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IBN TAYMIYYA'S CONCEPT OF *ISTIḤSĀN*: AN UNDERSTANDING OF LEGAL REASONING IN ISLAMIC JURISPRUDENCE

By

Ahmad Syukri Shaleh

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of the requirements of
the degree of Master of Arts

Institute of Islamic Studies
McGill University
Montreal

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ABSTRACT

Author: Ahmad Syukri Shaleh

Title: Ibn Taymiyya's Concept of *Istiḥsān* : An Understanding of Legal Reasoning in Islamic Jurisprudence

Department: Institute of Islamic Studies, McGill University

Degree: M. A.

This thesis studies the theory of *istiḥsān*, an aspect of Islamic legal reasoning, as a method for ascertaining the legal norm in cases where *qiyās* dictates an overly strict ruling. The study primarily focuses on the concept presented by Ibn Taymiyya (d. 728/1328), a prominent Muslim theologian, philosopher, ṣūfī, and outstanding jurist. Placed in the context of later development, Ibn Taymiyya's theory proposes both a criticism and reformulation of the Ḥanafī school's perception of *istiḥsān*. Having observed previous formulations, Ibn Taymiyya sees this theory as being understood as an arbitrary contradiction to *qiyās*. Although attempts to redefine the theory, through rigorous definition and well-calculated application were conducted by later Ḥanafī jurists, criticism from other schools continued unabated. To this effect, Ibn Taymiyya's contribution emerges as an alternative solution. In order to fully understand *istiḥsān*, Ibn Taymiyya contends that one must determine particularization of the cause (*takhṣīṣ al-ʿilla*). By doing this, *istiḥsān* and *qiyās* can be easily distinguished. He, thus, perceives *istiḥsān* as *takhṣīṣ al-ʿilla*. Unlike the Ḥanafīs, Ibn Taymiyya does not juxtapose *istiḥsān* against *qiyās ṣaḥīḥ*. He argues that if there is a contradiction, it must be proved by a decisive discrepancy (*farq muʾaththir*) provided by the law giver. Furthermore, when *qiyās* produces an unsatisfactory legal norm, *takhṣīṣ al-ʿilla* represents a viable alternative. Above all, Ibn Taymiyya contends that *istiḥsān* must be supported by the revealed texts, consensus or necessity.

RÉSUMÉ

Auteur: Ahmad Syukri Shaleh

Titre: Le concept d'*Istiḥsān* d'Ibn Taymiyya: Une interprétation du raisonnement légal au sein de la jurisprudence islamique

Departement: Institut des Etudes Islamiques, Université McGill

Diplome: Maîtrise ès Arts

Ce mémoire porte sur l'étude de la théorie de l'*istiḥsān* , un aspect du raisonnement légal islamique en tant que méthode confirmant la norme légale dans les cas où le *qiyās* dicte une trop stricte sentence. L'étude se concentre principalement autour du concept présenté par Ibn Taymiyya (mort en 728/1328), un théologien, philosophe, ṣūfī et juriste d'envergure. Dans un contexte de développement tardif, la théorie d'Ibn Taymiyya propose à la fois une critique et une reformulation de la perception de l'école hanafite de l'*istiḥsān.* Ayant observé les formulations antérieures, Ibn Taymiyya perçoit cette théorie comme étant comprise en tant que contradiction arbitraire au *qiyās.* Malgré les tentatives de redéfinition de la théorie et grâce à une définition rigoureuse ainsi qu'une application bien calculée qui furent entreprises par les juristes hanafites plus récents, les critique des autres écoles de pensée ne s'affaiblissèrent pas. De ce fait, la contribution d'Ibn Taymiyya émerge comme une solution alternative. Pour mieux comprendre l'*istiḥsān*, Ibn Taymiyya soutient qu'on doit déterminer la particularisation de la cause (*takhṣīṣ al-ᶜilla*). En effectuant cela, les concepts d'*istiḥsān* et de *qiyās* peuvent être distingués aisément. Ainsi Ibn Taymiyya perçoit l'*istiḥsān* comme étant un *takhṣīṣ al-ᶜilla.* Contrairement aux hanafites, Ibn Taymiyya ne juxtapose pas l'*istiḥsān* avec le *qiyās ṣaḥīḥ.* Il affirme que, s'il y a contradiction, celle-ci doit être prouvée par une variation décisive (*farq*

muʾaththir) fournie par le législateur. De plus, lorsque le *qiyās* produit une norme légale insatisfaisante, le *takhṣīṣ al-ʿilla* représente une alternative viable. Somme toute, Ibn Taymiyya affirme que l'*istiḥsān* doit être soutenue par les textes révélés, le consensus ou la nécessité.

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Last but not least, my sincere thanks go to my mother, sisters and brother and their encouraging support. Especially, I would like to mention the patience and encouragement of my beloved wife and son, without whom this thesis would never have seen completion.

This thesis is dedicated to both the memory of my father and grandmother.

A. S. S.

Montreal, 1995

ABBREVIATIONS

The following abbreviations have been used in this thesis:

AJCL *The American Journal of Comparative Law.*

AJISS *The American Journal of Islamic Social Sciences.*

DI *Der Islam.*

EI *The Encyclopaedia of Islam.* New edition. 7 volumes to now. Leiden: E. J. Brill, 1960 (I), 1978 (IV), 1993 (VII).

ER *The Encyclopaedia of Religion.* 16 volumes. Edited by Mircea Eliade. New York: Macmillan Publishing Company, 1987.

ERE *The Encyclopaedia of Religion and Ethics.* 13 volumes. Edited by James Hastings. New York: Charles Scribner's Sons, 1955.

IICLR *Indiana International & Comparative Law Review.*

IJMES *International Journal of Middle East Studies.*

JAOS *Journal of the American Oriental Society.*

JIS *Journal of Islamic Studies.*

SEI *Shorter Encyclopaedia of Islam.* Edited by H. A. R. Gibb and J. H. Kramers. Leiden: E. J. Brill, 1961.

SI *Studia Islamica.*

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INTRODUCTION

Ibn Taymiyya[1] was undoubtedly one of the most prominent jurists of Islam, and an author of several treatises on certain topics of Islamic jurisprudence (*uṣūl al-fiqh*). These treatises were presented in *al-Musawwada fī Uṣūl al-Fiqh* (which also comprises contributions by his father and grandfather), *Risāla fī Maʿnā al-Qiyās*, part of *Majmūʿat al-Rasāʾil al-Kubrā*, *al-Qiyās fī al-Sharʿ al-Islāmī* (co-authored with his disciple, Ibn Qayyim al-Jawziyya) and *Masʾalat al-Istiḥsān*.

In the latter work, Ibn Taymiyya offers an extensive discussion of *istiḥsān*, which differs in certain respects from that of previous scholars. Early Ḥanafīs, for instance, are often reported to have used *istiḥsān* by basing a legal norm on their own personal preferences.[2] This, however, was no longer the case with Bazdawī and Sarakhsī of the post-formative period. They attempted to redefine the use of *istiḥsān* as

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[1] His full name is Taqī al-Dīn Abū al-ʿAbbās Aḥmad b. ʿAbd al-Ḥalīm b. ʿAbd al-Salām al-Ḥarrānī al-Dimashqī: considered a theologian and ṣūfī as well. He was born in 661/1263 in Ḥarrān, near Damascus and died in 728/1328 at the age of sixty-five. At an early age, Ibn Taymiyya devoted himself to a wide-range of Islamic sciences such as Qurʾānic exegesis, *ḥadīth* and legal studies. He was also a dedicated reader of other "foreign" sciences such as logic, philosophy and theology. *ER*$_2$, VI, s.v. "Ibn Taymīyya," (by George Makdisi): 571, 574. He became a public figure at a relative young age as a successor to his father, ʿAbd al-Ḥalīm Ibn Taymiyya. His father held the position of Sheikh and Khaṭīb in Ḥarrān. Within a short period of time, Ibn Taymiyya's lectures and writings which were deemed to be "antagonism to the dominant tendencies of Muslim orthodoxy, made a great stir and aroused vehement opposition. He rejected the unthinking and slavish adherence to a particular school of religious law." Ibn Taymiyya promoted a return to the traditional sources vigorously represented by the Ḥanbalīs. *ERE*, III, s. v. "Ibn Taimiya" (by I. Goldziher): 72. A somewhat detail biography of Ibn Taymiyya can be obtained, among others, in Ibn Kathīr's *al-Bidāya wa al-Nihāya*, XIV, 141-46; Karmī's *al-Kawākib al-Durriyya*, 51-231; Abū Zahra's *Ibn Taymiyya*; Brockelmann's *History of the Islamic Peoples*, 237-38.

[2] *SEI*, s.v. "Istiḥsān and Istiṣlāh," 184.

a textually based method.[3] While agreeing with many of his predecessors' views on *istiḥsān*, Ibn Taymiyya adopted a distinctive approach by interpreting *istiḥsān* as the particularization of the cause (*takhṣīṣ al-ʿilla*). This particularization was completed by modifying or changing the cause in toto.[4] Ibn Taymiyya's views on *istiḥsān* need more elucidation than they have thus far received from modern scholarship.

Some scholars, however, have examined Ibn Taymiyya's presentation of the theory of *istiḥsān*. George Makdisi published Ibn Taymiyya's *Masʾalat al-Istiḥsān*, while both John Makdisi[5] and Wael B. Hallaq[6] have analyzed his concept of *istiḥsān*.

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[3] For Bazdawī and Sarakhsī, *istiḥsān* can be conducted in two ways: 1) through the abandonment of *qiyās* (a) in favor of the revealed texts or (b) in favor of consensus or necessity; or 2) by choosing the stronger of two *qiyāses*. John Makdisi "Legal Logic and Equity in Islamic Law," *AJCL*, 33 (1985): 75-6; Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī*, II, ed. Abū al-Wafā al-Afghānī (Cairo: Maṭābiʿ Dār al-Kitāb al-ʿArabī, 1954), 202-3.

[4] In other words, "a cause may be either completely rejected or modified so as to accommodate certain new cases if the cause consists of *maʿnā* (a meaning) which can be ascertained from the *sharīʿah* and which distinguishes the new case from the original case." Ridwan A. Yusuf, "The Theory of *Istiḥsān* (Juristic Preference) in Islamic Law," unpublished Ph.D Dissertation, McGill University, 1992, 64-5, summarizing Ibn Taymiyya's *Masʾalat al-Istiḥsān*, 459-69.

[5] Makdisi remarks that Ibn Taymiyya offers one of the best explanations of the concept of *istiḥsān*. According to Ibn Taymiyya, *qiyās* "must be based on a valid cause (*ʿilla ṣaḥīḥa*), and a valid cause may not stand in contradiction to a text from the sources of the law. If it does, the text stands and the reasoning by analogy [*qiyās*] is invalid (*fāsid*). Any concept of *istiḥsān* which allows reasoning by analogy to stand in contradiction to a text from the sources is invalid." Makdisi, "Legal Logic," 83-4; idem, "Hard Cases and Human Judgment in Islamic and Common Law," *IICLR*, 2, no. 1 (1991): 197-99.

[6] Hallaq notes that "Ibn Taymiyya (d. 728/1328), a staunch advocate of *istiḥsān*, argued that the only dividing line between *qiyās* and *istiḥsān* is that the former does not require the particularization of its *ʿilla* whereas the latter does. This should not imply, however, that jurists are allowed to particularize an *ʿilla* once they decide to follow the procedure of *istiḥsān*." Wael B. Hallaq, "Considerations on the Function and Character of Sunnī Legal Theory," *JAOS*, 104, nos. 3-4 (1984): 683.

However, these discussions so far have focused on comparing Ibn Taymiyya's approach to other jurists. What remains ignored is a detailed analysis of Ibn Taymiyya's views on *istiḥsān* while placing them in a broader context of earlier juristic thought. Such an approach would improve current understanding of Ibn Taymiyya's methodology as well as illustrate the development of *istiḥsān* as a legal concept. This thesis therefore aims at 1) studying Ibn Taymiyya's concept of *istiḥsān* in light of the views of earlier jurists of both the formative (Abū Ḥanīfa, Abū Yūsuf, Shaybānī, Mālik, Shāfiʿī and Ibn Ḥanbal) and post-formative periods (Bazdawī, Sarakhsī, Bājī, Shīrāzī, Ghazālī, Āmidī and Shāṭibī); and 2) presenting a comprehensive portrayal of Ibn Taymiyya's theory of *istiḥsān*.

Structurally, this thesis is divided into two major chapters. Chapter one concentrates on the theory of *istiḥsān* prior to Ibn Taymiyya, particularly its early development. This chapter will also address the rationalization phenomenon of the post-formative period. Chapter two will then analyze Ibn Taymiyya's theory of *istiḥsān* in relation to the issues of *qiyās*, *istiḥsān*, and *takhṣīṣ al-ʿilla*. This is then supplemented by examining the controversy around *takhṣīṣ al-ʿilla*, Ibn Taymiyya's perception and application of *istiḥsān* and, finally, his critique of the Ḥanafī model of *istiḥsān*.

CHAPTER ONE

THE THEORY OF *ISTIḤSĀN* BEFORE IBN TAYMIYYA

The study of early *istiḥsān*, particularly its development and rationalization in the post-formative period, is of paramount importance to this study since it lays the basis for understanding later developments of *istiḥsān*. These later developments are best represented in the writings of Ibn Taymiyya. Before discussing Ibn Taymiyya's concept of *istiḥsān*, we have to explore previous *istiḥsān* theories. However, given the overwhelming scope of such an endeavor, this chapter will only look at the principal features of *istiḥsān* expounded by the four schools of law. Therefore, in the following pages an attempt will be made to present a clear picture of the early development of *istiḥsān*, specifically its origins and its growth with all the criticism and defense that accompanied it.

