Maqaṣid and the Renewal of Islamic Legal Theory in ʻAbdullah Bin Bayyah's Discourse

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Abstract

This article investigates the central role assigned to *maqāṣid* by ʻAbdullah Bin Bayyah (b. 1935) in his project of renewal of *uṣūl al-fiqh*. He presents maqāṣid as crucial for the functioning and

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widening of the system of ratiocination (*manẓūmat al-taʿlīl*) and inference (*istidlāl*). In his theory of renewal, Bin Bayyah expands the role of *maqāṣid* in *uṣūl al-fiqh* beyond the system of ratiocination to all the chapters of *uṣūl al-fiqh*. In this context, he provides more than thirty ways in which *maqāṣid* are blended into the texture of Islamic legal theory and are necessary for its sound functioning. In this way, he tries to demonstrate that *maqāṣid* are *uṣūl al-fiqh* itself and its heart. This article explores the discursive strategies adopted by Bin Bayyah to establish the relevance of *maqāṣid* for the renewal of *uṣūl al-fiqh* and offers a succinct critical appraisal of Bin Bayyah's reasoning on the topic. It argues that Bin Bayyah is successful in demonstrating the indispensability of *maqāṣid* for any project of renewal of *uṣūl al-fiqh*, but falls short in proving that *maqāṣid* are *uṣūl al-fiqh* itself and its heart.

The call for renewal (*tajdīd*) of Islamic Law has occupied a prominent place in contemporary Islamic thought. In order to respond to the new realities created by modernity and the perceived ossification of the traditional Islamic Law, Muslim scholars have proposed various and often incommensurable reform proposals that aim to restore the vigor of *sharīʿa* and its relevance for modern times.[1] Part of this impetus for reform has manifested in various intellectual projects of renewal of the very methodology of Islamic legal theory (*uṣūl al-fiqh*). Contemporary Muslim scholars have identified the rigidity of Islamic legal theory, its presupposed overconcern with textual/linguistic analysis, and its disregard for the "objectives of sharīʿa" (*maqāṣid al-sharīʿa*) as the main reasons behind the inability of classic Islamic legal theory to respond adequately to modern realities.[2] Reopening the gates of *ijtihād* in legal theory and the introduction of rational and non-literal considerations in its structure have constituted some of the solutions offered to guarantee the relevance of *sharīʿa* in the contemporary world. The reform of Islamic legal theory pursuant to the theory of the objectives of the *sharīʿa* has appeared prominently in recent proposals of reform.[3] The infusion of the methodology of Islamic legal theory with *maṣlaḥa/*

maqāṣid considerations has been increasingly perceived as necessary to make it responsive to the new dynamics of modern life and sufficiently flexible to accommodate the necessary legal/hermeneutical adjustment needed for the purpose.

ʿAbdullah Bin Bayyah (b. 1935) is an important voice in ongoing discussions over the renewal of Islamic legal theory. Considered by the Muslim scholarly community to be one of the leading contemporary legal scholars, Bin Bayyah has dedicated a series of writings to the topic of the relation between the *maqāṣid* and legal theory along with the reform of Islamic legal theory through the objectives of *sharīʿa*.[4] Bin Bayyah has lamented the fact that in the history of Islamic Law, legal theory and *maqāṣid* have been conceived as separate from each other. More specifically, *maqāṣid* have often been considered a supplement or an afterthought to Islamic legal theory.[5] Bin Bayyah's primary concern has thus been to construct a legal framework that allows for the integration of *maqāṣid* into its very structure. Bin Bayyah goes so far as to present *maqāṣid* as the heart of Islamic legal theory, while attempting to provide the theory of *maqāṣid* with the needed *uṣūlī* rigor necessary to dispel the common objection which conceives the objectives of *Sharīʿa* as subjective, inherently versatile and unregulated. In order to accomplish this twofold aim, in his project of renewal, Bin Bayyah adopts a series of discursive strategies. In this paper, we will try to unravel the nature of these discursive strategies, explain how they are situated in Bin Bayyah's overall legal reform project, and offer a succinct critical appraisal of Bin Bayyah's reasoning on the topic.

A Neo-Traditionalist Reformist Project

Contemporary Islamic thought has witnessed a series of attempts of renewing Islamic legal theory. Some traditionalist scholars have categorically rejected such calls for renewal.[6] In contrast, in some modernist circles, Islamic legal theory has been perceived as in irreversible crisis, obsolete, a pre-modern conceptual legal framework that needs to be supplanted by modern and novel legal hermeneutics that reflect the needs of the modern condition.[7] Bin Bayyah rejects

the modernist-revisionist call for the sidestepping or the substantial reconfiguration of Islamic legal theory. Nevertheless, he acknowledges the need for an organic renewal that will restore its rigor in order to respond adequately to modern challenges. He grounds his position on the conviction that modernity and its new socio-political and religious realities constitute an epistemic shift from the pre-modern world.[8] The new realities necessitate the reconsideration of many traditional Islamic legal rulings and the consequent revision or adjustment of some of the hermeneutical tools and mechanisms of legal theory. In this regard, Bin Bayyah states:

> The classical legal extrapolations were correct in their time, and some continue to be correct. The new and modern extrapolations that are based on a sound foundation as regards ascertaining the *ratio legis* are also correct. To a certain extent they resemble the relationship between classical mathematics, which provided plausible solutions within the epistemic and realist paradigms of their time, and modern mathematics, which provides solutions that are plausible and relevant for the age in which we live.[9]

According to Bin Bayyah, contemporary calls for the renewal of Islamic legal theory has taken three forms: 1) the simplification of its very subject-matter (*mādda*), i.e., reformulating Islamic legal theory in a way that will facilitate its comprehension by the modern readers; 2) the trimming or alleviation of Islamic legal theory from perceived unnecessary and unrelated elements, like logics and theology—including simplifying the terminology of Islamic legal theory by purifying it of unnecessary intricate technicalities; and 3) the transcending of the conditions of regulation (*al-inḍibāṭ*) in the characteristic (*waṣf*) through which the efficient cause is inferred, in order to be content with the wisdom (*ḥikma*) and producing legal norms in accordance only with the dictates of *maṣlaḥa*.[10] In Bin Bayyah's view, all these proposals lack legal clarity and direction. Among them, the proposal to simplify the procedures and terminology of Islamic legal theory is worthy of consideration, but it entails only pedagogical modifications and does not

focus on the main objective of Islamic legal theory, i.e., the deduction of legal rulings.[11]

Bin Bayyah draws attention to three other claims or projects of renewal of Islamic legal theory that, according to him, constitute a danger for the existence of *sharīʿa* itself. He associates these projects of renewal with the writings of modernist scholars like Muhammad Arkoun (d. 2010), ʿAbd al-Majīd al-Sharafī (b. 1942), and Nasr Abū Zayd (d. 2010).[12] These three claims of renewal are:

1 A call for relying on wisdom and *maṣlaḥa* unrestricted by any regulation of ratiocination (*taʿlīl*) or by any of the instruments used in the application of the legal rulings.[13] According to Bin Bayyah, such an approach undermines the very structure and foundations of *ijtihād*.

2 A call to rely on *maqāṣid* devoid from any *uṣūl* considerations and divested from any concern for the particular textual indicants (*dalāʾil*).[14] Although Bin Bayyah acknowledges that there is some legitimacy to this proposition, nevertheless he argues that the scholars who have endorsed such a view have failed to understand that the scale of Islamic legal theory (*al-mizān al-uṣūlī*) is the only mechanism that guarantees the correct usage and application of the objectives of *sharīʿa* in bringing legal rulings into life. Without it, the *maqāṣid* will remain subjective and non-anchored on solid textual grounds.

3 A call for historicizing and contextualizing the shariatic texts.[15] In Bin Bayyah's view, the final result of this historical-critical method is disconnection from the shariatic texts and the transformation of legitimate considerations, i.e., the historicity of the texts, in general law or established principle for the entire process of understanding the revelatory texts. In short, for Bin Bayyah, these claims of renewal violate the eternal validity of the textual proofs and constitute a jump to the unknown. They represent an escape from the more arduous task of constructing a project of renewal grounded in the texts of *sharīʿa* and able to respond to modern needs.[16]

According to Bin Bayyah, the modernist projects of renewal give undue precedence to purely rational *maṣlaḥa* over the categorical scriptural texts. As such, they fall outside the legitimate boundaries of the

Islamic discursive tradition and do not share in its fundamental commitments to scriptural sources. The result of these types of projects, accordingly, is the "creation of a new legislation, rather than the renewal of *sharīʿa*."[17] Bin Bayyah's criticism of the modernist proposals of renewal is hardly new or unprecedented. It follows, in language and structure, the standard way in which these proposals have been presented and criticized in existing revivalist and centrist (*waṣaṭiyya*) projects of reform, particularly as articulated by Yūsuf al-Qaraḍāwī.[18] In his discussion, Bin Bayyah seems unable or unwilling to critically engage with the modernist projects of reform; their methodology is dismissed without proper analysis. Nevertheless, highlighting their 'errors' allows him to situate his reformist project as a middle way between the approach of those who dismiss specific texts in the name of some higher *maqāṣid* (i.e., modernists) and those who claim to defend the tradition by dismissing the *maqāṣid* in the name of a presupposed faithful adherence to the literal meaning of the texts (i.e., traditionalist-conservatives). In this way, he can present himself as an internal critic who, despite his critical stance towards some aspects of the tradition, aims at reinvigorating that very same tradition instead of dismissing or replacing it with entirely novel conceptual frameworks.[19]

Apart from his distancing from modernist projects of reform, Bin Bayyah does not provide an account of where his project stands in relation to other contemporary trends of renewal of Islamic legal theory.[20] Nevertheless, his discourse of renewal manifests many commonalities with other revivalist and centrist (*wasaṭiyya*) approaches.[21] Bin Bayyah's project shares with the centrist discourse the attempt to construct the *maqāṣid*-based proposal of renewal as a middle path between modernist utilitarianism and traditionalist literalism. He displays a traditionalist stance by rejecting the ability of purely rational *maṣlaḥa/maqāṣid* to override categorical texts or the constants (*thawābit*) of *sharīʿa*. He restricts the latter only to a narrow number of principles and texts, leaving the rest open to *ijtihād* and *maṣlaḥa* considerations. However, he ascribes to *maṣlaḥa/maqāṣid* a greater role in overriding probable texts or the changeable (*mutaghayyirāt*) aspects of *sharīʿa* as well as a central role in those fields towards which *sharīʿa* is silent or neutral.[22] For Bin

Bayyah, Islamic jurisprudence operates mostly within the domain of the probable (*ẓann*) and the changeable aspects of *sharīʿa*; therefore *maṣlaḥa/maqāṣid* occupy a prominent role in the juridical discourse writ large.

