanbalī schools. Probably, he was led to think so by the importance the zāhirī, Mālikī and Ḥanbalī schools assign to traditions. That is, all three schools embrace a legal hermeneutics in which manifest meaning is prioritized over latent meaning.⁶ However, historically speaking, the Mālikī and Ḥanbalī schools were founded before the zāhirī school, although that in and of itself does not rule out a zāhirī impact on those schools. There is also a difference in the type of traditions each school promotes: the zāhirī school emphasizes the literal meanings of the Qurʾān and authentic *ḥadīth*, while the Mālikīs promote the collectively transmitted traditions of Medina in particular. As for Ḥanbalism, it has a long history, since its founder, Aḥmad b. Ḥanbal (d. 241/855), of mobilizing the prophetic tradition as a major source of law, although Ḥanbalīs were sophisticated enough to combine elements of speculative theology, Sufism, traditionalism, scripturalism, and activism (Holtzman 2015). That said, the consolidation of the prophetic tradition as a main source of law should be accredited to al-Shāfiʿī (d. 204/820) rather than to Khārijism or zāhirism.

In the long history of Islamic legal thought, al-Marzūqī excludes two names from the influence of the dominant paradigm of *uṣūl al-fiqh*: Ibn Taymiyya (d. 728/1238) and Ibn Khaldūn (d. 808/1406). In his view, their reflections on language, history, knowledge, and nature are revolutionary and should inspire the desired renewal of Islamic thought (al-Marzūqī and al-Būṭī 2006, pp. 52–53). On one side, Ibn Taymiyya, as interpreted by al-Marzūqī, used a critical method of knowledge and nature to “purify” language and history of formalism and esoteric ideas. That is, he fought the negative influences of zāhirism and Muʿtazilism on Sunnism. Al-Marzūqī praises Ibn Taymiyya's method based

on the Qur'ān-*ḥadīth*, reality, and creation. Ibn Taymiyya is also eulogized for seeking an agreement between nature and law. Here, al-Marzūqī displays an uncommon interpretation of Ibn Taymiyya's work: Ibn Taymiyya was sometimes cited as an example of moderate Sunni reformism or as a model for Puritan religious and political extremism (Rapoport and Ahmed 2010; Krawietz et al. 2013; Bazzano 2015; Hoover 2016). While the typical scholarly reception of Ibn Taymiyya highlights his rejection of the use of Greek logic in *uṣūl al-fiqh* and his traditionalism, al-Marzūqī perceives him as a nominalist thinker. According to his interpretation, Ibn Taymiyya criticized Aristotelian realism, which claims the universals exist as such, and their existence as abstract ideas is real, independently of human perception (al-Marzūqī 1994, p. 148). This account of Aristotelian realism (in the sense that the universals have a reality of their own) has some support in the academic literature on the history of science (Franklin 2014, pp. 11–20). Against this position, Ibn Taymiyya argues that universals exist only as particulars (al-Marzūqī 1994, p. 176). In addition, from his perspective, Ibn Taymiyya might be the first to consider *ijtihād* as an individual obligation (al-Marzūqī and al-Būṭī 2006, p. 66).

In al-Marzūqī's understanding, Ibn Taymiyya's main mission was to de-philosophize Sunni thought. Indeed, Ibn Taymiyya sought to find an agreement between tradition and reason, although such an agreement does not exclude the primacy of tradition over intellectual efforts (El-Tobgui 2020). In seeking agreement between tradition and reason, Ibn Taymiyya is not different from any Sunni theologian or those jurists rejected by al-Marzūqī. For Ibn Taymiyya, *ijtihād* is governed by the transmitted traditions, while the legal hermeneutics should exhaust first what the early religious scholars (called *salaf*), stated to be the meaning of the Qur'ān and *ḥadīth*. We should also add that Mu'tazilīs, whom al-Marzūqī dismisses as esoteric, were among the earliest to call for individual responsibility and independent reasoning.

Al-Marzūqī reads Ibn Taymiyya as a pioneer of the renewal of legal hermeneutics who focuses on scripture and rejects juristic imitation, *taqlīd*. Without a doubt, Ibn Taymiyya criticized juristic imitation, *taqlīd*, as the attitude of following devotedly the scholars of a single juridical school. This explains why Ibn Taymiyya was mobilized by reformist thinkers in the 19th and early 20th centuries, as they shared with him the objective of dismantling the tyranny of madhhabism and the rigid legal tradition transmitted from previous generations. However, Ibn Taymiyya endorsed *ittibā' al-salaf* (emulating the early Muslim scholars by recognizing them as role models for devotion and as experts in interpreting the Muslim scriptures), which means following the generations of early Muslim scholars, accepting their interpretations of Islamic norms as highly authoritative (Al-Matroudi 2006; Peters 1980).