A. The Early Development of *Istiḥsān*

A substantial body of evidence suggests that even though *istiḥsān* was established by the Prophet's Companions, especially ᶜUmar b. Khaṭṭāb, the technical use of the term appeared only during the time of Abū Yūsuf, or somewhat earlier, during the time of Abū Ḥanīfa.[1] However, before examining the initial instances of formal *istiḥsān*, we will briefly discuss the early Islamic period which allowed *istiḥsān* to be implemented, especially during the reign of ᶜUmar b. al-Khaṭṭāb. ᶜUmar is traditionally portrayed as a firm supporter of the validity of *raʾy*, or *istiḥsān*. Such a portrayal, according to Fazlur Rahman, is not uncommon due to the fact that most illustrations

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[1] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: The Clarendon Press, 1950), 111.

given by later jurists rely on some of ᶜUmar's legislation.[2] Furthermore, it was during the reign of ᶜUmar that "du ' ' sudden and vast conquests, big sociological and political problems arose in Madinah itself and in the conquered lands."[3] Thus, ᶜUmar occasionally went beyond the strict Islamic codes of the day and exercised his own judgement. A case in point is his abrogation of the Qurʾānic command giving alms (*zakāt*) to certain Muslims or "new" Muslims for "conciliation of their heart."[4] This abrogation was not in agreement with the Prophetic tradition of giving a conciliatory share of the alms to the leaders of certain Arab tribes. ᶜUmar also discarded Abū Bakr's previous command of donating certain lands. ᶜUmar argued that the Prophet had given such shares in order to strengthen Islam; however, as Islamic conquests expanded, the need to disburse land ceased.[5] ᶜUmar also altered the method by which booty (*ghanīma*) was distributed among Muslims. According to previous codes, lands acquired through conquest should be distributed like other articles of booty. However, ᶜUmar preferred the general welfare of the Muslim community over individual prosperity.[6] ᶜUmar's alterations clearly contradicted the Qurʾān; however, those policies were undertaken on the basis of particular situations and were in conformity with the spirit of the Qurʾān. In this regard, Rahman tries to argue that "although ᶜUmar obviously departed formally from the Sunnah of the Prophet on a major point, he did so in the interest of

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[2] Fazlur Rahman, *Islamic Methodology in History* (Islamabad: Islamic Research Institute, 1984), 179.

[3] Ibid.

[4] A. Yusuf Ali, *The Holy Qurʾān Text, Translation and Commentary* (Maryland: Amana Corp., 1983), (9 : 60), 458.

[5] Abū Bakr Aḥmad b. ᶜAlī al-Rāzī al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, III (Beirut: Dār al-Kitāb al-ᶜArabī, n.d.), 124.

[6] Rahman, *Methodology*, 180.

implementing the essence of the Prophet's Sunnah."[7] At any rate, it may be possible to deduce that had the Prophet faced similar circumstances, he would have acted similarly. These examples suggest a dynamic understanding of *istiḥsān*. It could be argued that, while there was no technical application of a formal concept named *istiḥsān*, some of its characteristics were in circulation quite early.[8]

Several accounts indicate that the common use of the term *istiḥsān* began after 150 A. H. and acquired a prominent position during the time of Abū Ḥanīfa who is best known as the founder of the Ḥanafī school, and during the time of his own successors, such as Abū Yūsuf and Shaybānī. As Joseph Schacht notes in his *Introduction* :

> The literary period of Islamic law begins about the year 150 of the hijra (A. D. 767), and from then onwards the development of technical legal thought can be followed step by step from scholar to scholar. For Iraq, successive stages are represented by the doctrine which must be credited to Ḥammād (d. 120/738), and by the doctrine of Ibn Abī Laylā (d. 148/765), of Abū Ḥanīfa (d. 150/767), of Abū Yūsuf (d. 182/798), and of Shaybānī (d. 189/805) respectively.[9]

Schacht's statement can be justified when we take into account other evidence, adduced by different scholars, such as Coulson who is probably right when he concludes that in the early ᶜAbbāsid period at least two major trends appeared

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[7] Ibid., 181.

[8] Ibid., 180-81.

[9] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1964), 40. This notion is also shared by other scholars, such as Goldziher who maintained that "the 8th century started with an overwhelming movement towards human reasoning, commonly known as *raʾy*." See Wael B. Hallaq, "Was al-Shāfiᶜī the Master Architect of Islamic Jurisprudence?" *IJMES*, 25, no. 4 (1993): 597. According to Zafar I. Ansari, the use of *raʾy* is possible when there was no explicit explanation provided by authoritative sources. In such cases, resorting to personal opinion or to analogical reasoning was deemed appropriate. See Zafar I. Ansari, "An Early Discussion on Islamic Jurisprudence: Some Notes on *al-Radd ᶜalā Siyar al-Awzāᶜī*," in *Islamic Perspectives Studies in Honour of Mawlānā Sayyid Abul Aᶜlā Mawdūdī*, eds. Khurshid Ahmad and Z. I. Ansari (Jeddah: Saudi Publishing House, 1980), 159.

concerning the development of the jurisprudential method.[10] The first trend is related to "the interest of consistency and coherence of the doctrine [which allowed] reasoning [to become] more systematic, and arbitrary opinion, or *raʾy* [to] gradually [give] place to analogical deduction, or *qiyās*." The second trend is concerned with the "growing emphasis on the notion of *sunna* or established doctrine."[11] For our purposes, the first trend will be looked at.

Since the first trend promotes consistency and coherence, the implementation of analogical reasoning (*qiyās*) is perhaps the best, if not the only method for discovering the law. However, the use of analogical reasoning[12] frequently led to overly strict rulings. Therefore, jurists often set aside this kind of reasoning and replaced it with their preferred opinion (*istiḥsān*). As Noel J. Coulson remarks in *A History of Islamic Law:*

> Practical consideration, however, often necessitated a departure from strict analogical reasoning. Where the jurists made equitable concessions or preferred some other criterion to analogy - as, for instance, the criterion of the public interest in the rule that the joint perpetrators of a homicide could all be put to death in retaliation for the life of their single victim - this was called *istiḥsān* or "preference." It represented a return to the freedom of *raʾy*, and in fact the two terms were at first used synonymously. But *istiḥsān* represents a more advanced

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[10] Noel. J. Coulson, *A History of Islamic Law* (Edinburgh: The University Press, 1991), 39.

[11] Ibid., 39-40.

[12] Hallaq's assertion that *qiyās* cannot be restricted to simple analogical reasoning is worth noting. *Qiyās* should be understood as "a relative term whose definition and structure vary from one jurist to another." To this effect, *qiyās* may also be included in non-analogical argument. Therefore we cannot say that the *qiyās* conceived by Shāfiʿī is similar to those of later Shāfiʿī such as Āmidī. Jurists like Baṣrī, Ghazālī and Ibn Taymiyya, among others, presented a wider meaning for *qiyās* "to include formal arguments." They maintain that the *reductio ad absurdum* (*qiyās ʿaks*) can be recognized as an argument of *qiyās*. See Wael B. Hallaq, "Non-Analogical Arguments in Sunni Juridical *Qiyās*," *Arabica*, 36 (1989): 305-6.

> stage in the development of legal thought since it presupposes as normal the method of reasoning by analogy.[13]

Hallaq's assessment goes one step further when he states that "[i]n a great many cases the early Ḥanafīs and Mālikīs relied on their personal opinion in finding the required rulings. It may well have been the case that, guided by no systematic method, they also attempted to justify customs that were prevalent at the time. Most of these were termed, or labelled as, *istiḥsān* or *raʾy* cases."[14] The only opponents of this method were Shāfiʿī and his followers who maintained that "*istiḥsān* is no more nor less than a setting aside of the revealed sources in favour of the personal opinion of the canonist."[15] This issue will be further analysed when we discuss Shāfiʿī's critique of *istiḥsān.*

Some hypothesize that the practice of *istiḥsān* in the early stages of Islamic law was sponsored by the Iraqi school, which was associated with Abū Ḥanīfa (d. 150/767). To prove this assertion, Schacht quotes Shāfiʿī's view that "the Iraqians are accustomed to say: The *qiyās* would be ... , but we practice *istiḥsān.*"[16] According to some accounts, this statement is attributed to Abū Ḥanīfa, thus creating some debate among jurists. Schacht maintains that Abū Ḥanīfa and his successors regarded a certain legal norm as "valid by *istiḥsān*, although it is against the *qiyās*, this decision is taken for

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[13] Coulson, *History*, 72.

[14] Hallaq, "Considerations," 682.

[15] Nicolas P. Aghnides, *Mohammedan Theories of Finance* (Lahore: The Premier Book House, 1961), 92; Abū Isḥāq Ibrāhīm al-Shīrāzī, *Sharḥ al-Lumaʿ*, II, ed. ʿAbd al-Majīd Turkī (Beirut: Dār al-Gharb al-Islāmī, 1988), 971-72; Sayf al-Dīn al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, III (Cairo: Dār al-Ḥadīth, 1986), 214-15. In the latter work, Āmidī vehemently criticizes several verses and traditions used by the proponents of *istiḥsān* as inappropriate.

[16] Schacht, *Origins*, 111.

purely practical reasons; ..."[17] Abū Ḥanīfa is also reported to have used *istiḥsān* when "there were two traditions bearing on the same subject, ... " and of the two, he would choose the one "which he thought would be least harmful."[18] Thus, Ignaz Goldziher concluded that "Abū Ḥanīfa himself established the principles of *istiḥsān*."[19] The validity of this assessment, however, has been contested by Schacht. The latter remarks that *istiḥsān* existed prior to Abū Ḥanīfa as part of Iraqi legal reasoning (as established by the companion Ibn Masᶜūd). The technical term for the concept appeared in treatises by Abū Yūsuf.[20] It is difficult to judge whether Schacht's suggestion is correct, especially when taking into consideration sources such as *Akhbār al-Quḍāt* by Muḥammad b. Khalaf Wakīᶜ (d. 306/919). This text mentions the use of *istiḥsān* by an early Ummayad jurist, Iyās b. Muᶜāwiyya (d. 122/740). Muᶜāwiyya recommends to "implement *qiyās* in judgement so far as it is beneficial to the people, but when it leads to undesirable results, then use juristic preference (*Qīsū al-qaḍāʾ mā ṣaluḥa al-nās, faʾidhā fasadū fastaḥsinū*)."[21]

It should be noted that many writers tend to relate *qiyās* or *istiḥsān* to *raʾy*. Particularly, scholars of Islamic law (Joseph Schacht, N.J. Coulson, George Makdisi, and Zafar I. Ansari) perpetuate this trend. Schacht, in his *An Introduction to Islamic*

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[17] Ibid.

[18] Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 30.

[19] Schacht, *Origins*, 112.

[20] Ibid. In his *Kitāb al-Kharāj*, Abū Yūsuf did use the term *istiḥsān* on pages 178 and 183, and *astaḥsinu* on page 182.

[21] Muḥammad b. Khalaf Wakīᶜ, *Akhbār al-Quḍāt*, I, ed. ᶜAbd al-ᶜAzīz Muṣṭafā al-Marāghī (Cairo: Maṭbaᶜat al-Istiqāma, 1947), 341. Ibn Taymiyya, in his *Masʾalat al-Istiḥsān*, also refers to Iyās b. Muᶜāwiyya saying that "If *qiyās* is invalid, then apply *istiḥsān* (*fastaḥsin*)," 464.

Law, comments that *raʾy* may represent two functions, "when it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision it is called *qiyās*, ... When it reflects the personal choice and discretionary opinion of the lawyer, guided by his idea of appropriateness, it is called *istiḥsān* ..."[22] Ansari states that "[*r*]*aʾy* is the genus of which *qiyās* and *istiḥsān* are species."[23]

Goldziher highlights several pieces of evidence from Abū Yūsuf's *Kitāb al-Kharāj* and Shaybānī's *al-Jāmiᶜ al-Ṣaghīr* which adopt the term *istiḥsān* and contradict it with *qiyās.*[24] As illustrated in Abū Yūsuf's *Kitāb al-Kharāj,* if a ruler or his judge sees a man committing theft, illegitimate sexual intercourse, etc., he should not arbitrarily enforce *ḥadd* punishment without any testimony. Abū Yūsuf designates this as *istiḥsān,* founded on an *athar* from Abū Bakr and ᶜUmar; *qiyās* would stipulate that the *ḥadd* punishment should be enforced.[25] It is also recorded that Abū Yūsuf said that "according to the *qiyās* this and that would be prescribed but I have decided according to my opinion (*istaḥsantu*)"[26] to implement a different legal norm. In *Kitāb al-Kharāj,* we find Abū Yūsuf using expressions such as "*faʾinnī astaḥsinu*" and "*ʾannī istaḥsantu.*"[27] In Shaybānī's *al-Jāmiᶜ al-Kabīr,* the use of *istiḥsān* occurs eighteen times,

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[22] Schacht, *Introduction*, 37.

[23] Zafar I. Ansari, "Islamic Juristic Terminology before Shāfiᶜī: A Semantic Analysis with Special Reference to Kūfa," *Arabica*, 19 (1972): 288.

[24] Schacht, *Origins*, 112.

[25] Abū Yūsuf Yaᶜqūb b. Ibrāhīm, *Kitāb al-Kharāj* (Būlāq: n.p., 1302/1885), 178.

[26] *SEI,* s.v. "Istiḥsān and Istiṣlāḥ," 184.

[27] Abū Yūsuf, *Kharāj*, 182, 189.

with only nine references to *qiyās*.[28] However, we will limit our discussion to the application of *istiḥsān* and its contradiction with *qiyās*, rather than to quantify it. Matters are complicated by the lack of any early Ḥanafīs definitions of *istiḥsān*. We are operating on the supposition that *istiḥsān* came about as a possible alternative to *qiyās*. It should be stressed that *istiḥsān* was regarded as a valid recourse to *qiyās;* however, it could not justify departure from *āthār*. In this regard, Shaybānī charges the Medinese of having used *istiḥsān* even though there was a tradition from the Prophet that contradicted their position.[29] Nonetheless, there is still no clear definitive understanding of how and when the term *istiḥsān* was first used.

Studying the formulation of *istiḥsān* would not be complete without understanding the Ḥanafī school's contribution. By examining the cases ruled by jurists like Abū Ḥanīfa, Abū Yūsuf and Shaybānī, we can get a clear presentation of how *istiḥsān* was implemented in the formative period of Islamic law.

Abū Ḥanīfa, founder of the Ḥanafī school, was reported to have occasionally used *istiḥsān*. Since the works of Abū Ḥanīfa himself, either in the field of jurisprudence or substantive law (*fiqh*) are unavailable, it is difficult to trace his opinions on *istiḥsān*. Fortunately, we have the works of Shaybānī which, in many cases, attribute *istiḥsān* to Abū Ḥanīfa.