Consequently, despite Bin Bayyah's overall traditionalist stance towards the renewal of Islamic legal theory, his substantial law reasoning (*fiqh*) manifests a more modernist-revivalist inclination. In Bin Bayyah's discourse the pragmatic and utilitarian aspects of Islamic law—*maṣlaḥa*, *ḍārūra* (necessity), *rukhṣā* (legal license), *taysīr* (leniency), etc.—occupy a prominent role in the renewal of Islamic law. In this regard, his jurisprudence too is not very dissimilar to that of scholars like al-Qaraḍāwī.[23] In the same vein as revivalist discourse, historicism and contextualism are two key hermeneutical tools through which Bin Bayyah tries to bring perceived problematic aspects of the pre-modern legal tradition in line with modern sensibilities.[24] In a sense, this apparent difference in Bin Bayyah's approach towards legal theory and substantive law might be conceived as an instance that corroborates the scholarly position that ascribes to legal theory only a justificatory role of validating *ex post facto* existing legal positions.[25] Nevertheless, Bin Bayyah's himself does not subscribe to this way of understanding the role of legal theory. He endorses the dominant traditional narrative that conceives of legal theory as the method for legal derivation and a criterion for judging the coherence and validity of legal reasoning. For Bin Bayyah, the central aim of legal theory remains the facilitation of deduction of legal norms. Therefore, a *maqāṣid*-centered renewal of legal theory is presented as crucial for the production of a flexible jurisprudence that will adequately respond to modern exigencies.[26]

Despite his commonalities with the centrist-revivalist discourse, Bin Bayyah's theorization of renewal of Islamic legal theory is more in line with the neo-traditionalist approach. As al-Azami explains, generally neo-traditionalism refers to "a denomination of Sunnism that emphasizes respect for and adherence to one of the four schools of law, the Ash'arī or Māturīdī schools of theology, and valorizes Sufism."[27] In terms of its approach to Islamic law and its renewal, neo-traditionalism presents itself as "opened to more than one school of law for reference on valid rulings and not restricted to one school."[28] In this context, it is the entire

corpus of the legal tradition and not a particular eponym of a *madhhab* or school of law that is presented as the repository of legal authority. The main approach of neo-traditionalism towards the renewal of Islamic Law consists in the creative and renewal-oriented selection (*takhayyur*) and amalgamation (*talfīq*), from the legal tradition, of those legal rulings of the madhhabs that are perceived as most suitable for the modern age. Often this process includes not only the choice between two well-established legal rulings, but also the selection of an outweighed ruling (*marjūh*) over a preponderant one (*rājih*). For many neo-traditionalists, including Bin Bayyah, modern circumstances dictate the need for the adoption of outweighed rulings. This process of preponderance (*tarjīḥ*) should be conducted in light of *maṣlaḥa* and *maqāṣid* considerations. The role of *maqāṣid* in this process is that of providing the necessary regulations (*ḍawābiṭ*) for a sound exercise of preponderance.[29]

In neo-traditionalist terms, Bin Bayyah accepts the inherited conceptual edifice of post-formative Islamic legal theory and affirms its eternal relevance for all times and conditions.[30] He rejects the claim that Islamic legal theory is in a state of irreversible crisis and dismisses calls for a thorough reconsideration of its structure.[31] Bin Bayyah portrays the process of creative drawing on the reservoir of the existing resources of the classical legal tradition as sufficient for addressing modern realities. Therefore, he is generally reluctant to explicitly bypass the madhhabs' well-established legal rulings and the formal procedures of classical legal theory in favor of "creative ijtihad" (*ijtihad inshā'ī*). Instead, in order to bring the needed legal changes and maintain conspicuous links with the legal tradition, he makes recourse mostly to selective *ijtihād* (*ijtihad intiqā'ī*). This aspect also appears prominently in centrist-revivalist discourse, like that of al-Qaraḍāwī.[32] However, unlike the latter, in Bin Bayyah's discourse the *madhhab*s' legal tradition seems to bear a heavier weight. Although both scholars use the aura of tradition as a discursive strategy to legitimize their legal conclusion, nevertheless identification with and general adherence to the *madhhab* tradition is more manifest in Bin Bayyah. In contradistinction, al-Qaraḍāwī manifests a more pronounced *salafī* tendency, that he inherits from the modernist salafism of Riḍā, which encourages the bypassing of the inherited legal tradition

in favor of a new reading of the scriptural sources, informed by the exigencies of the modern age.[33] In many respects, the differences between the discourses of these two scholars reside more in degree and emphasis rather than their nature and methodology.

In the introduction of his treatise on *maqāṣid*, Ibn ʿĀshūr made the case for the establishment of the science of the objective of *sharīʿa* (*ʿilm al-maqāṣid al-sharīʿa*) as independent, in status, from Islamic legal theory.[34] His approach towards *maqāṣid* has been endorsed by may centrist-revivalist scholars (e.g. al-Raysūnī), and constitutes the actual way in which *maqāṣid* are taught in many influential Islamic educational institutions.[35] Bin Bayyah rejects the idea that *maqāṣid* should be considered an independent source of law or conceived as a standalone methodology for rule derivation. Instead, in his discourse *maqāṣid* are subsumed under legal theory and the relation between them is conceived as that between the soul and the body.[36] As we shall see, relying on the Aristotelian theory of causation, Bin Bayyah rejects the reconsideration of the subject-matter (*mādda*) of Islamic legal theory and confines his reform proposal to the form (*ṣūra*) and the role that the *mujtahid* plays in shaping the subject-matter through his work on the form of legal theory. As a result, Bin Bayyah's project of renewal of legal theory is traditionalist in nature and modest in its claims. It consists mainly in the attempt to integrate *maqāṣid* considerations in the formal procedures of Islamic legal theory by demonstrating their centrality and indispensability. In this regard, his main strategy consists in the expansion of the role and scope of *maṣlaḥa/maqāṣid* in Islamic legal theory through a process of new divisions, rearrangement, reorganization, expansion, and restriction of its existing structures. This process of *maqāṣid*-based restructuring and reorganization of existing legal frameworks allows him to carve out a more central role for *maṣlaḥa* and *maqāṣid* in legal theory.[37]

Maṣlaḥa and *Istidlāl*: The History of Islamic Legal Theory as the History of *Maqāṣid*

Among Muslim scholarly circles there is a common narrative according to which *maṣlaḥa* and the *maqāṣid* approach are portrayed as a

phenomenon that emerged late in Islamic legal history and was marginal to the very nature of Islamic legal theory.[38] As Mohammad Hashim Kamali states, "maqāṣid did not receive much attention in the early stages of the development of Islamic legal thought and, as such, they represent rather a later addition to the juristic legacy of the madhāhib."[39] For many critics of the contemporary *maqāṣid* approach, the absence of a theorization of *maṣlaḥa* and *maqāṣid* in the early Muslim generations is evidence of the absence of its legal pedigree, which would be necessary for the establishment of their legitimacy in legal theory. In this context, the fact that the earliest evidence for the technical use of the term *istiṣlāḥ* (public welfare) appeared at the end of the fourth-century *hijrī*, in the writings of Muḥammad b. Aḥmad al-Khwārazmī (d. after 387/997), constitutes a genealogical problem for advocates of *maṣlaḥa* and *maqāṣīd*.[40]

In order to resolve this apparent handicap in the juridical pedigree of *maṣlaḥa* and *maqāṣid*, Bin Bayyah offers a narrative of the early Islamic legal history in which *maqāṣid* are conceptualized as integral parts of the origins of legal theory itself. The grounding of the genealogy of the *maqāṣid* approach in the very foundational period of Islamic legal history is crucial for Bin Bayyah's project of portraying *maqāṣid* as an essential part of legal theory. In order to achieve this goal, he presents the central motivation behind the development of the science of Islamic legal theory as the attempt to strike a balance between the textual sources (*al-naṣṣ*) and inference (*istidlāl*).[41] Linguistically *istidlāl* refers to the search for an indicant (*dalīl*). In the terminological sense, the term has been used in a general and particular meaning.[42] In its general meaning, *istidlāl* refers to seeking evidence from the Qur'an, Sunna, consensus, analogy or other legal sources. In its particular meaning, it is used "to designate any indicator that does not fall under the familiar headings of Qur'ān, Sunna, *Ijmā'*, and analogy."[43] Bin Bayyah uses the term in this latter meaning. For him, *istidlāl* becomes a catch-all term that includes the legal mechanisms and processes that are not directly connected or based on textual considerations, such as public welfare (*istiṣlāḥ*), blocking of the means (*sadd al-dharā'i'*) and juristic preference (*istiḥsān*). Bin Bayyah does not clarify the precise relation between *maqāṣid* and *istidlāl*. However, his discourse on the topic shows that, for him, on the one hand *maqāṣid* are

just an element or part of *istidlāl*, while on the other hand *maqāṣid* constitutes the foundation or the ground through which *istidlāl* mechanisms are regulated or legitimized in legal theory.

The strong relation of *maqāṣid* with *istidlāl* allows Bin Bayyah to trace back the *maqāṣid* discourse to the time of the Companions. In this context, the Prophet's greatest companions, especially the four Rightly Guided Caliphs, systematically considered the *maqāṣid* in their legal reasoning. Abū Bakr's (r. 632-634) decision to consider as apostate and fight the Arab tribes that refused to pay zakat; ʿUmar b. al- Khaṭṭāb's (r. 634-644) refusal to apply the *ḥadd* punishment for theft during the time of famine; or ʿAlī b. Abī Ṭālib's (r. 656–661) refusal to fight the *khawārij* while in a state of war, become read as a concrete manifestation of *maqāṣid* in the *ijtihād* of the Companions. They are proofs of the fact that the Companions used *maqāṣid* reasoning to act in the absence of textual sources or in contradiction with their outward meaning.[44] In Bin Bayyah's view, the Followers (*ṭābiʿūn*) received the *maqāṣid* approach as a natural continuation of the legal heritage from the era of the Companions.[45] He singles out the school of Medina, represented by the seven jurists of Medina, as the school of *maqāṣid*. Quoting Ibn Taymiyya, Bin Bayyah argues that the school of Ahl al-Madīna was renowned for taking into consideration *maqāṣid* and its foundations.[46] The tradition of the school of Ahl al-Madīna culminated with Imam al-Mālik (d. 795) and his legal approach based, among others, on 'public welfare' and 'blocking of the means'. Bin Bayyah quotes the saying of the renowned Mālikī jurist, Abū Bakr b. al-ʿArabī (d. 1148) regarding Imām al-Mālik: "As for *maqāṣid* and *maṣāliḥ,* this is also something in which Imām Mālik was unparalleled, unlike other scholars."[47]

Bin Bayyah continues his construction of the genealogy of the development of *maṣlaḥa* and *maqāṣid* by tracing its developments from the second century *hijrī* until the formation of the Islamic schools of law in the fourth-fifth century.[48] Quoting al-Shāṭibī, he argues that three textual approaches emerged in Islamic legal history in the second-century *hijrī*: 1) a literalist (*ẓāhirī*) approach that did not take into consideration the intention or the objectives of the texts but restricted itself to the apparent meaning of the texts; 2) an esoteric (*bāṭinī*) approach that refused the

apparent meaning of the textual sources and restricted the meanings of the texts only to their internal/esoteric dimensions; and 3) a balanced approach, endorsed by most Muslim legal scholars, that considered both the textual and the extra-textual dimensions of the revelatory sources.[49]

In Bin Bayyah's framework, this third attitude consists in the attempt to strike a balance between texts and inference. Nevertheless, historically speaking, the precise middle path between the two was not easy to determine and it was subject of staunch disagreements between the *madhhab*s. In his view, the Shāfiʿī school of law took a position nearer to the literalist approach, in which textual and linguistic considerations played central importance in the law-finding process. In his *Risāla*, al-Shāfiʿī took a strong stance against the legal notions of juristic preference (*istiḥsān*), blocking of the means (*sadd al-dharā'iʿ*), and (to a certain degree) public welfare (*istiṣlaḥ*).[50] By contrast, the Ḥanafī, Ḥanbalī and Mālikī schools of law inclined more towards inference, emphasizing these legal notions.[51] Bin Bayyah accepts the conventional narrative that considers Imam al-Shāfiʿī as the founder of legal theory and his *Risāla* as the first conscious articulation of Islamic legal theory.[52] As a response to Imām al-Shāfiʿī's rejectionist attitude towards these *istidlāl* mechanisms, the third-century *hijrī* witnessed an intense debate on the legitimacy of *maṣlaha, maqāṣid* and *sadd al-dharā'iʿ*. The result of this controversy was the emergence of various legal strategies to justify these legal mechanisms and connect them with more *uṣūlī* considerations.[53]

The controversies around *istidlāl* mechanisms required the exercise of *ijtihād*. For Bin Bayyah, *maqāṣid* emerged precisely as the necessary legal framework that provided this required means and criteria for regulating (*ḍabṭ*) *istidlāl*.[54] This role makes *maqāṣid* central to *istidlāl* and essential for any project of renewal of Islamic legal theory. The debates that al-Shāfiʿī's position on certain *istidlāl* mechanisms (*istiḥsān, istiṣlāḥ*, etc.) originated, resulted in the acceptance and legitimation of *istidlāl* mechanisms as an integral part of Islamic legal theory. Hence, according to Bin Bayyah, al-Shāfiʿī's discourse in his *Risāla* should be regarded as the beginning of the journey of the *maqāṣīd* school of thought.[55] In this way, the *maqāṣid* approach is integrated in the history of Islamic legal theory itself. Such a reconstruction of the history of *maqāṣid* allows Bin

Bayyah to invoke foundational figures of Islamic legal theory, like Imām al-Shāfiʿī, in favor of his conceptualization of *maqāṣid* and its importance for the renewal of Islamic legal theory.

