Istihsan (juristic preference) : the forgotten principle of Islamic law

Kayadibi, Saim

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ABSTRACT

The research work embodied in this thesis constitutes a critical analysis of classical and modern aspects of the concept of *istiḥsān* (juristic preference) in Islamic law, an important principle in Islamic legal legislation throughout history. This area of legislation has been investigated by many researchers and scholars; however, the research work conducted to evaluate the true nature and role of *istiḥsān* with regard a combination of classical and modern approaches still requires further investigation.

The thesis consists of four chapters. The introductory chapter is the theoretical basis of the study and comprises a brief understanding of some general principles of Islamic law; the *Qurʾān*, the *Sunnah*, *ijmāʿ* (consensus), *qiyyāṣ* (analogical reasoning), *maslahah mursalah* (consideration of public interest), *istiṣṭāb* (presumption of continuity), *qawl al-ṣaḥābi* (the saying of the Companion of the Prophet), *ʿurf* (custom), *sadd al-dharāʾiʿ* (blocking the means), *sharʿ man qablanā* (revealed laws preceding to the *shariʿah* of Islam) and *istiqrāʿ* and so on.

Chapter II deals with the development of *raʿy* and *ijtihād* in the context of *istiḥsān*. This chapter introduces the concept of *raʿy* and *ijtihād* as related to historical background and implementation, with their methods of development where *istiḥsān* originated from. *Istiḥsān* was practiced well before the formation of the Islamic legal schools of thought and can be referred back to the time of the Prophet, the Companions and the Successors.

Chapter III begins with definitions of the term of *istiḥsān*, identifying its true nature with an extensive analysis both linguistically and technically. Historical development is investigated, and then the viewpoints of the scholars and their discourses
that form the main cornerstone of this study. Also in this chapter the validity of *istiḥsān* is discussed and explained with special reference to the reason behind the disagreement over *istiḥsān* as the scholars introduce their evidences to justify the claims of those who consider it a valid source of law and those who do not recognize it as such. Consideration of *istiḥsān* and its implementation in the early Ḥanafi school of thought by eminent scholars is also elaborated.

Chapter IV is devoted to the types of *istiḥsān* and the division among the scholars with practical examples. Other related terms as *iḥtiyāj* (need), *ḍarār* (harm), *rafʿ al-ḥaraj* (avoiding hardship), *mashaqqah* (hardship), *ḍarūrah* (necessity).
Bismillahi al-Rahman al-Rahim
wa salallahu 'alai Sayyidina Muhammadin
wa 'ala ailihi wa sahabi ajma'in
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For
my wife Yasemin
and
our children
Zeynep Pınar and Mehmet Edip Taha,
who are the joys of our life.
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Oxford Journals, the Journal of Islamic Studies was used for English transliteration.
a- Objective of the research

Justice is one of the fundamental principles to keep a society alive, and thus law has to be based on justice. It is a fact that abusing the system of justice causes corruption for the society. The subject that I have researched has a vital role that has substantially contributed to the development of law based on justice and equity.

The objective of my research is to investigate the concept of *istihsān* from every possible aspect. Islamic law has been developed over the centuries using the methods of *ra'y* and *ijtihād*. However, the development of the principle of *istihsān* opened for Islamic law a new horizon for the future phenomenon.

The present work initially began as a study of the nature and reality of the concept of *istihsān*. In the very early stage of legislation of Islamic law, the growth of the Islamic world presented people with new challenges. These included rapid urbanization, multi-cultural relationships and new responses that required the Islamic jurists to provide vigorous efforts to resolve the problems and issues of the Muslim community using their personal discretion and *ijtihād* based on *nass* (text). The process of systematic reasoning, which is analogy (*qiyaṣ*), began as a methodological solution to operate with the appearance of the juristic schools of thought; in fact the process of legal reasoning is technically called model of legal reasoning (*ijtihād*).

However, the application of the process of systematic reasoning (analogy) in certain situation has not always responded to the needs of the people and sometimes was detrimental to the objectives of the Lawgiver. In such cases, the situation has to be studied in the light of justice, wisdom, equity and necessity in order to remove its rigidity and harms by way of departing from the already established rule. One who studied such cases on that manner and developed justifying it as a principle of Islamic
law was the Ḥanafī school of thought, on the basis of a number of verses in the Qur‘ān and in traditions. "And follow the best (i.e. this Qur‘ān) of that which is sent down to you from your Lord."1 "Those who listen to the Word (good advice) and follow the best."2 "Whatever the Muslim community views as good, it is also considered by God as good"3. Later on, despite much opposition, istiḥsān was embraced and used by many other schools of thought, including the Shāfi‘ī school of thought who never accepted the term istiḥsān, but implemented the same principle under the name of maṣlaḥah, istiṣhāb, istislaḥ and so on.

In this context, I have faced many issues, and have had to question whether Islamic law can accommodate the challenges of modern life, providing adequate solutions to it without violating the religion and interfering with God’s commands. Are there any possibilities that the jurist in Islam might interpret the revealed laws without being accused of legislating arbitrarily? The reply to this question is the focal point of the investigation carried out in this research, benefiting from the institution of ijtihād that created the power of the concept of istiḥsān to provide adequate solutions to modern problems. Istiḥsān is a form of ijtihād in which jurists use their personal discretion within the guidelines of the shari‘ah to choose the better legal judgment in a case which has more than one possible solution. As explained in the hadīth of Mu‘ādh4 the better and adequate solution is required by jurists to secure what is deemed to be of benefit, easier and most suitable for a community without contradicting the objectives of the Lawgiver.

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1 Qur‘ān: 39/55.
Introduction

*Istihsān*, therefore, is an attempt on the part of the jurist to understand the commands and objectives of God. It goes back to the time of the Prophet, and from the outset opened the way for the development of Islamic law.

b- The importance of the research

Few works of note have been done on the sources of Islamic law, which is why I was encouraged to carry out this research on the concept of *istihsān*.

Whilst much academic attention is given to Islamic law in the western world, the Muslim world itself is sadly lacking in this area. This reflects the extent to which the Muslim world has fallen behind, not only in terms of science and technology, but also in the social sciences and the study of religion. And one of the reasons for the academic and intellectual stagnation in the Muslim world is the perception which many have that the gate of *ijtihād* -of which *istihsān* is an important part- is closed. The present work is a study of an extremely under-researched area- namely *istihsān* or juristic preference- which is itself a long-forgotten source of law and principle of *ijtihād*; hence the title of this thesis: "*Istihsān* (juristic preference): the forgotten principle of Islamic law."

During the early Islamic period the term *istihsān* was neither known nor directly defined, and therefore when it was applied in judgments, it was applied without giving any specific definition or explanation. Supporters of *istihsān* considered the fundamental principle of ease and the avoidance of hardships as the sole basis for the concept of *istihsān*. It could be said that the opponents of *istihsān* misunderstood the procedure of the usage of *istihsān*. Applying *istihsān* without giving precise definitions to the term led even those who support *istihsān* to fall into the trap that sparked intense debates amongst the various schools of thought. The opponents of *istihsān* were- and still are- those who consider it to be "Arbitrary law-
making within religion”, thus possibly missing what its supporters, Hanafis, Malikis, Hanbalis meant by istihsans.

Although acquainted with the distinction between the concept of ra’y and the concept of ijtihad in Islamic legal philosophy, my general assumption was that they are two complementary facets of a similar approach to the Islamic concept of law. However, what gradually became clear was that these two aspects have been used interchangeably. It is difficult to distinguish between ra’y, ijtihad and istihsans, all of which are based on personal judgment. Moreover, it is viewed that istihsans is a product of ijtihad.

In fact, Abü Hanifah used to implement ijtihad based on his personal opinions, but conforming to the Qur’ān and the Sunnah by saying, “Qiyās rules this, but we ‘Nasta‘sinu’ (prefer) that; or we proved this by istihsans contrary to qiyās; or, the qiyās of this is so and so and the ijtihad of this is so and so, and the ijtihad we take5.

For the development of Islamic law ijtihad plays one of the most important roles in comprehending the purposes of the Qur’ān and the Sunnah.

With this realization, I then began to explore the concept of istihsans from every possible aspect. Historically the technical term istihsans began with Abü Ḥanifah, although its practical implementation goes back to the period of ‘Umar. In my extensive research, I realized that this concept was used on various occasions in the very early period of legislation, without its name being mentioned. Eventually my investigation led me to believe that istihsans as a juristic term was not in use before Iyās bin Mu‘āwiya (d.122/740).

I then began to study the viewpoints of scholars from different schools. Ḥanafi scholars perceive istihsans as a valid source of shari‘ah, according to which action

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could be taken in juristic rulings; it is also recognized by the Mālikī, Ḥanbalī and Zaydī Schools. However, the first scholar who rejected and strongly criticized istiḥsān was Imām Shāfi‘ī (d.204)\textsuperscript{6} who wrote a book titled “Ibāl al-Istiḥsān” (Invalidating Juristic Preference) and made his famous statement: “Man istahšana faqad sharra‘a” (whoever approves of juristic preference is making himself the Lawmaker)\textsuperscript{7}; his disciples also followed this view:\textsuperscript{8} Isnawi (d.772/1370), Bishr b. Qays (d.218/833), Shīrāzī (d.476/1083), and Ghazālī (d.505/1111). Dāwūd al-Zāhirī (d.270/884)\textsuperscript{9}, and Ibn Ḥazm (d.456/1064)\textsuperscript{10} who founded the Zāhirī School, not only rejected qiyās, but was also strongly opposed to istiḥsān,\textsuperscript{11} as were the Imanī Shī‘ah.\textsuperscript{12}

The concept of istiḥsān in Islamic law has been discussed and commented upon by both its supporters and its detractors. One of the major factors behind the tendency to reject, or the inability to distinguish between arbitrary law-making and personal judgment based on evidence, is the fact that the early Ḥanafī scholars had not provided any direct definitions to identify their claims and the usage of the concept. In that respect, the earlier Ḥanafī scholars’ examples of how to apply the concept has been discussed and their ramifications for Islamic law pointed out.

More importantly, the validity of istiḥsān, namely whether it is a source of law, was also the subject of debate amongst the various scholars. I have discussed their arguments through the evidence supplied and have covered the reasons behind the disagreements among the ‘ulamā’.

\textsuperscript{12} Abū Zahrah, “Al-Imām al-Ṣādiq Ḥayātuḥu ve ‘Aṣrūhu Ṭūru wa Fīqhuhu”, p: 527-529, Cairo.
In addition the various types of *istihsān* have also been explored. There are many types of *istihsān*, and the scholars give basic and general classifications which have been identified and simplified in this study. Another interesting aspect related to the concept of *istihsān* is the objectives of the lawgiver (*maqāṣid al-Shārī‘*). Those objectives, also, have been discussed and explored in this final chapter.

During my research, I have realized the importance of the concept of *istihsān* in terms of development and renewal in Islamic law. Over the past four years, I have gained the experience that the concept of *istihsān* is a crucial factor in the development of Islamic law. As Kamali says, "A clear and well-defined role for *istihsān* would hopefully mark a new opening in the evolutionary process of Islamic law"\(^{13}\).

c- Method and sources:

My main concern throughout has been to make an extremely complex subject as approachable as possible, without compromising either detail or depth of analysis. My main approach has been a phenomenological one, based on a comparative analysis of the main historical sources. My base has been the works of the Ḥanafī School, which is the source and origin of *istihsān* in its technical sense.

Abū Ḥanīfah and his disciples often used many works on *istihsān* which are no longer extant. An example is "*Kitāb al-Istihsān*" which is attributed to Shaybānī but which has not reached us, despite the many quotations made by Sarakhsī and Jaṣṣāṣ. The principle was not often expounded in Ḥanafī texts as an independent subject but was usually dealt with in connection with related concepts such as *qiyyās* (analogy).

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\(^{13}\) M. Ḥāshim Kamāfi, "Principles", p. 264.
Information on *istiḥsān* could also be found in the books of "al-Qawā'id al-fiṣḥiyah", and the Ottoman Courts Manual "Al-Majallah", from which I have benefited.

Single works dedicated to *istiḥsān* are conspicuous by their absence in juristic circles. However, as I have indicated above the true nature of *istiḥsān* can be gleaned from Ḥanafi books.


I have realized that, despite the many contemporary research works that have been made, there is much that is left to be desired, especially in those works that emphasize the classical understanding of fiqh and its connection with the principles.

In addition, general *uşūl al-fiṣḥ* (principles of Islamic law) books, independent works about principles of Islamic law such as *qiyyās*, *ijmāʿ*, *maṣlaḥah*, *ʿurf*, *darūrah*, *istiṣlah* etc; hadīth collections; dictionaries; and general books which are related to my work have been used and benefited from. Also a wide range of contemporary works related to ijtihād and sharīʿah reform have been consulted.

The introductory chapter (chapter I) looks at a number of important juristic terms relevant to the study, such as *uşūl*, *fiṣḥ*, *aṭḥām*, *adillah*, *shariʿah* and so on. It also defines and critically analyses all of the main sources of law: These are divided into two categories: the unanimously accepted sources; and the controversial sources. The former comprises the Qur'an, the Sunnah, *ijmāʿ* *qiyyās*; the latter includes 'forgotten principles' such as *maṣlaḥah*, *istiṣlah*, *ʿurf* and so on. The main works consulted for this have been the major classical works of jurisprudence such as Ibn al-
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Qayyim, Laknawi, Ibn Amīr al-Ḥajj, Ibn Taymiyyah, Ṣadr al-Shari‘ah, M. Hāshim Kamālī, Wahbah Zuhayli, and so on.

The fundamental sources of istiḥsān, namely ra‘y and ijtihād, form the subject of chapter II. This area has been covered extensively in classical and modern works by a wealth of eminent scholars such as Āmīdī, Ibn al-Qayyīm, Bazdawī, ‘Abd al-‘Azīz al-Bukhārī, Ibn Khaldūn, Ibn Ḥazm, Shafi‘i, Ḥazālī, Sarakhsi, Shawkānī, Ibn Taymiyyah, Isnawi, Qaraṭī, Ibn al-Humām, etc. as well as western scholars such as Schacht, Hallaq, Emile Tyan, Noel J. Coulson, George Makdisi, and Yasin Dutton and it is upon their works and other erudite contemporary individuals that I have drawn for inspiration in the development of this chapter.

The heart of the study, namely the main arguments concerning the concept of istiḥsān, is chapter III. In the definition of istiḥsān, linguistically and technically, I have referred to many classical dictionaries such as Ibn Manẓūr’s “Lisān al-‘Arab”, Jowharī’s “Tāj al-Lughah wa Ẓāhī al-‘Arabiyyah”, Zābīlī’s “Tāj al-‘Arūs from Jawāhir al-Qāmūs”, Fūrūzābādī’s “Qāmūs al-Mufīs. I have also referred to classical and modern usūl al-fiqh (principles of Islamic law) books whilst introducing scholars’ viewpoints and arguments about istiḥsān. Several previously neglected works have been used extensively in the research for this chapter, and also throughout the study.

Besides these sources, other primary source materials have also been used; a complete list of sources is presented in the Bibliography.

I have made an effort to access as many sources as possible. To this end I travelled to Egypt twice, spending approximately four months on my second trip, and travelled to Jordan and Saudi Arabia as well as Turkey. I conducted research in the places mentioned at many independent and university libraries, as well as through personal discussions with eminent scholars such as Prof. Muḥammad ‘Ali Sawwā’, University of Jordan Faculty of Sharī‘ah; Dr. Aḥmad al-Raissounī, the University of Muḥammad Khamis, Rabat; Prof. Muḥammad M. ‘Aḥmad al-Latef Jamāl al-Dīn, University of Al-Azhar; Prof. Orhan Çeker and Prof. Dr. Aḥmed Yaman Konya Selcuk University /Turkey; Prof. Ṭāha Jābir al-‘Alwānī, the president of the Fiqh Council of North America; and Ustādha Shaikh Shu‘ayb al-Amawūṭī in Jordan.

Chapter N, on the different types of istiḥsān, draws almost entirely upon the classical and modern sources that I have introduced previously. Besides the previous sources, I have also benefited from the works of many contemporary scholars to develop my thesis, particularly on issues such as the concept of maqāṣid al-sharī‘ah. Some of the selected sources that I have referred to include Shāṭibi’s “Muwāfaqāt”, Ibn ‘Āshūr’s “Maqāṣid al-Sharī‘ah al-Islāmiyyah”, and “Naẓarīyyah al-Maqāṣīd” by Aḥmad al-Raissounī, which is an academic dissertation on Imām Shāṭibi. It investigates his perception of maqāṣid and is now a text book being taught at the University of Jordan by Muḥammad ‘Ali Sawwā’. Other sources include ‘Allāl Fāsī’s, “Maqāṣid”, Juwayni’s “Al-Burḥān”, Ghazālī’s “Al-Mustaṣfā”, Tūfī’s “Risālah fī al-Maṣlaḥah al-Mursalah” and “Sharḥ Mukhtaṣar al-Rawadh”, etc.
1.0 THE SOURCES OF ISLAMIC LAW

As a starting point for understanding the concept of istitiṣān, an explanation of some basic components of Islamic law is necessary. Basically, all rulings of Islamic law are based ultimately on the Qur'ān and the Sunnah. In other words, the atkām sharī`ah (legal rules) are produced using particular methods and mechanisms which are applied to the general rules given originally by God Himself.

Islamic legal theory is, in general, based on four sources— the Qur'ān, the Sunnah, ijmāʿ (consensus), and qiyās (analogy)—which are unanimously accepted by all the Sunnī schools of law. Shiʿī and Zāhiri legal theory is different.²

The Qur'ān is the first source of law for Muslims who seek guidance. If one finds the answer within the Qur'ān there is no need to resort to other sources. However, if one does not find his answers within the Qur'ān, one should seek enlightenment from the Sunnah. If the required knowledge is not obtained from these two sources, one should look to ijmāʿ (consensus) for an answer; if the desired information is still not forthcoming, one must finally turn to qiyās (analogy).

The hadith below, narrated from Muʿādh ibn Jabal (d. 18/640), shows the sequence in which rulings are to be sought from the sources. Explaining the methodology of the jurists in discovering and applying the law, scholars usually quote this Tradition. When the Prophet intended to send Muʿādh ibn Jabal to Yemen, the Prophet asked him: “How will you judge when the occasion of deciding a case arises?” He replied: “I shall

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1 The Qur'ān and the Sunnah are the two main sources of Islamic Legal Theory. However, the majority of jurists are of the view that Islamic law is based on four sources. It took the jurists considerable time to prove through the texts of the Qur'ān and the Sunnah that ijmāʿ is a valid source of law, and any that fiqih (ruling) based on it should be accorded the status of the fiqih of God. And qiyās was also successfully used to deduce the law from the Qur'ān and the Sunnah. The law deduced by Qiyās and ijmāʿ are actually dependent on evidence from the two main sources.

judge in accordance with God's book." The Prophet asked: "What will you do if you do not find guidance in God's book?" He replied: "I will act in accordance with the Sunnah of the Messenger of God." The Prophet asked: "What will you do if you do not find guidance in the Sunnah of the Apostle of God and in God's Book?" He replied: "I shall do my best to form an opinion and spare no pains in my search for truth". The apostle of God then patted him on the chest and said: "Praise be to God who helped the messenger of the Apostle of God to find an answer which pleases the Apostle of God." 2

Also, the same method of discovering and applying the law was used by the Companions of the Prophet. 4 Mhrän bin Maymûn reports that Abû Bakr (d.13 AH) referred to the Qur'ân whenever a claimant-defendant asked him for guidance. If he was unable to find the result in the Qur'ân, he would then seek a judgment in the Sunnah. Failing to discover the answer within these sources, he would then consult the righteous men of the community who would convene to discuss the matter and arrive at a solution. If they arrived at an opinion which was unanimously accepted, the consensus was that he should judge accordingly. 'Umar and other companions of the Prophet applied these methods of judgment and consequently the Muslim community also accepted this procedure. 5

This shows that Islamic Law is able to find answers for human problems and develops itself naturally. Based on Mu'âdh's answer, "I shall do my best to form an opinion and spare no pains" can we say that human opinion influences Islamic law? Is

this a proof that Islamic Law can deal with any issues relating to human life? And, is Islamic law itself developing further and evolving over time?

1.1. Definition of some Juristic terms:

We shall now explain some important terms that are crucial to an understanding of the discipline of ʿusūl al-fiqh (the principle of jurisprudence), and thus for our central topic, which is ʿistiṣnān.

1.1.1 ʿUsūl: In certain cases, this is defined as something upon which another thing is constructed, be it material or spiritual; here it gives the meaning of foundation (asās). The term ʿasāl is used in the sense of the ‘Arabic word “maṣdar” (source). The term ʿusūl is the plural of ʿasāl, and it is “something from which another thing originates or is sourced.” Thus, the origin of a thing is its ʿasāl that is the reason for translating the word ʿasāl as “root” (judhr). It also means nasab (lineage and stock), ʿillah (cause and reason). Another meaning is haqīqī which means true, genuine, authentic and real.

Technical applications of the word (a-ṣ-l) in Islamic Law are as follows: One of the uses of a-ṣ-l is the meaning of dalīl. The word dalīl was applied to mean a guide leading a caravan, or scout finding the trail. In this sense, a directory, like a telephone directory, may be called a dalīl, because it leads us to a number or an address.

In Islamic law, the word dalīl is used in two ways: dalīl tafṣīlī is like an individual verse of the Qurʾān or an individual Sunnah in a ḥadīth. We may refer to it as “specific evidence”, though it is sometimes translated as “detailed proof”. For example, God says

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"Forbidden to you (for marriage) are your mothers, your daughters, your sisters...". It indicates a *hukm* (rule), which is obvious, that marriage to mothers, daughters and sisters is forbidden. "And come not near to unlawful sexual intercourse..." This verse indicates a *hukm* (rule), which is also obvious: do not commit adultery.

As compared to *dalîl tafsîlî* (specific evidence), the *dalîl ijmâli* or *kulî* is general evidence, because it contains within it a large amount of specific evidence. The *dalîl ijmâli* has nothing to do with direct, absolute order and prohibition. However, it produces general rulings as *wujûb* (necessity) and *tafrîm* (prohibition). The Qur'ân is general evidence: it contains a large number of specific evidences: "And perform as-salât" is the *aṣâl which makes prayer obligatory in the Qur'ân.

The word (*aṣâl*) is also used to indicate the foundation upon which analogy is constructed. An example in the Qur'ân: "O you who believe! Intoxicants (all kinds of alcoholic drinks)... are an abomination of Satan’s handiwork. So avoid (strictly all)." This is the general prohibition of drinks which contain intoxicants. As *ḥadîth* confirms it: "Every drink which contains intoxicant is khamr (wine) and every khamr is forbidden". Therefore, *khamr* is an original case (*aṣâl*) or basis for the prohibition of *nabîdîh* (fermented dates); the *ʾillah* of intoxication is found in both, but is extrapolated from *khamr*, which is the *aṣâl*.

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8 Qur'ân: 4/23
9 Qur'ân: 17/32
11 Qur'ân: 2/43.
12 Qur'ân: 5/90.
14 See Nyazee, p: 27.
In addition, *asl* is sometimes applied in the sense of the original rule. Hence, the maxim says: “*Al-asl fī al-ashyā’ al-ibāhah*, which means the original rule for all things is permissibility. Another use of *asl* is that the meaning of general principles of jurisprudence (*al-qawā‘id al-fiqhiyyah*) governs the law and its interpretation. An example is “*lā ḥarara wālā ḥarār*” which means “Harm is neither inflicted nor reciprocated in *Islām*” is an *asl* in the principle of Islamic Law. It also means *al-rujah* (preference, preferability), and as jurists say: “*al-asl fī al-kalāmi al-ḥaqiqah*” which means in that literal meaning rather than metaphor is to be understood.16

*Dalil* (proof) is distinguished from *amārah* (indication), which literally means sign or allusion. A sign indicates the existence of a thing without the need for rational proofs like the *mīnārāh* of a mosque, and milestone of the road.17 *Dalil* could only relate to evidence which leads to a definitive ruling or to positive knowledge (*‘ilm*). *Amārah* on the other hand is reserved for evidence or indication that only leads to a *ẓannī* (speculative) ruling.18 In this way, the term *dalil* could only be concerned with the definitive proofs, namely the *Qur‘ān*, the *Sunnah*, and *ijmā‘*, while the remaining proof which contains a measure of speculation, such as *qiyyās*, *istihsān*, *istiṣbāh*, *maqāleh mursalah*, etc, could fall under the category of *amārah* (signs or allusions, probable evidence). However, most jurists consider both *dalil* and *amārah* whether *qaṭī*

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(definitive) or ṭanī (speculative), as a dalīl (proof). Amārah becomes dalīl if ṭukm shar‘i
is deduced from it.19

After all these explanations of the concept of the term asl we can say that the term
asl is actually dalīl, which is a proof or an evidence of Islamic Law.20

The jurist seeks the dalīl ijmā‘ī or kullī (general evidence), yet the adillah al-
tafsīliyyah (specific evidence) is the subject field of the mufti. Therefore, the usūl al-fiqh
(principles of Islamic Jurisprudence) is called adillah al-fiqh al-kulliyyah (proofs or
evidences of general fiqh).

The juristic scholars (usūli) define the term of usūl al-fiqh in two separated parts
as usūl and fiqh. As I have covered the term of usūl (plural of asl) above, the term of fiqh
now will be elaborated.

1.1.2 Fiqh: In the linguistic sense, the term fiqh is synonymous with al-fahm
(understanding).21 The Qur‘ān has used the word fiqh in its general sense of
“understanding” as: “O Shu‘ayb! We do not understand much of what you say,”22 and
“So what is wrong with these people that they fail to understand a single fact.”23, “They
have hearts wherewith they understand not.”24 It implies an understanding of Islam and
consideration of religion. The same meaning is also revealed in the ḥadith of the Prophet
as saying: “He for whom God wills His blessings is granted the understanding of din.”25

21 For the transformation of the Muslim understanding of the concept of fiqh in the last two centuries, see:
Murteza Bedir, “Fikih to Law: Secularization Through Curriculum”, in Islamic Law and Society 11.3,
22 Qur‘ān: 11:91
23 Qur‘ān: 4:78
24 Qur‘ān: 7:179
25 Muslim: ibid, Kitāb al-Amārah.
In addition the term, 'ilm (knowledge) was used for the same meaning of fiqh (understanding) in the early time of Islam, as the Prophet blessed Ibn 'Abbas (d.68) saying: “Allahumma faqqihhu fi al-din” (O God, give him understanding in religion)\textsuperscript{26}.

The Prophet could not have meant absolute knowledge of the law. However, it is clear that the Prophet meant a deeper understanding of Islam in general.

The term figh also means kalām, which Abū Ḥanīfah (d.150) defines as “Maʿrifat al-nafsi mā lahā wahmā ‘alayhā” which means “A person’s knowledge of his rights and obligations”\textsuperscript{27}. 

Al-Fiqh al-Akbar which is attributed to Abū Ḥanīfah (d.150) against the beliefs of ahl al-qadar deals with the basic tenets of Islam like faith, unity of God, His attributes, the life hereafter, prophecy, etc. These are problems which are dealt with in kalām and not in the discipline of law.\textsuperscript{28}

Fiqh is used for the meaning of exercise of intelligence as the Successors of the Companions of the Prophet at most were fiqah (jurists), who gave legal judgments using their own intelligence and reason in solving legal problems, in that respect the term figh is also used for the knowledge of the law.

Technically, the definition of figh is confined to Islamic law alone. Among the scholars, Shāfi’i’s (d.204/819) definition is widely known: “The knowledge of the legal rules (aḥkām al-shar’iyya), pertaining to conduct, have been derived from their specific evidences.” On the other hand “It is a compilation of the legal rules pertaining to conduct

\textsuperscript{26} Muhammad ibn Sa’d (d.230/844), “Al-Tabagat al-Kubra”, Beirut 1957, v: 2, p: 363.

\textsuperscript{27} Ubayd Allah ibn Masʿūd bin Tāj al-Shariʿah al-Ḥanafi, Sadr al-Shariʿah (d.747/1346), “Al-Tawdih fi Ḥall Jawāmid al-Tanqīḥ”, Karachi, 1979, pp: 22-25. Explaining the definition given by Abu Ḥanīfah, he says that it includes three things: 1-knowledge of the tenets of faith, 2-knowledge of ethics and mysticism (Sufism), 3-knowledge pertaining to acts. The first is covered by “ilm kalām”, the second by ethics and mysticism and the third by figh. Therefore, he says if you wish to confine the definition to figh alone, that is, “Al-figh al-Aṣghar”, you must add at the end of the definition the word “amalan” (with respect to acts).

\textsuperscript{28} Ahmad Ḥasan, “The Early Development of Islamic Jurisprudence”, Islamic Research Institute, International Islamic University, Islamabad, Pakistan 1994, p: 3.
that have been derived from their specific evidences." The definition of fiqh can be understood in stages. Then the meaning of fiqh will be the knowledge of the aṭkām al-sharʿiyya.

1.1.3 Usūl al-fiqh: The meaning of usūl al-fiqh (principle of Islamic jurisprudence) is combined by the understanding of the meaning of usūl and fiqh individually. The term of usūl al-fiqh now can be defined as: "The principles by the use of which the mujtahid arrives at legal rules through the specific evidences." It is a discipline of Law, a kind of methodology, which explains the reasoning behind istiḥṣān (juristic preference), qiyyās (analogy), istiqṭāb (presumption of continuity). These are taken from general evidences, the rules of interpretation, deduction and the sources of Islamic law. Usūl al-fiqh also includes the kind of general evidences that are indicative to the aṭkām of God and the sources of Islamic law, as well as proofs or evidences on how to arrive at the aṭkām.

1.1.4 Aṭkām: Aṭkām (rules) is the plural form of ṭukm (rule), which means rule, command, the absolute, order, judgment, injunction, prescription, and decree. This rule could be a rule of any kind; it is to command one to delegate an order to another whether approval or disapproval. You could say that the moon is rising or the moon is not rising, or that fire burns.

Technically, it is considered a rule of Islamic law. Āmidī (d.631/1234) defines adillah as the science of the proofs of fiqh and the indications that they provide with regard to the aṭkām of the sharīʿah. The ṭukm sharʿī is therefore defined as: "A
communication from God, the Exalted, related to the acts of the subjects through a
demand or option, or through a declaration."\(^{34}\)

The above definition of \textit{al-hukm} is found only amongst the \textit{usüli} (juristic
scholars). The first point of the definition is that any communication must be from God
otherwise it is not accepted and cannot be considered as a \textit{hukm}. This communication is
related to the actions of the \textit{mukallaf} (subjects). The relationship also enables the
\textit{mujtahid} (jurist) to evaluate the requirements, and to judge whether it is for the command
for the act or the prohibition. God says "O you who believe! Observe \textit{ṣawm} (fasting)".\(^{35}\)
This contains a \textit{hukm} which demands obedience. "And come not near to the unlawful
sexual intercourse."\(^{36}\) This verse contains a \textit{hukm} which requires prohibition.

The \textit{hukm} (rule) is clarified through a request (\textit{talab} or \textit{iqtida'}). The request in this
case is communicated in the form of a command of an act or its prohibition. The request
may or may not be binding. When the request is binding, it creates \textit{wujūb} (an obligation)
or \textit{tahrim} (prohibition), which are established by \textit{datil qat'i} (definite proof). When the
request is not binding, then the ruling creates \textit{nadib} (recommendation) or \textit{makrūh}
(discouraged), which are established without definitive proof. God says "O you who
believe! Fulfil (your) obligations."\(^{37}\) This verse is addressed to the \textit{mukallaf} (subject), and
consists of a particular demand. And "O you who believe! Let not a group scoff at
another group, it may be that the latter are better than the former...".\(^{38}\) This Qur'anic text
conveys a prohibition to the \textit{mukallaf}. The freedom of choice is given to the \textit{mukallaf}
(subject) a choice to commit the act or avoid it.

\(^{34}\) Şadr al-Shari'ah, ibid, v:1, p: 13; Bannānī, "Fiqhishah, v:1 p: 32; Nyazee: ibid, p: 64.
\(^{35}\) Qur'ān: 2/183
\(^{36}\) Qur'ān: 17/32
\(^{37}\) Qur'ān: 5/1
\(^{38}\) Qur'ān: 49/11
On the other hand if the subject is free to perform the act it is known as mubah (permissible). For example “But when you finish the ihram pilgrimage (of ḥajj or 'umrah), you may hunt…” This hukm conveys an option for the mukallaf (subject) and he has the freedom to act or not to. As a final point of the definition, the communication may be clarified through an enactment or declaration; this is neither a demand nor an option. However, it is in relation to an act which is connected to another act by reason of sabab (cause), shart (condition) or māni' (impediment). “…and ḥajj to the House is a duty that mankind owe to God for those who can afford the expenses…” Financial ability is the condition for the application of the rule.41

The identification of hukm shar'i is perceived differently between the usūlis (juristic scholars) and the fuqahā. For instance God says “And perform al-ṣalā”42 which is a hukm shar'i itself according to the usūlis. However, according to the fuqahā', it is the effect or the result of the demand in this verse, namely the wujūb (obligation), which represents the hukm shar'i.43

Basically, hukm shar'i (legal rule) is divided into two main categories: the first is al-ḥukm al-taklīfi (the obligation, creating rule, defining law) and the other is al-ḥukm al-waḍ'ī (declaratory law). In contemporary common law, Hart has divided it into primary and secondary rules. The only difference is that the rules of Islamic law are based on religious law. The Muslim jurists designate the category of primary rules as al-ḥukm al-taklīfi (defining law). The category of secondary rules is designated as the al-ḥukm al-

39 Qur'ān: 5/2
40 Qur'ān: 3/97
42 Qur'ān: 2/43
Al-hukm al-taklifi (defining law) is a communication from God, the exalted, related to the acts of the mukallaf (subjects), which consists of a demand or an option; it arises in the five categories of wâjib or farḍ (obligatory), mandûb (recommended), makrûh (adversity), ṭarâm (prohibited) and mubah (permissible). In addition, the Ḥanafī school deduces seven varieties from the same definition: 1. farḍ (obligatory) 2. wâjib (obligatory) 3. mandûb (recommended) 4. makrûh karâxat al-taḥrīm (strongly disapproved) 5. makrûh karâxat al-tanţîh (disapproval) 6. ṭarâm (prohibited) 7. mubah (permissible).

Al-hukm al-wattî is a communication from God which is related to the acts of the mukallaf (subject) in a manner that is declaratory. It is classified into: 1. sabab (cause) 2. shart (condition) 3. mâni′ (impediment).

1.1.5 Sharʿiyah: Sharʿiyah derived from “sh-r-′a (legal); ta-sh rr-′a” (legislation), it excludes al-ahkâm al-hissiyyah (law of sense perception: for instance fire burns, wood floats on water, the sun shines), al-aktîm al-ʿaqliyyah (rational rules, for instance one is half of two, etc.), al-ahkâm al-lughawiyyah (linguistic rules, like the doer of an act is called the subject) and al-aktîm al-wad`riyyah (declaratory rules).

1.1.6 `Amaliyyah: al-atm al-`amaliyyah are divided into three types: fi`li (physically), qalbî (which takes place in the heart) and qawîlî (relating to speech). The physical acts, as the acts of prayer, murder, homicide, the qalbî acts as intention, love, hate, etc. and qawîlî acts as recitation during prayers, offer and acceptance in a contract, etc.

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46 Qur′ân: 2143
According to Imâm al-Râzî (d.606) the meaning of the term *al-'amaliyyah* does not contain all of *al-atkâm al-fiqhiyyah*, since *al-atkâm al-fiqhiyyah* contains also *nazarî* (theoretical) rules.\(^{47}\) Some sources of law such as *ijmâ‘* (consensus), *qiyyās* (analogy) are considered to be *nazarî* (theoretical). *Al-atkâm al-'amaliyyah* excludes *al-atkâm al-i'tiqādiyyah*, which is belief in the existence of God, His oneness, His qualities, the truth of the mission of the Prophet, belief in the Day of Judgment etc.

1.1.7 *Adillah*: is a plural of *dalîl*, which contains the meanings of *ishârah* (indication, sign, token, and symptom), *murshid* (guide, conductor), *burhân* (proof, evidence), and *shâhîd* (witness). It also means "*kitâbun yustarshad bihi‘*" (guide book, itinerary), or *fihrîst* (index).\(^{48}\) Linguistically *dalîl* means that which leads or guides to anything sensible or moral. The term means in a literal sense a proof, evidence, indication or guide.

Technically *al-dalîl* means a proof or evidence of a practical *tukm* (rule) of the *sharî‘ah* which is inferred. It is also defined as something which guides one to the practical rule of the *sharî‘ah* by the correct understanding.\(^{49}\)

One of the main features of the Islamic *sharî‘ah* is that it is based on evidence or proof deduced from the *Qur‘ân* or the *Sunnah* through *îjtihād* which conforms to these two sources of Islamic law. Consequently, it can be stated that the sources of Islamic Law are mainly either revelation or non-revelation:\(^{50}\)

Revelation is considered to be of two types:

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\(^{47}\) Isnawi, "*Sallam al-Wusul*", v: 1, p: 26; Molla Husraw, "*Mar‘at al-Usul*", v: 1, pp: 48-54.


\(^{49}\) Zuhaylî, ibid, v: 1, p: 417.

1. Al-wafry al-matlü or wary ähir (recited or manifest revelation), which is defined as communication from God to the Prophet Muḥammad, conveyed by the angel Gabriel, i.e. the Qur’ān.

2. Al-wafry ghair al-matlü or wahy bäßn (un-recited or internal revelation). This consists of the inspiration (ilhām) of concepts only: God inspired the Prophet and the latter conveyed the concepts in his own words, i.e. the Sunnah, which comprises the sayings aḥādīth of the Prophet.\(^{51}\)

Non-revelation refers to ijmā’ (consensus of mujtahidūn of the Muslim community), qiyās (analogy) or istidlāl (inference). In addition, Imām al-Shāṭibī (d.790/1388) divided the sources of the shari’ah into two types: either pure transmitted (al-naqîl al-maḥf) or pure opinion (al-ra’y al-maḥf). Opinion (ra’y) is not considered as a source of shari’ah unless it is based on transmitted proof\(^{52}\).

Another classification of adillah shari’ah is the qaṭ‘i (definitive) and the qānni (speculative).\(^{53}\)

The adillah shari’ah have also been categorized into transmitted (naqîl) and rational (aqīl). The transmitted proofs, adillah naqliyyah, are the Qur’ān, the Sunnah, and ijmā’. Two other transmitted proofs are the rulings of the Companions and the laws revealed prior to the advent of Islām (shar’ man qablanā). Rational proofs are adillah ‘aqālīyyah namely qiyās, istiṣṭāb, etc.\(^{54}\) Adillah is further classified by al-Āmidī

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\(^{51}\) Zuhaylī, ibid, v: 1, p: 417.


The sources of the shari'ah are further divided into two types:

A. **Unanimously accepted sources:**
   1. the Qur'an, 2. the Sunnah, 3. ijmā', (consensus), 4. qiyās (analogy).

B. **Controversial sources:**
   1. istiḥsān (Juristic Preference), which is the main subject of this research, 2. maṣlaḥah mursalah (consideration of public interest), 3. istiṣṭāb (presumption of continuity), 4. qawl al-ṣaḥābī (The sayings of a Companion of the Prophet), 5. ʿurf (custom), 6. sād al-dhārāʾi (blocking the means), 7. shar' man qablanā (revealed laws preceding to the shari'ah of Islam) and 8. istiqrā’ (induction).

The sources of shari'ah are identified in the Qur'an as follows: “O you who believe! Obey God and obey the Messenger (Muḥammad) and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves refer it to God and His Messenger.”57 The reference to Qur'an is pointed out in the verse as “Obey God” and the reference to the Sunnah as “Obey the Messenger”. Ijmā’ is also referred to in the idea of obedience to “Those of you who are in authority” and the last part of the verse “If you differ in anything amongst yourselves refer it to God and His Messenger” which requires the referral of disagreement to God and His Messenger, is in effect a clear authorisation for the principle of qiyās.58

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56 Controversial sources number as many as 45. (See Tüfî, "Risalah al-Maṣlaḥih") 19 of them, as Qāsimī indicated, were dalā'il quoted from Quraṭī (d. 684/1285); Qāsimī then discovered 26 more by the way of induction (istiqrā'). See: Kasif Hamdi Okur "Maqâṣid ve İctiṣâh", in Islamic Legal Philosophy Researches, Yediveren, Konya, 2002, p:275.
57 Qur'an: 4/59
1.1.8 Muktasabah: means that which is obtained, thus, any type of knowledge which are not obtained are not considered as fiqh.\textsuperscript{59} The obtained knowledge is the knowledge of the jurist (faqīh) and the follower (muqallid). The term al-muktasabah excludes the knowledge of the sharī'at athkām (legal rules) which pertains to man’s knowledge of God. This knowledge is not granted by the way of performing ijtihād but only by way of divine revelations concerning God’s angels and prophets etc.\textsuperscript{60} Finally, adillah tafsīliyyah (specific evidences) which is excluded from the definition of fiqh, thus the knowledge of the muqallid (one who follows the opinion of another) is different from the knowledge of jurists and the knowledge of the leaders of the schools of thought.\textsuperscript{61} It is not permitted for the muqallid to obtain his knowledge of fiqh directly from the Qur’ān and the Sunnah. However, a faqīh can obtain his knowledge from the Qur’ān and the Sunnah directly.

1.2.0 Unanimous sources of Islamic law

1.2.1 The Qur’ān

The first unanimously accepted source of Islamic law is the Qur’ān which is not only the first source of Islamic law but also, as far as it is concerned, is the only source and all other sources are explanatory to the Qur’ān. Alternatively, all other sources are dependant on the Qur’ān in respect of the focal principle of Islamic law.

1.2.1.2 The Qur’ān in ‘ilm al-uṣūl al-fiqh:

The theologians when discussing the attributes of God, define Qur’ān as the meaning of the essence of God expressed in utterances or words, yet the ‘ulamā’ al-uṣūl treat the Qur’ān as a connection of utterances from which athkām (practical rules) may be derived. Here the utterances are ‘Arabic words. Consequently, they define Qur’ān as

derived. Here the utterances are 'Arabic words. Consequently, they define Qur’ān as Arabic utterance or words indicating or explaining the meaning of the speech of God sent down to the Prophet, conveyed by the Angel Gabriel and written in the book, transmitted to us by tawātūr (continuous testimony). It is a proof of the prophecy of Muḥammad, the most authoritative guide for Muslims and the first source of the shari‘ah. It should be noted that some words of non-Arabic origin occur in the Qur’ān but this usage is confined to odd words. A phrase or a sentence of non-Arabic origin does not occur in the Qur’ān.

1.2.1.3 Characteristics of the Qur’ān:

The definition of the Qur’ān reveals the following obvious characteristics:

a- Any speech other than that of God is excluded.

b- Any non-Arabic speech of the previously revealed books is excluded.

c- Any Arabic non-revealed speech including the Sunnah and hadith qudsi is excluded.

d- Any part that is not established by continuous testimony, such as variant readings, is excluded.

e- Any revelation sent down without the challenge of i‘jāz (inimitability) such as previous revelations and the Sunnah is excluded.

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64 Ḥadīth qudsi or holy hadīth is a sub-category of hadīth which is saying of the Prophet. It is considered to be the word of God, repeated by the Prophet and recorded on the condition of an isnad (chain of verification by authorities who heard from the Prophet) but this report is not part of the Qur’ān.
1.2.1.5 *Aḥkām* (ordinances) of the *Qurʾān*:

The *Qurʾān* ordinance /legislation cover several aspects of the life of the *mukallaf* (the subject). The *aḥkām* include the following types:

1- *Aḥkām iʿtiqādiyyah* (creed/convictional).

2- *Aḥkām khuluqīyyah* (ethical and moral).

3- *Aḥkām ṣamaʿiyyah* (practical): This type of *aḥkām* is related to sayings, actions, contracts and behaviour of the *mukallaf* (the subject). *Aḥkām ṣamaʿiyyah* is the *fiqh* of the *Qurʾān* and is the aim of `ilm uṣūl al-ḥijj (principles of jurisprudence). They are classified into two types:

a- *Aḥkām al-ʿibādāt* (worship or devotional matters) which regulate the relationship between the *mukallaf* and his God such as prayers, fasting, zakāh (alms), ḥajj (pilgrimage).

The *aḥkām* in the *Qurʾān* about ʿibādāt (worshipping) consists of approximately 90 verses.66

b- *Aḥkām al-muʿāmalāt* (transactions) which regulate the dealings of the *mukallaf* with others as individuals or groups, such as commercial, civil, criminal, constitutional, international, economical and financial legislations67. Of these, family matrimonial law accounts for 70 verses; law of contracts and torts accounts for 70 verses; judiciary 13 verses; criminal law 30 verses; administrative law 10 verses; international law 25 verses and fiscal law about public revenues, public expenditures altogether are 317 verses.68

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67 Khallāf, *“ʿIlm”*, p: 33; Zuhailī, ibid: part 1, p:438; Zakīy al-Dīn Shaʿbān, *“Uṣūl”*, p: 42.
1.2.2 The Sunnah:

The concept of the Sunnah is also unanimously accepted as the second source of Islamic law (shari'ah). The Sunnah of the Prophet is a proof of Islamic law, and attests to the Qur'an's authority. As the Qur'an indicates the Prophet's teachings are also divinely inspired. "Nor does he speak of (his own) desire. It is only a revelation revealed." Therefore, the Prophet's words are hujjah (dalil, evidence, proof) for Muslims; and may have power like that of the Qur'an. The Qur'an commands submission to the Prophet and makes it a sense of duty for Muslims to bow to its judgment and its authority without question. As is indicated in the Qur'an: "And whatever the Messenger (Muḥammad) gives you, take it and whatsoever he forbids you, abstain" "He who obeys the Messenger (Muḥammad), has indeed obeyed God".

The word Sunnah is derived from the root verb s-n-n, which the `Arabs used to describe the continuous and gentle flow of water; the water flows so gently it appears as one cohesive body. The literal meaning was used by `Arabs to describe a clear path or to imply a customary practice, or an established route of conduct whether good or bad; this conduct was set by an individual or a community. The opposite of the Sunnah is bid'ah (innovation), which is characterised by lack of precedent or continuity with the past. Azharī (d.370/980) maintains that Sunnah is the good path only, hence the term ahl al-sunnah which means those who follow the Sunnah correctly. It also means "The

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69 Qur'an: 53/3-4.
70 Qur'an: 59/7
71 Qur'an: 4/80
72 Ibn Manzūr, ibid: part 17, p: 92.
troddden path and was used by the pre-Islamic ‘Arabs to denote the model behaviour established by the forefathers of a tribe.”

As a general legislative term, the Sunnah is used to imply the practical reality of Islamic shari’ah and its concepts, whether it came from the Qur’an, hadith or was deduced from these two sources. In this manner, the Sunnah includes khabar (news or report) and athar about the Prophet and the precedent of the Companions.

1.2.2.1 The Muṭaddithin (narrators) refer to the Sunnah as all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved, in addition, all of the reports describing his physical attributes and characters before and after the revelation.

Suyūṭī (d.911/1505) reports Ibn Ḥanbal (d.241/855) as saying “For us the Sunnah refers to athar (impressions, impacts) of the Prophet, the Sunnah is the tafsīr (interpretation) of the Qur’an and it is the dalā’il (indications or proofs) of the Qur’an”.76

1.2.2.2 ‘Ulamā’ of fiqh: the main concern for these scholars is to search for the ṭukm (ruling) of shari’ah with regard to the acts of an individual or group. For these ‘ulamā’, the Sunnah primarily refers to “Al-fāriqah al-mutta‘ah (the path followed or the way shown) in the religion, excluding farḍ / wājib (obligatory)”. Laknawi (d.1304/1886) defines the Sunnah as an act which, when it is performed results in thawāb (reward) and when it is not performed, results in ‘itāb (blame) but not in ‘iqāb (punishment).77

According to Baidāwi (d.685/1286), the Sunnah refers to the mandūb (commendable),

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which he defines as any act that will gain praise for the dutiful person and will not lay blame on the one who abandons the duty; such an act is called both Sunnah and nāfilah.  

1.2.2.3 ‘Ulamā’ of usūl al-fiqh: the main concern for the ‘ulamā’ of usūl al-fiqh is to search for a dātil shar‘i (legal proof) with regards to the atkām al-shar‘iyyah (juristic rulings). Their search into the life of the Prophet is based on his position as messenger of God conveying the laws that govern the lives of people. The Prophet set the principles for mujtahidīn (competent jurists) after him.

Consequently their interest in the life of the Prophet is in his aqwāl (sayings), af‘āl (acts) and tacit taqrīr (approval) of the acts or sayings of the Companions. They believe that the atkām legislate them as the second source of shari‘ah next to the Qur‘ān. For the ‘ulamā’ of usūl al-fiqh, the Sunnah refers to whatever came from the Prophet in the form of a saying, act or tacit approval, other than the Qur‘ān.

The juristic usage of the Sunnah has two different meanings. According to the ‘ulamā’ of usūl al-fiqh, Sunnah refers to a source of the shari‘ah (Islamic law) where legal proofs accompany the Qur‘ān. According to the ‘ulamā’ of fiqh (juristic scholars), the Sunnah primarily refers to a legal value, which falls under the category of mandūb.  

1.2.3 Ijmā‘ (consensus):  

The Qur‘ān and the Sunnah are the main sources of Islamic law as mentioned above. Ijmā‘ is, in reality, subsidiary to them and applied when the original sources are silent on a certain problem. Ijmā‘ plays a very important role and undertakes the most essential role in the development of Islamic law in the history. Ijmā‘ is the third source of shari‘ah as the following verses and hadith indicate.

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The Qur'ān: “O who believe! Obey God and obey the Messenger (Muḥammad) and those of you (Muslims) who are in authority. If you differ in anything amongst yourselves refer it to God and His Messenger, if you believe in God and in the Last Day. That is better and more suitable for final determination.”

There are different interpretations of ‘ulūl amr (those in authority). They can be leaders, commanders of an expedition, scholars, jurists, the Companions of the Prophet, Abū Bakr and ‘Umar, and the Sultān. ‘Ulūl amr, according to Fakhr al-Dīn al-Rāzī (d.606/1210), means the scholars.

Shāfī‘ī quotes the following āyāh (verse) to support the authority for ijmā‘.

“And hold fast all of you together the Rope of God (Qur'ān), and be not divided amongst yourselves,” In addition, here are some ḥadīth:

“My community shall never agree on an error.” “God will not let my community agree upon an error.” “I beseeched Almighty God not to bring my community to the point of agreeing on dalālah (error) and He granted me this.” “The hand of God is with the community and (its safety) is not endangered by isolated oppositions.” “Whoever leaves the

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10 Qur'ān: 4:59
14 Qur'ān: 3:113
community or separates himself from it by the length of a span is breaking his bond with Islām.” “Whatever the Muslims deem to be good is good in the eyes of God.”

1.2.3.1 Definition of *ijmāʿ*:

*Ijmāʿ* is the verbal noun of the ‘Arabic word *ajmaʿa*, which is derived from (*j-m-a*, *ajmaʿa*, *ijmāʿ*). The root meaning of *ijmāʿ* is “to collect, to gather up, assemble, and congregate”.

*Ijmāʿ* has another meaning “composing and settling a thing that has been unsettled, as an opinion which one determines, resolves or decides upon.” Therefore, it stands for determining, resolving or deciding an affair so as to make it firmly settled (after it had been unsettled in the mind). Alternatively after considering what might be its issues or result, and saying at one time ‘I shall do this’, and at another time, ‘I shall do that’. Hence the phrase, (*ajmaʿu ʿalā al-amr or ajmaʿu al-amr*) which means I determined, resolved and decided whom the affair. The word *ajmaʿa* has another meaning, which is, to reach unanimous agreement. As an example: “*ajmaʿa al-qawm ʿalā kadhā*” which means the people reached a unanimous agreement on such and such.

1.2.3.2 Technical Definition: *ijmāʿ* is a unanimous agreement of the jurists of the Community of a particular era on a certain issue. Āmidī (d.631/1233) defines it as: the unanimous agreement of the mujtahidin (competent scholars) of the Muslim community

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87 E.W. Lane “‘Arabic English Lexicon” London, 1863; Ibn Manzūr: ibid.
of any period following the demise of the Prophet Muḥammad on any matter.91 Ghazālī’s view on *ijmāʿ* is an agreement of the community of Muḥammad on a religious point.92 Briefly *ijmāʿ* is defined as the “agreement of the scholars”.93 *IJmāʿ* applies to all the religious legal questions and agreements on any point whatsoever (*amr or amrun mā*).94 All problems relating to the *shariʿah* are covered by *ijmāʿ*.

1.2.3.3 Types of *ijmāʿ*:

Based on the way it is formed, *ijmāʿ* may be divided into two types: a- *ijmāʿ* ʿarīḥ, b- *ijmāʿ* sukūṭī.95

a- *al-ijmāʿ* ʿarīḥ (explicit *ijmāʿ* ‘ażmāḥ): occurs when all mujtahīds (jurists) are united on a specific issue and express opinions which are unanimous. ‘Ażmāḥ in the context of *ijmāʿ* means the agreement of Muslims on the essentials of Ḩisn. It contains the fundamentals of religion over which there is no dispute, such as the necessity of prayer, fasting during *Ramāḍān*, the ʿḥa(j (pilgrimage), prohibition of adultery, of usury, and of marrying one’s own mother or sister, etc.

b- *al-ijmāʿ* suktūṭi (tacit *ijmāʿ* ruthāṣ): This occurs when some of the mujtahīdin (jurists) of the community express an opinion on disputed issue and others, after examining the expressed opinion remain silent. The silence is a sign of acceptance.96 This kind of *ijmāʿ* is a presumptive *ijmāʿ*, which only creates a probability (*znūn*).

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91 Āmidī, “*Iḥkām*”, i, p: 196.
92 Ghazālī, “*Muṣṭafā*”, i, p: 110.
95 Sha‘bān, “*Uṣūl*”, p: 45.
Sarakhsi (d.483/1090) states that God has not put the community in hardship, therefore the silence of scholars over an opinion will be considered sufficient for the validity of *ijmāʿ*. Bazdawi (482/1089) indicates that *ijmāʿ* by silence is valid on two conditions: the opinion of a single scholar or a group of scholars should reach all the remaining scholars; and that the time of consideration of the disputed problem should lapse. Ghazālī (d.505/1111) rejected the validity of *ijmāʿ* suktī saying that tacit agreement was neither an *ijmāʿ* nor an authority.

*ijmāʿ* is also sub-divided into the following categories: 1-religious-legal (*sharīʿ*), 2-worldly (*duniawi* or ghayr *sharīʿ*), 3-intellectual (*ʿaqīʿ*), 4-sensory (*ḥissī*), 5-customary (*ʿurfi*), 6-etymological (*lughawi*).

1.2.3.4 Arkān (essential requirements) of *ijmāʿ*:

It is obvious from the definition of *ijmāʿ* that the pillar or prerequisite of *ijmāʿ* is the consensus of the competent scholars (*ittiṣāq al-mujtahidīn*) and without a unanimous agreement no *ijmāʿ* will materialise. Similarly, the condition that all mujtahidīn should be from the Muslim community is in fact a condition that the mujtahidīn themselves have to fulfil and does not constitute an independent *rukn* (condition) of the agreement. Also, where there is only one mujtahid in the Muslim community or mujtahidīn of a certain locality, race, colour, school or following, no *ijmāʿ* is expected to materialise; nor does it constitute an essential requirement (*rukn*) of the agreement in question. They are merely

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100 Aḥmad Ḥasan, “The Doctrine of *ijmāʿ* in Islām”, p: 104.
conditions and controlling factors to achieve the agreement which is the pillar of *ijma*\(^{101}\). Ghazālī\(^{102}\) maintained that the layman's opinion should be taken into account because of the hadith “My community does not agree on error”, which includes both laymen and mujtahid. *Ismah* (infallibility, immunity from making errors) is a grace of God bestowed on the whole community and is the doctrinal basis of *ijma*\(^{103}\). Bazdawī (482/1089)\(^{104}\) suggested that no discrimination should be made between the laymen and the jurists regarding the essentials of the faith; *ijma* is confined to the mujtahidīn only with regard to matters which require expert knowledge.

1.2.4 *Qiyās* (analogical deduction):

The fourth unanimous principle of Islamic law is analogy (*qiyās*) which is the developed version of opinion (*ra’y*). The tradition of Muʿādh Ibn Jabal, which I have touched upon at the beginning of the thesis, is that the jurist was permitted to give his own opinion, and act upon it as a source of law for a solution.

1.2.4.1 Definition of *qiyās*:

*Qiyās* and *qā’is* are verbal nouns, which have the same meaning; measuring or ascertaining the amount, value or quality of something. It is derived from root *q-y-s* and that is why the scales are called *miqyās*. An Arabic idiom “*qāsat al-thawba bi al-dhirā’*” means the cloth was measured by the yardstick.\(^{105}\)

*Qiyās* also means similarity, with a view to suggesting equality or similarity between two things whether sensible or moral. For example ‘I have compared this book with this book’, ‘Zayd compares with Khālid in intelligence and descent’, ‘this person is

\(^{101}\) Zuhayli, “*Uṣūl*, part 1, p: 536-537.


\(^{103}\) Amidi, “*Al-Ihkām*, part 1, p: 226.

\(^{104}\) Bazdawī, ibid: part 3, p: 239.

\(^{105}\) Amidi, “*Ihkām*, iii, p: 183.
not evaluated with that person' which means they are not the same value. As the term qiyyās is used for measuring and comparing, disagreement among 'ulamā' emerged as to whether qiyyās in both of the meanings are real or whether one is real and the other is metaphorical.\(^{106}\)

In the uṣūlī (juristic) definition, technically, the qiyyās is the extension or application of shari'ah value from an original case (aṣl), to a new case (far'), where the latter has the same effective cause ('illah) as the former. The original case is regulated by a given text (the Qur'ān and the Sunnah), and qiyyās seeks to extend the same textual ruling to a new case.\(^{107}\)

Āmidī (d.631/1233) gives some definitions of qiyyās as follows: a- qiyyās means attaining the truth, b- qiyyās is the use of effort to derive the truth, c- qiyyās stands for similitude, d- qiyyās is an indication leading to the truth, e- qiyyās is a knowledge acquired through reflection on a known case.\(^{108}\)

Baqillānī (d.403/1013) defines qiyyās as: "To arrive at a judgement on (kaml) a known, using a precedent set with a previous, by establishing or rejecting a law on the basis of a connecting link (amr jām')."\(^{109}\) The Ḥanafi jurist, Ṣadr al-Shari'ah ('Ubayd Allah bin Mas'tūd d.747/1346) defines qiyyās as "extending the shari'ah value from the original case (aṣl) over to the subsidiary (far') by reason of an effective cause ('illah) which is common to both cases and which cannot be understood from the expression (concerning the original case) alone."\(^{110}\)


Abū Bakr al-Jassāṣ (370/955) gave his own definition, stating “Qiyās is nothing but the return of the parallel case (far‘) to the original (aṣl) on the bases of the idea or reason (ma‘nā’) which combines both cases and necessitates equality between the rules of law about them”.

The main sphere for the operation of human judgement in qiyās is identification of a common ‘illah between the original and the new case. Once ‘illah is identified the rules of analogy necessitate the ruling of the text be followed without any interference or change.

1.2.4.2 Arkān of qiyās:

The essential requirements (arkān) of qiyās as indicated in the above definitions are summarized with the following explanation.

The main requirement is the original case (aṣl), namely a ruling given in the text, and which the analogy seeks to extend to a new case. The second requirement is the new case (far‘) where a ruling is needed. The new case must not be covered by the text or ijmā‘ and must not result in altering the law of the text; this would mean over-ruling the text by qiyās. The third essential is the effective cause (‘illah), which is an attribute (wasf) of the aṣl and is found to be in common between the original and the new case. The final element is the rule (hukm) governing the original case, which is extended to the new case.

An example of qiyās is as follows:

“O you who believe! Intoxicants (all kinds of alcoholic drinks), and gambling, and al-ansāb, and azlām (arrows for seeking luck or decision) are an abomination of Satan’s
handiwork. So avoid (strictly all) that (abomination) in order that you may be successful.”

In this verse, the drinking of wine is clearly forbidden. If this prohibition is extended by analogy to *nabīdh*, the original case (*aṣ*) would be wine that is forbidden by the Qurʾān; the parallel case (*fār*) is *nabīd*; the cause (*ʿillah*) is intoxication, which is common to both cases, and the rule of law of the original case (*hukm*) is prohibition. *Nabīd* is also forbidden because of the same cause (*ʿillah*), which is intoxication, according to the *nass* (text) “Every intoxicant is khamr and every khamr is forbidden.”

The Ḥanafi jurist Bazdawi (d.482/1088) confined the essential requirements of *qiyās* to the common effective cause (*ʿillah*) alone. Both Bazdawi and Āmidī (d.631/1233) are of the view that the result of *qiyās*, namely the *hukm al-fār* (ruling extended to the new case), should not be included in the essential requirements (*arkān*) of *qiyās*. Isnawi has, on the other hand, included the *hukm al-fār* in the essential requirements of *qiyās*.