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[28] Muḥammad b. Ḥasan al-Shaybānī, *al-Jāmiᶜ al-Kabīr*, ed. Abū al-Wafā al-Afghānī (Hyderabad: Lajnat Iḥyāʾ al-Nuᶜmāniyya, 1356/1937), 25, 45, 55, 85, 94, 109, 111, 145, 165, 167, 169, 170, 203, 225, 268, 287, 299, 305. I have also consulted other works of Shaybānī such as *al-Jāmiᶜ al-Ṣaghīr* where the related term had been used no less than eleven times. Ten occurrences are found in Shaybānī's *Kitāb al-Siyar al-Kabīr*, vol. I, and nineteen vol. II. In short,we may conclude that Shaybānī's works display a noticeable use of *istiḥsān*.

[29] Ẓafar I. Anṣārī, "The Early Development of Islamic Fiqh in Kūfah with Special Reference to the Works of Abū Yūsuf and Shaybānī," II, unpublished Ph.D Dissertation, McGill University, 1966, 301-2.

The following is an account of a number of cases attributed to Abū Ḥanīfa:

1. A man who absentmindedly eats, drinks, or has sexual intercourse during Ramaḍān is not obliged to compensate. However, if these acts were committed intentionally, he is responsible for compensation (*qaḍāʾ*). This is considered *istiḥsān* and is based on a Prophetic tradition declaring that "You should pursue your fasting, because it is God who has fed you" (*Tamma ʿalā ṣawmika faʾinnamā aṭʿamaka Allāh wa saqāka*).[30]

2. The case of a slave who is illegally taken away from his master and is sold to another person. If the buyer then freed the slave, the manumission is permissible as long as the first owner has no objection.[31] According to Shaybānī, however, this is not permissible.

According to Majid Khadduri, the flexibile position taken by Abū Ḥanīfa manifested "the need of a new social environment for the development of a system which had originated in Arabia before its area of validity was widened by the rapid expansion of the Islamic state."[32] Similarly, the region where Abū Ḥanīfa lived had implemented *raʾy* because of a lack of any clear definition of the term *sunna*. Khadduri suggests that the conquered territories of Syria and Iraq had a two-fold understanding of *sunna*. It could refer to the Sunna of the Prophet as well as to the local customs. When "there were no Qurʾānic rule or sunna, resort was made to *raʾy*. ... The jurists, accordingly, had to find other means in which reason was used to supplement the

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[30] Muḥammad b. Ḥasan al-Shaybānī, *al-Jāmiʿ al-Ṣaghīr* with its commentary by ʿAbd al-Ḥayy al-Laknawī (Beirut: ʿĀlam al-Kutub, 1986), 139.

[31] Ibid., 359.

[32] Khadduri, *War and Peace*, 30.

Qur'ān and sunna."[33] If Khadduri's assessment is valid then it is possible that the Ḥanafīs sanctioned the departure of *istiḥsān* from *qiyās.* However, the *athar* had to be preserved in an *istiḥsān* ruling.

Abū Yūsuf also applied *istiḥsān* to several questions being raised in the field of substantive law. In his monumental work, *Kitab al-Kharāj*, we find extensive use of the term *istiḥsān.* It seems that Schacht's gauging of Abū Yūsuf as the first jurist to use the term properly is valid. The following are a few examples of Abū Yūsuf's implementation of *istiḥsān.*

1. The case of a *ḥarbī* who goes to an Islamic region where Muslims try to steal his property or amputate his hand. According to *qiyās*, these criminals should also lose their hands. Abū Yūsuf, however, applies *istiḥsān* so as to avoid cutting the hands of these Muslims.[34]

2. If a woman apostatises during her "death-sickness." Using *istiḥsān*, Abū Yūsuf declares that her husband is entitled to her property. He formulates this opinion on the difference between apostasy in normal conditions and apostasy during (mortal) illness. Here, Abū Yūsuf clearly contradicts *qiyās'* stipulation that no distinction can be made between apostasy in illness and apostasy in health.[35]

Shaybānī's implementation of *istiḥsān* is similar to his predecessors. The only clear difference is the number of cases actually dealing with *istiḥsān.* The sheer number is not surprising since Shaybānī had written numerous treatises on substantive law.

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[33] Ibid., 29.

[34] Abū Yūsuf, *Kharāj*, 189.

[35] Ibid., 182.

1. According to *istiḥsān*, a slave can get married without permission from his master. Both Shaybānī and Abū Yūsuf supported this innovation.[36]

2. Non-Muslims and their children asking for sanctuary would, according to *qiyās*, be accepted. However, *istiḥsān* would permit *amān* (security) for their grandchildren as well.[37]

Scholars, like Ansari, suggest that Abū Yūsuf and Shaybānī's use of *istiḥsān* was simply an alternative to *qiyās*. They did not mean to challenge *qiyās* ' validity but rather hoped to limit its scope to "avoid the unhappy consequences that might follow from adhering to *qiyās* rigidly, and to affirm the validity of the jurist's discretion to depart from strict analogy on the strength of some overridingly important consideration."[38] Accordingly, Ansari concludes that *istiḥsān* "signified departure from *qiyās*, sometimes on the ground that *athar* seemed to be opposed to the *qiyās* in question; or else it signified departure from *qiyās* in favour of considerations of equity and justice, or in favour of a doctrine which might have been formally less systematic, but more practicable and appealing to the commonsense."[39] The Ḥanafī treatment of *istiḥsān*, however, was only one of four schools. To gain a significant understanding of *istiḥsān*, we have to move to other schools.

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[36] Shaybānī, *Kabīr*, 85.

[37] Muḥammad b. Ḥasan al-Shaybānī, *Kitāb al-Siyar al-Kabīr* with its commentary by Sarakhsī, I, ed. Ṣalāḥ al-Dīn al-Munajjid (Cairo: Sharikat al-Iʿlānāt al-Sharqiyya, 1971), 333.

[38] Ansari, "Islamic Juristic," 292.

[39] Ibid., 294.

The Mālikī school calls *istiḥsān istiṣlāḥ* or sometimes *maṣāliḥ mursala*;[40] these terms suggest public interest or public welfare. Although Mālik b. Anas does not explicitly use the term *istiḥsān* in the first written compendium of Islamic law *al-Muwaṭṭaʾ*, [41] sporadic remarks suggest the presence of *istiḥsān* ideas. In *al-Muwaṭṭaʾ*, Mālik discusses the ruling of two Medinese jurists, Sālim b. ʿAbd Allāh and Sulaymān b. Yasār, regarding whether a woman afflicted with eye infections can use a perfume-based medicine. Normally, a woman cannot use perfume during her waiting period (*ʿidda*). Mālik overturned this legal norm, saying that, when necessity arises, God's religion can be lenient.[42] Moreover, Mālik does not consider it obligatory for the old to feed the poor in compensation for not fasting in Ramaḍān. But he says, "It is more desirable to me (*aḥabbu ilayya*) that the old feed the needy, if they can afford it."[43] In another case, as recorded in *al-Mudawwana al-Kubrā*, Mālik did not use the term *istiḥsān*.[44] This specific case dealt with whether or not a person who, unintentionally punches a pregnant woman, thereby killing the unborn child, should be obliged to pay or perform expiation (*kaffāra*). Mālik replied, as narrated by Ibn Qāsim, that "According

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[40] Aghnides, *Mohammedan*, 83.

[41] Mālik used expression such as "*hādhā aḥsanu mā samiʿtu*" or "*aḥabbu ilayya*" which are basically similar to *istiḥsān*. See Mālik b. Anas, *al-Muwaṭṭaʾ*, I , ed. M. Fuʾād ʿAbd al-Bāqī (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, 1951), 307.

[42] Ibid., II, 599.

[43] Ibid., I, 307.

[44] This notion is strongly criticized by Schacht who proclaimed that "Ibn Qāsim, in the *Mudawwana*, often uses *istiḥsān*. But in most passages there is nothing to show whether the term *istiḥsān* was used by Mālik himself or only introduced by Ibn Qāsim, ... [T]he term does not, as far as I know, occur in Mālik's *Muwaṭṭaʾ* or in other ancient quotation from Mālik;" Although Schacht himself acknowledges that reasoning used by Mālik might be called *istiḥsān*, the term itself never came directly from Mālik. Schacht, *Origins*, 118.

to the Qurʾān, if a free man kills without intention, he has to compensate through expiation. However in the above case, I prefer (*astaḥsinu*) to impose *kaffāra* on the accused."[45] So far, the application of *istiḥsān* by Mālik b. Anas was done on the basis of public interest (*maṣlaḥa*) and necessity (*ḍarūra*). Shāṭibī remarks that Mālik and Abū Ḥanīfa display a similar line of thought when dealing with *istiḥsān*. They attempt to particularize a general precept with whatever evidence (*dalīl*) available, either from its external or internal meaning. The only difference is that in Abū Ḥanīfa's model of *istiḥsān*, the case can be particularized only when a tradition from one of the Prophet's Companions explicitly contradicts *qiyās*. In contrast, Mālik's model particularizes the case at hand with *maṣlaḥa*.[46] Due to its flexibility in accommodating religious matters, it is not surprising that Mālik considers *istiḥsān* as nine tenths of knowledge (*Tisᶜatu aᶜshār al-ilm al-istiḥsān*).[47]

Inspite of Mālik's point of view, later Mālikīs do recognize the validity of *istiḥsān* as an authoritative method in understanding and implementing law. This notion, among others, is well-presented in the work of Bājī's *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl*, and Shāṭibī's *al-Muwāfaqāt*. In the latter, the concept of *istiḥsān* is perceived as acceptable in order to entertain a *maṣlaḥa* (which represents a partial case) as opposed to a case of general indication (*dalīl kulliy*).[48] Moreover, Shāṭibī responds to the criticisms of *istiḥsān* by declaring that, "Verily, those who use *istiḥsān* are not merely

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[45] ᶜAbd al-Salām b. Saᶜīd b. Saḥnūn, *al-Mudawwana al-Kubrā*, XVI (Cairo: Maṭbaᶜat al-Saᶜāda, 1323 A.H.), 200.

[46] Abū Isḥāq Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt*, IV, ed. ᶜAbd Allāh Darāz, et al (Beirut: Dār al-Kutub al-ᶜIlmiyya, n.d.), 150-51.

[47] Ibid., 150.

[48] Ibid., 148-49.

basing their decision on feeling and desire, but they also resort to the very basic purpose of the *shāriᶜ*. They will follow religious obligations, including those derived from *qiyās*, insofar as such obligations do not interfere with public interest (*maṣlaḥa*) or do not cause harm (*mafsada*)."[49] Unlike later Ḥanafī jurists, the Mālikīs do not name *istiḥsān qiyās khafī. Istiḥsān*, according to the Mālikīs, can displace *qiyās* when one of the following stipulations exists; when *qiyās* contradicts the prevalent custom (*ᶜurf ghālib*) or contradicts what already brings a clear benefit to people (*maṣlaḥa rājiḥa*) and when the application of *qiyās* may lead to harm or difficulty.[50]

As for the Ḥanbalī school, Ibn al-Ḥājib's *Mukhtaṣar al-Muntahā* confirms that this school resorted to *istiḥsān* in solving judicial disputes.[51] Unfortunately, he does not provide any examples. Later jurists, like Shawkānī (d. 1255/1839), quote Ibn al-Ḥājib's (d. 646/1248) opinion regarding the use of *istiḥsān* by the Ḥanbalī and Ḥanafī jurists.[52] Although there is no unequivocal evidence suggesting Aḥmad b. Ḥanbal's use of *istiḥsān*, the works of Ṭūfī (d. 716/1316) and Ibn Taymiyya (d. 728/1328) demonstrate that a number of later Ḥanbalī jurists incorporated the theory. Both accounts show that Ibn Ḥanbal himself advocated solving legal problems through *istiḥsān*, instead of by

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[49] Ibid., 149.

[50] Muṣṭafā Aḥmad al-Zarqāʾ, *al-Madkhal al-Fiqhī al-ᶜĀmm*, I (Damascus: Dār al-Fikr, 1967-1968), 87; Abū Zahra, *Mālik: Ḥayātuhu wa ᶜAṣruhu Ārāʾuhu wa Fiqhuhu* (Cairo: Dār al-Fikr al-ᶜArabī, 1946), 324.

[51] ᶜUthmān b. ᶜUmar b. Abī Bakr b. Ḥājib, *Mukhtaṣar al-Muntahā al-Uṣūlī*, II, ed. Shaᶜbān M. Ismāᶜīl (Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1974), 288.

[52] Muḥammad b. ᶜAlī b. Muḥammad al-Shawkānī, *Irshād al-Fuḥūl* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.), 240.

analogy in cases of a *muḍāraba* contract,[53] *tayammum*,[54] the purchase of *Sawād* land and land usurped for agriculture.[55]

According to Ibn Taymiyya, Ibn Ḥanbal frequently favored *istiḥsān*, even in cases where it contradicted *qiyās* (*mukhālif li al-qiyās*).[56] An example is the *muḍāraba* contract, where a manager disobeys the employer (the owner of the capital) and buys stock other than what he was ordered. In that case, profit should go to the latter and an equitable wage be paid to the former according to reasoning by analogy. However, *istiḥsān* dictates that the employer and the manager share in the profit. Ibn Ḥanbal first argued that the profit should go to the employer; later, he arrived at a different conclusion through *istiḥsān*.[57] In addition, Maymūnī reports that Ibn Ḥanbal had said that "I prefer (*astaḥsinu*) to have *tayammum* in every prayer, but *qiyās* invalidates such

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[53] This is a contract where "one party provides a specified amount of capital for another to trade with for an agreed percentage of the profit." See N. J. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (London: Graham & Trotman Ltd., 1984), 23.

[54] This activity is done when water is not available for ablution and clean sand is used. As explained in the Qurʾān "And ye find no water, then take for yourselves clean sand or earth, and rub therewith your faces and hands." Ali, *Qurʾān* (5: 7), 242.

[55] Taqī al-Dīn Aḥmad b. ʿAbd al-Ḥalīm b. Taymiyya, *Masʾalat al-Istiḥsān* in G. Makdisi "Ibn Taimīya's Autograph Manuscript on *Istiḥsān* : Materials for the Study of Islamic Legal Thought," ed. G. Makdisi in *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb* (Cambridge: Harvard University Press, 1965), 456-57; Najm al-Dīn al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍa*, III, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī (Beirut: Muʾassasat al-Risāla, 1989), 197.

[56] Ibn Taymiyya, *Masʾalat*, 456.

[57] Ibid., 456-57. See also the footnotes in Makdisi's "Legal Logic," 81.

an action if water can be found."[58] While the purchase of *Sawād* land is permitted through *istiḥsān*, its sale is forbidden. *Qiyās* forbids either transaction.[59]

So far we have delineated the theory of *istiḥsān* according to those who advocate its use in solving legal problems. There were, however, opponents of *istiḥsān* who offered lengthy, well ordered arguments on why it should be rejected as a methodology. The principal critic of these thinkers was Shāfiᶜī.