Through his reconstruction of the genealogy of *maqāṣid*, Bin Bayyah seeks to provide historical corroborations for his particular conceptualization of *maqāṣid* and their importance for the renewal of Islamic legal theory. This endeavor implies a reading of early Islamic legal history in hindsight of later developments and consequently manifests a certain degree of anachronism. For instance, it is true that, as Bin Bayyah suggests, *ijtihād* of the early Muslim generations often reflected an intuitive and underlying *maqāṣid* reasoning that later on became integrated or justified through non-analogical *istidlāl* frameworks, like *istiḥsān*, *istiṣlāḥ* and *sadd al-dharāʾiʿ*. Nevertheless, the emergence of *istidlāl* itself, as a general concept for methods of enquiry separated from *qiyās* that included formal and non-analogical arguments, was a late development (4th-5th century *hijrī*).[56] Moreover, as Hallaq states, all these arguments "existed in the realm of the controversial within the systems of the four schools of law."[57] Hence, although the relationship between text and inference might have been important for the jurist of the formative period of the Islamic law, presenting it as a fundamental feature of Islamic legal theory from its beginning and the main impetus behind the development of Islamic legal theory seems to be historically an overstretch and a backward projection of later legal developments into the early period.

Moreover, while *istidlāl* contains and necessitates, to a certain degree, *maṣlaḥa/maqāṣid* considerations, historically speaking it is textual considerations, rather than *maqāṣid*, that seem to have played a greater role in integrating *istidlāl* mechanisms in the structure of Islamic legal theory. For instance, one important strategy to legitimize and integrate *istiḥsān* in the structure of legal theory has been its rationalization as a form of particularization (*takhṣīṣ*) of the efficient cause (*ʿilla*). Another important strategy has been the presentation of *istiḥsān* as a concealed form of analogy (*qiyās al-khafī*) that on certain occasions, based on juristic considerations, should be preferred over manifest analogy (*qiyās al-jālī*).[58] In this way, *istiḥsān* could be presented not as "the arbitrary opinion of the jurist but the carefully conducted analogy on

the basis of textual evidence and sound methodological principles."[59] In both cases, although *maqāṣid* considerations were perceived as important for the existence of *istidlāl* mechanisms, it was the grounding of *istidlāl* on agreed upon formal textual mechanism like *qiyās* or *ta'līl* rather than *maqāṣid* which proved essential in providing the criteria for regulating (*ḍabṭ*) *istiḥsān*.[60]

In short, Bin Bayyah reconstructs the early history of Islamic legal theory in ways that fit his particular understanding of the role of *maqāṣid* in it. His narrative of the genealogy of *maqāṣid* is indicative of a common feature of the contemporary Islamic discourse, and Islamic legal tradition in general, where modern and new constructs like *fiqh al-maqāṣid* (purposive jurisprudence), *fiqh al-wāqi'* (jurisprudence of reality), *fiqh al-muwāzanāt* (jurisprudence of balance), etc., are often justified by backward-projecting them into the prophetic or foundational period. By conceptualizing *istidlāl* and its relation with the text (*naṣṣ*) as the main impetus behind the development of Islamic legal theory, Bin Bayyah is able to carve out a central role for *maqāṣid*. This discursive strategy allows him to justify the place of *maqāṣid* in the very structure of Islamic legal theory and trace the beginning of the journey of the *maqāṣid* school of thought back to the founder of legal theory himself (al-Shāfi'ī). In this way, Bin Bayyah is able to present *maqāṣid* and classical *usūlī* textual procedures as sharing the same roots and legitimacy.

The Role of *Maqāṣid* in Bin Bayyah's Project of Renewal

In laying out the structure of his project of renewal, Bin Bayyah draws from the Aristotelian theory of causation, namely the distinctions between material, formal, efficient and final causes (*mādda*, *ṣūra*, *fā'il*, *ghāya*).[61] In fact, in his book on the renewal of legal theory, *Ithārāt al-tajdidiyya*, Bin Bayyah gives to legal theory a logical structure organizing it in accordance with the four forms of causation (*al-'illal al-arba'*). In Bin Bayyah's view, these are the only means through which scholars can realize change and provide explanations for their reasoning. The subject-matter (*mādda*) of Islamic legal theory, i.e., "its essence from which the structure of *uṣūl* spring forth and without which its existence is not conceivable,"[62] is not

susceptible to revision or reconsideration. He conceives the subject-matter (*al-mādda*) of Islamic legal theory as constituted by seven fundaments: 1) Qur'an, 2) Sunnah, 3) Arabic language, 4) substantive law (*fiqh*), 5) the legal verdicts (*fatwa*) of the Companions, 6) theology (*'ilm al-kalām*) and 7) Aristotelian logic.[63] He restricts the renewal of legal theory principally to the realm of the form (i.e., the formal causation), especially in its element of *tarkīb* (structuring) and its role in constructing the relationship between the universals and the particulars.

It is in the realm of the formal (*ṣūra*), i.e., "which through its shape makes the matter (*mādda*) responsive towards a specific function,"[64] that most of the renewal of legal theory takes place. In Bin Bayyah's view, any work on the subject-matter is actualized through the effect that the form has on it, and not by negating parts of the matter's constitutive elements. Formal causation is composed of five elements: *tarkīb* (structuring), *tabwīb* (classification), *tartīb* (arrangement), *talqīb* (designation), and *taqrīb* (approximation). It is through reprising these five elements that significant changes in Islamic legal theory can be actualized. The role of *maqāṣid* deliberations appears predominantly in the element of *tarkīb* (structuring) and consists in the assembling or putting together the parts of a compound reality (*ajzā' al-murakkaba*). By this, Bin Bayyah means the construction (*tarkīb*) of the universals from its particulars and vice versa as well as the structuring of two particulars by putting them in relation with each other.

In a broader perspective, Bin Bayyah conceives the role of formal causation (*al-ṣūra*) in the renewal of legal theory as manifested in three principal forms of *ijtihād* that constitute the heart of Islamic legal theory itself. These are:

1. *ijtihād* concerning the linguistic indicators (*ijtihad fī dalālāt al-alfāẓ*) that refers to all the issues related to the Arabic language;
2. *ijtihād* concerning issues related to harm and benefit that refers to *maqāṣid*, in its entirety and details; and
3. *ijtihād* in the verification of the hinge (*taḥqīq al-manāṭ*), which is a type of perpetual *ijtihād* concerned with the application of the shariatic legal rulings to the particular/individual cases encountered in specific contexts.[65]

These three types of *ijtihād* respond respectively to the what, the why, and the how of Islamic law. To each of these forms of *ijtihād*, Bin Bayyah has dedicated a particular study.[66] Although the role of the form (*ṣūra*) is crucial to all the types of *ijtihād* mentioned above, nevertheless the role of *maqāṣid* in the renewal of Islamic legal theory is particularly essential for the second kind of *ijtihād*. Hence, our analysis will be mainly focused on this aspect, which constitutes the second step of inquiry and is more profound and important than *ijtihad* based on linguistic indicators.[67] The third type of *ijtihād*, which revolves around the notion of the verification of the hinge (*taḥqīq al-manāṭ*), constitutes a crucial element of Bin Bayyah's theory of applicative *ijtihād*.

Bin Bayyah conceives of the contribution of *maqāṣid* to Islamic Law predominantly in three aspects, of which our analysis will focus on the two former ones:

1 The actualization (*taf'īl*) of Islamic legal theory in light of the realization of *maqāṣid* in its structure;[68]

2 The selection of the appropriate legal opinions, even if this entails the adoption of an outweighed opinion (*marjūḥ*) over a preponderant one (*rājiḥ*);[69] and

3 The actualization of the theory of *maqāṣid* to develop a comprehensive Islamic philosophy that answers the questions raised by the modern age by relying on the mutual relationship between revelation and reason.[70]

As we will see, Bin Bayyah situates the role of *maqāṣid* in the renewal of Islamic legal theory as crucial for the system of ratiocination (*manẓūmat al-ta'līl*) and the broadening of its role. Within the system of ratiocination, he ascribes to the objectives of *sharī'a* the principal role of enabling the construction of universals (*kulliyyāt*) and preserving the balance between the universals and the particulars.[71] In this context, any process of ratiocination (*ta'līl*) should be proceeded by two preludes (*muqaddima*) that pertain to the domain of *maqāṣid*. These preludes consist in (1) taking *maqāṣid* into consideration, be it universal or particular, original or dependent, the objectives of the Lawgiver or the legally responsible subjects (*mukallifūn*); and (2) taking into consideration the

logicality of *uṣūl* (*mantiqiyyat al-uṣūl*).[72] In the following, we will elaborate further on these two preludes that are central to Bin Bayyah's presentation of the role of *maqāṣid* in the renewal of Islamic legal theory.

The First *Muqaddima*: Considering *Maqāṣid* in the Process of Ratiocination *(Ta'līl)*

According to Bin Bayyah, *maqāṣid* constitute the natural environment for the efficient cause (*'illa*), be it in the case of a universal or a particular *'illa*. Most of the efficient causes are *maqāṣid*, while a few of them do not pertain to the *maqāṣid* domain, like those deductions of the efficient cause through the procedure of co-presence and co-absence (*ṭard wa 'aks*) or sorting and eliminating (*sabr wa taqsīm*). [73] As such *maqāṣid* are crucial for researchers to understand the foundations of the efficient cause. For Bin Bayyah, the actualization of Islamic legal theory in the light of *maqāṣid* serves as a way to expand the capacity of deduction, and as a prelude (*muqaddima*) to *ma'qūl al-naṣṣ*, the same way linguistics (*mabāḥith al-lughawiyya*) serves as a prelude for the signification of expressions (*dalālat al-alfāẓ*). The most important feature of the renewal of Islamic legal theory through *maqāṣid* consists in the latter's ability "to construct universals, while maintaining a balance between the universal and the particular as well as elucidating the order and the sequence [of the objectives], i.e., the ranks and levels of the general objectives on which the particular indicants are based according to their [i.e., *maqāṣid*] different degrees and whether they entail obligation or permissibility."[74] This role of *maqāṣid* in the renewal of Islamic legal theory consists principally in a) the actualization (*taf'īl*) of Islamic legal theory in the light of the realization of *maqāṣid* in its structure and b) taking into account the principle of mutual attraction between the universal and the particulars.[75]

1 *The actualization of Islamic legal theory in the light of maqāṣid*

For Bin Bayyah, actualizing Islamic legal theory by taking into consideration the structure of the *maqāṣid* is necessary to expand the role and scope of four *uṣūlī* circles or fields (*dawā'ir*) that constitute the core of inference (*istidlāl*) and consequently of *maqāṣid* reasoning itself.