Be that as it may, contrary to al-Marzūqī, who believes philosophy is able to provide a rational theory of knowledge and to build Islamic law as ethics, Ibn Taymiyya discarded philosophy as a tool for attaining "truth" (al-Marzūqī and al-Būṭī 2006, p. 225). Carl Sharif El-Tobgui has shown recently, through his study of Ibn Taymiyya's ten-volume magnum opus, *Dar' ta'ārūd al-'aql wa-l-naql* (*Refutation of the Conflict of Reason and Revelation*), that Ibn Taymiyya's epistemology consists in reconstituting "a pure reason" that is both truly universal and in full harmony with authentic revelation (El-Tobgui 2020, p. 104). This perspective put him in conflict with Muslim philosophizing theologians and philosophers who adopted a rationalist epistemology. Ibn Taymiyya's epistemology and rationalist epistemology differ significantly, in that the former relies on integrating tradition and reason, which allows the three types of knowledge—experience, reason, and transmitted reports—to be corroborated and strengthened by one another (El-Tobgui 2020, pp. 18, 131, 275). Rationalist epistemology, on the other hand, relies primarily on demonstration. In his admiration of Ibn Taymiyya's line of thought, al-Marzūqī is not the only contemporary reformist thinker. The Pakistani modernist thinker Fazlur Rahman (1919–1988) believed Ibn Taymiyya to be "the only medieval Muslim who seeks to formulate clearly the ultimate issues at stake between the cognitive approach to reality of the Greeks and the 'anticlassical' attitudes of the Koran" (Rahman 1958, p. 101). Further, Fazlur Rahman described Ibn

Taymiyya as a bright and bold spirit who made an attempt to reopen the gate of absolute *ijtihād* (Rahman 1966, p. 79). Additionally, the prominent Indonesian Muslim intellectual Nurcholish Madjid (1939–2005) defended a PhD dissertation on *Ibn Taymiyya on Kalam and Falsafa: (A Problem of Reason and Revelation in Islam)* at the University of Chicago in 1984, in which he advocates for Ibn Taymiyya's sense of *ijtihād*, tolerance, and moderation (Madjid 1984, pp. 238–39).

As for Ibn Khaldūn, al-Marzūqī accredits him with establishing a philosophy of history, designed to replace decadent theology and Islamic philosophy, *fiqh*, and Sufism (al-Marzūqī and al-Būḥī 2006, p. 53). For al-Marzūqī, aligning Islamic knowledge with historical and concrete existence, whereby the laws of nature correspond to the laws of sharia, Ibn Khaldūn attempted to liberate Muslim thought and ethics of action from the dependence on mystic and neoplatonic philosophy that affected these disciplines, with belief in superstition and excess of theory. By highlighting scientific inquiry that can be described as a balanced theoretical and practical *ijtihād* with a new metaphysics and ethics and reforming Islamic law in the light of history, Khaldūnian history reconciles Muslim understanding of clear reason and authentic tradition (al-Marzūqī and al-Būḥī 2006, pp. 55–56).

Al-Marzūqī's Khaldūnism is also consistent with the general tendency among Muslim reformists to appropriate Ibn Khaldūn's legacy. In North Africa, the most renowned examples that come to mind here are those of the Algerian thinker Malek Bennabi (1905–1973) and the Moroccan philosopher Muḥammad ʿĀbid al-Jābirī (1935–2010). The former borrowed from Ibn Khaldūn his theory of cycles of civilizations (Berghout 2015). The latter developed Ibn Khaldūn's theory on state and group solidarity in his work *Fikr Ibn Khaldūn: al-ʿaṣabiyya wa-l-dawla: maʿālim nazariyya Khaldūniyya fī l-tārīkh al-Islāmī* (al-Jābirī 1971; Hashas et al. 2018). However, Ibn Khaldūn himself composed works in Islamic theology and Sufism and conceived his philosophy of history in accordance with the religious and rational sciences of his time, rather than using his philosophy of history to replace other disciplines or perspectives. What is more, Ibn Khaldūn wrote about, taught, and practiced Islamic jurisprudence for decades. In his *Muqaddima*, he refers to the religious subjects with appreciation and sees them as part of a flourishing civilization (Ceyhan 2008, pp. 483–515).