Goldziher maintains that "It is ... indicative of al-Shāfiᶜī's thinking that he does not recognize *al-istiḥsān*, a concession made by the Ḥanafite school which questions the methodological element in applying *qiyās* altogether, ... [And that] he also rejects *taᶜlīl*.[60] Against the application of *al-istiḥsān*, the most arbitrary point of the Ḥanafite method, al-Shāfiᶜī wrote a pamphlet of which only the title has survived."[61] The validity of Goldziher's remark is not surprising since Shāfiᶜī consistently attacked the theory of *istiḥsān*, especially since it was so vehemently espoused by the Ḥanafīs. We can cite two major works of Shāfiᶜī which examine the theory of *istiḥsān*. In *Kitāb Ibṭāl al-Istiḥsān* (The Book of the Refuting *Istiḥsān*), published along with his *al-Umm*,

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[58] Ibn Taymiyya contends that in the case of the *tayammum*, the *qiyās* is correct and not the *istiḥsān* since using sand for ablution is no longer lawful when water can be found. Ibid., 456, 469, 472.

[59] Ibid., 456-57; Ibn Taymiyya and forefathers, *al-Musawwada fī Uṣūl al-Fiqh* (Cairo: Maṭbaᶜat al-Madanī, n.d.), 402; ᶜAbd Allāh b. ᶜAbd al-Muḥsin Turkī, *Uṣūl Madhhab al-Imām Aḥmad* (Riyāḍ: Maktabat al-Riyāḍ al-Ḥadītha, 1977), 509.

[60] In fact, Hallaq believes that "like the interconnected developments of *al-tawātur al-maᶜnawī*, induction, and consensus, *istiḥsān* was capable of development only by virtue of the refinements that took place in the theory of causation (*taᶜlīl*) which in its fifth/elevent- or seventh/thirteenth-century form would have bewildered Shāfiᶜī." Wael B. Hallaq, "*Uṣūl al-Fiqh*: Beyond Tradition," *JIS*, 3, no. 2 (1992): 197.

[61] Ignaz Goldziher, *The Ẓāhirīs: Their Doctrine and Their History*, trans. and ed. Wolfgang Behn (Leiden: E. J. Brill, 1971), 22.

Muḥammad Idrīs al-Shāfiᶜī (d. 204/820) states that such practice will lead every judge and *muftī* to base a *ḥukm* or a *fatwā* on personal preferences. More dangerously, judges may base decisions on personal desires. As a result, they would lose respect through carelessness and ridicule.[62] Shāfiᶜī's criticism is presented as follows:

> Supposing the governor and the *muftī* should say concerning a divine scourge that there is no provision for it either in a text or by analogy, and supposing they should have recourse to preference, would it not be incumbent upon them to concede to others the right to prefer some other ruling? Consequently, every governor and *muftī* in the various cities would rule according to his preference and there would be many contradictory rulings and *fatwas* in the same case ... If one of those who would wish to discard analogy should claim that people ought to obey his decisions, then, he should be told, 'who has ordered that you be obeyed so that people become duty-bound to follow you?' ... Obedience belongs only to those whom God and the Prophet have ordained that they be obeyed. Right is that which God and the Prophet have ordered be pursued and have pointed to through a text or through deduction.[63]

From this quotation we can conclude Shāfiᶜī's staunch support of *qiyās*. According to him, it is only through *qiyās* (sometimes he called it *ijtihād*),[64] that any legal norm (*ḥukm*) can be produced. Shāfiᶜī's defense of *ijtihād* is based on its comprehensive treatment by previous jurists. In other words, they thought of it as any method which employs reasoning in defining God's legal norms. Hence, *istiḥsān* can be

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[62] Muḥammad b. Idrīs al-Shāfiᶜī, *Kitāb Ibṭāl al-Istiḥsān* printed in *al-Umm*, VII (Cairo: al-Hayᵓa al-Miṣriyya al-ᶜĀmma, 1987), 273.

[63] S. Mahmassani, *Falsafat al-Tashrīᶜ fī al-Islām*, trans. F. J. Ziadeh (Leiden: E. J. Brill, 1961), 86-7.

[64] Although Shāfiᶜī does not explicitly compare the two terms, he did mention that if "The Prophet gave an order to exercise ijtihād, it should not be exercised save to seek an [unknown] object, and the object cannot be sought except through certain evidences [on the strength of] which analogical deduction [*qiyās*] may be made." In fact one of the evidence (*dalīl*) is *qiyās*. Therefore, one can conclude, that *ijtihād* contains *qiyās*. See Muḥammad b. Idrīs al-Shāfiᶜī, *al-Risāla*, ed. Aḥmad M. Shākir (Beirut: Dār al-Kutub al-ᶜIlmiyya, n.d.), 505 and its translation by M. Khadduri (Cambridge: The Islamic Text Society, 1987), 305.

incorporated as a branch of *ijtihād*. Moreover, Shāfiᶜī was zealously trying to restrict juristic speculation (*ijtihād*) to "the process of extending the application of established rules to new questions by analogy (*qiyās*)."[65] By confining the scope of *ijtihād* to *qiyās*, the unity of law could be guaranteed in a more systematic manner. At the same time, such a technique would prevent those attempting to usurp law for their own purposes.[66] Moreover, Shāfiᶜī equates those who issued legal norms with no reference to accepted sources (the Qurᵓān, the Sunna, consensus, or *qiyās*) to amateurs. They have, in fact, no right whatsoever to deliver an arbitrary opinion or put aside *qiyās* in favor of *istiḥsān*.[67] Shāfiᶜī declares that "no decisions by arbitrary *istiḥsān* are allowed, only reasoning by analogy on points on which there is no text in the Koran, no sunna, and no consensus - that is no binding information; we and the people of our time are obliged to observe this."[68] Furthermore, he adds that if the practice of *istiḥsān* is allowed at the expense of *qiyās*, the door to the unrestricted fallible human opinions, including those who have no knowledge on the subject under inquiry might be opened.[69] To support his opinion, Shāfiᶜī quotes the following verse; "Does Man think that he will be left uncontrolled,

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[65] Louay M. Safi, "Islamic Law and Society,"*AJISS*, 7, no. 2 (1990): 183. Theoretically, analogical reasoning required that the efficient cause (ᶜ*illa*) of the divine command be determined so that the application of the command may be extended to other objects sharing the same effect. For example, the jurists determined that the ᶜ*illa* for prohibiting the consumption of wine was its intoxicating effect. Thus, through analogy, the jurist decided that any substance that possessed the same effect must also be prohibited, even if it had not been explicitly forbidden by the Qurᵓān or Sunna.

[66] Ibid.

[67] Schacht, *Origins*, 121.

[68] Ibid., 122.

[69] Shāfiᶜī, *Risāla*, 505.

(without purpose)?" (*ʾAyaḥsab al-insān ʾan yutraka sudā*).[70] Whoever applies *istiḥsān*, Shāfiʿī insists, acts as though he was left without guidance and can come to any judicial conclusion he pleases.[71]

In *al-Risāla*, often considered the first systematic treatise on Islamic jurisprudence, Shāfiʿī vehemently announces that "It is unlawful for anyone to exercise istiḥsān whenever it is not called for by a narrative, whether the narrative is a text of the Qurʾān or a sunna, by virtue of which an (unknown) object is sought just as when the Sacred House is out of sight it should be sought by analogy."[72] Therefore, he continues, "nobody is allowed to give an opinion save through ijtihād, and this, as you said, is seeking (to know) the right answer. Thus would you hold that it is permissible for anyone to exercise istiḥsān by means other than analogy."[73] He then insists that such exercise is unacceptable, since "only the scholars - not others-may give an opinion, and the scholars hold that a narrative must be followed; if a narrative is not found, analogy might be applied on the strength of a narrative. For if analogy were abandoned, it would be permissible for any intelligent man, other than the scholars, to exercise istiḥsān in the absence of a narrative."[74] Yet, according to Āmidī, Shāfiʿī is reported to have declared that "whoever makes use of *istiḥsān* arrogates himself the function of legislator" (*man*

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[70] Ali, *Qurʾān* (75: 36), 1653.

[71] Schacht, *Origins*, 121.

[72] Shāfiʿī, *Risāla*, trans. Khadduri, 304.

[73] Ibid.

[74] Ibid., 304-5.

istaḥsana faqad sharraᶜa).[75] Shāfiᶜī added that *istiḥsān* is merely doing what is "agreeable (*taladhdhudh*)."[76] In this regard, Coulson remarks that "By repudiating these undisciplined forms of reasoning [including *istiḥsān*] and insisting on the exclusive validity of strictly regulated analogical reasoning (*qiyās*) ash-Shāfiᶜī is again systematically pursuing his goal of uniformity. Differences of opinion might still result, but would be cut to a minimum."[77] In order to clarify his critique of *istiḥsān* and his support of *qiyās*, Shāfiᶜī set forth the following cases:

1. As indicated in the Qurᵓān and the Sunna of the Prophet, it is incumbent upon every father to make sure that his children are suckled and they are supported during childhood.[78]

   Since the child is [an issue] of the father, he [the father] is under an obligation to provide for the child's support while [the child] is unable to do that for himself. So I hold by analogical deduction when the father becomes incapable of providing for himself by his earnings- or from what he owns - paying for his expenses and clothing. Since the child is from the father, he [the child] should not cause him from whom he comes to lose anything, just as the child should not lose anything belonging to his children, because the child is from the father. So for the forefathers, even if they are distant, and the children, even if they are remote descendants, fall into this category. Thus I hold that [by analogy] he who is retired, and in need should be supported by him who is rich and [still] active.[79]

2. A woman, upon hearing of the death of her husband waits for the period of the ᶜidda and marries another man, but her [former] husband returns. Separation [between the woman and her second husband] shall take place on the basis of the cancellation of

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[75] Āmidī, *Iḥkām*, III, 210; Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), 672.

[76] Shāfiᶜī, *Risāla*, 507; Khadduri's trans., 305.

[77] Coulson, *History*, 60.

[78] Shāfiᶜī, *Risāla*, 517.

[79] Ibid., 518; Khadduri's trans., 310.

> the second marriage without resort to divorce and neither one shall be held liable for punishment. The woman has the right to keep the bride-price, but she has to wait for the period of the ᶜidda [before she joins her former husband]. The child [if any] belongs to his father. Neither the woman nor the [second] husband can inherit from one another. A decision in his [the second husband's] favor- since in the explicit sense [the marriage] is lawful-gives the woman the right to keep the bride-price, to wait for the ᶜidda, the child [the right] belongs to his father, and waives the punishment. A decision against him [the second husband]- since in the implicit sense it is unlawful -invalidates the marriage [contract], forbid intercourse with her after [the two spouses] have known [about the first husband], prohibits inheritance between them, and separation takes place without divorce since she was not a lawful wife.[80]

In the first case, Shāfiᶜī uses *qiyās* to suggest that just as the father is obligated to take care of his children, the children should be equally responsible for their father's welfare. In the second case, it seems that Shāfiᶜī believed more than one answer can be given if there are various circumstances.[81]

However, inspite of this characteristic, it is said that Shāfiᶜī had declared that "I deem it proper (*astaḥsinu*) that the compensation (*mutᶜa*) paid to a divorced woman be thirty dirhams" and "I deem it proper (*astaḥsinu*) that the preemptor hold the right of preemption (*shufᶜa*) up to three days."[82] Sarakhsī reports that Shāfiᶜī sometimes writes "*astaḥibbu dhālik* " while, in fact, his intended meaning is more similar to *istiḥsān*. Sarakhsī then poses the following question "what is the difference between those who say "*astaḥsinu kadhā* " and those who state "*astaḥibuhu* ?"[83] Hence, this question leads

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[80] Khadduri's trans., 332.

[81] Ibid, 331.

[82] Ibid.

[83] Sarakhsī, *Uṣūl*, II, 201. Etymologically, the word *istiḥsān* is more eloquent than *istiḥbāb*, and is more likely used in *sharᶜ* postulation.

us to believe that Shāfiᶜī had two views on *istiḥsān* : one old (*qadīm*) and one new (*jadīd*).[84]

Malcolm H. Kerr justifies Shāfiᶜī's objection to *istiḥsān* by stating that "the difficulty with *istiḥsān*, in short, is that it does not rest on any clear-cut method of reasoning, and hence appears to the more systematic jurists to represent no more than an arbitrary introduction of personal preference." He then adds that "the failure of the Ḥanafī proponents of *istiḥsān* to do this - to justify their avoidance of *qiyās* in each case by reference to a specific *maṣlaḥa* - exposed them to the charge of legislating."[85] Thus, one might conclude that Shāfiᶜī's objection rested on the belief that *istiḥsān* offered no systematic method of reasoning. Although occasionally making use of the term *istiḥsān*, Shāfiᶜī felt that the method itself stood in direct contrast to his own systematic methodology. As we shall see, the Shāfiᶜī school represented by Shīrāzī (d. 475/1083), Ghazālī (d. 505/1111) and Āmidī (d.630/1233) later accepted *istiḥsān* as a method of deduction as long as it is supported by the revealed texts.[86]

One may venture that during early development the term *istiḥsān* and *qiyās* were interchangeably used to denote a rule-deducing mechanism. According to Kamali, "[o]riginally *istiḥsān* was conceived in a wider and relatively simple form which was close to its literal meaning and free of the complexities that were subsequently woven

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[84] Ibn Taymiyya, *Masᵓalat*, 454.

[85] Malcolm H. Kerr, *Islamic Reform : The Political and Legal Theories of Muḥammad ᶜAbduh and Rashīd Riḍā* (Berkeley & Los Angeles: University of California Press, 1966), 90.