These for *uṣūlī* circles are: 1) juristic preference (*istiḥsān*), 2) public welfare (*istiṣlaḥ*), 3) the deduction of legal analogies (*istinbāṭ al-aqyisa*) and 4) taking into consideration the anticipated outcomes (*ma'ālāt*) and means (*al-dharā'i'*) of legal rulings.[76] According to Bin Bayyah, in Islamic legal theory terms, employing or taking into consideration *maqāṣid* in order to bring renewal into these four legal circles means that sometimes *maqāṣid* might take the meaning of a particular, i.e., that of attaching the new case (*far'*) to a particular original case (*aṣl khāṣṣ*) in a particular locus (*maḥall makhṣūṣ*) and this constitute the procedure of *qiyās*. Some other times, the integration of the *maqāṣid* into the operation of Islamic legal theory might signify bringing into existence a legal norm based on a universal, in the cases where no particular original case exists for the issue under analysis. This procedure corresponds to *istiṣlāḥ*. Other times *maqāṣid* considerations might require the exemption of a particular from its established universal based on a specific feature of the particular that requires such an exemption. This aspect represents the *uṣūlī* structure of *istiḥsān*. Lastly, *maqāṣid* deliberations might require changing the outward meaning of a legal ruling in light of the anticipation of its effect. This constitutes the essence of *sadd al-dharā'i'* (blocking of the means).[77]

Here, Bin Bayyah insightfully emphasizes the ways in which *maqāṣid* considerations are intrinsically connected with the above-mentioned *uṣūlī* circles and constitute their basis. The importance of *maqāṣid* for these *uṣūlī* legal tools did not escape the attention of classic legal scholars. However, Bin Bayyah provides an original framework and a contemporary language of how to conceptualize these *uṣūlī* circles in *maqāṣid* terms. Yet he does not provide further explanations of how precisely is the actualization (*taf'īl*) of *maqāṣid* supposed to expand the role and scope of these *uṣūlī* circles beyond that envisaged in the traditional *uṣūlī* discourse. At this point his discourse remains theoretical and in need of concrete substantiations. Nevertheless, for Bin Bayyah, these four *uṣūlī* circles constitute the area of *maqāṣid* within Islamic legal theory, of which the most important is *istiḥsān*. The latter permits "the particularization (*takhṣīṣ*) of the general ('āmm) legal texts and the qualifying of the unqualified

(*taqyīd al-muṭlaq*)."[78] In the Maliki *madhhab*, it refers to "opting for a particular *maṣlaḥa* in lieu of a general indicant (*dalīl al-kullī*)."[79] It refers to giving precedence to unattested *istidlāl* over an analogy in cases where the strict application of an analogy brings to the non-realization of a *maṣlaḥa* and the acquisition of harm (*mafsad*). As Abū Bakr Ibn ʿArabī explains, *istiḥsān* consists in "giving preference to the relinquishment of the requirements of textual indicant (*dalīl*) via the path of exception (*istithnāʾ*) and legal license (*tarkhīṣ*). This, as a consequence of the existence of some opposition (*muʿāraḍa*) by which the *dalīl* is opposed in some of its requirements."[80]

In this context, evidence can be opposed by giving preference to customs, *maṣlaḥa*, consensus, legal license, or lifting hardship. Bin Bayyah argues that need (*hāja*) also can specify a general text, especially when the generality of the text is weak with regard to the specific issue under analysis. Here, the weakness refers to the situation when a particular issue that is particularized through *istiḥsān* pertains to a rare case that cannot be included in the general ruling.[81] A concrete example of this is Imām Malik's permission for menstruating women to read from the *muṣḥaf* of the Qur'ān despite the existence of a general text that prohibits its reading by those in a state of major impurity (*janāba*). Imam Malik's legal verdicts consisted of the particularization of the general text. He based his legal position on women's need (*hāja*) to preserve the memorization of the Qur'ān. This is also facilitated by the fact that the generality of the text that prohibits such an act is weak with regards to the issue at hand because the general text speaks of major impurity (*janāba*) rather than menstruation.[82] Thus, the exercise of *istiḥsān* relies on the understanding of *maqāṣid* and the thorough contextual circumstances related with particular cases. For Bin Bayyah, in this context, one of the essential functions of *maqāṣid* is the construction of universals (*kulliyāt*) or concepts (*mafāhīm*) necessary for the proper application of the four *uṣūlī* circles. In other words, *maqāṣid* can serve as the best guide in the formulation of universals and particulars necessary for the proper actualization of the four *uṣūlī* circles to respond adequately to contemporary realities.[83]

2 *The principle of mutual attraction between the universal and particulars*
Bin Bayyah argues that the *maqāṣid* in all their diversity constitute the appropriate environment for the construction of concepts (*mafāhim*), universal or particular, that have significant repercussion for jurisprudence and the Islamic legal theory framework of dealing with scriptural texts. Al-Shāṭibī stressed the importance of a proper balance in which the universals (*kulliyyāt*), i.e., the objectives of *sharīʿa*, and the particulars (*juz'iyyāt*), i.e., the particular textual sources, are put in a mutual and symbiotic relationship with each other. For al-Shāṭibī, as reason requires, the particulars are derived from the universals that should be considered during the analysis of specific textual indicators from the revelatory sources. However, the universals themselves are made known by inducing them from the particulars and necessitate them for their legitimacy and existence. Therefore, "it is impossible for the particular to dispense with the universals. Consequently, whoever holds, for example, to the particular aspect of a text and rejects its universal [aspect] is mistaken, and whoever holds to a particular rejecting the universal is wrong. Similar is the case with whoever holds to a universal rejecting the particular."[84] For al-Shāṭibī, when a general rule (*qāʿida kulliyya*) is established by induction, and a text, in its particular aspect, contradicts it, harmonization between the two is necessary. According to him, the *sharīʿa* did not state this particular except by preserving at the same time those general rules. Therefore, it is not possible, in this case, to violate the general rule by canceling what is considered by *sharīʿa*. It is not possible to consider the universal and cancel the particular.[85]

However, according to Bin Bayyah, al-Shāṭibī seems to contradict himself elsewhere, stating that in the case of a contradiction between a general rule and a particular text it is necessary to preserve order and give precedence to the first. This because no system in the world is disturbed by the unsettling of the particular, unlike if precedence is given to the particular.[86] Whereas, for Bin Bayyah, when a particular and a universal clash with each other, it is obligatory for the *mujtahid* to reconcile them, and in case this is not possible, then neither the universal nor the particular should be preferred over the other

in an unqualified way. The reason for this resides in the possibility that the *mujtahid* might realize in the particular a specific meaning that makes it stand alone from the universal and take another legal ruling different from that dictated by the universal under which this particular was originally subsumed. For Bin Bayyah, this is the heart of *istiḥsān* (juristic preference), i.e., excluding a particular from the universal. Blocking the means (*sadd al-dharā'i'*) constitutes another case where, in the light of the anticipated effects, the particular takes the place of a universal, and the legal norm is given following the dictates of the particular. Other times, as in the case of unattested *maṣlaḥa*, the particular is divested of all meanings and is absorbed and controlled by the universal.[87]

For Bin Bayyah, all these four *uṣūlī* legal mechanisms are the domain of *maqāṣīd*, and by nature, they exist in order to take into consideration and respond to new occurrences or novel social contingent realities. The present condition might require the abandonment of a preponderant (*rājiḥ*) legal opinion in favor of an outweighed one (*marjūḥ*) as a consequence of the occurrence of matters of general necessity (*'umūm al-balwa*), hardship, the non-realization of a *maṣlaḥa*, and the possibility of acquisition of harm.[88] In traditional Mālikī jurisprudence, the appropriation of outweighed opinions (*marjūḥ*) has been legitimized under the notion of *juryān al-'amal*.[89] In the Islamic West, Maliki scholars reviewed the preponderant opinions of the *madhhab* in the light of *juryān al-'amal*. Each region followed a specific *'amal* different from one another.[90] In the Ḥanafī jurisprudence, the same function is played by the notion of deterioration of times (*fasād al-zamān*). Based on this concept, later Ḥanafis allowed giving salaries to Qur'an teachers and prohibited a woman from traveling even if accompanied by her husband.[91] For Bin Bayyah, the realization of *maqāṣid* in modern times might require the adoption of a forsaken opinion (*mahjūra*) as long it is correctly attributed to early authorities, it is narrated from a trustworthy narrator, and need calls for it.[92]

For instance, against the classical legal ruling, contemporary Muslim scholars have permitted the throwing of pebbles in Muzdalifa

before the sun's zenith. The appropriation of such outweighed opinion (*marjūḥ*) is based on the fatwa of some early legal authorities. It relies on the *maṣlaḥa* of avoiding overcrowding and fatalities of human life that occur nowadays during the fulfillment of this particular pilgrimage ritual. In Bin Bayyah's view, it is precisely the instrument of *maqāṣid* that guarantees the correct understanding of the new realities and the sound legal framework that will legitimize the adoption of an outweighed opinion instead of a well-established preponderant one.[93] Being an incubator of the generation of universals and concepts through which the new challenges or crises can be adequately tackled, in his view, the *maqāṣid* fulfill the crucial role of providing Islamic legal theory with the necessary legal framework and flexibility to be relevant and respond to new social contingent realities as well as to serve as a bridge between the everchanging reality and the scriptural text.[94] For Bin Bayyah, the use of *maqāṣid* in favor of the appropriation of outweighed opinions should be based on clear *uṣūlī* regulations (*ḍawābiṭ*). This will provide the legal procedure with the necessary *uṣūlī* rigor. In this context, Bin Bayyah offers eight such rules:

1 Ascertaining the correct verification of the original objective (*al-maqṣad al-aṣlī*) for which the legal norm has been legislated. The process of the verification of the objective is necessary for the realization of ratiocination (*ta'līl*).

2 Ensuring that the objective (*maqṣad*) is a characteristic which is evident and inherently determinate (*waṣf ẓāhir munḍabiṭ*) for the *ta'līl* to be possible.

3 Determining the category of the objective, i.e., does the objective in question fall under the category of necessity or that of need, is it an original or a dependent objective?

4 Examining the particular texts (*al-nuṣūṣ al-juz'iyya*) that are the foundations of the legal ruling (*ḥukm*) to confirm the presence, or not, of the ruling in it so that the scholar can adequately deal with it in the cases where an inevitable necessity or an urgent need goes against the explicit legal norm contained in the particular texts.

5 Understanding if the inferred objective (*al-maqṣad al-mu'allal*) is textually expressed (*manṣūṣ*) or is deduced (*mustanbiṭ*). In the first

case, the absence of the objective necessitates the absence of the ruling, whereas in the second case, it does not, but it might serve as a particularization.

6 The inferred objective (*maqṣad mu'allal*) should not be rejected by a defective impediment like working with the opposite of the objective.

7 Guaranteeing that a specific *maqāṣid* is not opposed by another one that has priority over it.

8 Confirming that the identified *maqāṣid* is not the locus (*maḥall*) of a ruling that is canceled by textual evidence, consensus, or analogy.[95]

For Bin Bayyah these rules guarantee the correct usage of *maqāṣid* in the law-finding process. He presents them as sufficient to provide the utilization of the objectives of *sharī'a* with the necessary legal methodological rigor and undo the negative image that the *maṣlaḥa* and the *maqāṣid* approach enjoys in some Islamic scholarly circles as being inherently versatile, unregulated, and subjective. Although Bin Bayyah does not delve into the mechanics or the detailed analysis of the above-mentioned rules, nevertheless he presents them as crucial for the process of preferring an outweighed opinion over the preponderant one.[96]

The Second *Muqaddima*: Syllogism and the Broadening of the System of Ratiocination

The second *muqaddima* consists in taking into consideration the logicality of Islamic legal theory (*manṭiqiyyat al-uṣūl*), which explains the conceptions (*taṣawrāt*) acquired through explanation (*qawl al-shāriḥ*) in order to reach the judgments (*taṣdīqāt*) through the two types of proofs, textual and rational.[97] In stressing the logicality of Islamic legal theory, Bin Bayyah aims to reject the call to disassociate Islamic legal theory from logic (*manṭiq*). For this, he presents syllogistic analogy as an integral part of Islamic legal theory and highlights the importance of logical demonstration (*burhān*) for it. He presents the system of ratiocination (*ta'līl*) as composed of three types of analogies: 1) syllogistic analogy (*qiyās al-shumūlī*); 2) inductive analogy (*qiyās al-istiqrā'ī*); and 3) juristic analogy (*qiyās al-tamthīlī*). In other words, the *uṣūlī* proofs fall back on

either a universal (rational or textual) from which the particulars are derived (syllogistic analogy); induced universal deduced from the particulars (inductive analogy); or a particular deduced from another particular (juristic analogy).[98] Therefore, for Bin Bayyah, the second *muqaddima* "is necessary to build the foundations of inference (*istidlāl*) and facilitate the ways for deduction which is the structure of the edifice of Islamic legal theory that frames its various issues."[99] Syllogistic analogy is crucial for the sound process of inference, for structuring its rules (*qawāʿid*) and arranging its proofs (*burhān*). It plays an important role in creating or refining concepts and determining the contents of legal reasoning to build a new framework, test the readiness of old frameworks, or produce frameworks new in types but old in the genus.[100]

In his discussion on the logicality of Islamic legal theory and the importance of syllogistic analogy for its structure, Bin Bayyah provides a summary of the debates of classical Muslim scholars such as al-Ghazālī (d. 1111), Ibn Rushd (d. 1198), Ibn Taymiyya (1328), and Najm al-Dīn al-Ṭūfī (1316). For Bin Bayyah, the disagreement between scholars on this issue revolved around three elements: 1) terminology; 2) the epistemic status of various types of analogy (syllogistic and juristic); and 3) the possibility of conversion of legal analogy into a syllogism.[101]

Regarding the first element, Bin Bayyah argues that both kinds of analogy can be constructed from textual sources. The terminology used in the Islamic sciences is not scriptural. Therefore, the terminology used to describe both juristic and syllogistic analogy cannot be considered non-Islamic. Regarding the second element, i.e., the epistemic status of various analogies, Bin Bayyah discusses al-Ghazālī's argument that juristic analogy leads only to probability (*ẓann*), whereas syllogistic analogy, properly structured, leads to certainty (*yaqīn*) and definitive knowledge. Hence, the juristic analogy cannot be used in rational matters (*ʿaqliyyāt*).[102] In contrast, Ibn Taymiyya challenged the epistemic status of syllogism. Based on a nominalist view, he rejected the idea of universal premises. He argued that "a complete induction of all particulars in the external world is …impossible, and thus cannot lead to a truly universal premiss or to certitude."[103] For him, both types of analogies can lead to certainty. It is not the form but the subject-matter (*mādda*) of the

prepositions that determines the epistemic value of the conclusions. For Ibn Taymiyya, "both analogy and the syllogism yield certitude when their subject-matter is veridical, and they result in mere probability when their subject-matter is uncertain."[104] Therefore, analogical reasoning can be used also in rational matters (*'aqliyyāt*).