4. Al-Marzūqī's Critique of the *maqāṣid* Theory

Now that we have gained some understanding of his views on Ibn Taymiyya and Ibn Khaldūn, as well as some perspectives on Khārijite and Muʿtazilī theology, let us focus on his critique of the *maqāṣid* theory. Al-Marzūqī proposed two types of critique: an epistemological critique in his *Ishkālīyyat tajdīd uṣūl al-fiqh* (2006) and an ethical critique in his *Shukūk ʿalā nazariyyat al-maqāṣid* (2017).

4.1. The Epistemological Critique

Al-Marzūqī considers the *maqāṣid* theory to be a by-product of Muʿtazilism, even if the latter did not contribute directly to the literature of *maqāṣid*. Muʿtazilism has indeed promoted the theory of ratiocination, *taʿlīl* (the purposefulness of divine acts), and has also contributed to the juristic analogy (*qiyās*) on which the *maqāṣid* theory is built. While juristic analogy (*qiyās*) works on individual *ratio legis*, ʿilla, the *maqāṣid* theory induces a purpose of law through examining a large number of individual cases. As al-Shāṭibī puts it:

The evidence for this is induction within the sharia, and the empirical examination of the general as well as particular evidences that converge upon these matters through an inductive meaning that is not established by an individual evidence. In fact, it is established by evidences that have been added one to another, though they have different individual purposes, so that their combined implication comes to agree upon a single meaning. (al-Shāṭibī 2014, II, p. 37)

Even so, Ashʿarīs and Sufis who rejected the theory of ratiocination in theology were the main religious scholars who developed the *maqāṣid* theory, starting with al-Ḥakīm al-Tirmidhī (d. ca. 298/910), al-Juwaynī (d. 478/1085) and al-Ghazālī (d. 505/1111).

Additionally, ratiocination is a keystone of jurisprudence and the quest for the *ratio legis* in legal norms, which makes it impossible to imagine any juristic analogy and therefore any *fiqh* process.

Casting off ratiocination as a way of obtaining reliable knowledge, it is unsurprising that al-Marzūqī set out to undermine al-Shāṭibī's celebrated oeuvre on the *maqāṣid*. Muslim reformists have attempted to use al-Shāṭibī in order to generate an ethical transformation of Islamic law (Auda 2008; Opwis 2019, 2010, 2022; Rane 2011; Ibrahim 2014; Duderija 2014; Kamali 2021). In spite of this semi agreement of intellectuals and jurists on al-Shāṭibī's innovative contribution to Islamic legal theory, al-Marzūqī denounces the *maqāṣid* theory for its alleged impossibility. Al-Marzūqī asserts that it is impossible to grasp the higher objectives of God (al-Marzūqī and al-Būṭī 2006, p. 92). Without knowing them, one cannot know which laws fulfill these objectives. He does not consider induction, *istiqrā'*, the main method used by the *maqāṣid* jurists and applied by al-Shāṭibī (al-Raysūnī 2005, p. 280), sufficient to reach certainty (why should *maqāṣid* be held to a higher standard when most of *fiqh* does not seek certainty? This is an interesting point to make in this context). He claims Muslim jurists did not carry out induction in the texts of *sharī'a* or in human actions (al-Marzūqī and al-Būṭī 2006, p. 72). Accordingly, he discards the five necessities of Islamic law (preservation of religion, life, intellect, progeny and property), the cornerstone of the *maqāṣid* theory, since one should first conduct a proper induction of all instances in law and practice to establish what is indeed a necessary human interest and what is not (al-Marzūqī and al-Būṭī 2006, p. 72).

In his view, these five necessities should be interpreted as ethical rather than legal principles; that is, as guiding teachings and Quranic ideals meant to motivate people to strive for perfection rather than as commandments to follow (al-Marzūqī and al-Būṭī 2006, pp. 82–83). For instance, the preservation of religion should not be the imposition of rituals, but the respect for religious freedom. Also, the safeguarding of life concerns a dignified life and not just any life. Al-Marzūqī also denies that forbidding wine protects the intellect. Rather, it is through the continuous nourishing and developing of intellectual skills and reflection that such a purpose may be accomplished. With regard to property, he requires it to be licit. Moreover, he highlights the role of a just state in protecting property. For him, the protection of progeny as an objective in its own right is irrelevant, as life implies progeny (al-Marzūqī and al-Būṭī 2006, pp. 80–82).