[86] Shīrāzī, *Lumaᶜ*, II, 973-74; Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā min ᶜIlm al-Uṣūl*, I (Beirut: Dār al-ᶜUlūm al-Ḥadītha, n.d.), 282-83; Āmidī, *Iḥkām*, III, 209.

into it."[87] However, after coming under attack from Shāfiᶜī in his treatise "Section of the Refutation of *Istiḥsān* " contemporary Ḥanafī scholars tried to justify the validity of *istiḥsān* by defining it as an abandonment of *qiyās* for another stronger form of *qiyās*.[88] Hence, some writers like Kamali, have come to the conclusion that if we understand *istiḥsān* in its literal sense (i.e. as Abū Ḥanīfa, Abū Yūsuf and Shaybānī did), there would be no conflict. However, if one looks at *istiḥsān* in a juristic sense, controversial problems arise. These problems will be further discussed in the section dealing with the Ḥanafī attempts to rationalize the theory of *istiḥsān.*

In the same vein, the question whether *istiḥsān* is similar to, different from, or part of *qiyās*, poses itself on the intellectual arena. Those who justify the authority of *istiḥsān*, such as the Ḥanafī Bazdawī and Sarakhsī, do so by obliterating the distinction between *istiḥsān* and *qiyās*, going as far as incorporating *istiḥsān* into *qiyās khafī.* However, this stance was denounced by other jurists on the grounds that such incorporation would inevitably restrict the flexibility of *istiḥsān.* These jurists placed a higher position on *istiḥsān* used in conjunction with the revealed texts, consensus, necessity, public interest, and custom as sources of law. In order to explore this, we will pursue our analysis of the rationalization of the theory of *istiḥsān* in the post-formative period.

B. The Rationalization of *Istiḥsān* in the Post-Formative Period

We will trace the Ḥanafī rationalization of *istiḥsān*, in defense of Shāfiᶜī's attack. This redefinition is well-illustrated in the works of Bazdawī (with its commentary in

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[87] M. H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 1991), 261.

[88] Sarakhsī, *Uṣūl*, II, 201.

Bukhārī's *Kashf al-Asrār*) and Sarakhsī. Other opinions will also be considered, namely Bājī and Shātibī of the Mālikī school, later Shāfiᶜīs like Shīrāzī, Ghazālī, and Āmidī, and finally the Ḥanbalī Ibn Taymiyya.

During the formative period, the use of *istiḥsān* was associated with arbitrary opinion and juristic self-indulgence. This, however, was no longer the case in the post-formative period after Bazdawī (d. 482/1089) and Sarakhsī (d. 483/1090) attempted to redefine the implementation of *istiḥsān* as a textually based method.[89] As Wael B. Hallaq remarks:

> After the third/ninth century, however, the Ḥanafī theorists ensured dissociating themselves from the perception of being arbitrary reasoners. Following the normative practice which had by then evolved as the unchallenged paradigm of juridical practice and legal scholarship, they insisted that no reasoning by means of juristic preference may rest on any ground other than the revealed texts. Thus, with the emergence of a full-fledged legal theory after the third/ninth century, no Sunnī school could have afforded to hold a view in favour of a non-textually supported *istiḥsān*.[90]

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[89] The tendency to perceive *istiḥsān* as an arbitrary opinion was not the only reason for the attempt by Bazdawī and Sarakhsī to redefine *istiḥsān*. The Ḥanafīs themselves disagreed on available definition. According to Bukhārī, some Ḥanafīs defined it as a departure from one *qiyās* to another stronger one. Others claim it is the particularization of *qiyās* by other stronger evidence. This suggests the possibility that *istiḥsān* is the particularization of the cause. Abū al-Ḥasan al-Karkhī, who preceded Bazdawī by a century, defines it as the attempt "to depart from judging in a case according to what has been judged in analogous cases, and to judge to the contrary on account of a stronger reason which renders necessary departure from the former." ᶜAlāᵓ al-Dīn ᶜAbd al-ᶜAzīz b. Aḥmad al-Bukhārī, *Kashf al-Asrār ᶜan Uṣūl al-Bazdawī*, IV, ed. Muḥammad al-Muᶜtaṣim bi Allāh al-Baghdādī (Beirut: Dār al-Kitāb al-ᶜArabī, 1991), 7-8; Aghnides, *Mohammedan*, 95. Others define it as an opinion based on the stronger of two indications (*aqwā al-dalīlayn*). For others, it is the particularization of the cause by evidence. See Shīrāzī, *Lumaᶜ*, II, 969. All those definitions strongly influenced Bazdawī and Sarakhsī.

[90] Wael B. Hallaq, *Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Manuscript), 157.

According to Bazdawī and Sarakhsī, the application of *istiḥsān* can be done in two ways: 1) through the abandonment of *qiyās* (a) in favor of *naṣṣ* (the revealed texts) or (b) in favor of consensus (*ijmāᶜ*) or necessity (*ḍarūra*); or 2) by choosing the stronger of two *qiyāses* (reasoning by analogy).[91] In both cases, *istiḥsān* is really the preference of one source over another.[92] This notion then rejects the thesis adopted by scholars of Islamic law that *istiḥsān* was built on the basis of equity. A concept that was perceived in the West as "the antithesis of the Islamic view that all law is derived from God through the Koran and the sunna. [While] [e]quity is grounded in the precepts of the conscience, a preconceived set of norms existing apart from positive law."[93] Similarly, equity is perceived as being validated by "the belief in natural right and justice beyond positive law."[94] This presumption is, in fact, in direct contrast to the basic premise of Islamic law, that is "the total reliance on the revealed Word of God in the Koran and sunna as the only primary source of law."[95] Although the concept of *istiḥsān* does contain a sense of equity, it always goes hand in hand with the teachings of the Qurʾān and Sunna. Therefore, western scholarship's presentation of *istiḥsān* as an equity-oriented concept is questionable![96]

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[91] Sarakhsī, *Uṣūl*, II, 202-3.

[92] Bukhārī, *Kashf*, IV, 7.

[93] Makdisi, "Legal Logic," 67.

[94] Ibid. A significant survey on the role of equity in the history of law has been presented by Hessel E. Yntema in his article "Equity in the Civil Law and the Common Law," published in *AJCL*, 15 (1967): 60-86.

[95] Ibid.

[96] Ibid.

We can begin our discussion of the post-formative period by examining the portrayal of *istiḥsān* in Bazdawī's *Kanz al-Wuṣūl ilā Maᶜrifat al-Uṣūl.* Bazdawī, as recorded in Bukhārī's *Kashf al-Asrār*, begins the discussion with "the Section of *Qiyās* and *Istiḥsān.*"[97] In his opinion, *qiyās* and *istiḥsān* have two common attributes. *Qiyās* may be powerful in terms of its external meaning (*lafẓ*), but weak in its effect (*ḍaᶜufa atharuhu*), or on the contrary, its effect may be strong, but its external meaning may be weak (*fāsid*). Similarly, *istiḥsān* may be an undeclared or hidden (*khafī*) utterance that exerts a powerful effect or it might exhibit a pronounced meaning that bears hidden weaknesses. According to this school of thought, Bazdawī selects *istiḥsān* as the stronger of the two analogies (*aḥad al-qiyāsayn*).[98] This does not, however, prohibit the use of *qiyās*, even though it is more preferable to adopt its effect.[99]

Bazdawī bases the legitimacy of *istiḥsān* on *athar*, *ijmāᶜ*, or *ḍarūra.*[100] Examples of *istiḥsān* relying on *athar* (authoritative source) include the contract of *salam* (the sale of an object to be delivered in the future), the contract of hire (*ijāra*) and cases pertaining to unthinking consumption of food or drinks during fasting. Secondly, *istiḥsān* backed by consensus (*ijmāᶜ*) addresses cases involving manufactured goods and materials. Thirdly, *istiḥsān* based on necessity (*ḍarūra*) deals with the purification of wells, vessels, containers (*awānī*), or utensils after contamination.[101] These situations will be discussed later in detail during an examination of Sarakhsī's theory of *istiḥsān.*

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[97] Bukhārī, *Kashf*, IV, 5.

[98] Ibid., 6-7.

[99] Ibid., 10.

[100] Ibid.

[101] Ibid.

Bazdawī's section endeavors to understand the process by which a legal norm is determined. Such a process may be called *qiyās*, when it results in an ineffective legal norm; if it maintains a strong effect it can be termed *istiḥsān* or preferred *qiyās* (*qiyās mustaḥsan*). Hence, the key element in this analysis is the effectiveness of the cause, not its external appearance (*ẓahr*). Bazdawī then supports his argument by comparing life on this world to life in the hereafter. Although people have not experienced the next world, its influence on people can be deduced from such noted characteristics as undecay (*dawām*), eternity (*khulūd*) and exclusiveness (*ṣafwa*). He also compares (*qiyās* and *istiḥsān*) to the body and heart, or in another metaphorical light, sight and reason. For Bazdawī, the internal meaning prevails over the external one. Therefore, when *qiyās* is brought face to face with *istiḥsān*, the latter is considered a superior methodology.[102] Bazdawī also tackles other issues such as the status of food left by predatory birds and other similar situations. These issues will be further discussed when we deal with Sarakhsī's view point on *istiḥsān*. Though his theory of *istiḥsān* is quite similar to Bazdawī's, Sarakhsī offers a more intensive analysis particularly with reference to *takhṣīṣ al-ʿilla*.[103] Sarakhsī's contribution is included in this discussion because it complements Bazdawī's rationale.

Similar to Bazdawī, Sarakhsī addresses the use of *qiyās* and *istiḥsān*, however, his treatment of these topics is considerably more detailed. His *Uṣūl al-Sarakhsī* begins with an itemized list of complaints against the Ḥanafīs and their arbitrariness. The complaint of arbitrariness was denounced by Sarakhsī on the following terms: "How do they arbitrate while neglecting the authoritative source (*ḥujja*), and acting on the spur of

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[102] Ibid., 10-12.

[103] The controversy around this issue emerges when some jurists accept *takhṣīṣ al-ʿilla* as another definition for *istiḥsān*, while others vehemently deny this equation.

their whims and desires? If they intend to disregard *qiyās* which is undoubtedly a *ḥujja*, while the *ḥujja shar^{c}iyya* itself is the truth, doing so would be similar to going astray. But if they intentionally abandon *qiyās* which is, in fact, invalid according to *shar^{c}*, then there is certainly no need for explanation!"[104] He confidently reiterates that *istiḥsān* is a choice between two strong bodies of evidence, and has little to do with indulging personal whim.[105] After his defense of the Ḥanafī school, Sarakhsī proceeds to a definition of *istiḥsān*. This definition is regarded by some scholars as the first appearance of a formal definition.[1] However, other sources indicate that *istiḥsān* had already been defined a century before Sarakhsī by predecessors such as Abū al-Ḥasan al-Karkhī (d. 340/951) and Abū Bakr Aḥmad b. ^{c}Alī al-Rāzī al-Jaṣṣāṣ (d. 370/980).[107]

Literally speaking, the word *istiḥsān* is a noun derived from the Arabic root *Ḥ S N* (*ḥasuna*), meaning "beautiful, good, to be expedient, suitable, to be in a proper state and be in a desirable condition."[108] Sarakhsī says that *istiḥsān* should be perceived as searching for the best available way to follow God's command. He finds support for his definition in the verse "So announce the Good News to My Servants, those who listen to the Word, and follow the best of it."[109] In his *al-Mabsūṭ*, Sarakhsī defines *istiḥsān*, as

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[104] Sarakhsī, *Uṣūl*, II, 199-200.

[105] Ibid., 201.

[106] Husain Kassim, "Sarakhsī's Doctrine of Juristic Preference (*Istiḥsān*) as a Methodological Approach Toward Wordly Affairs (*Aḥkām al-Dunyā*)," *AJISS*, 5, no. 2 (1988): 194.

[107] Bukhārī, *Kashf*, IV, 7.

[108] J. M. Cowan (ed), *The Hans Wehr Dictionary of Modern Written Arabic* (Ithaca, New York: Spoken Language Services, Inc., 1976), 177.

[109] Ali, *Qur^{3}ān* (39: 18), 1241. The commentators construe this clause in two alternative ways. (1) If "word" be taken as any word, the clause would mean that good

cited from Abū Ḥanīfa, as "the abandonment of *qiyās* and adopting what is more suitable for people." Or "finding an ease in ruling."[110] In short, it is a method by which difficulties can be avoided. He then quotes the verse "Allah intends every facility for you; He does not want to put you to difficulties."[111] However, this definition might be attacked by opponents of *istiḥsān* as still exhibiting tendencies of arbitrariness. Sarakhsī, therefore, covers himself by declaring that *istiḥsān* departs from *qiyās* on the basis of the revealed texts, consensus or necessity.[112] Besides, *istiḥsān* can also appear as the stronger of two analogical reasonings (*qiyāsayn*) since *qiyās* and *istiḥsān* are really two forms of analogy. It is called *qiyās* when the external part is clear (*jalī*) but has a weak effect (*ḍaᶜīf atharuhu*) or if it is unclear (*khafī*), but contains a strong effect (*qawī atharuhu*); this phenomenon is called *istiḥsān* or *qiyās mustaḥsan* (preferred *qiyās*).[113]

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men listen to all that is said and choose the best of it. (2) If "word" be taken to mean Allah's Word, it would mean that they should listen reverently to it and where permissive and alternative courses are allowed for those who are not strong enough to follow the higher course, those "endued with understanding" should prefer to attempt the higher course of conduct. For example, it is permitted (within limits) to punish those who wrong us, but the nobler course is to repel evil with good (23: 96); we should try to follow the nobler course.

[110] Abū Bakr Muḥammad b. Aḥmad al-Sarakhsī, *al-Mabsūṭ*, IX (Cairo: Maṭbaᶜat al-Saᶜāda, 1324 A.H.), 145.

[111] Ali, *Qurʾān* (2: 185), 73.

[112] Sarakhsī, *Uṣūl*, II, 202.

[113] Sarakhsī, *Mabsūṭ*, IX, 145. According to Chafik Chehata, the theory of *istiḥsān* seems to be a complicated matter, since Bazdawī and all the classical Ḥanafī jurists do not give a more explicit definition of it. All their efforts tend to dull the distinctive character of *istiḥsān*. To confront the polemic set by Shāfiᶜī, who denies the value of *istiḥsān* as a source of law, for instance, they try to integrate *istiḥsān* into *qiyās*. Therefore, *istiḥsān* for Bazdawī is a stronger analogy than the one called *qiyās*. Adopting a solution by way of *istiḥsān* is to renounce the solution induced through analogy, essentially a stronger *qiyās* (*qiyās aqwā*). Chafik Chehata, "L' «Équité» En Tant Que Source Du Droit Hanafite," *SI*, 25 (1966): 126.