1.2.4.3 Variety of *qiyās*:

*Qiyās* is divided into three categories based on the strength or weakness of *ʿillah* (cause). Its types will be briefly illustrated.

1. *Qiyās al-awlā* (analogy of the superior). This is when the effective cause is more evident in the parallel case than the original case; it is then called *qiyās al-awlā*. Giving an example we can illustrate the Qurʾān text in respect of parents “Say not to them...

112 Qurʾān: 5/90
From this one may understand that rebuking or beating them is prohibited too, and in fact is even more obvious than verbal abuse – a deduction made based on analogy.

2- Qiyās al-musāwāt (analogy of equals): This is when the `illah is common to both the parallel case and the original case, as deduced by analogy. An example is: “If they commit illegal sexual intercourse, their punishment is half that of free women.”

The text of the Qur’ān prescribes half the punishment for the bondswoman (slave women) if they are guilty of adultery. This rule will also apply to a male slave by analogy if they commit illegal sexual intercourse (zinā'); the punishment is fifty lashes. Making analogy over the bondman (slave) is the same punishment as that of bondswomen.

3- Qiyās al-adnā (analogy of the inferior): This is when the effective cause is less evident in the parallel case than in the original case. The prohibition of nabīdīh on the analogy of prohibition of wine and inflicting the same punishment for the drinking of nabīdīh fall under the category of qiyās. In this example the intoxication of nabīdīh is less in severity than that of wine.

Qiyās has been divided into a further two categories:  

a- Qiyās jāliy (obvious analogy): This type of qiyās is one where the inability to differentiate (nafy al-fāriq) between the original case and the parallel case is certain, or one where the possibility of differentiation is weak. It has been illustrated in the tradition of the Prophet by the analogy of a female slave with a male slave therefore the equation

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116 Qur’ān: 17/23.
between the *asl* (original case) and *farʿ* (parallel case) is obvious and the disagreement between them is removed by clear evidence.

b- *Qiyās khafī* (latent, hidden analogy) is one where the possibility of differentiating between the original and the parallel case is strong, or uncertain. Shawkānī illustrates this with a reference to the two types of wine, namely *nabīdḥ*, and *khamr*. *Nabīdḥ* is obtained from dates and *khamr* is obtained from grapes. The rule of prohibition is analogically extended to *nabīdḥ* despite some difference that might exist between the two. In other words, the removal of uncertainty in the *qiyās khafī*, between the *asl* (original case) and *farʿ* (parallel case) is by means of presumption (*zann*). *Qiyās khafī* and *qiyās al-adnā* are significantly parallel. Consequently, according to the Hanafī jurists, *qiyās khafī* is actually considered to be *istiṣān*.

1.2.4.4 Various views over *qiyās*:

The *`ulamāʾ al-usūl* (juristic scholars) are in agreement on the necessity of *qiyās* in affairs of life (*al-'umūr al-dunyawfyyah*) such as medicine and food. The *`ulamāʾ* are also in agreement on *qiyās* which came from the Prophet. However, regarding *sharīʿī* affairs (legal matters), the *`ulamāʾ* are not united. Is *qiyās* approved by *sharīʿah*? There are five views:

1. The majority of jurists believe that *qiyās* is a source of legislation in *sharīʿah* and practical *aḥkām*. According to Subkī (771/1369), *qiyās* suits the religious communal

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requirement, and accords with the Qur'anic verse: "Consider, O you possessors of eyes!" Consideration in this context means attention to similitude and comparison between similar things.

2. Both reason ('aql) and transmitted evidence (da'il naqî'î) indicate that acting according to qiyâs is wâjib (obligatory). This is the view of Qaffal (d.365) and Ḥasan al- Başbakan (d.436/1044).

3. Qiyâs is wâjib for only two situations otherwise it is prohibited to act according to qiyâs, this is the view of Qâshânî (d.427), Nahrawânî (d.390/999) and Dâwûd al-Isfahânî (d.270/884):
   a-The 'illah (cause) of the asl (original cause) should either be clearly stated or hinted at.
   b-The 'illah (cause) of the far' (parallel case) is more evident than in the original case.

Their view is that 'aql has nothing to do with these two forms, neither with wâjib nor with tahârîm of qiyâs, because the 'illah is evidently clear (thâbitah bi yaqîn).

4. Zâhirî School and Shawkânî (d.1250/1834) held the view that qiyâs is rationally permitted. However, they do not consider that it works in shari'ah. Ibn Ḥazm's claim is based mainly on two points: first one is that the naṣṣ (texts, verses) of the Qur'ân and the Sunnah accommodate all incidents. The second one is that qiyâs is an unnecessary addition to the naṣṣ, therefore the qiyâs abuses the integrity of the text.

5. Shi'ah Imâmîyah and Nazzâm (d.221/836) from among the Mu'tazilah hold the view that to perform qiyâs through reasoning in shari'ah is impossible. They concluded that

122 Qur'ân: 59/2
the two different qiyās will lead to contradictions for one ḥukm. These ‘ulamā’ do not consider qiyās as a proof of shari‘ah.

Dihlawī (d.1762) expresses the following statement stating the necessity of taking into consideration maṣlaḥah while performing qiyās:

“When God had revealed to His Prophet a statute of the shari‘ah and had demonstrated the wisdom and good reason for it, the latter was then qualified to operate with the consideration of expediency (maṣlaḥah) set out to him, and to take the maṣlaḥah as the effective cause (‘illah) and pivot of the stature. This was the qiyās practiced by the Prophet. The qiyās left to the community (ummah) is to find out the effective cause underlying a stature and to take that as its pivot”126.

Given Dihlawī’s acceptance of qiyās, his rejection of the use of ra’y and istihsān comes as a surprise, “For ra’y in connection with the shari‘ah leads to tahrif (distortion).127 Hence the Prophetic tradition: “He who inserts into our religion something that is foreign is to be repulsed”. This also has a bearing on anybody who makes use of istihsān advancing a discretionary opinion contrary to strict analogy for reasons of public convenience”.128

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It is obvious that *istihsan* does nothing more than prefer the principle of *ma'afih* to *qiyyas.* In reality the principle of *istihsan* is not a judgment that is merely based on *ra'y* and personal *ma'afih* (benefit) but in contrast it is a method of activating the application of *shari'ah* and the general purposes (*maqasid al- 'ammah*), because one who performs *istihsan* must consider the *shari'ah*’s purpose in any matter. For example performing *qiyyas* in a case would cause one to avoid *ma'afih* and bring about *mafsadah* (harm) from a different angle. In unexpected situations eventually *istihsan* replaces *qiyyas.*

1.3.0 Controversial sources of Islamic law

In addition to the unanimous sources mentioned above, the *Sunni* schools consider other sources for Islamic law. These sources are somewhat controversial and not universally accepted by all Islamic schools of thought.

This section focus on these further sources, with special emphasis on *istihsan*.

The main controversial sources of Islamic law are as follows:

1. *Istihsan* (juristic preference),
2. *Ma'afih* mursalah (consideration of public interest),
3. *Istihsab* (presumption of continuity),
4. *Qawl al- Sahaba* (the saying of the Companion of the Prophet),
5. 'Urf (customary law),
6. *Sadd al-Dhara'ii* (blocking the means),
7. *Shar' man Qablanā* (revealed laws preceding to the *shari'ah* of Islam) and
8. *Istiqrā'*(induction).

These concepts are briefly outlined as below:

1.3.1 *Istihsan* (juristic preference):

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The concept of *istiṣān* is the main topic of my research and I will cover it in greater detail later.

1.3.2 *Istiṣḥāb* (presumption of continuity)

Like the other controversial sources, it is secondary to the Qur‘ān, the Sunnah, *ijmā‘* and *qiyyās*. *Istiṣḥāb* is validated by the Shāfī‘īs, the Ḥanbalis, the Zahiris, and the Shi‘ah schools, but the Ḥanafis, the Mālikīs and the Mutakallimūn, including Abū al-Ḥasan al-Baṣrī, do not consider it as a source of *shari‘ah*.132

1.3.2.1 Definition of *istiṣḥāb*:

Literally, the word *istiṣḥāb* comes from the root (ṣ-h-b), from which verbs such as to accompany, to remain along with as opposed to separating or departing from, for example, the action of taking a book or a friend along whilst travelling is called *istiṣḥāb*.133

Technically, the jurists define *istiṣḥāb* as “a ruling presuming that the present or future status of an issue continues to remain invariably the same as it was in the past, owing to the unavailability of a reason (evidence) to warrant the establishment of any changes of that status”134. A similar definition considers *istiṣḥāb* as “believing that the existence of something in the past or present renders it obligatory to presume the variability of that existence in the present and future”135. A third definition given by the jurists is as follows: *istiṣḥāb* means to adhere to a well-established ruling due to the

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unavailability of any evidence to warrant any change". When a doubt is raised in regard to any issue in existence, the ruling of *istiṣḥāb* states that the issue can continue to exist as before. The same ruling of *istiṣḥāb* is also applied to non-existent issues. For example, when a property is transferred from one owner to another, the ownership of the property continues to remain the right of the first owner until it is transferred to the second owner and the transfer is confirmed by evidence.

1.3.2.2 Status of *istiṣḥāb* as a source of Islamic law:

The status of *istiṣḥāb* among other sources of *shari`ah* is well explained in the statement of al-Khawārizmī (d.665/1267) as quoted by Shawkānī, namely that *istiṣḥāb* is the last resort of *muftī* (judge). If the *muftī* is asked about an issue he should pursue the ruling first from the Book, then the Sunnah, then *ijmāʿ*, then *qiyās*. If he fails to find the ruling in these sources, he takes the ruling on that issue from *istiṣḥāb* whether the status is positive or negative. If the jurist has any hesitation regarding a ruling then the ruling continues as it was originally established. If, however, the hesitation was in order to prove the ruling, and no proof is established, then the principle to follow is that there is no evidence to prove the ruling and the status should be changed".

1.3.2.3 Types of *istiṣḥāb* (presumption of continuity):

With regard to the existence of a ruling, *istiṣḥāb* is divided into the following types:

1- *Istiṣḥāb al-ibāḥah al-aṣḥāyyah lil ashayā*’ (presumption of original permissibility for objects): This means that one is to presume the continuation of its permissibility until the contrary is proven. When there is no ruling, then it is presumed to be permissible. All

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137 Shawkānī, "Irshād" p: 237.
objects, contracts, and services which are beneficial to man are lawful on the grounds of original permissibility. In the case of legal prohibition, *istişṣāb* presumes the continuity of this prohibition until evidence is established to suggest that it is no longer prohibited. The principle of permissibility (*ibāḥah*) begins in the Qur'ān: “It is He who has created for you all that is on the earth”\(^{138}\) and “God has subjugated to you all that is in the heavens and on the earth”.\(^{139}\) These verses indicate that man should be able to use the resources of the world around him for his benefit unless he has been clearly prohibited.\(^{140}\)

2- *Istiṣṣāb al-barâ’ah al-aṣlîyyah* (presumption of original freedom from responsibility):

It is a fundamental principle, according to Islamic law, that a person is free from obligations unless there is evidence to the contrary. For example, no one is required to perform a sixth *salat* (prayer) in one day.\(^{141}\) According to *al-Majallah* “If one person destroys the property of another and a dispute ensues as to the amount thereof the statement of the person causing such destruction shall be heard, and the requirement of the proof as to any amount in excess thereof is upon the owner of such property.”\(^{142}\)

3- *Istiṣṣāb al-wasf* (presumption of attributes). This means that everything remains as it was until evidence warranting any changes are established. This was formulated in *al-Majallah* as: “It is a fundamental principle that a thing shall remain as it was originally”\(^{143}\). For example, the “*mafqūd*” (missing person) is assumed to be alive until evidence is established to prove his death. The Jurists agreed by consensus that his heirs cannot inherit his property until his death has been established. According to most jurists,

\(^{138}\) *Qur’ān*: 2/29.

\(^{139}\) *Qur’ān*: 45/13.


\(^{142}\) Al-Majallah: clause: 8

no one can benefit from any property bequeathed to the missing person until his status is established; the condition of inheritance is fulfilled by proving that the heir (missing person) is alive at the time of the deceased’s death. As opposed to other schools of thought, the Hanafi school maintains that a missing person cannot inherit from anyone.\textsuperscript{144}

1.3.3 \textit{Ma$lahah Mursalah} (public interest) or \textit{al-isti\dollar{\textl}}\textsuperscript{dollar{a}}\text{r}:

Another controversial source of Islamic law is \textit{ma$lahah} which is based on benefit and avoiding harm. After the unanimous sources, \textit{isti\dollar{l}ah} is a legitimate basis for legislation. When the \textit{ma$lahah} is identified and the mujtahid does not find an explicit ruling in the main four sources, then the jurist can resort to further steps to protect social benefit and to prevent corruption in the earth.\textsuperscript{145} However, \textit{ma$lahah} should not contradict the \textit{shari`ah} and its general objectives.

In this context, Shāṭībī (d.790/1388) indicates\textsuperscript{146} that the purpose of the \textit{shari`ah} is to promote people’s welfare and to prevent corruption and hardship; it is clearly explained in the Qur’ān that “We have not sent you but as a mercy for all creatures”\textsuperscript{147}, and “God never intends to impose hardship on people”\textsuperscript{148}.

1.3.3.1 Definitions of \textit{ma$lahah}:

Linguistically, \textit{ma$lahah} means: benefit/beneficial, appropriate/suitable, convenient and so on. Literally, \textit{ma$lahah} is the opposite of \textit{fusād} (evil) according to \textit{Lisān al-‘Arab}. In \textit{al-Mu`jam al-Wasīt}, \textit{ma$lahah} is the removal of evil. The word \textit{ma$lahah} is derived from the root (\textit{s-l-h}). Its plural form is \textit{ma$sālih} and it is synonymous with \textit{isti\dollar{l}ah}. \textit{Ma$fadah} is its precise antonym. The verb “\textit{zulu`/a}” means something

\textsuperscript{145} Kamālī, \textit{“Principle"}, p: 268.
\textsuperscript{146} Al-Shāṭībī, \textit{“Al-Muwāfaqāt"}, v: 2, p: 3.
\textsuperscript{147} Qur’an: 21/107.
\textsuperscript{148} Qur’an: 22/78.
which has become beneficial or suitable. When someone “āštāţ”, he removes the evil and when something is “ištāţăţah” it becomes ready to expel the evil in it.\(^{149}\)

*Mursalah* means unrestricted. According to Lisān al-‘Arab, the verb “arsala” means to remove the restriction or to ignore it\(^{150}\).

Technically, *mastaţah mursalah* is defined by Shāṭibī as that which concerns the subsistence of human life, the completion of man’s livelihood, and the acquisition of what his emotional and intellectual qualities require of him, in an absolute sense\(^ {151}\).

It is more technically defined as: a consideration which is proper and harmonious *(wasf munāsib mulā’īm)* with the objectives of the lawgiver; it secures a benefit or prevents a harm, when the Qur’ān or the Sunnah provides no indication as to its validity or otherwise.\(^ {152}\)

It is obvious that the concept of *mastaţah* has a very close relationship with *maqāsid al-shariʿah* (objectives of the shariʿah), as *maqāsid* are defined briefly as obtaining *mastaţah* (benefit) and preventing *mafsadah* (evil). These two concepts *(mastaţah and maqāsid)* may sometimes be used interchangeably. The first significant work in this was done by Ghazālī (d.505/1111) who wrote: “In a real sense *mastaţah* consists of obtaining manfaʿah (benefit) and preventing maţarrāt (evil). However, we do not use that meaning... for the term of *mastaţah*, we mean, to protect the objectives of


\(^{150}\) Ibn Manzūr, ibid.

\(^{151}\) Al-Shāṭibī, *“Al-Muwāfagāt”*, v: 2, p: 25.

the *shari‘ah* (*maṣlaḥah al-shari‘ah*) which consist of five essential values, namely religion, life, intellect, lineage and property.\(^{153}\)

**1.3.3.2 Types of *maṣlaḥah***

Ibn ‘Āshūr (d.1973) divides *maṣlaḥah* into two types: a- *al-* *maṣlaḥah al-‘āmmah* (public benefit), which is a benefit that is useful to all, or to the majority of the community; and b- *al-* *maṣlaḥah al-khāṣṣah* (specific benefit), which is individual consideration of the benefits for people.\(^{154}\)

With regard to the social order, it is divided into three categories: a- *Qurūriyyāt* (essentials), b- *Hājiyyāt* (complementary), c- *Taḥsīniyyāt* (embellishment).

Regarding the whole community, its groups and individuals *maṣlaḥah* is either a- *kullī* (whole) or b- *juzˇi* (partial). There are also three types of *maṣlaḥah* in respect of the people’s situations: a- *qatˇi* (definite), b- *zanni* (speculative), c- *wahmī* (imaginary).\(^{155}\)

Briefly the main divisions of *maṣlaḥah* are as follows:

**1.3.3.3 Qurūriyyāt (essentials):** These are things on which the lives of people depend, and the neglect of which causes total disruption and anarchy. Ibn al-Ḥājib, Qarafi, and Shāṭibi consider these to be the five essential values, namely religion, life, intellect, lineage and property. Qarafi adds a sixth essential, protecting honour; this is attributed to Tūf.\(^{156}\) The first five essentials must not only be upheld but also protected against any real or unexpected threat to their safety. Destroying one of the five essential values is

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\(^{155}\) Ibn ‘Āshūr, ibid, p: 138.

\(^{156}\) Ibn ‘Āshūr, ibid, p: 139.
The five values would be protected in two ways: a-maintaining the subsistence, b-removing the disruptions.

### 1.3.3.4 Ḥājiyyāt

These are those things which, if neglected, many cause hardship to the community, but not its collapse. Shāṭibī (d.790/1388) says that Ḥājiyyāt are those things which are needed to enhance comfort and avoid hardship. If they are not taken into consideration, people would face harm and difficulties. However, those difficulties are not as dangerous as neglect of the essentials. In the field of `ibādāt (worship), Ḥājiyyāt includes the concessions (rukḥaṣ) that the shārī'ah grants to the sick and to travellers, permitting them to forego the fast and to shorten the prayers (salāt), in order to avoid hardship.

### 1.3.3.5 Taḥsīniyyāt

These are also known as kamāliyyāt (embellishments) and are supplementary to the previous types. This category represents the interest and awareness of the mukallaf. Shāṭibī says that it may be summarized as part of social and moral etiquette in the field of `ibādāt, such as eliminating dirt, considering all types of cleanness; or in the field of customary matters, such as good conduct in eating, avoiding wastefulness in consumption; in the field of transactions, such as not selling something which is impure; and in the field of jināyāt (criminal offence), such as the prohibition on the killing of women, children and scholars whilst on jihād. Therefore sadd al-dhara'ī (blocking the means) is considered as a kind of taḥsīniyyāt.

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159 Ibid , 2/10-11.
1.3.3.6 *Shurūt* (conditions) of *maslahah* mursalah:

Some strict and indisputable conditions have been set in order that *maslahah* be considered a valid source.

A vital condition of *maslahah* is that it must be appropriate to the objectives of the *Shārīʿ* (Lawgiver). Ghazālī says that “Interpreting the *maslahah* as protecting the *maqāṣid al-shariʿah* (objectives of the lawgiver), nobody would oppose obeying the *maslahah* unless they could produce positive evidence”\(^1\). He adds “We occasionally consider *maslahah* and rulings when indications interchangeably reflected one another.”\(^2\)

The following conditions are intended to ensure that the concept of *maslahah* is not established arbitrarily or by individual whim.

1. *Maslahah* must not be in conflict with a principle or value which is sustained by a *naṣṣ* (text) or *ijmāʿ*.

2. *Maslahah* must be genuine (*haqiqiyah*) as opposed to imaginary (*wahmiyyah*), which is an improper ground for legislation. For example the recording of marriages in the court and the issue of marriage certificates or the recording of contracts in the registry department prevents *shahādāt al-zur* (false testimony) and stabilizes the *muʿāmalāt* (trade contracts).

3. *Maslahah* must be *kulliyah* (general) so as to secure its benefits and prevent harm as a whole, not to a particular person or group of people.

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\(^1\) Ghazālī, *ibid*, v: 1, p: 311.


\(^3\) Hasan bin Muhammad bin Mahmūd Atṭār (d.1250/1835), *“Ḫāshiyyah ʿAlā Sharḥ Jalāl al-Maḥālī ʿAlā Jamʿ al-Jawāmiʿ”*, Maṭbaʿah ʿIlmiyyah, Egypt, h.1316, part 2. p: 339.

\(^4\) Zuhaylī, *“Uṣūl”*, part 2, p: 799.

\(^5\) Khallāf, *“Ḫāmiʿ*, p: 87; Badrān, *“Uṣūl”*, p: 214.
Besides these conditions, Imām Mālik (d.179/795) considers further two other conditions:

4- The mašlaḥah must be maʿqūlah (rational) and acceptable.

5- Mašlaḥah must prevent or eradicate hardship, which the Qurʾān expresses in the sūrah al-māʾīdah (5:6) "God never intends to impose hardship upon people"¹⁶⁶, yet Ghazālī (d.505/1111) maintained that mašlaḥah must involve ḍarūriyyāt (essentials) for its validation.¹⁶⁷

Consequently, the main purpose of the law is to obtain benefit (jalb al-ṣalāḥ) and avoid evil (dafʿ al-fasād). Mašlaḥah would be obtained by improving man's situation and removing evil, because man is the vicegerent on earth and holder of His truth; therefore making him peaceful would reflect in world peace too.¹⁶⁸ If the evaluation of the mašlaḥah and mafsadah were the responsibility of mankind, the Lawgiver's objectives would be in jeopardy.

In this context, Shāṭibi says "In the religious context the aim of obtaining benefit (jalb al-ṣalāḥ) and avoiding evil (dafʿ al-fasād) is to provide the needs of this world for the sake of the hereafter, and not to provide personal desires or avoid personal hatreds. Religion prevents people from following their desires and guides them to be a servant of God".¹⁶⁹ God clearly indicates this in the Qurʾān: "And if the truth had been in accordance with their desires, verily, the heavens and the earth, and whosoever is therein would have been corrupted."¹⁷⁰

1.3.4 ʿUrf (customary law)

¹⁶⁷ Ghazālī, "Al-Mustafa", part 1, p: 141.
¹⁷⁰ Qurʾān: 23/71
The concept of ‘urf is also considered to be one of the controversial sources of Islamic law amongst the jurists.

1.3.4.1 Definition of ‘urf: ‘Urf as a noun derived from its ‘Arabic root ‘a-r-f (to know). According to Lisän al-‘Arab, ‘urf, ‘irfsan and ‘ärifah all have the same meaning, i.e. anything that the people know as good (khayr) as opposed to munkar (evil), or any effort you make by speech or action to help others.

Recognizing someone’s service or help offered to another to enable them to achieve an ambition is also covered by this concept. Generally, the word is mostly used for a higher level of feelings and a good and dignified expression.

‘Urf (custom) and its derivative ma‘ruf appears in the Qur’an in sura al-‘A’raf (7:199) “Keep to forgiveness, enjoin ‘urf (wa’mur bil ‘urf) and turn away from the ignorant”. Zamakhshari (d.538/1144) in his commentary on this verse states that: “‘Urf is known as a beautiful (nice or good) deed”. Another word largely synonymous with ‘urf is ‘ädah (habit- plural ‘ädah or ‘awā’id) which means repetition or recurrent practice of an individual or a group.

Technically, ‘urf is defined as “Habitual practices which are acceptable to people of sound nature”. ‘Ädah is defined as “habitual practices without a rational relationship”.

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1.3.4.2 Types of ‘urf:

‘urf is primarily divided into two types: qawlī (verbal) and fi‘lī or ‘amālī (actual or practical). An example of verbal ‘urf is the word walad which means the offspring, whether a son or daughter, although in its common usage walad is used to denote a son only. It occurs in the Qur’ān: “God commands you as regards your children’s (inheritance): to the male, a portion equal to that of two females…”\(^176\) An example of actual ‘urf is the bay‘ al-ta‘āṭī (give-and-take sale) which is normally concluded without utterance of offer and acceptance.\(^177\) These ‘urf, either qawlī or ‘amālī, eventually are divided into two types: al-‘urf al-‘āmm general custom and al-‘urf al-khāṣ (special custom).\(^178\)

1.3.4.3 Conditions of the validity of ‘urf:

a- ‘urf must not contradict a nass or definitive principles of the Islamic law.\(^179\)

b- ‘urf must be continual or prevalent in most cases. The practice of that ‘urf by a few individuals or of a limited number of people among a large community will not be authoritative.\(^180\)

c- The existence of ‘urf (custom) must be established at the time of the transaction.\(^181\)

d- ‘urf (custom) must not contravene the clear requirements of an agreement.\(^182\)

Consequently, the following principles, mentioned in al-majallah, point out the prevalence of ‘urf in legislation:

\(^{176}\) Qur’ān: 4/11

\(^{177}\) Sha‘bān, “Islam Hukukū”, p: 175.


\(^{181}\) Ismā‘īl, ibid; Kamālī, ibid.

\(^{182}\) Ibid.
Custom is an arbitrator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgment.\textsuperscript{183}

In the presence of custom, no regard is paid to the literal meaning of a thing.\textsuperscript{184}

Effect is only given to custom where it is of regular occurrence or when universally prevailing\textsuperscript{185}

A matter recognized by custom is regarded as though it was a contractual obligation.\textsuperscript{186}

A matter established by ‘urf (custom) is like a matter established by law.\textsuperscript{187}

To change ‘urf without consideration for the harm that this may cause is clearly unacceptable.\textsuperscript{188}

1.3.5 Sadd al-Dharā‘i‘ (blocking the means)

The validity of this concept amongst the jurists is considered controversial; the Hanafi, Shafi‘i and Zahir jurists do not recognize it as a source of Islamic jurisprudence, yet Mālikī and Ḥanbali jurists have validated it as a principle of shari‘ah.\textsuperscript{189}

1.3.5.1 Definition of sadd al-dharā‘i‘:

Sadd al-dharā‘i‘ (blocking the means) consists of two terms; first, sadd (blocking) and second, dharā‘a‘, plural dharā‘i‘ (means). Blocking the means implies blocking the means of evil but not blocking the means of good. In juridical application, the concept of sadd al-dharā‘i‘ also extends to “Opening the means to beneficence”. For

\textsuperscript{183} Al-Majallah: clause: 36.
\textsuperscript{184} ibid: 40.
\textsuperscript{185} Ibid: 41.
\textsuperscript{186} Ibid: 43.
\textsuperscript{187} Ibid: 45.
\textsuperscript{188} See: Majmā‘ al-Fiqh al-Islāmī, “Karārāt wa al-Tawsīyāt”, Kuwait, 1988, in 9. For more about custom and its applications, see Chapter Four.
this reason some jurists use the term dharä'i ` (means) alone as a title for the doctrine. The literal meaning of each term will clear this point. According to Mu'jam Maqäyis al-Lughah and Mukhtär al-Sifāh,¹⁹⁰ the term sadd literally means a barrier between two things, for example a mountain. It also means blocking a gap with landfill to level it; dharä'i `h are the means or the causes used to achieve or obtain a certain thing or end.¹⁹¹

Shätibi (d.790/1388) defines dharä'i `h as "That means by which a prohibited end or thing (containing evil) is obtained."¹⁹² It is obvious that this definition refers exclusively to meaning evil, evil that must be blocked. Other jurists such as Ibn al-Qayyım (d.751/1350) define dharä'i `h as that which is a means or a way to something.¹⁹³ Here (something) implies juridical obedience or disobedience to God. Qarafi (d.684/1285) considers dharä'i `h to be the means to beneficence or evil: the former must be embraced whilst the latter must be blocked. He states that "As the means to evil is prohibited (and must be blocked), the means to wäjib (obligatory action) is obligatory. The bases regulating the rulings on affairs are two parts. The first part is maqäṣid (objectives), which contains the beneficence and evil each in itself. Second, wasä'il (means) which are the ways leading to them. The ruling on the ways to obtain the objective or end is the same as the ruling on the objective itself."¹⁹⁴

¹⁹² Shätibi, "AI-Muwagät", part 4, p: 198.
1.3.5.2 Types of dharāʾī' (means):

Its types are considered from two perspectives: the result discovered by Ibn al-Qayyīm in “Iʿlām al-Muwāqqītīn”\(^\text{195}\); and the degree of probability, or otherwise, of leading to an evil as discussed by Shāṭibī in “Al-Muwāfaqāt”\(^\text{196}\).

First: An example of means which leads to evil or harm is the digging of a deep pit next to the entrance to a public place which is not lit at night; thus anyone who enters the door is very likely to fall into it. That action is completely forbidden as it might cause harm to someone.\(^\text{197}\)

Second: Means which are rarely expected to lead to evil and are likely to lead to a benefit. An example is digging a water hole situated in a place which is unlikely to harm anyone.\(^\text{198}\)

Third: Means which are most likely (al-zann al-ghālib) to lead to evil. For example selling weapons during warfare or selling grapes to a wine maker. However, Shāṭibī says that these transactions are invalid according to the consensus of the ‘ulamā’.

Briefly, when there is a strong likelihood that they would lead to evil, the means may be declared forbidden.\(^\text{199}\)

Fourth: Means which frequently lead to evil. An example is deferred sales (buyūʿ al-ajal), which mostly leads to usury (ribā’).\(^\text{200}\)

Consequently, the main understanding of the whole concept of sadd al- dharāʾī' was founded on the idea of preventing evil before it happens. When the result is expected

\(^{197}\) Ibid, v: 2, p: 358.
\(^{198}\) Ibid, v: 2, p: 359.
\(^{200}\) Ibid; see them in detail in Kamāli, “Principles”, pp:310-320.
to be good or commendable, then the means will be acceptable. However when the result is expected to be blameworthy then the means will be considered as being blocked, regardless of the intention of the perpetrator, or the actual recognition of the result itself.

Additionally, if the act performed leads to the situation where the evil is either equal to or bigger than the benefit, then the means must be blocked too, according to the general principle “repelling an evil is preferable to securing a benefit”.201

1.3.6 Qawl al-ṣaḥābī (the saying of a Companion of the Prophet):

Many disputes have occurred over the validity of qawl al-ṣaḥābī. Briefly the Ḥanafī Mālikī, and Ḥanbalī schools in general have validated the concept as a source of shari‘ah, but Shāfi‘ī does not consider it thus.202

1.3.6.1 Definition of the Term:

The word ṣaḥābī is derived from the root “ṣ-h-b” and the verb ṣaḥībah or ṣaḥabah (to accompany) and ṣuṭbah (companionship), which imply continuity of contact and narration of ḥadīth from the Prophet. Qawl al-ṣaḥābī consists of two words; “qawl” (saying) and “ṣaḥābī -plural- ṣaḥabah” the Companions. According to most jurists203 anyone who met the Prophet, while believing in him, even for a moment, and died as a believer, is considered as “ṣaḥābī” (Companion) regardless of whether he or she narrated any ḥadīth from the Prophet or not.

Jurists agree that the ʾijmāʾ (consensus) of the Companions of the Prophet is a binding proof, and represents the most authoritative form of ʾijmāʾ. The question arises, however, as to whether the saying or fatwā of a single Companion should also be

201 Al-Majallah: clause: 30.
recognized as a source of law and should take precedence over other sources such as qiyās or the fatwā of other mujtahidūn.

There is no disagreement among the jurists that the saying of a Companion is a proof, which commands obedience if it is not opposed by other Companions. Rulings on which the Companions were known to be in agreement are binding. The jurists are however in disagreement with regard to rulings which were based on opinion (ra‘y) and ijtihād, and also in those matters where the Companions differed among themselves.

There is a general agreement among jurists that the ruling of one Companion is not a binding proof over another Companion, regardless of whether the ruling in question was issued by one of the Caliphs, a Judge or a leading mujtahid among their number. The jurists did differ as to whether the rulings of a Companion are binding on Successors (Tābi‘ūn) and the succeeding generations of mujtahidūn. There are four views on this\(^\text{204}\), which are briefly summarized as follows:

1- The ijtihād of the Companions is not a proof and is not binding on the succeeding generations of mujtahidūn or anyone else. This view is held by the Ash‘arīs, Mu‘tazilīs, Imām Ahmad, and al-Karkhī\(^\text{205}\).

2- The fatwā of the Companions takes priority over qiyās, regardless of whether it was in agreement with qiyās or not. This was the view of Imām Mālik, Imām Shāfi‘ī, Imām Ahmad, and some of the Ḥanafī jurists\(^\text{206}\).

3- It is acceptable when it is in agreement with qiyās. In such a case, qiyās comes before the ruling of the Companion. This is a later view of Imām Shāfi‘ī\(^\text{207}\).


4-It is acceptable when it is in a conflict with qiyās but not when it agrees with qiyās. This is the view of Imām Abū Ḥanīfah. 208

1.3.7 Sharī' man qablanā (revealed laws preceding to the sharī'ah)

This subject represents the extent to which the sharī'ah of Islām is related to the laws of previous revelations. The Qur'ān and the Sunnah have chronicled the lives of previous Prophets and some of the rulings of the revelations they received. 209 The Qur'ān confirms the essence of believing in the oneness of God and the need for divine authority and guidance to maintain good conduct and the principles of morality and justice that represent ordinary reason and the matter of all divine religions 210. The same religion has been ordained from the previous prophets and nations, as is indicated in the Qur'ān: “He (God) has ordained for you the same religion (Islamic Monotheism) which He ordained for Nūḥ (Noah), and that which We have revealed to you (O Muḥammad), and that which We ordained for Ibrāhīm (Ibrahim), Mūsā (Moses) and ‘Īsā (Jesus) saying you should establish religion (i.e. to do what it orders you to do practically), and make no divisions”. 211

For example, several rulings (aḥkām) such as fasting and law of retaliation have been ordained before in previous revelations, “O believers, fasting is prescribed for you as it was prescribed for those who came before you” 212, “And we ordained therein for them life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal”. 213

211 Qur’ān: 42/13
212 Qur’ān: 2/183
1.3.8 *Istiqra'* (Induction):

*Istiqra'* is a *hujjah* (proof) according to the Shafi'i, Malikî and Hanbalî schools, however, the Hanafi school does not accept *istiqra'* as an independent *dalil* (proof) in proving a *takm shar'i*.\(^{214}\)

*Istiqra'* (induction) is a process of reasoning by which a general ruling for a certain issue is drawn from a set of principles constituting that issue, based on the fact that the ruling applied to the premise must apply to the whole issue or some of the issues. The general ruling goes beyond the information contained in the principles and does not necessarily follow from them. *Istiqra'* is divided into two types:
a- *Istiqra' tämm* (complete induction) is arrived at by exploring the entire premise with the exception of the premise of disagreement. These results give a definitive (*qa'îr*) ruling.
b- *Istiqra' nāqis* (incomplete induction) is achieved by following the point of disagreement comparing it with other point. The ruling in this case is mostly probable (*zannî ghâlib*). Jurists of *usûl* use complete *istiqra'*.\(^{215}\)

**Conclusion:**

A brief introduction to the legal theory (*usûl al-fiqh*) behind the general principles of Islamic law is now concluded and the basis for my research has been established.

The majority of jurists agree that the four fundamental principles are unanimously accepted. There are also other principles that are activated when fundamental principles are silent and unable to help the law for its continuity.

\(^{214}\) Ghazâlî, *"Al-Mustafâ"*, part 1, p: 33; Shâîbî, *"Al-Muwâfaqû*”, part: 3, pp: 298- 304.

\(^{215}\) Ibid.
However, while there is unanimity on the four main sources of law, there are considerable differences of opinion on the validity and application of the controversial sources.
Chapter Two

2.0 DEVELOPMENT OF IJTIHĀD BY RA’Y (JURISTIC OPINION) IN THE CONTEXT OF ISTIḤSĀN

Following the end of the period of the revelation, Islamic law was developed with great effort by those who had the authority and expertise, despite the rapid changes in social, economical and political life. It is undeniable that the jurists' contributions had added to the great enhancement of Islamic law in its ability to manoeuvre and its skill to be flexible; therefore Islamic law is described as a law made by jurists.¹

In order to assess the concept of istiḥsān (juristic preference) it is necessary to first consider its basis, for it is possible that the main source of inspiration behind istiḥsān is the concept of ra’y (personal opinion in juridical judgment). The criteria of personal judgment in istiḥsān indicate a direct relationship between istiḥsān and ijtihād by ra’y which is a personal judgment. Moreover, it is viewed that istiḥsān is a product of ijtihād. In fact, Abū Ḥanīfah performed ijtihād from his personal opinions (conforming to the Qur’ān and the Sunnah) by saying, “Qiyās rules this, but we ‘nastabsinū” (prefer) that, or we proved this by istiḥsān contrary to qiyās, or the qiyās of this is so and so and the ijtihād of this is so and so, and the ijtihād we take”².

2.1.0 Concept of ra’y (opinion):

The word ra’y is derived from the verb r‘ā which means to see something or somebody; later it was used as a verbal noun. It may also denote a dream or vision; a view; or that which is known only by heart but cannot be seen with the eye i.e. an

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opinion. It can also mean *i'tiqād* (faith, belief), *zann* (assumption), *ʿilm* (knowledge, science), *ʿaqīl* (reason, intellect, mentality), *taḍbīr* (precaution), and *iṣābah* (target).

Ibn al-Qayyīm (d.751/1350) points out that one aspect of *ra'y* is “after considering a subject and making a judgment from the heart, a search through the evidence and inferences, both which have their own considerations, is made to implement the truth, reality”. Rāghib al-ʿIsfahānī (d.502/1109) defines the word “*ru'yah*” as “To perceive an object which is seen”; this perception is divided into the following parts: 1. the five senses and that which replaces the senses in a similar activity. 2. *wahm* (illusion- false impression) and *tahayyul* (imagination) 3. *tafakkur* (contemplation), 4. *ʿaqīl* (intellectual faculty), *iḍrāk* (perception).

2.1.1 Historical perspective of *ra'y*:

Studying the concept of *ra'y* from the historical perspective shows that there have been different views as to when it was first used. It is the view of the majority of scholars that the use of *ra'y* began during the period of the Prophet’s life time. The *ṣaḥaba* (Companions) applied *ijtihad* by *ra'y* according to their perception of an action of the Prophet.

An alternative point of view with regard to the ruling based on *ra'y* suggests that the practice of *ra'y* was used only after the death of the Prophet. The practice was used when the Companions were faced with issues that had not been detailed in the *Qur'ān* and the *Sunnah*. This view is disputed by scholars such as Ibn Khaldūn.

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4 Ibn Manẓūr, ibid: XIV 300,301.
5 Ibn al-Qayyīm, “*Iʿlām*”, i, 113.
(d.808/1405) and Ibn Ḥazm (d.456/1064). According to Ibn Khaldūn: “The ḥākim had
been taught either during the time of the Prophet through revelation, which was sent
to the Prophet, or his direct speeches and attitudes; therefore it was unnecessary to
apply intellectual reasoning or analogy (qiyyūs)”. ⁸ Ibn Ḥazm says “The claim that raʾy
appeared at the time of the Companions had nothing to do with Companion’s actions,
contrary to the report that the Companions used raʾy (opinion); the validity of such
reports and narrations is uncertain.” ⁹ According to those scholars, the sources of
Islamic law at the time of Prophet are confined only to the Qurʾān and the Sunnah.
The ijmāʿ took form at a later period than the time of the Companions. The
application of analogy was used when a ruling on a matter did not have a textual
(nass) reference in the main sources of guidance. ¹⁰

It is well documented that the use of ijtihād by raʾy has been practiced from
the time of the Prophet; this is evident from several narrations. For example when the
Prophet saw the people of Medina fertilizing palm trees, the Prophet forbade it; when
he heard the account that the trees had become barren he said, “I’m a human, if I order
you to do something in the name of your religion then conform to it. However, if I
order something which depends on my personal raʾy (opinion), I am only a human”. ¹¹
In the famous tradition of Muʿadh Ibn Jabal (d.18/640), the Prophet asked: “How will
you judge when the occasion of deciding a case arises”? He replied: “I shall judge in
accordance with God’s book”. The Prophet asked: “(What will you do) if you do not
find guidance in God’s book”? He replied: “(I will act) in accordance with the Sunnah
of the Messenger of God”. The Prophet asked: “(What will you do) if you do not find  

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Wāfī, Nahḍat al-Misr, Cairo, iii, 1061-1062.
al-Raʾy wa al-Istīfān wa al-Taqlīd wa al-Taʾīl”, ed: Said al-Asghānī Maṭbaʿah al-Jāmiʿat al-
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guidance in the *Sunnah* of the Apostle of God and in God’s book? He replied: “I shall do my best to form an opinion and spare no pains”. The apostle of God then patted him on the chest and said: “Praise be to God who helped the messenger of the Apostle of God to find a thing which pleases the Apostle of God”. In support of this view, it is well known that the Companions practiced raʾy to achieve solutions on issues pertaining to juristic affairs.

It is obvious that the Prophet applied and practised *ijtihād* by raʾy in his lifetime. He taught and encouraged the companions to perform *ijtihād* by raʾy with regard to various issues.

2.1.2 Raʾy in terms of a judicial meaning:

The scholars of *uisūl* have called the practice of inference to arrive at a ruling *ijtihād*, *qiṣāṣ* (analogy) or raʾy (opinion). There are different views on whether raʾy is a kind of *ijtihād* or *qiṣāṣ*.

Ṣḥāfiʿī (d. 204/819) says that raʾy is not based on a validated source of *shariʿah*. He considered it to be only a performance of inferences that depends purely on intellectual reasoning and inclination. Therefore, he was critical of scholars who used raʾy in their *ijtihād*. He also distinguished between raʾy and *qiṣāṣ*, and considered them opposed to one another. Ghazālī (d.5005/1111) considers raʾy and *qiṣāṣ* as synonyms saying “Raʾy consists of comparing and representing any *ḥukm* (ruling) to itself”.

It is also the view of some Jurists, particularly the Ṣḥāfiʿī scholars that the concept of raʾy is synonymous with *qiṣāṣ* (analogy). Also taking into consideration

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the practice of the Companions (ṣaḥābāh) and the Successors (Tābi‘īn), some other scholars have considered it to be a kind of a comprehensive method of *ijtihād* as well as consisting of *qiyyās* (analogy), *istihsān* (juristic preference), *al-maṣāliḥ al-mursalah* (consideration of public interest), and *sadd al-dhārāʾ* (blocking the means).\(^{16}\)

Sarakhshī (d: 483/1090) is one of the jurists who believe that *raʾy* is more extensive than *qiyyās*. In an interpretation of the verse "Then take admonition, O you with eyes (to see)"\(^ {17}\) he explains that *iʿtibār* (admonition) means practising *raʾy* in place of that which has no *nass* (text) and *qiyyās*.\(^ {18}\) ‘Abd al-Wahhāb Khalīf (d.1956) says that *raʾy* is more comprehensive than *qiyyās*. He defines it as "Analogising and thinking in order to reach the right *ḥukm* (ruling) in a field where no *nass* (text) is available by the *shariʿah* provided for the purpose of inference."\(^ {19}\)

Shawkānī (d.1250/1834) points out that *raʾy* could have been applied to the explanation and interpretation of the *nass* (text), saying that "*Ijtihād* by *raʾy* can be the way of inference from *Qurʾān* and the *Sunnah*. It was originally permitted in *shariʿah* for the consideration of benefit and in cases of necessity."\(^ {20}\) Fāṭḥī Dirinī believes that the confinement of *ijtihād* to *raʾy* on issues which have no *nass* (text) is incorrect. He says that the Companions’ interpretations of the *nass* (text) should also be included in the circle of *ijtihād* by *raʾy*. For example, when Abū Bakr was questioned on "*kalālah*"\(^ {21}\), his response was "I will express my point of view on this issue; if it is

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17 Qurʾān: 59/2


21 *Kalālah* are those who inherit from the deceased who dies leaving neither ascendants nor descendants.
correct and rightly done then it is from God, if I fall into error it is from me and from Satan”.

Accordingly, we can see that ra’y has virtually the same meaning as ijtihād. Technically ijtihād is defined as “Maximum effort made by jurists to ascertain, in a given problem or issue, the shar’i rulings deduced from the general principles with the injunction of Islam and its real intent”. At first glance, there is a very close relationship between ijtihād and ra’y. However, it is clear that ijtihād is more comprehensive than ra’y. At the time of Companions and Successors, the constituent parts of ra’y were clear and extensive, as opposed to the nass, which is not obviously clarified and defined. Following that period, some jurists continued to use ra’y in the meaning of ijtihād in a wider range. At the same time, the majority of jurists confined the use of inference to issues where there were no nass (text) to reach a right and just hukm (ruling). In addition to qiyaṣ (analogy), they also used istiḥsān (juristic preference), al-maṣūlīḥ al-mursalah (consideration of public interests), sadd al-dharāʾi’i’ (blocking the means), and ‘urf (customary law) which agreed with the general aim of sharī’ah and its spirit. Hence, the field of ra’y is narrow as compared to that of ijtihād, but it is more comprehensive than qiyaṣ and consequently it is called “ijtihād by ra’y”.

2.1.3 Types of ra’y (juristic opinion):

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Many narrations have been reported by the Companions and the Successors over the validity of ra'y, as was the case with *istihsān*.  

Generally, Ibn al-Qayyīm (d. 751/1350) has divided ra'y into three types: ra'y *sāḥīh* (valid, authentic), ra'y *bāṭil* (invalid; null, and void), and ra'y *mashkūk* (doubtful, uncertain).  

1- Ra'y *sāḥīh* (valid, authentic): This is ra'y which does not contradict the textural evidence (*nass*) but rather supports and confirms it; therefore it is true and valid.  

2- Ra'y *bāṭil* ((invalid, null, and void): This is rejected since it contains elements that are harmful and dangerous to the religion. The following are included in this category: ra'y that is rejected because it is against *nass* (text), which confirms that it is invalid and void, ra'y which relies on pure 'aql (intellect and reason); ra'y which causes changes to the Sunnah of Prophet or can lead to heresy.  

3- Ra'y *mashkūk* (doubtful, uncertain): The early scholars gave permission to perform ra'y *mashkūk* to give *fatwā* (formal legal opinion) and *ḥukm* (ruling). However, there has to be sufficient grounds to justify this and only then when there is no other option to arrive at a solution. No one is forced to perform ra'y *mashkūk*, nor is opposition considered to be *ḥarām* (unlawful); no one who follows it is considered to be against religion or those who oppose it to be following the religion. Hence, one has the freedom to choose between accepting and rejecting this type of ra'y.

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26 Ibn al-Qayyīm, "I`lām", i, p: 103.  
28 Ibn al-Qayyīm "I`lām", i, p:104.  
30 Ibn al-Qayyīm, "I`lām", i, p: 105-106.  
2.2.0 CONCEPT OF IJTIHĀD

Ijtihād is one of the most important key words of sharī'ah (Islamic Law) and the aim to comprehend the purpose of the Qur'ān and the Sunnah. The main purpose of law is to maintain the continuity of answering people's needs. A legal system which answers questions of its era while offering solutions for future generations can be realized by constantly renewing itself. In this sense, ijtihād has very important functions in keeping the law alive, which is one of the main dynamics of the sharī'ah.

2.2.1 Exigency of ijtihād (performing personal judgment):

The use of ijtihād to derive sharī'ah rulings is crucial for everyday life. Today's Muslims actually need two types of ijtihād: the first is to understand its nature by preferring and choosing ijtihād to select the main objectives of the sharī'ah rules. The most basic of sharī'ah rules is to accommodate the benefit of people and the most suitable opinions for modern life's circumstances. These rules have been handed down from former jurists. The second type is the derivation of new rulings in law using legal methods such as qiyās, istiḥsān, maṣlahah, istiṣlah, 'urf, and so on, where the jurists' performance of ijtihād has room for manoeuvre, according to Qaradāwī. 32

Ijtihād is a very demanding requirement in modern day life, and therefore it is sometimes an individual duty (farḍ 'aynī) and sometimes a collective duty (farḍ kifāyah) for Muslims. 33 If the requirement of ijtihād is ignored then the whole Muslim community will be considered sinful. The scholars unanimously agree that ijtihād is included in the scope of the following verses: “So keep your duty to God and fear

Him as much as you can”\textsuperscript{34} and “Then take admonition, O you with eyes (to see)”\textsuperscript{35}. Qarafi expresses his anxiety, saying “God save us if there is not an available competent mujtahid.”\textsuperscript{36}

The Qur’an indicates that the use of \textit{ijtihād} is a religious duty and encourages Muslims to avoid disagreements amongst themselves. When they differ, the Qur’an refers them to the Messenger of God or the one who is in authority amongst Muslims (\textit{‘ulul amr}): “O you who have believed, obey God and obey the Messenger and those in authority among you. If you differ in anything amongst yourselves, refer it to God and His Messenger. If you believe in God and in the Last Day. That is better and more suitable for final determination.”\textsuperscript{37} Referring the disagreements to God and His Messenger is an effort made to find solutions according to \textit{nass}; this is an example of \textit{ijtihād} \textsuperscript{38} and an encouragement to Muslims to perform \textit{ijtihād} in the future.

The Sunnah of the Prophet encourages the use of \textit{ijtihād}.\textsuperscript{39} “When a judge exercises \textit{ijtihād} and gives a right judgment, he will have two rewards, but if he errs in his judgment, he will still have earned one reward.”\textsuperscript{40} Another example of this concept is the case of the hadith of Mu‘ādh.\textsuperscript{41}

Shāfi‘i (d.204/819) believes that the rulings inferred by \textit{ijtihād} have a divine character: “The rulings which are inferred by \textit{qiyās} are considered to have a divine quality”.\textsuperscript{42} “The rulings of many cases where there are no direct indications in the Book or the Sunnah have to be deduced by means of \textit{qiyās} (analogy) and

\textsuperscript{34} Qur’an: 64/16.
\textsuperscript{35} Qur’an: 59/2.
\textsuperscript{36} Qarafi, “Tanglh”, 4\textsuperscript{th} chapter of \textit{ijmā‘}, quoted from Ibn Āshūr, \textit{Maqāsid al-Shari‘ah}, p: 197-198.
\textsuperscript{37} Qur’an: 4/59.
\textsuperscript{38} Shāfi‘i, \textit{Al-Risālah}, 368.
\textsuperscript{39} Shāfi‘i, \textit{Al-‘Umm}, 7/272.
\textsuperscript{40} Abū Dāwūd, \textit{Sunan} iii, 1013, Ḥadīth no: 3567; Bukhārī \textit{Saḥīḥ}, 8/157.
\textsuperscript{41} Abū Dāwūd, iii, 1019 Ḥadīth no:3585.
\textsuperscript{42} Shāfi‘i, \textit{Al-Risālah}, 81, 368.
interpretations of the *nass*'.\(^{43}\) Juwaynî (d.478/1085) says that, "When there is no direct trace within the *nass* nine out of ten rulings and legal opinions (*fatwā*) are deduced by way of personal opinions (*ra’y*) and inferences."\(^{44}\)

According to Fazlur Rahman, the *Qur’ān* should be our guidance and the *Qur’ān*'s general principles, values, long term purposes must be determined and systemized; it is important that these principles and purposes are to be formulated and conveyed into the present time. They could become applicable for recent issues pertaining to humankind; in other words, determined principles and purposes should be rationally integrated into present circumstances.\(^{45}\)

In his model, the principle of *ijtihād* would be performed as a 'double movement': "the process of interpretation proposed here consist of double movements, from the present situation to the *Qur’ān* times, and then back to the present."\(^{46}\) First, travelling to the time of the revelation of the *nass* verses must be investigated, the wisdom behind them discovered, and the purpose of the revelation considered along with their historical circumstances. It is necessary to discover and comprehend the *Qur’ān*'s purpose in its entirety and its detailed response to particular circumstances. Generalizing the individual responses sets the precedent for future ethical and social structures. Secondly, returning to the present and pertaining the general systemized principles to issues. This requires from us that the present circumstances be analyzed in detail with its various constitutive components. Historians, sociologists, moralists, should co-operate in the *ijtihād* of the double movement.\(^{47}\)

\(^{43}\) Ibid: 368; Shafi‘ī *“Al-Ūmm”*, 3/85, 278.

\(^{44}\) Sayyid ‘Abbī, *“Usūl al-Tashrīḥ”*, v: 9, p: 344.


\(^{46}\) Ibid: p: 5.

If people do not consult the Qurʾān and give credence to its fixed ideas, the double movement process would be the sole hope for an ideal technique for a successful interpretation.  

Shahristānī (d. 548/1153) believes that performing ijtihād is an obligatory duty:
"Definitely we know that either ‘ibādāt (worshiping) or taṣārurūfūt (transactions) are numerous and can not be calculated. We also have to realise that every single matter has not been revealed in the naṣṣ (text), for it would not be practical. Therefore in respect of the unlimited matters, performing ijtihād is an obligatory duty."  

Ibn Šiddīq indicated that a mujtahīd has two ways to obtain the objectives of the lawgiver in the naṣṣ. These are as follows:

a- linguistically investigating naṣṣ. While doing this investigation, the general principles become a part of an activity and if the general principles and particular principles are not in harmony then the general principles are preferred.

b- Investigating naṣṣ in the context of the objectives of the shariʿah.  

Generally, the main sources of shariʿah are first divided into two parts:

1. Al-Qurʾān

2. Al-Sunnah

Ijtihād is the main method of making new rulings in Islamic law relying on the two main sources.

The Qurʾān has pointed to such issues in sūrah al-Nisā': "O you who believe! Obey God and obey the Messenger (Muḥammad), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to God

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48 Fazlur Rahman, "İslami Çağdaşlaşma", in Islamic research magazine, p: 318.
and His Messenger, if you believe in God and in the Last Day. That is better and more suitable for final determination."  

The Prophet taught the Companions how to practice *ijtihād*. When the Prophet intended to send Mu‘ādh Ibn-Jabal (d. 18/640) to Yemen, the Prophet asked him: “How will you judge when the occasion of deciding a case arises?” He replied: “I shall judge in accordance with God’s book.” The prophet asked: “(What will you do) if you do not find guidance in God’s Book?” He replied: “(I will act) in accordance with the *Sunnah* of the Messenger of God.” The Prophet asked: “(What will you do) if you do not find guidance in the *Sunnah* of the Apostle of God and in God’s Book?” He replied: “I shall do my best to form an opinion and spare no pains.” The apostle of God then patted him on the chest and said: Praise be to God who helped the messenger of the Apostle of God to find a thing which pleases the apostle of God”.  

Sa‘īd Ibn al-Musayyib narrated a hadith and said: “I asked the Messenger of God, O! Messenger of God what shall we do when we face a problem, which has no answer in the *Qur’ān* and the *Sunnah*?” The Apostle of God said: “Your scholars (‘ulama’) come together, or worshippers come together from among the believers, and make consultation among yourselves; do not judge on the basis of only one opinion.”  

As we can see, the Prophet encouraged the Companions to perform *ijtihād* during his life time. The encouragement of people to perform *ijtihād* gave them the ability to find answers to their problems, and to open doors that would never be

51 Qur’ān: 4/59  
52 Abū Dawūd, iii, 1019 Ḥadīth no:3585.  
closed. When ‘Umar ibn Khattāb appointed Shurayh as a judge to Kūfah, he said to him: “First of all look into the Qur’ān as though it was revealed to you without asking anyone, then rule with it. If you cannot find what you are looking for in the Qur’ān then follow the Prophet’s Sunnah. If you cannot find the right guidance in the Sunnah then perform ijtihād by ra’y with your personal opinion and consult the people of righteousness (virtuousness, justness) and honesty.”

2.2.2 Definition of ijtihād

2.2.3 Linguistically:

Ijtihād is derived from two words; the word juhd which means exertion of effort or energy; and jahd which means the forbearance of hardship, that is striving and self-exertion in any activity which entails a measure of hardship. It would thus be suitable in order to use jahada in respect of one who carries a heavy load, but not so if he carries a trivial weight. Ijtihād is the expenditure of efforts to arrive at righteous judgement; it could be either physical such as walking, working or intellectual such as inference of a ruling, or juristic and linguistic theory.

2.2.4 Technically:

The juristic meaning of ijtihād has several definitions according to the scholars of usūl. Some define ijtihād in accordance with the action and activity exerted by the jurist to arrive at a solution. Ghazālī (d.505/1111) defines it as “Total expenditure of effort made by a jurist for the purpose of obtaining the religious rulings.”

Āmidī (d.631/1233) defines ijtihād as the expenditure of the total efforts in search of zann (probability), to the extent that the jurist feels obliged to exert himself

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54 This is my view but also it is still a controversial subject. A more detailed discussion on the “gate of ijtihād” appears in the final chapter of this work.
further in proving the ruling being correct. Āmīdī’s definition of *ijtihād* implies that it is not enough to exert efforts only; the jurist should feel that he has spared no effort to ensure he could pursue the issue further. According to Āmīdī, “*ijtihād* is the application of the jurist using all of his faculties either in inferring the practical rules of *shariʿah* from the sources, or implementing such rules and applying them to a particular issue.”\(^{58}\) The definitive rulings of *shariʿah* that are known by necessity are therefore excluded from *ijtihād*, such as the five pillars of Islām, rulings related to Islamic *ʿaqīdah* (belief) and realization of the attributions of God; all these are determined by explicit textual statements. There is only one correct view in regard to these matters and anyone who differs is wrong.\(^{59}\)

Qarāfī (d. 684/1285) defines it as “The expenditure of total effort while considering a case which is condemned by religion.”\(^{60}\)

Isnāwī (d. 772/1370) defines *ijtihād* as, “Expenditure of effort to arrive at and realize the rulings of *shariʿah*, whether definitive (*qatʿī*) or probable (*zanni*)”.\(^{61}\)

Kamāl Ibn Al-Humām (d. 861/1457) defines *ijtihād* as the expenditure of efforts by the *faqīḥ* to arrive at a juristic ruling, such ruling being either rational (*ʿaqīlī*) or transmitted (*naqlī*), definitive (*qatʿī*) or speculative (*zanni*).\(^{62}\)

Ibn Ḥāzm (d. 456/1064) differs and defines *ijtihād* as “Investigating the rules of God solely in the Qurʾān and in the Sunnah”.\(^{63}\)

Fazlur Rāhmān defines *ijtihād* technically as “The effort to understand the meaning of a relevant text or precedent in the past, containing a rule, and to alter that

\(^{58}\) Āmīdī, “*Al-İfıkām*” v: 3 p: 204

\(^{59}\) Ibid.

\(^{60}\) Qarāfī, “*Sharḥ*”, 189.

\(^{61}\) Isnāwī, “*Nihāyāt*”, v:2 p:232.


\(^{63}\) Ibn Ḥāzm, “*Al-İfıkām*”, 41, pp: 977, 1155; and “*Ibtal al-Qiyās*”, 42.
rule by extending, restricting or otherwise modifying it in such a manner that a new situation can be subsumed by a new solution."64

2.2.5 Validity of *ijtihād:*

There are many verses which appear to validate *ijtihād* in the Qurʾān: "Verily, in these things, there are āyāt (proof, evidences, lessons, signs, etc.) for people who reflect."65 "Verily, in these things, there are āyāt for the people who understand."66, "Surely, We have sent down to you (O Muḥammad) the book (this Qurʾān) in truth that you might judge between men by that which God has shown you".67 These verses support the use of *ijtihād* by way of qiyās (analogy).68 The following verses obviously indicate the validity of *ijtihād: "... and consult them in the affair."69, "... and who (conduct) their affairs by mutual consultation."70

In addition, many *ḥadīth* also validate *ijtihād: It is narrated that `Amr Ibn al-ʿĀṣ heard the Prophet say: "If a jurist exerts efforts and arrives at a correct ruling he will be rewarded twice, and if he arrives at a ruling which is in error he will be rewarded once"71.

The *ḥadīth* of Muʿādh Ibn Jabal, as mentioned above, is a very good example of validation. "I shall spare no pains to do my best to form an opinion."72

According to Dasūqī, *ijtihād* which is valid and unanimously accepted is to be used by all jurists. The practice of *ijtihād* is a key to the progress of the development of Islamic law, and opens a gate to Islamic *fiqh* that will develop the law when dealing

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65 Qurʾān: 13/3
66 Qurʾān: 13/4
67 Qurʾān: 4/105
68 Amidi, "AI-Iaflcäm' v: 3 p: 140.
69 Qurʾān, 3/159
70 Qurʾān, 42/38
72 Narrated from Tirmīzī, Dārimī, "Sunan", Abū Dāwūd, iii, 1019 Ḥadīth no: 3585.
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with new issues. Muḥammad Al-Dasūqī says that the use of *ijtihād* is a kind of revelation of Islamic *fiqh.*

### 2.2.6 Types of *ijtihād:*

After considering the divisions of *ijtihād* based on the *maqāsid* (objectives of the *sharī'ah*), we should assess its classical typology. As for *ijtihād* based on the *maqāsid,* Muḥammad Tahir b. ‘Āshūr (d.1973) says that it has five main divisions.

**a-** Comprehending the commands of the *sharī'ah* and its *nass,* which must be in the context of linguistic meanings and *sharī‘i* (legal) meanings.

**b-** Cases which are contradictory to *nass* must be examined with a view to *naskh* (abrogation), *takhsīs* (specifying the general), and *rājīh* (preference).