Furthermore, al-Marzūqī accuses the promoters of the *maqāṣid* theory of utilitarianism, which, from his perspective, is immoral (immoral and unethical, as seen above, are synonyms in his usage) as it is based on pragmatism (al-Marzūqī and al-Būṭī 2006, pp. 92–93). For this reason, he relinquishes analogy, *qiyās*, as well as public interest, *maṣlaḥa*; he deems them inadequate for Islamic legislation, as the jurist who practices them recedes from the texts and ignores consensus. Inasmuch as the legal devices of analogy and public interest are approved, the despotism of the *mujtahid* is encouraged, al-Marzūqī asserts (al-Marzūqī and al-Būṭī 2006, p. 88). The *zāhirīs* argued that the jurist cannot employ analogy, since doing so would require him to take on the job of legislating by applying previous judgments to new instances. They find this undesirable because it suggests that the jurist has the power to enact new laws, even though, according to Islamic law, only God and his Prophet are permitted to do so. Since analogy and the public interest give the jurist the power granted by legislation, they should not even be regarded as sources of law. In fact, no legal school officially claims to pass new laws, as analogy is considered a hermeneutic attempt to apply existing laws to new situations.

As an alternative to the *maqāṣid* theory, al-Marzūqī suggests an Islamic collective ethics that should be the basis of legislation. According to him, consensus can conciliate the Qur'ān and *sunna* on the one side and the world and history on the other (al-Marzūqī and al-Būṭī 2006, p. 129). This legislative consensus is expected to bypass schools held responsible for the spiritual disunity of the *umma*. Al-Marzūqī's consensus, however, does not bear the meaning conveyed in traditional *uṣūl al-fiqh*, which denotes the consensus of jurists at a specific time (*ijmā'*). Al-Marzūqī interprets consensus as the ability of the

current Muslim community, *jama'ā*, to autonomously and jointly pass laws, with mutual guidance. It is the sole possible and legitimate standard for religious knowledge and behavior, other than the Quran and the Sunna. Since *ijtihād* is an individual obligation and consensus is the only way to validate each individual argument, this consensus ensures that Muslims will not be subjected to the tutelage of religious authorities. This will allow the collective pursuit of truth to create new traditions while putting the wisdom of the Quran into practice (al-Marzūqī and al-Būḥārī 2006, pp. 30–31).

Al-Marzūqī's argument from the limits of juristic knowledge was used by the traditionalists, especially the *zāhirīs*, against the validity of the juristic analogy in *fiqh*; it argues that since the purposes of Islamic law are defined by God, and God's intent is unknown to the jurists, there is no way the jurists would know the purposes of Islamic law. If such is the case, any type of Islamic knowledge can also be said to be futile; al-Marzūqī recommends staying faithful to the Quran and Sunna, but these two texts are mostly equivocal (hence the disciplines of Quranic exegesis and legal hermeneutics), and need interpretation, which itself opens up the endless circle of human efforts to understand and debate the scripture. There is no way one would know God's meaning in the Quran or the Prophet's intent in the Sunna, either. *Maqāṣid* theorists do not assert that they understand God's actual purposes, but rather that certain kinds of higher objectives appear in authoritative texts of Islamic law. Let us elaborate further on this point. In his *Muwāfaqāt*, al-Shāṭibī states the following:

The intention of the Lawgiver as reflected in His commands and prohibitions. If a person forms an intention that is different from this, then he is intending what he wants and seeking what he is after, not what is the purpose of the Lawgiver. If he has not formed an intention conforming to the intention of the Lawgiver then that is what is intended; rather he has formed an intention in terms of what he deems to be the means to his end through his act or omission. In this way, he considers what has been intended by the Lawgiver to be a mere means for his end. Anything that is of this nature amounts to the refutation of what has been settled by the Lawgiver and the demolition of the basis He has determined. (al-Shāṭibī 2014, II, p. 262)

Thus, al-Shāṭibī makes it apparent that the Lawgiver's (God's and, by extension, the Prophet's) intention is manifest in the writings of Islamic law, which are given out for understanding. It is impossible to discern the Lawgiver's intentions supratextually. Therefore, in order to determine what the higher goals of sharia are, one should consider the laws and obligations of sharia rules. Insofar as they support the texts of sharia and give it a universal meaning, the higher objectives of sharia constitute its spirit, essence and core. Al-Shāṭibī does not suggest that jurists can infer the Lawgiver's intentions from sources other than the scriptures. According to al-Shāṭibī, jurists can determine the Lawgiver's goals, through induction, something to which he was staunchly devoted and which serves as the cornerstone of his methodology (al-Raysūnī 2005, pp. xvi, 171).