We have noted that *istiḥsān,* for both Bazdawī and Sarakhsī, can appear in two modes. It may be derived from the revealed texts, consensus or case of necessity. In addition, *istiḥsān* can be the stronger of two *qiyās.* The basic distinction between the first and second characteristics is that the latter can be extended to parallel cases, while the former cannot.[114] According to Aghnides, the definition of *istiḥsān* offered by Bazdawī and Sarakhsī can be summarized aptly as follows:

> The abandonment of the opinion to which reasoning by analogy would lead to, in favour of a different opinion supported by stronger evidence. Such a departure from *qiyas*, may be based on evidence found in the *sunnah*, or the *ijmaᶜ*, on necessity or on what the upholders of *qiyas* claim to be another kind of *qiyas* which, though it does not so readily occur to the mind as the first *qiyas*, in reality is stronger than it.[115]

The above definition suggests that Sarakhsī ignores other definitions, specifically the one that renders *istiḥsān* as *takhṣīṣ al-ᶜilla* (the particularization of the cause). In fact, this definition has attracted considerable attention from the jurists. Such as Sarakhsī himself, Abū al-Ḥusayn Muḥammad al-Baṣrī and Ibn Taymiyya. However, Ibn Taymiyya's emphasis on *takhṣīṣ al-ᶜilla* is a matter of debate for the second chapter. Nevertheless, it is sufficient to observe that both Sarakhsī and Baṣrī vehemently refuse, in contrast to Ibn Taymiyya, to define *istiḥsān* as the particularization of the cause.

The following are several instances pertaining to the implementation of *istiḥsān* based on the revealed texts, consensus or instantaneous necessity. In this regard, it is worth considering Makdisi's remark "the preference for [a] solution dictated by the

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[114] Sarakhsī, *Uṣūl,* II, 206.

[115] Aghnides, *Mohammedan,* 91-2.

Koran, the sunna, or consensus over a solution dictated by reasoning by analogy from these sources is based on the priority of primary sources over a derivative source."[116]

Bazdawī and Sarakhsī cite the following cases as examples of *istiḥsān* supported by a revealed text: the *salam* contract, the contract of *ijāra* (hire) and eating during fasting due to forgetfulness. According to *qiyās*, the *salam* contract is not permitted since the object is not present at the time of the contract. However, *istiḥsān*, backed by a *naṣṣ*, can argue differently.[117] Likewise, the contract of *ijāra* is debatable, since *qiyās* requires payment at the time of contract. However, *qiyās* is abandoned in this case on the basis of a Prophetic tradition (*athar*) which allows such a contract (*ijāra*). In this case, the order to give a wage to a laborer affirms the validity of the contract.[118]

Similarly, *qiyās* invalidates the fasting of a person who unintentionally eats or drinks during Ramaḍān. Theoretically, *qiyās* does not allow for intention, but only actions. In fact, *qiyās* compares such an act to the state of *ṭahāra* (ritual purity) which is abrogated by a *ḥadath* (the existence of ritual impurity). However, a quote from the Prophet (*Tamma ʿalā ṣawmika faʾinnamā aṭʿamaka Allāh wa saqāka*) favors the use of *istiḥsān* by allowing the continuation of the fast with concurrent validation.[119]

Consensus supported *istiḥsān* looms large in cases dealing with manufactured goods. Consider a man who goes to a shoemaker for a pair of shoes and provides an idea of what he wants with a pre-payment. *Qiyās* regards this transaction as invalid

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[116] Makdisi, "Legal Logic," 76.

[117] Sarakhsī, *Uṣūl*, II, 203; Bukhārī, *Kashf*, IV, 10.

[118] Bukhārī, *Kashf*, IV, 10-11.

[119] Sarakhsī, *Uṣūl*, II, 202; Bukhārī, *Kashf*, IV, 11,

since there is the possibility of an error during manufacturing. *Istiḥsān*, however, sanctions such a sale on the basis of consensus. Popular trade practices usually allowed for some degree of error in trade manufacturing.[120]

In cases where necessity dictated the use of *istiḥsān*, Bazdawī and Sarakhsī highlight the cases of purifying wells, vessels, containers and the like after being previously tainted by pollutants. *Qiyās* insists that such containers cannot be used. *Istiḥsān*, on the other hand, acknowledges the hardship of life and permits placing water in previously used vessels.[121] Likewise, according to *qiyās*, the body of a woman is *ᶜaura* and off limits. However, *istiḥsān* uses a Prophetic tradition which suggests that seeing certain parts of a woman's body is permissible. Conditions cannot always guarantee the exclusivity of the female.[122]

Istiḥsān's second feature is when it represents the stronger of two analogical reasonings. It is not uncommon to have two simultaneous lines of reasonings for one problem. This occurs when one solution is founded on an obvious *qiyās* (*qiyās jalī*) but on closer examination a weak tradition is discovered. The other legal norm can be founded on a hidden (*khafī*) tradition that might be more appropriate to the case at hand. *Istiḥsān* represents the analogy based on a hidden stronger tradition whereby *qiyās* is the legal norm relying on the weaker, visible tradition.[123]

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[120] Bukhārī, *Kashf*, IV, 11; Makdisi, "Legal Logic," 76.

[121] Ibid.; Sarakhsī, *Uṣūl*, II, 203.

[122] Sarakhsī, *Mabsūṭ*, IX, 145.

[123] Idem, *Uṣūl*, II, 203.

In order to determine the strength or weakness of a deduction based on *qiyās*, one should at first "determine whether the cause generating the legal norm in the tradition has been properly determined and exists in the particular being solved, or whether there is only a superficial resemblance between the tradition and the case at hand. It is on the basis of reasoned elaboration that one *qiyās* is chosen over another."[124] In this regard, Bazdawī and Sarakhsī present the case of food touched by predatory animals. Islamic law deems such food unlawful. Nevertheless, Islamic law does consider other parts of predatory birds and animals, such as their skin, bone and hair, as pure. Why should food touched by pure parts of their anatomy be considered unclean?[125] More precisely, take the example of cats in comparison with birds. As Hallaq elaborates, "when cats ... eat or drink, their tongue, covered with saliva, comes in contact with the food, thus causing its impurity. Birds, however, use their beaks, which are formed of bone, and when they eat or drink, only the bones come in touch with the food. Since bones are considered clean, the food from which the birds eat is also clean, and therefore permitted."[126] Above all else, perhaps it should also be remembered that a salient characteristic of *istiḥsān* proponents is their reliance on Qurʾānic scripture,[127] the Prophetic tradition[128] and *ijmāʿ*.[129]

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[124] Makdisi, "Legal Logic," 77, summarizing Bukhārī's *Kashf*, IV, 12-3; Sarakhsī's *Uṣūl*, II, 204.

[125] Ibid., 78.

[126] Hallaq, "Considerations, " 684.

[127] "Those who listen to the Word, and follow the best of it. Those are the ones who Allah has guided, and those are the ones endued with understanding." Ali, *Qurʾān* (39: 18), 1241.

[128] "What the Muslims deem to be good is good in the sight of Allāh" (*Mā raʾāhu al-muslimūn ḥasanan fahuwa ʿind Allāh ḥasanun*). Sulaymān b. Khalaf al-Bājī,

It is to be hoped that the above-mentioned illustrations have managed to demonstrate that in the post-formative period, the application of *istiḥsān* is more rigorous and well developed than that of the formative period, which was characterized by the jurists' preference and their inconsistency in supporting a legal solution with the revealed texts. Despite this tremendous improvement gained by the Ḥanafīs in redefining the theory of *istiḥsān*, both protest and refinement from other schools are still unavoidable. They are, among others, presented by Bājī and Shāṭibī of the Mālikī school, and Shīrāzī, Ghazālī, and Āmidī of the Shāfiᶜī one.

Sulaymān b. Khalaf al-Bājī's *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl* clearly supports the Ḥanafī view that no polemical (*iḥtijāj*) *istiḥsān* is acceptable without documentation by textual evidence (*dalīl*).[130] He also mentions that some Ḥanafī jurists have applied *istiḥsān* with no serious foundations. For instance, in cases of adultery, there might be some dispute among witnesses as to where the alleged crime occurred. This uncertainty of evidence, according to *qiyās*, would forbid *ḥadd* punishment. However, Abū Ḥanīfa, on the basis of *istiḥsān*, suggests that punishment should be meted out.[131] This decision, Bājī argues, has been offered without referring to textual evidence, and is, therefore, unacceptable as a legal norm. It seems that Abū Ḥanīfa's legal norm might have been influenced by personal inclinations.[132] Bājī proceeds to criticize the verse and

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Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl, ed. ᶜAbd al-Majīd Turkī (Beirut: Dār al-Gharb al-Islāmī, 1986), 689.

[129] For instance, it is permissible to utilize public bathroom (*ḥammām*) without giving a fixed wage for the service, but, on the contrary, *qiyās* insists on fixing a wage. Shīrāzī, *Lumaᶜ*, II, 973.

[130] Bājī, *Iḥkām*, 688.

[131] Ibid.

[132] Ibid.

the tradition used by the proponents of *istiḥsān*. What is really intended by that particular verse (Q. 39: 18), Bājī insists, is following the best word corroborated by textual evidence. He argues that if that verse is perceived in its general indication (*ʿumūm*), our preference to forbid the decision by inclination and desire would also be considered a good thing (*ḥasan*) to be followed. As for the tradition "What the Muslims deem to be good is good in the sight of Allāh,"[133] it is rooted in the consensus that when the Muslims regard something as good, it would bring benefit to all. The dispute is not on the entity of *ḥasan* (the thing considered as good), but evolves around the term *istiḥsān* itself. Our understanding is that Muslims would never define the good without basing it on textual evidence.[134]

The great jurist, Abū Isḥāq Ibrāhīm al-Shīrāzī (d. 475/1083) might be considered the first Shāfiʿī jurist to criticize the theory the Ḥanafī version of *istiḥsān*. In *Sharh al-Lumaʿ*, Shīrāzī sets forth several contemporary definitions of *istiḥsān*. From those definitions, he only accepts the one that is supported by stronger evidence (*aqwā al-dalīlayn*),[135] such as the example of eating during fasting due to forgetfulness. Consequently, Shīrāzī vigorously refutes the definition of *istiḥsān* as particularizing the cause on the basis of evidence. His arguments, to some extent, are similar to Bājī's except for his description of the Ḥanafī jurists who did not base their legal norms on textual evidence (the Qurʾān and Sunna) as ignorant of the following verses: "And

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[133] Ibid, 689.

[134] Ibid.

[135] Shīrāzī comments in great detail on this issue by giving instances on every case supported by the stronger evidence either from the revealed texts (*naṣṣ*), *ijmāʿ*, *qiyās* or *istidlāl*. This is what he called the valid procedure of *istiḥsān* (*istiḥsān ṣaḥīḥ*). Shīrāzī, *Lumaʿ*, II, 973-74.

pursue not that of which thou hast no knowledge,"[136] "And those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah,"[137] and "Whatever it be wherein ye differ, the decision thereof is with Allah."[138] As well as the tradition referring to *ahl al-ḥall wa al-ᶜaqd* (the authoritative jurists) not to all Muslims. According to Shīrāzī, what has been deemed good by *ahl al-ijmāᶜ* (another phrase for the former), is also acceptable by Allāh. In this instance, the issue at hand becomes compulsory for all Muslims.[139]

Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505/1111), another adherent of the Shāfiᶜī doctrine, continues the polemic against *istiḥsān*. In his outstanding treatise *al-Mustaṣfā*, Ghazālī slots *istiḥsān* under the topic of *al-Uṣūl al-Mawhūma* (Illusory Principles) and proposes three distinct definitions of *istiḥsān*. The first definition describes *istiḥsān* as "something which emerges involuntarily to the mujtahid's understanding (*al-fahm*)."[140] The second is "an indication coming up in the mind of the mujtahid which he cannot articulate nor bring out in the open."[141] The third is "something which is corroborated by an indication (*dalīl*) from the revealed texts."[142]

Ghazālī vehemently attacks the first definition and refuses its validity as a legitimate source of law since consensus prohibits the scholar from ruling according to

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[136] Ali, *Qurᵓān* (17: 36), 704.

[137] Ibid. (4: 59), 198.

[138] Ibid. (42: 10), 1307.

[139] Shīrāzī, *Lumaᶜ*, II, 969-72.

[140] Ghazālī, *Mustaṣfā*, I, 274.

[141] Ibid., 281.

[142] Ibid., 282-83.

his inclination and desire and without guidance from the sources of law. This version of *istiḥsān*, he adds, is used by laymen who, unlike scholars, have no ability to exercise *ijtihād* or use detailed sources of law.[143] Ghazālī relegates the second definition as illusory and assumptive. In this instance of Abū Ḥanīfa's legal norm on an unclear case of adultery, Ghazālī admonishes the jurist. He insists that decidedly more proof is needed before you can arbitrarily punish an adulterer. Ghazālī favors the third definition and deems it acceptable. He takes the voluntary contribution of alms (*ṣadaqa*) as an illustration. By way of analogy, all one's goods should be given as alms when one states that what is mine is alms, however, Abū Ḥanīfa's *istiḥsān* resorts to a specific Qurʾānic verse allowing the individual to limit his almsgiving to a specific amount called *zakāt*.[144] Ghazālī argues, however, that if we have already based our legal solutions on the revealed texts, why do we not refer directly to them without resorting to *istiḥsān* ? As Kerr maintains that "besides the hidden *qiyās* there were other cases to which the term was sometimes applied, in which nothing really more than an intelligent interpretation of the revealed sources was involved [such as] when, for example, an analogy is avoided by restricting the application of the original rule by means of another text." Kerr continues describing Ghazālī's argument that this is not *istiḥsān* "but simply a correct adjustment of two seemingly conflicting texts."[145]

In addition to criticizing the definition of *istiḥsān*, Ghazālī attacks the Ḥanafī use of sources. Responding to both "And follow the Best that which was revealed to you

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[143] Ibid., 275-76.

[144] Ibid., 283.