**c-** To perform analogy based on the effective cause, which is obtained from the rulings.

**d-** Creating a rule in an area where there is no availability of *nass* (text) and analogy.

**e-** The *ta‘ābūdī* (worship) rulings would be accepted as they are.

In performing *ijtihād* the jurist is to consider these five divisions; a jurist needs to know the objectives of the *sharī'ah* (*maqāsid al-sharī'ah*).

*IJtihād* with regard to the amount of effort exerted by the *mujtahid* is divided into two types:

**a-Full or Complete *ijtihād***: The *mujtahid* exerts all efforts possible in searching and investigating until he feels that he is incapable of further efforts. This is what Mu‘ādh Ibn Jabal indicated in the *ḥadīth* stated above “I shall spare no pains to do my best to form an opinion.”

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75 Ābu Dāwūd, “*sunan*”, iii, 1019 ḥadīth no:3585
b-Imperfect (Incomplete) *ijtihād*: when there is a lack of effort in searching and investigating. This type of *ijtihād* is not considered as *sharīʿi ijtihād*.

Ghazālī (d. 505/111) was the first to divide *ijtihād* into two categories in general:

1. Absolute (*muṭlaq*) *ijtihād*: This is where the *mujtahid* is unrestricted by the rules of a particular *madhhab*. This level of *ijtihād* is for those who have fulfilled all the requirements of *ijtihād*, and also deduced the *aḥkām* from the evidence in the sources.

2. Limited (*muqayyad*) *ijtihād*: This is where the *mujtahid* expounds the law within the confines of a particular school while adhering to the principles laid down by their *imāms*.

*Ijtihād* is also divided into the general and the specific:

1. General (*ʿām*) *ijtihād*: deals with all sections of Islamic *fiqh*.

2. Specific, individual (*khas*) *ijtihād*: deals with a particular section of *fiqh* or evidence such as *ijmāʿ* and *qiyyās*.

Further classifications are individual and collective as follows:

1. Individual *ijtihād*: is when a person fulfils the conditions or requirements of a *mujtahid* without any contribution or participation by another *mujtahid*.

   Alternatively, it is an *ijtihād* performed by several *mujtahids* on an issue in which there is no evidence of agreement on an opinion. The above type of *ijtihād* is that which the hadith of Muʿādh Ibn Jabal has indicated.

2. Collective (*jamāʿī*) *ijtihād*: This is the *ijtihād* where consultations take place amongst scholars and jurists regarding current issues of importance to the general

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public. This type of *ijtihad* has been proven by the textual statement of the *Qur'ān* and the *Sunnah* as well as the works of the Companions and their Successors.  

2.2.7 Conditions of *ijtihad*:

The aims of the conditions are to ensure the ability of a person to perform *ijtihad*. The earliest complete account of the qualifications of a *mujtahid* was given in Abū al-Ḥusayn al-Baṣrī’s (d.436/1044) “*Al-Muʿramad fī Usūl al-Fiqh*”. Shīrāzī (d.467/1073), Ghazālī (d.505/1111) and Āmīdī (d.632/1234) later accepted the broad outline of Baṣrī’s exposition, with minor changes. This does not mean that the requirements of *ijtihad* received no attention from the ‘ulamā’ who came before Baṣrī.

The first condition is “to perceive the *maqāsid* (objectives) of the Lawgiver. The second condition, in the same context, is to have the ability to infer rules based on awareness of the *maqāsid*. Uṣūlī scholars for many centuries prepared extensive lists of the abilities jurists must possess to enable them to perform *ijtihad*. Some increased and others decreased the conditions. An outstanding scholar, Shātibī, ignored these lists and reduced the conditions of *ijtihad* to one comprehensive point: the precise comprehension of the *maqāsid* and in the light of this comprehension the ability to deduce rules from the sources.

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81 Hallaq, “*The Gate*”, p: 14-17.
Ibn al-Subki (d.771/1370) mentions the conditions of *ijtihād* in his book “*Jamʿ al-Jawāmi’*”. 85 In the explanation of “*Minhāj*”, Ibn al-Subki stated that one of the conditions of *ijtihād* is “to know the objectives of the Lawgiver before specializing in that field”. 86

Şuyūṭī (d.911/1505) quotes from “*Al-Tanqīḥ*” of Aminuddin b. Muḥammad Tabrīzī (d.621/1224) the following statement: “Knowledge of providing evidence of rulings is obtained by investigating every single word of the main sources (the *Qur’ān* and *Sunnah*) in the context of the *maqāṣid*”.

Shāṭibī believes that there are some who think that they are competent in the concept of *ijtihād* but who are unable to perceive the objectives of the Lawgiver. Their self-belief in their ability to arrive at just a ruling undermines Islamic law. Shāṭibī says: “the incorrect use of partial ruling destroys the general principles. Without realizing their lack of knowledge in understanding the *maqāṣid al-shari`ah* questions are never asked, and the ruling is established with the first thought that comes to mind, with no further investigation deemed necessary…”

If a ruling relating to people’s needs is adequate and the mufti does not possess the ability to comprehend God’s purposes the ruling may cause problems and therefore it is necessary for the mufti to understand the *maqāṣid al-shari`ah*. 89

### 2.2.8 Status of the gate of *ijtihād*:

The conditions of *ijtihād* stated above are the criteria for anyone who wants to qualify in practicing *ijtihād*, irrespective of the era in which the person may live. In later centuries, restrictions were imposed on *ijtihād* which, by the end of the third century, led to the allegation that the Gate of *ijtihād* was closed. The closure of the

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87 Raysūnī, ibid, p: 355.
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Gate of *ijtihād* arose in order to prevent those who were incapable of practicing *ijtihād* -yet who claimed to do so- from bringing the concept into disrepute. To those who are capable, the doors to the gate of *ijtihād* remained opened.  

Furthermore, recent western scholars, in particular Wael Hallaq, and W. Montgomery Watt, have indicated that the door of *ijtihād* is still open and the term “The closing of the door of *ijtihād*” is a myth. In reality, the door of *ijtihād* was never completely closed, as properly qualified scholars must have the right to perform *ijtihād* continuously. *IJtihād* is not confined to the four schools of law and can be performed by all capable scholars. Consequently, the gate of *ijtihād*, in my personal opinion, is still and must remain open.

Dihlawī (1703/1762) strongly criticizes those who claimed that the door of *ijtihād* was closed. He calls them: “The simpletons of our time” who are, “totally averse to *ijtihād*. Like she-camels, in the nose of which a piece of wood is put to guide them, they do not know where they are going”. *IJtihād* is actually a *fard kifāyah* (a collective duty, the fulfilment of which by a sufficient number of individuals excuses the other individuals from fulfilling it) for every epoch since “every age has its own countless specific problems, and cognisance of the divine decisions with respect to them is essential”. He continues: “The occupant of this office is qualified to exercise *ijtihād* whenever an affair arises for which he does not find an unequivocal judgement of the founder (*imām*) of the *madhhab*; he has the right to elicit judgements in the same manner and by preceding analogously the verdicts of the *imām*.”

I shall elaborate about this study further in the final chapter.

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2.3.0 Implementations of *ijtihād* at the time of the Prophet:

At the time of the Prophet many *ahkām* (rulings) and legislations were determined by *waḥy* (revelation). The solution of an issue or problem encountered during the life of the Prophet was either by revelation or by the Prophet through inspirations. Even in situations where there was no revelation, the Prophet used his knowledge based on experience and the use of *ra‘y* (opinion) to perform *ijtihād*. The Prophet is reported to have said, "When I do not receive a revelation I adjudicate among you on the basis of my opinion."94

If the Prophet made a mistake, it was corrected through subsequent revelations.95 Revelation was brought down to the Prophet revealing the messages to give general rules of guidance for issues pertaining to social life during his time and thereafter, ensuring that Muslims could carry out their affairs.96 However, according to Ashʿarīs, Muʿtazilah, Ibn Ḥazm al-Ẓāhirī and some Ḥanbalī and Shāfiʿī scholars the Qurʿān provides clear evidence that every utterance of the Prophet partakes of *waḥy*. A specific reference is made to the verse, which provides: "He says nothing of his own desire; it is nothing other than revelation sent down to him."97 This verse is quite categorical on the point that the Prophet is guided by divine revelation and that all his utterances are to be seen in this light. This would mean that all the rulings of the Prophet consist of divine revelations and are not considered to be *ijtihād*.98

Another view is that we can not judge the situation of the Prophet, owing to the conflicting nature of the evidence. This view is attributed to Shāfiʿī (d.204/819) and upheld by Baqillānī (d.403 AH) and Ghazālī (d.505/1111). Shawkānī

97 Qurʿān: 53/3.
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(d.1250/1834) however rejects this saying that the *Qur’an* gives us clear indications not only to the effect that *ijtihād* was permissible for the Prophet but also that he was capable of making errors. On the other hand the ‘ulamā’ who have supported this view say that such errors were not sustained, meaning that any errors the Prophet might have made were rectified by the Prophet himself or through subsequent revelation. To give an example on this point, the Prophet was blamed in the *Qur’an* for his errors. In 8:67 we read that “It is not fitting for a Prophet that he should have prisoners (of war) until he has thoroughly subdued the earth.”

This verse was revealed concerning the captives of the Battle of Badr. It was reported that seventy people were taken prisoner. The Prophet first consulted Abū Bakr asking, what they should do with the prisoners? He suggested that they should be ransomed, whereas ‘Umar bin al-Khaṭṭāb held the view that they should be executed. The Prophet approved of Abu Bakr’s view but then the verse was revealed, disapproving of taking ransom for the captives’ release. Elsewhere, in *sūrah al-taubah* in an address to the Prophet, we read: “God granted you pardon, but why did you permit them to do so before it became clear to you who was telling the truth?” This verse shows that the Prophet granted a pardon to those who did not participate in the Battle of Tabuk. These passages in the *Qur’an* indicate that the Prophet had on some occasions acted on his own *ijtihād*; had he acted in pursuance of a divine command there would have been no cause for a reprimand, or the granting of divine pardon for his mistakes.

The subject of whether or not *ijtihād* was used by the Prophet has been, from a very early period, discussed and disagreed upon by the scholars.

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101 *Qur’an*: 8/67
102 *Qur’an*: 9/43
Muslim scholars disagree as to whether the Prophet performed *ijtihād* by his personal opinion on issues such as daily maintenance, war and peace rules, rules relating to attack and defence, the solutions of disputes, or juridical and political issues. According to Ibn al-Humām some jurists of the Ḥanafi School have confined the *ijtihād* of the Prophet by *raʿy* to *qiyaṣ* in situations where there was no revelation.

The Prophet performed *ijtihād* by his own *raʿy* on several occasions and he educated the Companions to follow his examples; his instruction of the companions was practical rather than theoretical. The Prophet’s practice of *ijtihād* by *raʿy* provided the example for *qiyaṣ* (analogy), *istiḥsān* (juristic preference), *maslahah* (consideration of public interest), *sadd al-dharrāʾī* (blocking the means), and *ʿurf* (customary law).

For example a woman from Juhaynā came to the Prophet and asked: ‘My mother vowed to make a pilgrimage, but she died before she could fulfil the vow. Can I do it in her name? The Prophet said: “Yes, fulfil the pilgrimage instead of her; if your mother had a debt, would you not pay it? Pay your debts (fulfil your promises) because God fulfils promises to.” Here the Prophet has made a comparison between two similar things: he wanted to show that to fulfil a promise to God is the same as fulfilling a promise made to a human being. This type of analogy is called *awlāʾ*.

Another example of an analogy is as follows. A nomad tried to reject his ancestors by telling the Prophet: ‘My wife gave birth to a black baby’. The Prophet asked him “Do you have grey camels among your red ones?” When the nomad said that he did the Prophet asked him “Where did they come from?”

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They presumably look like his ancestors.' The Prophet then told him: 'Your child presumably also looks like his ancestors.'

The Prophet allowed most of the pre-Islamic 'Arab customs to be preserved, although a few were changed, such as trade, pawn, rent, salam (contract of purchase of goods with pre-payment), marriage, the equality between husband and wife and murder cases. When the Prophet came to Medina, he saw that the people there had made salam (forward sale) agreements for 1 or 2 years. To emphasise this he said: 'Anyone who makes salam agreements should do this according to specific measurements and for determined periods.' This practice, which was common among the 'Arabs, was practiced freely after a few amendments.

2.3.1.1 The practices of ijtihād in terms of istiḥsān:

Abū al-Hasan al-Karkhī (d.340/952) defines istiḥsān as 'The principle which authorizes departure from an established ruling to similar cases and authorizes applying an alternative established ruling to cases similar to those which set the precedent.' The departure is authorised only when there is enough reason to justify that departure. The departure from a ruling on a certain issue- one that has been applied to a similar case previously- to another ruling, must be based on clear evidence. The evidence which necessitates this departure, as viewed by the jurist, should be established by nass, or ijmā' (consensus), ċarūrah (necessity), 'urf (custom), maslahah (benefit), qiyyās khafīyy (Implicit analogy), or other sources, irrespective of the methods which the earlier, similar ruling depended on, such as dalil ċām (general evidence), qā'īdah fiqhiyyah (jurisprudence rule) or qiyyās zāhir jaliyy.

107 Bukhārī, "Ijtisām", 12; Muslim, "Līān", 18.
108 Sha'bān, "Islām Hukuk Ilminin Esaslari", pp: 176-177.
109 Bukhārī, "Salam", 1,2; Muslim, "Musāqāt", 25; Tirmīzī, "Buyū̀", 70; Abū Dāwūt, "Buyū̀", 57; Nasāī, "Buyū̀", 63.
(apparent clear analogy). This meaning of istihsān is according to Ḥanafi jurists; other jurists, especially Mālikī scholars, also applied this definition.112

Sometimes an issue is included within the range of a settled general rule with the common characteristic of nass or in the light of some evidence. However regarding the issue, another specific evidence is to be found which can be a nass darūrah, ‘urf or maṣlaḥah that can be used to judge in opposition to the common nass or the common rule. The mujtahid (competent jurist) must be convinced that this specific evidence is to be preferred before abandoning the practice of the common nass or common rule judgements that are used in such issues, and judging according to the specific evidence.

Sometimes when an issue is not within the range of a nass, qiyās is then used to judge. Here we come across two different possibilities, apparent clear analogy and implicit analogy. If the mujtahid finds that the second one is stronger (khaff qiyās) the judgment given accordingly is called istifzsän.113

Through istihsān some issues within the range of common nass and criteria such as difficulty, complexity, necessity, and need are removed because of their specific nature and a new judgement is given to this special situation to implement maṣlaḥah.

If one studies nass from the Qur'ān and the Sunnah, it is possible to find many examples on this issue. The principle of istihsān is used to remove the common nass or a settled rule from its area application. The mujtahid who applies this principle applies the essence of what the Shāri‘ wants for the people in any given situation or

113 ibid pp:162-163.
place in order to remove harm or discomfort, and establish *maslahah*. Istiḥsān is in the general sense concerned with the public interest and the mujtahid uses his judgement in the context of general rules by proving stronger evidence pertaining to the particular situation. The basis for the mujtahid's judgment could be *darurah* (necessity), *maslahah*, *urf* (custom), *ijmāʿ* or the nāṣṣ of the Qur'ān or the Sunnah.

When this evidence is nāṣṣ from the Qur'ān or the Sunnah, God becomes the one who actually gives this exceptional judgement, the one who makes istiḥsān, and it is by His announcement that this istiḥsān becomes legal.

As such it is the Shāriʿ who considers the special situations and circumstances with specific conditions, and who abolishes the difficulty, complexity and harm. This provides an ideal guide for the mujtahid. On this issue Muṣṭafā Zarqāʾ says: “The Qur'ān and the Sunnah are both istiḥsān, which is the creation of the Shāriʿ. The concept of istiḥsān is to guide the mujtahid when applying the nāṣṣ of the Shāriʿ to issues of life. The mujtahid makes istiḥsān inspired by the method that the Shāriʿ applies and in this way, the mujtahid implements the Shāriʿ’s purpose and intentions.”

The messenger and the explorer of the Qur'ān is the Prophet who applied the method, taught by the Qur'ān, from the general nāṣṣ and established rules to exceptional conditions and circumstances. There are a lot of examples on this issue to be found in the Prophet’s Sunnah. Before we examine these issues, I shall give a few examples mentioned in the Qur'ān:

Verse 4 of the sūrah an-Nūr says: “And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes and reject their testimony

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115 Ibid.
forever”. As seen in this verse, the accusation of adultery has a more damaging effect on society than the action itself. The ‘general sentence’ for a man that has seen a woman commit adultery is flogging. However, if the man who sees the woman commit adultery is her husband, then, according to the general sentence, the husband should stay silent or bring forward four witnesses; failure to produce these witnesses will result in his facing the sentence of flogging for qadhf (slander, accusation). This sentence obviously causes the husband to suffer. Therefore, in the case of a husband who accuses his wife of committing adultery but is unable to produce four witnesses to substantiate his claim, the court can, according to verse 6 of the same sûrah and the following sûrah, declare their marriage dissolved and the husband will not be punished for qadhf.117

According to the general rules, fasting during Ramaḍan is an obligatory duty for every adult Muslim. It is a condition that the Ramaḍan fast should be fulfilled during the month of Ramaḍan with the exception of those who are sick or travelling,

“And whoever is ill or on a journey, the same number – of days which one did not fast must be made up- from other days. God intends for you ease, and He does not want to make things difficult for you”.118

This is prescribed because of the special circumstances; a ruling is passed for difficulties that may arise.119 If the general sentence of the obligation of fasting applied to the sick and the travellers, such difficulties and sufferings might only delay

118 Qur’an: 2/185.
the healing process or lead to death of the sick. This would be in total contradiction to the Shāri‘a’s general aims, among which are ‘to protect human life’.

Among the Prophet’s Sunnah based on istiḥsān, some of the ijtihād by ra’y practices are these:

The contract known as salaf or salam (forward sale), is to sell something in return for cash and to show a commitment to deliver it in the future.\(^{120}\) There are two nasṣs concerning this issue. One is general and concerns the invalidity of the contract. The Prophet told Ḥākīm b. Ḥīṣām: “Do not sell something that you don’t own.”\(^{121}\)

The second nasṣ is more specific and concerns the validity of the contract. When the Prophet came to Medina, he saw that the people of Medina made salam (forward sale) for one and two years regarding the fruits of their labour. On this issue, the Prophet said “Those of you who sell goods with salam should do this according to stated measurements, scales and time.”\(^{122}\) The reason the Prophet changed his ruling on the permissibility of salam contracts was the present needs of the people.\(^{123}\)

The general sentence for theft in the Qur’ān is: “Cut off (from the wrist joint) the (right) hand of the thief, male or female, as a recompense for that which they committed, a punishment by way of example from God”\(^{124}\).

During a war, a man was caught stealing, and was brought to the commander Busr bin Artāf. The commander ordered him to be beaten and not have his hand cut off. He explained: “The Prophet prohibited us from severing hands during wartime.”\(^{125}\) The Prophet did not want the severing of the hand. The general ruling of the nasṣ was leniency shown to the thief therefore lessening the possibility the thief

\[^{122}\] Bukhārī, “Salam”, nos: 1,2 ; Muslim, “Musākāt” 25; Abū Dāwūd, “Buyū” 57.
\[^{124}\] Qur‘ān: 5/38.
\[^{125}\] Ahmad, “Musnad” IV, 181; Abū Dāwūd, “Ḥadūd” 19.
might join the enemy. The thief joining the enemy would cause serious problems; therefore, the leniency was justified.\textsuperscript{126} When two problems occur, the lesser of two evils is to be preferred.\textsuperscript{127} This principle is taken from the general naşş of the Shārī‘a.

During the Battle of Badr, ʿAbdāb b. Mundhir asked the Prophet about the first place picked for the camp: “O, Messenger of God! Is this a place that God has disclosed and we have to accept, or is it a raʾy or a war strategy? When the Prophet answered; “No, it is a raʾy and a war strategy”, ʿAbdāb said; “This is not an appropriate place. I suggest that we set up camp by the water, make ourselves a pond, fill it with water and close all of the other wells. This will deprive the enemy of water.” The Prophet accepted ʿAbdāb’s suggestion and changed the place.\textsuperscript{128} The Prophet by comparing the enemy to other living beings might have made the analogy. “You can’t deprive them of water just as you can’t deprive these of water.” However, ʿAbdāb, considering it was a time of war and that the enemy did not have the right to live, came to a different conclusion.\textsuperscript{129} At the end, the opinion that ʿAbdāb suggested was chosen and applied above the others, as it was more likely to further the cause of the Muslims.

The Prophet consulted his friends on the day of the Battle of Khandaq. They discussed coming to an agreement with the Gatafan polytheists, offering them one third of the fruits of Medina in exchange for leaving the battlefield. Saʿd bin Muʿadhd and Saʿd bin ʿUbādah stood up and said: ‘If this is the will of God we will listen and obey God’s order. If this is not a revelation but a raʾy we will only give them swords, because during ‘the age of ignorance’, when neither of us had a religion, they could

\textsuperscript{126} Hamawī, “Naṣṣurīyyār” pp: 138-139.
only get the fruits of Medina by buying them from us or if we treated them. Now when God has honoured us with His religion, we refuse to offer them anything except disparagement, and we swear that we can only give them our swords’. After this, the Prophet said: “I saw that the Arabs came together to be one against you and I wanted to send them away. You have the right not to accept it, there is no problem”130 and they insisted on their views.

The examples I have given are nass from the Qur‘ān and the Sunnah and show that in special circumstances, it is one of the Shāri‘s common goals to remove difficulties and complexities and thus confirm the principles of public need and interest. These rulings show that it is important to note the differences between similar events. One should not always look at events categorically, generally or prescriptively. If there are differences between events, it is necessary to give the ruling on merit. It would be apparently wrong to apply to analogy to events that appear to be in the scope of general rules and then attempt to include it as a general rule when in fact it is an exceptional one. In circumstances like these, the right way is to evaluate events with special features on merit, namely to apply istiṣān.131

The Prophet rejected an application to fix the price of goods, as it might be unfair to the seller.132 However Sai‘d b. al-Musayyab (d.94), Rabī‘a b. Abī ‘Abd al-Rahmān (d.136/753) Yahyā b. Sai‘d al-Anṣāri (d.147/760) and other jurists made a juridical decision regarding the pricing of goods based on their personal opinions regarding the economic climate of the day.133 Those scholars believed that an

understanding of public interest is crucial in order to protect people from incorrect 
āhkām.\textsuperscript{134}

According to Shaybānī, Ibrāhīm al-Nakhā‘ī said: “Supposing someone 
murdered someone else at his front door and alleged that he committed the crime in 
order to protect his goods and honour. To be able to give a verdict an investigation is 
carried out. The case may have two possible outcomes. In the first scenario, the law of 
retaliation is not applied, but the blood-money has to be paid even if the victim is 
guilty of stealing. However if the victim is known to be a respectable man, then the 
law of retaliation must come into effect. In the second scenario, the law of retaliation 
is also dropped, but the blood-money is paid, even if the victim is guilty of adultery 
and/or fornication. However, the murderer will be prosecuted if the victim is known 
as a person who is chaste and virtuous.”\textsuperscript{135} Ibrāhīm al-Nakhā‘ī gives more 
consideration to the spirit of the \textit{nāss} rather than the literal meaning, neither rejecting 
nor applying the law of retaliation based on false testimony but supporting his claims 
with evidence, thus avoiding incorrect judgements. Nakhā‘ī, with this legal opinion, 
considers nothing other than the public good.\textsuperscript{136}

In the view of some Iraqi scholars, the law of retaliation with regard to stolen 
goods comes into effect only when the value of the goods stolen exceeds a certain 
amount. For them, this minimum was set at five \textit{dirham} (silver coin), although the 
generally accepted minimum is usually ten. The minimum value of stolen goods is 
extrapolated by analogy from the minimum value of the marriage dowry. The Iraqi 
scholars, however, disagreed saying: “We are surprised that entering into a sexual 
relationship is allowed by so little an amount.” In addition, Ibrāhīm al-Nakhā‘ī did not

\textsuperscript{134} Shalabi, “\textit{Ta‘līf}, p: 79; Sha‘bān, “\textit{Islam Hukuk Ilminin Esaslari},” p: 108.

\textsuperscript{135} Shaybānī Muḥammad b. Ḥasan (d.189), \textit{“Kitāb al-Ādhār”}, Lahore, 1329, p: 102.

\textsuperscript{136} Shalabi, “\textit{Ta‘līf},” pp: 80-81; Karaman, “\textit{Ictihād},” p: 89.
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take a favourable view of the dowry being less than forty *dirhams* and resorted instead to *istiḥsān* which yielded more useful results than analogy.\(^{137}\)

At the time of the Companions and the Followers, to be a witness in court for the defence of close relatives – for one’s father, say, or one’s child – was allowed in accordance with the belief that “everybody’s testimony is valid if he is Muslim and righteous”.\(^{138}\) However, with the passage of time and the inevitable weakening of faith which occurred among the Muslim populace as a whole, jurists concluded that this ruling might no longer serve the needs of society, since the possibility of bias and injustice would bring untold harm to the social fabric. They rejected the testimony of relatives in order to prevent corruption and to preserve justice and social harmony. The juristic decision was confined to offspring, fathers, brothers and spouses.\(^{139}\)

It is a rule of Islamic Law when a woman is widowed that her mourning period should last for four months and ten days, during this which time she should not use *kohl* or perfume. A woman applied to the Prophet asking whether or not her widowed daughter could use *kohl* to aid her painful eyes. In spite of her insistence, the Prophet said “No” three times.\(^{140}\) However, Imam Malik (d.179), Sālim b. ‘Abd Allāh (d.106/724) and Sulaymān b. Yāsār (d.107/725) rule that a woman in such a situation may cure her eyes with *kohl* or another medicine.\(^{141}\) While there is no possibility that these followers would oppose the saying of the Prophet, they considered his prohibition as applying only to that particular woman, as her condition did not necessitate the use of *kohl*. Their judgement was correct, based on their

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\(^{140}\) Būḥkārī, “Ṭalāq”, 47; Muslim, “Ṭalāq”, 9; Bājī, “Al-Muntaqā”, vi, pp: 143-144; Mālik, “Muwaṭṭā” ii, 597.

\(^{141}\) Bājī, “Al-Muntaqā”, vi, 145.
consideration of the avoidance of hardship (raf' al-ḥarāj) and the attainment of benefit.\textsuperscript{142}

2.3.1.2 *Ijtihād* by *ra'y* of the Companions at the time of the Prophet:

At the time of the Prophet there is evidence that the Companions performed *ijtihād* by *ra'y*; these happened in the presence of the Prophet and during his absence.\textsuperscript{143} During this time, the concept of *ijtihād* dealt with *adhān* (call to prayer), *ghusl* (ritual ablution of the whole body) and the postponement of the prayer. The Prophet included rulings pertaining to law within the range of *ijtihād*.\textsuperscript{144} During the time of revelation and as long as there were no explanations or prohibitions from God, the Companions considered *ijtihād* to be permissible.\textsuperscript{145}

When an issue arose and no relevant verses could be found in the *Qur'ān* the Prophet performed *ijtihād* by his *ra'y* (opinion); he authorized the companions to use the same method under the same circumstances.\textsuperscript{146}

The Companions Mu'adh (d. 18 AH), 'Amr b. al-'Ās (d. 65 AH) and 'Uqbah bin 'Āmir (d. 58 AH) performed *ijtihād* in the presence of the Prophet.\textsuperscript{147}

Examples of this are as follow: During the battle of Dhāt thalāsi 'Amr b. al-'Ās was the head of a group of soldiers. During the war he became *junub* (a state requiring a ritual ablution of the whole body). His opinion was that if he washed himself as required the severe cold might kill him; consequently he made *tayammum* (to wash with clean sand or earth where water is unavailable) and led the prayer in front of his friends, saying: 'God says in the *Qur'ān* “Do not kill yourselves”. When

\textsuperscript{142} Shalahi, "Ta'lī"", p: 77; Karaman, "Ijtihād" p: 87.


\textsuperscript{145} Ibn al-Qayyīm, "Iḱām", I, pp: 281-282.


he returned he recalled this incident to the Prophet and the Prophet approved of it. Because of his fear that the severity of the weather might cause death, ‘Amr applied a practice which was permissible when there was no water or when the person was too ill to use water. I agree that ‘Amr has implemented a form of istihsän by taking ease as the basis in accordance with the spirit of the shari‘ah, but contrary to the general rule.

When ‘Ali was a qāḍī (Muslim judge) in Yemen he gave a ruling with ijtihād by ra’y. Three men had intercourse with the same woman over a certain period of time, the result of which was that, the woman gave birth to a child. ‘Ali asked the men to draw straws whoever drew the short straw would have the child acknowledged as his, and would pay two diyyah (monetary compensation of blood) to the other two men. When this incident was narrated to the Prophet, he acknowledged it. Muḥammad bin Ḥasan al-Ḥajawī (d.1956), evaluates this ruling during the Prophet’s lifetime as a form of istihsän. If this or any similar issues arose today modern technology would be the vehicle used to confirm paternity, therefore using technology can be a method of istifzän which is based on maṣlaḥah.

During the Prophet’s lifetime ijtihād was performed either by the Prophet or, with the permission of the Prophet, the companions, who were responsible for the concept of ijtihād. Performing ijtihād in this period was under the control of the Shārī‘a. Accordingly, personal judgment and human contributions were integrated into the life of Islamic law. This integration into the revelation is not regarded as strange. The corner stone, which is the maqāṣid al-Shārī‘ (objectives of the Lawgiver), has to be taken into consideration when performing ijtihād.

2.3.2.1 *Ijtihād* at the time of Companions:

It is difficult to distinguish between the Prophet’s lifetime and the beginning of the era of the Companions. Basically we have the period of the Companions (11-40/632-660); the period of the Successors (40-120/660-738); the period of the Successors of the Successors; and the mujtahid imāms (120-160/738-777). An alternative break down would be political, the Companions’ period occurs during the Rāshidūn caliphate, the Followers period would be during the Umayyad dynasty (40-132/660-750); and the last period spans both the Umayyad and ’Abbāsids dynasty.\(^{151}\)

After the time of the Prophet the Muslims invaded other countries with the intention to convince them to embrace the Islamic way of life. The borderlines of the Islamic countries stretched from Iran to Central Asia in the east, to Syria in the north, to Egypt in the west and later to other North African countries. These were the first contacts and relationships sprung up between the nations and the Muslims who settled there. Consequently, Medina and the surrounding areas were populated by foreigners. Muslims visited Mecca for *ḥajj* (pilgrimage) and *umrah*.\(^{152}\) All these factors created mutual influences between ‘Arabs and the visitors in every aspect of life. The traditions and customs of the people of Iran and Byzantium became mixed with those of the ‘Arab Muslims’, and the Islamic norm and systems of law based on the Qur’ān and the Sunnah were challenged.\(^{153}\)

When Muslims became aware of the events and traditions of the cities they visited, they recognised the values and the wisdoms to incorporate them into the

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\(^{151}\) Karaman, “*Ijtihād*”, p: 47.


Islamic law. This was the beginning of new developments within fiqh (Islamic law). 154

2.3.2.2 Concept of ra'y at the time of Companions:

The Companions from time to time used the name ra'y and, according to Shafii, qiyas and ijtihaad have the same meaning. 155 Most of the Shafii'is have adopted their imam’s view. 156 Al-Isnawi (d. 772/1310), alleges that ijma' and ra'y are qiyas. 157 Muhammed Khudari (d.1927) defends the view that the Companions used qiyas as a reference for new issues where no nass was evident, and called this ra'y. 158

Most of the jurists are of the view that the ra'y that the Companions employed was more extensive than qiyas, but was an ijtihaad that also included qiyas. When a Hanafi jurist ‘Abd al-'Aziz al-Bukhari (d.730/1330) was answering the objections to the hadith of Mu'adh he made this statement: ‘I'm making ijtihaad according to the ra'y of Mu'adh. The Prophet confirmed this through his silence. The reason for his silence was that he knew that ijtihaad was sufficient for all rulings. If ijtihaad was confined only to a qiyas with a known reason it would not be sufficient for even one in a hundred rulings. A prime example is the exchange between the Prophet and Mu'adh. When Mu'adh replied, “I act by the Book and the Sunnah”, the Prophet asked: “And then with what!”’. 159 Consequently, ra'y is a general term that includes analogy and other inferences. At that time, ra'y included an explanation of the nass, and a comparison of similar cases, which in time led to the establishment of methods

of inference such as istihsān, maṣlaḥah (benefit), ‘urf (custom) and sādd al-dhara’ī (blocking the means). 160

2.3.2.3 Analogy among the Companions:

During the time of the Companions, methods of ijtihād had not yet been codified. Ra’y is the given name for the rulings found through ijtihād for issues where nāsī could not be found. Analogy came under the name of ‘understanding’ (fahm), ra’y or ijtihād. 161 There were of course principles that they regarded when they made ijtihād. One example is as follows: ‘Umar wrote a letter to Abū Mūsā al-Ash’ārī (d. 44 AH) whom he had appointed as qaṣī to Basra: “On cases where you are not satisfied, you should think very carefully. Research them and try to find the similarities between two things. When you find similarities that effect the rulings then apply the method of analogy.” 162 These words conveyed the fact that he wanted Abū Mūsā to use analogy. Jaṣṣāṣ (d. 370) says the first generations used the same method, making analogies to establish rulings. 163

When the Companions chose Abū Bakr to be caliph they said: “Just as the Prophet chose him to be prayer leader, why do we not choose him to be political leader?” 164 Thus the Companions made an analogy between the Prophet’s choice of Abū Bakr as imām and their election of him as Caliph.

‘Umar was told: “Samrā took wine from Jewish merchants as a tithe (‘ushr)” 165 from which vinegar was made and sold’, ‘Umar replied: ‘God will give Samrā what he deserves. Does he not know that the Prophet says: ‘God has damned the Jews because, despite it being forbidden, they took the inner fat of animals,

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161 Zarqā, “Maḥkāmah”, i, p: 139.
165 This is a kind of tax which is taken from non-Muslim traders to allow them access to Muslim countries.
changed its appearance, sold it and spent the money.” In this incident, ‘Umar makes an analogy between the prohibited fat of animals and wine. In both cases, the prohibition includes the selling and spending of the money.

2.3.2.4 Istihsän among the Companions:

Even though the term istihsän had not been used in the technical sense before the Iraqi school, it existed in practice during the time of the Companions and was widely applied. An allusion to the kind of istihsän that existed in the periods following the Companions can be found in the letter that ‘Umar wrote to Abū Mūsā al-Ash’ārī: “...Research similar cases and when you find similarities that effect the ruling, apply the method of analogy. Using the results of the analogy select the ruling that adheres to the Islamic principles and ensures your conscience is satisfied that justice has been served.” According to the first part of his sentence, ‘Umar wanted the analogy applied as soon as the similarities are found and the result is deemed just. However, in the second part of his sentence he says that if this is not possible then a ruling that is in accordance with the basic principles of justice and equity should be given. In other words, if the analogy is not in keeping with the spirit of the shari‘ah, then the ruling of similarities should be abandoned in order to give a ruling according to the special evidence that is justice and equity (istihsän).

Some examples of istihsän as applied by the Companions:

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1. Muslim men are allowed to marry women from among the people of the Book (Christian and Jewish women), as stated in the Qur’ān 5:6.171 ‘Umar (d.23 AH) accepts this in principle, but he prohibited it because he believed it would be detrimental to Muslim women.172 In this example, we see conformity to maṣlaḥah, together with the principle of understanding and applying verses and ḥadīth by considering all the nass. ‘Umar has given a ruling that is in opposition to the general ruling of the nass in this special situation, according to the objective and spirit of the shari‘ah.173

2. According to the general ruling of nass those who inherit through ‘asabah (agnates) inherit what remains when those who are entitled (aṣḥābi furūq) have first received their shares. If nothing remains then they will be deprived of an inheritance.174 In one particular case ‘Umar acted according to the general basic rule175; the wife, the mother, siblings from the same maternal mother but from a different father, full brothers and half brothers from ‘asabah all acted according to its basic rule. Full brothers share by virtue of having the same mother. It is called “shared” (mushtarika) because the brothers share in the third, and is every question in which there is a husband and mother or grandmother, and two or more of the mother's

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175 The situation of full and consanguine brothers is as follows. If a man has no brothers, he inherits everything. If he has a full brother or a half brother with the same father the consanguine brother is excluded by the full brother if the latter is considered one of the ‘aṣabah, when there is no full brother a consanguine brother has this judgment. If there is a full brother, he excludes the half brother. If nothing remains, they receive nothing unless there are uterine brothers among the heirs who inherit a third. Then any full siblings, male and female, share equally with the uterine brothers in their third. This portion is called "shared" (mushtarika). Consanguine brothers do not share with the uterine brothers because they do not have the same mother. The rest of the heirs- Males only, or females only, or both- inherit two-thirds, like the wife, mother or grandfather, and this completes the estate.
Development of *ijtihād* by ra‘y in the context of *istihsān*

offspring, and ‘aṣabah in the form of full siblings. This is also known as the *himariyyah* case. That is because the case was presented to ‘Umar, and he wanted to judge the exclusion of the full brothers. Despite they are full brothers of ‘aṣabah, they were not entitled for the share. The full brothers objected to this judgment and said, “Consider if our father was a donkey (himār), do we not have the same mother?” So ‘Umar studied the case again and judged a third for all of them equally, full and uterine siblings, the portion of the man the same as the portion of the female.

In this matter the full brothers should, according to the general ruling of the *naṣṣ*, be deprived of inheritance as mentioned above. However, when ‘Umar understood that this was not in accordance with the general objective and spirit of the *shari‘ah*, and did not accord with justice and equity, he changed his opinion and gave sentence in accordance with the principle of *istihsān*.

3. The general ruling of Islam regarding conquered land and war booty is that it should be divided between the war veterans:

“And know that whatever of war booty that you may gain, verily one fifth of it is assigned to God, and to the Messenger, (Muḥammad), (and also) the orphans, the poor who beg and the wayfarer, if you have believed in God and in that which We sent down to Our slave (Muḥammad) on the Day of criterion (between right and wrong), the Day when the two forces met (the battle of *Badr*) and God is able to do all things.”

“And what God gave as booty to his Messenger (Muḥammed) from them, for which you made no expedition with either cavalry or camelry.”

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177 *Qur‘ān*: 8/41.
His Messenger (Muhammad) from the people of the townships, it is for God, His Messenger (Muhammad), the kindred (of Messenger Muhammad), the orphans, the poor who beg, and the wayfarer, in order that it may not become a fortune used by the rich among you.  

Nevertheless, this general ruling was not applied to the conquest of Iraq and Syria during the time of 'Umar. On the contrary, 'Umar thought that it would be more convenient to make this land the common property of Muslims. The land was to be left in the hands of its owners and taxes would be levied which would be used to pay the wages of judges, officials and soldiers. The taxes would also be used to help widows, orphans and those in need; in this 'Umar was forward thinking, believing that these taxes would be for the benefit of future generations. In this example of ijtihād 'Umar has abandoned the general ruling and adopted a ruling that would implement the maslaha for the future of the Muslims.  

4. A women from Ṣanā‘ plotted with her lover to kill her husband. The incident was reported to 'Umar by the governor of the city, Yā'lä bin 'Umayyah. 'Umar's view was the same as the general ruling of the nass namely that two people should not be executed for the killing of one. 'Ali defended the judgement to have them both executed in accordance with the spirit of the law of retaliation. Eventually 'Umar was persuaded and wrote to Yā'lä: 'Execute them both. If, by any chance, the whole city of Ṣanā‘ were involved in this murder I would have had them all
killed." 181. By this example of *ijtihād* `Umar and `Ali have given a ruling that is not in accordance with the Qur'ānic verses which deal with equity in punishment:

"O you who believe! *Al-qīsās* (the law of equality in punishment) is prescribed for you in the case of a murder: the free for the free, the slave for the slave, and the female for the female. But if the relatives (or one of them) of the murdered (person) forgive their brother (the killer) something (i.e. not to kill the killer by accepting the blood-money in intentional murders), then the relatives (of the victim) should demand blood money in a reasonable manner, and the killer must pay with handsome, gratitude. This is alleviation and a mercy from your Lord. So after this whoever transgresses the limits he shall have a painful torment. 182, "And We ordained therein for them: Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." 183

`Umar considered this in the beginning and was why he didn't want to apply the *qīsās* (retaliation) punishment. However with `Ali's contribution, the incident was studied in greater detail, which led to the view that the punishment of *qīsās* should be applied in keeping with the demands of *maṣlaḥah*, and the goal and spirit of the *sharī'ah*. The basis of *qīsās* is to implement justice and prevent further injustice. In this way if *istihlān* had not been applied to this case, then justice would not have been implemented and it would have opened the door for people with evil intentions. 184

182 Qur’ān: 2/178
183 Qur’ān: 5/45
As seen the *ijtihād* of the Companions is covered by the term *istihsān*: in all of these examples the rule of law is changed when conditions change and a fresh situation emerges. The Companions, when performing their *ijtihād*, have not acted in accordance with the given rules; instead, they have acted according to their own initiatives and principles, in keeping with the demands of *maslaha* and the removal of harm.

Consequently, as has been indicated, the work of *ijtihād* never stops; it continues progressively.

Thus we see that the Companions actually practiced *ijtihād*. Their method of *ijtihād* was mostly based on the *shūrah* (consultation), with there being no written juristic principles on which to base their rulings. In this period, the *mujtahid* (competent jurists) and the *muqallid* (the close and faithful followers of established rules) are indistinguishable from each other. *Ijtihād* was not restricted to any one individual or school of thought. Where *nass* was silent or not clearly identified, the Companions applied their personal opinions, and anyone had the liberty to perform *ijtihād*.

### 2.3.3.1 *Ijtihād* at the time of the Successors and after:

The Successors and the Successors of the Successors were the generation following the Companions. They also used *ra'y* in cases where *nass* was silent.

The term *ra'y* was not limited to *qiyaṣ* (analogy) during the period of the Companions; it also meant to understand and comment on the *nass*. One of the Successors of the Successors, 'Abd Allah b. Mubārak (d.181/797) said: "So long as it

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185 Hasan, "*The Early*", p: 145.
does not contradict it, use your personal opinion to interpret the *hadith*.” This emphasizes the role of ra’y in commenting on the *nasṣ* and the objectives of the *shari‘ah*.

Ra’y is also used in areas where there is no *nasṣ*. When Ḥasan al-Ībrahīm al-Baṣrī (d.110/728) was asked if the *fatwās* he uttered were rulings based on *hadith* or based on his ra’y?, he answered: “All the *fatwās* I utter are based on the narrations of *hadith*, however our ra’y is more beneficial to them than their own ra’y.” It is possible to understand that the Successors used ra’y in the way the Companions understood and applied it. It is understood that they used ra’y to understand the *nasṣ*. They also used other forms of ra’y such as *qiyās*, *istiḥsān*, and *maṣlahah* where there was no *nasṣ*.

To the end of the period of the Successors, ra’y was used particularly in the areas of belief, regarding ‘the superstitious beliefs of foreigners’ and in the areas of *fiqh* to define *qiyās*. In the *Tabaqāt* of Abū Ishāq Ibrāhīm al-Shīrāzī (d.476/1083), first, he was with those who applied *fiqh*, later he was with those who applied ra’y; ra’y is the *qiyās* of Abū Ḥanīfah (d.150/767); by this he meant ra’y is the last meaning.

We can see the practice of *ijtihād* by ra’y at the time of the Successors and after them. The jurists among the Successors, as their predecessors the Companions did, used *ijtihād* by ra’y to give a ruling only when they could not find a ruling in the *Book*, the *Sunnah* and the *fatwā*’ of the Companions. The use of this method can

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193 Karaman, “Ictihād” p: 82-83.
clearly be seen in the letter that 'Umar wrote to Qaḍī Shurāyḥ and in Ṣāḥīḥ (d.103/712) answer to the question: “When giving a ruling in court there are three principles: the Sunnah followed by ra‘y and then ijtihād”. The ra‘y they used included methods such as qiyās, istiḥsān, maṣlaḥah, and ‘urf. Even though methods were unnamed they were used widely and were in accordance with the spirit, meaning and efficiency of the sharī‘ah. In their ijtihād they observed the changing of social conditions, the needs of people and their maṣlaḥah. Muḥammad Khudārī describes the way the Companions and the Successors used ra‘y: “When the Companions and the Successors could not find a nāṣṣ in the Book of God or in the Sunnah of the Prophet they used a method they would eventually call ra‘y. They practiced ra‘y based on the general rules of the religion such as “Removing harm” and “Abandoning that which is doubtful”.

Khudārī goes on to say:

“The experts of ra‘y and qiyās consider the meaning and the true nature of the ruling of the Shārī‘. According to them the sharī‘ah has general rules which the Qur‘ān states and the Sunnah confirms. Accordingly there are principles which were taken from the Book and the Sunnah belonging to every part of fiqh and where there is no nāṣṣ on a certain case, jurists still attempt to produce a ruling. Their attitudes toward the Sunnah were such that so long as they were satisfied that a hadīth did

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not contradict the main principles, they would use it as the basis of *istihsân*. Amongst the predecessors of those who made *istihsân* with this *qiyaṣ* are 'Umar who was among the Companions in the first period; in the second period there was Ibn 'Abbās (d.68) and later Ibrāhīm al-Nakhāʾī (d.95) who was among the Successors".\(^{201}\)

Ḥammād b. Abū Sulaymān (d.120/738), the *muftī* of Kūfah and one of Nakhāʾī’s better students, was an authority in *fiqh*; he was also the teacher of Abū Ḥanīfah who followed in the footsteps of his teacher in *ijtihād* by *raʿy*. Ḥammād was the bridge between Nakhāʾī and Abū Ḥanīfah. The knowledge he acquired from his teacher he passed to his student particularly on the importance of thorough research when faced with complex cases, the goals of *Shārīʿ*, and interpretations of the *Qurʿān* and *ḥadīth*.\(^{202}\)

Zayd b. ʿAlī (d.122/740), and his contemporary Abū Ḥanīfah used *ijtihād* by *raʿy* to understand and comment on *naṣṣ* and where there was no *naṣṣ* methods such as *qiyaṣ* and *istihsân* were implemented.\(^{203}\) For example, when a pregnant woman dies, but the child in her womb is still alive, then a caesarean section is performed in order to save the baby, because God prescribes: "The one who saves one’s life is seen as have saved all human beings."\(^{204}\) In this *ijtihād* of Imām Zayd, a meaning of *istihsân* based on *maṣlaḥah* and need can be seen. Abū Ḥanīfah gave the same *fatwā* in similar cases.

\(^{203}\) Baltaji, "*Manāhij al-Tashrīʿ*", i, pp: 154, 158.
\(^{204}\) *Qurʿān*: 5/32.
Another contemporary of Abū Ḥanīfah is Ibn Abī Laylā (d.148/765) a faqīh who based his opinions on ijtihād by ra'y when giving fatwa. The Ḥanāfī jurist Abū Zayd al-Dabbūsī (d.430/1039) is one of the first of those who laid out the differences, based on ijtihād, between Abū Ḥanīfah, his followers and Ibn Abī Laylā. Amongst the ijtihād by ra'y methods that Ibn Abī Laylā' uses are qiyās, istiḥsān, 'urf, sadd al-dharrā'ī', and istiṣḥāb. Sarakhsī records that Ibn Abī Laylā practiced 'rational qiyās' which is a kind of istiḥsān. This practice was abandoned because of some of the practices of the Companions. Ibn Abī Laylā uses this method in the case of terminally ill men who divorced their wives to deprive them of their inheritance. According to 'rational qiyās' the husband's intentions were deemed to be vindictive and their wives were permitted to inherit on the understanding that they would not re-marry. Ibn Abī Laylā has applied this istiḥsān based on 'urf.

Was it Ibn Abī Laylā himself who called istiḥsān the 'abandoning of qiyās' he himself preserving to have his rulings on 'urf and the utterances of the Companions, or was it the Ḥanāfī jurists who came after him who called istiḥsān Ibn Abī Laylā's ijtihād'? There is no doubt that istiḥsān was Ibn Abī Laylā's ijtihād. However, the method that the Ḥanāfīs called istiḥsān is something that Ibn Abī Laylā practiced in his ijtihād. Another contemporary of Abū Ḥanīfah, 'Abd Allah b. al-Muqaffā' (d.139/756) was also well known for his opinion on ra'y, qiyās and istiḥsān. Ibn al-Muqaffā' notes that qiyās might cause discrepancies between rulings, and commented on how qiyās should be practised.

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205 Baltajī, "Manāhib", i, p: 246.
206 Ibid, i, pp: 249-257.
As Schacht (d.1969) indicates, the personal use of ra'y and istihsän can achieve unwanted results of qiyās. 211 According to Ibn al-Muqaffā', qiyās should be practised as long as it leads to maṣlahah, and applied if a positive result is achieved; however, if the result is negative then qiyās should be abandoned and the case with legal evidence should be used. 212

There are parallels between the thoughts of Ibn al-Muqaffā' and Abū Ḥanīfah, who both abandoned qiyās for istihsän. However, it is not apparent whether there has been interaction between these two, although it can be said that Ibn al-Muqaffā' shares similar thoughts to those of Abū Ḥanīfah, who became known for his teachings on qiyās and istihsän. 213

Conclusion:

The source of law in the first period was the Qur'ān and the Sunnah. The growth of the Muslim society engendered different social issues and problems, which meant that the established law based on the Qur'ān and the Sunnah needed to be reconsidered, expanded and re-interpreted to give adequate answers to new questions. As a result, Islamic law made improvements according to the circumstances of the era, and this practice is ongoing.

The independent re-considering and interpretation of the law was known as ijtihād. Personal opinion (ra'y) was the main element in ijtihād and become widespread, gradually paving the way for the development of qiyās (analogy) and istihsän. 214

For many years, it was the belief that only those with outstanding intellectual ability could be involved in the process of rational rule-making. The Qur'ān strongly

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213 Özen, ibid.
214 Hasan, "The early", p: 115
encourages people to contemplate every single Qur'ānic verse, and then use their intellect and personal opinions on the legal issues.\textsuperscript{215} The Prophet is a good example, for he always considered the opinions of the Companions on issues where the naṣṣ was silent.\textsuperscript{216}

The problems faced by the Muslim community during the period of the Prophet Muḥammad were easily and effectively solved, as he was the supreme authority to make comment on the verses and explain them to the people. Following the death of the Prophet, the problems increased and were of a more complex nature. The Companions had the Qur'ān and the Sunnah to decide on the new obstacles stemming from the social life.\textsuperscript{217} They also needed to use their own opinion to decide upon which verse or hadīth could be applied to a case. Thus, the Companions employed their own opinion not only to understand the verses correctly and apply them to new problems, but also to achieve a solution for the more problematic cases on which no verses were directly available. The most striking example of this could be seen from the interpretation of ‘Umar, the second caliph: his abrogation of the share from the zakāh given for mu'allafa’ al-qulūb (conciliation of hearts) can be seen as an example of this.\textsuperscript{218} Although, this practice apparently seems to be conflicting with the holy Qur’ān, ‘Umar considered the practical conditions along with the spirit of the holy Qur’ān for his judgment. He decided upon this matter by assuming that if the Prophet were still alive, he would also seek the solution in the same manner.\textsuperscript{219} The land of Iraq and Syria was not distributed among the Companions; rather, it was left to the original owners who were forced to pay taxes, which were used where

\textsuperscript{215} Qur’ān: 47/24.
\textsuperscript{216} Hasan, "The early", p: 117
\textsuperscript{217} Ibid.
\textsuperscript{219} Hasan, "The early", p: 119.
required. This appears to be in opposition to the traditional applications and rules in which the land is confiscated and shared along with other properties obtained through war. However, 'Umar preferred the common benefits of the community to those of the individual. Social justice necessitated that those lands should not be shared amongst the soldiers. This outstanding example symbolizes the fact that the general rules can be ignored for the sake of the supreme interest of society. This is known as *istihsan* in Islamic law.

As can be seen, the opinion of the Companions appeared to be another type of *istihsan*. This unique method was often preferred over the common practice, general rules and obvious analogy, especially where the justice, equality and the benefit to the society were concerned. *Istihsan* is preferable to an established ruling in a certain scenario or a decision based on absolute reasoning rather than on analogical reasoning. A jurist may have to abandon a compulsory decision and, in fact, relies upon the person's sagacity to differentiate whether a rule should be applied or otherwise. *Istihsan* is not an arbitrary, despotic or capricious personal opinion; rather it is the way of making a proper decision by considering the specific nature of the individual cases.

The Successors of the Companions and the Successors of the Successors also used their own opinions widely to solve the problems through resorting to *istihsan*. However, during this period two different approaches emerged: one of them prioritized the *hadith*; the other employed the scholars' opinions (*ra'y*). Ahmad Ḥasan has claimed that these two groups—the *ahl al-*hadith (the traditionalist group) and *ahl al-ra'y* (the rationalist group) did not regard their own approaches as the only methods. This is due to the fact that the *hadith* scholars of that period also used their

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221 Hasan, ibid.
opinions alongside the *hadith* for their juristic inference, while the *ahl al-ra'y* scholars often prioritized *hadith*. This is because Muslim jurists were committed to reinterpreting the verses in the light of the current needs of society.

Although analogy (*qiyaṣ*) may be regarded as one form of *ra'y*, there is a difference between them. *Ra'y* is flexible and dynamic in nature and the cases are decided upon in the light of the spirit, justice and the wisdom of Islam. Ibn al-Qayyim states that *ra'y* is the decision of a scholar to find the right solution after making a sincere research where the evidence conflicts. In other words, the person who uses *ra'y* trusts that he is making the same kind of decision on a case that the Prophet would have made were he still alive. Analogy is the comparison of two different cases to obtain a solution for the new case. The scope of *qiyaṣ* is narrower than that of *ra'y*, while the emphasis in *ra'y* is on the current situation or the specific conditions of the problem; the emphasis in *qiyaṣ* is on the intangible (abstract) similarities. As stated by Ibn al-Muqaffā, results may not be satisfying in *qiyaṣ* due to the narrowness of its coverage. As can be seen from the time of the Companions and the Successors, the decision is reached through *istihsān* by focusing on common interests and consideration of justice. On the other hand, especially in the Iraqi schools, *qiyaṣ* was practiced in a more comprehensive way by hiding the meaning of *ra'y*.

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224 Ibid, p:146.
227 Ibid.
228 Ibid, p: 147.
In later years, the scholars of Iraq narrowed the scope of *qiyaṣ* by developing *istiḥsān*, which was a new method in the coverage of *qiyaṣ*.\(^{229}\) The main reason for this was to avoid the inconsistency in *qiyaṣ*.

Like the Companions, Muslim jurists produced many new legal rulings regarding the current problems of the society. They justified their decisions on the grounds that the new cases must be tackled by considering new conditions and situations.\(^{230}\) Sometimes they found that it was satisfactory to act according to absolute verses by taking into consideration the general interest and benefit (*maṣlahah*) of the society. They were prepared to apply those decisions which were much more in harmony with society’s requirements.\(^{231}\)

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\(^{229}\) Ibid, p: 149.


\(^{231}\) Mūsā, “*Tārīkh*”, ii, 10.
3.1.0 DEFINITION OF ISTIHSÂN AND ANALYSIS

As I have previously stated the concept of istihsân is the main theme of my research and the two definitions—the linguistic and technical—are very important parts of the concept and will be elaborated in the usage of its various aspects.

3.1.1 The Technical (istiṣlah) definition of istihsân:

No technical definitions of istihsân have reached us from the early Islamic period, simply because there was no reason for istihsân to be defined. Abü Hanîfah and other early Hanafi jurists such as Abû Yusuf (d.182) and Shâybânî (d. 189) have directly given rulings using the concept of istihsân without giving any specific definitions or explanations. Their judgments were based on the fundamental principles of securing ease and avoiding hardship: “God intends facility and ease for you, He does not intend to put you to hardship”.¹

The fact that the Hanafîs were attacked by the Shâfi`î jurists, and especially by Shâfi`î himself, shows that the Shâfi`î schools did not recognize istihsân as a basis of Islamic Law. They dismissed it as “Arbitrary law-making in religion”. Indeed, Shâfi`î jurists did not understand what the Hanafîs meant by istihsân. Hanafi jurists spent much time defending their position and trying to show that istihsân is a valid source of law, and not merely an ad hoc method.

However, among the jurists there was no consensus as to the precise meaning and definition of istihsân. Yet in spite of all the different definitions, the meanings are very close. In fact all the definitions may be derived from that of Karkhî which is arguably more comprehensive than the others, as we shall see.

¹ Qur‘ân: 2/185
Among the Ḥanafi jurists definitions were given by Karkhī, Sarakhsi, Jaṣṣāṣ, Bazdawī, Nasafi, and Ibn Humām; jurists from the other schools remained flexible, as will be seen later.

It is of course that the jurists living in the 9th century had been influenced by the jurists from the earlier centuries. The jurists in my examples are widely spread over six or seven centuries: Karkhī lived in the 4th century AH and Ibn Humam lived in 9th century AH.

The definitions of the Ḥanafi jurists will be presented in chronological order, and then investigated to discover whether these definitions changed over time. The position of the Shāfi‘ī jurists will also be elaborated accordingly.

Other jurists who recognize istiḥsān will also be covered, and their definitions may help to throw more light on the subject.

3.2.0 Istiḥsān: a historical perfective:

In the early period of Islamic legislation, the sources of the shari‘ah were confined to the Qur’an, the Sunnah, and the use of personal opinion (ra’y), with the permission of a competent authority. It is pointless to debate whether istiḥsān was applied at the time of the Prophet as a source of law, since both the Prophet himself and the Qur’an –the actual sources of the shari‘ah- were all that was needed. Although the terminology of Usūl al-Fiqh had not been systemized yet, some Companions such as caliph ‘Umar, ‘Ali, Ibn ‘Abbās and Ibn Mas‘ūd applied the spirit of Istiḥsān, if not the technical method itself.

According to Khudārī (d.1927) whoever uses istiḥsān as a method of legislation is not doing anything new or innovative, and jurists merely codified a method which had been used from the early times of the Islamic period. During the formative period, there were many important leaders who applied this unnamed
method. These leaders were appointed to solve obstacles and to eliminate obstructions to legislation which the community encountered. Examples include 'Umar (d.23 AH) at the first stage; and Ibn 'Abbās (d.68 AH) Rabi'ah (d.136 AH) and Ibrāhim al-Nakhā'ī (d.96 AH) at the second stage. The fundamental sources of Islamic law for them were the Qur'ān and the Sunnah, which were developed by using personal judgment by competent, guided and intellectual jurists, interpreting in accordance with the needs of the age. Serious consideration of the fundamental sources can produce new meanings, which in turn give rise to new obstacles and different circumstances, thus enabling the jurists to arrive at a solution.

The concept of istiḥsān is a developed form of raʾy. One could extend the fundamental basis of istiḥsān to the time of the Prophet, given his advice to Muʿadh (d.18). This actually advocates a defining role for the community, teaching the people how to use their own discretion and understanding; in this context, if the Prophet had not persuaded Muʿadh to use his own judgment after considering the main sources, the development of Islamic law would not have been successful, and would have remained stagnant. The Prophet’s question “What will you do if you do not find guidance in the Sunnah of the Apostle of God and in God’s Book?” and Muʿadh’s response, “I shall do my best to form an opinion and spare no pains”, contains the key to the evolution and dynamism of Islamic law.

In the early periods of Islām the rules of shari‘ah were never rigidly applied but the main objective was to ensure that the spirit of the action conformed to the shari‘ah. As we saw in the event of the battle of Banū Qurayzah, some companions of the Prophet were despatched to the enemy’s territory and were instructed to perform the asr prayer on arrival at their destination. The asr prayer time arrived during their

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4 Ibid.
journey and an argument ensued: some of the Companions chose to pray on time, believing that the Prophet had not meant for the prayers to be delayed, while others went on, taking the Prophet’s command literally, and performed the prayer on their arrival at the place of destination at sunset.

They reported this incident to the Prophet, who said nothing. His silence was taken as tacit approval of both sides, indicating that no-one was in the wrong.\(^5\) An important lesson may be learned from his case: it teaches the community not to be rigid, so long as their actions do not conflict with the spirit of the *shari‘ah* obedience to divine commands. Both sides were seeking the aim of the *shari‘ah*, one party abiding by the command literally and the other abiding by the spirit of the command in order to demonstrate their allegiance to God and to the Prophet.

Hence, personal interpretations were given credence at a very early time, and these examples inspired jurists to develop or formulate their understanding of religion and express their feelings without any fear or obstruction. The Battle of Badr yields another example of the use of personal opinion (*ra‘y*) by the Companions. The Prophet had chosen a particular battle position for the Muslim army. However, Hubbāb ibn al-Mundhir considered the place unsuitable and wanted to know whether the Prophet had chosen that place by revelation from God or by his own judgment (*ra‘y*). It soon became clear that the Prophet had used his own judgment. Then Hubbāb suggested a more suitable place whereupon the Prophet said: “You have made a suggestion with your opinion (laqad asharta bi al-*ra‘y*).”\(^6\) The examples given here indicate that the use of personal opinion became a basis for the use of *istihsān* later on.


Chapter Three

After the demise of the Prophet, the same doctrine continued amongst the Companions, as can be seen in the decision of ‘Umar ibn Khattāb regarding the inheritance of two half brothers. The case concerned a woman who died and left behind her husband, her mother, two half brothers, and two full brothers. Initially the Caliph applied the usual ruling, based on an established precedent, as laid out by the Prophet. This involved two categories: the ahl al-farā‘iḍ (those portions for heirs designated in the Qur‘ān)\(^7\) and ahl al-asabah (the residual heirs)\(^8\). The ahl al-farā‘iḍ have definite priority over the ahl al-asabah in the distribution of the property.