Regarding the third element, i.e., the possibility of conversion of legal analogy into the form of a syllogism, Bin Bayyah draws from al-Ṭūfī's attempt to mediate between al-Ghazālī and Ibn Taymiyya. In line with al-Ṭūfī, he argues that juristic analogy falls back on syllogistic analogy composed of two prepositions and one conclusion. For example, the jurist's statement "*nabīdh* (date wine) is intoxicating, so it is forbidden like wine" summarizes the syllogistic construction "Wine is intoxicating, and every intoxicant is prohibited." Syllogistic analogy is composed by two prepositions and one conclusion. In terms of subject and predicate that constitute it, syllogistic analogy is composed of six parts and takes the following form:

[S] Every intoxicant is [P] prohibited (*ḥarām*) ⟶ Major premise (universal)
[S] *Nabīdh* is an [P] intoxicant ⟶ Minor premise (Particular)
[S] *Nabīdh* is [P] prohibited ⟶ Conclusion

For al-Ṭūfī, like syllogistic analogy, the juristic analogy is essentially composed of six parts, but often the middle term is omitted—thus resulting in a structure composed of four parts as in the case of the expression "[s] *Nabīdh* is [p] intoxicant. Therefore, [s] it is [p] *ḥarām*".[105] In this way, for al-Ṭūfī, juristic analogy falls back to syllogistic analogy.

In western scholarship, formal logic is usually portrayed as a latecomer in Islamic legal theory.[106] Al-Ghazalī was instrumental in according to Aristotelian logic its acceptability and incorporating it into legal theory.[107] Nevertheless, Bin Bayyah argues that elements of the Aristotelian logic in legal theory can be traced back to the second century *hijrī*. He claims that from the second century Muslim scholars integrated logical definitions and theological terminology in their legal discourse. Bin Bayyah does not provide further details for his claim, but considers it

sufficiently established so as to render Aristotelian logic a fundament of legal theory and a source from which the principles of Islamic legal theory are derived.[108] Despite the attention allocated to the relevance of syllogistic analogies to legal theory, Bin Bayyah writes that this topic has more relevance for theology than legal theory. In practical terms, the role of syllogistic analogy in legal theory is confined to the regulation (*ḍabṭ*) of some textual particulars to facilitate, in this way, the process of deduction.[109] Despite this, Bin Bayyah portrays calls to excise Aristotelian logic from legal theory as proceeding at "the expense of the correct understanding and the deep comprehension of the philosophy of Islamic legal theory, which affects the renewal and origination of legal rulings."[110] He expresses the importance of the relation between logic, *maqāṣid*, and Islamic legal theory by stating that comprehensive renewal consists in "planting the tree of ratiocination (*ta'līl*) in the soil of *maqāṣid* watered by logic."[111]

An important discursive step undertaken by Bin Bayyah consists in the expansion of the system of ratiocination beyond the three abovementioned types of analogies (syllogistic/inductive/ juristic) by including in it formal arguments like indicative analogy (*qiyās al-dalāla*), coexclusive analogy (*qiyās al-aks*), and that of similarity (*qiyās al-shibh*).[112] He also presents the central elements of *ijtihād* regarding the efficient cause (*'illa*)—i.e., the verification of the hinge (*tahqīq al-manāṭ*), the extraction of the hinge (*takhrīj al-manāṭ*) and determination of the hinge (*tanqīḥ al-manāṭ*)—as integral parts of the system of ratiocination.[113] Historically, the introduction of formal arguments in the structure of Islamic legal theory, particularly under the heading of *istidlāl*, was a later phenomenon (4th/10th and 5th /11th century)[114]. Their inclusion as integral part of *istidlāl* and the system of ratiocination was indebted to the appropriation of logic and dialectics in Islamic legal theory. As Hallaq states "At first, particularly during the sixth/twelfth century, it was in the introductory pages of those *uṣūl* works which admitted the Greek logical element that such arguments appeared."[115] For Bin Bayyah these non-*qiyās* arguments allow the jurists to draw on a wider reservoir of legal mechanisms to respond to the new occurrences, in cases where a strict application of juristic analogy yields unwanted consequences. They demonstrate the importance of logic and dialectic arguments for Islamic legal theory and *ijtihād*.

Bin Bayyah presents the verification of the hinge as particularly important for the system of *ta'lil*. In its essence, it consists in "applying the general principle to its individual cases" or ascertaining that "a *ratio legis* found in the original case (and agreed upon by scholars) also exists in a new case under examination."[116] As such, this legal mechanism is essential for the correct application of legal ruling in concrete cases. It requires a profound knowledge of both the Islamic legal rulings and the particular circumstances surrounding the locus of the legal rulings (*maḥall al-ḥukm*). Being an incubator of the universals, *maqāṣid* play a pivotal role in the realization of the verification of the hinge and in devising the correct juridical response to new realities. As Bin Bayyah states, "The objectives of *sharī'a* take into account reality and deal with the new occurrences because they are a bridge and a path of passage between the changing reality and the inferred text (*naṣṣ mu'allal*)."[117]

In Bin Bayyah's discourse, the expansion of the system of ratiocination carves out an important role for *maqāṣid*, especially for the *ijtihād* based on unattested *maṣlaḥa* or unattested suitability (*al-munāsib al-mursala*). Both types constitute a form of ratiocination by universals (*kullī*). The former has been used particularly by Imam Mālik on issues pertaining to the penitentiary and discretionary punishments. It is based on his stance towards unattested *maṣlaḥa* that it is said that Imām Mālik permitted the extraction of forced confessions from those accused of crimes. Although in the Mālikī *madhhab*, such a position has been criticized, nevertheless many classical scholars, like Imam al-Ghazālī, have portrayed it as a legitimate form of *ijtihād* and rational investigation.[118] The unattested suitability consists of the attachment to the mere *maṣlaḥa* without any attestation from a specific textual foundation. In this case, it is as if *maṣlaḥa* has become a special effective cause (*'illa*). Strictly speaking, this form of *ijtihād* cannot be considered a juridical analogy because it does not consist in carrying a hidden particular to a more manifest particular as a consequence of a shared effective cause between the two. In the case of an *ijtihād* by unattested *maṣlaḥa* or suitability, we face a form of *ta'līl* consisting in the deduction of a particular from a universal in accordance with specific conditions.[119] In this way, for Bin Bayyah, any time the strict application of a juristic analogy leads to

over-stringent conclusions, the *mujtahid* can use the *istidlāl* by *maṣlaḥa* and *munāsaba* or other forms of *istidlāl* (like *qiyās dalāla*, *aks*, and *shibh*) as an exit way from the narrow confines of *qiyās* to the broader area of *maqāṣid* and interpretation.[120]

The Inseparability of *Maqāṣid* from Legal Theory: *Maqāṣid* as the Heart of *Uṣūl al-Fiqh*

As we have seen, for Bin Bayyah, *maqāṣid* and legal theory are inextricably connected. *Maqāṣid* operate within the *uṣūlī* mechanism of ratiocination, understood in a broad sense, and represent a type of *ijtihād* that concerns itself with the identification of the reasons why specific legal injunctions have been established. For Bin Bayyah, without the *maqāṣid*, Islamic legal theory is deficient whereas *maqāṣid* without Islamic legal theory considerations are ineffective or fruitless.[121] In Bin Bayyah's view, often scholars tend to negate the importance of *maqāṣid* for Islamic legal theory or conceive *maqāṣid* as a higher form of law-making that is self-subsistent and independent from Islamic legal theory. Bin Bayyah rejects categorically the idea that *maqāṣid* can exist and operate independently from Islamic legal theory.[122] He argues that not only are *maqāṣid* embedded in the very fabric of Islamic legal methodology but that they constitute its heart. For him, the relation of *maqāṣid* with Islamic legal theory resembles that of the spirit with the body. *Maqāṣid* are Islamic legal theory itself and its inner dimension.[123] The actualization of Islamic legal theory in the light of *maqāṣid* implies the importance of the objectives of *sharīʿa* for Islamic legal theory in its entirety. As we mentioned earlier, Bin Bayyah does not restrict the role of *maqāṣid* in Islamic legal theory only to the framework of the system of ratiocination, but extends it to all its chapters.

As an illustration, Bin Bayyah presents more than thirty ways in which *maqāṣid* are blended into the texture of Islamic legal theory and are necessary for its sound functioning. He claims that these ways that demonstrate the way *maqāṣid* constitute the essence of legal theory are presented for the first time and constitute his particular contribution to the debate. We will recount here only a representative number of them:[124]

1 *The particularization by a maqāṣid of a general (ʿāmm) text.* This is the case with Imam Mālik's legal ruling that exempts the menstruating woman from the general prohibition of touching and reading from the Qur'an while in a state of major impurity (*janāba*). The exception of this particular case from the general prohibition is based on juristic preference and the *maṣlaḥa* reasoning that the strict application of the original legal ruling would render difficult for women the memorization and remembrance of the Qur'an.

2 *The relinquishment (al-ʿudūl) of the requirement of a particular text (naṣṣ khāṣṣ) as a consequence of its clashing with a legal fundament or maxim.* Such is the case with ʿĀ'isha's refusal of Ibn ʿUmar's report from the Prophet which states that a deceased person will be punished in the grave as a consequence of people weeping for his/her death. ʿĀʿisha refused this authentic report based on an established *maqāṣid* foundation deducted from the Qur'anic verse: "No bearer of burdens will bear the burden of another" (Q. 53:38). Also, sometimes the requirement of a particular text can be relinquished to favor a higher legal objective *(maqṣad).* For example, ʿUmar prohibited applying the punishment of expulsion, foreseen for the virgin adulterer, despite a clear prophetic text on this regard. His legal judgment relied on the reasoning that the adulterer's expulsion could bring his/her to join the enemies' ranks. In this case, the particular text clashes with the higher *maṣlaḥa* of keeping people within the fold of Islam.

3 *The elucidation of an ambiguous expression (mujmal) through a maqṣadī meaning.* For example, the Ḥanafis have understood the ambiguous Qur'anic term *kurū'* as referring to menstruation. This, based on the understanding that the waiting period for a woman (*ʿidda*) has been legislated to ensure that the woman is not pregnant and menstruation is a sign that confirms this fact.

4 *The relinquishment of a manifest text based on a maqāṣid indication* and its transformation in the fundament of the interpretation of the manifest text. For example, the Ḥanafīs and the Mālikīs have interpreted the word "*mutabāyiʿān*" of the hadith: "The two contracting parties (*mutabāyiʿān*) are free to rescind [their agreement] as long as they have not departed from each-other [i.e., from the contracting session]" to mean the bargaining (*mutasāwimīn*) parties. They have

departed from the manifest meaning of the word *mutabāyiʿān* (two contracting parties in a sale) in favor of the outweighed meaning (*marjūḥ*) of *mutasāwimīn* (the two bargaining parties) because in their opinion in a financial transaction, the objective (*maqṣad*) is to achieve precision (*inḍibāṭ*) and it is impossible to define or be precise when a sitting session starts and finishes.