[145] Kerr, *Reform*, 90. In line with Ghazālī, Shāṭibī remarks that if *qiyās* has already been abandoned due to another text (*dalīl*) there is no need to call it *istiḥsān*, since the reference is the text itself. Abū Isḥāq Ibrāhīm al-Shāṭibī, *al-Iʿtiṣām*, II, 2nd edn., ed. Aḥmad ʿAbd al-Shāfī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1991), 369.

from your Lord"[146] and "Those who listen to the Word, and follow the best of it,"[147] Ghazālī explains that the true meaning is to follow the guidance of the sources. If not, it would be similarly valid to consider the polemic against *istiḥsān* as a form of *istiḥṣān* as well.[148] As for the Prophetic tradition, it cannot be considered as a *ḥujja* (argument). First, because it is narrated by one traditionist only (*khabr wāḥid*). Second, the statement "What is deemed good by Muslims" contains two different meanings. If the whole Muslim *umma* is intended (*ijmāᶜ*), then it is obvious that the *umma* would never agree on something without evidence. While *ijmāᶜ* itself is recognized by the Prophetic tradition as a reliable argument (*ḥujja*). However, if the verse addresses every single Muslim, uneducated laymen can apply *istiḥsān*, thus limiting the value of learned jurists and theoreticians. Thirdly, the companions prohibited the use of *istiḥsān* without evidence since it is often founded on both internal and external appearance. If one, for instance, says "I decide such ruling for such a case because I prefer it (*liʾannī istaḥsantuhu*). The companions would undoubtedly reject his decision. They would say "Who are you? What is your authority to judge a legal norm by your preference." Even Muādh [b. Jabal] when sent out to Yemen, never said "*ʾinnī astaḥsinu*," rather, he merely recited *al-Kitāb*, *al-Sunna* and *al-ijtihād*.[149]

Although the following century witnessed further objections to the Ḥanafī definition of *istiḥsān*, the Shāfiᶜī's author, Abū al-Ḥasan ᶜAlī al-Āmidī (d. 630/1233), attempted to minimize the controversy. He begins his deliberation by presenting the

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[146] Ali, *Qurʾān* (39: 55), 1254.

[147] Ibid. (39: 18), 1241.

[148] Ghazālī, *Mustaṣfā*, I, 277.

[149] Ibid., 278-79.

discrepancy between jurists concerning the theory of *istiḥsān*. The Ḥanafīs and Ibn Ḥanbal, Āmidī tells us, accept the theory, but other jurists reject it. The rejection is apparently supported by Shāfiʿī's statement "Whoever utilizes *istiḥsān* arrogates to himself the role of legislator" (*man istaḥsana faqad sharraʿa*).[150] Āmidī makes it clear that all jurists agree on the invalidity of *istiḥsān* which operates on arbitrary opinion. When dealing with the definition that *istiḥsān* is "an indication coming up in the mind of the mujtahid which he cannot articulate nor bring out in the open," Āmidī arrives at a different conclusion from Ghazālī. Essentially, if such indication is still doubtful, whether it is supported by definitive evidence (*dalīl muḥaqqaq*) or merely by delusion, no single jurist should support it. If, on the other hand, the indication is unequivocally backed by textual evidence (*ʾadilla sharʿiyya*), all parties will be required to accept it.[151] For Āmidī, the problem is whether such an act constitutes *istiḥsān*.[152] When considering the definition that *istiḥsān* is using the stronger of two analogies, Āmidī asserts that since the latter finds support from the revealed texts or customs sanctioned by consensus, nobody should find any repugnance in accepting it.[153] Āmidī then examines several cases of valid *istiḥsān* expounded by the Ḥanafīs. He also discusses different definitions offered by jurists as well as the Shāfiʿī reaction towards the Ḥanafī use of verses, traditions and *ijmāʿ*.[154] Having explored the development of *istiḥsān* in the post-formative period, one can conclude that its definition and application was on the

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[150] Āmidī, *Iḥkām*, III, 209; Weiss, *Search*, 672.

[151] Ibid., 211. The examples being given here are customs at the time of the Prophet and of the Companions which were established by consensus. See Shawkānī, *Irshād*, 241.

[152] Ibid.

[153] Ibid.

[154] Ibid., 212-15.

threshold of refinement and reconciliation due to the efforts of jurists like Ibn Taymiyya and Shāṭibī.

Unlike the Shāfiᶜīs and Bājī, Shāṭibī (d. 790/1388) of other Mālikī jurist also defended the validity of *istiḥsān* by declaring that the proponents of this theory acknowledge the primary purpose of *shāriᶜ* (law giver).[155] The application of *istiḥsān* has been attacked as functioning without the required proofs (*muqtaḍā al-ʾadilla*) needed in a case of judicial matters. However, this is not true since the proponents of *istiḥsān* always takes the required proofs and their consequences into account. *ᶜAzl* (coitus interruptus) and *inzāl* (normal intercourse) are used by Shāṭibī as illustrations. Both sexual practices can result in pregnancy. In such cases, *istiḥsān* concludes that an embryo can likely result from *inzāl*, whereas *ᶜazl* is much less possible. Shāṭibī hypothetically states, "If the outcome of a legal norm has not been considered while searching for proof, then it would be impossible to distinguish between the nature of *ᶜazl* and *inzāl*."[156] However, although he accepts *istiḥsān* as promulgated by the Ḥanafīs, Shāṭibī attempts to expand its scope by considering the role of *maṣlaḥa*.

The concept of *maṣlaḥa* as illustrated by Shāṭibī, incorporates three interrelated components: *ḍarūrī* (absolutely necessary), *ḥājī* (expedient) and *takmīlī* (supplementary), occasionally called *taḥsīnī* (for bettering morals). It is important to note that Shāṭibī is not the first jurist to introduce these three components. In fact, Ghazālī had described the same composition.[157] These components always went hand in hand with respect to the application of the law. Shāṭibī believes that the

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[155] Shāṭibī, *Muwāfaqāt*, IV, 149.

[156] Ibid., 151-52.

[157] Ghazālī, *Mustaṣfā*, I, 287-90.

implementation of *qiyās* in cases of absolute necessity[158]may, at times, lead to hardship and difficulty. Thus, an exception should be made to avoid presenting excessive difficulties. This exception might also be applied in the cases of *ḥājī*, [159] and *takmīlī*.[160] A number of Shāṭibī's cases bear a strong resemblance to the Ḥanafī cases. Hence, Hallaq's assessment that "Although cases of *istiḥsān* and *istiṣlāh* were viewed as separate and different in character, there was indeed no clear cut boundary line between them. In fact, there is much truth in the accusation that certain schools who opposed the reasoning methods of one or the other of these principles used them, but under a different cover."[161]

Thus, *istiḥsān* was carefully and thoughtfully developed in the post-formative period. During this period, Ḥanafī jurists worked diligently to redefine the concept of *istḥsān. Istiḥsān* was no longer an arbitrary opinion but a legal method that relied on

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[158] Such is supposed to be the case in the following five instances called *al-kulliyyāt al-khams* : (a) preservation of religion(the killing of the apostates and killings during a holy war); (b) preservation of life (the supply of food, clothes and house); (c) preservation of the offspring (recommending marriage and prohibiting adultery); (d) protection of property (prescriptions like the cutting off one's hand for theft); (e) preservation of reason (the prohibition of alcoholic drinks). Further explanation, see Shāṭibī, *Muwāfaqāt*, IV, 20-1.

[159] The cases strongly tied to *al-kulliyāt al-khams* are with respect to religion, the permission (*rukhṣa*) to perform *tayammum* for ritual purification, shortening (*qaṣr*) of praying, lifting religious duty for those who are in a sate of unconsciousness, praying by sitting instead of standing; with respect to the preservation of life, it is permissible to eat carrion; with respect to the preservation of offspring, the lawfulness of a marriage without mentioning the dowry, permitting divorce and the like; with regard to the protection of property, it is permitted to perform the *salam* contract, a right of pre-emption (*shufʿa*), etc.; with regard to the preservation of reason, the punishment is lifted for those in a state of intimidation (*ikrāh*) or fright (*khawf*). Ibid., 22-3.

[160] The cases are related to inculcating good morals and habits; they also include being well-dressed, having a good relationship with others, modesty and so forth. Ibid., 23.

[161] Hallaq, "Considerations," 682.

primary texts. Similarly, the justification of *istiḥsān* as a part of *qiyās*, a *qiyās khafī*, by later Ḥanafī jurists called for cautious application. However, the listed examples suggests that the scope of *istiḥsān* was beyond serious restrictions. Accordingly, it is difficult to accurately conclude that *istiḥsān* was a part of *qiyās* or an entirely distinct methodology.

In this study, a number of striking elaborations on *istiḥsān* during the post-formative period have been touched upon. However, Ibn Taymiyya's contribution has remained unexamined, a subject which will be analyzed in the second chapter.

CHAPTER TWO

IBN TAYMIYYA'S THEORY OF *ISTIḤSĀN*

In the previous chapter, an outline of the development of the theory of *istiḥsān* in the early Islamic period, with its subsequent rationalization in the post-formative period was presented. By Ibn Taymiyya's period, the concept of *istiḥsān* had been repeatedly interpreted by jurists and disciples from various schools.[1] This controversy intrigued Ibn Taymiyya and convinced him to contribute to the ongoing debate.[2] Specifically, Ibn Taymiyya contended that the expositions offered by previous jurists concerning the interrelated principles of *istiḥsān*, *qiyās* and *takhṣīṣ al-ʿilla* were questionable and unclear. He maintains that "there is urgent need for examining them with respect to many questions of the sacred law, its fundamental principles as well as its general application."[3]

The ramification of the *istiḥsān* debate were not simply theoretical; Ibn Taymiyya believed a number of societal traits were being affected. This is evident in his various texts which examine the relationship between legal issues and contemporary society. The theory of *istiḥsān*, as Ibn Taymiyya argues in his treatise, needs re-examination.

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[1] Victor E. Makari, *Ibn Taymiyyah's Ethics: The Social Factor* (Chico, California: Scholars Press, 1983), 85.

[2] Generally speaking, G. Makdisi remarks, "Ibn Taymiyya's works are indispensable for the study of the development of Islamic religious thought up to the fourteenth century; and this is due both to the fact that he stands among the greatest scholars of Islam, as well as to the progress which had been made in the methods and technique of scholarship by the time he had begun to make his contributions." See introduction of Ibn Taymiyya's *Masʾalat* by Makdisi, 453.

[3] Ibid., 446.

This chapter will endeavor to present a comprehensive portrayal of Ibn Taymiyya's contribution towards this debate. In this respect, an important question poses itself: did Ibn Taymiyya's concept of *istiḥsān* offer a different definition and composition in comparison with previous arguments or was it simply a regurgitation of previous work? Does Ibn Taymiyya propose a new understanding of *istiḥsān* or does he merely reiterate previous ones? To answer these questions we shall set forth Ibn Taymiyya's definition of *qiyās*, *istiḥsān* and *takhṣīṣ al-ʿilla*.

A. Definitions

Qiyās

Qiyās is one of the sources of Islamic law sanctioned by consensus and acknowledged by the four schools of law.[4] Etymologically, the word *qiyās* is a noun derived from the Arabic root *Q-Y-S*, meaning "to measure, to draw analogous conclusion or to correlate."[5] In its juristic sense, *qiyās* is often defined as "the method by which the principles established by the Qurʾān, *sunna*, and consensus are to be extended and applied to the solution of problems not expressly regulated therein."[6]

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[4] The reason for restricting the authority of *qiyās* is due to some schools, such as the Ẓāhirī, vehemently refuted *qiyās* as a source of Islamic law.

[5] Cowan, *Hans Wehr Dictionary*, 804.

[6] Coulson, *History*, 60. A variety of definitions has been offered by each school of law. The Ḥanafīs define *qiyās* as "an extension of law from the original text to which the process is applied to a particular case by means of *ʿillat* [a cause], which cannot be ascertained merely by interpretation of the language of the text." The Mālikīs perceive *qiyās* as "the accord of a deduction with the original text in respect of the effective cause [*ʿilla*] of its law." The Shāfiʿīs suggest "the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the effective cause of its law." Abdul Rahim, *The Principles of Muhammadan Jurisprudence* (London: Luzac & Co., 1911), 138. It must also be remembered that the definition of *qiyās*, as noted in a footnote of chapter one, always varies from one jurist to another and cannot be isolated

Hence, a legal norm (*ḥukm*) of a new case can be offered by extrapolating from a previous, similar case that is mentioned in the revealed texts (*naṣṣ*).

The implementation of *qiyās* usually requires four components: *aṣl* (original case), *farᶜ* (new case), *ᶜilla* (cause) and *ḥukm* (legal norm).[7] To illustrate this, let us look at the case of drinking *khamr* (wine). According to the revealed texts, wine (original case) is forbidden due to its intoxicating quality (cause). In applying *qiyās*, every kind of beverage (new case) which contains the same intoxicating quality (cause) becomes forbidden (legal norm).

In order to clarify Ibn Taymiyya's understanding of *istiḥsān*, we first have to examine his approach to *qiyās*. As shown in *al-Qiyās fī Sharᶜ al-Islāmī*, Ibn Taymiyya presents *qiyās* as a two-fold category encompassing *qiyās ṣaḥīḥ* and *qiyās fāsid*.[8] However, he acknowledges the difficulty in distinguishing between the two. Only a qualified jurist, intricately familiar with the *sharᶜ* and its purpose, is capable of making such a distinction.[9] Of the two types, Ibn Taymiyya offers *qiyās ṣaḥīḥ* as the more reliable. As stated by the *Sharīᶜa*, *qiyās ṣaḥīḥ* (valid analogy) can provide analogies through either two similar causes or two contradictory ones. When one deduces a similarity between two causes, it is called *qiyās ṭard* (co-extensiveness). Conversely, if

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to simple analogical reasoning. Hallaq, "Non-Analogical," 305.

[7] For a detailed explanation, see Muḥammad b. al-Ḥusayn al-Farrāʾ al-Baghdādī (Abū Yaᶜlā), *al-ᶜUdda fī Uṣūl al-Fiqh*, I, ed. Aḥmad b. ᶜAlī al-Mubārakī (Beirut: Muʾassasat al-Risāla, 1980), 175-76.

[8] Taqī al-Dīn Aḥmad b. ᶜAbd al-Ḥalīm b. Taymiyya and Shams al-Dīn b. Qayyim al-Jawziyya, *al-Qiyās fī al-Sharᶜ al-Islāmī*, ed. Muḥibb al-Dīn al-Khaṭīb (Cairo: al-Maṭbaᶜa al-Salafiyya, 1955), 6.