According to this basis, ‘Umar gave one half of the property to the husband of the deceased woman; one sixth to her mother, and one third to the uterine brothers. No portion was given to the half-brothers as they were considered residual heirs. The half-brothers contested the case saying, “Suppose our father was a donkey (himār), do we not still have the same mother as the deceased?”

Consequently, ‘Umar revised his first decision based on the consideration of equity and justice. Then he found a stronger reason to depart from the already established ruling to a new ruling, which he ‘istahsana’ (approved as the better judgment): he ordered a new ruling that one third of the property that remained should be distributed equally among both full- and half-brothers. This distribution would take place after the deduction of the husband’s and mother’s portion.\(^9\) The case later came to be known as “The Donkey Case (al-himariyyah)”.

‘Umar’s decision appears to be a basic application of istihsān and brings to mind Karkhi’s definition: his decision differs from the established one, and is based on the consideration of justice and equity. ‘Umar made qiyyās (analogy) with regard to

\(^7\) For details of the heirs see: Qur‘ān: 4/ 1-40

\(^8\) Aṣabah: those who are entitled to the remainders of the shares. See: Doi, “Sharī‘ah”, p: 277.

the precept of the Prophet (athar), and the appeal by half-brothers caused him to change his decision, departing from qiyās to istiḥsān.

How do we apprise ‘Umar’s ruling? Was his judgment based solely on personal opinion, or did he endeavour to act in conformity with the spirit of the shari‘ah?

When ‘Umar was faced with such issues, he applied Abū Bakr’s methods, looking for the solution first in the Qur‘ān and the Sunnah; if, after much scrutiny and deliberation, no solution was determined, he then gave a ruling from his personal view of what best accorded with the shari‘ah.

When ‘Umar appointed Shurayḥ as judge of Kūfa, he advised him with the following principle: “Seek a clear ruling in the Qur‘ān, if you find what you are searching for, do not seek advice from another. However, if you could not find any guidance therein, then conform to the Sunnah. Should that fail you, then proceed with your personal judgment.”10 It is obvious that the use of this guidance enables justice to be administered and ‘Umar’s departure from the set precedent to the new ruling is justified when stronger evidence comes to light.

The basic notion of istiḥsān had been exercised since the time of the Companions even if there is no definite evidence that the exact term was used at the time of ‘Umar.

Another example is the water conflict between the two Companions Dahhāk b. al-Muzāhim and Muḥammad ibn Maslamah (d.46). The Caliph ‘Umar sided with Dahhāk b. al-Muzāhim, when Dahhāk asked for permission to extend a water canal through Maslamah’s property. Maslamah objected. The Caliph granted Dahhāk his request on the grounds that it was unlikely to cause any harm to Maslamah, as

indicated in the Prophet’s saying, “Harm is to be neither inflicted nor reciprocated in Islam”\textsuperscript{11}. The Caliph did not base this decision on any source or compare it to any established rule as such; he believed his decision on this case was not contradictory to the general spirit and purpose of the \textit{shari‘ah}. 

Another example of the legal practice of the Caliph was to suspend the prescribed punishment for theft of food during the year of the famine.\textsuperscript{12} In the \textit{Kitāb al-Kharāj} the example of theft during the year of the famine was explored. A man had stolen something from \textit{Bayt al-Māl} (treasury, exchequer) and ‘Umar had not amputated his hand\textsuperscript{13}; he suspended the rule of amputation during famine. At first glance, the Caliph’s practice seems to contradict the command of the \textit{Qur‘ān}- “Cut off (from the wrist joint) the (right) hand of the thief, male or female, as a recompense for that which they committed, a punishment.”\textsuperscript{14} However, the \textit{Qur‘ān} is silent on the circumstances attending such punishments. In fact, ‘Umar in this case departed from the established rule to a new rule, i.e. not to amputate a thief’s hand during the time of famine. Considering the circumstances of the famine to be exceptional, ‘Umar discontinued amputation for all thieves during the time of famine.

A similar example was reported regarding a case of a stolen she-camel. A slave stole a she-camel, slaughtered and ate it. When the incident reached ‘Umar and he investigated the crime, he ordered the thief’s hand to be amputated. ‘Umar then departed from his first decision, decided not to amputate the slave’s hand and ordered the owner’s slave in for questioning. Judging that the slave-owner had probably starved the slave, ‘Umar departed from the precedent to a new ruling not to amputate

\textsuperscript{11} Ibn Mājah \textit{“Sunan”}, ii, 784, hadith no: 2340.
\textsuperscript{12}  Abū Zahrah, \textit{“Imām Mālik”}, p: 324.
\textsuperscript{13} Abū Yūsuf, \textit{“Kitāb al-Kharāj”}, p: 14.
\textsuperscript{14} Qur‘ān: 5/38.
the thief’s hand. However, he penalized his master and ordered him to pay double the price of the she-camel.\(^{15}\)

According to the Prophet’s practice, war booty was distributed among the Companions. However, 'Umar decided not to distribute the lands of Iraq and Syria among the Companions out of consideration for the general public welfares, which dictated that borders and newly conquered lands should be protected. He therefore distributed the lands amongst the Muslims in general. Bilāl and other companions asked him the reason for his decision after 'Abd al-Rahmān ibn Awf and others apposed him. 'Umar's response was to point out that the distribution of land amongst the new Muslims would ensure that all land would be worked and protected at all times. However, to distribute it among only the army, for example, would expose borders and conquered lands to danger once the army had returned to the homeland. Then they finally gave their consent as "al-ra'y ra'yuka" (the opinion to be followed is yours). This case is illustrated in the Qur'ān: (59: 6-10) in justification of 'Umar's decision.\(^{16}\) Thus, 'Umar has departed from an established rule to a different rule in favour of the general benefit of Muslims.

The basis of 'Umar's ijtihād was to help the public in their day to day life by removing any difficulties, so that the objectives purpose of the sharī'ah might be accomplished. When 'Umar's ijtihād is studied,\(^{17}\) it is obvious that his established reforms were recognised by the sharī'ah; however, 'Umar did not attempt to alter the obligatory (fard) principles.

The Qur'ān and the Sunnah are not based only on obligatory commands; some of the rules exist in the form of recommendations and requests. An authorised

\(^{15}\) Mālik, "Al-Muwatţā", v: 2, p: 748.
\(^{17}\) Nu'mān, "Omar" v: 2.
individual (‘ulu al-amr) can attempt to alter non-obligatory rules only. However, attempting to alter obligatory rules and prohibitions is considered destructive to religion.

"Any decision taken by the authorised person (‘ulu al-amr) makes his orders obligatory (farḍ) and whatever he decides to ban becomes prohibited (ḥarām). However, as the rulings of the ‘ulu al-amr are restricted within the time of his reign those rulings are likely to be temporary. In addition the ‘ulu al-amr’s interference in obligatory rulings (farḍ) must be continued only to postponing or bringing these forward under certain circumstances."18

It is quite difficult to determine the applications of istiḥsān in the very early periods. However, ‘Umar’s decisions provided the means by which researchers have been able to gain some indication of how to implement istiḥsān in legal matters. Early istiḥsān then, involved making a decision which was a departure from an established rule for the sake of equity and public interest.

At the beginning it was seen that the appearance of istiḥsān could affect judicial and legal proceedings, and social or political issues that were possibly influenced by the caliphs during both the Umayyad dynasty (661-750/41-132), and the period of the Abbasid dynasty (750-1258/132-656). The administration of justice was in the hands of provincial governors throughout most of the Umayyad period. They also appointed particular judges, whose task was to act as agents of the governors in various areas.

18 Orhan Çeker, verbally given information by him at the University of Selçuk dated on 29.03.04 in Konya/ Turkey.
The Concept of *Istihṣān*

Muʿāwiyah ibn Abī Sufyān, Marwān Ibn al-Ḥakam, ʿUmar ibn al-Abd al-ʿAzīz of the Umayyad Caliphs and other members of the family were directly or indirectly involved in Umayyad legal practice.\(^{19}\) For example, normally when divorce happens before the consummation of the marriage, the husband has to pay only half of the fixed dower, whether or not *khulwah* (privacy) has taken place.\(^ {20,21}\) However, during the Umayyad period, the full dower was paid whether consummation and/or *khulwah* had taken place or not. The right to claim the full dowry for divorce which followed an unconsummated marriage was abolished in Umayyad times and this is attributed to Marwān Ibn al-Ḥakam or to the governor.\(^ {22}\) However, in Abbasid times, the judicial system was separated from the political administration.\(^ {23}\)

After the 'Arab conquests, the Companions of the Prophet spread out in different parts of the Islamic world, and soon faced the problem of finding solutions to various hitherto unencountered problems. As Muslims, including the Companions settled in conquered areas,\(^ {24}\) ʿUmar appointed many Companions to take responsibility for legal activities in the different cities. Shurayḥ b. al-Ḥarith (d.78) was appointed judge of Kūfa under the guidance of Abū Müsa al-Ashʿarī (d.44), who told him: "Think again and again over a point so long as it remains doubtful in your mind—a point which you do not find in the Qurʾān or in the Sunnah of the Prophet. Get yourself acquainted with precedents and similar cases; then weigh up the matters (*qis al-umūr*). Then adopt the one that is more favourable in the eyes of God and identical

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\(^{19}\) Schacht, "*The Origins*, p: 192.

\(^{20}\) *Khulwah*: where a man and woman are left alone together.

\(^{21}\) Qurʾān: 2/237

\(^{22}\) See: Schacht, "*The Origins*, p: 193.


\(^{24}\) Khudarī, "*Tārikh*", p: 135.
with the truth in your opinion."\(^{25}\) The legal methods and doctrines of the Kūfī jurists were mainly inherited from Ibn Masʿūd and Ḥaṭṭib’s thoughts, opinions, and judgments.\(^{26}\)

The Iraqi jurists claimed that their opinions were likely to coincide with the decisions of the Prophet. The following examples illustrate the harmony between the Companions and the Prophet. One-day Ibn Masʿūd was asked about a matter. He responded by saying “I am not aware of any decision of the Prophet on such a matter”. He was then asked to give his personal opinion (raʿy), which he did. One of the men in his circle declared that the Prophet had given the same decision, and Ibn Masʿūd was exceedingly happy that his opinion had coincided with the decision of the Prophet.\(^{27}\) Therefore, the same idea and spirit was held to have transferred from the Prophet to the Successors through the Companions and through the light of traditions.

Later on, the Successors inherited the role of the Companions, with scholars such as Alqamah bin Qays (d.62), al-Aswad bin Yazīd (d. 75), Shurayḥ bin Ḥārith (d. 78), al-Shāʿibī ṣAbū Ḥaṭṭib (d. 103), Ibrāhim al-Nakhaʿī (d.95), Ḥammad bin Sulaymān al-Asghārī (d. 120) all of whom lived in Iraq, the scholarly environment in which Abū Ḥanīfah developed. He learned fiqh from his teacher Ḥammad b. Sulaymān, student of Ibrāhim al-Nakhaʿī, Ibrāhim learned fiqh from the associates of Ibn Masʿūd, who in turn were students of Companions of the Prophet, such as Ḫaṭṭib, Ibn Masʿūd and Ḥaṭṭib.\(^{28}\) Their opinions were not expressed arbitrarily; rather they were inspired by the Qurʾān and the Sunnah. For example, Ḫaṭṭib was reported to have asked a man who had once come to him with a problem, whether his case had yet been solved. The man

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replied: "'Ali and Zayd b. Thabit have given a ruling". 'Umar said: "I would have given a similar ruling if I had not been able to find a solution in the Qur'ān and the Sunnah. My opinion is as theirs."\(^{29}\)

The Companions did, however, always endeavour to make the Qur'ān and the Sunnah the main source of their decisions, and to ensure that their rulings did not contradict the Qur'ān and the Prophet's traditions.

Istihsān found a very appropriate atmosphere in Iraq, in which to develop. Iraqi jurists used personal reasoning (\(\text{ra}'\text{y}\)) and qiyās (analogy), which they saw as an interesting intellectual challenge, given that they were more interested in the theory of the law, unlike the Medina School, which focused on the actual practice of the law.\(^{30}\)

According to Ahmad Hassan the term istihsān was not used in its technical sense with era of the aforementioned Iraq scholars.\(^{31}\) The idea was prevalent in juristic practice, as we shall see when we look at the "application of istihsān in the early Ḥanafi School". While Iraqī jurists applied the concept of istihsān by departing from the established ruling, they did not give any reason for their practice.\(^{32}\) Abd al-Rahmān b. Hujairah, a judge between the years 69 and 83 AH; Thaubah b. Nimr between 115 and 120 AH; and Khair b. Nu'aym between 120 and 127 AH\(^{33}\) all gave rulings based on personal reasoning, yet never made any reference to the principle of istihsān in its strictly technical sense.

I have not been able to discover any authentic source that leads me to believe that the form of istihsān was used prior to the time of 'Umar ibn `Abd al-'Azīz. However Iyās b. Mu'āwiyyah (d.122/740) who was the judge of Basra between 101 and 102 A.H, said: "Use qiyās as a basis for judgment so far as it is beneficial to

\(^{29}\) Khudari, "Tākh", p: 143.
\(^{31}\) Hasan "The Early", p: 145.
\(^{32}\) Ibid, p: 146.
\(^{33}\) Schacht, "The Origins", pp: 100-1.
people, but when it leads to undesirable results then use juristic preference (faṣaḥṣinū)."\(^{34}\) He suggested that if the present juristic rulings are not sufficient to prevent evil, then in order to arrive at rulings which are more effective, the principle of istiḥsān would be used. Muwaffaq b. ʿĀbd al-Makkī (d.568/1198) adds: "If qiyyās leads to undesirable results you should apply the more accurate of the two opinions."\(^{35}\)

Iyās b. Muʿāwiya also says "I understand that the judgments given in the courts should be in accordance with istiḥsān."\(^{36}\) This shows that rulings must not contradict the consideration of maṣlahah, and must provide justice and equity.

The research thus shows that the use of the term of istiḥsān came to light before the time of Abū Ḥanīfah and was not confined to him. When Iyās b. Muʿāwiya's use of the term istiḥsān is compared to Abū Ḥanīfah's, much similarity can be seen. For them, the main purpose of applying istiḥsān was to avoid the possibility of causing harm to the public interest. The reason for their emphasis on istiḥsān was their desire to avoid the negative results that often occurred when qiyyās was applied incorrectly. However, istiḥsān owes its existence to qiyyās, and would not have superseded it had qiyyās not proved to be ineffective in some cases.

The use of istiḥsān appears in a different guise in the early Abbasid period, namely as "discretion" (istiṣwāb). Ibn al-Muqaffa' (d.137/756) observed that discretion must be taken into account in cases where there is no established ruling, and where guidance from the Qur'ān and the Sunnah is not forthcoming. In exceptional circumstances, the guardians of the shariʿah should be aware that unfair and unjust results sometimes obtain from performing qiyyās, and that therefore the use


of discretion is necessary in order to ensure justice. He ruled that unreserved adherence to qiyās sometimes leads to injustice, and that flexibility was advisable in law in order to prevent an unjust ruling based on analogical deduction.\(^{37}\)

From the very early days of Islam, the use of the principle of istihān was not clear. Its validity was never open to question, as is clear from the rulings of 'Umar and, later on, Iyās b. Mu'āwiyyah who declared that analogical deduction is valid so long as it is beneficial to people; if the analogy is not beneficial it is then abandoned. The door of solution is therefore always left open.

It is evident that all the previous critical disputes appeared over istihān after Abū Ḥanīfah’s famous saying “qiyās is such and such but we apply istihān”. Abū Ḥanīfah did not elaborate the reason why he applied those judgments of his which were based on istihān.\(^{38}\) On the other hand, whenever Ḥanafi jurists realized that a hadith they were using was reliable and proven, even if it contradicted the principles of their school, they acted upon the hadith: the application of this ruling is called istihān.\(^{39}\) The following statements will demonstrate that Abū Ḥanīfah used to base his rulings on hadith, be they the Prophet’s acta or dicta. Apart from Prophetic hadith, he also relied on the practices of the Companions and those who followed them. He said: “If it had not been for precedents (athar) I would have judged here according to qiyās”, or “If it had not been for the sake of riwāyah (transmitted hadith), I would have judged the case by qiyās”.\(^{40}\)

Ibn Ḥazm suggests that the term istihān first appears in the third generation.\(^{41}\)

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\(^{40}\) Bazdawi, “Kashf”, p: 1126.
\(^{41}\) Ibn Ḥazm, “Mulakhkhāṣ”, p: 5; Ibn Ḥazm had used the term ‘asr’=(one hundred years) to mean ‘generation’. See also: Al-Iṣbāhānī, v: 6, p: 289. This term was also used by the Prophet in the famous
Hanafis say, "Qiyās is such and such but we apply istīḥsān". He adds that even Imām Mālik performed istīḥsān on occasion. Schacht (d.1969) mentions Ibn al-Muqaffa's views, reiterating that the usage of ra'y and istīḥsān might remove the undesired results of analogical reasoning.

Goldziher (d.1921) claims that the first use of the term istīḥsān was by Abū Ḥanīfah, in spite of the fact that, according to Schacht, a method and concept similar to istīḥsān existed before Abū Ḥanīfah. Schacht claims that the first technical use of istīḥsān was by Abū Ḥanīfah's pupil, Abū Yūsuf (d.182/798).

Although we do not have the works of Abū Ḥanīfah as evidence, we do have the works of his pupils, especially those of Shaybānī, who attributed the term istīḥsān to Abū Ḥanīfah. This fact clearly indicates the weakness of Schacht's claims. Hence, contrary to the claim of Schacht, the term istīḥsān was not first used by Abū Yūsuf, who attributes the term itself to his master Abū Ḥanīfah.

An alternative view, proposed by Khaddūrī and Liebesny, is that istīḥsān was practiced in Māliki School, although the idea is now more common to the Hanafīs.

In short, despite the fact that the concept of istīḥsān was used in the very early days of juristic legislation, my research leads me to believe that the term istīḥsān was not used in its technical sense before Iyas bin Mu'āwiyah (d.122/740).
Hanafi scholars see *istihsân* as a valid source of shari'ah and a basis for the formulation of legal rulings. They also see most criticism of *istihsân* as the product of misunderstanding, and the imputation to Abü Ḥanīfah this is because of ulterior motives. However, it is difficult to believe that he would have abandoned a ruling that had been established on true shari' foundations for his personal preference.  

Al-*Taqrîr wa al-Taḥbîr* of Ibn Amīr al-Ḥājj mentions Shāfi‘ī’s famous dictum, “Whoever rules according to personal preference has set himself up as legislator”, but goes on to say that Shāfi‘ī was unaware of the true meaning of *istihsân* and thus had judged the issue rather hastily. This misunderstanding may come about because of the different meanings of the word *istihsân*, one of which is indeed connected to the notion of personal desire.

Hanafi scholars are adamant that *istihsân* is a source of law and not in any way a form of ruling made according to personal desire. For the Hanafi school *istihsân* means acting according to one of the two forms of *qiyaṣ*. *Istihsân* may also be acted upon based on *athar* (*ḥadīth*), *ijmā‘* or necessity. Based on this, the denial of *istihsân* is unwarranted since, the Hanafis say, cases are resorted to when they come in opposition to *qiyaṣ jāli‘* (explicit analogy), making the departure from *qiyaṣ* in this situation a priority. This means that *istihsân* is agreed upon when it is opposed to *qiyaṣ jāli‘* and is acted upon if it is stronger than the *qiyaṣ jāli‘*. Therefore, there is no point in denying it.

In order to explain the Hanafi viewpoint, I will try to summarize what Shaikh ‘Abd al-‘Aziz al-Bukhārī pointed out in his commentary of *Usūl al-Bazdawi*.

50 Ṣadr al-Sharī‘ah, “Al-*Tawdī‘ī*”, v: 2, pp: 81, 82.
51 This is not the actual statement of Bukhari but rather what could be understood from his statement. A reference to this can be found in “Sharī‘ Usūl al-Bazdawi by al-Bukhārī”, v. 4, pp: 3, 4, 5, 13.
Bukhārī’s view is that those who deny *istihsān* as defined by Abū Ḥanīfah do not deny *istihsān* if it is based on *athar*, *ijmā’*, or necessity, since departure from *qiyyās* that is based on these indications (*dalā‘il*) is generally preferred in such cases, and all scholars accept this. Those scholars who refute the *istihsān* of Abū Ḥanīfah do so because they believe it is based on personal opinion (*ra’y*) and the arbitrary departure from *qiyyās* with the claim that it is stronger than *qiyyās*. Abū Ḥanīfa’s alleged response to this was to emphasize that that *istihsān* that they were contesting is one of the two kinds of *qiyyās*, a separate principle invented for the sake of whim and departure from the truth without evidence. This is because it is compulsory to act according to a stronger *qiyyās* in a case where two *qiyyās* findings are opposed to each other, whenever possible. The stronger *qiyyās* is called *istihsān* to indicate the priority of the side that should be acted upon, and the fact that it outweighs the other.

According to Bukhārī the opinion of Sarakhsi is that *istihsān* is so named in order to distinguish it from apparent *qiyyās* that may be wrongly perceived, since *istihsān* is a *dalil* opposed to it; when the weaker *qiyyās* is abandoned, the stronger *qiyyās* is given the name “*istihsān*” as an indicator of its superiority.

Ḥanafī scholars used the term *istihsān* and *qiyyās* with the aim of distinguishing between two pieces of evidence (*dalā‘il*) which are opposed to one another. They used the term *istihsān* because acting upon it is to be preferred compared with the other, which is different to the method followed in the case of apparent *qiyyās* (explicit analogy). According to Bukhārī, Sarakhsi’s aim was to defend *istihsān* against criticism and to show what is meant by the *istihsān* that is the subject of disagreement, rather than intend to offer a comprehensive definition of the term.

Bukhārī continues to explain the confusion that may arise. For example, it is permitted to act according to a *qiyyās* which contradicts *istihsān*, but acting according
to *istiḥsān* is better. For example, acting according to *qiyās al-ṭārīq* (analogy) is permitted, even though acting in accordance with the *athar* of the Prophet and Companions is preferred. Bukhārī counters this by saying that acting according to *istiḥsān* leads to the departure from *qiyās*, and acting according to what has been departed from is invalid since it is weaker than *istiḥsān*. For this reason, acting according to *qiyās* cannot be sustained if there is *istiḥsān*: a ruling based on *qiyās* no longer carries any weight when opposed by *istiḥsān*. This is also the case of the ruling by *qiyās al-ṭārīq* with the *athar*, since *ṭārīq* is not a proof while *athar* is, and therefore, how one could allow acting according to *qiyās* as opposed to *istiḥsān*? The general rule is whatever is not a proof (*hujjah*) should not be acted upon, while that which is a proof (*hujjah*) should.

This leads to the conclusion that when two pieces of evidence (*dalīlān*) happen to oppose each other and one of them exhibits more weight as compared to the other, then the one which has more weight should be the basis for action. Similarly, this is the case of *qiyās* with regard to *istiḥsān*. This means that *istiḥsān* should be the preferred action. Perhaps those who consider *qiyās* to be the course of action that is allowed as opposed to *istiḥsān* mean that ruling in accordance with *qiyās* is valid when it is faced with no opposition by *istiḥsān* which is stronger than *qiyās*.

Bukhārī concludes his comments on the Ḥanafī point of view with the assertion that *istiḥsān* is a source of law that can be used as a basis for the *shari‘ah* rulings. Therefore, he adds, there should be no disagreement as to the validity of the principle.

Then Bukhārī refers to those who objected not to the principle of *istiḥsān* as such, but to the term itself. They argued that there is no point in giving a specific name to such acting because the whole of Islamic legislation is more or less the result
of *istihsān* anyway, since it is all about recommending what is better and less burdensome for the people. Bukhārī replies to this objection by saying that there is no point to this disagreement as it is simply a term, and the rule is that there is no value in terms as such (*la mashāḥatah fī al-istiḥlāf*).

Those who objected to the name *istihsān* themselves concocted names for every kind of *qiyyās* such as *qiyyās al dalālah* (indication), *qiyyās al ‘illah* (cause), and *qiyyās al-shabah*. Furthermore, is it not slightly ironic that mujtahidin who, as we shall see shortly, used *istihsān* in their rulings, should criticise others for giving that method a name?

In his book “*Tashīl al-Wuṣūl ilā ‘Ilm al-Uṣūl*”, Maḥillāwī states, “We act upon the wisdom of the proof of *istihsān* when it is stronger than *qiyyās*. The Ḥanafī school’s definition of *istihsān* is one of the *adillah* (evidences) agreed upon as opposed to explicit analogy (*qiyyās jalīl*)

This statement indicates that *istihsān*, according to the Ḥanafī School, is far from being an issue of personal opinion and whim, used in order to rule against that which God has revealed; *istihsān* is taking action according to the stronger evidence (*dalīl*), and no one can say that the stronger *dalīl* is not a valid proof.

The following statement has been reported in “*Fawātiḥ al-Raḥmūt bi-Sharp Musallam al-Thubūt*”:

“To summarise, *istihsān* for us is nothing but a *dalīl* opposing *qiyyās*, therefore it is simply an opposition; we can say that *istihsān* is a kind of *qiyyās*—or, better still, a way of revealing the wisdom that lies behind the *qiyyās*:

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52 For more about them and their definitions. See: Ahmad Ḥasan, “*Analogical Reasoning*”, pp:76-92, 294-302; and Bukhārī, “*Kashf*”, v: 4, pp: 3, 4, 5, 13.
*Istihsân* simply makes this wisdom obvious. Were it otherwise, there would be no need to call it *istihsân*, and we would have to make do with *qiyyās*, or *naṣṣ* or *ijmā‘*.

Both of the above-mentioned statements indicate the validity of what we have presented as the Ḥanafi viewpoint with regard to what is meant by *istihsân*.

In spite of the above explanations, we have been unable to find one universal definition for *istihsân* among Ḥanafi scholars. They have debated many different definitions and have discussed various objections and criticisms whilst researching the subject. However, before presenting the discussion of these definitions of *istihsân*, they should be simplified so that they can be identified.

Whoever investigates this concept may encounter only two types of *istihsân* scenario according to Zakiyyuddin Sha‘bān. These are summarised as follows:

1. The jurist departs from a general ruling on an issue to another ruling because of a particular evidence which justifies this departure,

2. Or: The jurist finds an issue with two differing analogies: one is apparently explicit, the other hidden or implicit. He then departs from the ruling necessitated by the explicit analogy to another ruling necessitated by the implicit analogy. This departure was called *istihsân* because the jurist acted according to stronger evidence: such a solution is a "*mustahsân*" (preferred) affair.

A jurist may encounter cases that have no explicit ruling in the Qur‘ān, the Sunnah, or *ijmā‘*. If, for example, there are two similar original cases and rulings...
which conflict with one another (astayn)\textsuperscript{56}, and one is based on an explicit ‘illah (cause), easily distinguished, and the other is based on an implicit ‘illah which requires closer examination, the adoption by the jurist of the ruling with the implicit ‘illah is called istihsän or the juristic preference of an implicit analogy over an explicit analogy.

Based on the above istihsän may be defined as: The departure from a previous ruling on a certain issue, which is applied to similar issues because of particular evidence that necessitates this departure, as viewed by the jurist, regardless of whether this evidence is nass (textual), ijmā‘ (consensus), ḍarūra (necessity), ‘urf (custom), maslahah (benefit), qiyās khaṭī (implicit analogy), or otherwise, and irrespective of whether the method in which the ruling on the similar problem was established by dalîl ‘ām (general evidence), qā’idah fiqhiyyah (jurisprudence rule) or qiyās zahir jalīy (apparent clear analogy).\textsuperscript{57} This is the meaning of istihsän according to the Hanafi jurists or others who applied it, especially the Māliki jurists.

3.3.1.1 The view of Karkhī (d.340/952):

One definition which generally gives the meaning of istihsän as understood by the jurists of usūl (principles), and also reflects the definition adopted by the Hanafi jurists, who consider it accurate and comprehensive, is that of Abū al-Hasan al-Karkhī (d.340/952). He defines istihsän as follows: “istihsän is when one takes a decision on a certain case different from that on which similar cases have been decided on the basis of its precedents, for a reason which is stronger than the one found in similar cases and which requires departure from those cases”\textsuperscript{58}. This definition has been espoused and accepted by many jurists such as Tūfî (d.716/1317), Shīrāzī

\textsuperscript{56} The linguistic definition of “aṣf” is the foundation or basis on something. It is defined technically in many different aspects. The original case (aṣf) is one of the four constituents of qiyās (analogy). There is, however, a difference of opinion amongst jurists on the definitions of the original case.

\textsuperscript{57} Sha‘bān, “Usu’”, pp: 144-145.

\textsuperscript{58} Bukhārī, “Kashf”, part: 4 p: 3.
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Abū Zahrah (d.1974) comments on the definition, saying that “This definition is the clearest one in which the true nature of *istihsan* is expressed by the Ḥanafi jurists, highlighting its aspects, its principle and its essence. The basis of *istihsan* is, instead of conforming to one rule, to find a solution with a ruling on the evidence that is presented; this evidence could be against the general principle but in keeping with the aim of the *shari‘ah*. In respect of the new solution regarding the problem, the evidence is stronger than the analogy.”\(^{60}\) Another contemporary scholar ‘Abd al-Wahhāb Khallāf, considers Karhki’s definition as “the best”, saying that “in my view the definition is the definition of Karhki from Ḥanafis, Ibn Rushd (d.595) from among the Mālikīs and Tūfī (d.716) from among the Ḥanbalīs”.\(^{61}\) The clearest and most comprehensive definition of *istihsan* that the researcher has found is that of Khallāf: “In the view of the jurists the technical definition of *istihsan* is the authorisation to depart from an established ruling to a different ruling when legal evidence is presented. The legal evidence which is presented is known as the authority of *istihsan*.\(^{62}\)

To summarise, *istihsan* is evidence which is preferred over an accepted established ruling after ensuring that this evidence does not contravene the Islamic legal ruling. In fact, Khallāf’s definition is not a new one; the only difference is its expression, and thus the meanings of the two definitions are similar.

According to Karhki, “departure” must be based on particular evidence which warrants a move from an established ruling to a different ruling on a similar case. The

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62 Ibid.
purpose of the stronger reason or evidence requires the departure; the jurist (mujtahid) departs from the established ruling because of the stronger reason. I shall illustrate this statement by giving an example:

If a group of people gain unlawful entry into a house, steal goods and decide to load the goods onto one person's back and that person carries the goods outside while the others carry nothing, what would happen?

According to qiyás, the punishment applies only to the person who carries the goods. However, according to "istihsán" the punishment is applied to all of those who are involved in the robbery. Here, there are two contradictory asl (original cases):

The first case is: a group of people encourage one of the group to rape a woman; in this case there is no conflict among the jurists, who agree that the penalty is only applied to the rapist. This is a ruling of analogy which is opposite to the ruling of istihsán. The second case is: a group of people gather with the intent to attack and kill people robbing them of their goods; here the penalty of highway robbery is applied to all. In this case, there is no conflict amongst the jurists; they all agree that the punishment is applied to all who are involved in highway robbery.

According to the Qur'an: "The recompense of those who wage war against God and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter. Except for those who (having fled away and then) came back (as Muslims) with repentance before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful." After careful investigation, we see that comparing the

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63 Sarakhsi, "Usul", ii, 201; Jaṣṣāṣ, "Fusūl", iv, 238.
64 Qur'ān: 5/33-34.
house robbery to highway robbery is a clearer solution than comparing it to rape.\textsuperscript{65}

The departure from one case (\textit{aṣīṣ}) to another case (\textit{aṣīṣ}) because of the stronger reason is called \textit{istiḥsān}. This definition of \textit{istiḥsān} was chosen by Ibn Qudāmah Al-Maqdisī (d.620/1223)\textsuperscript{66}.

Shirāzī (d.476/1083), who is a follower of the Shāfi‘ī school, says: “If Ḥanafi and Karkhī (d.340/952) say that “

\textit{Istiḥsān is the giving of a ruling with the stronger reason rather than the weaker reason}” then we agree with it, and therefore the dispute between us have been solved.”\textsuperscript{67} After quoting the definition of Karkhī, Ghazālī (d.505/1111) says that there is “no dispute against the definition”.\textsuperscript{68} Ghazālī defines \textit{istiḥsān} as: “A departure from the established ruling to a certain case which is similar to previous cases where this ruling was applied due to particular evidence taken from the Qur’an or the Sunnah.”\textsuperscript{69} Ghazālī’s definition differs from that of Karkhī’s. None of the jurists among the Shāfi‘ī school of thought has defined \textit{istiḥsān} as Ghazālī did, identifying different kinds of \textit{istiḥsān} such as, \textit{istiḥsān} based on “\textit{nass}” (textual evidences), which is based on the Qur’an and the Sunnah. However \textit{istiḥsān} is not confined to these two, and Ghazālī’s definition is narrower than that of the Ḥanafīs’ view because it is far less comprehensive in its scope.

While citing Karkhī’s definition, Sarakhsi says: “the precedent which is set aside by \textit{istiḥsān} normally consists of an established analogy (\textit{giyās}) which may be abandoned in favour of the superior proof, namely the Qur’ān, the Sunnah, necessity (\textit{darūrah}) or a stronger analogy (\textit{giyās})”\textsuperscript{70}.

\textsuperscript{65} Jaṣṣāṣ, “\textit{Fusūl}” IV, 239.
\textsuperscript{66} Ibn Badrān, “\textit{Sharh Rawdat}”, part i, p: 497.
\textsuperscript{67} Shirāzī, “\textit{Sharh Al-Luma}”, ii, 970.
\textsuperscript{68} Ghazālī, “\textit{Al-Mustaṣfī}”, v, i, 283.
\textsuperscript{69} Ghazālī, “\textit{Al-Mustaṣfī}”, v, i, p: 273.
\textsuperscript{70} Sarakhsi, “\textit{Al-Mabsūf}”, x, 145.
Karkhi’s definition has been criticised for involving in *istiḥsān* the particularization of the general (*takhfsās*) and *naskh* (abrogation) in spite of the fact that they do not belong in *istiḥsān*.\(^{71}\) Muḥammad b.Ḥusayn Baḥīt (d.1354/1935) says that if Karkhi definitely meant such a particularization, then they would have a right to accuse him; however, he continues, it was not actually meant; what was meant in his definition was the particularization of analogy by the evidence of implicit analogy, text, *ijmā‘*, etc. *Istiḥsān* might be considered as part of particularisation, but the concept of abrogation (*naskh*) is completely different to *istiḥsān*. Abrogation is confined to the time of the revelation, while *istiḥsān* is not. The objective of *istiḥsān* is usually to move from difficulty to ease; however, abrogation is not considered in that context.\(^{72}\)

### 3.3.1.2 The view of al-Jāṣṣāṣ (d.370/981):

The definition of *istiḥsān* according to Jaṣṣāṣ is the “Departure from a ruling of *qiyaṣ* (analogy) in favour of another ruling which is considered preferable.”\(^{73}\) According to the translation of Aḥmad Ḥasan: “*Istiḥsān* means to depart from the obvious analogical reasoning (*qiyaṣ jāli*) and to adopt that which is better.”\(^{74}\)

Jaṣṣāṣ points out that *istiḥsān* is performed in two ways:

1. **The first:** a parallel case (*far‘*)\(^{75}\) which has similarity with two original cases (*asi*), where the rulings in those cases are different. *Istiḥsān* involves abandoning one of the original cases and taking the other as a basis because of the preference of the jurists.

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71 Taftazānī, “Ta‘līf”, ii, 163; Bukhārī, “Kashf”, iv, 3.
75 *Far‘* (parallel case): This is a parallel or fresh case which is not covered by the text (*nass*). A jurist finds out a rule of law for this case by the use of *qiyaṣ*. This is also known as *maqāṣ* (the case which is analogically compared with a textual rule); See: Aḥmad Ḥasan “Analogical Reasoning”, p. 16. See also: Al-Jaṣṣāṣ, “Uṣūl”, p. 226; Ghazālī, “Al-Mustasfaq”, p. 324; Šāmilī, “Al-Ifkām”, v. 3, p. 276; Basrī, “Al-Mu‘īṣamād”, v. 2, p. 703; Ibn Amīy al-Ḥajj, “Al-Taqrīb”, 3/124.
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The second: is the particularisation of a ruling with an existing legal cause ('illah). This is achieved by considering the text, ḫadīth, ijmā' (consensus), another analogy or custom. Jassās has considered istihsān in the second type as a particularisation of ruling (ḥukm) with the legal cause; however it is not a particularisation of a ruling (ḥukm). Sarakhsī and Bazdawi and most of the Ḥanafi jurists do not accept this theory.

3.3.1.3 The view of Bazdawi (d.482/1089):

Bazdawi defines istihsān as, “It is one of the two qiyās”. ‘Abd al-‘Azīz al-Bukhārī, who interprets Uṣūl al-Bazdawī, points out that, “it is a particularisation of qiyās (analogy) due to stronger evidence.” Al-Izmirī (d.1102 A.H) agrees with this. Khallāf and others cite Bukhārī’s definition as though it was Bazdawi’s, however, it is not. The mistake was made when Bukhārī (d.730 A.H) quoted the definition without stating the originator, saying that “as the master pointed out”. The following example, concerning the issue of prepaid sale (salam), serves as an illustration of Bazdawi’s definition, and the “particularization of qiyās”. In a normal sale, the good should be available at the time of purchase, as stated in the ḥadīth. The Prophet explained to a Companion, Ḥakīm b. Hizām, when asked whether he could sell a commodity prior to purchasing it himself, “Sell not what is not with you”. According to qiyās, this ḥadīth means that the salam contract is invalid. Nevertheless, salam has been validated by the express terms of other ḥadīth in spite of

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79 Bazdawi, “Uṣūl”, iv. 3.
84 See: Kamali, "Istihsān", p: 47.
the non-existence of the goods at the time of purchase. Furthermore, a contract cannot be attributed to the future existence of usufruct because monetary compensations are not open to attribution to something in the future. Qiyās invalidates salam but the Sunnah approves it, for the Prophet says: “Whoever concludes salam, let him do so over a specified measure, specified weight and specified period of time.”

Eventually, salam has been validated by way of istiḥsān, which is contrary to qiyās.

When we reconsider Bazdawī’s definition we see that there are two kinds of qiyās: the obvious (jāli), and the hidden or assumed (khafrī). Jāli is the one which is easily intelligible to the mind while khafrī requires deep consideration and pondering. Khafrī is stronger in effect than jāli, thus khafrī is called istiḥsān or qiyās mustahsān (approved analogy). In certain situations, qiyās is called istiḥsān owing to the power of its evidence. Shaybānī says, “Some of the qiyās involves istiḥsān”. There are minor differences between the two. Istiḥsān is more general than qiyās khafrī, because the former applies to things other than qiyās khafrī. Sadr al-Sharī‘ah (d.747 A.H) observes that when the word qiyās is used absolutely, it means qiyās jāli; when the word istiḥsān is used it means qiyās khafrī. Bazdawī says that the qiyās which has a weak effect is called qiyās, and the qiyās which has a strong effect is called istiḥsān.

3.3.1.4 The view of Sarakhsī (d.483/1090):

Sarakhsī defines istiḥsān in a way that is different to other Ḥanafī scholars; he looks at the nature of istiḥsān, the wisdom behind the ideas of istiḥsān, and the wisdom of its use. Istiḥsān represents simplicity, ease and the lifting of difficulties.

85 Bukhārī, “Ṣaḥīḥ”, iii, 243 No: 441.
90 Bazdawī, “Uṣūl”, ii, 84.
Sarakhsi defines *istiḥsān* as “abandonment of an opinion to which *qiyaṣ* would lead in favour of a different opinion when supported by stronger evidence and adapted to what is acceptable to the public.” Sarakhsi has mentioned four other definitions. These definitions have been quoted by ‘Abd al-ʿAzīz al-Ḥulwānī (d.448/1050)\(^91\):

a-“it means to seek ease and convenience in legal injunctions whether *al-khāṣ* (the specific) or *al-ʿām* (the general),”

b-“to depart from *qiyaṣ* (analogy) and adopt what is more suitable for the people”

c-“to adopt what is accommodating and to seek mildness”

d-“to adopt tolerance and to seek what gives comfort”.

These definitions indicate the general idea of deviating from a law which causes hardship and adopting or creating a law which provides ease and comfort.

One of the main objections levelled against Sarakhsi and his definitions is this: is the departure from one ruling to another, on the ground of ease, really based on evidence, or is it merely a reflection of personal taste or whim? Sarakhsi himself does not explain satisfactorily. He says that, “briefly, those expressions mean that abandoning hardship for the sake of ease is the base of the religion” quoting the *Qurʾān*: “God intends for you ease, and He does not want to make things difficult for you.”\(^92\) The purpose of the divine injunction is to provide ease and comfort.

Sarakhsi looks at *istiḥsān* from a different perspective and categorises it in two types: the first one is called: “*ijtihād al-taqdīrā*”, which allows jurists all to give rulings and on which there is no cause for disagreement amongst the scholars. The second one is the evidence (*dalīl*), which is in the mind and is set against the explicit analogy. According to Sarakhsi, evidence which opposes the established ruling

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\(^91\) Önder, “Hanefi Mezhebinde”, p: 77.

\(^92\) *Qurʾān*: 2/185
appears stronger after considering evidence concerning similar cases; therefore ruling with evidence at hand is called *istiḥsān*.

3.3.1.5 The view of Nasafi (d.710/1310):

Abū al-Barakāt al-Nasafi has defined *istiḥsān* as: “Evidence which takes the opposite side to *qiyās ʿajāb* (obvious analogy), or it is the opposing evidence to the obvious analogy (*qiyās ḥalāl*)." It would appear that the differences between the previous definitions and this one are slight; the meanings of the two definitions are for all intents and purposes the same.

As I explained regarding the issue of forward sale (*salam*), the obvious analogy (*qiyās ḥalāl*) requires invalidating the sale, and then the departure comes owing to hidden analogy (*khafī qiyās*), which validates the *salam*, for the simple reason that the effective cause is obvious and visible. However, other evidence, which is stronger, affects the ruling and became opposite to the established evidence. Therefore jurists practise *istiḥsān* with the stronger evidence that naturally is going to be the opposite of the *qiyās*. The evidence has to be *nass* (from the Qurʾān or the Sunnah) or consensus or necessity and hidden analogy.

3.3.1.6 The view of Ibn Humām (d.861/1457):

The Ḥanafi jurist Ibn Humām defines *istiḥsān* as “An evidence which is agreed upon textually or consensually, by necessity and by hidden analogy, if it happens to be opposed to a *qiyās* which leads to its understanding.” A similar definition is: “The evidence which contradicts the apparent analogy and which needs to be understood through contemplation.” In addition, a similar definition was reported in Rahawi’s (d.774 A.H) footnotes; however the commentator did not mention the term

93 Sarakhsi, "Usūl", ii, 200.
95 Rahawi, "Ḥishyāṭ", p: 811.
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“necessity”, and this is explained in the following statement. “The general opinion settled on evidence whether agreed upon, textually, consensually, or by hidden qiyās. If it happens to be the opposite of qiyās, which understanding leads to, this name will not be given to the same evidence without opposition.”96 With a closer look at this definition, and in addition to what Rahawi mentioned, despite the fact that the words used differ substantially, the meaning remains more or less the same as the previous one. The term istiḥsān which is used in fiqh (jurisprudence) books is mostly considered to be qiyās khaṭfī (hidden analogy).97 It has been pointed out in works such as “Talwīh”98, “Fath al-Ghaffār”99, “Mirāt al-Uṣūl”100, and “Hāshiyat al-Nasamāt al-Asfār”101 that the technical meaning of istiḥsān as used by jurists is “hidden analogy”, or istiḥsān which was based on evidence such as nass (text), ījmāʿ (consensus), dharruraḥ (necessity), which opposed explicit analogy.

One of the outstanding scholars of the Ottoman Empire in the last period ‘Ali Ḥaydar Afandi (d. 1936), also held the view that istiḥsān is hidden analogy, saying: “There are two types of qiyās: one is explicit analogy, known technically as “qiyās”; the other is “hidden analogy” (qiyās khaṭfī), known as istiḥsān”.102

3.3.2.0 The view of istiḥsān among the Shāfi‘ī Jurists:

The Shāfi‘ī School definitely rejects the principle of istiḥsān as a source of Islamic law. Imām Shāfi‘ī103 (d. 204) wrote a book titled “Ibtāl al-Istiḥsān” (Invalidating Juristic Preference) and declared famously: “Whoever approves of

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100 Molla Ḥusrav, “Mirāt al-Uṣūl”, ii. p: 335.
103 For more about Imām al-Shāfi‘ī see: Abū ʾIyd Ḥasan Muḥammad Saḥīm, “Al-Imām al-Shafl’ī wa Atharuhu ff Uṣūl al-Fiqh”, unpublished PhD dissertation at Faculty of Sharīʿah and Qānūn Al-Azhar University, Egypt, 1976.
jurisprudential preference is making himself the lawmaker. However, Shāfi‘ī jurists have given some definitions of istiḥsān, but the definitions that they provided are not their own, and they have taken what they have understood about istiḥsān and attributed those definitions to the Hanafi School.

In order to explain the opinions of the ‘ulamā’ who reject istiḥsān, we will present some of the statements from Shāfi‘ī’s “Al-Umm and al-Risālah”.

In the chapter entitled “Invalidating Istiḥsān” in “Kitāb al-Umm”, Shāfi‘ī says: Any qualified Governor or muftī is not permitted to rule or issue fatwā unless it is supported by an obligatory report from a source such as the Qur’ān, and then the Sunnah, and then what the “people of knowledge” agree upon, or from giyās that is based on some of these sources. He is also not permitted to rule or issue fatwā by way of istiḥsān since istiḥsān is not obligatory in any of these meanings.

He then quotes the Qur’ān, citing 75:36 “Does man think that he will be left uncontrolled, (without purpose) sudān” The people of knowledge never disagreed over the Qur’ān, as I know, that sudan is the one who neither is instructed to act nor prohibited from taking action. According to Shāfi‘ī, the word sudan, which Yusuf Ali translates as “uncontrolled”, denotes someone who is neither commanded to perform an action nor prohibited from carrying it out. Whoever gives a fatwa or rules in a manner opposing God’s commands will fall under the category of sudan. God makes it known to him that He has left him as sudan, and that if whatever he says is opposed to what the Qur’an has revealed, he has therefore opposed the path of the Prophet and the general rule of the group of scholars who narrated the Prophet’s words. Shāfi‘ī says that if anyone were to ask, “Where in the Qur’an, or the practice of the Prophet, do you find authority for rulings?”

He should be shown 6:106 and 5:49: “Follow what thou art taught by inspiration from thy Lord: there is no god but He: and turn aside from those who join gods with Allah.”\textsuperscript{105} And “And this (He commands): judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which Allah hath sent down to thee. And if they turn away, be assured that for some of their crimes it is Allah’s purpose to punish them. And truly most men are rebellious.”\textsuperscript{106}

Shāfi‘ī then relates how a group of people asked the Prophet certain questions about the ‘People of the Cave’ (ahl al-kahf), and how the Prophet replied that he would respond to their questions as soon as he had received revelations concerning them via the angel Gabriel; God then revealed verse 22 and 23 of the sura entitled al-Kahf. Similarly, when the wife of Aws ibn al-Sāmit came to Muhammad with complaints against her husband, the Prophet did not reply until the first verse of the sura entitled al-Mujādila had been revealed. Another example was when al-Ajlānī came to the Prophet with the allegation that his wife had committed adultery. Muḥammad replied that nothing had yet been revealed concerning the issue of adultery; when verses were eventually revealed, the Prophet called both of them to bear witness, in accordance with the dictates of the Qur’an: “O David! We did indeed make thee a vicegerent on

\textsuperscript{105} Qur’an: 6/106
\textsuperscript{106} Qur’an: 5/49
According to Shāfi‘ī, nobody is ordered to rule according to ḥaq (truth) unless he knows what ḥaq is and ḥaq cannot become known unless it is from God either as text or by indication, as God made ḥaq in his Book and in the Sunnah of his Prophet. Hence, there is no problem that one faces for which the Book has not given an indication of a solution, either in the form of text or in general. Shāfi‘ī adds that if one asks, “what is the text and what is the generality?”, text is what God has prohibited or permitted textually, such as marriage with mothers, sisters, grandmothers, aunts and all others mentioned; all other women are permitted. He had also prohibited carrion, blood, pork and fawāḥish (corruption) hidden or explicit, as well as other things. These are all clear in the text. As for generally, this is whatever God has ordained concerning salāt, zakāt and ḥajj (pilgrimage), and in a general sense; it was down to the Prophet to show how to perform the ritual prayers, the numbers of prayers, and its times and the actions performed during prayers. He also introduced zakāt and specified the kind of money, time and amount, and he also explained ḥajj and its requirements.¹⁰⁸

In the same manner Shāfi‘ī continues:

“I am not aware of any knowledgeable people who can give accreditation to any thinkers and literate people to issue a fatwā’ or rule according to his own opinion, if he is not equipped in the field of qiyyās which revolves around the book (Qur’ān) or the Sunnah or ijmā’ and ‘aql, which explains the similar cases. If they claim

¹⁰⁷ Qur’an: 38/26
they are capable of issuing a *fatwā* or ruling, we would ask them why thinkers who are more capable than many of those who are knowledgeable in the Qurʾān, the Sunnah and *fatwā*, were not permitted to have a say on issues that were revealed, since both groups know that *istiḥsān* is not from the Qurʾān, the Sunnah, or *ijmāʿ*, and they are more intellectual and more capable of explaining than their public. If it is said those who reject *istiḥsān* have inadequate knowledge of *usūl*, then you will be asked, “What evidence do you have in your knowledge of *usūl* if you rule without any base of *usūl* or *qiyās* based on *usūl*? Do you think that the scholars who have no command of *ʿilm al-usūl* will not be able to effect *qiyās* in what they do not know, and that your knowledge of *usūl* will enable you to perform *qiyās* or permit you to depart from such *qiyās* based on such *usūl*? If you are permitted to depart from these *usūl*, then they are permitted to rule as you do; then they will depart from *qiyās* based on this *usūl* or they will get it wrong.”\(^{109}\).

Shāfiʿī continues:

“If a ruler or a *muftī* in an issue in which there is neither a text reported or *qiyās* says “I prefer”, then he has no choice but to accept others who pass rulings opposed to

\(^{109}\) Ibid. v: 7, p: 300.
his on the same issue. Then different rulers (muftî) in different places rule according to what each of them prefers, resulting in various rulings on one issue. If this is permitted, they will ignore the others and rule as they wish, and if it is not permitted then they are not allowed to rule as they wish. If the one amongst them who departs from qiyās says that people should follow what he says, then he will be asked: “Who ordained that you should obey others or that others should obey you? If any one claims the similar, will you follow him? For my part, I will only follow the one I have been asked to pursue. Similarly, no one is obliged to follow you because obedience is only to the one that God and His Prophet ordained. The haq to follow is only what God and His Prophet ordained. God and His Prophet indicate textually or by indications: if God enjoins prayers on one who is incapable of locating the direction of the Ka'ba. He makes it possible for him to discover it by the way of ijtiḥād by seeking the indication to that direction”\footnote{Ibid. v: 7, p: 301}.

These are some of the arguments that Shāfi‘i mentioned in the chapter “Invalidating istīḥāsān” in the book “Al-Umm”.
Anyone following the statements of Shāfi‘ī will observe that he does not recognize *istihsān* in any form whatsoever. As he explained, the rulings can only be deduced from the Qur'ān, the Sunnah, ijmā', qiyās.

As far as *istihsān* is concerned, Shāfi‘ī does not recognize it as a basis to issue a ruling. He says that acting according to *istihsān* leads to situations where human beings are left in a state of lawlessness (*sudān*), that is, what ever his desire dictates to him and is naturally at odds with the above quoted āyāh (verse).

Actually, everybody, including those who recognize *istihsān*, reject *istihsān* that is based on personal desire. Shāfi‘ī said, with regards to the case of the thinkers and the literate, that if they were allowed to rule by *istihsān* it would be in contradiction to the use of *istihsān*, as those who recognize *istihsān* understand that its meaning is the departure from qiyās to a stronger *dalāl*. The situations are such that the *dalāl* can only be expected from a mujtahīd who is competent in the shari‘ah rulings and the *dalāl*, while it is unacceptable from thinkers and the literate who are not qualified.

As for the allegation of adultery against the wife of Aws, the Prophet waited for a revelation so that he could issue a ruling. It is generally accepted that during the period of ongoing revelation, there was no need for the application of *istihsān*, qiyās or *ijtihād*. With the death of the Prophet, the revelation ceased, and so some form of *ijtihād*, and *istihsān*, was needed. This is discussed in the section on “invalidating *istihsān*”. As we have seen, Shāfi‘ī does not recognize *istihsān* completely, as is mentioned in the book of “al-Umm”. In his *Risālah*, in the section “*tahrīm al-istihsān*” Shāfi‘ī regards *istihsān* as *talāzzuz* (deriving pleasure).111 This does not differ too much from what is reported in “al-Umm”, except in the formulation of the

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words. As far as invalidating istiḥsān is concerned, the statements in both books are the same; however, the statement in the “Risālah” mentions that it is prohibited (ḥarām) for anyone to act according to istiḥsān. The “Risālah” statement rules in effect that acting according to istiḥsān is ḥarām (prohibited).

3.3.2.1 The view of Shirāzī (d.476/1083):

Another definition of istiḥsān, which is attributed to Ḥanafīs, is one given by a Shāfi‘ī jurist, Shirāzī, as: “Something which is considered good by the faculty of reason (‘aql) and depends on assumption rather than evidence.”112 However, according to Zarkashi (d.794/1392), this definition is not quoted directly from Abū Ḥanīfah, but is simply Shāfi‘ī’s interpretation of what istiḥsān meant to Abū Ḥanīfah.113 According to Shirāzī and Zarkashi this definition and attribution was rejected by the Ḥanafīs.114

The Shāfi‘īs considered that the definition attributed to Abū Ḥanīfah was used in conjunction with a case where there was no evidence to support the practice of istiḥsān. For example: If a man commits adultery and the four witnesses testify that he has committed the crime, the punishment (ḥadd) is to be inflicted on the accused, on the basis of istiḥsān, in the opinion of Abū Ḥanīfah. Generally, of course, there should be no punishment if the evidence is doubtful. Abū Ḥanīfah might have interpreted the evidence by saying that each one of the witnesses might have seen him at different moments. This would not constitute the standard evidence according to Shirāzī, and would save the accused from conviction. Alternatively Abū Ḥanīfah could have argued that the fornicators might have moved around during their act of fornication and, as a result, been seen by four different people, at four different moments, from

four different positions, thus explaining the divergence in testimonies. But for Shirâzi, this cannot be evidence; it might be only an *istihsân*, which is not evidence.\(^{115}\) Ghazâli said that it was a ridiculous law based on *istihsân* that condones the shedding of Muslim blood.\(^{116}\)

There is another definition given by the Shâfi`i Bishr b. Ghiyâś (d.218/833) which is attributed to Abû Ḥanîfah: "*Istihsân* is a departure from analogy that is based on personal opinion, in which case it can be considered valid without the support of evidence."\(^{117}\)

Zufar gives a similar example in Sarakhsi's book, *al-Mabsûf*: "If a man commits adultery and the four who witnessed the crime testified that he committed the act but in different corners of the house, the punishment (*hadd*) shall not be inflicted on the accused on the basis of *qiyyâs* (analogy). Since the act is seen from two different sides of the room, it could appear that the act of adultery took place in two different rooms, and, therefore the punishment (*hadd*) is applied to the adulterers according to *istihsân*; this is the opinion of Abû Ḥanîfah and other imāms. The witnesses are unanimous on the adultery and only disagree on what they actually witnessed, and therefore it should be accepted that the crime of adultery was committed and that punishment should be administered, even if it was impossible to describe the dress the woman was wearing at the time or to observe every detail.

The Ḥanafîs opposed this definition, as the evidence was not conclusive in the Ḥanafî *Usûl* (methodology) books. This invites doubt about the attribution and the possibility of its accuracy. The doubt caused al-Bâṣrî (d.436/1044) to respond by saying: "the advocators of the concept of the definition know the purpose of their..."\

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\(^{115}\) Shirâzi, "*Sharîf*", ii. p: 970.


\(^{117}\) Zarkashi, "*Al-Baḥr*", vi. p: 93; Shirazi, "*Sharîf*", ii. p: 970.
ancestors who evidently stated in many cases 'we approved istihsän depending on this athar (tradition) and evidence'. We understand that they do not approve istihsän without positive evidence.' Therefore, what al-Baṣrī said confirmed that the attribution of the definition to Abū Ḥanīfah may be incorrect.

3.3.2.2 The View of Ghazālī (d.505/1111):

Ghazālī gives three different definitions of istihsän. The first he describes as: "That which the jurist prefers using the intellectual faculty; the Jurist (al-Mujtahid) uses his own judgement to arrive at the decision." After giving the definition, he criticizes it. According to him, before the appearance of istihsän, the Muslim community had unanimously accepted that the mujtahid would not give any fatwā' (ruling) without depending on adillah al-shari`ah (proofs of Islamic law) rather than depending on his own desires. Ghazālī rejects the concept by saying, "We approve (nastahsinu) the invalidation of istihsän". Āmidī (d.631/1233) and Isnawī (d.772/1370) also have mentioned the same definition.

Scholars other than those of the Shāfi`i School also mention a similar definition. One such scholar is Shāṭibī, who added the expression "and tends to it by his opinion". Shāṭibī, when discussing the definition, explains that when looking closely at the definition and those who adopt it, it is their custom to use istihsän to give the people their desires; however, this should not contradict the evidence of shari`ah. In such a case, ruling by istihsän is acceptable as long as it does not contradict shari`ah.

120 Ghazālī, "Al-Mustaṣfa", i, p:138
122 Isnawī, "Minhāj" iii, p: 141.
Shātibī continues, “This definition may apply to certain acts of worship which are the evidence that is the invention of certain people but which have no textual basis in the Book of Allah. Such definition is aimless since it follows that istiḥsān has to be divided into the good (ḥasan) and the bad (qabih), which means that not all of istiḥsān is correct. It could be understood that Shātibī did not accept this definition; the mind (‘aql) often accepts that which is incorrect and based on desire, even if it distances one from what is right (ḥaq). Shātibī mentions a comment that contains a similar meaning to such understanding in “al-Iʿtiṣām”. He says: “Scholars agree, if customs and habits lean towards this definition, it is acceptable to have a ruling (ḥukm) based on istiḥsān, though this ruling must not contradict the shariʿah. This shows that some acts of worship can be without textual basis, thus leading to what is known as “bidʿah”; consequently it has to be either good or bad since not every istiḥsān is right (ḥaq).”¹²⁴ Shātibī states as an objection to this definition that “whatever the mujtahid selects by using his mind (‘aql), leads to another objection which is: “Is it with evidence (dalīl) or without evidence?” Scholars in general concur that it should be based on evidence (dalīl) but there is nothing in the definition that shows reference to evidence (dalīl). Shātibī continues: “If the opinion of the scholar is based on evidence of Shariʿah it could have been more accurate and representative of the case, but since such things are not mentioned in the definition, the definition consequently is no longer valid for istiḥsān.” It is possible that the scholars who gave a different definition of istiḥsān reflected their own point of view without evidence.

The definition that has been criticised and rejected by al-Juwaynī (d.478/1085), his pupil Ghazālī and other Shāfiʿī scholars such as Āmidī and Isnawī, has not been found in any Hanafī Uṣūl sources. The reality is that Abū Ḥanīfah and his

¹²⁴ Shātibī “Al-Iʿtiṣām”, ii. p: 136
followers have used *istihsân* in their judgements. However, after examination and investigation of the examples of *istihsân*, we can clearly see that these examples have been based on a validated proof and its preferred analogy (*giyâs*) with a legal reason.125

Consequently, whenever they approve *istihsân* it is simply a case of *ijtihâd* based on personal desire, because they have performed *istihsân* after investigation and hard work. If it is merely based on personal desire, then laborious work is unnecessary.126

Nobody can reject the role of 'aql (intellect) when dealing with matters pertaining to people or the methods of finding evidence to reach a ruling or the reason why it is acceptable since it is not against the aim of *sharî'ah*. As al-Tüfî (d.716/1316) explains, "The definition is accepted according to what is generally agreed by scholars, if it concords with *sharî'ah* proof; otherwise it is rejected."

3.3.2.3 The view of Āmidî (d.631/1233):

Āmidî, a Shâfi‘î jurist, views *istihsân* as a proof that action should be based on evidence. He considers that *istihsân* is not a subject of disagreement if it is supported by text, or *ijmâ‘* or others.

In such situations there is no disagreement over its validity as a proof, although there can be disagreements over the terminology.

Actually, his opinion is that the disagreement stems from the use of different words to describe *istihsân*. Additionally, this disagreement is of no use since the words are used to describe what the mujtahîd prefers based on *dalîl* and the public preference (*maṣlaḥah* *mursalah*) without any proof of *sharî'ah*. The meaning here is

Istihsān that is based on a *dalil* thus becomes a proof, and there is no room for disagreement over such an issue.