It is safe to say that al-Marzūqī's argument here is inconsistent, especially as he praises Muslim thinkers such as Ibn Taymiyya and Ibn Khaldūn, who not only practiced juristic analogy and induction but also adopted some of the *maqāṣid*'s notions on public interest. Furthermore, al-Marzūqī's call to resume *ijtihād* is only possible if we accept the proposition that a Muslim scholar's quest for God's intent is not futile. Indeed, the epistemic authority of any intellectual, including philosophers, historians, doctors, etc., has limits, and the knowledge it acquires is uncertain. All types of knowledge are flawed efforts, because they are produced by human beings. Yet, striving to reach the target is what drives these efforts forward. These lawyers do not claim to produce any certain knowledge or to have access to a divine source of meaning. Therefore, it cannot be justified as criticism to reject the *maqāṣid* theory because its proponents are unable to produce certain knowledge. The *maqāṣid* jurists attempt, like any other person on a quest for knowledge, to understand the significance of both Islamic law and human conduct.

4.2. The Ethical–Political Critique

Beside the epistemological critique, al-Marzūqī issued an ethical–political critique of the *maqāṣid* theory, especially in his *Shukūk ‘alā nazariyyat al-maqāṣid*, published in 2017. This critique is, for the most part, attentive to the limits of the authority of the Muslim jurists (the limitations on juristic authority in the administration of the religious and political affairs of the Muslim community intersect with those on juristic knowledge as described in the section above). Al-Marzūqī contests the capacity of the jurists to state the purposes of Islamic law based on mere opinion, without a fixed compendium of laws. Although al-Marzūqī supports *ijtihād*, he perceives it as a tool to be used within the collective ethics of the Muslim global community, and in accordance with Islamic references (the Quran and the *Sunna* in particular), whereby theory and action (following the prophetic example) align with each other; he accuses the *maqāṣid* theory of over-theorizing Islamic law and establishing a dichotomy between theory and practice (al-Marzūqī 2017, p. 6). As he puts it:

Jurisprudence is left with nothing but the role of imparting posterior and formal legitimacy to the actions of the state, which operates in reality with positive law and not with jurisprudence. Unless we acknowledge this fact, we cannot resume the development of jurisprudence and connect what modern states do with the Islamic references. And my position is: the solution to the *maqāṣid* is sterile and dangerous to Islam. . . this futility and danger result from the process of reasoning on the basis of the *ratio legis* (legal reasons). This reasoning can be dangerous when Islamist movements adopt it and use it after they come to power. Then we can clearly see the danger of the transition from dealing with an issue of legal reasoning to a political issue in essence. (al-Marzūqī 2017, p. 2)

Al-Marzūqī raises four questions in relation to the juristic authority. First, he contests the right of the *maqāṣid* jurists to authorization, as they justify certain acts in the name of the higher objectives of Islamic law. Second, he casts doubt on the reliability of juristic procedures, thus challenging the epistemic authority of the *maqāṣid* jurists. Al-Marzūqī exploits, here, a weakness in the juristic method, namely that most of the legal reasons are speculative, *maznūna* (but most legal judgments are speculative anyway). Third, he denounces the complicity between the religious authority of the *maqāṣid* jurists and political power. Al-Marzūqī seems to be critical of the arbitrariness of the juristic authority, which could be instrumentalized, willingly or unwillingly, by political power, to control the public. Fourth, al-Marzūqī criticizes the *maqāṣid* jurists for using the principle, “necessities permit prohibitions”, to make sharia a pretext for the tyranny and corruption of the contemporary state (al-Marzūqī 2017, p. 107). Therefore, he includes *maqāṣid* discourses in his broad allegation of official Muslim jurists’ collaboration with the authoritarian state, rather than providing a comprehensive discussion of how the state uses the *maqāṣid* discourses.