5 *Exercising preponderance between two general texts (ʿumūmayn) in the light of a maqṣād* that consists in the discernment of an efficient cause in one of the general texts and the absence of it in the other. For example, most Muslim scholars have given priority to the *hadīth*: "Kill whoever changes religion" over the Prophetic report that prohibits killing women. The reason offered for this position is that the first text contains the efficient cause (i.e., the apostate is killed because he/she changed religion), whereas the second text does not state or contain an efficient cause. Therefore, the prohibition of killing women in the second text has been interpreted as applying to women's killing on the battlefield.

6 *The origination of a legal ruling (iḥdāth al-ḥukm) about which there is no considered suitability (munāsaba muʿtabara*). This is known as unattested suitability that falls back to the unattested *maṣlaḥa.* An illustration of this is the creation and establishment of the prison system by the caliph ʿUmar b. ʿAbd al-ʿAzīz (r. 717–720) as deterrence for criminals.

7 *Relying on the objectives of sharīʿa to preserve the blocking of the means (al-dharāʿi') and the anticipation (al-maʾālāt) of outcomes.* It is in this context that the Ḥanbalīs and the Mālikīs have prohibited the selling of specimen based on the possibility that this method can be used to circumvent usury. The Ḥanbalī and the Mālikī scholars have understood the objective of the Lawgiver in prohibiting usury as that of prohibiting undo increase *(al-ziyāda)* and whatever leads to it.

8 *The peculiarity of some of the legal injunctions specific only to the Prophet.* For example, the Prophet avoided praying *tarāwīḥ* with the congregation, fearing that this would become an obligation. The efficient cause behind this prophetic practice is the objective *(maqṣad)* in itself and constitutes an argument that this practice was specific only for the Prophet's time.

9 *The implication of correspondence (mafhūm al-muwāfaqa), which sometimes is called faḥwā al-khiṭāb and vacillates between analogy (qiyās) and verbal indicant (dalīl lafẓī).* An example of this is the Qur'anic verse: "Say not to them a word of contempt" (Q. 17:23). What is meant by the verse is not to strike *(ḍarb)* the parent given that one of the intentions *(qaṣd)* of *sharīʿa* is to order the children to show respect to their parent, which excludes any form of harm toward the parent. Here maqāṣid has been used to extract a legal ruling based on the implication of correspondence *(mafhum al-muwāfaqa).*

10 *Maqāṣid and their relevance for the qualification of the unqualified* (*taqyīd al-muṭlaq*). For Bin Bayyah, the searching for meaning is what is intended by the theory of the objectives of *sharīʿa*, and what follows is one concrete application of it. In the Qur'an, one of the expiations *(kaffāra)* for a false oath or *ẓihār* consists in the freeing of a slave. The expiation for an unintentional killing is also freeing of a slave, but with the additional qualification that the slave should be Muslim. The Ḥanafīs do not accept this qualification and have argued that, in this case, the objective of *sharīʿa* is to distinguish between two kinds of *kaffāra*, based on the different scale of the legal injunction on killing and that of oaths and *ẓihār*. In comparison, most scholars accepted the qualification of the unqualified texts and required that both in the case of oaths and *ẓihār*, the freed slave should be a believer. In their opinion, in this case, the objective of *shārīʿa* is to encourage the freeing of Muslim slaves. In Bin Bayyah's opinion, both cases are based on a different evaluation of the *maqāṣid* that stand behind the legal rulings.

For Bin Bayyah, these examples show that *maqāṣid* are the heart of Islamic legal theory. The interconnections between *maqāṣid* and Islamic legal theory demonstrate the inseparability and the mutual relation between these two domains of Islamic law. The ways articulated by Bin Bayyah are indeed a strong argument for the intermingling of *maqāṣid* with Islamic legal theory, and Bin Bayyah has done a tremendous service to the debate on this issue by proposing and articulating them. The cases mentioned by Bin Bayyah demonstrate the insufficiency of strictly linguistic or textual considerations in understanding the correct legal

ruling for particular cases. They constitute a strong case for the need of *maqāṣid* deliberation in particular cases of Islamic legal theory analysis. Nevertheless, a closer look at the examples presented shows that the invocation of *maqāṣid* considerations comes into play only when strictly *uṣūl* deliberations fail to provide a sound legal outcome. The linguistic and textual considerations appear to still be the central *uṣūlī* way to arrive at the correct deduction of legal norms from textual sources. The *maqāṣid* factor, albeit part of Islamic legal theory, seems still an auxiliary dimension mobilized to provide legal clarity for cases whose meaning cannot be grasped by strictly *uṣūl* analysis.

Another seemingly problematic element is the fact that the exercise of *maqāṣīd* deliberation, in the above-mentioned cases, seems to be left to the rational discretion and subjective evaluation of the *mujtahid*. What are the criteria or rules that stipulate the cases when a general (*ʿāmm*) text is particularized (*yukhaṣṣiṣ*) by a *maqāṣid*; an ambiguous expression is elucidated through a *maqṣad* meaning; or a manifest text is relinquished based on a *maqāṣid* indication? When is a *maqāṣid* consideration regarded as necessary for the sound understanding of a legal text? What is the correct method of applying the *maqāṣid* deliberations in such cases? What are the criteria that determine when a *maqāṣiḍ* method has been applied correctly, or not, in case of a disagreement between scholars? For the most part, the introduction of *maqāṣīd* element to resolve the difficulties encountered in particular legal situations is the fruit of the legal intuition and acumen of the mujtahid. Despite their importance for the legal analysis of the issues in question, it seems that generally the *maqāṣid* elements, present in the cases mentioned by Bin Bayyah, lack clear-cut rules of procedure that will guarantee them the perceived objectivity, predictability, and stability claimed by the methodology of Islamic legal theory.

Moreover, most of the cases presented by Bin Bayyah are taken from the traditional disagreement (*ikhtilāf*) genre.[125] A closer look at the way these cases appear in the *ikhtilāf* literature shows that that *maqāṣid* do not represent the only available way to resolve these apparently problematic cases. Even in the instances where *maqāṣid* reasoning is used it is not considered final and decisive by everyone.[126]

Often conventional linguistic and textual *uṣūlī* reasoning are invoked to resolve the same problematic cases, mentioned by Bin Bayyah, without resorting to *maqāṣid*. For instance, regarding the third way presented by Bin Bayyah, the Mālikis have argued that although the singular *kur'* is an ambiguous (*mujmal*) term and denotes either purity or menstruation, nevertheless this word takes two plurals. The first is *aqrā'* and refers to menstruation, whereas the second is *kurū'* and refers to purity. The plural used in the Qur'ān is *kurū'*. Hence the term refers necessarily to the period of purity and not menstruation. Here the Malikis have rejected the *maqāṣid* reasoning of their opponents and have resolved the issue by making recourse to *uṣūlī* linguistic analysis. Moreover, in the fourth way mentioned above, Bin Bayyah argues that, based on *maqāṣid* considerations, the Ḥanafīs and the Mālikīs have interpreted the word *mutabāyi'ān* (the two contracting parties) to mean *mutasāwimīn* (the bargaining parties). This based on the *maqāṣid* reasoning that the objective of every contractual session is precision. However, the Ḥanafīs and the Mālikīs have supported their stance on this issue by relying also on a particular feature of the Arabic language where sometimes the name for something is denoted by the thing that accompanies it. For this reason, the Prophetic hadith mentions *mutabāyi'ān* to mean *mutasāwimīn* because agreement/contract follows almost always the bargaining process.[127]

As we can see, in both the abovementioned cases, instead of *maqāṣid* reasoning, various Islamic schools of law have relied on traditional *uṣūlī* linguistic mechanisms to defend their position. Although the same legal rulings have been justified through *maqāṣid* deliberations, as Bin Bayyah suggests, they have also been explained by relying on textual and linguistic *uṣūlī* mechanisms. The ways presented by Bin Bayyah show how *maqāṣid* can be an integral part of the structure of Islamic legal theory. However, they seem to fall short in demonstrating that *maqāṣid* are Islamic legal theory itself, or its heart. At its best, the examples or the ways presented by Bin Bayyah demonstrate that in certain occasions, *maqāṣid* considerations are crucial for the sound understanding of legal rulings; but this does not necessarily mean that *maqāṣid* are always conclusive or more profound that textual and linguistic analysis. Bin

Bayyah's claim that the above-mentioned cases are a proof that *maqāṣīd* are the heart of *uṣūl* and that they are to *uṣūl* like the soul to the body now reads as overstated.

Conclusion

Bin Bayyah is overall successful in demonstrating how *maqāṣid* are interwoven in the structure of legal theory and relevant for its renewal. The discursive strategies adopted by him to ground his reform proposal on solid *uṣūlī* terrain are valuable and constitute a good starting point for further elaborations. In short, Bin Bayyah has articulated a constructive framework to envisage the relationship between *maqāṣid* and Islamic legal theory. His main strategy in showing the relevance of *maqāṣid* for the renewal of legal theory consists in the *maqāṣid*-based reorganization of existing legal frameworks and the expansion of the role and importance of *maqāṣid* for the system of ratiocination, especially *istidlāl*. Overall his project remains neo-traditionalist in nature: mostly focused on proving the inseparability from and the importance of *maqāṣid* for classic legal theory, rather than the comprehensive modern re-theorization of *maqāṣid*, such as undertaken by Ibn ʿAshūr. Hence, for the most part, his discourse on *maqāṣid* remains conventional and his project of the renewal of legal theory is mainly restricted to the reorganization, revision, or adjustment of some existing *uṣūlī* tools and legal frameworks. Bin Bayyah tries to make the case that *maqāsid* are not only important for classic legal theory but that, in reality, they are the heart of legal theory itself. As we saw, despite his original contribution in this regard, he falls short in convincingly demonstrating this point. Bin Bayyah's conservative approach towards the renewal of legal theory seems at variance with his call for the need for a thorough reconsideration of many traditional legal rulings as a consequence of the epochal material and epistemic shifts brought by modernity. In this context, his substantial legal reasoning (*fiqh*) appears to more faithfully reflect this sense of urgency for the reconsideration of the inherited legal tradition than what transpires from his cautious and restrictive model of renewal of legal theory.

Endnotes

1 See Nathan J. Brown, "Shari'a and State in the Modern Muslim Middle East," *International Journal of Middle East Studies* 29, no. 3 (1997): 359-376; Wael B. Hallaq, *Shari'a, Theory and Practice* (Cambridge: Cambridge University Press, 2009), 255-556; and Aharon Layish, "Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement," *Islamic Law and Society* 21, no. 3 (2014): 276-307.

2 See Sherman Jackson, "Literalism, Empiricism, and Induction: Apprehending and Concretizing Islamic Law's *Maqāṣid al-Shari'ah* in the Modern World," *Michigan State Law Review* 2006: 1469-1486; Mohammad Hashim Kamali, "Issues in Legal Theory of Uṣūl and Prospects for Reform," *Islamic Studies* 40, no. 1 (2001): 5-23.

3 See Aḥmad Raysūnī, *Tajdīd al-uṣūlī: nahw' siyāgha tajdīdiyya lī 'ilm uṣūl al-fiqh* (Jordan: Al-Mahad al-'Alamī li al-Fikr al-Islāmī, 2014); Yūsuf al-Qaraḍāwī, *Dirāsa fī al-maqāṣid al-sharī'a: Bayna al-maqāṣid al-kulliyya wa al-nuṣūṣ al-juz'iyya* (Cairo: Dār al-Shurūq, 2006); Abdullah Bin Bayyah, *Itharāt tajdīdiyya fī ḥuqūl al-uṣūl* (Riyād: Dār al-Ujūh & Dār al-Tajdīd, 2013); Mohammad Hashim Kamali, *Actualization (taf'īl) of Higher Purposes (Maqāṣid) of Shari'ah* (Herndon, VA: International Institute of Islamic Thought, 2020).