It can be concluded that Āmidī views *istihsān* as a proof so long as the departure from *qiyyās* stems from the availability of a stronger *dalil*\(^{128}\).

Āmidī has defined *istihsān* as: “An evidence embedded (yanqadīhu) in the mind of the jurist that words will not assist him to express or show.”\(^{129}\) Ghazālī said much the same in his second definition.\(^{130}\) Shāṭibī gave the same definition;\(^{131}\) a similar definition was given by Isnawi, although he applied different words. He defined *istihsān* as: “Evidence embedded in the mind of the jurist, but unexpressed by word.”\(^{132}\) Similar definitions were also given by Ibn al-Subki, Shawkānī, al-Taftazānī, and Shaykh ‘Abd Allah Dirāz (d.1351/1932), who defines *istihsān* as: “Evidence embedded in the mind of the jurist who finds difficulties to express it in words.”\(^{133}\)

Criticism has emerged about whether the definition hesitates between acceptance and rejection. The explanation for this is as follows: the first section of the definition “evidence embedded” makes one wonder what is meant by “embedded”; it is meant as confirmation of the evidence and it should be applied, which is the general agreement. There is no lack of explanation on the part of the jurist. His explanation may differ to what others understand, but the jurist himself does not have any problems because he understands the evidence. If, however, the “embedding” is taken as a knowledge of the evidence, but has been mixed with some doubt, then it will be rejected according to the general agreement of the scholars. A *hukm* (ruling) can not

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\(^{130}\) Ghazālī, “*Al-Mustaqfā*”, i. p: 138.

\(^{131}\) Shāṭibī, “*Al-Iʿtiṣām*”, ii. p: 137.

\(^{132}\) Isnawi, “*Mihāf*”, v 3, p: 140.

be adopted with doubt and probability. These objections, which Ghazâlî and ‘Aḍūḏ al-Dîn al-Iji (d. 756 AH) report, show that this definition is not valid for istiḥsān.

It is essential for hukm to be dependent on evidence that is clearly taken from shari‘ah. This is to enable the jurist to distinguish whether the evidence is true or false. Therefore if the evidence could not be expressed, it follows that hukm cannot depend on it.

3.3.3.0 The view of istiḥsān according to the Mālikī School:

It is generally accepted that Mālikīs recognize istiḥsān, as is clear from the definitions mentioned previously in the first part. It was narrated that Imām Mālik (d. 179 AH) said, “Istiḥsān represents nine-tenths of human knowledge”136. According to Ashba’ adopting istiḥsān may outweigh qiyās.137

If this is so, then we can not imagine istiḥsān being defined by some as “Whatever is preferred by mujtahid rationally and through self inclination based on personal opinion”. Nor is it “a proof that emerges (yangadihū ft nafs al-mujtahid) in the mind, but the mujtahid could not express it in words”. Such istiḥsān cannot be viewed as nine-tenths of human knowledge; nor will it outweigh qiyas as one of the proofs. Shāṭibī says, in what could be seen as support for istiḥsān, “I used to agree with those scholars and dismiss istiḥsān; however, it gained support and was strengthened, since we can find a number of rulings (fatāwā) of the Caliphs and the learned Companions and those around them, and so there can be no denial. After that I changed my mind and began to support it.”138

It was reported in “Sharḥ Al-‘Aḍūḏ ‘alā al-Muntaha” that “istiḥsān, over which there is disagreement, went unnoticed because they mentioned in its interpretation

134 Al-Majallah: clause: 74.
issues that do not amount to a basis for disagreement. Some of these issues are generally accepted, others lie somewhere between being generally accepted and rejected. As to those who define it as what emerges (yanqadihu fi nafs al-mujtahid) in the mind of the mujtahid but which can not be expressed in words, this constitutes a quandary between acceptance and rejection. Otherwise, what does it mean to say emerges (yanqadihu)? If it means the realization of confirmation of evidence, then acting according to it becomes obligatory by general agreement, irrespective of the inability to express it in words. If the meaning of it emerges (yanqadihu) and is difficult to express in words because one has doubts about the dalil, then istihsan is rejected in this case by general agreement because the rulings are not confirmed by probability and doubt. If istihsan means that the mujtahid prefers rational thinking and is inclined to his own opinion, then this is rejected by general agreement. Since there is no difference between a member of the public and a scholar, this would spring from personal desire. If however, istihsan means the departure from a ruling on a similar case to a different ruling due to stronger evidence, then this is generally accepted and there is no disagreement.

It can be concluded from both of the above statements that the Maliki School recognize istihsan and accept it is a proof on which a number of fiqh cases have been established.

Shawkani (d.1834 AD) says that the view of Qurtubi (d.671 A.H) is that Imam Malik denied istihsan and did not adopt it. Shawkani also claims that it was Imam al-Haramayn (d.478 AH) who attributed the recognition of istihsan to Imam Malik. According to Shawkani: "Imam al-Haramayn attributed istihsan to Malik and Qurtubi

denied istiḥsān and said it is unknown according to Imām Mālik's madhhab. This statement is in fact at odds with the reports in the books of the Mālikī School.

Perhaps the reader will note, from the statements we have reported that there is no indication anywhere of the denial of istiḥsān by Mālik rather than the recognition, by Mālik, as was mentioned earlier.

Consequently, it can be seen that the Mālikī School recognize istiḥsān as a proof of shariʻah; however, their views of istiḥsān are somewhat different from those of the Ḥanafi School. The Mālikī School views istiḥsān as departure from qiyās due to public interest; istiḥsān for them does not go beyond being a maṣlaḥah (public interest) that requires the departure from qiyās, even though this maṣlaḥah depends on a proof of shariʻah. The departure from qiyās is due to a necessity so that people do not suffer from hardship.

This is explained in the book al-Muwāfāqāt: “The one who 'prefers' (i.e. to make istiḥsān) does not refer to his own personal taste or desire, but is simply trying to obtain the purpose of the Legislator (i.e. God) which is to discover what are the obligatory duties. For example, in an issue that requires qiyās, but in which qiyās may leads to missing a maṣlaḥah or bringing about mafṣadah, the application of qiyās in absolute terms will inevitably lead to hardship in some of its sources, and therefore the possibility of harm must be avoided.”

This statement shows that the previous explanation is correct. Reference to a group of fiqh issues will be referred to in the section on the effects of the application of istiḥsān on the construction of Islamic fiqh. Al-Shāṭibī concludes his sayings by

asserting that this is a technique of proof (dalil) that shows the correctness of this rule and is the basis on which Mālik and his followers constructed their views.\textsuperscript{142}

This would explain the direction of the Mālikī School in recognizing istiḥsān, as it is limited to a ṭaṣlaḥah (public interest) as opposed to qiyās, while the Ḥanafī school says this proof may be athar, ījmāʿ, qiyās ḥaṣfīy, necessity, or maṣlaḥah.

3.3.3.1 The view of Abū al-Walīd Al-Bājī (d.474/1081):

Quoting from Mālikī jurist Ishāq bin Khuwaydh Mindād (d.390/1000), al-Bājī defines istiḥsān as “Acting on a ruling based on a stronger dalil as compared to another”\textsuperscript{143}, Qarafī (d.684 A.H) comments on this definition saying that “in this manner, it becomes hujjah by ījmāʿ, while actually it is not”.\textsuperscript{144} In fact, this definition, although it agrees with other definitions as far as meaning is concerned, is criticized for the wordings or terms it uses. This definition is general and does not have any limitation because it is based on stronger evidence.

Shāṭibi (d.790/1388) gives the following explanation: “Istiḥsān according to us and the Ḥanafīs is ‘practising on a ruling based on the stronger of two evidences (dalīlayn)’.”\textsuperscript{145} On the other hand, this is also applicable to nāsikh (abrogating) with mansūkh (abrogated); general (‘ām) with particular (khāṣ), and absolute (mutlaq) with muqāyyad (constrained).

3.3.3.2 The view of Ibn al-ʿArabī (d.543/1147):

According to Ibn al-ʿArabī, istiḥsān is “To abandon what is required by the law, when applying the existing law would lead to a departure from some of its own objectives.”\textsuperscript{146} It is clear that Ibn al-ʿArabī indicates that the essence of istiḥsān is “to apply a ruling based on the stronger of the two evidences (dalīlayn)”. The explanation

\textsuperscript{142} Ibid, v: 4, p: 207
\textsuperscript{144} Ibid: p 451.
of this definition is that there would be a *dalīl*, which concerns general principles, and
which would be applicable to various cases. In some such cases, a *dalīl* may later
emerge which is different—and preferable—to the first. This new *dalīl* necessitates a
ruling different to the earlier one. In such situations the *mujtahid* departs from the
general ruling based on the first *dalīl* by the way of exception for this case; he acts on
the basis of the new *dalīl* to deduce another ruling which departs from the generality
of the earlier *dalīl*. The reason for this action of the *mujtahid* is based on the general
principle of the jurisprudential maxims, which holds that: “Repelling an evil is
preferable to securing a benefit”\(^\text{147}\), or to keep away a *mafsada* rather than obtaining
*maṣlaḥah* or to bring about a *maṣlaḥah*, which would otherwise be missed if the
*mujtahid* acted on the basis of the first *dalīl*.

Shāṭībī comments on this definition, saying: “It is the departure from a ruling
for *ʿurf*, *maṣlaḥah*, or *ijmāʿ* avoiding the hardship in respect of the preference of ease
to facilitate people’s affairs.”\(^\text{148}\)

3.3.3.3 The view of Ibn Rushd (d. 595/1198):

Ibn Rushd says that “*Istiḥsān*’s usage is so common that it exceeds *qiyyās*; it is
the departure from a *qiyyās* that leads to extremity and exaggeration in the ruling of a
case which is based on the meaning of an effective cause (*ʿillah*) and thus influences
the ruling of the case.”\(^\text{149}\) Despite all of these different explanations, the meanings are
compatible with Ibn al-ʿArabi’s definition.

3.3.3.4 The view of Ibn Al-Abyārī (d. 618/1221):

Shams al-Dīn Abū Ḥusayn al-Abyārī defines *istiḥsān* as “using partial
*maṣlaḥah* (in the interest of the public) as opposed to general *qiyyās* (analogy).”\(^\text{150}\)

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\(^{147}\) Majallah: clause 30.


\(^{149}\) Shāṭībī, “*Iʿtiṣām*”, v: 2, p: 139.

\(^{150}\) Shāṭībī, “*Al Muwafaqāt*”, v: 4, p: 206.
Shaṭībī interprets this as: “the implication of using partial maṣlaḥah is to bring forward the mursal (discontinued) evidence (istidāl mursal) to qiyaṣ”.¹⁵¹ To explain this ‘Abd Allah Dirāz (d.1351) gives the example of someone who buys goods of his own free will and on his death leaves his heirs in disagreement as to whether to keep or return the goods. Istiḥsān, Dirāz explains, would dictate that if the vendor refuses to take the goods back, then it is acceptable to keep them.¹⁵²

Consequently, istiḥsān thus defined cannot be expanded, as it is limited to maṣlaḥah mursalah. The discussion of this definition shows that it does not succeed in defining istiḥsān; it only makes istiḥsān applicable where the dalīl, particularizing the qiyaṣ, is considered as nothing other than maṣlaḥah mursalah.

3.3.3.5 The view of Shatibi (d.790/1388):

Abū Ishāq Ibrāhīm al-Shatibi, a Māliki jurist, is one of the prominent scholars dealing with the concept of maqaṣid (objective of the sharī‘ah). He considers istiḥsān as a source of Islamic law, but says that the interpretation should not be based on desire, and that the jurists must have a full understanding of the intention of the Lawgiver. When presented with a new problem the jurists will resort to istiḥsān if the use of the strict application of analogy will lead to loss of maṣlaḥah or the possibility of evil. He defines istiḥsān as “An evidence embedded (yanqadihu) in the mind of the jurist but which words will not allow him to express”.¹⁵³ The same definition has been given by Āmidī (d.631) and a similar definition given by Ibn al-Subkī (d.771), Shawkānī (d.1250), Taftazānī (d.793), and Shaykh ‘Abd-Allah Dirāz (d.1351).

3.3.4.0 The view of Istiḥsān amongst the Ḥanbali School:

Chapter Three

The narrations reported about the Ḥanbalī School’s views on *istiṣṣān* as a principle of *shari‘ah* differ: some narrations reported that Imām Aḥmad (d.241 A.H) recognized *istiṣṣān*, while others reported that he did not.

Abū Yā’lā (d.458/1065) defines *istiṣṣān* as “leaving one *ḥukm* (ruling) for another stronger or better *ḥukm* (ruling).” He points out that the Qur’ān or the Sunnah and *ijmā‘* will be reliable proofs while performing *istiṣṣān.*

Qaḍī Yā‘qūb reports that *istiṣṣān* is the way of Imām Aḥmad. It is “The departure from one ruling to another which has priority; no one can deny this. If the name differs there is no point in disagreement over terms when there is an agreement on the meaning.” This is based on the statement which Ibn Qudāmah (d.620/1223) narrates from Qaḍī Ya’qūb, who contended that *istiṣṣān* with its meaning is generally agreed upon.

Ibn Taymiyyah narrates from Hulwānī: “Hulwānī interpreted *istiṣṣān* in different ways. In my opinion *istiṣṣān* is probably the departure from *qiyyās* *jāli* and other proofs to a *dalīl* from the text of a solitary *ḥadīth* (*khabar al-wāhid*) or another *dalīl*, or the departure from *qiyyās* to a saying of a companion when *qiyyās* does not apply. I have noted that al-Fakhr Ismā‘īl, in his book, “*Al-Jadal*”, reports a similar interpretation of *istiṣṣān*. The Ḥanafī School agreed with us in that when a companion said something in which *qiyyās* finds its way, then it is taken as if the companion had said that to avoid incorrect interpretation. The Shāfi‘īs opposed us on this issue. Similarly, the Ḥanafīs agreed with us on *istiṣṣān* whilst Shāfi‘īs disagreed with us.”

Ibn Taymiyyah’s statement shows that recognizing *istiṣṣān* in the narration which Qaḍī Yā‘qūb reported from Imām Aḥmad, and which Hulwānī and al-Fakhr

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155 Ibn Qudāmah, “*Rawḍat*”, p: 85.
Ismā'īl support, is a proof if it is based on dalīl. This means that we depart from qiyyās based on such a dalīl whether this dalīl is a solitary ḵabār or another report. If the departure was due to a saying of a Companion, then following this method confirms that istīḥsān is a proof for them (Hanbali) and there can be no disagreement over this issue. The narration confirming istīḥsān as a proof comes from Maimūnī, and is quoted by Ibn Taymiyyah: “Our shaikh said that Aḥmad used istīḥsān in many cases”.

In the Maimūnī narration, Imām Aḥmad is quoted as saying: “I prefer (astaḥsinū) tayammum for every prayer, and the qiyyās here is on equal footing with water where the ritual prayer can still be performed until the ṭūfū (ablution) is invalidated or until the water becomes available”157. This narration thus shows that istīḥsān is a proof for Imām Aḥmad where it can be traced clearly in many fiqh issues.

However, Abū Ṭalib reported that Imām Aḥmad did not resort to istīḥsān. He says that when the followers of Abū Ḥanīfah encountered an issue opposed to qiyyās, they then adopted it and departed from qiyyās. This leads to the conclusion that when faced with an issue which is opposed to qiyyās the correct thing to do is depart from qiyyās to istīḥsān.158

This leads to the conclusion that from the Ḥanbalīs point of view, one cannot depart from one qiyyās to another qiyyās; rather, departure from qiyyās can only be sanctioned by nass, be it a ḥadīth or other reports. This could be explained best by Abū al-Khaṭṭāb (d.510/1116) who is reported in the Musawwadah as saying: “For me, he (imām Aḥmad) denied the istīḥsān without evidence, which is why he said that the Ḥanafīs departed from qiyyās which they claimed was right (ḥaqq). If istīḥsān was based on dalīl, they adopted it and he (imām Aḥmad) did not deny it, because it was

158 Ibid: p. 452
right (taq). And he said: I follow the hadith and I do not perform qiyās based on it, this means that I depart from qiyās by khabar, which is istihsān by dalīl"159.

Ibn Taymiyyah explains this as meaning that when he sees an indication which is stronger than qiyās, the mujtahid is led to depart from qiyās and to adopt that indication without invalidating qiyās itself. This is about departing from qiyās zāhir (explicit analogy) to qiyās khaftiy (implicit analogy) which is stronger and refers to specifying the cause (takhfs al-`illah). Ibn Taymiyyah prohibits the specification of `illah while he supports the adoption of istihsān, whatever the reason for the departure from qiyās and when it refers to a stronger dalīl, be it text or other reports.160.

Ibn Taymiyyah refers to what Qaḍī said in reply to Abū al-Khaṭṭāb’s statement. He says that there is a difference between the specification of `illah and the departure from qiyās to khabar (report). This is because whoever speaks of the validity of takhsfs al-`illah may depart from qiyās for a dalīl or without a dalīl; this prevents its meaning from being subjected to takhsfs (specification) with evidence. Ibn Taymiyyah responds by saying: “If we do not adopt takhsfs al-`illah this takes away the restriction located in takhsfs and makes it a restriction in the `illah (cause); this explains that the `illah is incomplete. As explained by the specified (al-mukhassas) that it is not completed, thus there is no difference between the specification and non-specification of `illah. This is what Abū al-Khaṭṭāb said and it is in agreement with the saying of al-Bāṣrī and Ibn Al-Khatīb and others.”161

This leads to the conclusion that istihsān for Abū al-Khaṭṭāb is an `illah which is stronger than the qiyās and is opposed to qiyās, irrespective of whether this dalīl is a khabar or implicit qiyās (qiyās khaftiy). Thus he supported the departure from one

159 Ibid: p: 452.
qiyās to another; this departure is known as takhṣīṣ al-ʿillah. Thus this Ḥanbalī Scholar has invalidated the report in the second narration.

Al-Hulwānī (d.448/1050) however, sees istiḥsān with the same view as the Ḥanafīs. For him, istiḥsān is more general than both Abū al-Khaṭṭāb’s definition and what has been reported in the earlier narration. In one case he says that it is the stronger qiyās and in another, he says, it is the stronger dalīl, and this is more general than the first. This would mean that istiḥsān for him may be based on the Qur’ān, the Sunnah, or ijmāʿ.

For Najmuddīn al-Tūfī (d.716/1316), the definition of istiḥsān was similar to that of Ibn Qudāmah. However, his definition was more comprehensive in spite of Ibn Qudāmah confining the evidence to the Qur’ān and the Sunnah. Al-Tūfī expands the meaning of istiḥsān to cover all of the adillah shari`ah (legal proofs). He defines istiḥsān as “A departure from the existing precedent, by taking a decision in a certain case different from that on which similar cases have been decided in the light of special adillah shari`ah (legal proof).”

In conclusion, the Ḥanbalīs recognize istiḥsān in spite of their disagreement over the meaning; some interpreted it as the departure from qiyās to the saying of a companion or a solitary hadīth (khabar al-wāḥid), while others saw it as a departure from one qiyās for a stronger dalīl, or as a departure from one qiyās to a stronger one. Only Abū Tālib dismisses istiḥsān as a ruling based on personal desire.

When we examine the Ḥanbalīs and what they said on the subject of istiḥsān the following could be concluded:

1-The majority of the Ḥanbalī Scholars agree that istiḥsān is the departure from qiyās to a dalīl stronger than that qiyās, even though they use different expressions.

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Some of them say that it is the departure from what qiyās requires to a dalīl which is that which is stronger compared to that qiyās. Others say it is the stronger of two qiyās, and so on.

2-All of them- based on this definition- accept istiḥsān, and consider it to be the way of Imām Aḥmad, whom they portray as resorting to istiḥsān based on this definition.

3-Given the above, istiḥsān is not an independent proof, but is related to weighing proofs against each other, as Ibn Taymiyyah confirmed earlier.

4- They reject any kind of istiḥsān that is based on personal desire without dalīl, and consider this to be legislating in sharī'ah that which God forbids.

5- They are not in disagreement with other scholars, as all scholars recognized istiḥsān as long as the departure was from one dalīl to a stronger one.

6-The report which claims that Aḥmad denied istiḥsān does not convey a clear denial. In spite of this Abū al-Khattāb (d. 510/1116) interprets this as denial of istiḥsān which is not supported by a dalīl. In such situations the original rule remains intact. That is Aḥmad recognized istiḥsān as long as the departure from qiyās is by a dalīl.164

In short istiḥsān is a principle of sharī'ah for the Ḥanbalīs in spite of their disagreement on how to arrive at istiḥsān. As for those who said it is not a principle (e.g. Abū Tālib), they were referring to istiḥsān without a dalīl, which springs from hawā' (desire); there was no disagreement over this.

Thus it can be said that the Ḥanafīs, Mālikīs and Ḥanbalīs agreed upon the recognition of istiḥsān in spite of the different ways they conceived of the departure from one ruling to another.

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3.3.5.0 The view of *istihsān* amongst the Shi`ah Jurists:

3.3.5.1 The Imami Shi`ah:

The Imami Shi`ah do not accept *istihsān* at all and rejects the performance of *qiyaṣ* (analogy). It is their belief that *istihsān* has been approved without evidence, and thus they do not give any credence to the *istihsān* rulings. They claim that *istihsān* and *qiyaṣ* are not considered as proof if they are not based on explicit textual or reasonable evidence; furthermore, they are obviously forbidden as they are based on assumption.

3.3.5.2 Zaydiyyah Jurists:

The concept of *istihsān* among the Zaydiyyah thought is close to the Ḥanafīs. The Zaydiyyah and Ḥanafī jurists consider *istihsān* as part of analogy. It is defined as “A departure from one established ruling to a stronger one.” The Zaydi definition of *istihsān* is very close to the Ḥanafī definitions. While Karkhi’s definition and that of the Zaydis is similar, the meaning is exactly the same even though Karkhi’s definition has been criticised because it included the *takhṣṣṣ al-‘illah* (particularization) within the scope of *istihsān*.

In the Zaydiyyah school of thought, the condition upon which *istihsān* can occur is if the departure is from one speculative proof to another. First, both must fulfil the conditions of eligibility and one of them must be stronger and preferable. If the proofs are both *qiyaṣ*, or one is *qiyaṣ* and the other is a *hadith* (*khabar*, *athar*), there is nothing to be considered, since *istihsān* is based on the principle that “No

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166 Ibid, pp: 527-528.
168 Ibid. p: 438.
conflict occurs between two definite proofs". The conflict between two definite proofs is only to be taken into account when considering naskh (abrogation), and so it is not an istihsân.

Indeed, the Zaydiyyah declare that istihsân can not be based on definite proofs, owing to the jurisprudential principle which accords priority to definite proofs over speculative proofs. Conflict arises only when both proofs are speculative. The Zaydiyyah also point out the conditions of qiyâs, which is against the istihsân, must be fulfilled. 171

3.3.6.0 The view of istihsân amongst the Zähiriyyah Jurists:

The foundation of Zähiriyyah (Literalists) thought is based on the literal meanings of the Qur'ân and the Sunnah. The jurist Dawûd Ibn 'Ali (d.270/884) is the founder of this school; his most famous disciple was the belletrist, poet, historian, theologian, jurist, philosopher, and polemicist Ibn Ḥazm (d.456/1064). 172 The Literalists instructed their followers in the superficial rather than the deeper meaning of the Qur'ân and the Sunnah.

According to the Zähiriyyah, the primary source of the shari'ah is the text of the Qur'ân, in accordance with the verse: “O you who believe! Obey God and obey the Messenger (Muḥammad) and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to God and His Messenger if you believe in God and in the last day. That is better and more suitable for final determination.” 173 Citing the verses “…we have neglected nothing in the Book,” 174, “the Book is an exposition of everything”. 175

171 Ibid. p: 439.
173 Qur'ân: 4/59
174 Qur'ân: 6/38
175 Qur'ân: 16/89
you, completed my favour upon you..." 176, "and that you may explain clearly to men what is sent down to them..." 177, Ibn Ḥazm indicates that every aspect of life and all human needs be they material or spiritual, are provided for in the Qurʾān, and therefore no divergence is allowed from the text of the Qurʾān except where one verse is abrogated by another. 178

As indicated in the Qurʾān, the second source of the shariʿah is the Tradition (ḥadīth), which is a record of the Prophet’s acta and dicta. The Prophet is deemed totally trustworthy, as the Qurʾān itself confirms: "Nor does he speak of (his own) desire. It is only a Revelation revealed." 179 180

The last source is consensus (ijmāʿ) which for Ibn Ḥazm signifies the general agreement of the Companions of the Prophet. However, it is a further condition that they all should be aware of the matter agreed upon and no one should have any disagreement. Beyond this he does not accept any other principle as a source of law; therefore he rejects qiyāṣ (analogy). 181

Accordingly, istiḥsān is also rejected on the following grounds: “Those who listen to the Word and follow the best thereof those are the ones whom God has guided and those are men of understanding.” 182 Ibn Ḥazm says that this verse is evidence against, rather than support of, istiḥsān and qiyāṣ. God does not say they should follow what they consider best; He says, “Follow what He considers best”. Therefore, the best words are those which conform to the Qurʾān and the hadīth, and not to something that man considers best. Also ijmāʿ(consensus) fits in with this, and whoever apposes it, will be considered a non-Muslim. According to Ibn Ḥazm, God

176 Qurʾān: 5/3
177 Qurʾān: 16/44
179 Qurʾān: 53/3-4
182 Qurʾān: 39/18
explains this with the following verse: "...and if you differ in anything amongst yourselves, refer it to God and His Messenger, if you believe in God and in the Last Day. That is better and more suitable for final determination." Here it can be seen that God does not say 'refer it to what you consider best' (mā nastahsinū); in addition it is impossible that the truth (al-ḥaqq) will be in what we like (mā nastahsinū) without proof. If it were so, God would have commanded something that he did not wish, in which case textual evidence and proofs would contradict one another. This would also mean that the God had ordered us to differ when He actually prohibits us from doing so. It is impossible that all scholars would like the same thing, taking into consideration the difference in their inclination, nature and objectives, so it is impossible to achieve complete agreement on any one issue. He goes on to say "We see that what the Mālikīs consider good, the Ḥanafīs may consider bad and vice versa. This proves that consideration of istiḥsān is wrong because God's religion does not revolve around other people's considerations; it would apply only if the religion were not complete. But the religion is complete without requiring any extension or supplementation. "The truth is the truth (al-ḥaqqu ḥaqqun) even if people dislike it, and wrong is wrong (al-bāṭilu bāṭilun) even if people like it." He later describes istiḥsān as a passion (shahwah), an inclination (havā'), and an error (dalāl). Ibn Ḥazm believes that the very fact that one accepts a qiyās and then departs from it is enough to invalidate istiḥsān as a principle. For there would be nothing to favour one jurist's istiḥsān over another's. If the religion of Islam were based on istiḥsān everyone would have the right to legislate whatever they desire.
It can be concluded from this statement that Ibn Ḥazm categorically objects to *istiḥsān* and believes it is not a principle of law. The invalidity however is not only confined to *istiḥsān* but also is extended to *qiyās*. Those who denied *istiḥsān*, including Ibn Ḥazm, seem somewhat extreme. What is the motive behind their denial? For as we have seen from the views of those who support *istiḥsān*, the principle does not go beyond the departure from a ruling due to a stronger *dalīl*.

Ibn Ḥazm, among others, seems to be lumping the juristic preference of scholars together with the opinion of the layman, implying that a jurist's ruling based on a considered proof is the same as a layman's opinion that is based on personal desire.

In short, the group who denied *istiḥsān* did so to preserve the agreed *dalīl* and to avoid any other rulings. The scholars who are *mujtahid* recognized only the rulings of the Islamic *shari‘ah* and considered the abuse of such rulings a remote possibility.

3.3.7.0 The view of *istiḥsān* amongst the Mu‘tazilah jurists:

Bishr b. Ghiyās b. Abī Karīmah ‘Abd al-Rahmān al-Marṣî (d.218/833), a follower of the Shāfi‘īs, the Murjū‘ītes (Mu‘tazilī) and the Ḥanafīs, was also a special disciple of Imām Abū Yūsuf (d.182/798) and a famous theologian. He attributes to Abū Ḥanīfah the following definition: "*Istiḥsān* is a departure from analogy based on personal opinion which can be considered right without requiring evidence."¹⁸⁶ Al-Ḥārī (d.436/1044) recognizes *istiḥsān* as a principle of *shari‘ah* as long as the departure from *qiyās* depends on a *dalīl*. Al-Ḥārī's view holds more credence than that of others who disagreed with the Ḥanafīs, bearing in mind the fact that he himself was from a different school. His view is also confirmed by other scholars of different jurisprudential persuasions.

In al-Muʿtamad, al-Basri explains:

"Let it be known that what has been said by the followers of Abū Ḥanīfah is that he recognizes istiḥsān, and many of those who rejected istiḥsān thought that they (the followers of Abū Ḥanīfah) meant that it is a ruling without dalīl. In addition, what the later Ḥanafīs stated is "Istiḥsān is the departure from one ruling to another that is stronger." This has priority over what those who disagree with them thought; the people of knowledge are more aware of the aims of their predecessors. They stated in many issues: "We preferred this athar, for such a reason" and thus we came to know that they did not prefer something without following the proper procedure. That which invalidates such a ruling is either its being a ruling out of desire, or one based on whatever comes to mind first; or zann (speculations); or an amārah (indication) to that ruling. These are as attainable by a child or a member of the public as they are by the scholar. This would mean that we would have to accept all of them equally, and nobody would be blamed for ruling in that way, because these matters deal with ḥaqq (right) and bāṭil (wrong), and because zann (speculation) without amārah (indications) is not distinguishable from the speculation of a mad man. The talk about istiḥsān as explained by the followers of Abū
Hanifah concerns both meaning and definition. As for the meaning, some indications (amārah) are stronger than others. It is permissible to depart from one amārah to another without invalidating the one that has been departed from. This is referred to as takhṣṣ al-`illah (specification of the cause)."\(^{187}\)

Al-Bāṣrī’s views afford us the best defence so far of the recognition of istiḥsān. As a theologian, al-Bāṣrī recognizes istiḥsān as a principle whether it is a departure from qiyās owing to a naṣṣ or ijmāʾ, or a departure from qiyās āḥir (explicit analogy) to a qiyās khafty (implicit analogy) stronger than the first. He defines it clearly with the following words: “Istiḥsān is a departure from the established ruling to another ruling, when the reason (dalil) in the second is stronger than the one found in the first, and other fresh evidence is provided (ḥukm al-tāri) vis-à-vis the previous one.”\(^{188}\)

Al-Bāṣrī states that many of those who reject istiḥsān assume that it is the derivation of rulings without evidence. However, he believes that the disciples of Abū Ḥanīfah did not perform istiḥsān randomly. Rather, they used proper methods and ways of reasoning, as is evidenced by statements such as “we approved istiḥsān depending on this athar and evidence (istahsannā hādha al-athar, wa liwajhi kadhā)”. This makes it clear that they do not approve istiḥsān without depending on evidence.\(^{189}\)


Al-Baṣrī’s view seems entirely logical, for it is unreasonable to assume to that so many scholars from the different schools of jurisprudence were given to producing rulings on a whim and without sufficient evidence.

These are the opinions of the scholars who gives their opinion about *istihsān* as a principle; I have presented their views separately, since they differ from one *madhhab* to another.

### 3.4.0-FURTHER EVIDENCES OF THE VALIDITY OF *ISTIHSĀN*

In the previous section, I discussed the various technical definitions of *istihsān* according to various schools and scholars. Anyone who examines these definitions should be able to distinguish between those who consider *istihsān* as a principle and those who reject it. The historical development of *istihsān* has been traced. Lastly, opinions of the early Ḥanafī scholars and their applications of *istihsān* have also been expounded.

I shall now look in greater depth at the ways in which different groups either accepted or rejected *istihsān* as a valid principle of Islamic law.

First, *istihsān* was defined as a departure from a ruling on an issue to another for a reason that is stronger. Similarly, some scholars consider *istihsān* as evidence opposed to *qiyyas* or departure from one *qiyyas* to a stronger one. Such scholars see *istihsān* as a principle of *shari‘ah*, the effect of which appears clearly in many issues of *fiqh*. Ḥanafī, Mālikī, Ḥanbali and Zaydī schools of thought followed this path, but for the Mālikīs *istihsān* differs from the others.190

Secondly, those scholars who consider *istihsān* to be whatever the mujtahid bases his intellectual judgment on, or judgments judged by personal opinion,191 do not


consider *istihsān* as a principle of *shari‘a*. Rather, they see it as a ruling that has been arrived at out of personal desire and whim without any evidence from the *Qur‘ān*, the *Sunnah* or *ijmā‘*; as such, it constitutes nothing other than a man-made law that has no place in Islamic jurisprudence. 192 Hence the well-known statement of Shafi‘i, who represents the group of scholars who reject *istihsān* as a principle of *shari‘ah* "Man ista‘lsana faqad sharra‘ah"(whoever approves of juristic preference is making himself the Lawmaker). 193 This will be clearer when we discuss the views of scholars in detail. It is represented by the Shafi‘is, Zāhiris and the Shi‘ah. However, Āmidī and Taftazānī, both of whom follow the Shāfi‘i school, recognized *istihsān* 194 as did the Mutakallimūn (Theologians) and Abū al-Ḥusayn al-Basrī. 195

Lastly, there are those who took the middle ground between the two sides; they did not view *istihsān* as an independent principle, but referred it to the other principles already agreed upon among scholars, namely the *Qur‘ān*, the *Sunnah*, *ijmā‘* and *qiyaṣa*. 196 *Istihsān* according to such points of view does not extend beyond these four principles, which have been agreed upon. Thus the holder of this view neither rejects the proof of *istihsān*, as Shāfi‘i did, nor does he say that it is an independent principle, as the Hanafi, Mālikī and Ḥanbalī jurists did. This group of scholars is represented by Shawkānī (d.1834). 197

It should be noted that some Mālikī and Ḥanbalī scholars reject *istihsān* while other scholars of these two schools accept it, as was discussed in detail earlier when we explored the views of various jurists.

This section will explain the reason behind the disagreement over *istiḥsān* as a principle of law and will be elaborated on, following an overview of the various evidences to justify the claims of those who consider it to be a valid principle of *shariʿah*, and those who do not. Both groups discussed each other’s arguments with the aim of invalidating each other’s claim while upholding their own. As the discussion was not limited to the opinion of one group, but included the opinion of their opponents and supporters, it gave way to many discussions, which we will discuss separately.

### 3.4.1 Reason for disagreement over the validity of *istiḥsān*

Before discussing the views of the ‘ulamā’ (jurists) on *istiḥsān*, it is worth exploring the reasons behind the disagreements among them as to whether *istiḥsān* is a principle of *shariʿah* or not.

The opponents of *istiḥsān* are those who see it as “Arbitrary law making within religion”, mainly because they did not understand what the supporters of *istiḥsān* -the Hanafis, Mālikīs, and Ḥanbalīs- meant by the term.

In the early Islamic period, the term *istiḥsān* and its exact meaning were not directly defined; it was applied in judgments without any specific definition or explanation being given. Supporters’ considerations are based mainly on the fundamental principle of securing ease and avoiding hardship. This procedure of the usage of *istiḥsān* was misunderstood by its opponents.

Shāṭibī is of the view that the point of dispute relates to several issues:

1. *Istiḥsān* relates to “the people of innovation” (*ahl al-bidʿah*) who make statements that are far from the *ahkām al-dīn* (rulings of religion) and attempt falsely to present it as the form of *istiḥsān* that the scholars have adopted.
This may have been one reason why scholars refused to accept istitisan as a principle; this refusal might have been because they intended to tighten the noose “around the people of innovation” and thus prevent misguidance wherever possible. These scholars believed that since it is possible for anyone to use istitisan, it could be used as an excuse to propagate self-opinion and thus lead to the collapse of the principles of religion.

2- Istihsan does not materialize unless there is a mustasfin that makes istihsan valid; such a mustasfin has to be either the shar‘ (law) or ‘aql (intellect). If it is shar‘ then the issue is already resolved as the evidence in shar‘i‘ah has shown, and consequently following the dalil (evidence) cannot be called istihsan. In such situations there is no need for additional interpretations to the Qur‘an, the Sunnah, ijma‘ and whatever is derived from them in the form of qiyas and dalil.

As for ‘aql, if istihsan by way of ‘aql is based on a dalil (evidence) then there is no point calling it istihsan; since the reference here is the dalil and nothing else. If, however, istihsan is by the way of ‘aql without any dalil, then it is a bid‘ah (innovation). This might have been the reason why some scholars said that istihsan is not valid, or the reason that made some refer istitisan to other sources.

3-Those who differ with the above view do so if the action is based on the stronger of the two dalils (proof) which they state is a proof when the general (‘am) continues and when the qiyas is directly proportional. Both Abū Ḥanīfah and Mālik specify the general by implicit or explicit dalil (proof). Although Mālik prefers to specify generality by maslahah (public interest) whilst Abū Ḥanīfah prefers to specify by solitary (aḥād) hadith from the companions when it is opposed to qiyas, they both
recognize specifying qiyās and disqualifying the cause (`illah). However once the evidence is established, Shāfi`ī does not accept specifying the ‘illah of shar‘.\(^{198}\)

This is what could be understood from Shāṭibi who clarifies the point of disagreement by saying: “As for istihsān, since the “people of innovation” have links to istihsān it cannot be without a mustaḥsin (recommending), and this can either be ‘aql (reason) or shar‘. As for shar‘, to approve or disapprove is immaterial since the issue is already settled; the evidence has already decided the case and calling it istihsān is of no use, nor is attempting to lay down any extra interpretation. The exception to this rule is that which has been established by the Qur‘ān, the Sunnah and ijmā‘ from qiyās or by istidlāl (inferences). Only one thing remains -‘aql (reason)- as the tool of choice. If reasoning is with evidence then there is no point in calling it istihsān, since as a reference it becomes the dalīl. If it is without dalīl then it is bid‘ah (innovation). Mālik and Abū Ḥanīfah recognise that it is worth considering istihsān in atkām; this view is opposed by Shāfi‘ī who denies it to such an extent that he said: “Whoever gives approval places himself as the Law-giver.” What could be concluded from their madhhab (i.e. Mālik and Abū Ḥanīfah) is that it refers to acting according to the stronger of two dalīls. This is what Ibn al-‘Arabī (d.543/1148) stated: “the general if it continues and qiyās if it is directly proportional, and Mālik and Abū Ḥanīfah see takhṣīs of the general by any dalīl, implicit or explicit.” He (Ibn al-‘Arabī) said; “Mālik prefers to specify with maṣtaḥah and Abū Ḥanīfah prefers to specify with the solitary saying of a companion, which is opposed to qiyās.” He said: “And both specify qiyās and reject the cause, whilst Shāfi‘ī does not accept any specification of ‘illah (cause) of shar‘ once shar‘ has been proved”\(^{199}\).
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It is possible that the above statement is Sh\$tibi’s explanation of the disagreement the scholars have over the validity of *istih\$an* to deduce the *shari‘ah* rulings.

The reasons of disagreement might be very different; for example, it may refer to the linguistic meaning of *istih\$an*. Linguistically *istih\$an* covers all meanings including the mujtahid’s preference based on evidence (*dal\$il*); whatever is preferred by way of personal desire (*tashah\$hi* and *haw\$a*); and whatever the public prefer. It is this general linguistic meaning which might have been the reason for some to reject *istih\$an* as a principle of law. The linguistic terms have already been discussed in previous chapters.

The above summarize the reasons behind the disagreement among the ‘ulamä’ of *us\$ul* (jurists of the principles of Islamic law) over the validity of *istih\$an*.

The main point of discussion concerning the validity of *istih\$an* is, as far as I know, what Sh\$tibi stated was a precautionary measure against those who would tighten the noose around the “people of innovation” (*ahl al-bid\’ah*), who try to interpret the religion and invent whatever is necessary to suit their own interests and desires.

We now turn to the opinions of the ‘ulamä’ (jurists) who consider *istih\$an* as a principle and those who reject it altogether. We will explore the opinions and discuss the evidence they provide to determine whether *istih\$an* is a valid proof that should be acted upon.

3.4.2 The ‘ulamä’ who recognize *istih\$an*

As we have seen, most scholars confirm that the concept of *istih\$an* is recognized by the Hanafi, M\$liki, Hanbali and Zaydi schools. However, despite the
fact that ‘ulamā’ from these different schools recognized the validity of istiḥsān as a principle they often disagreed over the meaning of the term.

The cause of the differences of opinions about the way istiḥsān is directed towards the deduction of juristic rulings is the technique with which each madhhab (school) presents those rulings. Ḥanafi scholars have used two techniques to prove the validation of istiḥsān. The first technique is to identify its true nature and framework, then distinguish the types of istiḥsān. Following this, they consider the various relationships between types and then relate a particular istiḥsān individually in the context of sharī'ī dalīl (valid sources) which is a recognized proof by the other schools of thought. The second technique is the expending of effort in order to prove the validity of istiḥsān as a recognized concept for everyone. The first technique was discussed earlier through in various examples. We now turn to the second technique, which is presenting the evidence needed to prove its validity.

The supporters of the validity of istiḥsān resort to proof from the Qur’ān, the Sunnah, and ijmā'. According to Ḥanafi scholars, to perform istiḥsān is to comply with Qur’ānic verses which command man to follow what is best, good and beautiful. Three verses from the Qur’ān are mentioned by this group to support their claims. The first is the verse in which God addresses Moses concerning the Torah: “(and said): Take and hold these with firmness, and enjoin thy people to hold fast by the best in the precepts”.

The people of Moses were ordained to follow what is best; this is a common-sense given, and leads to the conclusion that acting according to the best is evidence by way of ‘aql and is supported by sharī'ah. Generally it is accepted that istiḥsān is

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203 Qur’ān: 7/145.
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The departure from the good and acting according to the best when it is based on a stronger *dalil*. It is not possible for any one to raise an objection to the ruling in this verse by claiming that it is a specific commandment for the children of Israel only. And it cannot have been abrogated by the Islamic *shari'ah* since Islamic law states that any ruling for those who came before us is also a ruling for us unless the text explicitly specifies it as abrogated. As will be shown in the following verses, acting according to the best has not been abrogated by the Islamic *shari'ah*; rather, the *shari'ah* supports of it. "Those who listen to the Word (good advice), and follow the best of it."\(^{204}\)

The above verse mentions the praise and appreciation of those who depart from what is good in order to follow the better or the best. Nobody can deny that the praise for taking an action, and the punishment for not acting, implies that acting according to the best is obligatory. But in the case where acting according to the best leads to praise for the action, but not to punishment for inaction, then acting according to *istihsān* becomes optional (*mandūb*).

This shows that *istihsān* falls between *mandūb* (optional) and *wājib* (obligatory). However, those who validate *istihsān* may deem it *wājib* as explained by the following verse; "And follow the best of that which was revealed to you from your Lord."\(^{205}\)

According to Sarakḥsī, "The whole of the Qur'ān is beautiful, but here it requires following the best."\(^{206}\) The verses praise the best of those words that were

\(^{204}\) Qur'ān: 39/18.

\(^{205}\) Qur'ān: 39/55.

heard and listened to, and command man to follow the best of what is revealed. Istihsan is included in this and therefore it too is praised indirectly.\textsuperscript{207}

The above verse enjoins man to follow the best and to leave the evil. Istihsan does not by its nature stop the jurist from departing from the good to the best, which is a command; and a command implies obligation, according to 'ulama' of 'usul (jurists of the principles of Islamic law). Therefore, following the best is obligatory and this is what is required as far as istihsan is concerned. Therefore, what is good should be obtained and what is bad should be avoided.\textsuperscript{208}

Such proofs were put forward by those 'ulama' (jurists) who recognize istihsan. They can be referred to in the same references mentioned earlier during the discussion on the views of the 'ulama' recognizing the validity of istihsan. These verses strengthen each other and show the validity of istihsan.

\textbf{3.4.4 Denial of the validity of istihsan:}

The group who denied the validity of istihsan discuss the proofs put forward by the group who recognize istihsan in the following way:

As far as the first dalil from the Qur'an\textsuperscript{209} is concerned, the opponents of istihsan state that this dalil is contrary to what the supporters of istihsan claim, and is against rather than for istihsan. This is because the order (amr) in the verse is not aiming at acting according to istihsan as an obligatory principle; here, God orders the children of Israel to act according to the best that was revealed in the Torah, and not the istihsan claimed by its supporters. God orders the 'children of Israel' to take the best of the texts that were revealed in this divine book. The ruling at hand then has been deduced from the text rather than from an opinion or a whim. Even if we accept


\textsuperscript{208} Ijt, "Sharh Mukhtasar", ii. 384.

\textsuperscript{209} Qur'an: 7/145
that this text implies permission to act according to *istihsân*, then this permission was specific to the Jews rather than the Muslim community, and most of these rulings have been abrogated by the Islamic *shari'ah*.

The opponents of *istihsân* criticize the interpreting of verses in this manner by the principle’s supporters. Ghazâlî claims that the objective of the verse that requires following the best is the evidence: whenever people see something is good by their *'aql* (intellect) alone it should not be considered as a *dalîl* (proof). 210

As for the second evidence from the *Qur’ân* 211, the opponents of the validity of *istihsân* put forward three objections, according to al-Mäwardî 212.

First objection: God ordered him (Moses) to follow the best (*al-ahsan*) and not what is perceived as the best (*al-mustahsan*). *Al-ahsan* (the best) is that which in itself contains goodness, while *al-mustahsan* (what is perceived as best) is what others view or prefer as good, even if it is not. Hence, both types are very different and it becomes obligatory to follow the best (*al-ahsan*) rather than that which is viewed or preferred as best.

Second objection: It is clear that the best has to be followed, since there are rewards for obedience and punishment for disobedience. This is obvious and has noting to do with *istihsân*.

Third objection: As the *qiṣâṣ* verse (2:178) demonstrates, the best is understood as that which man must fulfil in order to do what is right. In the contrast of this verse, for example, forgiveness, while portrayed as better than *qiṣâṣ*, is still optional rather than obligatory.

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210 Ghazâlî, *"Mustaṣfâ",* v: 1, p: 277.
211 *Qur’ân*: 39/18
212 Mäwardî, *"Adab al-Qādi'",* v: 1, pp: 655, 656.
The group who recognised *istihsān* tried to substantiate their claim by resorting to the *Sunnah*, by following the *hadith* narrated from the Prophet which states: “Whatever the Muslim community views as good is also considered by God as good”\(^{213}\). In the interpretation of this *hadith* it was said, that if it was not a *hujjah* (proof) then on the side of God it would not be considered as good.\(^{214}\)

Whenever Muslims who are knowledgeable in the field of deducing the *sharī'ah* ruling, and have the ability to judge the stronger from the weaker, are shown something which is good and stronger than other things that the *mujtahid* approved, it becomes *hujjah* (proof) to what God describes as good. *Istihsān* is by nature of this sort.

The group who recognized the validity of *istihsān* based on this *hadith* faced two objections:

First objection: Ibn Ḥazm is of the view that this *hadith* was never transmitted from the Prophet in any form whatsoever; there is no doubt that this *hadith* does not exist in any transmitted *hadith*, we only know it from ibn Mas‘ūd.\(^{215}\)

Second objection: If we assume that this *hadith* is valid then it is not its intention to allude to *istihsān*, since it does not say “whatever some Muslims view”, but “Whatever Muslims view”. This statement conveys the validity of *ijmā’* and is generally agreed upon among the *mujtahidūn*.\(^{216}\)

The group who recognise *istihsān* also use *ijmā’* to support their claims, particularly on juristic rulings which appear to be at odds with the *dalil* involved. For example, people entering a public bath without specifying the time or the amount of water to be used is contrary to the normal contract of rent (*ijārah*), in which jurists make use of *ijmā’*.\(^{217}\)


\(^{214}\) Āmidī, “*Al-ʾIḫkām*”, v: 4, p: 394.

\(^{215}\) Ibn Ḥazm, “*Al-ʾIḫkām*” v: 6, p: 759.

agree that for the contract to be valid it is necessary to specify the period and the due amount of rent. Traditionally, it was also accepted that drinking water without specifying the amount or the value of money to be paid also contradicts the conditions for the contract to be valid. These are considered good (istihsān) by the `ulamā.\textsuperscript{217} As the Sunnah shows, this is also supported by the generally accepted custom during the life of the Prophet, even though it is contrary to the usūl followed in rent and sales contracts. There is a possibility that it might have also been the custom during the life of the Companions; if this was the case, then the evidence (dalīl) becomes ijmā' which everyone accepted. The evidence in such cases is the Sunnah or ijmā' (consensus) and this is the sort of istihsān that no one would deny.\textsuperscript{218}

The arguments based on ijmā' face the following objections:

First objection: With regard to the public bath example, the `ulamā' did agree that this is permissible and hence the departure from the aṣl (base) is constructed on ijmā' and not on istihsān.

Second objection: What people accept and tolerate in these transactions that some claim to be based on istihsān is simply what they are used to. The public do not object to such transactions so long as they do not lead to indecency. If judgment is required on such matters, we must refer back to the principle rules and not to istihsān.\textsuperscript{219}

These are the arguments that were put forward by the `ulamā' who recognized istihsān together with the objections of its opponents. The `ulamā' who rejected istihsān will be discussed below.

\textbf{3.4.4 The `ulamā' who reject istihsān:}

\textsuperscript{217} Āmidī, "Al-i/kām", iv. p: 393; Ghazālī, "Mustasfī", i. p: 279.

\textsuperscript{218} Māwardī, "Adab al-Qādir", i. p: 652; Izmirī, "Hashiyah", v: 2, pp: 335, 336.

\textsuperscript{219} Māwardī, "Adab al-Qādir", i. p: 657.
As I have mentioned earlier, the first figure to reject *istihsān* was imām Shāfiʿī (d.204), whose book "*Ibtāl al-istihsān*" (invalidating juristic preference) contains his famous statement: "*Man istahsana faqad sharraʿa*” (whoever approves of juristic preference is making himself the Lawmaker). Among those who agreed with him on this issue were: Isnawī (d.772/1370); Bishr b. Ghiyās (d.218/833); Shīrāzī (d.476/1083); Ghazālī (d.505/1111); Dāwūd al-Zāhīrī (d.270/884); Ibn Ḥazm, and the Imāmi Shīʿah.

Those who rejected *istihsān* put forward both scriptural (naqīli) and rational (ʿaqīli) arguments to support their claim.

One example of scriptural evidence is:

"O ye you believe! Obey Allah and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best and more suitable for final determination."

This verse confirms that the best is that which is taken from the Qurʾān or the Sunnah of the Prophet. Rulings are taken only from these two sources, since they are the origin of the shariʿah. As for anything taken from other than these two sources, it will evidently lead to dispute, which must be avoided. The verse directed the Muslim community to refer to the Qurʾān and the Sunnah for rulings; no mention is made of

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226 Qurʾān: 4/59.
The Concept of *Istihsān* 187

*Istihsān*, or the community adopting what it prefers. Who is to say that one preference is better than another? If *istihsān* and the adoption of personal desire as a criterion for rulings were to be implemented, religion would suffer: *ḥalāl* may be deemed *ḥarām*, and *ḥaquq* may be deemed *bāṭil*, and vice-versa. There is no need for this, since the religion is clear enough as it is, and anyone with common sense can understand it.\(^{227}\)

That the *Qur'ān* and the *Sunnah* are the principle sources of Islamic *shari`ah* is not to be denied. Moreover, whoever opposes them and rules by his own opinion is likely to miss the right path and end up actually opposing the principles of the *shari`ah*. However, the type of *istihsān* that is recognized by its supporters is somewhat different; for them, *istihsān* is based on text (*nass*), *ijmā’*, necessity or *maslahah* (public interest). As such, it should not lead to disagreement, and religion is not in jeopardy: *ḥaquq* will not become *bāṭil*, nor will *ḥalāl* become *ḥarām*. In fact such situations arise only when the source of *istihsān* is *hawa* and *tashahhī* (pleasure taking), and nothing as such is accepted by the `ulamā’ who recognize the validity of *istihsān*.

Another example of scriptural evidence is:

> "This day I have perfected your religion for you, completed My Favour upon you, and have chosen for you Islām as your religion."\(^{228}\)

According to the opponents of *istihsān*, God is saying here that the religion has been perfected, and therefore adding to the *shari`ah* is not permitted; if the religion had been incomplete, then *istihsān* would have been permitted. *ḥaquq* is *ḥaquq* even if people despise it and *bāṭil* is *bāṭil* even if people prefer it; this is enough to prove that *istihsān* means ruling by the way of desire and pleasure as well as misguidance. As far


\(^{228}\) *Qur’ān*: 5/3.
as the *Qur'ān* is concerned, the religion has been perfected and *istihsān* is unnecessary.

However, this argument is weak. After all, does anyone who recognizes the validity of *istihsān* actually consider the religion to be incomplete, that *istihsān* is there for the completion of the religion? Supporters of *istihsān* clearly do not subscribe to this view. There is no doubt for them that the religion is complete. However, there are always new issues that arise after the revelation has ceased. The `ulamā’ sought for *ijmā’* and *qiyyās* to give rulings on such issues and *istihsān* is one principle on which some rulings are based. To rule *istihsān* as invalid is to invalidate *ijtihād* per se. Yet no-one holds this view, since the Prophet approved *ijtihād* as the *ḥadith* of Mu‘adh ibn Jabal confirms.

Another Qur’anic example is:

> "And follow that which is inspired in you from your lord. Verily, Allah is Well Acquainted with what you do." 

According to the opponents of *istihsān*, here God is ordering the Prophets to follow revelation, and nothing else, since following anything other than revelation constitutes disobedience to God’s command; ruling through desire is nothing but misguidance, which goes against what God asks us to follow. God explicitly prohibits this according to the *Qur’ān*. Ruling according to *istihsān* is nothing but ruling by *aqq* (probability) and through personal desire and whim (*hawa‘*). No one is ordered to rule by *haqq* until he becomes aware of what *haqq* is, and *haqq* cannot become known from anyone other than God. God has enshrined *haqq* in the Book (the *Qur’ān*), and

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229 *Qur’ān*: 5/3.
232 *Qur’ān*: 33/2.
233 *Qur’ān*: 38/26.
then in the Sunnah of His prophet, and thus there is no solution for any obstacles that one may encounter without the Qur'ān indicating this solution either directly or indirectly.\textsuperscript{234}

The opponents of istihsān claim that the principles of the shari'ah were generally accepted at the time of the Prophet because revelation was still in progress and nothing else could be followed while the revelation continued. The best evidence that can be put forward for this is that ījmā' was not accepted as principle of law during the lifetime of the Prophet.

While this writer agree that there is neither ījmā' nor istihsān nor qiyyās while revelation is in progress, after the death of the Prophet, ījmā' became a reality as the Prophet validated ījīhād for the companions whom he sent to teach people in certain remote areas.

The best scriptural support for this is the hadith of Mu‘ādh. When the Prophet intended to send Mu‘ādh to Yemen, the Prophet asked him:

"How will you judge when the occasion of deciding a case arises? He replied, I shall judge in accordance with Allāh's book. The Prophet asked, "What will you do if you do not find guidance in Allāh's book?" He replied, "I will act in accordance with the Sunnah of the Messenger of Allāh. The Prophet asked, "What will you do if you do not find guidance in the Sunnah of the Apostle of Allāh and in Allāh's book?" He replied, "I shall do my best to form an opinion and spare no pains in my search for truth." The apostle of Allāh then patted

\textsuperscript{234} Shāfi'i, "Al-Umm", v: 7, p: 298.
him on the chest and said: “Praise is to Allāh who
chelped the messenger of the Apostle of Allāh to find
something, which pleases the apostle of Allāh.” 235

From the *hadith* it can be concluded that the Prophet approved *ijtihād* because Mu`ādh was far from the Prophet and thus had less access to revelation than companions who were at the Prophet’s side. This *hadith* clearly does not support the argument that when the revelation was still in progress, nothing else should be followed, under any circumstances. And after the death of the Prophet, the community was in need of some sort of *ijtihād* supported by a *dalīl*; and *istiḥsān* falls within this category of *ijtihād* 236.

According to Ibn Ḥazm, the supporters of *istiḥsān* base their claim on the following rational proof: *istiḥsān*, conceived during the era of Abū Ḥanīfah and Malik, is seen as a precaution there to remove hardship from the people; it is closer to custom, to what people are familiar and feel comfortable with, then it is to true principles of law. God in the Qur’ān 237 states that this is *bāṭil*. All of the verses adduced by the supporters actually serve to invalidate their claims. No-one could be more compassionate towards the believers than God the Creator, the Sustainer and the One who sent the prophets for guidance. Precaution means following the order of God and what is despicable is disobedience to Him. Nothing is good except what God has ordered His prophet to permit, and nothing is despicable other than what God has prohibited. 238

Regarding the evidence which states that *istiḥsān* in the era of Abū Ḥanifa and Malik was invalid on account of its being based on convenience it is necessary to

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point out that scholars such as Abū Ḥanīfah and Mālik did not recognize *istiḥsān* according to their desire without any *dalīl*; rather, all cases in which they resorted to *istiḥsān* were based on *dalīl shari*. Therefore, what their opponents claim is nothing more than a false allegation. The supporters of *istiḥsān* never mentioned any *istiḥsān* that was opposed to either the Qur’ān or the Sunnah.

Opponents of *istiḥsān* counter this by pointing out that the Prophet did not speak out of his own desire; nor did he give a ruling on issues pertaining to the affairs of religion by way of preference. Rather, he followed the revelation, and when he did not receive a revelation he waited for one. If this is the case for the Prophet, who was not permitted to say anything other than that which had been revealed to him, or to use means other than analogy, then it becomes a priority for others not to speak on affairs of religion unless they are following the same path as the Prophet.⁴³⁹

The second rational evidence adduced by its opponents is the assertion that *istiḥsān* was never practiced by the Prophet. He never gave any *fatwā* based on what he preferred concerning the affairs of religion, and always waited for revelations. If it is not permitted for the Prophet to rule according to personal opinion, then, it is automatically prohibited for people other than the Prophet to do so.⁴⁴⁰

The supporters of *istiḥsān* respond to this by saying that it is pointless to discuss the application or non-application of *istiḥsān* during the time of the Prophet. It is obvious that the Prophet did not perform *istiḥsān*, for the simple reason that revelation was incomplete and ongoing. A mujtahid today, however, does not receive revelation, which is why he has to rely on *ijtihād*. If we say that *istiḥsān* is not permitted because of the cessation of the revelation, then we would have to rule out *qiyās* and *ijmāʿ* on the same grounds. Yet the opponents of *istiḥsān*, do not deny *qiyās*

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⁴⁴⁰ Ibid pp: 143-144.
Chapter Three

or *ijmā'*. It is crucial that we recognize that *istihsān* depends on *dalīl*. It should be noted that Shāfi‘ī denied *istihsān* but recognized *qiyyās*. How did he differentiate between the two?

The third rational evidence adduced by the opponents of *istihsān* is that *qiyyās* is stronger than *istihsān*, as it is permitted to specify the ‘āmm (general) by *qiyyās*, but not by *istihsān*. Thus it is not permitted to put *istihsān* before *qiyyās*. If *istihsān* had been a *dalīl*, then it would have been permitted to make the departure from *istihsān* as an evidence, thus proving *istihsān* will lead to its own invalidity.\(^{241}\)

The supporters of *istihsān* respond by saying that *istihsān* cannot come before a stronger *qiyyās* when the departure from *qiyyās* for *istihsān* is a weak *qiyyās*, and there is no restriction on invalidating the weaker in deducing the *fiqh* rulings. It is confirmed in the books of ‘ulamā’ who recognize *istihsān* that they never departed from *qiyyās* in favour of *istihsān* unless it was stronger. A stronger *qiyyās* cannot invalidate *istihsān* because *istihsān* only invalidates the weaker *qiyyās*, and naturally this cannot be a principle of *shari‘ah*.\(^{242}\)

These are the arguments that both sides have put forward, to defend their positions. We now turn to the application of *istihsān* by the early Hanafi school.

**3.5.0 APPLICATION OF ISTIHSĀN IN THE EARLY HANAFI SCHOOL**

In this part of the study I aim to cover the implementation of *istihsān* in the early Hanafi school. This should provide ample proof that *istihsān* was applied in the early period of Islamic legislation. The main scholars covered here will be the school’s eponymous founder, Abū Ḥanīfah (d.150 AH) together with Zufar (d.158 AH), Abū Yūsuf (d.182 AH), and Shaybānī (d.189 AH).

**3.5.1 Abū Ḥanīfah and the concept of *istihsān***

\(^{241}\) Māwardī, "*Adab al-Qādī*, i. p: 655.

\(^{242}\) Māwardī, "*Adab*," pp: 144-145.
The Concept of *Istihsan*

The area in which Abū Ḥanīfah lived attracted many scholars and developed into a thriving intellectual milieu. Abū Ḥanīfah's father's occupation as a trader enabled him to associate with those who took an active part in the social and economical activities of their society. Abū Ḥanīfah stood against the government was a staunch supporter of *ahl al-bayt* (the household of the Prophet) and used *qiyyās* and *istihsān* when asked for guidance in various situations. He had a powerful understanding of *qiyyās*, and in the words of Imam Shāfi‘ī, was described in terms of great respect: "Many scholars could be considered the heirs of Abū Ḥanīfah in their use of *qiyyās* and *istihsān*."