In another instance, al-Marzūqī clearly stresses the problem with the justification role of the *maqāṣid* jurists, adding that:

The *maqāṣid* theory facilitates jurisprudential circumvention and justifies everything by purposes, especially if its user is not keen on what, without which, legislation loses the conditions of legitimacy. Regardless of the reference on which the law is based—whether Islamic law or positive law- the matter turns to be that of the relationship between the jurist and the politician, who employs *maqāṣid* as an ideological tool, while the jurist claims to define the purposes of the law according to the public interest, either with the illusion of knowing God’s purposes in Islamic law or the purposes of nature in positive law. (al-Marzūqī 2017, p. 9)

This criticism can be said to be inspired by the belief that the morality of an action should be based on whether that action itself is right or wrong under a series of rules and principles—against the supposed utilitarianism of the *maqāṣid* jurists. Indeed, jurists can use the *maqāṣid* to justify certain actions in accordance with certain policies or interests. In

turn, justifications made in the name of consequences or public interests open the door wide to the political instrumentalization of *maqāṣid*. This appears to be a critique that is more political than ethical: al-Marzūqī is wary of the double instrumentalization that involves the jurist and the politician. While the jurist takes his role too far by justifying politics in the name of the highest objectives of Islamic law, the politician turns the table on the jurist by mobilizing the *maqāṣid* to sanction certain policies that might not be in the interest of the community as a whole.

In the following, al-Marzūqī provides a clear example of the flaw in the *maqāṣid* legal argumentation:

When the *maqāṣid* jurists identify the necessary objectives of Islamic law, they soon neglect the omnipresent principle—the duty to protect—and pass directly on to the objectives that are the domains or protected subjects: the protection of such and such. They speak about “such” and forget “protection”. When I say “protecting” the intellect, for example, as a purpose under which the jurists place the prohibition of drugs, protection is a negative act that may end in the concept of blocking pretexts, or a positive action that may end in opening them; they neglect what makes the established law legitimate in a foundation that exceeds the control of their understanding of the will of the legislator, be it divine or human. In this way, protection becomes unspecified, and the conditions for expressing the divine or human will in legislation are unspecified. Rather, both of them are taken for granted, leaving aside the need to determine the nature and conditions of performing the jurist’s function as well as the values of this role, and making the jurist as a mufti or a judge authoritative, albeit implicitly, in the domains of legislation and judiciary. (al-Marzūqī 2017, p. 10)

In this passage, al-Marzūqī challenges the juristic authority to state how certain values should be perceived and implemented. He argues that the protection of foundational values in society needs a solid legitimacy that is anchored in the same society. No jurist is legitimate enough to claim knowledge of protecting the moral foundations of a society. Thus, legislation and the judiciary are public functions that require public legitimacy to be authoritative.

Al-Marzūqī puts emphasis on the question of legitimacy. He perceives *fiqh* as a component of the state in Islam, whereby juristic legitimacy is predicated on the legitimacy of the state, which would make laws compelling to the public. Al-Marzūqī endorses a perception of the Islamic state close to that of Ibn Taymiyya’s *siyāsa shar‘iyya* (governance according to Islamic law), which considers any policy that preserves order and public interest as legitimate from the point of view of Islamic law (Ramaioli 2022; Islam and Eryiğit 2022; Terzioğlu 2020; Bori 2016; Al Ghouz 2015). Perhaps one difference should be stated here between Ibn Taymiyya’s and al-Marzūqī’s *siyāsa shar‘iyya*: Ibn Taymiyya extends Islamic law to public policy, while al-Marzūqī confines Islamic law to its “initial political legitimacy” of serving the community (al-Marzūqī 2017, p. 23).

This argument can be relevant if *fiqh* turns into a state law, which is the case only in a few instances (marriage, divorce, and inheritance, mostly) in the Muslim world. Even so, *fiqh*’s legitimacy today stems from Muslim communities and individuals who seek Muslim knowledge and maintain *fiqh* alive through the *fatwas*, piety, and interaction with the jurists, independently of the state or context they live in. It is, thus, accurate to assume that the legitimacy of *fiqh* is autonomous and separate from the legitimacy of the state.

There is another reason why *fiqh* depends on the community’s legitimacy, namely that a plurality of communities exist in almost every Muslim country (within Sunnism and beyond), which explains the plurality of *fiqh* schools and religious authorities. Moreover, *fiqh* operates sometimes as knowledge of the rules of worship or daily transactions. Oftentimes, *fiqh* is practiced broadly and loosely as ethical teachings mobilized by Muslims in various contexts.