4 Some of his most important works on the topic include *Mashāhid min al-maqāṣid* (Riyād: Dār Ujūh lī al-Nashr wā al-Tawzī', 2012); *'Alāqat al-maqāṣid al-sharī'a bī uṣūl al-fiqh* (London: Mu'assasat al-Furqān lī al-Turāth al-Islāmī, 2010); *Tanbīh al-murāja' 'alā ta'ṣīl fiqh al-wāqi'*, 4th ed/ (Dubai: Markaz al-Muwatta, 2018), and *Itharāt tajdīdiyya*. For more on Bin Bayyah's scholarly status and his religious positions, especially after the Arab Spring, see David H. Warren, *Rivals in the Gulf: Yusuf Al-Qaradawi, Abdallah Bin Bayyah and Qatar-UAE Contest Over the Arab Spring and the Gulf Crisis* (London: Routledge, 2021), 71-115 and Usaama al-Azami, "'Abdullāh bin Bayyah and the Arab Revolutions: Counter-revolutionary Neo-traditionalism's Ideal Struggle against Islamism," *The Muslim World* 109, no. 3 (July 2019): 343-361.

5 Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld, 2008), 123-124.

6 Muḥammad Sa'īd Ramaḍān al-Būṭī, *Dawābiṭ al-maṣlaḥa fī al-sharī'a al-islāmiyya* (Damascus: al-Maktaba al-Umawiyya, 1966–67); see also al-Būṭī's contribution in Abū Ya'rub Marzūqī and Muḥammad Sa'īd Ramaḍān al-Būṭī, *Ishkāliyyat tajdīd uṣūl al-fiqh* (Beirut and Damascus: Dār al-Fikr, 2006). For more on the debate between al-Būṭī and Marzūqī, see Abdessamad Belhaj, "The Reform Debate: Al-Marzūqi and al-Būṭī on the Renewal of Uṣūl al-Fiqh," *Ilahiyat Studies* 4, no. 1 (Winter/Spring 2013): 9-23 and Hallaq, *Sharī'a*, 535-542.

7 See, Ḥasan Ḥanafī, *Min al-naṣṣ ilā al-wāqi'*, vol. 1 (Cairo: Markaz al-Kitāb lī al-Nashr, 2004); Abd al-Karīm Surūsh, *al-Qabṭ wa al-basṭ fī al-sharī'a* (Beirut: Dār al-Jadīd, 2002); Muḥammad Shaḥrūr, *al-Kitāb wa al-Qur'ān: Qirā'a Mu'āṣira* (Cairo and Damascus: Sīnā' li al-Nashr, 1992).

8 Bin Bayyah, *Ithārāt*, 124-128; *Tanbīh*, 48-56. Regarding the paradigmatic shifts brought by modernity and its significance for Islamic jurisprudence, see Ovamir Anjum, "Managing Epochal Change in a Global Community: A Three-Dimensional Approach to Managing Diversity in Islam," *American Journal of Islamic Studies* 37, no. 1-2 (2020): v-xviii.

9 Abdallah Bin Bayyah, *The Exercise of Islamic Juristic Reasoning by Ascertaining the Ratio Legis: The Jurisprudence of Contemporary and Future Contexts* (Abu Dhabi: Tabah Foundation, 2015), 22.

10 Bin Bayyah, *Ithārāt*, 23.

11 Bin Bayyah, *Ithārāt*, 23.

12 Bin Bayyah, *Mashāhid*, 104.

13 Bin Bayyah, *Ithārāt*, 24.

14 Bin Bayyah, *Ithārāt*, 24.

15 Bin Bayyah, *Ithārāt*, 24.

16 For the above-mentioned calls for reform, see Bin Bayyah, *Ithārāt,* 24-26.

17 Bin Bayyah, *Mashāhid*, 104.

18 See Yūsuf al-Qaraḍāwī, *al-Siyyāsa al-shara'iyya fī ḍū' nuṣūṣ al-sharī'a wa maqāṣi-diha,* 3rd edition (Cairo: Maktaba al-Wahba, 2008), 171-225.

19 Regarding the notion of religious authority and internal criticism, see Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age* (Cambridge: Cambridge University Press, 2012), 34-35.

20 For a succinct analysis of the various contemporary reform proposals of Islamic legal theory, see 'Alī Jum'a, *Qaḍiyyat Tajdīd Uṣūl al-Fiqh* (Cairo, Dār al-Hidāyya, 1993) and Waṣfī 'Āshūr Abū Zayd, *Muḥāwalāt al-tajdīdiyya al-mu'āṣira fī uṣūl al-fiqh: Dirāsa taḥliliyya* (n.p.; Ṣawt al-Qalam al-Arabī, 2009). See also Hallaq, *Sharī'a*, 500-543. For an insightful classification of contemporary Islamic trends of renewal of Islamic Law, see Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (Washington: IIIT Publication, 2007), 153-192.

21 As David Warren states, "Bin Bayyah echoes Qaradawi in his understanding of wasatiyya" (*Rivals in the Gulf*, 79).

22 These elements are manifested also in al-Qaraḍāwī's discourse on *maqāṣid* and the renewal of Islamic law. See Auda, *Maqasid al-Shariah,* 150.

23 The similarity in jurisprudence (*fiqh*) between Bin Bayyah and al-Qaraḍāwī is especially evident in their articulation of the jurisprudence of minorities (*fiqh al-aqalliyyāt*). Cf. Bin Bayyah, *Sinā'at al-fatwā wa fiqh al-aqalliyyāt* (Beirut: Dār al-Minhāj, 2008) and Yuṣūf al-Qaraḍāwī, *Fī fiqh al-aqalliyyāt al-muslima* (Cairo: Dār al-Shurūq, 2001).

24 For the ways in which these hermeneutical tools have been used by Bin Bayyah regarding sensitive topics like the Islamic state, the caliphate, interfaith dialogue, *hudūd*, *jihad*, etc., see Bin Bayyah, *Tanbīh al-murāja'*, 171-211 and *Mashāhid*, 294-321.

25 On this regard, see Sherman Jackson, "Fiction and Formalism: Towards a Functional Analysis of Usul al-Fiqh," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden: Brill, 2002), 177–201. For an overview of the western scholarly debate on the role of Islamic legal theory and its relation with substantive law (*fiqh*), see Youcef Soufi, "The Historiography of Sunni Usul al-Fiqh," in *The Oxford Handbook of Islamic Law,* ed. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2018), 249-271.

26 Bin Bayyah, *Ithārāt*, 23.

27 Usaama al-Azami, "'Abdullāh bin Bayyah and the Arab Revolutions," 343. In his definition, al-Azami follows Brown's description of the main features of what he calls "Late Sunni traditionalism", which we have labeled here as neo-traditionalism. See Jonathan A.C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: Oneworld, 2009), 261-263. For more on the definition and understanding of neo-traditionalism, see David Warren, *Rivals in the Gulf*, 7; Usaama al-Azami, "Neo-traditionalist Sufis and Arab Politics: A Preliminary Mapping of the Transnational Networks of Counter revolutionary Scholars after the Arab Revolutions," in *Global Sufism: Boundaries, Structures, and Politics*, ed. F. Piraino and M. Sedgwick (London: Hurst, 2019), 225f. and 278, n. 2; Walaa Quisay, "The Neo-Traditionalist Critique of Modernity and the Production of Political Quietism," in *Political Quietism in Islam: Sunni and Shi'i Practice and Thought*, ed. Saud al-Sarhan (New York: I.B. Tauris, 2019), 242-243; Abdullah Ali, "'Neo-Traditionalism' vs 'Traditionalism,'" *Lamppost*, n.d., accessed October, 10, 2021, https://lamppostedu.org/neo-traditionalism-vs-traditionalism-shaykh-abdullah-bin-hamid-ali.

28 Audah, *Maqāṣid*, 164.

29 Bin Bayyah, *Mashāhid*, 288-294 and *Ithārāt*, 76**.** As al-Auda states, it is precisely in this role of *maqāṣid* for the process of preponderance (*tarjīh*) and the selection of one legal ruling over the other that "neotraditonalism intersects with modernist reformism" (Auda, *Maqāṣid*, 164).

30 As Bin Bayyah states, "Islamic legal methodology is the best method (*manhaj*) invented by the Islamic genius to deal with the texts of divine revelation. It is an eternal method because its source and subject matter derive from the texts of revelation and the language of the preserved Qur'an which guarantees its subsistence and ensures his purity" (*Ithārāt*, 159).

31 Here, Bin Bayyah seems to respond to scholars like Ḥassan al-Turābī (d.2016), Jamāl al-Dīn al-Aṭiyya (d. 2017), Ṭāha Jābir al-Ulwānī (d. 2016) and Salīm al-'Awa (b. 1942), who each on their terms have argued for the need of a thorough reconsideration of the structure of Islamic legal theory. For more on their discourse, see 'Ali Jum'a, *Qaḍiyyat tajdīd*, 18-23.

32 See Yūsuf al-Qaraḍāwī, *Fiqh al-zakāt*, 25th edition, vol. 1 (Cairo: Maktaba Wahba, 2006), 21-22; *Fiqh al-jihād*, 3rd edition, vol. 1 (Cairo: Maktaba Wahba, 2010), 35-36; *Fiqh al-islāmī bayna al-aṣāla wā al-tajdīd*, 2nd edition (Cairo: Maktaba Wahba, 1999), 62-66; *Madkhal lī al-Dirāsa al-Sharīʿa al-Islamiyya* (Beirut: Muwassasa al-Risāla, 1993/1414), 263.

33 This does not mean that this *salafī* tendency is not present also in Bin Bayyah or that his legal analysis lacks any originality. However, whereas scholars like al-Qaraḍāwī are more candid in acknowledging the bypassing of the legal tradition and the novelty of their rulings, Bin Bayyah tries to present his legal conclusions as in conformity with the legal tradition, or certain aspects of it, or dispense with traditional rulings by invoking pragmatic notions like necessity (*ḍarūra*), need (*hāja*), maṣlaḥa, etc.

34 Muḥammad al-Ṭāhir Ibn ʿĀshūr, *Ibn Ashur: Treatise on Maqāṣid al-Shariʿah*, trans. Mohamed el-Tahir el-Mesawi (Washington, IIIT publications, 2006), xxii.

35 See Ahmad al-Raysūnī, *Muḥāḍarāt fī al-maqāṣid al-Sharīʿa* (Cairo: Dār al-kalima li al-nashr wa al-tawziʿ, 2014), 178. See also Felicitas Opwis, "New Trends in Islamic Legal Theory: *Maqāṣid al-Sharīʿa* as a New Source of Law?" *Die Welt des Islams* 57 (2017): 7-32.

36 Bin Bayyah, *Mashāhid*, 288. As Hashim Kamali states, "Bin Bayyah's opinion on the relationship of uṣūl al-fiqh to maqāṣid is that they are inseparable from one another, albeit that maqāṣid is a distinctive chapter in the larger matrix of uṣūl alongside other chapters." Kamali, *Actualization*, 9.

37 Such a tendency is a common feature of contemporary proposals of renewal of legal theory. According to Warren, Bin Bayyah "follows Rida's model of refashioning once-marginal classical concepts and modes of reasoning and bringing them to the center of Islamic legal thought" (*Rivals in the Gulf*, 74). However, in my view, rather than Riḍā's modernist utilitarianism, in this case, Bin Bayyah follows the more conservative articulation of Riḍā's model by revivalists and centrist scholars like al-Qaraḍāwī.

38 Mohammad Hashim Kamali, "Maqāṣid al-Sharīʿah: The Objectives of Islamic Law", *Islamic Studies* 38, no. 2 (Summer 1999): 198; "Maqasid al-Shariʿah and Ijtihad as Instruments of Civilisational Renewal: A Methodological Perspective," *Islam and Civilisational Renewal* 2 (2011): 245-246; *Shariʿah Law: An Introduction* (Oxford: Oneworld, 2008),124-125.

39 Kamali, *Maqāṣid al-Sharīʿah*, 198.

40 Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from 4th/10th to 8th /15th Century* (Leiden: Brill, 2010), 15. See also Wael B. Hallaq, "Considerations on the Function and Character of Sunnī Legal Theory," *Journal of the American Oriental Society* 104, no. 4 (October-December 1984):686.