The failure of Abū Ḥanīfah to leave any written manuscripts explaining the concept or procedure of *istihsān*, or the conditions of its validity, is a source of conflict amongst the jurists, for the lack of written material has led him to be accused of judging cases without depending on any textual evidences. When he made the following statement: "*qiyyās* is such and such but we apply *istihsān*", he was criticized by many scholars such as Ibn Hazm (d.456/1064) and especially Imam

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243 Küfa was one of the biggest cities of Iraq, consisting of various tribes and communities, and was a center of the ancient civilizations. Before Islam, schools were established there for the teaching of Greek philosophy. It was also later the base for Shi‘ah, Mu‘tazilah, Khashārij and mujahid ‘Successors’ such as: Alqamah b. Qays (d.62), Masrūq b. al-Ajdā’ (d.63), al-Aswad b. Yazīd (d.75), Shuraykh b. al-‘A‘rīth (d.78), who spread the teaching of the Companions, ‘Ali Ibn Abī Ṭalib (d.40), Ibn Mas‘ūd (d.32), ibn ‘Umar (d.73), ibn ‘Abbas (d.68), of the Prophet. See: Abū Zahrah, "Abū Ḥanīfah", pp: 30, 31.

244 AN Flanifah’s father was a silk trader. AN IHantifah grew up in a wealthy family and took over the business from his father. Sha’bi (d.110) one day advised him to attend a scholarly gathering, which he did. The rest is history. See: Makki, "Manāqib", v: 2, p: 106.

245 Abū Ḥanīfah lived 52 years of his life in the period of Umayyad dynasty, and the remaining 18 years under the Abbasid dynasty. He lived under the rule of the despot governor Hajjāj b. Yūsuf Thaqafī and was witness to the murders of various members of the *ahl al-bayt*. He was also imprisoned. Later on, he understood that the Abbasid dynasty was a continuation of the same tyrannical system; he took a stand against them, which caused him to be persecuted. See: Abū Zahrah, "Abū Ḥanīfah", pp: 19, 104, 107, 108. See also: Khatib Baghdadi, "Tārikhi Baghdad", v: 13, p: 239.


Shafi‘i, who said “Whoever approves of juristic preference is making himself the Lawmaker”.

However, it is not entirely true to say that there is no trace of any reports regarding Abū Ťanīfah’s techniques; in fact he left writings giving indications as to his methods of performing ḫitḥād and his use of the principle of ṣistiḥsān. He expressed this method as follows: “I read God’s book to obtain guidance. If I am unable to find any guidance in the Qur‘ān then I resort to the Tradition (Sunnah) of the Prophet and the true reports (ḥadith) which have been transmitted from generation to generation by trustworthy narrators. If neither the Qur‘ān nor the Sunnah yields any guidance, I then refer to the opinions of the Companions. Consequently, when I make my personal decision then I do not ask others’ opinions. However, if a matter has been considered by Ibrāhīm al-Nakha‘ī (d.96), Shā‘bī (d.103), Ḥasan (d. 110), Muḥammad b. Shīrīn (d. 110), Sa‘īd b. al-Musayyab (d. 94) et al. I also act on their ḫitḥād.”

Abū Ťanīfah also seriously considers the issue of abrogated ḥadīth. Accordingly, his way of recourse to the Tradition was to research intensively a Tradition and to see whether it had been narrated through trustworthy narrators from the Prophet through the Companions; if it had, he would then apply it in his judgments. In addition to his authority in ḥadīth and fiqh, he was also aware of the customs (ʿurf) and traditions of the people, and how previous ḫitḥāds had been incorporated and practiced. He was also a master in qiyyās. Abū Ťanīfah explained his methods when applying qiyyās as follows: “We make qiyyās from one matter to another based on the Qur‘ān or the Sunnah or ijma‘ (consensus) of the Muslim

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Community. We consider seriously our *ijtihād* and whether they adhere to certain principles or not.\textsuperscript{253} He points out that *qiyās* would not be applied to every case without a reason, saying: "*Qiyās* cannot be applied to everything".\textsuperscript{254} The application of *qiyās* is a great responsibility because it may cause unexpected results and bad solutions. In this respect he says "To urinate in a mosque is better than some kinds of *qiyās*".\textsuperscript{255}

Abū Yūsuf (d.182) made a statement regarding his master’s method of performing *ijtihād*, saying, “In any case which is presented to Abū Ḥanīfah, his first requirement is information as to whether there are any Traditions (*athar*) regarding this matter. When we show him what there is, he then applies his knowledge after examining the case and ensuring that it is according to procedure. If two opinions are given and the information is stronger in the Tradition then the stronger opinion is chosen to resolve the issue. However if the two opinions are similar, he judges the case on his own personal opinion (*ra’y*). Thirdly, if any Traditions do not exist relating to this issue, he refers it to *qiyās*. Whenever *qiyās* yields an unacceptable result, he eventually abandons it in favour of *istīḥān*.\textsuperscript{256}

Abū Zahrah summarizes Abū Ḥanīfah’s method of performing *ijtihād* similarly: “He performs *ijtihād* when he can not find any guidance in the *Qurʾān*, in the *Sunnah* or within the *qawl al-ṣaḥābah* (the saying of the Companions). To ensure a competent judgment, he assesses a case on opinion and investigates it using different aspects of deduction. Sometimes he goes with *qiyās* and occasionally makes *istīḥān*. He considers people’s benefit and obeys the principle which states that “No

\textsuperscript{253} Makki, "*Manāqib*", v: 1, p: 74.
\textsuperscript{254} Ibid.
\textsuperscript{255} Saymari, "*Akhbār*", p: 27; Makki, "*Manāqib*", v:1, p: 81.
\textsuperscript{256} Makki, "*Manāqib*", v: 1, p: 85
harm shall be inflicted or reciprocated in Islam.”\textsuperscript{257} If he decides to use *qiyaṣ* when its results conflict with the custom of the people, he then applies *istiḥsān*. Whatever he chooses to perform, whether *qiyaṣ* or *istiḥsān*, the customs of the people are taken into consideration.\textsuperscript{258}

Abū Ḥanīfa’s connection with trade life gave him an intensively absorbed knowledge on how to deal with the common practices and needs of the people, and the newly-occurring problems of daily life. This knowledge gave him the flexibility to depart from the unexpected results of analogy and arrive at rulings that might benefit the people, through the principle of *istiḥsān*.\textsuperscript{259}

According to Shaybānī, “Abū Ḥanīfah was discussing *qiyaṣ* with his friends who always debated with him fiercely in order to arrive at the truth. When Abū Ḥanīfah said, “I am making *istiḥsān*”, nobody could fault him because he had judged so many cases on the grounds of the principle of *istiḥsān*. Eventually everyone abandoned their previous opinions and followed him.”\textsuperscript{260}

The reason for Abū Ḥanīfah’s success is that he automatically recognizes the effective causes (*i‘llah*), distinguishes between the explicit and implicit, and applies the ruling that is consonant with the people’s benefit, thereby obtaining justice and equity.\textsuperscript{261} His use of the principle of *istiḥsān* was performed proficiently without contradicting the main principle of religion and the soul of the shari‘ah. Ibn Shubrumah extols Abū Ḥanīfah’s supremacy in the application of *istiḥsān* by saying, “If someone is allowed to present just one opinion in God’s religion, it can only be


\textsuperscript{259} Abū Zahrah, “Abū Ḥanīfah”, p: 75.


Abū Ḥanīfah’s saying, “I approve *istiḥsān*.262 In addition to this, Abū Ḥanīfah was reported to have said about the validation of this principle “*istiḥsān* is a principle that is necessary for the production of legal rulings in the religion.”263

Abū Zahrah points out the main factors behind Abū Ḥanīfah’s confidence and his success in performing *istiḥsān*: “He used the principle of *istiḥsān* perfectly. Use of this principle, requires deep perception and awareness of the benefits of people, and a knowledge of their current transactions and lifestyles. Besides these, it demands an awareness of God’s commands which constitute the main principle of *shari`ah*, the ability to deduce implicit effective causes, and to find appropriate qualities (wasf) and connect rulings to them; to be dexterous in departure from explicit analogy to implicit analogy, and to understand the applicability or non-applicability of different rulings.”264

As for this statement “*Qiyās* is such and such, but we apply *istiḥsān*”,265 Abū Ḥanīfah did not explain either the meaning of this concept nor its conditions for validation. As we have seen earlier, the reason behind the disagreements amongst the scholars is there that were not enough explanations and definitions available to them. Nevertheless, Abū Ḥanīfah used to refer his judgments to the athar (*hadith*)266 or riwāyah (transmitted *hadith*) and rely on its authority that they narrated from the Prophet or approved precedent. This might not have been generally known to others, which is why he made a statement saying: “If it had not been for precedents, I would

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264 Abū Zahrah, ibid, p: 364.
have decided here according to *qiyās*”, or “If it had not been for the sake of *riwāyah* (transmitted *ḥadīth*), I would have decided the case by *qiyās*.267

In the writings of his disciples, Abū Yūsuf (d.182) and Shaibānī (d.189), the use of the concept of *istiḥsān* by Abū Ḥanīfah and the early Ḥanafis is explained, primarily in the context of the notion of “departure from *qiyās*”. Abū Ḥanīfah based his method of judgement on departing from applications of *qiyās* to the principle of *istiḥsān* based on distinctive and specifically valued evidence and prudence.268 The examples of the practice of *istiḥsān* in the writings of Abū Yūsuf (d.182) and Shaibānī (d.189) reveal that the use of the concept could mean the following:

a- Leaving *qiyās* due to the precedents of the Companions:269

The sayings of the Companions of the Prophet (*qawl al-Safīzibfl*, as mentioned earlier, is a valid yet a controversial principle of *shari`ah*270 For example, if a man grants his wife the authority to choose whether or not she will remain with him, and she chooses divorce, her right to divorce him is ruled invalid according to *qiyās*: only men, and not women, have the right to instigate divorce proceedings. However, according to ‘Umar (d.23), ‘Uthman (d.35), ‘Ali (d.40), Ibn Mas‘ūd (d.32), Ibn ‘Umar (d.73), A‘ishah (d.58), Abū Ḥanīfah and his disciples such a divorce on the authority of the woman is possible, thanks to *istiḥsān*.271

Abū Ḥanīfah’s departure from *qiyās* is based on the sayings and practices of the Companions. The following example illustrates the comparison between *qiyās* and *istiḥsān*. If someone has pigeon excrement on his clothes, *qiyās* does not allow that

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267 Bazdawi, “*Kashf*”, pp: 1126-1130.
268 Baltaci, “*Manāhib al-Tashrī‘*”, v: 1, p: 357.
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person to perform ritual prayers since according to *qiyyās*, pigeon excrement is ritually impure and therefore any form of prayers would be considered void. However, *istihsān* allows that person to go to prayers based on the practice of Ibn Mas‘ūd (d.32) who once brushed pigeon excrement from his clothes using his fingers before going on to pray. Ibn ‘Umar, when faced with the same problem, wiped the bird excrement from his clothes using a piece of stone, then went to pray. According to *qiyyās*, since excrement is considered impure it should prevent a person from prayer; however, Abū Ḥanīfah and his disciples departed from a ruling in *qiyyās* and applied *istihsān*, concluding that the bird excrement is considered natural and should not prevent any prayers, based on the practices of the Companions Ibn Mas‘ūd and Ibn ‘Umar.272

*Istihsān* is preferred over *qiyyās* even if it is a practice of only one Companion. One of the Hanafi scholars, Abū Sa‘īd Aḥmad b. al-Birdār (d.317/929) said: “We have understood from our masters that even only one person’s *qawl* (word) from among the Companions may be preferred over *qiyyās*; on that word, *qiyyās* would be left”.273 When there is more than one opinion from the Companions (*qawl al-ṣāḥib*) then Abū Ḥanīfah chooses the more preferable one.274

b- Leaving *qiyyās* owing to the consensus (*ijmā‘*) of the Companions:276 The consensus (*ijmā‘*) of the Companions is confined to the time of the first four Caliphs and represents their established practices. The Caliph ‘Umar in particular, consulted the Companions on new cases and announced their decisions in open congregations.277 Sarakhsi reports a case of apostasy (*irtidād*) from Islam, in which a husband and wife apostatise together. According to *qiyyās* such a couple must separate,

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275 For more about *ijmā‘* see: in introduction chapter.
as apostasy is an obstacle to nikāh (marriage) and the continuance of a marriage. However, Abū Ḥanīfah and his disciples Abū Yūsuf and Shaibānī departed from the ruling of qiyās based on the consensus of the Companions with regard to the case of the Banū Ḥanīfah. It is known that the Banū Ḥanīfah tribe avoided paying obligatory alms and therefore were deemed to have apostatised from the religion. This crisis caused Abū Bakr to announce a war against the rebels unless they agreed to pay zakāt (alms), repent and return to Islām. Even when they repented, the Caliph did not ask them to renew their marriages (nikāh); nor would any other Companions require it as the consensus of the Companions not recognize this as case of apostasy.

c- Leaving qiyās in favour of sadd al-dharāʾiʿ (blocking the means): In the case of fornication, if a man is accused of committing adultery and discrepancies are found in the witnesses’ evidence, then according to qiyās the accusation is doubtful and no ḥadd punishment is administered. However, AND Hanīfah disregarded this and gave his opinion based on istiḥsān, namely that the ḥadd punishment should be administered in order to deter others from committing such criminal acts. Ghazālī opposed Abū Ḥanīfah’s ruling, saying that the ḥadd punishment should be carried out only when the evidence is indisputable.

d- Leaving qiyās due to authentic Tradition (ḥadith ṣaḥīḥ): According to qiyās, eating and drinking in Ramaḍān, whether consciously or by mistake voids the fast and necessitates expiation. However, Abū Ḥanīfah and his disciples observe that according to istiḥsān, eating or drinking by mistake or through

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280 For more on this, see: introductory chapter.
282 Sarakhsi, ibid, v: 4, pp: 138-140.
forgetfulness does not annul fasting. Accordingly, Abū Ḥanīfah says, “I would have decided according to analogy if there had been no narration” since such incidents are out of one’s hands. For example, a fly may be entering a man’s mouth and he may swallow it; this should be considered as a kind of eating or drinking by mistake. Abū Ḥanīfah discusses this point, saying that this circumstance is beyond the control of one who is fasting, and compares it to a person swallowing dust whilst speaking.

Another example regarding this concept is that laughing out loud while praying annuls the ablution. According to qiyās ablution is annulled when something is expelled from the body; however laughing cannot be used as a comparison. If laughing invalidated the ablution during the ritual prayer, it stands to reason that it would invalidate ablution outside of the prayer too: laughter is laughter whenever it occurs. Laughing outside of the ritual prayers does not invalidate ablution according to qiyās. In spite of the ruling of qiyās the rule of istiḥṣān says that laughing annuls the ablution, based on a report narrated from the Prophet, who said “Whoever laughs, let him repeat his prayer and ablution”.

Abū Ḥanīfah and his disciples were highly respectful of the Traditions, and used them in their ijtihād; even if it was a hadith daīf (weak tradition) they would prefer it over qiyās. Ibn Ḥazm has affirmed that Abū Ḥanīfah and his disciples were united concerning the effectiveness of a weak hadith against qiyās, considering it to be on a higher level.

Yahyā b. Ādam (d.203/818) comments on Abū Ḥanīfah’s method of departing from qiyās due to a hadith saḥīḥ (authentic tradition): “Whoever says that Abū
Hanifah approves *qiyās* over *athar* (*ḥadīth*), is making an unfair accusation. Abū Hanifah’s practices and his disciples’ writings are full of examples of his departing from *qiyās* and applying the rule of *athar* (*ḥadīth*).290

**e-** Leaving explicit analogy (*qiyās ḣalīf*) for something that is more effective and beneficial.291

If a person who performs a supererogatory prayer, begins praying whilst standing and wants to continue the prayer sitting down, without an excuse, then according to Abū Hanifah, this is allowed, based on the principle of *istiḥṣān*. However, Abū Yūṣūf and Shabībīnī do not give permission, based on analogy. They compared it to an obligatory prayer: a person is not allowed to perform two *rak‘a* standing and then, without an excuse continue to pray whilst sitting. According to Abū Ḥanīfah, sitting without an excuse in a supererogatory prayer (*nāfilah*) is like sitting with an excuse in an obligatory prayer (*fard*); therefore, it is certainly considered the same as an obligatory prayer. There are no differences whether one sits at the beginning of, or during an obligatory prayer.292

Abū Ḥanīfah in this case preferred to compare someone who performs a supererogatory prayer to someone who prays sitting, with an excuse. However it is unimaginable to compare this situation with someone who intends to pray two *rak‘as*. Someone who intends to pray two *rak‘as* of ritual prayer commits himself to fulfill that duty. Someone who begins to perform a supererogatory (*nāfilah*) prayer also commits himself to complete it.293 At the beginning of the performance of worship,

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290 Jaṣṣāṣ, “*Fusūl*”, v: 4, pp: 116-117; Makki, “*Manāqib*”, v: 1 p: 83; also for more examples, see:


293 Sāraḫšī, “*Uṣūl*”, v: 1, pp: 115-116. According to the Ḥanafis, to complete a started supererogatory worship is obligatory (*wājib*).
those who intend to perform the supererogatory prayer are free to do so; however once they begin to worship, they are under obligation to complete it.\footnote{Baltacı, "Manâhiş", v: 1, p: 362.}

However, Abū Ḥanīfah did not compare this to the explicit analogy; instead be used istiḥsān, through implicit analogy (qiyyās khâfi), even though the first thing which comes to mind is explicit analogy. The reason to give permission for someone with an excuse to sit during obligatory prayer is to alleviate hardship and difficulties. The supererogatory (nāfîlah) prayer is an optional act of worship and not an obligatory duty; therefore asking someone who is performing the supererogatory prayer to fulfil the duties of obligatory prayer is not alleviating hardship and difficulties. Sitting during supererogatory prayer has been permitted in order to alleviate hardship and difficulties.\footnote{Sarakhsi, "U I", v: 1, p: 115.}

f- Leaving analogy in favour of widespread common custom (‘urf).\footnote{For more on the concept of custom see the introductory chapter.}

Example: if someone buys goods on the condition that they be delivered to his home, according to the principle of analogy, that condition is void and the transaction cannot take place. Despite this Abū Ḥanīfah has approved making such a condition, since this was the people's custom.\footnote{Sarakhsi, "Al-Mabsût', v: 12, pp: 199, also for more on this concept, see: Makki, "Manâqib", v: 1, p: 75; and also see: Sarakhsi, "Al Mabsut", v: 11, pp: 159, 180-181, 192-193, v: 12, pp: 84, 159-161.}

On the other hand, Abū Ḥanīfah does depart from custom; one example is the custom of marking animals (ish'âr). This was one of the Prophet's traditions, applied during the ḥajj to indicate that the animal was intended for sacrifice. The Prophet, after performing the afternoon prayer at Dhu -l-Hulayfa, asked for a camel, which he then marked on the right side of its hump.\footnote{Ibn al-Athîr, "Jâmi` al-Uṣûl", v: 3, pp: 338-339.} Despite this, Abū Ḥanīfah disapproved of the custom because of the cruel manner in which the Iraqis branded their animals.
Abū Ḥanīfah was not against the hadith, because it was clear that the Prophet forbade cruelty to animals.\textsuperscript{299}

After an in-depth investigation of Abū Ḥanīfah’s works, we can see how and why he used the term istiḥsān. In short, istiḥsān is to depart from explicit analogy to implicit analogy which is discovered only after very careful consideration. This kind of istiḥsān is debated among the scholars. Abū Ḥanīfah was also using istiḥsān in the sense of departing from an already established rule or qiyās, or from something which caused difficulties for the Muslim community, in favour of Prophetic Traditions, consensus, rulings of the Companions of the Prophet, and custom.

This kind of istiḥsān -departing from explicit analogy to implicit analogy- is based proofs and evidences which may not be accepted in the viewpoint of others.\textsuperscript{300} The use of istiḥsān from the viewpoint of Abū Ḥanīfah indicates that he was departing from qiyās not only for the sake of the benefit of people, but also with regard to a hadith (tradition) or a custom which is common and prevalent among the community. This does not mean that he simply preferred istiḥsān to customs or whenever it was in line with traditions: he preferred custom or traditions whenever it was in the people’s best interests.\textsuperscript{301}

Abū Ḥanīfah also paid attention to matters between individuals where one has a natural priority over the other. For example, if a man tells his wife: “If you are menstruating, consider yourself divorced”, and the woman says that she is indeed menstruating, then according to Abū Ḥanīfah, the divorce is valid, even if the husband disbelieves her and claims that she is lying. This is because a woman has natural priority over a man when it comes to being believed with regard to women’s issues.

\textsuperscript{299} Mūsa, “Abū Ḥanīfah”, pp: 76-79.

\textsuperscript{300} Baltaji, “Manāhij”, v: 1, p: 363.

\textsuperscript{301} Hasan, “The early” p: 145.
such as menstruation, pregnancy and so on. However, according to *qiyaṣ*, her statement is not accepted and she is not divorced. Hence, Abū Ḥanīfah departed from *qiyaṣ* on the grounds that only women can be certain in such a matter.\footnote{Sarakhšī, “*Uṣūl*”, v: 2, p: 202.}

### 3.5.2 Zufar\footnote{Imām Zufar: Zufar b. Huzayl b. Qays al-Anbārī, from the Tamim tribe. He was a judge (qaḍā) and one of the best friends of Abū Ḥanīfah. He originated from Iran (Isfahan): his father was an ‘Arab and his mother Iranian. He lived in Basra and died there in 158h. It is not known whether he has left any work of jurisprudence. See: Ismā‘īl Sha‘bān Muhammad, “Uṣūl al-Fiqh Tarikhuhu wa Rijāluhu”, p: 46; Abū Zahrah, “Abū Ḥanīfah”, pp: 244-245.} (d.158) and the concept of *istiḥsān*:

Zufar was the first of the three students of Abū Ḥanīfah. Later the other two, Abū Yūṣuf and Al-Shaybānī, became more famous than Zufar.\footnote{Ibid.} At the beginning of his academic career Zufar was known for his adherence to the Traditionalist School (*Ahl al-Hadīth*). Impressed by Abū Ḥanīfah’s teaching, he studied *fiqh* and was thoroughly educated in *ra’y* (opinion) and *qiyaṣ* (analogy). He quickly made a reputation amongst the disciples for his sensitive and sharp analogy.\footnote{Khudaif, “*Tārikh*”, p: 240; Saymari, “*Akhbār*”, pp: 24, 112-113; Abū Zahrah, “*Abū Ḥanīfah*”, p: 244; Khaṭīb, “*Tārikh*”, v: 14, p: 246.} He has been quoted as saying “‘We do not approve of opinion (*ra’y*) when there is a Tradition (*athar*) available; whenever an *athar* comes through we depart from opinion.’\footnote{Ismā‘īl, “*Uṣūl*” p: 46.}

Zufar’s method of practising *ijtihād* is based on the *Qur’ān*, the *Sunnah*, *ijmā‘*, *qawl al-Saḥabah* (the sayings of the Companions of the Prophet), *qiyaṣ*, *istiḥsān* and *‘urf*. As such, it was not so far removed from the methods of his master, Abū Ḥanīfah and his friends, Abū Yūṣuf and Shaybānī. These methods were based on the teachings of their master. The other disciples used slightly different methods in many cases and had different points of view when they were implementing these principles.\footnote{Baltaji, “*Manāhib*”, v: 1, pp: 400-401.}
For example, if a husband gives permission to someone to divorce his wife in accordance with the principle of *talāq raj ‘ī* ("revocable")\(^{308}\) but the person who is authorized to give the divorce pronounces the divorce to be absolute (*talāq bā’in*)\(^{309}\), according to Zufar this divorce is not recognised because he has misused the authority which was given to him. However, Abū Ḥanīfah, Shaybānī and Abū Yūsuf disagree with Zufar on this issue and consider that this is recognised as *talāq raj ‘ī*\(^{310}\).

Zufar’s method of approving *istiḥsān* is based on public interest, so long as it is not in contradiction with the principles of *shari‘ah*. However, at times he favours *qiyyās* where others favour *istiḥsān*. When a matter was being considered the application of *qiyyās* was approved if the outcome was not negative and not opposed to the required purpose; where the application of *qiyyās* produced negative results, then *istiḥsān* would be approved as it aims to seek the reason why *qiyyās* resulted in negativity, thus benefiting the people. Zufar usually prefers to approve the rule of *qiyyās* rather than *istiḥsān*. However, if there is a dispute between *qiyyās* and *istiḥsān*, he would approve *istiḥsān* in the sense of implicit analogy which is based on *nass*.

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308 *Talāq Raj ‘ī*: A husband has the right to take back his wife, who still menstruates, as long as she has not yet entered her third menstruation in the course of the *iddah* (waiting period); it is the third in the case of a free woman, and the second menstruation in the case of a slave woman. See: Al-Qayrawānī, “*Risālah*, *bāb fi al-nikhd wa al-falāq*, p: 89-97 quoted from: Doi I. “*Shari‘a*”, p: 177. The first two pronouncements of divorce followed by the periods of retreat from the wife with whom marriage is consummated are called *talaq raj ‘ī*. It is based on the following Qur’ān verse: 2:229 “A divorce is only permissible twice after that the party should either hold together on equitable terms or separate with kindness.” In this kind of divorce the spouse can still enjoy the usual benefit from each other since the marital relationship is not over. If one of them dies, the other will inherit from him or her, as the case may be. Maintenance will still remain available to the wife and children. The *raj ‘a* (return) is the right of the husband. As Qur’ān says: 2:228 “And the husband has the better right to take them back in that period if they wish for reconciliation.” It will suffice just to utter the words like “I take you back” or the return can be effected through actions such as resuming sexual relations or kissing. See: ibid.

309 *Talāq Bā’in*: This is divorce with three pronouncements of divorce before the consummation of marriage. There is no possibility of return to the conjugal relationship when the three divorces are completed. There are two kinds of *talaq bā’in*: *Baynūnah ṣuḥrā* and *baynuna kubra*. The *baynūnah ṣuḥrā* decreases the conjugal rights of the husband. In the event of the death of one of the parties, the other will not inherit from him or her as all the conjugal rights cease. The former husband cannot even re-marry the former wife unless she marries another man and he voluntarily divorces her without any intention of *taḥfīl*. See: ibid.

310 Istā‘īl, “*Uṣūl*”, p: 46.
qawl al-Sahōbah (the saying of the Companions of the Prophet) and present 'urf (custom). 311

3.5.3 Abū Yūsuf (d.182 AH) and the concept of istiḥsān:

Abū Yūsuf was appointed312 judge of Baghdad during the time of al-Mahdī (d.169 AH), al-Hādi (d.170 AH) and al-Rashīd (d.193 AH). 313 This position gave him the opportunity to practice Ḥanafī law in order to resolve the problems presented to him, and so his rulings and his practice of istiḥsān come from both actual life and juristic theory. 314 Schacht asserts that the first technical user of istiḥsān was not Abū Yūsuf,315 who he claims inherited this method from his master, Abū Ḥanīfah. Abū

312 He is one of the greatest followers of Abū Ḥanīfah. He was also an Imām in his own right. Abū Yūsuf was a descendant of the Ansār and Sahābah, Saʿd b. Sībāt. He was born in Kufah in 113 or 117 h. and passed away in 182 h. He regularly attended Abū Ḥanīfah’s circle of lectures and acknowledges of his mastery in fiqh. He was attending Ibn Abī Lailā’s lecturers at first: “I would attend Ibn Abī Lailā’s circle, who recognized my potential, however when some issue would arise, he would apply Abū Ḥanīfah’s ījthād. Owing to this, I considered that I should go to Abū Ḥanīfah’s circle and study and gain more benefit from him. Eventually, I attended regular circles of Abū Ḥanīfah.” He followed his master’s method of ījthād and reached the level of mujtahid mutlaq (absolute independent legal thinker). After the death of his master he moved to Baghdad. In 150 h. was appointed qadi (judge) by the caliph al-Mahdī and carried out this duty for 16 years; he was also given the highest legal post in the entire khilāfah, namely that of gadi al-qudāt (chief Justice). Abū Ḥanīfah said of him: “If God forbid, this man (Abū Yūsuf) dies, the world will lose one of its great scholars.” A narration from Abū Ḥanīfah about the participants of his own lecture: “Among the students there are 36 mature men: 28 of them are capable of being judge, 6 of them are good for the position of giving legal opinions, and 2 of them are capable of being both chief justice (raʾīs al-qudāt) and giving legal opinions (ifta’), they are Abū Yūsuf and Zuwar”. However, al-Shaybānī was only 18 years old when Abū Ḥanīfah died. He actually became famous after the death of his master. (See: ibn Bazzaz, “Maḍāʾīb ʿIlm Maṣām”, v: 2, p: 125. quoted from Abū Zahraḥ, “Abū Ḥanīfah”, pp: 222-223). His most famous teachers are Aʾmash, Iḥsām b. Urwah, Sulaimān b. Tālīm, Abū ʾIshaq al-Shaybānī, Yahyā b. Saʿd al-ансārī (d.146), Mālik b. Anas (d.179), ʿUyaynah, Ḥasan b. Dinār, Hanzalah b. Abū Sufyān. He learned maghāti (military history and siyar (international law) from Muḥammad b. ʾIshaq and knowledge of fiqh from Muḥammad Abī Lailā (d.150). He was endowed with so much intelligence and such a good memory that he learned all these disciplines simultaneously. Abū Yūsuf was ranked so high in Tradition (hadith) as to be considered a ḥaḥiṣ in it. Ibn Jarb Tabarī used to say: “Qādī Abū Yūsuf Yaʾqūb b. ʾIbrahīm is a faqih (jurist) and ʿalim (scholar). He knows hadith, he is famous for reciting hadith by memory, and he used to visit and attend the lectures of muḥaddithīn and at one sitting learn 50 to 60 traditions. After the lecture he would dictate them”. See: Ibn ʿAbd al-Bār, “Inšīqā”, p: 172; Bilmen, “Iṣṭilḥāʿī Fiqhīyyah”, v: 1, p: 392.
Yūsuf practiced *istiḥsān* very skilfully in his *ījīhād* thanks to his position as judge, despite his allegiance to Tradition (*Hudūth*).\(^{316}\)

Abū Yūsuf’s method of judgment with regard to the principle of *istiḥsān* can be found in his rulings, words and writings. According to the sources, he would pray to God, saying: "O my Lord! As you are aware, whenever I face a problem I look for guidance. First I look in your Book and if I find guidance there then I take it; otherwise I continue, looking in your Prophet’s traditions. If the guidance can not be found either in the Book or in the Prophet’s traditions, I then take into consideration the Companion’s words."\(^{317}\) Sarakhsī points out that Abū Yūsuf’s method considers the saying of the Companions (*qawl al-Ṣahrābī*) and is preferable to *qiyyās*.\(^{318}\) Karkhī (d.340/952) was reported as saying “Abū Yūsuf used to say: “*Qiyyās* is such and such, but I left it because of athar (tradition)”.\(^{319}\)

According to Karkhī the meaning of *athar* here is an opinion of the Companions where no opposing opinion has been recorded. It obviously means that if any of Abū Yūsuf’s contemporaries had a conflict of opinion, then applying the Saying of the Companions would be deemed more preferable.\(^{319}\) Abū Yūsuf followed his master’s methods of *ījīhād*, seeking guidance first in the *Qur’ān*, the *Sunnah* and the Sayings of the Companions; the Saying of the Companions were given priority over *qiyyās*.\(^{320}\) In his use of the principle of *istiḥsān*, he also followed his master, and mainly used it to oppose the rule of *qiyyās*.\(^{321}\)

\(^{316}\) Matlüb, Maḥmüd, “*Abū Yūsuf*”, the University of Baghdad, Iraq, 1972, p: 129.

\(^{317}\) Ibid, p: 129.

\(^{318}\) Sarakhsī, “*Usūl*”, v: 2, p: 105.

\(^{319}\) Jaṣṣas, “*Fusūl*”, v: 3, p: 361.

\(^{320}\) Salim Öğüt, “*Ebu Yusuf*”, x, DIA, p :263.

Abū Yūsuf embraced the principle enshrined in the following quote: “It is an accepted fact that the terms of law vary due to changes of the times”. An example is the case of kharāj (land tax), which was fixed for a certain amount by the second Caliph 'Umar. Abū Yūsuf, however, did not hesitate to change and reset it according to the circumstances of the times. Abū Yūsuf took the opposite view to Abū Ḥanīfah on the matter of usury. If the Prophet ruled that goods could be sold in different units of weights and measures, according to Abū Ḥanīfah and Shaybānī, custom (ʿurf) could not be taken into consideration. However, Abū Yūsuf has a different opinion, and rules that since circumstances have now changed, trading should be in accordance with local or popular custom.

Abū Yūsuf sometimes uses the term “I approve” (astaṣṣinū), to mean “I believe it is the right thing to do”, and sometimes uses the opposite term “I disapprove” (astagbīfū), meaning “I believe it is the wrong thing to do”. For example, if a man is attacked by a camel, and the man then kills the camel, according to the opinion of Abū Ḥanīfah and Shaybānī based on qiyaṣ, the person who has been attacked must pay compensation to the camel’s owner. Despite their opinion, Abū Yūsuf points out that it is the man who is entitled to compensation. This is a kind of istiḥsān for he says “I disapprove (astagbīfū) of him compensating the owner of the camel.”

After considering Abū Yūsuf's writings and rulings on the basis of the principle of istiḥsān, we can see that he uses istiḥsān in the following senses:

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325 Ṭahwīl,“Al-Mukhtaṣar”, p: 258.
a- Leaving the explicit analogy (qiyyās jāliy), which is based on discretion and prudence, in favour of an alternative analogy that has a stronger effective cause (‘illah):

For example, if someone performs four rak‘as of supererogatory prayer but does not sit within the required time of tashahhudd at the first sitting, according to Abū Ḥanīfah and Abū Yusuf his prayer is valid. This is a type of implicit analogy within istiḥsān. They have compared the four rak‘as of supererogatory prayer to four rak‘a of obligatory prayer, and have arrived at the logical conclusion that the four rak‘a supererogatory prayer, despite the fact that the required time of sitting has not been adhered to, is as valid as an obligatory prayer, since it was performed of his own free will.327

Next is an unusual example of istīḥsān approved by Abū Yusuf, in favour of the general benefit of Muslims: If a Muslim steals from an infidel who is living in a Muslim country and who abides by the laws of that country and pays tax (jizyah) the Muslim will not have his hand amputated. According to qiyyās, however, a Muslim thief will have his hand amputated.328 This type of legal opinion is a very peculiar example of istiḥsān in that it appears to be an unjustified decision. In spite of the difficulties of understanding the judgment of Abū Yusuf which is not to amputate the hand of the Muslim thief, Aḥmad Ḥasan presumes that it was his intention to discourage the entry of foreigners into Muslim territories in order to keep society immune from their influence.329

b- Approving istīḥsān based on the text (nass):

326 To say while sitting: “There is no god but Allah and Muḥammad is Allah’s Apostle.”
The Concept of *Istifsan*

The following examples explain Abū Yūsuf's departure from *qiyyās* and approval of *istihsān* based on *nass*, which is the authentic Tradition: laughing out loud during prayer negates the ablution\(^{330}\); fasting is not invalidated when someone eats or drinks by mistake;\(^{331}\) and the validation of the agreement of crop sharing (*muzāra‘ah*) and share tenancy.\(^{332}\)

c- Approving *istihsān* based on the consensus (*ijmā‘*) of the Companions: one example is when a husband and wife apostatise together, their marriage (*nikāh*) continues as it is.\(^{333}\) In a similar case, if a woman apostasizes from Islam during a terminal illness, the husband should inherit her estate; this is based on *istihsān* according to Abū Yūsuf and Abū Ḥanīfah. According to *qiyyās*, the husband is excluded from the inheritance.\(^{334}\) In these circumstances Abū Yūsuf gives the explanation that the woman's apostasy during terminal illness must be out of pure malice, as it is clearly her intention to disinherit her husband. Therefore, the circumstances surrounding apostasy should be absolutely clear in the situation of terminal illness. According to *qiyyās* the husband does not inherit her estate as it does not distinguish between the different circumstances of normal and terminal illness.\(^{335}\)

d- Approving *istihsān* based on the Saying of the Companions of the Prophet (*qawl al-Ṣaḥābi*).\(^{336}\) For example, if someone in authority—a ruler, say, or a judge—has witnessed a crime of theft, adultery or the consumption of alcohol, they cannot pass judgment based on their personal knowledge; they can only pass judgment when the legal evidence has been established. Abū Yūsuf indicates here that "this is a kind of

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\(^{333}\) ibid v: 5, p: 49.

\(^{334}\) According to Islamic law, Muslims are prohibited from inheriting from unbelievers and vice-versa. See: Buhārī, "Ḥaḍīth", no: 44; "Farāḍ", no: 25; Muslim "Farāḍ", no: 1: (*Lā yarīth al-Muslim al-Kāfir wa la al-Kāfir al-Muslim*).


istihäsän based on a Tradition (athar) which is reported from Abū Bakr and ‘Umar. However, according to qiyäs, they are able to execute their judgment on the basis of their personal knowledge.\textsuperscript{337} Through istihäsän, justice is established. The authority is powerless to judge without evidence. If the judgment had been allowed by mere personal knowledge, it may be an arbitrary decision as it creates turmoil within society, causing people to lose their trust. However, the requirement of evidence ensures that the people continue to have faith in the judicial system.

e- Approving istihäsän on the grounds of necessity, the pursuit of ease, and avoidance of hardship or the removal of that which is harmful:\textsuperscript{338}

The following are considered as forms of istihäsän: Friday prayer is permitted to be held in more than one mosque in the same town, in order to alleviate any difficulties within the Muslim community;\textsuperscript{339} after a successful battle, the booty (ghanîmah) is collected and, if it is not possible to forward it to the treasury (bayt al-māl), the commander may distribute it among his men;\textsuperscript{340} and muzāra‘ah and musâqāt (share tenancy) agreements are deemed valid in order to alleviate hardship.\textsuperscript{341}

f- Approving istihäsän on the grounds of custom. For example, a person employs a labourer to dig a well without first asking permission from the ruler. The well is dug beside a path along which Muslims walk, and afterwards someone falls into the well and dies. According to qiyäs the labourer must accept the responsibility of the death. According to the general custom, an individual must have the ruler’s permission before he can have the well dug. Abū Yûsuf says that qiyäs should not be considered in this case because the labourer had already taken permission from the


\textsuperscript{338} Matûb, “Abū Yûsuf”, p: 130.


\textsuperscript{340} Sarakhsî, “Al- Mabsûf”, v: 10, p: 34.

\textsuperscript{341} ibid v: 23, pp: 17, 32, 41, 46.
employer, and therefore, according to istihsān, it is the employer who has to accept the responsibility for the crime.\textsuperscript{342}

According to Abū Yūsuf, another example of the use of istihsān would be in the case of a husband paying zakāt al-fitr\textsuperscript{343} on his wife's behalf but without her permission. This is valid according to istihsān because custom dictates that the husband is responsible her paying zakāt al-fitr and therefore his wife's permission is not necessary. According to the rule of qiyās, this is not valid.\textsuperscript{344}

g- Departing from a ruling of qiyās due to doubt and uncertainty over the evidence:

According to qiyās, if a man is accused of fornication (zinā') by four people, the penalty prescribed by the Qur'ān is one hundred lashes.\textsuperscript{345} However, what happens if two people give evidence that the accused is married?\textsuperscript{346} Will he be punished with the hundred lashes first and then by being stoned?

According to qiyās, if the witnesses withdraw the accusation while the accused is being punished, he must still be subjected to the rest of the lashes. However, istihsān rules that the accused person should be relieved of both the penalty of lashes and stoning.\textsuperscript{347} Because of doubts and uncertainty over the evidence, istihsān overrules qiyās in accordance with the shari'ah, which dictates that a hadd

\begin{itemize}
\item[\textsuperscript{342}]Abū Yūsuf, \textit{"Al-Jāmi` al-Saghir"}, p: 182.
\item[\textsuperscript{343}]The charitable donation paid at the end of the month of Ramadan.
\item[\textsuperscript{345}]Qur'ān: 24/2: This verse indicates that one hundred lashes is for an unmarried person who commits illegal sexual intercourse. A narration from Abū Ḥurairah (d.59) states that God's Messenger judged that the unmarried person who was guilty of illegal sexual intercourse should be exiled for one year and receive the legal punishment that is one hundred lashes. See: \\textit{Saḥīḥ al-Bukhārī}, v: 8, no: 819.
\item[\textsuperscript{346}]A married who commits adultery is stoned according to shari'ah: According to a narration from Jabir b. 'Abd Allah al-Anṣārī, "A man from the tribe of Banī Aslām came to God's Messenger and informed him that he had committed illegal sexual intercourse and he bore witness four times against himself. God's Messenger ordered him to be stoned to death as he was a married person. See: \\textit{Saḥīḥ al-Bukhārī}, v: 8, no: 805.
\item[\textsuperscript{347}]Abū Yūsuf, \textit{"Al-Jāmi` al-Saghir"}, p: 165.
\end{itemize}
punishment should not be established where there is uncertain evidence. Therefore, istiḥsān departs from the ruling of qiyyās on the ground of uncertain evidence in order to secure justice for the people. Also, had qiyyās been enforced, the accused person would be faced with two different punishments for a single crime; carrying out double punishments for one offence is considered unjust and therefore must be avoided.

3.5.4 Shaybānī (d.189) and the concept of istiḥsān:

Shaybānī is also a Traditionalist and depends on Traditions for his rulings to a greater extent than Abū Yūsuf. He points out the importance of balance between tradition and ra’y saying that “Tradition can only work when it is hand in hand with opinion (ra’y), and vice versa. Knowledge of ra’y or Tradition is not enough to judge or take the place of a muftī (the authority of giving fatwā’-ruling).”

In this context, Shaybānī follows Abu Ḥanifah, and is careful not to make any rule arbitrarily without depending on legal evidence. To avoid an arbitrary decision he applies analogy; if no guidance is found in the Qur’ān and the Sunnah, or results in a bad decision, he departs from qiyyās and applies istiḥsān. He also made the condition...
that the one eligible to perform *ijtihād* to give a *fatwā* (ruling) will be the one “who knows the *Qur’ān*, the *Sunnah*, the Sayings of the Companions of the Prophet, and Muslim jurists’ considerations of *istiḥsān*. He must be versed in performing *raʿy* (opinion) *ijtihād* and giving *fatwās*, which are validated rulings on obligatory acts such as praying, fasting, and pilgrimage; and forbidden acts such as drinking alcohol, fornication, and dealing in usury. When he performs *ijtihād*, he uses the faculty of reasoning and compares it to something similar, and even if a mistake is made with the judgment, applying it is permissible.”

Shaybānī often uses the following statement “I depart from *qiyyās* and approve *istiḥsān*”. His definition of the *istiḥsān* that sometimes refers to athar (tradition) was called *raʿy* at the time of the Companions. He used *istiḥsān* in the sense of taking an opposite side and departing from *qiyyās*. Without giving an explanation that is opposite of *qiyyās*, he simply says: “this is *istiḥsān*” or “According to *istiḥsān*, it is as such: Jaṣṣāṣ and Sarakhsi give some quotations from Shaybānī’s book called “*Kitāb al-* *istiḥsān*”.

Shaybānī criticises the kind of *istiḥsān* which is performed against clear evidence and considers it to be an arbitrary decision. He condemned the *ahl al-* *Medinah* for what he saw as their hypocrisy in their use of *istiḥsān*: he saw them as people who would abandon their Traditions when faced with a problem, and approve *istiḥsān* which was not supported by athar (Traditions) and the *Sunnah*, and which went against their own narrations. How, he asks, could they be *ahl al-athar*.

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(Traditionalists) when they depart from their own narrations? This confirms that Shaybānī never approved *istiḥsān* over Tradition. For example, the *ahl al-Medinah* on inserting the *salām* (conclusion of prayer) between every two *rak‘a* of canonical prayer. Shaybānī responded saying, “How dare they approve this with *istiḥsān!*” A narration had been reported concerning the Prophet who prayed four *rak‘as* at noon without separating them by a *salām*.

These examples clearly indicate that Shaybānī was insistent that *istiḥsān* be based on legal evidence.

Shaybānī applied the principle of *istiḥsān* in the following ways:

a- Using *istiḥsān* based on textual *naṣṣ*.

According to Shaybānī, *qiyyās* is not a valid principle to be applied when there is textual evidence. Shaybānī opposes the Medina jurists and their claim that someone who has eaten by mistake or through forgetfulness during Ramadan has to repeat the fast. He says: “Of course the Medina jurists are sure that *ra‘y* (opinion) would not be applied in the presence of definite proof as Abū Ḥanīfah said, ‘I would have ordered the fast to be repeated if there were no narrations’.”

In the case of laughing whilst praying, the Medina jurists, despite the presence of textual evidence, applied the ruling *qiyyās*, saying, ‘Laughing out loud whilst praying does not annul ablution; ablution is annulled when some kind of excretion occurs from the body, which cannot be compared with laughing. If laughing had invalidated ablution at prayers it would also have invalidated ablution outside of the prayer: laughter is laughter wherever and whenever it occurs. In spite of the *istiḥsān* ruling which says that laughing invalidates ablution during prayer, according to *qiyyās*...
laughing does not invalidate ablution. This _istiḥsān_ ruling is based on a report narrated from the Prophet, who said: "Whoever laughs let him repeat his prayer and ablution". Given such clear evidence (athar), _qiyaṣ_ is not applied. Shaybānī criticizes them, saying "If athar (Traditions) were not present when the jurists of Medina were considering practising _qiyaṣ_, it would be acceptable, but since they are present, _athar_ has to be followed.

b- Using the principle of _istiḥsān_ based on the Sayings of the Companions:

Shaybānī approves the use of _istiḥsān_ to validate the continuation of a marriage (nikāḥ) of a husband and a wife who have apostatized together, on the basis of the agreement of the Companions.

c- Using the principle of _istiḥsān_ based on avoiding hardship:

If a small piece of animal faeces is dropped into a well, according to _qiyaṣ_ the water cannot be consumed, since it is ritually impure. However if very little has contaminated the water, according to _istiḥsān_ it is considered pure; as wells are located on open lands it is difficult to prevent the wells from becoming contaminated from the various germs carried by the wind. This ruling is based on the maxim of the Shari'ah: "Necessity renders prohibited things permissible".

In the subject of the forward sale (salam) one of the requirements is that the goods must be physically present at the time of the contract; if they are not present, then, according to _qiyaṣ_, _salam_ is invalid. An example is when one of the

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364 Shaybānī, "Al-Hujjah", v: 1, p: 204; for this example see p: 199 in this thesis.
368 Majallah: clause: 21
Companions, Hakim b. Hizäm, asked the Prophet if he could sell a commodity prior to purchasing it. The Prophet answered: “Sell not what is not with you”.\(^{369}\) Despite qiyás invalidating salam, another hadîth approves salam: “Whoever concludes salam, let him do so with a specified measure, weight and within a specified period of time.”\(^{370}\) Shaybânî uses istihsân to legitimize forward sale in order to prevent hardship for Muslims.\(^{371}\) Similar business transactions such as muḍârabah,\(^{372}\) mużāra‘ah,\(^{373}\) musaqaţh\(^{374}\) are also validated by istihsân, despite qiyás invalidating them.

d- Using the principle of istihsân based on custom:

The consideration of (‘urf) plays an important role in the legal thinking of Shaybânî.\(^{375}\) For example if a certain town and its residents ask Muslims for protection, then according to the ruling of istihsân the agreement of protection would also cover the belongings of those people mentioned in that agreement. The terms qal‘ah (fort) or madina (town) in their common usage (‘urf) does not simply apply to the buildings but all the contents in the buildings. However, according to qiyás, it would only apply to the fort or the town, and it would exclude the contents.\(^{376}\)

e- Using the principle of istihsân to explain an ambiguous statement:

If a man says to his wife “Consider yourself divorced if you enter the house” while his wife is in the house,” Shaybânî says that according to istihsân: “the

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\(^{369}\) Abû Dâwûd, “Buyû”, 70; Nasâî, “Buyû”, 60.

\(^{370}\) Bukhârî, “Saḥîḥ”, iii, 243, hadîth no: 441.


\(^{372}\) Muḍârabah: This means a contract of co-partnership, in which one of the parties (the proprietor) is entitled to a profit on account of the capital (ra‘s al-mâl) he has invested. He is designated as the owner of the capital (râb al-mâl). The other party is entitled to profit on account of his labour and is designated as the muḍârib (or the manager) in as much as he derives a benefit from his own labour and endeavours.

\(^{373}\) Mużâra‘ah: This is a contract between two persons whereby one party is the landlord and the other the cultivator. They both agree that whatever is produced by cultivation of the land shall be divided between them in specified proportions.

\(^{374}\) Musâqaţh: This is a contract between two parties whereby one party takes charge of the fruit tree of the other partner on condition that the crops shall be divided between them on specific terms.


condition would only be fulfilled if the woman re-entered the house after having left it. However, according to qiyās, the presence of the wife in the house at the time when the husband pronounces this statement is taken into account, and the very fact that his wife is in the house fulfils the condition of the husband’s statement. This statement is unclear: if he applies his condition whilst she is still in the house then he is contradicting his own oath, and therefore it remains ambiguous. Istiḥsān explains that the husband’s statement is unclear and, rather than applying qiyās ambiguously, states that the oath only applies if the wife leaves the house and then re-enters.

Conclusion:

As founders of the theory of istiḥsān, the Ḥanafi jurists defined the term in various ways. However, the definitions, although explained differently, have the same meaning.

Methodologically the first to define istiḥsān was Karkhi who lived in the third and fourth century. The key word in his definition is “departure” (al-ʿudūl), which points to the heart of the objective: simple departure is not enough; there must be a stronger reason for a departure. The word tark (departure) and the word “better” (awlā) were used by Jaṣṣāṣ (d.370/981). After one century, the way of expressing istiḥsān changed slightly. The different key word given by Bazdawī (d.482/1089) was “particularization” (takhṣīṣ) with a stronger reason. Sarakhsī (d.483/1090) had four definitions, each with a different perspective, and used the key words, “ease, convenience, suitability, accommodating, seek mildness, tolerance” which appear to be the main goal of istiḥsān in departing from qiyās (analogy). Nasaff (d.710/1310) and Ibn Humām’s definitions also have more or less the same meaning, and use the key phrase “evidence, opposing qiyās jali (explicit analogy).”

Briefly, the main common point of the Hanafi jurists concerning *istihsān* is the idea of departure from one ruling to another, or to prefer one decision to another \(^{378}\), or to set aside *qiyaṣ jali* (obvious analogy)\(^ {379}\) or to adopt what is more suitable, easy, convenient and comfortable.\(^ {380}\)

"Whoever approves juristic preference is making himself the lawmaker".\(^ {381}\) Shāfī’ī’s criticism of *istihsān* is based on the above statement, which rejects *istihsān* altogether. Nevertheless, the Shāfī’ī scholar Āmidī (d.631/1233) appeared to recognize *istihsān* when giving the definition and using the key phrase “an evidence embedded (yanqadīḥu) in the mind of the jurist”. Rather than agreeing with Shīrāzī (d.476/1083), who said, “Depending on assumption rather than evidence”, he shares the same idea as Ghazālī (d.505/1111) who said “Use your own judgment to arrive at a decision”. Besides the Shāfī’ī jurists, the Imami Shi’ites also rejected *istihsān*, considering it to be assumptions without proof. However, the Zaydīs, despite being an offshoot of Shi’ism, considered *istihsān* as a valid principle of shari`ah. In addition, the Zaydīs made further conditions that the proof which allows the departure must be eligible for the conditions of *ṣiḥḥat*, which must be stronger or preferable.\(^ {382}\)

As we are aware, the opinions of the Mālikī jurists about the definitions of *istihsān* are not far from those of the Hanafīs. “Departure from a *qiyaṣ* that would lead to extremity and exaggeration in the ruling,” is a quote from Ibn Rushd (d.595/1198). “Preferring or acting on a ruling based a stronger *dāliṯ*” is the opinion of al-Bāji. In addition, the basis, while departing from one ruling to another ruling, should be one of

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\(^{379}\) Nasafi, “Kashf”, v:2, p: 164.  

Hanâlî jurists concur with Hanafis on *istihsân*, despite different definitions. According to the Hanâlîs, departure must be based on consideration of the main principles, (the Qur'ân, the Sunnah and *ijmâ'*). The key words in Hanâlî definitions are “leaving, returning and departure” because of stronger or better reasons; “abandoning the *qiyyâs jalî* (explicit analogy)” are the same as the key phrase given by the Hanafî jurist Nasâî.

Ibn Ḥazm and the followers of the Zâhirî school rejected *istihsân* unconditionally. According to them, everything one needs is available in the Qur'ân: “…we have neglected nothing in the Book.”\footnote{Qur'ân: 6/38} Ibn Ḥazm likens *istihsân* to a passion (*shahwah*), a whim (*hawâ*) and an error (*dalâl*).\footnote{Ibn Ḥazm, “Al-Iḥlâm”, v: 2, p: 196.} He says that the truth (*al-ḥaqq*) will not be what we like (*mâ istahsannâ*) unless there is proof for it. If it were so, God would have commanded something that is not pronounced; then the realities of things would be invalid, and textual evidence and proof would contradict each other.\footnote{Ibn Ḥazm, “Al-Iḥlâm”, v: 2, p: 196.}

Lastly, Basrî (d.436/1044) considered *istihsân* to be a principle of *shari'ah*; he did not believe that the Hanafî jurists’ use of *istihsân* depended on self-opinion and personal judgment without evidence.\footnote{Basrî, “Al-Mu'tamad”, v:2, p: 295.} However, Bishr bin Ghiyâs (d.218/833) despite being a Mu'tazilî, considered it to be self-opinion which does not depend on evidence.\footnote{Zarkashî, “Al-Bâhîr al-Muţhâb”, vi, p: 93; Shirâzî, “Sharh al-Luma'”, ii, p: 969.}

Examining the views of the ‘ulamâ’ regarding the validity of *istihsân*, we conclude the following: *istihsân* is a valid principle according to Hanafî, Mâlikî,
Hanbali, Abu Al-Husain Al-Bashri from the mutakallimun, and Al-Amidir who is from the Shafi'i scholars. Istihsan is not a valid principle according to Shafi'i, Ghazali, Isnawi and Ibn Hazm al-Zahirir.

As the application of the concept of istihsan has been elaborated throughout the research, with its varieties of practices and the early period of Islamic law, we have seen that istihsan has been practiced based not on personal desire but on valid legal evidence. These applications were sometimes based on the text (nass); the sayings of the Companions (qawl al-Sahabi); the consensus of the Companions (ijma' al-Sahabah); authentic tradition (hadith Sahih); implicit analogy which is more effective and beneficial; widespread common custom; necessity and needs that are based on ease, avoiding hardship and removing that which is harmful; and whenever there was doubt due to the uncertainty of the evidence.

On the validity and disagreement over istihsan the Hanafi viewpoint can be summarized as follows: Hanafi jurists divided istihsan mainly into two categories. The first is a kind of qiyas, which is based on implicit analogy. The second is based on text (the Qur'an, the Sunnah), consensus (ijma'), necessity (darurah) etc. Amongst the schools of thought there is no disagreement on rulings deduced from proofs which are based on the Qur'an, the Sunnah, ijma', darurah, qawl al-Sahabah, 'urf. However, it is difficult to say that there is no disagreement over istihsan which is based on an implicit analogy that is preferred to an explicit analogy, because its effective cause is stronger than the explicit effective cause. Shafi'i gave much attention to qiyas, considering it as a main principle of shari'ah; his views on the components of qiyas differ to those of Hanafis with regard to the determination of 'illah. In fact, opponents do not contradict Abu Hanifah's view of istihsan which is based on nass,

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*iṣmā‘*, and *ṣurūrah* because these are unanimously considered valid amongst the scholars.

However, they did oppose Abū Ḥanīfah when they believed that he was implementing personal opinion (*ra‘y*), which is considered to be the abandoning of *qiyaṣ* by whim and personal desire.\(^{390}\) It is obvious that opponents have criticized Abū Ḥanīfah abandoning the explicit analogy and preferring implicit analogy irrespective of the power of its effective cause; this was considered to be an approval of it without *dalīl* where there was no reliable basis, and his judgment was seen to be based purely on arbitrary opinions inspired by intellectual reasoning. Therefore, Ḥanafī scholars focused on this criticism and tried to prove that their use of *istiḥsān* was valid and legal.

Moreover, the Ḥanafīs sometimes determine the ‘*illah* (effective cause) of the implicit analogy by way of *ijtihād*. The way that the ‘*illah* is determined differs from one scholar to the next, which is unavoidable. Because of this, different approaches occurred amongst the Ḥanafī scholars. In some cases Abū Ḥanīfah approved *istiḥsān* by implicit analogy while Abū Yūsuf and Shaybānī approved *istiḥsān* by explicit analogy; sometimes it would be vice-versa. I would say that if internal conflicts within one *madhhab* are inevitable, then different approaches and interpretations on legal issues between two different schools of thought are entirely to be expected.

When we take into consideration the evidence presented by the group which recognizes the validity of *istiḥsān*, we see that on the whole they are more than enough to refute any objections raised against them. The *istiḥsān* that has been objected to by those ‘*ulamā‘* who refute the principle is somewhat different from the *istiḥsān* described by the groups who recognize its validity. This is because the group

supporting *istihsan* do not accept it unless it is supported by strongly validated evidence. As for the *istihsan* that relies on whim and personal desire, this is not supported by evidence, and since its source is what the person himself prefers rationally (by `aql), this *istihsan* is not approved by the group that recognize *istihsan*.

As it is understood from the evidence which has been proposed, the reason Shafi‘i and others rejected *istihsan* is that they assumed it was the giving of a ruling not based on the Qur’an, the Sunnah, *ijma‘* or *qiyas*, but rather solely through *aql* (intellect) and desire. \(^{391}\) Such *istihsan* is to deviate from what is right for the sake of personal pleasure: "*Istihsan* is merely doing what is agreeable."\(^ {392}\)

As we have shown in the previous chapters there is a lot of confusion regarding the concept of *istihsan*, which is why the scholars’ debate on the validation of *istihsan* is centred around whether *istihsan* could be a principle of Islamic law or not.

Debates concentrated mainly on the true relationship between the *lughawi* (linguistic) and the *istilahi* (technical) meanings of *istihsan*. Some scholars saw the *lughawi* (linguistic) meanings as positive, others as negative. There are many *istilahi* definitions of *istihsan*.

Shirazi and Juwaynī from the Shafi‘i school opposed *istihsan* but after citing both the definitions of Karkhi and other recognized definitions they said "If these definitions are what they mean when they say ‘*istihsan*’ then there is no dispute."\(^ {393}\) Ghazālī was of a similar opinion. "The principle is not disputable; however, naming it

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*Iṣtiṣān* will be rejected"³⁹⁴. Here he was concerned with the terminology rather than the concept.

Later Shafī‘ī scholars such as Rāzī, Āmidī, ibn al-Subki, and Isnawi rejected Ghazāli’s approach, claiming that his reasoning did not come from the *Qur’ān* and the *Sunnah*, and was not used by previous scholars in their *ḥijād*.

Taftazānī (d. 792 A.H) made the following statement pointing out the disagreement over *istiṣān*:

“Many arguments have been made on both sides and whoever accepted *istiṣān* has been criticized. The arguments occurred because no investigation had been undertaken to identify the real facts and neither party understood the others’ intentions. Both parties issued hurtful criticisms and they were unkind and insensitive. Advocators of *istiṣān* believe it is one of the four main principles. The statement “whoever performs *istiṣān* puts himself in place of the Lawgiver”, which means whoever approves a rule from his own personal desire and pleasure without basing their judgment on the proofs approved by the Shāfi‘ put themselves in place of God, has nothing to do with *istiṣān*. In fact, there is no reason to dispute the concept of *istiṣān*.”³⁹⁶

³⁹⁴ Ghazāli, “*Mustaqfī*”, v: 1, p: 283.
³⁹⁶ Taftazānī, “*Talwīh*”, v: 2, p: 162.
Taftazānī gives examples explaining that there is no dispute over the term, quoting several definitions of *istihsān* which are unanimously accepted as a principle of Sharī'ah.\(^{397}\)

Shāfi‘ī and the disciples who followed him in many cases approved rulings according to *istihsān*. Al-Suyūtī (d.911/1505) in accordance with the maxim of *fiqh* “Any needs, whether of a public or private nature, are so dealt with as to meet the exigencies of the case”\(^{398}\), said that on issues involving matters such as rent and transfer of property, for example, *istihsān* may be used rather than *qiyās*.\(^{399}\)

In my opinion the disagreement over the validity of *istihsān* is without substance as no-one recognizes *istihsān* without the support of evidence. Additionally *istihsān* which is based on a stronger *dalil* and departs from a weaker *dalil* is accepted by all ‘ulamā’. There are issues based on *istihsān* which Shāfi‘ī adopted that demonstrate this. These have mentioned by al-Māwardī in his book “*adab al-qaḍā’*.”\(^{400}\)

Some of these issues are as follows:

For example, Shāfi‘ī is reported to have said: “If there was no disagreement presented against a solitary saying of a Companion, the Companion’s opinion becomes valid evidence (*hujjah*)”. Moreover, Shāfi‘ī performed *istiḥbāb* too by saying “I approve this (*astafiibibu*)”.\(^{401}\) Therefore Sarakhsī claimed that there is no difference between *astafisinu* (I approve the preferable) and *astafibibu* (I deem the preferable), but the term *istihsān* is more clear and preferable then the term *istiḥbāb*.\(^{402}\)

The right of the claimant to ask for pre-emption (*shuf‘ah*) within three days following the sale of the property is according to Shāfi‘ī, an example of *istihsān* not

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\(^{397}\) Ibid, v: 2, p: 163.