Al-Marzūqī divides the history of Islam into an era of legitimate Islamic polity and jurisprudence and an illegitimate one with its despotic rule and justifying *fiqh*. For him, the

only periods of legitimate rule and law are the Prophetic and the Rightly Guided Caliphs. This takes the question to another level: that of delegitimizing the entire history of *fiqh* as mere justification of an illegitimate political order wherein Muslim jurists were servants of power, assisting despotic states in corruption and preventing the liberation of man (al-Marzūqī 2017, p. 27). For al-Marzūqī, if early Islam was a transition from illegitimate power to legitimacy with power (under the Prophet's rule), in later Islam *fiqh* bestowed legitimacy on despotic power, betraying God's trust in favor of the rulers (al-Marzūqī 2017, p. 34).

Since al-Marzūqī's account of the problem of religious authority and its relationship with power in the history of Islam is too reductionist, I suggest here that certain complex aspects of this relationship should be shown. As community leadership, religious authority in Islam is multi-centered, and religious authority can be found wherever the community is. Since communities are divided along regional, tribal, ethnic, social, political, etc., lines, religious figures of authority are only authoritative for their specific audiences (even if a few religious figures can influence a large audience beyond national borders). The believers choose whose authority to trust, forming communities around religious centers (mosques, religious schools, shrines, etc.) which provide religious figures with the structures in which they can effectively exercise their religious authority.

Thus, men of power throughout the history of Islam prioritized force and coercion to eliminate competitors and gather sources of power (economy, military, and state bodies). Men of authority focused on symbolic resources (religious knowledge and service to the community) in order to keep traditional structures of morality outside the control of power. Yet men of power need to secure a functioning order and minimal religious legitimacy. Conversely, men of authority need to cooperate with men of power in order to obtain goods and regulate the social order.

The Prophet of Islam (d. 632) embodies the prototype of authority, the model of community guidance (followed by his first successors according to Sunnis until 661 CE (Crone and Hinds 2003, p. 115)), where religious authority and political power were united. The schisms of early Islam, which resulted in the establishment of the first Muslim dynasty, the Umayyads, in 661 in Damascus, alienated religious authority from political power, creating continuing problems of legitimacy as successive dynasties often failed to live up to the expectations of the caliphate for Sunnis and the imamate for Shī'īs; in sum, religious authority has opposed political power from the late seventh century CE until the contemporary period, although close alliances have linked various jurists and sultans, and solutions were worked out to ensure relative autonomy for religious authority while remaining under close control of the ruling dynasty (Zaman 2020; Siddiqui 2017). In Islamic political ethics, however, the alienation between religious authority and political power was thought of as an irregularity.

In the contemporary period, (since the 19th century), the opposition between religious authority and political power has been mobilized by religious authorities in the face of the coercion of modern state powers. These religious figures have appealed to their moral and epistemic authority and their "devotion to the best interests of the *umma* they claim to serve well" (Hallaq 2004, p. 258; Mouline 2011).

The gap between the perception of religious authority (as ethical and legitimate) and power (as brutal and illegitimate) has widened in recent decades. The problem of the ethical deficit of the state in the Muslim world was formulated by the Palestinian–Canadian academic and thinker Wael B. Hallaq as follows:

The modern "Muslim" nation state failed to gain authority over its subjects, for authority, unlike power, does not necessarily depend on coercion. When the traditional legal schools acquired authority, they did so by virtue of the erudition of their jurists, who proved themselves not only devoted to the best interests of the *umma* (whom they served very well) but also the most competent human agency to discover God's law. [...] The state, on the other hand, abandoned

God and His jurists' law, and could find no other tools to replace it than the instruments of worldly coercion and imperial power. (Hallaq 2004, p. 258)

Hallaq went further with this argument in his book, *The Impossible State. Islam, Politics, and Modernity's Moral Predicament* (Hallaq 2012), in which he acknowledged Islamic governance, although he considers the idea of an Islamic state impossible and self-contradictory. As he puts it: "Islamic governance (that which stands parallel to what we call "state" today) rests on moral, legal, political, social, and metaphysical foundations that are dramatically different from those sustaining the modern state. In Islam, it is the Community (Umma) that displaces the nation of the modern state". (Hallaq 2012, p. 49).