41 Bin Bayyah, *ʿAlāqat al-maqāṣid*, 48.

42 For a succinct analysis of the different usages of the term *istidlāl* in Islamic Law, see Muḥammad al-Rukay, *Nazariyyat al-taqʻīd al-fiqhī wa athāruhā fī ikhtilāf al-fukahā'* (Casablanca: Kuliyyat al-Adab wa al-Ulūm al-Insāniyya, 1994), 129-163; ʻUmar al-Maḥmūdī, *Mafhūm al-istidlāl ʻinda al-uṣūliyyīn wa taṭawwur dalālatihī*, accessed October, 10, 2021, https://diae.net/49098/.

43 Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidi* (State Lake City: University of Utah Press, 2010), 647.

44 For the abovementioned examples from the time of the Companions, see Bin Bayyah, *ʻAlāqat al-maqāṣid* , 39-40; *Mashāhid*, 55-57.

45 Bin Bayyah, *ʻAlāqat al-maqāṣid*, 39-40; *Mashāhid*, 55-60.

46 Ibn Taymiyya, *Majmūʻ al-Fatāwā*, vol. 30, 29. Quoted in Bin Bayyah, *ʻAlāqat al-maqāṣid*, 41.

47 Quoted in Bin Bayyah, *ʻAlāqat al-maqāṣid*, 41; *Mashāhid*, 58.

48 Bin Bayyah, *Mashāhid*, 60-70.

49 Bin Bayyah, *ʻAlāqat al-maqāṣid*, 39-40; *Mashāhid*, 61-62.

50 On al-Shafiʻī's theory of *ijtihād* and especially on his position regarding *istiḥsān* and other *istidlāl* elements, see Muhammad bin Idris al-Shafiʻī, *Al-Shafiʻī's Risāla: Treatise on the Foundations of Islamic Jurisprudence*, trans. Majid Khadduri (Cambridge: Islamic Text Society, 2010), 295-353 and Joseph A. Lowry, *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʻī* (Leiden: Brill, 2007), 327-357.

51 Bin Bayyah, *ʻAlāqat al-maqāṣid*, 44-45; *Mashāhid*, 63-64.

52 See Bin Bayyah, *ʻAlāqat al-maqāṣid*, 45. In his study of the Risāla of Imām al-Shafiʻī, Joseph Lowry argues that "the Risāla can no longer be claimed to be the direct progenitor of uṣūl al-fiqh" (*Early Islamic Legal Theory*, 360). Wael B. Hallaq situates the emergence of *uṣūl al-fiqh*, as a genre, at the end of the 9th and the beginning of 10th century: see Hallaq, "Was al-Shafiʻi the Master Architect of Islamic Jurisprudence?," *International Journal of Middle East Studies* 25, no. 4 (1993): 587-605. For contrarian views that restate the importance of Imām al-Shafiʻī's *Risāla* for the emergence of Islamic legal theory as a genre, see Devin J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998), 30-37; Ahmed El Shamsy, "Bridging the Gap: Two Early Texts of Islamic Legal Theory," *Journal of the American Oriental Society* 137, no. 3 (2017): 505-36, and David Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theories Imagined a Revealed Law* (New Haven, Conn.: American Oriental Society, 2011), xvi. For Hallaq's response to the critics, see "Uṣūl al-Fiqh and Shāfiʻī's Risāla Revisited," *Journal of Arabic and Islamic Studies* 19 (2019): 129–183.

53 For the various strategies developed by Muslim jurists to legitimize and ground juristic preference and public welfare in the structure of Islamic legal theory, see Hallaq, "Considerations," 679-689.

54 Bin Bayyah, *ʿAlāqat al-maqāṣid*, 48; *Mashāhid*, 67-68.

55 Bin Bayyah, *ʿAlāqat al-maqāṣid*, 48; *Mashāhid*, 68.

56 Hallaq, "Logic," 318.

57 Hallaq, "Logic," 318.

58 For the various textually-oriented strategies adopted to justify *istiḥsān*, see Mohammad Hashim Kamali, "Istiḥsān and the Renewal of Islamic Law," *Islamic Studies* 43, no. 4 (2004): 561-581; Wael B. Hallaq, "Considerations," 683-685.

59 Hallaq, "Considerations," 684.

60 As Kamali expresses it, the textual orientation of Islamic legal theory is behind the reason why (although not denied in principle) "the maqasid remained on the fringes of the mainstream juristic thought that was manifested in the various themes and doctrines of Uṣūl al-Fiqh" (*Maqāṣid al-Sharīʿah*, 198).

61 For the Aristotelian four types of causation and its presence in Islamic Philosophy, see Robert Wisnovski, "Towards a History of Avicenna's Distinction between Immanent and Transcendent Causes," in *Before and After Avicena: Proceeding of the First Conference of the Avicenna Study Group*, ed. D.C. Reisman and A.H. Al-Rahim (Leiden: Brill, 2003), 49-69.

62 Bin Bayyah, *Ithārāt*, 28.

63 Bin Bayyah, *Ithārāt*, 28-30.

64 Bin Bayyah, *Ithārāt*, 28.

65 Regarding these three kinds of *ijtihād*, see Bin Bayyah, *Ithārāt*, 42-43.

66 For the first type of *ijtihād*, see ʿAbdullah Bin Bayyah, *Amālī al-dalālāt fī majālī al-ikhtilāfāt* (Bayrūt: Dār al-Minhāj, 2007); for the second, see *al-Ithārāt* and *Mashāhid*; and for the third type, see *Tanbih* and *al-Ijtihād bī taḥqīq al-manāṭ: Fiqh al-wāqiʿ wa tawāquʿ* (Abu Dhabi: Mu'assasa Tābah, 2014)_

67 Bin Bayyah, *Ithārāt*, 62.

68 Bin Bayyah, *Mashāhid*, 294.

69 Bin Bayyah, *Mashāhid*, 302.

70 Bin Bayyah, *Mashāhid*, 305.

71 Bin Bayyah, *Ithārāt*, 70.

72 Bin Bayyah, *Ithārāt*, 67-77.

73 Bin Bayyah, *Ithārāt*, 67.

74 Bin Bayyah, *Ithārāt*, 70.

75 Bin Bayyah, *Ithārāt*, 70, 72.

76 Bin Bayyah, *Ithārāt*, 70.

77 For Bin Bayyah's analysis of the four *uṣūlī* circles, see *Ithārāt*, 70; *Mashāhid*, 294-295.

78 Bin Bayyah, *Ithārāt*, 70; *Mashāhid*, 295.

79 Bin Bayyah, *Mashāhid*, 296.

80 Bin Bayyah, *Mashāhid*, 298.

81 Bin Bayyah, *Mashāhid*, 299.

82 Bin Bayyah, *Mashāhid*, 299-300. For a series of classical examples of *istiḥsān*, see Bin Bayyah, *Mashāhid*, 297-301. For contemporary examples and analysis, see Mohammad Hashim Kamali, "Istiḥsān," 561-581.

83 Bin Bayyah, *Ithārāt*, 71.

84 Shāṭibī, *Muwāfaqāt*, vol. 3, 171. Quoted in Bin Bayyah *Ithārāt*, 72; *Mashāhid*, 117.

85 Shāṭibī, *Muwāfaqāt*, vol. 3, 176. Quoted in Bin Bayyah *Ithārāt*, 73; *Mashāhid*, 119.

86 Shāṭibī, *Muwāfaqāt*, vol. 1, 498. Quoted in Bin Bayyah *Ithārāt*, 73; *Mashāhid*, 119-120.

87 For the explanation of the above-mentioned possibilities, we have relied extensively on Bin Bayyah, *Mashāhid*, 78-79.

88 Bin Bayyah, *Ithārāt*, 75.

89 According to Bin Bayyah, "Ijraʾ al-ʿamal or jarayān al-ʿamal is to take a weaker view from (the views of) a credible scholar when passing a court judgment or issuing a legal verdict in a certain time or place for the purpose of realizing a particular benefit or preventing a particular harm" (The Exercise of Islamic Juristic Reasoning, 29). See also ʿAbdullah Bin Bayyah, Ṣināʿat al-fatwā wa fiqh al-aqalliyyāt (Jeddah: Dar al-Minhaj, 2008), 114.

90 On some concrete examples on this regard see, Bin Bayyah, *Ṣināʿat al-fatwā*, 114-121 and *The Exercise of Islamic Juristic Reasoning*, 28-29.

91 Bin Bayyah, *Ithārāt*, 75.

92 Bin Bayyah, *Mashāhid*, 302.

93 Bin Bayyah, *Ithārāt*,75.

94 Bin Bayyah, *Ithārāt*, 70.

95 Bin Bayyah, *Mashāhid*, 288-294. See also *Ithārāt*, 76.

96 Opwis, *Maṣlaḥa*, 5-6.

97 Bin Bayyah, *Ithārāt*, 77.

98 Bin Bayyah, *Ithārāt*, 89.

99 Bin Bayyah, *Ithārāt*, 77.

100 Bin Bayyah, *Ithārāt*, 77.

101 Bin Bayyah, *Ithārāt*, 84.

102 Bin Bayyah, *Ithārāt*, 79-80. For more on al-Ghazālī's discussion on the epistemic status of legal analogy, see Felicitas Opwis, "Syllogistic Logic in Islamic Legal Theory: al-Ghazālī's Arguments for the Certainty of Legal Analogy (Qiyās)," in

Philosophy and Jurisprudence in the Islamic World, ed. Peter Adamson, vol. 1 (Berlin, Boston: De Gruyter, 2019), 93-112.

103 Wael B. Hallaq, *Ibn Taymiyya Against the Greek Logicians* (Oxford: Clarendon Press, 1993), xxxv.

104 Hallaq, *Ibn Taymiyya*, xxxv.

105 Al-Ṭūfī, *Sharḥ Mukhtaṣar Rawḍa*, vol. 3, 225. Quoted in Bin Bayyah, *Ithārāt*, 84.

106 Hallaq, "Logic," 315-316; Opwis, "Syllogistic Logic," 95**;** Weiss, *The Search*, 648-649**.**

107 See Abū Hāmid al-Ghazālī, *al-Mustaṣfā min ʿilm al-uṣūl*, critical edition of Muḥammad Yūsuf Najm, 3rd ed., vol. 1 (Beirut: Dār Ṣādir, 2010), 17-67.

108 Bin Bayyah, *Ithārāt*, 30.

109 Bin Bayyah, *Ithārāt*, 89.

110 Bin Bayyah, *Ithārāt*, 89.

111 Bin Bayyah, *Ithārāt*, 161.

112 Bin Bayyah, *Ithārāt*, 90.

113 See Bin Bayyah, *Tanbih* and *al-ijtihād.*

114 For more on the logic and the role of the formal arguments in Islamic legal theory, see Wael B. Hallaq, "Logic, Formal Arguments and Formalization of Arguments in Sunnī Jurisprudence," *Arabica* 37, no. 3 (November 1990): 315-358.

115 Hallaq, "*Logic,"* 318.

116 Bin Bayyah, *The Exercise of Islamic Juristic Reasoning*, 5, 7.

117 Bin Bayyah, *Ithārāt*, 71.

118 Bin Bayyah, *Ithārāt*, 95.

119 Bin Bayyah, *Ithārāt*, 96.

120 Bin Bayyah, *Ithārāt*, 98-99

121 Bin Bayyah, *Ithārāt*, 68; *Mashāhid*, 294.

122 Bin Bayyah, *Mashāhid*, 288.

123 Bin Bayyah, *ʿAlāqat al-maqāṣid* , 131.

124 For the following explanation and examples, we have relied extensively on Bin Bayyah, *Mashāhid* 154-180 and *ʿAlāqat al-maqāṣid*, 99-131.

125 See Ibn Rushd, *The Distinguished Jurist's Primer*, volume 1-2, trans. Imran Ahsan Khan Nyazee (Reading: Garnet, 1994, 1996). For a close study of six traditional works of *takhrīj* genre together with many examples, see Atif Ahmed Atif, *Structural Interrelations of Theory and Practice in Islamic Law: A Study of Six Works of Medieval Islamic Jurisprudence* (Leiden: Brill, 2006).

126 See al-Sharīf al-Tilmisānī, *Miftāḥ al-wuṣūl ilā binā' al-furu' alā al-uṣūl*, critical edition of Muḥammad ʿAlī Farkūs (Beirut: al-Maktaba al-Makiyyā & Muwassassa al-Rayyān, 1998), 440-441.

127 al-Tilmisānī, *Miftāḥ al-uṣūl*, 473.