\(^{399}\) Suyūtī, “*Al-Ashbāḥ*”, p: 62.

\(^{400}\) Māwardī, “*Adab al-Qaḍā’*”, v: 1, pp. 658, 659, 660.

\(^{401}\) Shāfi‘ī, “*Al-Umm*”, v: 5, p: 52.

\(^{402}\) Sarakhsī, “*Usūl*”, v: 2, p: 201.
an aṣl. This shows that Shāfiʿī adopted istiḥsān although the aṣl is the right of the claimant to seek pre-emption immediately. The way of istiḥsān here is that people generally agreed to delay the right of pre-emption as near as possible to the pre-emption deadline. If the sale became known to the claimant at night it would be delayed until the next morning; the time allowed includes the time it would take for him to eat and dress. The Qur'ān set the 3 day limit. This istiḥsān is based on nasṣ and ijmaʿ together. It was Shāfiʿī who said that when governors require an oath it should be taken on the Qur'ān; he considered this good (ḥasan). Here istiḥsān confirms that an oath taken on the Qur'ān is binding when applied to various issues relating to money; it also makes the kaffārah obligatory, which persuades people to take it seriously. This is istiḥsān as the principle rule is that an oath should be taken in God's name only.

Shāfiʿī also ruled that cupping the ears with the hands whilst performing azān (the call to prayers) is good. The reason for this was the precedent set by Bilāl, who was in charge of performing the azān during the Prophet's time and the Prophet tacitly approved (sunnah taqrīriyyah) this as basis for this istiḥsān.

When a question was asked of Shāfiʿī as to whether ‘umra could be performed in the month of ḥajj, he said “it is good, I deem it good (astatninu)” Al-Māwardī states that Shāfiʿī never adopted istiḥsān without an associating dalil; istiḥsān based on dalil is unproblematic, while istiḥsān that is not associated with dalil is rejected.

When we study the statements of both early and contemporary scholars, the usage of istiḥsān becomes clear. Shāṭibī was in the beginning one of the ‘ulamāʾ who denied istiḥsān as he thought it was ruling only through desire and personal opinion.

404 Qur'ān: 11/65
He eventually understood that the point of view of those who recognized *istiḥsān* had to be based on *dalil*. This was mentioned in the rulings (*fatāwā*) of the well known Companions of the Prophet. He was motivated to support the view that *istiḥsān* is a valid source of shari`ah. Shāṭibī thus states in his book "Al-Iʿtiṣām": "I also said the same as those ‘ulamāʾ who dropped *istiḥsān* and whatever was based on it, until *istiḥsān*, after being traced through the *fatāwā* of the caliphs, the well known Companions and their followers, and without any objections from other companions, became stronger and firmer. Thus for me, it gathered more strength, it gave my soul tranquillity and my heart trusted in it willingly. I followed the Companions and took them as an example, may God be pleased with them all".408

This statement shows that whoever understands and recognizes the real meaning and rationale behind *istiḥsān*, will find that, basically, there is no disagreement between the ‘ulama’.

Shāikh Maḥillāwī states in his book "Tashīl al-wusūl ilā ʿilm al-usūl": "Actually, no *istiḥsān* over which there is disagreement could be realized, and if it meant simply that which the mind ('aql) considers good, no one would ever deem it valid. If it is intended to mean what the Ḥanafis meant, then it is a valid source for all, and it is a matter that is not worthy of disagreement".409 This statement shows that there was no real disagreement over the validity of *istiḥsān*. To explain this issue further we refer to the opinions of contemporary scholars:

Khallāf says: "What widened the gap of disagreement in this and similar subjects is that the followers of the four main imāms were exaggerated in advocating the view of their individual imām, for whenever one of the followers of a particular imām catches a statement of another imām and such statements appear to have some

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contradiction, he (the follower) withholds this apparent meaning and starts to reply invalidating the concept of *istiḥsān*. In turn whoever comes after him from the same school also exaggerates, and thus the disagreement is widened farther. Had there been good intentions without suspicion, and had they accepted it with good intentions, there would never have been room for disagreement".\(^{410}\) Khallāf continues: “Had those who disagreed with each other specified exactly the point of disagreement before exchanging the proofs (*hujjah*), Muslims would have been saved the trouble of having to research and clarify many different terminologies.”\(^{411}\)

This view of Khallāf continues what we have uncovered during the research concerning the opinions of the various schools supporting and opposing the validity of *istiḥsān*. Therefore, the view that outweighs other opinions is the view of the group who recognize the validity of *istiḥsān*, on the condition that the departure from the principle rule is in favour of *istiḥsān* and is supported by a *dalīl*. *istiḥsān* is a valid source as long as it is not based on personal whim and is supported by one of the *shariʿah* proofs.

We can conclude that as long as *istiḥsān* remains the departure from the rule on the grounds of the existence of a stronger *dalīl*, there is sufficient ground for recognizing its validity. In cases where *istiḥsān* is without any *dalīl*, but depends on personal desire, then it is not permitted. This ensures that the doors are closed in the face of those who do not have adequate knowledge of the rules of Islamic *shariʿah* to perform *iftāʾ* and legislate laws. Consequently, the ‘ulamāʾ who recognize *istiḥsān* disapprove of *istiḥsān* without *dalīl*. As I elaborated earlier, all of the reported cases in which *istiḥsān* was performed were issued based on a *dalīl*. Ḥanafī, Mālikī and

\(^{410}\) Khallāf, "*Maṣādir*", p: 77.

\(^{411}\) Ibid.
Hanbali scholars have recognized *istihsān* as a source of *sharī'ah* and have used it to find solutions in circumstances where there is no textual source available.
4.0 VARIOUS TYPES OF ISTIHSĀN

Scholars divide istisān into many types depending on the school of thought and the basis based on which they recognize the validity of the principle. We have touched on this issue in the previous chapter; now we will discuss it in greater detail.

Istisān appears originally as a reaction to the concept of qiyās, and mainly when a jurist is faced with a problem for which he can not arrive at a ruling from the definitive sources of law within the Qur’ān and the Sunnah, and when he then searches for precedent and tries to find a solution by making a comparison with a previous case. His investigation may reveal two different solutions: one of which is based on an explicit (jali) analogy and the other on an implicit (khafi) analogy. If they contradict each other, then the jurist may reject the former in the favour of latter. The implicit analogy is considered to be more effective and therefore is preferred over the explicit. Departure from one type of qiyās, i.e. jali, to another type of qiyās, i.e. khafi, is simply called istisān.

Despite the controversy over the division of istisān, it is divided mainly into two categories: a: analogical istisān, which consists of a departure from qiyās jali to qiyās khafi and b: exceptional istisān (istihsān istithnāt) which consists of making an exception to a general rule of the existing law; it is approved when the jurist is convinced that by making such an exception, justice might be better served.1 After confirming the division of qiyās into two types—the explicit and the implicit—Ṣadr al-Shari‘ah (d.747/1346) calls the implicit (khafi) analogy istisān. However, istisān is more comprehensive than implicit analogy: while every implicit analogy can be called istisān,

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Various Types of *Istiḥsān*

not every case of *istiḥsān* can be called implicit (*khafi*) analogy. *Istiḥsān* is an evidence (*dalīl*) which is established against explicit analogy. Şadr al-Sharī‘ah then says that it is divided into several types such as *ijmā‘*, *darūrah* (necessity), *athar* etc.²

Another jurist Bazdawi (d.482/1089) also indicates that *istiḥsān* is an implicit analogy, and says that its other types consist of *athar*, *ijmā‘* (consensus) and *darūrah* (necessity).³

The contemporary scholar Khallāf (d.1376/1956) divides *istiḥsān* into two main types⁴: 1- *istiḥsān* which is departure from one ruling to another. It includes: a- the requirement that the departure be from *qiyaṣ jsālī* to *qiyaṣ khafi*, b- the requirement that the departure be general text (*naṣṣ ʿām*) to a specific ruling (*tukm khās*), and c- that the departure be from the general rule of the existing law to an exceptional law. 2- *Istibsān* based on *sanad* (evidence), which the departure requires.

The second type of *istiḥsān* is considered by the schools of thought (*madhhabs*) along the following lines. The Ḥanafis divide *istiḥsān* into four types: a- *istiḥsān* based on *athar*, which is the textual evidences in the *Qur’ān* and Sunnah, b- *istiḥsān* based on *ijmā‘* (consensus), c- *istiḥsān* based on *darūrah* (necessity), d- *istiḥsān* based on *qiyaṣ jsālī* (implicit analogy). Ibn Nujaym (d.970/1562) has summarised the divisions recognized by the Ḥanafis as follows: *istiḥsān* is based on *naṣṣ* (*athar*), *ijmā‘* (consensus), *darūrah* (necessity) and *qiyaṣ jsālī* (implicit analogy).⁵

The Ḥanbalī School has not pronounced officially on the divisions within *istiḥsān*. However, particularly, their *istiḥsān* can be divided into three types: a- departure from a

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² ibid v: 2, pp: 161-163.
⁴ Khallaf, "*Masāʾer*, p: 72.
ruling in favour of *Nass*, b- departure from *qiyās* in favour of the saying of the Companions, c- departure from *qiyās* in favour of a stronger one. They have also pointed out that the departure from *qiyās* may be in respect of *nass* of which *khabar al-wāḥid* (isolated Tradition), ḥadīth *mashhūr* (well known Tradition), ḥadīth *mutawātir* (widely spread Tradition) and textual evidences from the *Qur’ān* are some examples. Sometimes, the departure occurs in favour of the saying of the Companions, even if it is against *istiḥsān*. These types are agreed upon among the scholars. In spite of this, if the departure applies to another analogy, the scholars on this issue are in disagreement. In addition, departure in favour of a stronger analogy is recognised.

The Mālikīs divide *istiḥsān* into four types: a- *istiḥsān* based on ‘urf so long as it does not contradict textual evidence, b- *istiḥsān* based on *maṣlaḥah* (benefit), c- *istiḥsān* based on *ijmā‘* (consensus), d- departure from *qiyās* in order to avoid hardship and secure benefit for man.6

In spite of the disagreement over the division of *istiḥsān*, some common issues with regard to the types of *istiḥsān* are generally agreed upon. As Sarakhsī points out, the first type of *istiḥsān*—departure from *jāli* to *khafi*—is agreed upon by all the scholars, and opposition to it is unthinkable. Therefore it is regarded as *ra‘y ghālib*.7

*Ra‘y ghālib* can be defined as: “The application of *istiḥsān* by interpretation through the most appropriate opinion resembling the ruling whose application the Legislator has entrusted to our opinion”.8 It is illustrated in the example of the fixing of maintenance (*mut‘ah*) and alimony (*nafaqah*) as mentioned in the *Qur’ān* “But bestow on them (a suitable gift), the rich according to his means, and the poor according to his

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means, a gift (mut'ah) of reasonable amount is a duty on the doers of good”.9 Another example is fixing the cost of the mother’s food and clothing as indicated in “The father of the child shall bear the cost of the mother’s food and clothing on a reasonable basis.”10 and, “For divorced women, maintenance (mut’ah) (should be provided) on reasonable (scale).”11 In the Qur’an the maintenance (mut’ah) of women, and the cost of their food and clothing has been made obligatory on those, responsible according to their financial capacity. Fixing the exact amounts involved is entrusted to the discretion of the mujtahid.12

Approving such ijtihād based on prevailing opinion is called ra’y ghālib, which is the prevailing opinion in istiḥsān.13 Other issues such as the types of punishment for killing an animal in the protected places (ḥaram), the evaluating of an animal to be sacrificed, or the evaluation of the blood money in the case of injury have been left to the discretion of the jurists, which is based on the most prevalent opinion (ra’y ghālib).14

4.1 Istiḥsān in the sense of departing from one ruling to another ruling:

As I have touched on above, this can be divided into three types as follows15:

4.1.1 Departure from qiyyās jalī to qiyyās khaft:

Hanafis divide qiyyās into the jalī (explicit) and the khaft (implicit). Jalī is an analogy where the ‘illah (effective cause) appears at first glance, without careful consideration needing to be given to it. For example, the prohibition of nabidh appears to follow on by analogy from the prohibition of wine. However, qiyyās khaft is one where the

9 Qur’ān: 2/236
10 Qur’ān: 2/233
effective cause (‘illah) is understood after careful consideration and reflection.\(^{16}\) In other words, qiyās khafi is preferred over qiyās jali if they are opposed to each other, on account of the effective cause (‘illah) which is stronger in khafi. Therefore, it is called the qiyās of juristic preference (istihsān al-qiyās).\(^{17}\)

Hanafi jurists point out that the qiyās khafi, which they called istihsān is in reality a kind of qiyās and therefore, its ruling can be moved referred (ta‘diyah) to other cases.\(^ {18}\) In order to refer a ruling of qiyās, it must be related to an effective cause (‘illah) that is based on another cause (‘illah). Every ruling which is based on ‘illah would be referred to other cases (furū’a) which have a similar ‘illah. This is the ruling of the validated qiyās. Ta‘diyah (referring a ruling to another case) is an indispensable factor of an effective cause (‘illah) according to the Hanafis.\(^ {19}\)

We can see how qiyās khafi is preferred over qiyās jali in the following examples:

a- According to Hanafi rulings, when transferring the ownership of agricultural land, all of the ancillary rights (haqq al-irtifaq) attached to the property, such as the right of water (haqq al-shurb), the right of passage (haqq al-murūr) and the right of flow (haqq al-masūl), are also transferred. This is indisputable, even if it is not stipulated explicitly in the document. Besides this, in the contract of lease (ijārah), even if the ancillary rights are also not explicitly mentioned in the document, the usufruct (intifa‘) is considered as part of the contract. So, the leaseholder is able to benefit from these rights.

Another transaction, which resembles both contract sales and leases, is called waqf (charitable endowment). If it is considered from the point of view of the donor, waqf resembles a contract of sale, because the ownership changes hands. Considering it from the side of the donee, waqf resembles a contract of lease (ijārah), because both involve a transfer of usufruct (intifā'). However, the ownership is not transferred to the other party.

According to these explanations, the contract faces two different qiyās (analogy) rulings when the property is donated as waqf (charitable endowment): if it is compared to a contract of sale, what is not included in the contract and is not specified in it, such as the ancillary rights (haqq al-irtifāq) will not be included. If it is compared to a contract of lease, the ancillary rights will be included in the scope of waqf, even if these are not explicitly mentioned and specified by the donee. Here, the first instinct is to compare waqf with a contract of sale; comparing it to a contract of lease comes to mind only after investigation. Therefore, comparing waqf to a sale is called an explicit analogy (qiyās jali), while comparing it to a lease is called implicit analogy (qiyās khatt).

Consequently, including the ancillary rights in the transaction of the waqf without requiring any statement or permission from the donee is a ruling of istiḥsān. If, however the ancillary rights are not included it is a ruling of qiyās (analogy). The main reason for the preference of istiḥsān over analogy is that such analogy would lead to unfair results: the waqf of cultivated land without its ancillary rights would frustrate the basic purpose of waqf, which is to facilitate the use of the property for charitable purposes. Usufruct is the essential purpose of ijārah, and this would enable us to say that waqf can be deemed

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valid even if it does not specify the ancillary rights to the property in detail. Therefore, it is compared to a lease in order to avoid hardship for the people.\(^{21}\)

As we see, the effective cause of the implicit analogy, which is not contrary to the Shārī’s (Law-maker) purposes, is stronger than the explicit analogy, and therefore it is preferred over explicit analogy so that the benefits of the people will be secured.

b- if a husband tells his wife “Consider yourself divorced if you are menstruating”, and his wife says “I am menstruating”, according to the rule of qiyās, her statement is not accepted unless her husband approves or it is made clear that she is definitely menstruating. However, the wife’s statement is considered true and the divorce is actualised based on istihsān.

The original case (ṣāl), based on qiyās, is when a husband says to his wife “If you enter the house you are divorced” or “If you speak to someone you are divorced”, and the wife immediately says “I entered the house after your stipulation” or “I have spoken with someone”. After that, if husband denies her word, the wife would not be divorced. However, if she has evidence to verify it, or if her husband has confirmed her claims, she is then divorced, even if another original basis (ṣāl) is found and its effective cause is stronger. The ruling of istihsān is therefore based on the new ṣāl (original case) as mentioned in the Qur’ān: “And it is not lawful for them to conceal what God has created in their wombs, if they believe in God and the Last Day”\(^{22}\). In addition, a narration from ‘Ubay b. Kāb verifies this: “To trust a woman of her honour is a necessity.”\(^{23}\) The Qur’ān and hadith advise women that concealing menstruation is forbidden. Therefore, it is


\(^{22}\) Qur’ān: 2/228.

necessary to trust women on those issues which can only be recognized by them. The ruling of the Qur'an and hadith have become an asl (original case) for the statement of women on that issue. In addition, if woman says, "my period has ended" then her statement must be taken as true. Therefore, her statement in the issue of divorce when she says "I have a period" is also accepted on the basis of this asl (original case), according to istihsan.  

e- If a group of people gain unlawful entry into a house, steal collected commodities and load them on one person's back and that person carries the commodities outside while the others are not carrying anything, according to qiyas, the punishment is only applied to the person who carried the commodities. However, according to istihsan the punishment is applied to all of those who were involved in the robbery.

In this case, there are two contradictory asl (original cases): the first involves a group of people who encourage one of their number to rape a woman. In this case, there is no conflict among the jurists and the penalty is applied only to the rapist. This is a ruling of qiyas as opposed to istihsan. The second case is that of a group of people who congregate with the intention to attack, kill and rob people of their commodities; in this case, the penalty of highway robbery is applied to all. This case is not disputed by jurists because they agree that the punishment must be applied to all who are involved in the highway robbery. According to the Qur'an:

"The recompense of those who wage war against God and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be

25 Sarakhsi, "Usūl", ii, 201; Jaṣṣāṣ, "Fugāl", iv, 238.
cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter. Except for those who (having fled away and then) came back (as Muslims) with repentance before they fall into your power; in that case, know that God is Oft-Forgiving, Most Merciful.'

After investigating carefully, it becomes clear that comparing the house robbery to a highway robbery offers a clearer solution than comparing it to rape. The departure from one original case (aṣl) to another because of the stronger reason is a solution sought by istiḥsān in order to better protect society.

d- If a man sells goods, such clothes, with a specific weight or measure under a contract of forward sale (salam) to someone, but then withdraws the offer of sale before being paid, the transaction becomes null and void. However, if this transaction is completed in the normal way and the seller does not withdraw the offer of sale, the transaction is valid according to istiḥsān because the customer is able to take his goods any time he wants and the possibility of illegal action is therefore avoided. This is in spite of the fact that, according to qiyās both transactions are similar. As is normal, the goods will be delivered later in the forward sale (salam). If the money is not taken in advance, both parties may discontinue the transaction, which then causes harm to either the seller

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26 Qur’ān: 5/33-34
27 Jassās, "Fusūl" iv, 239.
28 Salam. This is an investment as a forward sale contract involving the current payment for assets to be delivered in the future. The goods or assets to be purchased do not need to be in existence or in completed form at the time of contracting, but must be ascertainable. The Prophet said: “Whoever concludes salam, let him do so over a specified measure, specified weight and specified period of time”. See: Bukhārī, “Ṣiḥḥ”, v: 3, p: 243, Ḥadīth no: 441.
or buyer or both. Paying in advance is preferred as the contract will be more secure. The condition\(^{29}\) of a forward sale (salam) naturally includes guarantee of security.\(^{30}\)

We can draw a conclusion regarding implicit analogy as follows:

a- Departing from explicit analogy to implicit analogy indicates that the explicit analogy, at the appearance of the effective cause ('illah), could not secure the benefit of the people and is thus unable to manifest the wisdom of the Shari'ah.\(^{31}\)

b- To prefer the explicit analogy is to risk the occurrence of unexpected and unwanted results, which would not be conducive to the public good. When istihsān, which is the implicit analogy, is preferred, the purposes of the Shāri‘ will obviously be achieved.

c- While rulings based on explicit analogy are suitable for specific issues with textual (nass) evidence, implicit analogy is more suited to non-specific issues with no

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\(^{29}\) **Conditions of Salam:**

1. It is necessary for the validity of salam that the buyer pays the price in full to the seller at the time of the sale. In the absence of full payment, it will be tantamount to sale of a debt against a debt, which is expressly prohibited by the Holy Prophet. Moreover, the basic wisdom for allowing salam is to fulfil the "instant need" of the seller. If it is not paid in full, the basic purpose will not be achieved.
2. Only those goods can be sold through a salam contract in which the quantity and quality can be exactly specified. Precious stones cannot be sold on the basis of salam because each stone differs in quality, size, weight and their exact specification is not possible.
3. Salam cannot be effected on a particular commodity or on a product of a particular field or farm e.g. Supply of wheat of a particular field or the fruit of a particular tree since there is a possibility that the crop will be destroyed before delivery and given such a possibility, the delivery remains uncertain.
4. All details in respect to quality of goods sold must be expressly specified leaving no ambiguity which may lead to a dispute.
5. It is necessary that the quantity of the commodity be agreed upon in absolute terms. It should be measured or weighed in its usual measure only, meaning what is normally weighed cannot be quantified and vice versa.
6. The exact date and place of delivery must be specified in the contract.
7. Salam cannot be effected in respect of things which must be delivered on the spot.
8. The commodity for salam contract should remain in the market right from the day of contract up to the date of delivery.
9. The time of delivery should be at least fifteen days or one month from the date of the agreement. The price in salam is generally lower than the price in a spot sale. The period should be long enough to affect prices. But Ḥanafi fiqh does not specify any minimum period for the validity of salam. It is alright to have an earlier date of delivery if the seller consents to it.
10. Since the price in salam is generally lower than the price in a spot sale, the difference in the two prices may be a valid profit for the Bank.
11. A security in the form of a guarantee, mortgage or hypothecation may be required for a salam in order to ensure that the seller delivers.
12. The seller at the time of delivery delivers commodities and not money to the buyer who would have to establish a special cell for dealing in commodities. See: Meezan Bank: salam: http://www.meezanbank.com/knowledge-islamic-section-4-5.asp.


\(^{31}\) Bakkal, "Neticeleri", pp: 348-349.
clear textual evidence to support them. Indeed, implicit analogy may realize the purpose of *naṣṣ* more effectively than explicit analogy.

### 4.1.2 Departure from *naṣṣ* to a specific ruling:

Under this sub-heading, I will give some information about the *ām* (general) the *khāṣ* (specific) and *takhāṣ* (particularization).

#### 4.1.2.1 The *ām* (general): This is a term that involves general principles or issues rather than details or particular issues: it is not confined to one particular case or amount and may be generalized to cover a wide range of different issues and people. For example, in "(as for) the thief, the male and the female, amputate their hands in recompense for what they earned (i.e. committed) as a deterrent punishment from God. God is Exalted in Might and Wise."  

The words "al-sāriqu wa al-sāriqatu" (the male and the female thief) apply to all who commit that crime, and no-one in particular is specified.

#### 4.1.2.2 The *khāṣ* (specific): This is a term that denotes detailed and exact meaning connected with only one specific thing or person. For example, 'Umar, man, woman etc. Besides this, even if it contains plurality, and that plurality is restricted, then the term is considered as *khāṣ* for example; two, three, four, a hundred, two thousand etc.

Scholars unanimously agree that the *khāṣ* (specific) definitely indicates a determined meaning, so long as contrary evidence against its specificity does not exist. The specific meaning cannot define the term to be anything other than what it is.  

For example, in

"God will not impose blame upon you for what is meaningless in your oaths, but He will impose blame

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32 Qur’ān: 5/38;  
33 Sha’bān, "Islam Hukuk Ilminin Esasları", p: 265.
Various Types of *Istiḥsān*

upon you for (breaking) what you intended of oaths.

Therefore, expiation is the feeding of ten needy people from the average of that which you feed your (own) families or clothing them or the freeing of a slave. But whoever can not find (or afford it) then a fast of three days (is required)"\(^{34}\),

The words "*raqabah*, (neck), "*`ashara*, (ten), and "*thalāthah*, (three) are *khāṣṣ* (specific) and denote the expiation of broken oaths, namely the freeing of a slave, the feeding of ten orphans, or fasting for three days. Indicating these with *khāṣṣ* (specific) terms excludes any possibility of their having other meanings.\(^{35}\)

4.1.2.3 *Takhsīs* (particularization)\(^{36}\): The thing or issue which prompts particularisation is called *mukhāṣṣ* (particularising agent), while the thing or issue particularised is known as the *mukhāṣṣ*ṣ (particularized agent).\(^{37}\)

Departing from a general ruling to a specific ruling in order to uphold the spirit and purpose of the *shariʿah* is considered a type of *istiḥsān*. In the ruling of *qiyyās*, particularization is not recognized under any conditions; however *istiḥsān* allows the particularization of the *ʿillah* in order for *istiḥsān* itself to be applied. As we know, one of the definitions of *istiḥsān* given by the Ḥanafī jurists is the "abandoning of one judgement in favour of another"\(^{38}\). For example, according to the general rulings in the *Qurʾān*, Muslims are prohibited to eat unlawful meat (*maytata*) which has not been slaughtered

\(^{34}\) *Qurʾān*: 5/89.

\(^{35}\) Shaʿbān, ibid, p: 266.

\(^{36}\) This term was translated as specification, particularization, specialization or limitation. George Makdisi used it in the meaning for "limitation". See: Makdisi "*Ibn Taymiyyah Autograph Manuscript on Istiḥsān* in the Arabic And Islamic Studies In Honor of Hamilton A. R. Gibb", Cambridge: Harward University Press, 1965, p: 446.

\(^{37}\) Atar, "*Fikih Usulā*", p: 195; Shaʿbān, ibid, p: 297.

\(^{38}\) Ibn Taymiyyah, "*Masʿalah*", pp: 457-458.
ritually: "Forbidden to you (for food) are: al-maytata (the dead animals-cattle beast not slaughtered)…”39. Here the word “al-maytata” (dead) is comprehensive and covers sea animals as well as others. However, the Prophet’s saying “Huwa al-tahīru māuhu al- nihil maytatuhu”40, particularizes the word to mean all animals apart from sea animals.41

From a different perspective, if someone’s life is in danger and there is nothing for him to eat except carrion (maytata), then the general ruling has to be reconsidered and put aside, since protecting the live of Muslims is considered to be one of the five essential values of the shari‘ah. The ‘illah (cause) of the particularization of the general ruling here is starvation, which may lead to death. Hence, particularization is aimed at securing a better understanding of the general principles of the shari‘ah and its proper implementation by means of istit‘ān.42 This kind of implementation, according to Hanafi thought, is considered part of istit‘ān, which is based on the naṣṣ of the Qur’ān and Sunnah.43

More examples here will help to further illustrate this. According to the general text of the Qur’ān, theft is absolutely forbidden and the thief is punished by the cutting off hands. “And (as for) the male thief and the female thief, cut off (from the wrist joint) their (right) hands as a recompense for that which they committed, a punishment by way of example from God. And God is All Powerful, All wise.”44 The naṣṣ of the Qur’ān requires that the thief’s hand be amputated if the condition of stealing is fulfilled. General rulings of Islamic law require the cutting off of the thief’s hand even in the year of

40 Abū Dāwūd, “Tahārah”, 41.
41 Sha‘bān, ibid, p: 299.
44 Qur’ān: 5/38.
famine, because of the generalized meaning of the word “sāriq” (thief). However, the scholars are in agreement that during a famine, no amputation would take place. As ‘Umar practiced such particularisation, no one opposes the consensus. 45

Nevertheless, the consensus is restricted by the condition that the person who steals would not be able to find food to eat. If he has sufficient rations and he survives, he will then be penalized. In spite of the ruling of qiyās, which requires amputation because the text does not distinguish between the obligatory or non-obligatory nature of amputation, scholars have said that it is not necessary, based on istiḥsān. Ibād b. Shurāḥbil, narrates the following anecdote: During a year of famine, hunger forced me to steal food, which I hid in my clothes. When the owner found out, he thrashed me and took me to the Prophet. The Prophet said: “If he is uneducated, educate him; and if he is starving, feed him.” He then ordered the owner to return my clothes and gave me a container of food. 46 In the light of this haddith, Ibn Qudāmah said that, as narrated from Ahmad Ibn Hanbal, if a needy person steals, his hand will not be amputated during the year of famine. It was also narrated by ‘Umar ibn Khattāb that “amputation will not take place during the year of famine” and according to ‘Umar’s practice, the penalty was avoided. 47 This is because the hadd penalty was never carried out when there was doubt. Consequently, ‘Umar particularized the general text of the Qur’ān because of the year of famine and avoided the cutting off of the hand based on the concept of istiḥsān.

4.1.3. Departure from the general rule of the existing law to an exceptional law:

Exceptional istiḥsān is represented here by the example of charitable endowment (waqf) made by someone mentally defective (safih) who is under the protection of a

guardian. This is based on the istiḥsān ruling which permits the mentally defective to make such endowments regardless of whether or not they are under someone’s guardianship. It is based on the benefits of the people because permitting it by way of istiḥsān may encourage people to do charitable and good works. According to qiyās, however, a mentally defective person cannot make a charitable endowment (waqf) under protection of a guardian. The charitable endowment is a kind of donation (tabarru’) and a person under guardianship is not eligible to give donations.\(^{48}\) Istiḥsān departs from the established ruling and thus validates the donation.

However, if the one under guardianship does make a charitable endowment, what is the position?

According to the general rule, which is qiyās, this donation is not valid if the mentally defective (saflh) makes a donation. Al-Khussāf, a Ḥanafi jurist, observes that this donation may cause harm to his self, and therefore is not valid. However, Abū Yūṣuf is of the opinion that it is valid. However, all Ḥanafi scholars agreed that if he donates something after he leaves the guardianship, it is valid.\(^{49}\)

4.2. Istiḥsān based on sanad in terms of the departure:

Under this sub-heading, I am going to discuss the types of istiḥsān based on sanad. We know that istiḥsān is invalid if it is not based on dalīl, in which case it would be seen as acting according to one’s own wishes and desires. Therefore, relating it to the evidence is vital, otherwise it is not recognised. Jurists divide istiḥsān into different types as I have mentioned earlier.


We encounter, in general, three types of *istihsān*, which are based on explicit evidences, according to the Ḥanafi sources. These are *istihsān* based on *athar* (the Qur'ān and the Sunnah); on *ijmāʿ* (consensus); and on necessity (*ḍarūrah*). In addition, they considered implicit analogy as one of the types of *istihsān*.\(^{50}\) Beside this, we also come across kinds of *istihsān* based on the sayings of the Companions,\(^{51}\) on *ūrf*; on *maṣlaḥah*;\(^{52}\) on *rafʿ al-ṭaraj* (avoiding hardship);\(^{53}\) on precaution (*iḥtiyāt*); and on the consideration of current needs.\(^{54}\)

Ḥanafi Jurists have also used the term *athar* (tradition)\(^{55}\) more than the term *nass* (text), and include the sayings of the Companions\(^{56}\) in this term.\(^{57}\) They used to say, “We approve *istihsān* on the ground of *athar*” which is based on the sayings of the Companions.\(^{58}\)

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As Shāṭibi shows, Mālikī scholars also divide *istiḥṣān* into four types;59 *istiḥṣān* based on ‘urf (custom); on *maṣlahah* (benefit); on raf‘ al-ḥaraj and mashaqqah (avoiding hardship); and *ijma‘* (consensus).60

Comparing the Ḥanafī and Mālikī viewpoints, we see that they agree on *istiḥṣān* which is based on custom (‘urf), or on benefit (maṣlahah). Khallāf adds that benefit (maṣlahah) contains that which the Ḥanafīs call necessity (ḍarūrah), and which the Mālikīs refer to as avoidance of hardship (raf‘ al-ḥaraj). Departure from a ruling inferred by giyās or from a general ruling or established ruling to another ruling on the ground of custom (‘urf) or benefit (maṣlahah) which brings ease and avoids hardship is called *istiḥṣān* by both schools.61

However, they disagree as to what the evidence is based on, and whether it is *naṣṣ* (text) or implicit analogy (giyās khafi). However, to describe something as *istiḥṣān* based on naṣṣ or implicit analogy does not make sense, since a ruling that is based on naṣṣ is established by naṣṣ (text) and giyās too. Therefore, *istiḥṣān* based on naṣṣ is an exception.62

Despite this disagreement, the scholars do not reject rulings that are inferred; their disagreement is purely academic.

Consequently, we may consider *istiḥṣān* based on *sanad* into five types: 1- *Istiḥṣān* based on athar, which is the Qur‘ān, the Sunnah and the saying of the Companions. 2- *Istiḥṣān* based on *ijma‘* (consensus). 3- *Istiḥṣān* based on necessity

60 The first three types of *Istiḥṣān* have been mentioned in the book “Al-I’tīṣām” v: 2, p: 139, and the last one which is *ijma‘* (consensus) is mentioned in the book of “Al-Muwāfaqāt”, v: 4, p: 208.
62 Ibid.
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(дарурах) and the avoidance of hardship (راف’ ал-тараў). 4- Istiṣḥān based on benefit or public good (ماشلة). 5- Istiṣḥān based on custom (۸رف).

The Qur’ān, the Sunnah and the saying of the Companions will now be considered in the context of textual evidence (ناص).

4.2.1 Istiṣḥān based on athar:

The meaning of istiṣḥān based on athar is the departure from the ruling of qiyās jalī (explicit analogy) to a ruling that is proved by nass which opposes the ruling of qiyās.63 The ruling of nass is considered as stronger evidence, whether it is from the Qur’ān or the Sunnah or from athar. The ruling of qiyās cannot charge the opposition of nass. Considering many cases based on the general rulings and general texts using analogical reasoning is quite possible; however, it may oppose the Lawgiver’s purposes and thus run counter to the public good.64

There is no dispute among the scholars that mutawatir65 and mashhūr hadith (well-known hadith)66 narrated from the Prophet are preferred over qiyās.67 Isolated traditions (khabar al-wāhid) are also seen as a valid source of law.68 However, in the case

63 Bazdawī, “Kashf”, v: 4, p: 5.
65 Mutawatir: literally means continuously recurrent. In the present context, it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie. Such a possibility is inconceivable owing to their large number, diversity of residence, and reliability. See: Kamali, “Principles”, p: 68; Khudari, “Uṣūl”, p: 214; Aghnides Nicolas P. “Muhammedan Theories of Finance”, New York, Longmans Green &Co. 1916, reprint, Lahore: Premier Book House, 1957, p: 40.
66 Mashhūr: is defined as a hadith which is originally reported by one, two or more Companions from the Prophet or from another Companion but which has later become well-known and transmitted by an indefinite number of people. See: Aghnides, “Muhammedan Theories”, p: 44; Abū Zahrah, “Uṣūl”, p: 84.
of a dispute between a *khabar al-wāḥid* (isolated tradition) and analogy, which is a subject of disagreement among the scholars, the former is usually preferable.\(^6^9\)

However, Zarqā criticises the kind of *istiḥsān* which is based on *nass* and *athar*, saying that *istiḥsān* which is based on *nass* and *ijmāʿ* could not be called *istiḥsān* because these rulings are already based on *nass* and *ijmāʿ* and have nothing to do with *istiḥsān* or *qiyaṣ*. He says that *istiḥsān* is the departure from analogy due to the non-existence of written legal rulings. Of course, the Qurʿān, the Sunnah and *ijmāʿ* have priority over *qiyaṣ* (analogy). Therefore, neither *qiyaṣ* nor *istiḥsān* is needed and it is incorrect to call this *istiḥsān* because it causes confusion.\(^7^0\)

Despite Zarqā’s comments, his view seems erroneous because *qiyaṣ* would not be approved with the existence of *nass* and *ijmāʿ*; only when *nass* and *ijmāʿ* are absent may *qiyaṣ* or general rulings be applied.\(^7^1\) In fact, jurists who approved *istiḥsān* used the statement “We left this *qiyaṣ* because of *athar*”; “If *athar* is not existent we would approve it according to present *qiyaṣ*.”

### 4.2.1.1 Istilaän based on the Qurʿān:

This kind of *istiḥsān* is illustrated by the following examples:

a- A highway robber repents after stealing goods and after a while recompenses the owner of the goods. According to *qiyaṣ*, he must be prosecuted because of his original crime. This case refers to a thief and a highway robber; and on the basis of *ḥirābah* (highway robbery), punishment is obligatory. However, *istiḥsān* departs from this and no longer considers it highway robbery after repentance. Repentance (*tawbah*) releases the

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\(^6^9\) Preferring an Isolated tradition (*khabar al-wāḥid*), which is narrated by a just and honest narrator, to *qiyaṣ* (analogy) is also considered a kind of *istiḥsān* and therefore it is disputable.


\(^7^1\) Taftazānī, *Al-Talwih*, v: 2, pp: 163-164.
guilty party from the charge of highway robbery and drops the punishment of ḥadd, based on istiḥsān, as indicated in the Qur’ān: “Except for those who return (repenting) before you overcome (i.e. apprehend) them. And know that God is forgiving and Merciful.”

This verse necessitates the departure from the ruling of qiyās and the dropping of the ḥadd. An example is that of Ḥarith ibn Zayd. He was a highway robber who later repented and was not executed, even though he had committed the crime. ‘Alī ibn Abī Ṭalib approved the departure from the ruling of qiyās based on the above mentioned nasṣ.73

b- An elderly person is incapable of performing the obligatory fast. He is allowed instead to pay a sum of money for each day of the missed obligatory fast, based on istiḥsān. However, he is not allowed to do this according to qiyās because there is no connection or similarity between fasting and the feeding of poor people. Despite the qiyās ruling, God has shown leniency to those who are incapable of fasting: “So whoever among you is ill or on a journey (during them) then an equal number of days (are to be made up). And upon those who are able (to fast, but with hardship) a ransom (as substitute) of feeding a poor person (each day).”74 Therefore, it is allowed based on the textual nasṣ.75

c- A Muslim does not have to pay upkeep to his father if the latter is a non-Muslim, according to analogy based on the fact that they do not inherit from each other after death. However, Ḥanafī jurists base their judgment on the verse “Accompany them in this world with appropriate kindness”76 and approve istiḥsān against the ruling of qiyās, thus departing from the established ruling to one which says that a Muslim has to

72 Qur’ān: 5/34
74 Qur’ān: 2/184.
76 Qur’ān: 31/15.
pay upkeep to his poor elderly parents who are non-Muslims. In addition, Ḥanafi jurists base their judgements on the following rational reason, namely that rights of upkeep and financial maintenance between parents and a child are a natural matter of birth rights (wilādāh), and that leaving parents in poverty is an unkind act.  

4.2.1.2 Istiḥsān based on the Sunnah:

This kind of istiḥsān is illustrated by the following examples:

a- Eating and drinking in Ramaḍān by mistake nullifies the fast and requires expiation, according to qiyyās. However, Abū Ḥanīfah and his disciples observe that according to istiḥsān, eating or drinking by mistake do not nullify the fast.  

According to qiyyās, eating and drinking by mistake is compared to cutting short the prayers by mistake, which does not nullify the prayer. According to istiḥsān, the eating or drinking is not purposeful and thus does not nullify the fast. Therefore, istiḥsān is validated and preferred over the ruling of qiyyās. It is based on naṣṣ for the Prophet says “Whoever eats or drinks by mistakes, let him complete his fasting because it is a gift from God.” And: “If a person who is fasting eats or drinks by mistake, it is a rizq which God feeds him with and no compensation is required”, similarly “Whoever breaks his fast by mistake in the month of Ramaḍān is neither required to repeat the fast nor to pay kaffārah (penance, expiation).”  

Consequently, qiyyās is departed from on the grounds of naṣṣ (ḥadīth), and istiḥsān is approved. Abū Ḥanīfah says: “I would have used qiyyās if narrations had not been found”. Naturally, eating or drinking by mistake is beyond one’s power. Also a fly

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entering the mouth is considered the same as eating or drinking by mistake. Abū Ḥanīfa says that such incidents are beyond one's control whilst fasting, and dust entering a person's mouth whilst speaking.82

b. Forward sale (salam), for example, is invalid because of failing to satisfy one of the requirements of a valid sale, which is that the subject matter of the sale must be physically present at the time of contract. According to qiyās forward sale is invalid. The Prophet was asked by one of the Companions, Hakīm b. Ḥizām, whether he could sell a commodity prior to purchasing it himself. The Prophet replied: "sell not what is not with you".83 Despite the fact that qiyās rejects forward sale, the hadith approves salam with the following statement: "Whoever concludes salam, let him do so in a specified measure, specified weight and specified period of time."84 Based on this hadith, Ḥanafi jurists validated forward sale (salam) according to istihsan.85

4.2.1.3 Istihsan based on athar:

The meaning of athar, as I have explained earlier, refers to the acta and dicta of the Prophet and the Companions.86 Provided that there was no disagreement concerning it, a Companion’s opinion was acceptable by Ḥanafi jurists as a kind of implicit ijmā’ (ijmā’ sukūt) that was preferred to qiyās.87

Istihsan based on athar will be illustrated by the following examples; a- A judge, ruler or political authority who witnesses witness a crime of theft, adultery or the drinking of wine, may not judge or punish on the basis of his own witnessing and must wait until

83 Abū Dāwūd, “Buyū’”, 70.
84 Bukhārī, “Saheeh”, iii, 243, hadith no: 441; Muslim, “Musāqāt”, 25; Abū Dāwūd “Buyū’”, 57.
legal evidences are established. This kind of *istihsān* is based on a tradition (*athar*) reported from Abū Bakr and 'Umar. However, according to *qiyās* they are able to execute the judgement on the basis of their personal knowledge and witnessing.\(^88\)

b- If a person is unconscious and the time for prayer passes, according to *qiyās* the person should not have to make up the prayer later. However, Ḥanafi jurists departed from the ruling of *qiyās* to the ruling of *istihsān* based on the behaviour of 'Ammār, one of the Companions. He was once unconscious for a whole day, then woke up and prayed the prayers he had missed. Therefore, the Ḥanafis ruled that whoever misses their prayer in such a circumstance should make up that prayer.\(^89\)

c- A group of people attack a person and kill him; according to *qiyās*, retaliation (*qaṣās*) is not required against the whole group. The chief condition in retaliation is equality. Killing more than one person is considered as transgression and oppression. However, Ḥanafi jurists departed from the ruling of *qiyās* based on the practice of the Caliph 'Umar. It is narrated that seven people had killed a person during an attack. 'Umar was reported to have said "I would have ordered retaliation against the whole of the population of San‘ā if they had joined in the killing of one person".\(^90\)

4.2.2 *Istihsān* based on consensus (*ijmā‘*):

*Ijmā‘*\(^91\) is the unanimous agreement of the mujtahidūn of the Muslim community of any period following the demise of the Prophet Muḥammad on a religious issue.\(^92\)

*Istihsān* based on *ijmā‘* is illustrated here by the following examples:

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\(^{88}\) Abū Yūṣuf, "Al-Kharāj", p: 178; Ḥassan, "The Early" p: 146.

\(^{89}\) Jaṣṣāṣ, "Fusūl", v: 3, p: 361.


\(^{91}\) For more about *ijmā‘* see in the Introductory Chapter.

a- Ḥanafi scholars mainly illustrate this kind of istiḥsān by the concept of isticnā' (the contract for manufacturing of goods). For example, if someone places an order with a craftsman for certain goods to be made at a price which is determined at the time of the contract, according to the general rule of shari'ah, it is invalid. This is because the object of the contract does not exist at the time the order was made. Making a transaction for a non-existent object is invalid according to the Prophet’s prohibition, "Sell not what is not with you".

However, the Ḥanafīs use istiḥsān and depart from the established ruling of qiyās on the grounds of the consensus of the Companions. During the time of the Companions, this customary transaction was prevalent and no one scholar rejected it. Dabbūsī (d.430/1039) says: "They depart from the ruling of qiyās because of consensus which is based on the customary transactions, and it is accepted in, and uncontested by, the Muslim community." A similar point has been made by Sarakhsī: "Qiyās does not deem this contract valid, yet we left the ruling of qiyās on the grounds that the transaction in question has been customary since the time of the Prophet". People were implementing this transaction, and none of the scholars rejected it; custom is a factor that must be considered in social and economic issues such as this. Following custom reflects the Prophetic Tradition: "What the Muslims deem to be good is good in the sight of God".

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93 **Istīṣnā'**: This is the giving of an order to a labourer or artisan to make a definite article with agreement to pay a definite price for that article when made. See: Ṣāleḥ A. Nābil, "Unlawful gain and legitimate profit in Islamic law", Cambridge University Press, 1986, p: 61.


96 Sarakhsī, "Usulā'", v: 2, p: 203.

and “My community will not agree on an error. When you see disagreement, you should follow the overwhelming majority.”

b- According to Sarakhsi, if a husband and wife apostatize together, they must separate, according to qiyās. This is because the situation of apostasy is an obstacle for performing nikāh (marriage) in the first place; and secondly, it hinders the continuance of nikāh. However, Abū Ḥanīfah and his disciples, Abū Yūsuf and Shaibānī, depart from the ruling of qiyās because of the consensus of the Companions, based on the case of the Banū Ḥanīfah. It is known that the Banū Ḥanīfah tribe had apostatized in order not to pay zakāt. Because of this, Abū Bakr declared war on them, while inviting them to repent. After their repentance, the Caliph did not ask them to renew their marriages (nikāh), and no other Companions required it either.

The example indicates the consensus of the Companions with regard to this case. In fact, not all the Companions gave their opinion on this case, but expressed their tacit approval by not rejecting Abū Bakr’s decision. That is why this consensus is considered as a kind of tacit consensus (ijmā’ sukūtī). Ḥanafī Jurists apply istihsān based on consensus without indicating that it is a kind of tacit ijmā’.

c- A man dressed in ihram points out an animal to another man, who may or may not be dressed in ihram. The second man then slaughters that animal. Given that to slaughter an animal while in the state of ihram is forbidden, who is to be punished: the man who pointed out the animal in the first place, or the one who slaughtered it? According to the rulings of qiyās, punishment is not required. However, punishment is required according

99 Bukhārī, “Zakāt”, 1; Muslim, “Īmān”, 8.
101 For more about tacit consensus, see the Introduction Chapter.
102 ihram: the ritual garment worn for hajj.
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to the consensus of the Companions. Istihsān departs here from the ruling of giyās based on the Companions’ agreement. Someone asked Ibn ‘Umar: “I pointed out a deer while we were in ihram, and then my friend killed the deer. What should I do?” ‘Umar then asked ‘Abd al-Rahmān ibn Awf for his opinion. The latter replied that a sheep must be sacrificed as expiation. ‘Umar said: “I agree with the opinion”. A similar case has been reported from ‘Alī and Ibn Abbās.103

4.2.3 Istihsān based on necessity (ḍarūrah) and the avoidance of hardship (raf’ al-ṭarāf):

It is important to point out that Hanafi scholars use the term ‘necessity’ where Mālikī scholars use the term ‘avoiding hardship’.104

In order to understand the concept of necessity, I shall first explore the meanings of ḍarūrah.

Linguistically, the word “ḍarūrah” has an opposite meaning to the word maṣlaṭah (benefit). It is derived from the root ḍ-ʳ-ʳ, one of the derivatives of which is ḍarar or ‘harm’. Fīrūzābdī (d.817/1414) explains “ḍarar” as ‘straits’, and then mentions the words iḍūrār (harming) and ḍarūrah (necessity), which also are included in the meaning of ihtiyāj (need, exigency, necessity) and muḥāj (needing, necessitous).105 The word “uḍumra” also appears in the Qur’ān with the meaning of ‘forced’106. “But whoever is forced (by necessity), neither desiring it nor transgressing (its limit), then indeed, your Lord is Forgiving and Merciful.”107

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107 Qur’ān: 6/145; also see: 2/173; 16/115; 5/3.
According to Jassās, ʿdarūrah means necessity, and he interprets its meanings which come in the verse “He has explained in detail to you what He has forbidden you, excepting that to which you are compelled.” The permissibility alluded to in this verse may be adapted to any kind of compulsion during danger. The necessity in that context is because it may cause danger to part of the body. It covers circumstances such as when a starving person cannot find anything to eat except a dead body, or when a person is forced to eat a dead body even though there is edible food present, provided that eating the edible food is riskier than eating the dead body.

Hānafī Scholars consider the concept of ikrāḥ (coercion) in the field of ʿdarūrah as a necessity too. If for example someone is threatened to be killed or maimed in order to make him to eat or drink something unlawful, then in that context it becomes necessary to carry out their commands. However, if the person is threatened with jailing for life or beating, then he is not allowed to commit unlawful things; the condition of ‘necessity’ is that it be life-threatening. To commit unlawful acts in order to avoid non-life

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110 Ikrāḥ: al-ikrāḥ means forcing someone to do or say something against his will. See: Nyazee, “Theories of Islamic Law” p: 100. The coerced person is called “mukrah”. Its opposite is al-ikhtiyār which means choice, free wills. The juristic scholars have defined it as follows: “Forcing somebody to something which he had never agreed to do, and never will desire to do while he had free choice.” See: Taftazānī, “Talwīh”, v: 2, p: 196; also see in “Kashf al-Asrār”: “the person threatening is capable of that thing which he threatens: a threat which the coerced person is really frightened of.” See: v: 3, p: 1503.

If this coercion accompanies threats to kill or destroy some parts of the body, then it is called “ikrāḥ mulţā”. Tortures by robbers or oppressors would constitute “ikrāḥ mulţā”. At such instances, it becomes necessary to carry out their commands. Coercion through jailing or beating is called light coercion. Anyone who is faced with light coercion is not permitted to bow to the oppressor’s commands. Thus ikrāḥ is divided in to two types: a: ikrāḥ mulţā: someone threatens to kill or destroy some parts of the body or deliver a strong blow, b: ikrāḥ ghairi mulţā: someone makes a threat lower than that, for example jailing or beating.

There are some conditions: 1- The person who threatens must be capable of carrying out the threat and must be serious in his in threat. 2- The threatened person has overpowering assumption to go ahead with the action. 3- Coercion must involve the threat to kill or destroy some parts of the body. 4- The coercion must be a serious hazard. 5- It must be directed to the five essential values of human life, which are religion, life, intellect, lineage, and property. 6- ikrāḥ must be unjust, otherwise it is not considered as an ikrāḥ. See: Saymen, “Borclar Hukuku”, v: 1/1, p: 276; Bukhārī, “Kashf”, v: 4, p: 1502; Ibn al-Qudāmah “Al-Mughnī”, v: 7, p: 120; Shīrāzī, “Al-Muḥazzab” v: 2, p: 83.
111 Bukhārī, “Kashf” v: 4, p: 398.
threatening consequences is not accepted.\textsuperscript{112} These kinds of \textit{ikrāh} (coercion) are called light coercion.

However, if a beating with lashes were to reach to limit that would be unbearable, then the condition of necessity (\textit{ḍarūrah}) is fulfilled. The pain threshold of individuals differ and it is at the discretion of the person who is in that situation.\textsuperscript{113}

If an act reaches the level of \textit{ḍarūrah} (necessity), it naturally becomes lawful. This is enshrined in \textit{fiqh} maxim: "Necessity renders prohibited things permissible."\textsuperscript{114} Ansārī (d.1180/1767) indicates that \textit{ḍarūrah} must reach the level of necessity before it becomes valid.\textsuperscript{115} According to ‘Ali Ḥaydār Afandi (d.1936) \textit{ḍarūrah} refers to a situation which involves doing something by force or eating things that are forbidden by the religion.\textsuperscript{116} Consequently, \textit{ḍarūrah} is generally concerned with fear of destruction and threat to one of the five essential values of human life, namely: religion, life, intellect, lineage and property\textsuperscript{117}, which must be protected from harm.\textsuperscript{118}

The concept of \textit{ḍarūrah} is closely related to legal concepts such as \textit{iḥtiyāj} (need), \textit{ḍarar} (harm), \textit{raf al-ḥaraj} (avoiding hardship), \textit{mashaqqah} (hardship, difficulty), and \textit{‘umūm al-balwā} (general calamities). Explanation of these terms now follows.

\textbf{4.2.3.1 \textit{Iḥtiyāj} (need):} Technically the term \textit{iḥtiyāj} (need) here means "a situation of facing difficulty and hardship, such as when a hungry person cannot find food to eat."

In the "\textit{Fawātiḥ}" it is described as: "a circumstance which does not reach the level of

\textsuperscript{112} Bukhārī, "\textit{Kashf}" v: 4, p: 398
\textsuperscript{113} Sarakī, "\textit{Al-Mabsūf}" v: 24, pp: 46, 48, 49-50.
\textsuperscript{114} Al-Majallah al-Ahkām al-Adliyyah (the Ottoman courts manual (Hanafi): clause: 21; Ibn Nujām, "\textit{Al-Ashbāḥ}"
\textsuperscript{115} p: 85.
\textsuperscript{116} Ansārī, "\textit{Fawātiḥ}" v: 2, p: 262.
\textsuperscript{117} ‘Ali Ḥaydār, "\textit{Sharḥ al-Qawāid}"; p: 76.
\textsuperscript{118} Shāṭibī, "\textit{Al-Muwāfaqaṭ}" v: 1, p: 476.
darūrah.” Zarkā defines it as: “A case which necessitates ease in order to achieve a goal”. Need (iḥtiyāj) is a less significant than darūrah. The reason for this is that whilst rulings approved by need are continual, they are only temporarily accepted in the case of darūrah.

Needs are divided into two types: a- General needs, both of the individual and of the whole Muslim community (Ummah), irrespective of ethnic group or class distinctions. Examples are: salam (forward sale), bay‘ wa shirā’ (trading), ijāra (leasing), waṣīyyah (will, testament) and so on. b- Specific needs, namely those of people who live in a particular country, or of a member of a particular occupational group. Other examples include the use of gold teeth because of illness; the wearing of silk; and a doctor examining the usually clothed parts of a woman’s body. The concept of darūrah became a law enshrined in the Ottoman court manual: “Any need, whether of a public or private nature, is so dealt with as to meet the exigencies of the case”.

4.2.3.2 Qarar (harm): This term is similar to darūrah; however, it is used more comprehensively. Every darūrah may be a qarar, but the opposite is not the case. Sarakhsi says that darūrah has a close similarity with qarar, as the darūrah is defined as “Having fear that one may lose life or limb through lack of food.” In addition, many such cases are based on the principle of raf' al-qarar (avoiding the harm) to approve istihānān.

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122 Al-Majallah al-Aḥkām: clause: 32.
Suyūṭī considered the term ẓarūrah together with the term of ẓarar and pointed out that the fiqh maxim “Necessity renders prohibited things permissible”\(^{124}\) was derived from the principle of avoidance of harm.\(^{125}\) Actually, all these maxims are derived from the Prophet’s hadith: “Harm must neither be inflicted nor reciprocated”.\(^{126}\) As we see, ẓarar and ẓarūrah are virtually the same, and are involved in many cases, such as returning goods due to a fault\(^{127}\) and most contracts involving freedom of choice (khīyār).\(^{128}\) However there is some disagreement as to whether ẓarar and ẓarūrah covers issues such as fraud, bankruptcy of the buyer, hijr (limitation of someone’s legal competence), shuf’ah (right of pre-emption), retaliation (qaṣās),\(^{129}\) al-ḥudūd (punishments) or kaffārāt (expiation).\(^{130}\)

4.2.3.3 Raf’al-ḥaraj (avoiding hardship):

Linguistically the term “ḥaraj” means tight, close, straitened, narrow, sin, prohibition, narrowness, and critical point. Beside those meanings, it is also means ‘forest’. The most prevalent of all these meanings is narrowness and closeness.\(^{131}\)

Technically, it is defined as “A thing which causes immoderate harm to life or any parts of the body or properties, at present or in the future.”\(^{132}\) Therefore, “avoiding
hardship" is the effort made to keep away from all kinds of difficulties in the first place, or to try to make it easy and mitigate it, and if it happens, then to seek to halt it.133

In the Hanafi sources, the term was formulated in order to make things easier and thus facilitate human needs.134 In addition to the term “raf’ al-ţaraj”, the terms “daf’ al-ţaraj”, “wad’ al-ţaraj”, and “naf’y al-ţaraj” are also used.135

The principle of “avoiding hardship” is especially considered by the Lawgiver as a purpose of the general law when rulings are established. Hence the verse: “God intends for you ease and does not intend for you hardship”136. Here the Lawgiver wishes to make things easy and to avoid imposing hardships on people and thus does not obligate anyone more than his or her capacity: “No one is charged with more than his capacity”137.

Accordingly, the Prophet enjoined the Community (Ummah) to pursue ease and avoid hardship as far as possible, as seen in his saying, “The best of religion is that which brings ease”.138 Suyūṭī and many jurists have taken this principle into consideration based on the Shāri‘s purposes and have then applied it successfully, in accordance with the maxim “Latitude should be afforded in the case of difficulty, that is to say, upon the appearance of hardship in any particular matter, latitude and indulgence must be shown”.139 Difficulty thus requires ease that is to say in times of hardship, consideration must be shown, and cases which were not permissible by analogy must then be permitted.140

133 Ibid. p: 48.
137 Qur‘ān: 2/233. also see: 2/286; 5/6; 7/42; 22/78; 24/61; 33/37
Such permission is only allowed during a time of hardship. It is disallowed when
the difficulties no longer exist. The original ruling is then restored as soon as the
extraordinary situation finishes. This is in accordance with the maxim, "When a
prohibition is removed, the thing to which such prohibition attaches reverts to its former
status of legality."\(^{141}\)

Many cases of Islamic jurisprudence, such as the transfer of debts and loans, are
derived from this principle; the latitude and indulgence shown by Islamic scholars in their
rulings are all based on this rule.\(^{142}\)

**4.2.3.4 Mashaqqah (hardship):**

The dictionary definition of "al-mashaqqah" is "hardship, difficulty, trouble,
discomfort, inconvenience".\(^{143}\) In its technical sense, it became a very important norm
(qāidah) in Islamic law as the basis of many shari'ī rulings. This norm is alluded to in the
maxim, "Difficulty begets facility"\(^{144}\). Commenting on this maxim, Ali Ḥaydar Afandī
says, "difficulty is the cause of facility and in time of hardship consideration must be
shown; in another words, it is necessary to make ease in the time of hardship."\(^{145}\) It is
based originally on the verses: "God intends for your ease, and He does not want to make
things difficult for you"\(^{146}\), and "The best of religion is that which brings ease".\(^{147}\)

\(^{142}\) See: Al-Majallah: clause 17.
\(^{143}\) Ibn Manzūr, "Lisan", v: 10, pp: 181-184; Fīrūzabādī, "Al-Qāmūs", p: 1159; Zāibli, "Tāj" , v: 25, pp:
511-512.
\(^{144}\) Al-Majallah: clause: 17.
\(^{145}\) Ali Ḥaydar, "Durar al-Ḥukm", p: 70.
\(^{146}\) Qur'ān: 2/185 and see: 22/ 78.
\(^{147}\) Ibn Ḥanbal, "Al-Muṣnud", 3/582, ḥadīth no: 15942; and the similar meanings see: ibid, 5/314, ḥadīth
no: 22354; ibid: 6/130, ḥadīth no: 24908; Tabarānī, "Al-Awsaf", 1/300-301, ḥadīth no: 1006; Bukhārī, "Al-
Wuṣṭā", 1/386, ḥadīth no: 220; Abū Dāwūd, "Al-Tahārah", 1/101, ḥadīth no: 380; ibid, "Al-İbm", 1/196,
ḥadīth: 69; Muslim, "Al-Jihād", 3/1359, ḥadīth 8/1734.
Suyūṭī suggests that all ease and latitude in Islamic law can be linked to this norm. The situations in which this principle is involved include such as travelling, illness, oblivion (forgetfulness), illiteracy (ignorance), general calamity (‘umum al-balwä) and deficiency (naqṣ).\(^\text{148}\)

Not every difficulty or hardship is considered as a reason for leniency. Therefore, mashaqqah (hardship) is divided into different types: Shāṭibī considers mashaqqah as having two main categories; a- genuine hardships, b- imaginary hardships.\(^\text{149}\) Suyūṭī also divides it into two types, albeit slightly differently. First, he says there are hardships which come from ‘ibādāt (worship) itself. Examples of these include: making minor or major ablutions with cold water; fasting on long hot days; enduring long journeys to hajj; jihād; and the hardship of punishments such as the stoning of adulterers and the punishing of murderers. Such hardships are seen as an inextricable part of these acts of worship and obedience, and cannot be removed.\(^\text{150}\) However, the permissibility of tayammum\(^\text{151}\) because of fear of possible illness from taking ablutions with very cold water, is an exception.\(^\text{152}\)

Secondly, he considers hardships which do not come from ‘ibādāt (worship); these he divides into three:

1- Fear of disaster or loss of life or limb.