In sum, there are at least three types of relationships between *fiqh* and power: 1. Justification, as noted by al-Marzūqī, in which Muslim jurists are recruited as employees in ministries, courts, and other institutions of the state to support a political rule. 2. Dissidence, as in the case of various religious authorities, within Islamist movements, or as individuals who rebelled against the ruling regimes. 3. Cooperative autonomy, through which religious authority maintains its relative autonomy while cooperating on certain matters with the ruling power (for example, al-Azhar). The major jurists of the *maqāṣid* such as al-Ṭāhir Ibn ʿĀshūr, ʿAllāl al-Fāsī (1910–1974), Muḥammad Saʿīd Ramaḍān al-Būṭī, Yūsuf al-Qaraḍāwī (1926–2022) and Aḥmad al-Raysūnī (born in 1953–) went through periods of dissidence or cooperative autonomy with power, rather than justifying unfair policies.

That said, we must give credit to Abū Yaʿrub al-Marzūqī at least for two contributions to the *maqāṣid* debate: 1. He was one of the earliest thinkers to draw attention to possible flaws in the *maqāṣid* theory. Recently, several scholars have "signaled caution when it comes to the *maqāṣid* method. . . arguing that the reforms it promises are limited and are predicated on presumptions about the role of Islamic law in state affairs, thus reinscribing legal boundaries rather than subverting them" (Nassery et al. 2018, p. 2) 2. The possible arbitrariness of applying the theory to various economic and political domains can indeed lead to instrumentalization by economic and political centers of power.

5. Conclusions

In this paper, the aim was to explore and assess Abū Yaʿrub al-Marzūqī's critique of the *maqāṣid* theory. Overall, his critique focuses on epistemology and ethics. On the one hand, al-Marzūqī argues that the *maqāṣid* theory relies on uncertain processes of knowledge, particularly that of ratiocination, *taʿlīl*, which is insufficient to claim access to God's intent in Islamic law. On the other hand, he questions the legitimacy of the *maqāṣid* jurists to state the purposes of law without popular legitimacy. Moreover, he accuses the *maqāṣid* jurists of bestowing legitimacy on political power, and then using the *maqāṣid* approach to justify certain policies in the name of preserving the public interest. It can be said that his main argument is that the *maqāṣid* theory displays arbitrariness without a vigorous method and transparent authority. Although the *maqāṣid* theory has its flaws and does not produce certain knowledge, it is similar to any other religious and intellectual inquiry. As legal reasoning, it is an effort to align the norms of law, ethics, and society. Additionally, the relationship between jurists and political power in the Muslim world was shown to be complex, ranging from dissidence and autonomy to justification.

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- ¹ https://www.aruc.org/en/bibliographic-search?keywords=%D9%85%D9%82%D8%A7%D8%B5%D8%AF%20%D8%A7%D9%84%D8%B4%D8%B1%D9%8A%D8%B9%D8%A9&field=all_fields&searchType=contains&sort=date_asc (accessed on 30 July 2023).
- ² And author of one the earliest works on *maqāṣid*: Saʿīd Ramaḍān al-Būṭī. 1966. *Ḍawābiṭ al-maṣlaḥa fī l-Sharīʿa al-Islāmiyya*. Damascus: al-Maktaba al-Umawiyya.
- ³ Abū Yaʿrub al-Marzūqī <https://www.aljazeera.net/encyclopedia/2014/11/13/%D8%A3%D8%A8%D9%88-%D9%8A%D8%B9%D8%B1%D8%A8-%D8%A7%D9%84%D9%85%D8%B1%D8%B2%D9%88%D9%82%D9%8A> (last accessed 30 July 2023).
- ⁴ al-Muʿallafāt- Abū Yaʿrub al-Marzūqī abouyaarebmarzouki.wordpress.com/%D8%AD%D9%88%D9%84-%D8%A7%D9%84%D9%85%D9%88%D9%82%D8%B9/%D8%A7%D9%84%D9%83%D8%AA%D8%A8/%D8%A7%D9%84%D9%85%D8%A4%D9%84%D9%81%D8%A7%D8%AA/ (last accessed 30 July 2023).
- ⁵ *Idem*.
- ⁶ In his *Islam and Literalism. Literal Meaning and Interpretation in Islamic Legal Theory*, Robert Gleave provides a good account of literalist tendencies in Sunni and the *ẓāhiri* school: see (Gleave 2013).

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