2- Insignificant hardships. Examples might include slight headaches, for example, or nausea. Such difficulties are insignificant and cannot be cited as a reason for the


\(^{151}\) Tayammum: to wash with clean sand or earth where water is unavailable.

\(^{152}\) Suyūṭī, “Al- Ashbāḥ”, v: 1, p:162.
relaxation of laws. Gaining the benefits of worship is more important than repelling these kinds of difficulty which are relatively unimportant.

3- Intermediate hardships. For example, a sick person fasts in Ramadān and worries that the fast may delay his recovery. Under such circumstances, the person is allowed to discontinue the fast. Similarly, someone for whom water may be dangerous is allowed to make tayammum even when water is available.153 This third category of hardship is very difficult to quantify, and so jurists tend to judge each case in the light of the criteria pertaining to the first two categories alone.154

4.2.3.5 The Conditions of ẓarūrah (necessity):

To be valid, ẓarūrah (necessity) must fulfil certain conditions.

1- There must be absolutely no doubt as to the existence of ẓarūrah, or to the impossibility of escaping from the situation which invokes the principle without recourse to a change of ruling. The reason for invoking this principle must be a situation which is life threatening, or which jeopardizes the health or property of an individual.155 This concept is clearly alluded to in the Majallah in the words "No weight is attached to mere supposition".156

2- The compelled person must consider the general purposes of the lawgiver (Shārī') while acting on something. The five essential shari'ah values, which are religion, life, intellect, lineage, and property, must be given protection.157

156 Al-Majallah: clause: 74.
157 Zuhaylī, ibid, p: 70; Ibn Mūbarak, ibid, p: 305.
3- Avoiding a situation of ḍarūrah must not lead to greater evil or harm. In other words, doing something prohibited out of necessity should not bring about a worse situation than the original one. Jurists have added to the maxim “Necessity renders prohibited things permissible” the caveat that the case for ḍarūrah has to be a compelling one.

This condition is based on the principle of choosing the lesser evil. (ahwan al-sharr). Obviously, if there are two benefits to choose from, the greater and more general good is preferred over the minor and specific one. However, if there is a benefit and a harm; then first the harm must be removed, and then the benefit pursued. The Lawgiver gives more attention to the avoidance of the prohibited than implementation of the obligatory.

An example of choice between evils is as follows. Consider three prohibited things; kufr (unbelief); qatl (murder); and zinā (adultery), all of which are forbidden in Islamic law. However, if someone is forced to deny his belief, he will be forgiven as long as he keeps his belief in his heart. To force others, on the pain of death, to commit murder is prohibited. If such coercion actually leads to murder, qiṣāṣ will not be exacted from the killer, but from the one who forced him to kill. And similarly, if someone is coerced into committing adultery, he or she will not be punished by law, despite the fact that the law abhors such a crime and, considering its far-reacting social implications, deems it more destructive than the killing of a single individual under threat.

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159 Al-Majallah: clause: 21.
161 Ibid p: 90.
Various Types of Istiḥsān

This concept has been articulated by jurists in the following maxim: “A private injury is tolerated in order to ward off a public injury.” The prohibition from practice of an incompetent physician is derived from this principle. Similar maxims include: “Severe injury is removed by lesser injury”, “In the presence of two evils, the greater is avoided by the choosing of the lesser”, “The lesser of the two evils is preferred”, and “Repelling an evil is preferable to securing a benefit”.

4- The limits of ḍarūrah should not be exceeded. The person who is in difficulty should be content with a solution that is just enough to rescue him from ḍarūrah. For example, if a starving person can find only ritually impure food, he must eat as much as will allow him to survive; exceeding the limits is prohibited, in accordance with the statement “Necessity is estimated by the extent thereof”.

When the circumstances of ḍarūrah are over, the permission to benefit from the prohibited is also terminated, in accordance with the ruling: “A thing which is permissible by reason of the existence of some excuse thereof, ceases to be permissible with the disappearance of that excuse”.

5- An evil cannot be removed by an evil of similar gravity: when both are equal, choosing one in order to remove the other is prohibited. For example, a starving man is not allowed to take food from another man if it means that by depriving him, he too will starve. This

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164 Al-Majallah: clause: 26. for more on this see: Zarkā, ibid, v: 2, pp: 681-683.
165 Al-Majallah: clause: 27.
166 Ibid. 28.
concept is in accordance with the juristic norm, "an injury can not be removed by the commission of a similar injury".  

Another example is that no one has the right to violate someone else’s personal rights in order to satisfy his needs. Selfishness can never be a reason. In fact, if a person takes someone else’s food in a situation of necessity, under threat of force or without permission, then the ādar attached to the victim has to be compensated for. For example, if a hungry person eats bread belonging to another, that person must later pay the value. This rule is based on the following statement: “Necessity does not invalidate the rights of another”.  

4.2.3.6 Examples of istiḥsān based on necessity (ḍarūrah):

There are many examples of istiḥsān based on ḍarūrah according to the Ḥanafī School of law. Some of them are as follows:

a- A letter is sent by a judge from one place to another in order to provide evidence in support of a court case, since he is unable to be there in person. Under the rule of ḍarūrah, the evidence given by letter is as acceptable as evidence given in person in this particular case, since it eases hardship and secures the rights of those involved in, or affected by, the court case. According to qiyyās, however, for a judge to provide evidence in this way is deemed invalid: qiyyās does not recognise the personal information given by a judge to a court outside his jurisdiction. However, it is considered as evidence by ḍarūrah due to the needs of the people. 

b- The cleaning of wells and pools. According to the established ruling of qiyyās even if wells and pools have been totally emptied, they are still not considered ritually pure.

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172 Suyūṭī, ibid, v: 1, p: 178; Al-Majallah: clause: 25.
Various Types of *Istihṣān*

Emptying some of the water does not mean that it cleans all of the water. Even if all of the water is taken out, there is no difference. Fresh spring water from the well, or dropped into the well, will never be clean if the fresh water mixed with the polluted water remains adjacent to the wall of the well or pool and on the ground of the well. However, Ḥanafi jurists have departed from the general established ruling in this case, and have declared that the water will be considered clean by emptying just some of the water. This ruling, despite its opposition to *qiyyās*, is accepted by Ḥanafi jurists based on *istiḥsān* because of necessity and avoidance of difficulties for the people.\(^{175}\)

C- If a flying or running animal collapses and dies immediately after it has been shot, this animal is edible according to *istiḥsān*. According to *qiyyās*, however, it may not be eaten, since there is doubt that it may have died not from the actual shot but from the impact with the ground.

In this case, this kind of game is known as *mutaraddiyah* (dead by headlong fall), as indicated in the Qur'ān:

> “Forbidden to you (for food) are: *al-maytata* (the dead animals-cattle beast not slaughtered), blood, the flesh of swine, and the meat of that which has been slaughtered as a sacrifice for others than God, or has been slaughtered for idols etc., or on which God’s Name has not been mentioned while slaughtering, and that which has been killed by strangling, or by a violent blow, or by a headlong fall, or by the goring of horns—and that which has been (partly) eaten by a

wild animal- unless you are able to slaughter it
(before its death)- and that which is sacrificed
(slaughtered) on nusub (stone altars)...

Istihsan ignores the doubt concerning the actual cause of death in such cases, since it is
almost always impossible to tell.

d- The contract of sale on foodstuffs such as nuts, eggs, fruit, vegetables and so on is
valid even when the buyer discovers that some of them are spoilt, provided that the
damaged food is little. This is the ruling of istihsan; the buyer is always at risk of such
minor damages, which are unavoidable. However, if most of the food is spoilt, then the
contract is null and void. Despite the ruling of istihsan, the contract is considered invalid
by qiyas, regardless of the amount of damaged food.

4.2.4 Istihsan based on benefit or public good (masla‘ah):

As I have shown earlier, masla‘ah is one of the most controversial sources of
Islamic law. It is also a principle that is used to drive rulings based on istihsan. Some
examples are as follows:

a- According to the established ruling in the Hanafi School, even if someone has not yet
paid the dowry in full, he may establish their home wherever he wishes even if his wife
disagrees. However, this ruling has been challenged by many scholars, who believe

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176 Qur’an: 5/3.
179 For more on masla‘ah see: Ramaḍān al-Būfī, “Dawābīḥ”; Muṣṭafā Zayd, “Al-Masla‘ah”; Ḥusayn
İstiṣlāḥ”, pp: 137-156; Ṣarrā, “Al-İstiṣlāḥ wa al-Masla‘ah al-Mursaläh”; Sa’d Muḥammad al-Sanawī,
Koca, “İslam Hukukunda Masla‘ah Mursalah ve Najm al-Dīn al-Tūfī’nin bu konudaki görüşlerinin
that it often leads to mental cruelty, with women being forced to live far from their places of birth and families. Therefore, they rule, even if the dowry is paid in full, her husband cannot force her to go anywhere. The new ruling is given in consideration of the need to protect from unforeseen hardships that may arise. This ruling has been chosen as the preferred ruling among all the schools, and is based on the principle of *maṣlaḥah*.  

b- According to the established ruling of the Ḥanafi School, a person is free to dispose of his own property as he wills. For example, one may dig a well on one’s own land or build whatever one wishes. Such activities cannot be stopped even if they might cause harm to one’s neighbours. However, despite this ruling, at some point during the 8th and 9th century, Ḥanafi jurists declared that the rights of personal ownership are not absolute. Therefore, the condition must be that disposal of one’s property is allowed so long as it does not harm others. In order to avoid harm and protect the public good a new ruling is established based on the principle of *maṣlaḥah*, which is a major consideration in *istihsān*.

While one may dispose of one’s personal property as one wishes as far as *qiyyās* is concerned, *istihsān* changes this by considering what is more beneficial for the majority.

c- According to *qiyyās* both contract of *muḍārabah* (a contract of co-partnership) and the contract of lease are nullified when either one of the partners dies. However, some situations are considered as exceptional in order to avoid hardship and secure the greater good. For example, if the joint owner of a piece of agricultural land dies before the

harvest has been collected, his partner is not obliged to sell and /or vacate the land at the 
behest of the dead partner’s heirs, despite the general ruling which deems the contract 
null and void. This istisqan ruling is given in order to protect people’s rights. The same 
ruling is applicable for the contract of musaqat.

4.2.5 Istisqan based on custom (urf):

From the point of view its validity, custom (urf) can be divided into two types: 
urf, sahih (acceptable custom), which is a valid source of law according to the Qur’an 
and the Sunnah; and urf fasid (reprehensible custom), which is not accepted as a definite 
source of law.

Custom is further defined as being either qawl (verbal) or fi’li (actual).

‘urf qawl consists of the agreement of people as to the meaning of words established for 
functions other than their literal meaning. Consequently, the agreed meaning can be 
understood by itself without any explanation.

For example, the word “dirham” has been used to mean money that is presently used as 
currency. As such, it points only to this meaning rather than any other.

However, dirham in fact literally means “silver coin”, a meaning which does not come to 
mind when it is used on a day-to-day basis. Another example of verbal urf is the word 
“walad”, which literally means offspring, whether a son or daughter, but which in popular 
usage is used for son only. It occurs in the Qur’an: “God commands you as regards your

186 Musaqat: This is a lease contract for palm gardens in which one partner provides the land and seed and 
the other the oxen and labour.
Various Types of *Istihsān*

children's (inheritance): to the male, a portion equal to that of two females...". 192 An example of actual (fi’lī) 'urf is the "bay' al-fa‘āti" (give-and-take sale) which is normally concluded without utterance of offer and acceptance.

Consequently, jurists have asserted that "the original meaning of the word is departed from with respect to current custom". 193 According to *al-Majallah*, "In the presence of custom, no regard is paid to the literal meaning of a thing". 194 For example, a man takes an oath and says: "If such-and-such happens, I will make sure my clothes press against Ka‘ba." According to *qiyās*, however, no action needs to be taken, since there is no such act of worship as 'pressing one's clothes against the Ka‘ba. Where *qiyās* focuses on the literal meaning, *istihsān* adopts the customary interpretation of the oath. The literal meaning of this oath is not that the person will give his clothes to charity, and indeed *istihsān* supports this. 195

Actual custom ('urf fi’lī) consists of commonly recurrent practices that are accepted by the people, such as the ways in which payment is made on houses and shops; the payment of dowry in marriage, where a certain amount is paid at the time of the contract and the rest is paid later; the delivery of purchased commodities at a buyer's house or shop, and so on. 196

'Urf, regardless of whether it is qawli (verbal) or fi’lī (actual), is also divided into two types: al-'āmm (general) and al-khāṣṣ (particular): *urf ām denotes customs which are practiced by all, regardless of time and place; *urf khāṣṣ denotes customs which are

192 Qur‘ān: 4/11
194 Al-Majallah clause: 40.
particular to a certain country, locality or group. 197

We now turn to examples of situations in which custom may be invoked as a reason to overturn an established legal ruling.

The importance of custom as a consideration in the formulation of law cannot be overestimated. Because of the dynamic nature of human custom, consideration of this principle is crucial. 198

We have already indicated that custom is a valid source of Islamic law. According to al-Majallah, “Custom is an arbitrator: that is to say, custom, whether public or private, may be invoked to justify the giving of judgement”. 199 This in turn is derived from the saying of the Prophet “What the Muslims deem to be good is good in the sight of God.” 200

Many issues fall within the remit of custom-based istitbasan: contracts; waaf (endowment); public rights; personal rights and so on.

a- Shaybani has pointed out, under the subject of usury, loans and the borrowing of money, that lending and borrowing bread between neighbours is permitted, based on the principle of istitbasan, since everyday need has made it into a custom. Later, rulings were established by Hanafi jurists based on the opinion of Shaybani. However, strictly speaking, and according to nass, goods exchanged must be of the same kind and of equal value; if not, shortage or surplus may lead to unlawful usury, thus annulling the contract. 201 However, even though the lending and borrowing of bread may not always

199 AI-Majallah clause: 36.
involve exactly equal exchange, *istihsan* allows it on the ground of custom. Custom ignores small differences and only takes into the consideration the number of items involved,\(^{202}\) thus ensuring that these the transactions remain fair. In the example of the lending and borrowing of bread, a slight discrepancy in the amount exchanged is not enough to warrant a charge of usury.

b- According to most Ḥanafī jurists, the conditions and stipulations inserted into contracts are recognised so long as they are accepted by society in general. This *istihsan* ruling is clearly based on custom. In fact, conditions and stipulations which are unacceptable to the majority are deemed invalid. This is in accordance with the general meaning of the *ḥadīth* "The Prophet has forbidden sales with stipulations".\(^{203}\) For example, to stipulate handing back a house after staying in it for a month, or handing over a field after cultivating it for a year; selling something to someone on the condition that they later sell it back-all of these nullify the contract.\(^{204}\) However, Ḥanafī jurists permit two exceptions to this Prophetic norm: a- stipulation of the freedom to choose, b- stipulations which are customary.\(^{205}\)

According to most Ḥanafī scholars, such conditions should be recognised and considered. According to *al-Majallah*, "A matter recognised by custom is regarded as though it were a contractual obligation".\(^{206}\) For example, according to established rule of *fiqh*, *waqf* (charitable endowment) is a “lasting” endowment that can only involve

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\(^{204}\) Zarkā‘, "Al-Madkhal", v: 2, pp: 905-906.

\(^{205}\) Zarkā‘, "Al-Madkhal", v: 2, p: 906; Al-Majallah clause: 186: (If a contract of a sale is concluded with an essential condition attached, both sale and condition are valid), 188: (In the case of a sale concluded subject to a condition sanctioned by custom established and recognised is a particular locality, both sale and condition are valid.), 300: (The vendor, or the purchaser, or both, may insert a condition in the contract of sale giving them an option, within a fixed period, to cancel the sale or to ratify it by carrying out the term thereof.).

\(^{206}\) Al-Majallah clause: 43.
immovable property. Therefore, movable property, which is susceptible to damage and loss, is not to be included in waqf.  However, Shaybāni put aside this general rule and validated the waqf of movable goods such as books, in keeping with popular custom. The reason behind this is to encourage people to practice charity and do good works. Here, Shaybāni overrules qiyās and chooses istiḥsān, based on popular custom.

c- Bay' bi al-wafā (sale with right of return) was considered invalid before it was recognised by popular custom. Such a sale is considered to be permissible in view of the fact that the purchaser has a right to enjoy the goods he has purchased. It is also in the nature of an avoidable sale in as much as the two parties have the right to cancel it. It is also in the nature of a pledge, in view of the fact that the purchaser cannot sell the property sold to any third party.

This sale had been used commonly in the region of Bukhārā and Balkh as a valid sale because of people’s needs since the 6th century. Nasafi (d.537/1142) explains, saying “This is a kind of sale which people were accustomed to in order to avoid usury; however, in fact, it is a kind of pledge”. In this context, nullifying nass (text) and ignoring it is not an issue, since application of custom here is actually in keeping with the purpose of nass (text).

d- According to most Ḥanafi jurists, the right to water (ḥaqq al-shurb) may not be sold on its own, independently of the agricultural land which is irrigated by it, owing to the ambiguity over the contract of such a sale. Obtaining ownership of water can occur

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209 A sale subject to a right of redemption is a sale in which one person sells property to another for a certain sum of money, subject to the right of redeeming such property, upon the price thereof being returned.
only by actual possession; it can not be possessed while it is actually in the watercourse. However, some Hanafi jurists consider this permissible by way of istihsān, which is based on the customary approval of such a sale. In fact, the selling of the water on its own is against the general established ruling. Therefore, the new ruling is preferred by way of istihsān in respect of the common custom, and departs from the rule of qiyaṣ.\textsuperscript{213}

4.2.5.1 Conditions of validity of ‘urf:

Scholars assert that certain conditions must be fulfilled before custom (‘urf) can be deemed valid.

a- The principle of ‘urf must be relevant and actually applicable; it must also be prevalent. As is indicated in al-Majallah, “Effect is only given to custom where it is of regular occurrence or when universally prevailing”\textsuperscript{214} and “Effect is given to what is of common occurrence; not to what happens infrequently”.\textsuperscript{215} These statements form important maxims of fiqh.

b- ‘Urf must be actually be in practice at the time of the case which is referred to it. To rule on the basis of past or future custom is invalid.\textsuperscript{216} Ibn Nujaym says “The ‘urf connected to a case must be recent or current; possible future custom is not given any credence.”\textsuperscript{217}

c- Custom must not contradict evidence which is stronger than itself. If custom opposes a ruling of naṣṣ and cannot be reconciled to it, then it is neither valid nor recognised. Hence, no ruling can be adopted on such kinds of custom.\textsuperscript{218}

\textsuperscript{213} Sa‘bān, “İslam Hukuk İliminin Esasları”, p: 171
\textsuperscript{214} Al-Majallah, clause: 41.
\textsuperscript{215} ibid: 42.
We now turn to those instances in which custom contradicts *nass* or other principles. Can such customs still be considered a valid source of law?

In this context, 'urf may contradict *nass* in two ways. Firstly, it may contradict a specific *nass* involving a specific situation and meanings. Secondly, it may contradict the general *nass* involving general situations and meanings.

### 4.2.5.2 Opposition of 'urf to a specific *nass*:

A specific *nass* is one which involves specific matters, for example, adultery, gambling, alcohol, usury, and so on. If such acts are customary in a society, the fact that they are 'urf carries no weight or credence: these are acts which are outlawed by the *shari'ah*, and they are thus non-negotiable. Islam aims to abrogate some customs completely, to accept some of them as they are, or to rehabilitate some of them.\(^{219}\) For example, regarding a contract which clearly contradicted a *hadith*, Sarakhsi says: “An ‘urf which contradict a *nass* is not valid”.\(^{220}\)

The question which arises in this context is whether a specific *nass* can change a custom? Abü Ḥanīfah and Shaybānī preferred to follow a specific *nass* than custom. Abü Yūsuf, however, tended to prefer the custom.\(^{221}\)

An example of scholarly disagreement concerned the *hadith* about usury which stipulated that in lending and borrowing, the commodities exchanged had to be the same kind, amount and value: “Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt and like for like”.\(^{222}\) Abü Ḥanīfah and Shaybānī were of the opinion that the *hadith* must be followed to the letter. However, Abü Yūsuf points out

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\(^{220}\) Sarakhsi, “*Al-Mabsūṭ*”, v: 12, p: 196.


\(^{222}\) Abū Dāwūd, “*Buyū‘*”, 12; Bukhārī, “*Buyū‘*”, 74, 76, 77, 78; Muslim, “*Musaqāt*”, 79, 82.
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that custom often dictates other ways of exchange in these circumstances, and that as long as it is acceptable to the people and considered normal, then there is nothing wrong with it. In this case, it is ‘urf and the habitual practice (‘ādat) of the people that has to be taken into consideration. If the only difference between ‘urf and nasṣ is, as in this example, one of details only, then it cannot be considered as an actual contradiction of the purpose of the nasṣ.  

Abū Yūsuf’s practice was to focus on the meaning of the text and understand the exact purpose of it by application of ‘urf, not by preferring ‘urf to text, or ignoring the text, or falsifying and confining its limits.  

The first type of opposition of ‘urf to nasṣ is not considered valid since it is not in accord with the aims of the shari‘ah. Therefore, it is not included within the scope of istihsān. The first thing for istihsān is that there must be valid evidence. However, Abū Yūsuf’s judgement does not amount to istihsān.

4.2.5.3 Opposition of ‘urf to a general nasṣ:

When a general nasṣ contradicts an ‘urf qawli (verbal), the use of the latter in society is considered. For example, the people of a country may depart from the literal meaning of a word and become accustomed to understanding that word in a different context. For example, in some communities, the word ‘food’ is understood as referring to maybe no more than one or two foodstuffs, and they may be unaware of the vast range of things that the general word ‘food’ actually signifies. Thus the nasṣ becomes particularized in accordance with the specific ‘urf. That specific ‘urf is then considered to be an exception to the general meaning of the nasṣ. Jurists are in agreement on this issue. In this case, the

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general *nasṣ* is interpreted according to the custom. The general *nasṣ* is particularized by
the custom in that its indication to a particular meaning is approved, based on *istihsān*
according to Ḥanafis. However, if the metaphorical meaning of a word becomes *ʻurf,* Ḥanafi jurists disagree as to which is to be preferred, the literal meaning or the
metaphorical. According to Abū Ḥanīfah, the actual meaning is the preferable one, while
Abū ʻYūṣuf and Shaybānī prefer the metaphorical meaning that has become customary.

For instance if someone vows to walk to the Ka'ba, then he has to fulfil either *haţajj*
or *ʻumrah.* This is the view point of Abū ʻYūṣuf and Shaybānī. However, nothing is
required according to Abū Ḥanifa based on *qiyyās.* The reason why nothing is required is
that a vow becomes obligatory if there is a customary act of worship available through
which that vow may be fulfilled. In this context, there is no obligatory (*wājib*) duty of
walking to Ka'ba, and so the vow is nullified. However, Abū ʻYūṣuf and Shaybānī
performed *istihsān,* claiming that 'walking to the Ka'ba was a customary way of meaning
*haţajj* or *ʻumrah.* Therefore, they preferred this custom to the actual meaning of the
word.

The main reason of the disagreement among Abū ʻYūṣuf, Shaybānī and Abū
Ḥanīfah concerns the availability of the one of the conditions of the validation of *ʻurf,*
which is that "*ʻurf* must be in existence at the time a transaction is concluded". For the
custom to be valid, it has to fulfil certain conditions; otherwise, it will be invalid.

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225 Sarakhsi, "*Uṣūl*, v: 1, p: 190; Nasafi, "*Kashf*," v: 1, p: 267; Bazdawi, "*Uṣūl*," v: 2, p: 95; Ibn 'Abd al-
Shakārī, "Musállamát al-Subūr*," v: 1, p: 345; Suyūṭī, "*Al-Asbāb*," p: 66; Abū Sunnah, "*Al-ʻUrfu wa al-
Adāh*," pp: 122-123; Koca, "*Taktīs*," p: 257.


228 Bukhārī, "*Kashf*," v: 2, pp: 97-98.
In actual custom (‘urf ‘amali), the main point is to discover the Shāri‘s objectives. ‘Ali Ḥaydar Afandi explaining the maxim “Custom is an arbitrator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgement”229, says “‘urf (custom) and ādat (tradition), whether general (‘āmm) or specific (khāṣṣ), are as a judge who validates the legal ruling”.230 Here it is indicated that ‘urf would take a role in determining legal rulings; however, it must not actually ignore nass or alter it. Where there are two contradictory proofs, the one which is more suitable and adequate to materialize the Shāri‘s purposes is preferred to the other. In fact, the conflict here is not between ‘urf and nass, but rather of two evidences.

The question which arises here is that if ‘urf is a type of specific custom, can it particularize the general nass or not? Most Ḥanafī scholars claim that a specific custom will not particularize the general nass. In order for a specific custom to be a source of law, it has to be in use everywhere.231 According to al-Majallah, “Effect is only given to custom where it is of regular occurrence or when universally prevailing”.232 Nevertheless, al-Nasafi (d.424/1033), and Ibn Nujaym (d.970/1562) claim that the general nass maybe particularized by a specific ‘urf.233

However, specific ‘urf will not be valid if it contradicts nass.234 Furthermore, if a custom does not wholly contradict a nass and there is thus a way to reconcile it with a nass or a shar‘i evidence, then it is considered as valid, based on one of the principles of

229 Al-Majallah clause: 36.
232 Al-Majallah clause: 41.
Sunnah Taqrīrī, ijmā' (ijmā' sukūtī) or darurah, and as was practised in the example of bay‘ al-wafā235 (sale with right of return) and istiṣnā'. Otherwise, it would be rejected.236

4.2.5.4 Istiḥsān based on the opposition of ‘urf to qiyās:

This kind of istiḥsān becomes relevant when people are accustomed to practices that contradict a ruling of qiyās or an already established general ruling. Sarakhsī expresses the importance of custom by declaring that to obstruct people in their practice of what is customary is to do them much harm.237 According to al-Majallah, “A matter established by custom is like a matter established by law.”238

In Ḥanafī works there are many examples of this type of istiḥsān, some of which are included here:

a- According to the general established ruling of Abū Ḥanīfah, the endowment of movable property is not allowed. However, Abū Yūsuf allowed endowment of horses and war equipment based on the athar (practices) of the Companions. In addition, Shaybānī condoned the endowment of camels, axes, ropes, shovels, saws, cauldrons, clothes, funeral equipment, and the Qur‘an- in short anything moveable which it was customary to endow. In this respect, he departed from qiyās in favour of custom. Later, many Ḥanafī scholars followed Shaybānī and gave judgements according to his opinion.239

b- In the case of bay‘ al-wafā, the practice was prevalent in order to meet people’s needs without charging interest.240 In fact, in Islamic law, pledging a condition in advance in order to benefit from that pledge is considered as a kind of ribā (interest) and is therefore

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236 Ibid. p: 95;
238 Al-Majallah clause: 45.
Various Types of İstıhsân

not permitted. One interpretation of it is that it is a kind of “valid agreement” which a buyer has the right to benefit from; it is a kind of “nullified agreement” in respect of the buyer’s right to nullify; and is a kind of “pledge agreement” in respect of the buyer’s inability to sell the commodity. However, later it became a custom because of people’s need and is therefore, based on the principle of istıhsân. A similar transaction is bay’ al-istighlāl (sale by sub-letting). According to al-Majallah, “A person may make a valid pledge of property borrowed from some third person, provided he has received the permission of that person. This is known as a pledge of a borrowed article”. These kinds of transaction have become a customary and are thus permitted by istıhsân.

c- According to Abū Ḥanīfa, selling bees and silkworms is not allowed, because at his time they were not a valuable commodity. Abū Ḥanīfa compared their sale to the sale of reptiles such as snakes and lizards. Abū Yūsuf’s opinion is similar to Abū Ḥanīfa, although in the case of silkworms, he says that if they are used to make silk, then it is permitted. Despite Abū Ḥanīfa’s opinion, Shaybānī departs from qiyās to istıhsân, based on the judgment that the sale of such things had become customary among the people.

Conclusion:

Different scholars posit different typologies of istıhsân. On the whole, it is divided into two main types a: analogical istıhsân, which consists of a departure from qiyās fālī to qiyās khaft, and b: exceptional istıhsân (istihsân istithnār) which consists of making an exception to a general rule of existing law, and which is approved when the jurist is

242 al-Majallah: clause: 726.
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convinced that in making such an exceptions, justice might be better served.245 Besides
this main distinction, scholars divided istihsân into many different types and sub-types, as
I have mentioned earlier.246

We can see that istihsân which is based on naâṣs, ijmâ' and darûrah is not
extendable to parallel cases when we compare the two main types of istihsân, namely the
analogical and the exceptional. Hanafi jurists point out that the qiyâs khaftî, which they
called istihsân, is in reality a kind of qiyâs (analogy) and therefore its ruling can be
extended (ta`diyah) to other cases.247 In order to move a ruling of qiyâs, the 'illah must
be the same in both cases. This is the ruling of the validated qiyâs. Ta`diyah applying a
ruling to other cases is an indispensable factor of ijtihäd.248 However, the ruling of qiyâs
is not extendable to similar cases if the applicability is uncertain or unreasonable. Despite
this, istihsân which is based on implicit (khaftî) analogy is extendable by further analogy
to parallel cases.249

When we compare the Hanafi and Maliki views of istihsân, we see that the Hanafi
istihsân derives much of its substance largely from necessity (darûrah). The Maliki
approach to istihsân, however, is based on maâlahâ and the removal of hardship (raf' al-
harâf). Despite the different methods they used to approach the problem, they eventually
arrived at the same results. Their use of maâlahâ differs mainly in respect of the degree
of importance they accord it. Hanafis resorted to istihsân where there was conflict
between obvious (jali) and implicit (khaftî) qiyâs which inclined to a stronger evidence


246 See: at the beginning of the Chapter Three.


249 For an example, see: Chapter Three under the title of the departure from qiyâs jali to qiyâs khaftî.
and necessity (darūrah), while the Mālikīs were inclined to resort to *istiʿsān* where there was conflict between analogy and *maṣlaḥah*.250

A contemporary scholar, Kamālī, discusses the division of *istiʿsān* in the context of equity. He highlights the unnecessary classification and complains about the consideration of *istiʿsān* in the context of equity and fairness, which he says were not considered by the scholars. According to him, *istiʿsān* which is based on equity and consideration of fairness has not been given a separate category by either the Ḥanafīs or the Mālikīs. Instances of equitable *istiʿsān* often seem to have been subsumed under consideration of *rafʿ al-ḥaraj*. Removal of hardship is admittedly the nearest concept to that of equity and fairness; it has a definite Qur'anic identity and seems an eminently suitable basis for *istiʿsān*. Yet it is ironic that neither of these (i.e. equity and *rafʿ al-ḥaraj*) find a separate entry in the scholastic typology of *istiʿsān*. It seems that the *maṣlaḥah* based *istiʿsān* has a strong base of identity with *rafʿ al-ḥaraj*, and the ‘ulamā’ do tend to almost equate the one with the other. This can also be said of custom (‘urf) which is recognized as a proof precisely because acting on custom is in the spirit of *rafʿ al-ḥaraj*. Kamālī concludes that when both *maṣlaḥah* and custom are recognized as separate bases of *istiʿsān*, *rafʿ al-ḥaraj*, and also equity and fairness (*iḥsān*) could easily be added to the existing varieties of *istiʿsān*.251

As Kamālī indicates, equity and fairness are indeed concepts that would seem to be in conformity with *istiʿsān*. After all, linguistically it is derived from *iḥsān* (goodness), and connotes justice (‘adl). Therefore, equity and fairness should be considered in a contemporary approach. The basis of *iḥsān* finds a sufficient support in

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the Qur'an: "Verily, God enjoins al-'adl (justice) and iḥsān (the doing of good and liberality) and giving (help) to kith and kin...".\(^{252}\) According to Kamali, the main differences between justice and iḥsān may be said to be that justice is the normal requirement which is to be administered under the shari'ah. Iḥsān on the other hand opens up the scope of justice under positive law to considerations of equity and good conscience, especially in cases where the application of normal rules may not actually secure justice. Then, one should act in the spirit of iḥsān and find a method that serves the ideas of Qur'anic justice, even if it entails a certain departure from specific rules.\(^{253}\)
CONCLUSION

Deducing rulings is an important element for the development of Islamic law. The fundamental sources of Islamic law are the Qur'ān, the Sunnah, ijmā' (consensus), and qiyās (analogy) which are unanimously accepted by the majority of jurists. There are also other controversial principles that are activated when the fundamental principles are silent and unable to help the law for its continuity.

The ḥadīth of Mu'ādh ibn Jabal is very good example of the fact that Muslims believe that Islamic Law is able to find answers for human problems. For this reason, jurists must know the main requirements for legislation. The knowledge of jurisprudence was formulated as usūl al-fiqh (the principle of jurisprudence) and the meaning of usūl al-fiqh combines the understanding of the meaning of usūl and fiqh individually.

The term usūl is the plural of aṣl. One of the uses of a-ṣ-l is the meaning of dalīl. In Islamic law, the word dalīl is used in two ways: dalīl tafsīl is like an individual verse of the Qur'ān or an individual Sunnah in a ḥadīth. We may refer to it as "specific evidence", though it is sometimes translated as "detailed proof". And the dalīl ijmā'ī has nothing to do with direct, absolute order and prohibition. However, it produces general rulings as wujūb (necessity), tafrīm (prohibition) and so on.

Dalīl (proof) is distinguished from amārah (indication), which literally means a sign or an allusion. Dalīl could only relate to evidence which leads to a definitive ruling or to positive knowledge ('ilm). Amārah on the other hand is reserved for evidence or indication that only leads to a zanni (speculative) ruling. In this way, the term dalīl could only be concerned with the definitive proofs, namely the Qur'ān, the Sunnah, and ijmā', while the remaining proof which contains a measure of speculation, such as qiyās, istiḥsān, istiṣhāb, maṣāleḥ mursalah, and so on, could fall under the category of amārah.
(signs or allusions, probable evidence). However, most jurists consider both *dalîl* and *amârah*, whether *qâfî* (definitive) or *zanni* (speculative), as a *dalîl* (proof). The term *asl* is actually *dalîl*, which is a proof or an evidence of Islamic Law.

The term *fiqh* is synonymous with *al-fahm* (understanding) in the linguistic sense. It is used to denote the exercise of intelligence, as in the case of the Successors of the Companions of the Prophet, most of whom were *fuqahâ’* (jurists) who gave legal judgments using their own reason and intelligence; in that respect the term *fiqh* is actually used for the knowledge of the law.

The procedure of giving judgments among the Companions was that they used to refer first to the *Qur’ân* whenever a claimant-defendant asked them for guidance. If the Companions were unable to find the result in the *Qur’ân*, they would then seek a judgment in the *Sunnah*. Failing to discover the answer within these sources, they would then consult the righteous men of the community who would convene to discuss the matter and arrive at a solution. If they arrived at an opinion which was unanimously accepted, the consensus was that they should judge accordingly.

Despite the controversy among the scholars, it has been shown that the use of *ijtihâd* by *ra’y* was practiced from the time of the Prophet; this is evident from several narrations such as the *haddith* of Mu’adh Ibn Jabal or the incident when the Prophet saw the people of Medina fertilizing palm trees.

Between *ijtihâd* and *ra’y* there is a very close relationship. However, as we have seen, *ijtihâd* is more comprehensive than *ra’y*. At the time of the Companions and the Successors, the constituent parts of *ra’y* were clear and extensive, as opposed to the *nass*, which is not obviously clarified and defined. Following that period, some jurists
continued to use *ra'y* in the meaning of *ijtihād* in a wider range. At the same time, the majority of jurists confined the use of inference to issues where there were no *nass* (text) to reach a right and just *tukm* (ruling).

Performing *ijtihād* is seen as a religious duty. The Qur'ān and the Sunnah of the Prophet encourage Muslims to avoid disagreements amongst themselves by using *ijtihād*; it is said that whenever a judge exercises *ijtihād* and gives a right judgment, he will have two rewards, but if he errs in his judgment, he will still have earned one reward. Therefore, *ijtihād* becomes a very demanding requirement in modern day life, and sometimes performing it will be an individual duty (*farḍʿayn*) and sometimes a collective duty (*farḍʿkifayah*) for Muslims. Eventually, if the requirement of *ijtihād* is ignored then the whole Muslim community will be considered sinful.

There are some conditions which are aimed to ensure the ability of a person to perform *ijtihād*. The earliest complete accounts of the qualifications of a *mujtahid* were given by scholars such as Abū al-Ḥusayn al-Baṣrī (d.436/1044), Shīrāzī (d.467/1083), Ghazālī (d.505/1111), Āmidī (d.632/1234), Ibn al-Subkī (d.771/1370) and Shāṭibī (d.790/1388). They and many others prepared extensive lists of the abilities jurists must possess to enable them to perform *ijtihād*. Some increased and others decreased the conditions. An outstanding scholar, Shāṭibī, ignored these lists and reduced the conditions of *ijtihād* to one comprehensive point: the precise comprehension of the *maqāsid* and in the light of this comprehension the ability to deduce rules from the sources.

Regarding the door of *ijtihād*, besides the early and contemporary Muslim scholars, some recent western scholars, in particular Wael Hallaq, and W. Montgomery Watt, have indicated that the gate of *ijtihād* is still open and the term "The closing of the
gate of *ijtihađ* is a myth. In reality, the gate of *ijtihađ* was never completely closed, as properly qualified scholars must have the right to perform *ijtihađ* continuously. *Ijtihađ* is not confined to the four schools of law and can be performed by all capable scholars. Consequently, the gate of *ijtihađ*, in my personal opinion, is still and must remain open.

*Ijtihađ* has been practiced largely in terms of *istihsan*. Sometimes when an issue is not within the range of a *naṣṣ*, *qiyaṣ* is then used to judge. Here we come across two different possibilities: apparent clear analogy and implicit analogy. If the *mujtahid* finds that the second one is stronger (*khaṭṭi qiyaṣ*) the judgment given accordingly is called *istihsan*. Through *istihsan* some issues within the range of common *naṣṣ* and criteria such as difficulty, complexity, necessity, and need are removed because of their specific nature and a new judgement is given to this special situation to implement *maslaha*.

As such it is the Lawgiver (i.e. God) who considers the special situations and circumstances with specific conditions, and who abolishes the difficulty, complexity and harm. This provides an ideal guide for the *mujtahid*. On this issue Muṣṭafā Zargā says that the *Qurʾān* and the *Sunnah* are both *istihsan*, which is the creation of the *Shāriʿ*. The concept of *istihsan* is to guide the *mujtahid* when applying the *naṣṣ* of the *Shāriʿ* to issues everyday of life. The *mujtahid* performing *istihsan* is inspired by the method that the *Shāriʿ* applies and in this way, the *mujtahid* implements the *Shāriʿ*'s purpose and intentions. We have mentioned some examples in regards to this issue throughout the chapter.

No technical definitions of *istihsan* have reached us from the early Islamic period, simply because there was no reason for *istihsan* to be defined. Abū Ḥanīfah and other early Ḥanafi jurists such as Abū Yūsuf (d.182) and Shaybānī (d. 189) have directly given
rulings using the concept of *istihsān* without giving any specific definitions or explanations. It is said that their judgments were based on the fundamental principles of securing ease and avoiding hardship, in line with the Qur’ān: “The best of your religion is that which brings ease” and “God intends facility and ease for you, He does not intend to put you to hardship”.

The fact that the Ḥanafīs were attacked by the Shāfī‘ī jurists, and especially by Shāfī‘ī himself, shows that the Shāfī‘ī schools did not recognize *istihsān* as a basis of Islamic law. They dismissed it as “Arbitrary law-making in religion”. Indeed, Shāfī‘ī jurists did not understand what Ḥanafīs meant by *istihsān*. Ḥanafī jurists spent much time defending their position and trying to show that *istihsān* was a valid source of law, and not merely an ad hoc method. However, among the jurists there was no consensus as to the precise meaning and definition of *istihsān*. Yet in spite of all the different definitions, the meanings are very close. In fact all the definitions may be derived from that of Karkhī which is arguably more comprehensive than the others as we discussed earlier.

It is quite difficult to determine the applications of *istihsān* in the very early period. However, ‘Umar’s decisions provided the means by which researchers have been able to gain some indication of how to implement *istihsān* in legal matters. Early *istihsān*, then, involved making a decision which was a complete departure from an established rule for the sake of equity and public interest. I have not been able to discover any authentic source that leads me to believe that the concept of *istihsān* was used prior to the time of ‘Umar ibn ‘Abd al-‘Azīz.

When Ḥiyās b. Muā‘wiyyah’s use of the term *istihsān* is compared to Abū Ḥanīfah’s, much similarity can be seen. For them, the main purpose of applying *istihsān* was to

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1 Qur’ān: 2/185
avoid the possibility of causing harm to the public interest. The reason for their emphasis on *istihsān* was their desire to avoid the negative results that often occurred when *qiyyās* was applied incorrectly. However, *istihsān* owes its existence to *qiyyās*, and would not have superseded it had *qiyyās* not proved to be ineffective in some cases.

The investigation that I made throughout the research, and the opinions given by scholars such as Ibn Ḥazm, Schacht (d.1969), Goldziher (d.1921) and so on, show that the first usage of *istihsān* in its technical sense did not occur before Iyās bin Muā'wiyah (d.122/740).

The concept of *istihsān* is recognized by the Ḥanafī, Mālikī, Ḥanbalī and Zaydi schools. Ḥanafī scholars are adamant that *istihsān* is a source of law and not in any way a form of ruling made according to personal desire. For the Ḥanafī school *istihsān* means acting according to one of the two forms of *qiyyās*. *Istihsān* may also be acted upon based on *athar* (*ḥadīth*), *ijmā'*, or necessity. However, despite the fact that ‘ulamā’ from these different schools recognized the validity of *istihsān* as a principle they often disagreed over the meaning of the term. The supporters of the validity of *istihsān* resort to proof from the *Qur’ān*, *Sunnah*, and *ijmā’*. According to Ḥanafī scholars, to perform *istihsān* is to comply with Qur’ānic verses which command man to follow what is best, good and beautiful.

The first figure to reject *istihsān* was Imām Shāfi‘ī with his famous statement: “*Man istatsana faqad sharra‘a*” (whoever approves of juristic preference is making himself the Lawmaker). According to Shāfi‘ī, nobody is ordered to rule according to *haqq* (truth) unless he knows what *haqq* is and *haqq* cannot become known unless it is from God either as *nafs* or by indication, as God made *haqq* in his Book and in the
Sunnah of his prophet. Among those who agreed with him on this issue were: Isnawī (d.772/1370); Bishr b. Ghiyās (d.218/833); Shirāzī (d.476/1083); Ghazāli (d.505/1111); Dawūd al-Zāhīrī (d.270/884); Ibn Ḥazm; and the Imāmi Shi‘ah.

In reality, everybody, including those who recognize istiḥsān, reject istiḥsān that is based on personal desire. Shāfi‘ī said, with regards to the case of the thinkers and the literate, that if they were allowed to rule by istiḥsān it would be in contradiction to the use of istiḥsān, as those who recognize istiḥsān understand that its meaning is the departure from qiyās to a stronger dalīl. The situations are such that the dalīl can only be expected from a mujtahīd who is competent in the shari‘ah rulings and the dalīl, while it is unacceptable from thinkers and the literate who are not qualified.

Owing to the lack of written material, Abū Ḥanīfah has often been accused of judging cases without depending on any textual evidence, and this is the main source of conflict amongst the jurists. However, it is not entirely true to say that there is no trace of any reports regarding Abū Ḥanīfah’s techniques; in fact he left writings giving indications as to his methods of performing ijtihād and his use of the principle of istiḥsān. He declared that he used to read God’s book to obtain guidance. If he was unable to find any guidance in the Qur‘ān then he would resort to the Sunnah of the Prophet and the true reports (ḥadīth) which had transmitted from generation to generation by trustworthy narrators. If neither the Qur‘ān nor the Sunnah yielded any guidance, he would then refer to the opinions of the Companions. Consequently, when he made his personal decision he would not ask others’ opinions. However, if a matter had been considered by the likes of Ibrāhīm al-Nakhā’ī (d.96), Shābī (d.103), Ḥasan (d.110), Muḥammad b. Sīrīn (d. 110), Sa‘īd b. al-Musayyab (d. 94) et al, he would also act on their ijtihād.
Moreover, in the writings of his disciples, Abū Yūsuf (d.182) and Shaibānī (d.189), the use of the concept of *istiḥsān* by Abū Ḥanīfah and the early Ḥanafīs is explained. The examples of the practice of *istiḥsān* in the writings of Abū Yūsuf (d.182) and Shaibānī (d.189) reveal that the use of the concept could mean the following: leaving *qiyyās* due to the precedents of the Companions; leaving *qiyyās* owing to the consensus (*ijmāʿ*); leaving *qiyyās* in favour of *sadd al-dharāʾī* (blocking the means); leaving *qiyyās* due to authentic Tradition (*ḥadīth sāḥīḥ*). Abū Ḥanīfah and his disciples were highly respectful of the Traditions, and used them in their *ijtihād*; even if it was a *ḥadīth ḍaif* (weak tradition) they would prefer it over *qiyyās*.

Division of *istiḥsān* among the scholars differs from one jurist to another: mainly it is considered as being of two types:  

a: analogical *istiḥsān*, which consists of a departure from *qiyyās jalī* to *qiyyās khafti*;  
b: exceptional *istiḥsān* (*istiḥsān istithnāʾī*), which consists of making an exception to a general rule of the existing law.  

Sadr al-Shārīʿah (d.747/1346) also divides it into several types such as *ijmāʿ*, *ḍarūrah* (necessity), *athar*. These are actually established against explicit analogy. He considers the implicit (*khafī*) analogy is *istiḥsān*. However, despite the fact that implicit analogy is *istiḥsān*, it is more comprehensive than implicit analogy. We can conclude that while every implicit analogy can be called *istiḥsān*, not every case of *istiḥsān* can be called implicit (*khafī*) analogy.

Another jurist, Bazdawī, also indicates that *istiḥsān* is an implicit analogy. In fact *istiḥsān* is not merely an implicit analogy. In general, the Ḥanafīs considered *istiḥsān* as four types as follows: *istiḥsān* based on *nass* (*athar*); on *ijmāʿ* (consensus); on *ḍarūrah* (necessity) and on *qiyyās khafti* (implicit analogy).
The Mālikīs divide *istiḥsān* into four types: *istiḥsān* based on ‘urf; on *mašlaḥah*; on *ijmā‘*; and on *qiyyās*. Even though there are different opinions over the divisions of *istiḥsān*, some common issues with regard to the types of *istiḥsān* are generally agreed upon, namely the first type of *istiḥsān* — the departure from *jali* to *khafi* — which is agreed upon by all the scholars.

Ḥanafīs considered that *qiyyās khafi* was *istiḥsān*. The ‘illah (effective cause) of *qiyyās khafi* can not be discovered easily. However in *qiyyās jali* the ‘illah (effective cause) appears at first glance without careful consideration being given to it. In other words, *qiyyās khafi* is preferred over *qiyyās jali* if they are opposed to each other, on account of the effective cause (‘illah) which is stronger in *khafi*.

So many efforts were made by outstanding scholars throughout the history of Islamic juridical life to develop it in order to allow *mašlaḥah* to prevail and to prevent evil. Abū Ḥanīfah was one of them. He made *istiḥsān* and *qiyyās* essential to *usūl al-fiqh*, allowing society the freedom and flexibility with which to function and progress healthily, in line with the objectives of the *shari‘ah*.

Najm al-Dīn al-Tūfī (d.719/1316) took the concept of *mašlaḥah* to the furthest extent ever known. He emphasized the importance of the concept and considered it suitable for applications in all areas of social life and human relations, apart from *ibādāt* (worshiping) and those general principles of law already determined and deemed inviolate. The general principles of religion are binding and fixed for mankind until the day of judgment; particular principles, however, are subject to public interest (*mašlaḥah*) and the public interest changes as circumstances change. The Qur‘ān promotes reforms and new solutions by saying that if man does not know, he should go and ask someone
who does. As the verse indicates, “So ask the people of the reminder”\(^2\). Therefore understanding the purposes of the sharī‘ah is an indispensable qualification for a mujtahid in order to perform *ijtihād* and realize the role of the concept of *istiḥsān*, as Imām Mālik regards it a purpose-centred method of interpretation, adding that *istiḥsān* represents nine-tenth of human knowledge. Consequently, contemporary scholars should work on the principle of *istiḥsān*, and develop it in the framework of contemporary issues under the light of the fundamental principle of Islamic law.

\(^2\) Qur’an: 21:7.
GLOSSARY

‘adl : justice.

adillah (pl. of dalîl): proofs, evidences, indication

adillah al-shari‘ah : proofs of Islamic law

adhan : call to prayer

af‘al : acts

atâkân (pl. of ënhm) : rules, laws, practical rules and ordinances.
al-atâkâm al-‘amalîyyah: practical rulings

al-atâkâm al-‘aqîliyyah : rational rules

al-atâkâm al-dîn : rulings of religion

al-ahkâm al-‘issiyah: law of sense perception

al-atâkâm al-‘îtiqâdiyyah: creed/ convicitional, which is belief in the existence of God, His oneness, His qualities, the truth of the mission of the Prophet, belief in the Day of Judgment etc

al-atâkât al-‘khuluqîyyah : ethical and moral rules

al-ahkâm al-lughawiyyah : linguistic rules

al-atâkâm al-mu‘âmalât : transactions

al-atâkâm al-shar’iyya: legal rules

al-atâkâm al-waqfiyyah : declaratory rules

ahl al-âsâbah : the residual heirs

ahl al-bayt : the household of the Prophet

ahl al-bid‘ah : people of innovation

ahl al-‘hadîth : the traditionalist group or school

ahl al-ka‘fâ : People of the Cave

ahl al-ra‘î : the rationalist group

ahl al-farâ‘îd : those portions for heirs designated in the Qur‘ân

al-âfsan : the best

ahwan al-sharr : lesser evil

‘âmm : general

amârah : indication, signs or allusions, probable evidence

al-ansâb : gambling

Arkân : essential requirements

‘âqîl : intellect, reason

‘âqîlî : rational

‘âsâbah : those who are entitled to the remainders of the shares, agnates

asâs : foundation

asâbiyâ : gambling

asâl : root, origin, source, and used original case in the context of analogy.

âyâh (pl. of âyât) : proof, evidences, lessons, signs

azân : the call to prayers

‘azîmah : strict or unmodified law which remains in its original rigour due to the absence of mitigating factors.

azâlâm : arrows for seeking luck or decision

bâîl : wrong, null and void.

Bayt al-Mâl : treasury, exchequer
bay‘ al-ta‘ātī : give-and-take sale
bid‘ah : innovation
burhān : proof, evidence
daf al-fasād : avoid evil
dalā‘il : pl. of dalil: indication, proof, evidence
dalāl : error
dalil ‘am : general evidence
dalil imālī or kullī : general evidence
dalil qaṭ‘i : definite proof
dalil tafsīlī : specific evidence, detailed proof
darar : harm
darūrah : necessity
Qarāriyyāt : essentials
dharī‘a , : plural dharā‘i : means
dirhams : silver coins
fahm : understanding
fuqahā‘ (plural of faqīh) : jurist, one who is learned fiqh.
far‘ : lit. a branch or a sub-division, and in the context of qiyās a new case
farḍ : obligatory, obligation
farḍ ‘ayn : individual duty and obligation
farḍ kifāyah : a collective duty, the fulfilment of which by a sufficient number of individuals excuses the other individuals from fulfilling it
fasād : evil
fatwā : formal legal opinion
fawāish : corruptions
fi‘li : physically
ghanīmah : booty
ghusl : ritual ablution of the whole body
ḥadīth : tradition
ḥadīth mashhūr : well known Tradition
ḥadīth mutawātir : widely spread Tradition
ḥadīth Sa‘īdīh : authentic tradition
ḥajj : pilgrimage, the once-in-a lifetime obligation of pilgrimage to the holy Ka‘ba.
ḥājjiyyāt : complementary
ḥaqqī : true, genuine, authentic, real and literal as opposed to metaphorical.
ḥaqq : right
ḥaqq al-irtifāq : all of the ancillary rights
ḥaqq al-masīl : the right of flow
ḥaqq al-murūr : the right of passage
ḥaqq al-shurb : the right of water
ḥarām : prohibited
ḥasan : good
ḥawā‘ : inclination, whim
himār : donkey
himariyyah : donkey case
ḥissī : sensory
hujjah : dalil, evidence, proof

hukm (pl. ahkām) : rule, as in hukm sharī : law, value or ruling of Sharī'ah.
al-hukm al-taklīfī : the obligation, creating rule, defining law
al-hukm al-waqfī : declaratory law
Ibtīl al-istihsān : invalidating juristic preference
ihram : the ritual garment worn for hajj
iḥtiyāt : needs
ijārah : leasing
iʿjāz : inimitability
ijmāʿ : consensus, agreement
al-ijmāʿ al-ṣarīḥ : explicit agreement
al-ijmāʿ al-sukūtī : tacit agreement
ijtihād : is the expenditure of efforts to arrive at righteous judgement; it could be either physical such as walking, working or intellectual such as inference of a ruling, or juristic and linguistic theory: Kamāl Ibn Al-Humām defines ijtihād as the expenditure of efforts by the faqīh to arrive at a juristic ruling, such ruling being either rational (ʿaqīlī) or transmitted (naqlī), definitive (qāṭī) or speculative (zanjī).
ijtihād al-taqdisrī : which allows jurists all to give rulings and on which there is no cause for disagreement amongst the scholars
ikrāh : means forcing someone to do or say something against his will, coercion.
ilhām : inspiration
‘illah : cause and reason
‘ilm : knowledge
imām : founder
intifāʿ : usufruct
iqaʿ : punishment
iṣābah : target
ishārah : indication, sign, token, and symptom
ishār : marking animals
iṣnāḥ : infallibility, immunity from making errors
istahsana : approved as the better judgment
istidlāl : inference
istiḥsān : Juristic Preference
istiḥsān istithnāʿ : exceptional istithsān
iṣṭilāха : technical
iṣṭiqrāʿ : induction
iṣṭiqlāʿ tāmm : complete induction
iṣṭiqlāʿ nāqṣ : incomplete induction
iṣṭirḥāb : presumption of continuity
iṣṭiṣlāḥ : consideration of public interest.
iṣṭiṣwāb : discretion
istiḥnā : This is the giving of an order to a labourer or artisan to make a definite article with agreement to pay a definite price for that article when made.
iṭāb : blame
iʿtibār : admonition
iʿtiqād : faith, belief
jahd : which means the forbearance of hardship, that is striving and self-exertion in any activity which entails a measure of hardship
jalb al-şalāh : obtaining benefit
jināyat : criminal offence
judhr: root
juhd : which means exertion of effort or energy
junub : a state requiring a ritual ablution of the whole body
juz'ī : partial
kaffīrah : expiation
kamāliyyāt : embellishments
khabar : news or report
khabar al-wāhid : solitary ḥadīth
khamr : wine
kharāj : land tax
khas: specific, individual
khayr : good deed
khulwah : privacy
kufr : unbelief
kullī : whole
lughawi : linguistic
maqarrāt : evils
madina : town
maqūd" : missing person
mafsadah : harm, evil
al-Majallah : Ottoman court manual
makrūh : discouraged, adversity
makrūh karāḥat al-tahrīm : strongly disapproved
makrūh karāḥat al-tanzīh : disapproval
mandūb : recommended, optional
manfa'ah : benefit
māni': impediment, obstacle, hindrance.
maqāṣid : objectives, aims, purposes, goals.
maqāṣid al-‘āmmah: general purposes
maṣlar : source
mashaqqah : hardship, difficulty
masḥur : is defined as a ḥadith which is originally reported by one, two or more Companions from the Prophet or from another Companion but which has later become well-known and transmitted by an indefinite number of people
maṣlaḥah : benefit
maṣlaḥah mursalah : consideration of public interest
maytata : unlawful meat
minārāh : minaret
miqās : scales
muallafa’ al-quṭūb : conciliation of hearts
mubāh : permissible
**muṣārabah**: This means a contract of co-partnership, in which one of the parties (the proprietor) is entitled to a profit on account of the capital (ra's al māl) he has invested. He is designated as the owner of the capital (rabb al māl). The other party is entitled to profit on account of his labour and is designated as the muṣārib (or the manager) in as much as he derives a benefit from his own labour and endeavours.

**muftī**: the authority of giving fatwā'-ruling

**muṣtaḥba**: competent jurist

**μυκαλλατ**: subjects

**μυκαλλατας**: particularized agent

**μυκαλλατης**: particularising agent

**μυκαρ**: evil

**μυσακ**: abrogated

**μυκαλητα**: contracts

**μυκακ**: judge

**μυκαλητα**: the close and faithful followers of established rules, follower

**μυκαλητατα**: dependent, limited

**μυκαρατα**: discontinued

**μυκαλητη**: guide, conductor

**μυκαλητατα**: This is a contract between two parties whereby one party takes charge of the fruit tree of the other partner on condition that the crops shall be divided between them on specific terms; share tenancy.

**μυκαλητατικα**: shared

**μυκαλητατη**: independent,

**μυκαρ**: maintenance

**μυκαλητατα**: dead by headlong fall

**μυκαλητατατα**: literally means continuously recurrent. In the present context, it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie.

**μυκαλητατα**: absolute

**μυκαλητα**: This is a contract between two persons whereby one party is the landlord and the other the cultivator. They both agree that whatever is produced by cultivation of the land shall be divided between them in specified proportions; an agreement of crop sharing

**μυκαλητα**: fermented dates

**μυκαλητα**: supererogatory

**μυκαλητα**: Transmitted

**μυκαλητα**: deficiency

**μυκαλητα**: lineage and stock

**μυκαλητα**: abrogation

**μυκαλητα**: text

**μυκαλητα**: theoretical

**μυκαλητα**: marriage

**μυκαλητα**: jurisprudence rule

**μυκαλητα**: slander, accusation

**μυκαλητα**: judge

**μυκαλητα**: fort
qalbî : which takes place in the heart
qat′î: definitive
qatî : murder
qawā′id pl. of qā′idah : principles.
qawā′id al-kulliyah : general principles
al-qawā′id al-fiqhiyyah: general principles of jurisprudence
qawl" : saying
qawli : relating to speech, verbal
qawl al-şahābi : The sayings of a Companion of the Prophet
qiyās: analogy
qiṣṣa : retaliation
al-qiṣṣa : the law of equality in punishment
qiyās al-adnā : analogy of the inferior
qiyās al-awlā: analogy of the superior
qiyās jāli : obvious analogy
qiyās khafi : latent, hidden, implicit analogy
qiyās al-musāwāt : analogy of equals
qiyās zāhir jāli : apparent clear analogy
rājiḥ : preference
raf′ al-baraj : avoidance of hardship
ra′y : opinion
ra′y bāṭil : invalid; null, and void
ra′y mashkūk : doubtful, uncertain
ra′y saḥīḥ : valid, authentic
riwāyah : transmitted hadith
rujfān: preference, preferability
rakhaṣ : concessions
rukān : condition, essential requirement
ru′yaḥ : to perceive an object which is seen
sabab : cause
sadd : blocking
sadd al-dhara′t : blocking the means
şahābi : plural of şahabah: a Companion
salam : contract of purchase of goods with pre-payment, forward sale, prepaid sale
salām : conclusion of prayer
şalāt : prayer
sanad : basis, proof, authority.
shahādāt al-zur : false testimony
şāhid : witness
şahwah : passion
Şār′ : Lawgiver
şar′ man qablanā : revealed laws preceding to the šarī′ah of Islam
Şarī′ah : Islamic law
shart(pl. of shurūt): condition
shuf′ah : pre-emption
şūrah : consultation
sudan: uncontrolled, without purpose, a state of lawlessness

ta'abbud: worship

tadbir: precaution

ta'diyah: referring a ruling to another case

tafsir: interpretation

tahsiniyat: embellishment

tablif: distortion

tahrim: prohibition

kakhsha: specifying the general, particularization of the general

takhshas al-ilah: specifying the cause

talab or iqtida: request

talaq ba'in: divorce to be absolute

talaq raj'i: revocable

talazzuz: deriving pleasure

tark: departure

tasarruf: transactions

tasahhud: To say while sitting: “There is no god but Allah and Muhammed is Allah’s Apostle.”

tawatur: continuous testimony

tawbah: repentance

tayammum: to wash with clean sand or earth where water is unavailable

al-'udul: the departure

'ulama': scholars

'ulul amr: those in authority amongst Muslims

'umum al-balwa: general calamity

Ummah: the whole Muslim community

'urf: custom

al-'urf al-'amm: general custom

al-'urf al-khass: special custom

u'sul: plural of asl; root, origin, source

usuli: juristic scholars

usul al-fiqh: the principle of Islamic jurisprudence

wahmi: imaginary

wahy: divine revelation

wajib: obligatory

waqf: charitable endowment

wasil: means

wasif (pl. of awsaf): attribute, quality, adjective.

wujub: necessity, obligation, rendering something obligatory.

yanqadhu: embedded

zakah: alms

zann: speculation, doubt, conjecture.

zanni: speculative, doubtful.

zanni ghali: mostly probable

zahir: manifest, apparent.

zinah: illegal sexual intercourse, fornication, adultery.
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