[9] Idem, *Majmūᶜat al-Rasāʾil al-Kubrā*, II (Cairo: al-Maṭbaᶜa al-ᶜĀmira al-Sharafiyya, 1905), 276; idem, *Qiyās*, 44.

one draws an analogy between two contradictory causes, it is called *qiyās ᶜaks*.[10] This division may substantiate Hallaq's finding that we cannot restrict the definition of *qiyās* to exclusively analogical reasoning. *Qiyās ᶜaks* is, for Ibn Taymiyya, "not only as a form of *qiyās* but also as legitimate as the undubitably analogy."[11] Furthermore, these two forms of *qiyās* appear as reflections of the justice revealed by God and the Prophet. He suggests that *qiyās ṣaḥīḥ* must have a cause (*ᶜilla*) which is inherent in the original case. The cause of the new case cannot contradict its original counterpart. Such an analogy would never contradict the *Sharīᶜa*.[12]

Qiyās between original and new cases is also considered *ṣaḥīḥ* if there is no contradictory evidence from the revealed texts. At this point, Ibn Taymiyya presents a *Sharīᶜa* model of explanation particularizing elements which go on to produce a different legal norm. He insists that this must be supplemented by a description (*waṣf*) which demands particularization with a legal norm which cannot resemble other cases. However, such a particularized description is occasionally ambiguous for some jurists. According to Ibn Taymiyya, *istiḥsān* conveniently provides a methodological solution for this problem. It restricts "the cause which has been conceived too broadly and

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[10] Idem, *Qiyās*, 6. *Qiyās ᶜaks* is, as Hallaq quotes from Baṣrī, defined as "the course of reasoning in which the converse of a given rule of a case is applied to another case on the grounds that the *ᶜillas* of the two cases are contradictory." Hallaq, "Non-Analogical," 297. For instance, if a jurist says that there is no obligation to pay almsgiving (*zakāt*) on a horse. This means on both male and female horses. The reason being that there is no obligation to pay alms on male horses and, subsequently, there should be no obligation to pay alms on female horses too. Having observed the cause, through *qiyās ᶜaks*, the jurist would say that since almsgiving is obligatory on male animals (camel, cow, sheep, etc.), so should they be on their female counterparts. Baghdādī, *ᶜUdda*, I, 177. For a detailed illustration of *qiyās ᶜaks*, see Hallaq, "Non-Analogical," 297-99.

[11] Hallaq, "Non-Analogical," 296.

[12] Ibn Taymiyya, *Qiyās*, 6.

redefines it to allow for the exceptional case."[13] This explains Ibn Taymiyya's insistence that the *Sharīᶜa* will never contradict an accurate reasoning by analogy. Any inconsistencies can be explained by faulty analogies which often go undetected by jurists.[14]

It is interesting to note Ibn Taymiyya's adamance regarding the relationship between *Sharīᶜa* and *qiyās*. In this sense, *qiyās* is not restricted by the apparent cause, as the Ḥanafī jurists had strenuously practiced with *qiyās ṭard*. Ibn Taymiyya stresses the need for jurists to contemplate the underlying purpose of legal norms, as well as the larger objectives of the *Sharīᶜa*. In doing so, a jurist can ensure that *qiyās* reflects the intention of Islamic law: promoting benefits and limiting potential harm (*jalb al-maṣāliḥ wa dafᶜ al-maḍār*).[15] In situations where the *qiyās* contradicts the *Sharīᶜa*, Ibn Taymiyya insists that the contradiction exists on a superficial level. However, the abstract intention, essentially the core, of the *qiyās ṣaḥīḥ* is in congruency with the *Sharīᶜa*.[16] This argument is deliberately addressed to Ḥanafī jurists who treated some cases of Islamic law as contradictory *qiyās* and, thus, designated them *istiḥsān*. Those cases include: purifying contaminated water (*najāsa*), the removal of impurity, the contract of *salam*,

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[13] Makdisi, "Hard Cases," 200. To accept *istiḥsān* as an exceptional method would be in line with Ibn al-ᶜArabī's thought which regards it as a priority to neglect a legal norm produced by *qiyās* on the basis of exceptional matter (*istithnāʾ*) and concession (*tarakhkhuṣ*). In a sense that *qiyās* is abandoned in favor of custom, public interest, leniency and diminishing harm. Shāṭibī, *Iᶜtiṣām*, II, 371.

[14] In Arabic, "*Falaysa fī al-sharīᶜa mā yukhālifu qiyāsan ṣaḥīḥan, lākin fīhā mā yukhālif al-qiyās al-fāsid wa inkāna min al-nās man lā yaᶜlamu fasādahu,* " Ibn Taymiyya, *Qiyās*, 7.

[15] Muḥammad Abū Zahra, *Ibn Ḥanbal: Ḥayātuhu wa ᶜAṣruhu Ārāʾuhu wa Fiqhuhu* (Beirut: Dār al-Fikr al-ᶜArabī, 1947), 275; idem, *Ibn Taymiyya: Ḥayātuhu wa ᶜAṣruhu Ārāʾuhu wa Fiqhuhu*, 2nd edn. (Beirut: Dār al-Fikr al-ᶜArabī, 1958), 476-77.

[16] Ibn Taymiyya, *Qiyās*, 6-7.

the contract of *ijāra*, *muḍāraba*, *muzāraᶜa*, *musāqāt*, *ḥawāla* and the validity of continuing fasting after absentmindedly eating.[17] This will be further analysed when we discuss Ibn Taymiyya's critique of the Ḥanafī model of *istiḥsān*. Nevertheless, suffice it to say that Ibn Taymiyya vigorously promoted the congruency of *qiyās* with Islamic law while vehemently objecting to the Ḥanafī idea of *mukhālifal-qiyās* as *istiḥsān*.

Istiḥsān and Takhṣīṣ al-ᶜIlla

In chapter one, we discussed the various definitions of *istiḥsān* provided by the four schools of law. In *Masʾalat al-Istiḥsān*, Ibn Taymiyya states that *istiḥsān* is often perceived as contradictory to *qiyās* on the basis of a textual evidence (*dalīl*).[18] Indeed, with respect to its etymology and technical meaning, we have noticed that jurists did not agree. Ibn Taymiyya discusses at least three major groups who emerged to participate in the debate. The first group represented by Dāwūd, his followers of the Ẓāhirī school, a number of Muᶜtazilīs, and the Shiᶜīs, totally refute the concept of *istiḥsān*. Interestingly, they maintain that neither *qiyās* nor *istiḥsān* can be accepted as valid legal proofs.[19]

On the other hand, Abū Ḥanīfa and his disciples approve and implement *istiḥsān*. This was done as a direct contrast to *qiyās*.[20] Moreover, there is a third group

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[17] Ibid., 6.

[18] Ibn Taymiyya, *Masʾalat*, 454.

[19] Ibid. For instance, Dāwūd, in his *Uṣūl*, rigorously pronounces that "Making a judgement by *qiyās* is not obligatory and resorting to *istiḥsān* is not permitted." As quoted from Subkī's *al-Ṭabaqāt al-Kubrā*, II by M. Muṣṭafā Shalabī in his *Taᶜlīl al-Aḥkām* (Cairo: Maṭbaᶜat al-Azhar, 1947), 333. For a detailed exposition, see Abū Muḥammad ᶜAlī b. Aḥmad b. Ḥazm al-Andalusī, *Mulakhkhaṣ Ibṭāl al-Qiyās wa al-Raʾy wa al-Istiḥsān wa al-Taqlīd wa al-Taᶜlīl*, ed. Saᶜīd al-Afghānī (Damascus: Maṭbaᶜa Jāmiᶜa, 1960).

[20] Ibn Taymiyya says that Ibn Ḥanbal stated that whenever the followers of Abū

of scholars who applied *istiḥsān* inconsistently. This group includes prominent jurists such as Mālik, Shāfiᶜī and Ibn Ḥanbal.[21] While generally rejecting its exclusive use, Mālik and others occasionally apply *istiḥsān* in their arguments.

Typical of Muslim scholarship, Ibn Taymiyya begins his study by presenting previous definitions and approaches. He discusses the methods used by previous Ḥanbalī jurists such as Abū Yaᶜlā (d. 458/1066), his disciples Abū al-Khaṭṭāb (d. 510/1116) and Ibn ᶜAqīl (d. 513/1119). One of the approaches, in fact, is in line with the theory advocated by the Ḥanafī jurists: abandoning a legal norm in favor of another which is more appropriate. These jurists contend that the basis for *istiḥsān* is the Qurʾān, Sunna or *ijmāᶜ*. Ibn Taymiyya, apparently, had little difficulty with this approach.[22] With these definitions in hand, Ibn Taymiyya proceeds to apply them to realistic situations.

By referring to the Qurʾān, Ibn Taymiyya discovers that a Muslim, while traveling, is permitted to use non-Muslims as witnesses for his bequest (*waṣiyya*).[23] As

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Ḥanīfa decided a case to be contrary to *qiyās*, they would say "We prefer this (*nastaḥsinu hādhā*) and we leave *qiyās* behind." They affirm this as the correct *istiḥsān*. See Ibn Taymiyya, *Masʾalat*, 454. However, it seems that Bazdawī and Sarakhsī's inclusion of *istiḥsān* in *qiyās* (*qiyās khafī*) is disregarded by Ibn Taymiyya.

[21] Ibid. In chapter one, we have already mentioned Mālik, Shāfiᶜī and Ibn Ḥanbal's inclination to use the term *istiḥsān* or other related terms. Ibn Ḥanbal described by his adherents as an opponent of the theory of *istiḥsān*. This is implied from his statement that "I adopt every related *ḥadīth* and I do not apply *qiyās* to it."

[22] Kamali, in his analysis of the Ḥanbalī concept of *istiḥsān*, associates the definition with the teachings of the Qurʾān and Sunna. In this connection, he sets forth Ibn Taymiyya's view that "*istiḥsān* is the abandonment of one legal norm (*ḥukm*) for another which is considered better on the basis of the Qurʾān, Sunna, or consensus." See Kamali, *Principles*, 249.

[23] "O ye who believe! When death approaches any of you, (take) witnesses among yourselves when making bequest, two just men of your own (brotherhood) or others from outside if ye are journeying through the earth." Ali, *Qurʾān* (5: 106), 275.

for the Sunna, Ibn Taymiyya discusses a case that deals with a person who usurps a piece of land and then cultivates it. In this case, *istiḥsān* rules that the crop belongs to the person (the owner of the land) paying the labor expenses of planting the crops.[24] However, *qiyās* contends that the crop belongs to whoever did the planting. Referring to consensus, the exchange of silver coins (*darāhim*) for gold coins (*danānīr*) which are measured by weight is permissible, though *qiyās* indicates its prohibition.[25]

Another approach tackled by Ibn Taymiyya is the particularization of the cause (*takhṣīṣ al-ʿilla*). This notion is based on seeing a pressing need (*ḥāja*) as a particularization; this understanding was not rejected by jurists. Jurists define *takhṣīṣ al-ʿilla* as "the presence of a decisive description (*ṣifa muʾaththira*) in the cause which cannot produce a legal norm due to an impediment."[26] Examples include: permission for a starving Muslim to eat an unlawfully slaughtered animal (*mayta*) and allowing a sick person to pray while sitting. The problem arises, however, when no pressing circumstances exist to distinguish *istiḥsān* and *qiyās*.[27] As Makdisi asserts,

> Ibn Taymiyya indicated that there was no controversy over the validity of this type of *istiḥsān* if, in a case, there was a meaningful basis (*maʿnan*) on which to

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[24] The Prophet said: "Whoever plants in other people's land, the crop belongs to the owner of the land and he is responsible for the expenses." Ibn Taymiyya, *Masʾalat*, 457.

[25] Ibid. For example, the payment of blood money during the period of the *khulafāʾ al-rāshidūn*, the Syrians and Egyptians, who utilized gold in their commercial transaction, were asked to pay a fine about a thousand gold coins, while Iraqis, whose main currency was silver, were asked to pay about twelve thousand silver coins. This is, in fact, a custom sanctioned by consensus. Mālik, *Muwaṭṭaʾ*, II, 850; Muhammad Y. Faruqi, "Consideration of *ʿUrf* in the Judgments of the *Khulafāʾ al-Rāshidūn* and the Early *Fuqahāʾ*," *AJISS*, 9, no. 4 (1992): 485.

[26] M. Aʿlā b. ʿAlī al-Tahānawī, *Kashshāf Iṣṭilāḥāt al-Funūn*, I (Calcutta, 1862), s. v. "*takhṣīṣ al-ʿilla*," 431.

[27] Ibn Taymiyya, *Masʾalat*, 458.

> distinguish between the *istiḥsān* and the reasoning by analogy. ... However, where there was no necessity nor any other justified basis on which the domain of *istiḥsān* could be separated from that of reasoning by analogy, there was a controversy. It developed in the form of a dispute over the meaning of *istiḥsān* as the limitation of the cause (*takhṣīṣ al-ʿilla*).[28]

On the basis of this proposition, some jurists rejected the application of the particularization of the cause. Nevertheless, advocates of this theory asserted that such a situation necessitated a particularization of the cause. Ibn Taymiyya interpreted the objective of *istiḥsān* as the particularization of the cause.[29] The proponents of the particularization of the cause defined it as the presence of the cause in conjunction with an absence of any legal norm (*ḥukm*) due to impediments.[30] More precisely, the Qurʾān and the Sunna often offered legal norms without mentioning the cause (*ʿilla*). Jurists would then ascribe a cause to them from other similar cases. If this happens, *qiyās* dictates that the legal norm of the original case should be applied. However, Makdisi maintains that applying a legal norm in cases containing an impediment (*māniʿ*) is impossible. When this occurs, "the cause is found to exist in the new case, but the legal norm of the original case is not applied."[31]

Hence, one can safely conclude that Ibn Taymiyya was a proponent of *istiḥsān;* specifically, he endeavored to incorporate the particularization of the cause. As Hallaq puts it, "Ibn Taymiyya (d. 728/1328), a staunch advocate of *istiḥsān*, argued that the only dividing line between *qiyās* and *istiḥsān* is that the former does not require the

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[28] Makdisi, "Legal Logic," p. 82.

[29] Ibn Taymiyya, *Masʾalat*, 458.

[30] In Arabic, "*Takhalluf al-ḥukm li māniʿ maʿa wujūd al-ʿilla*," Bukhārī, *Kashf*, IV, 61.

[31] Makdisi, "Legal Logic," 82.

particularization of its *ʿilla* whereas the latter does."[32]

If we consider the previously noted case of someone usurping another's lands and then cultivating it, we can see that its cause through *istiḥsān*, was particularized by a cause from a Prophetic tradition. On this basis, a different legal norm is being produced. Jurists, such as Sarakhsī, explain that *takhṣīṣ al-ʿilla* occurs when the cause (*ʿilla*) cannot produce a legal norm because of an impediment (*māniʿ*). To eliminate any such impediments, the jurist must particularize the cause of the case.[33] Take, for instance, the prohibition of eating food partially consumed by predators; however, this interdiction does not include predatory birds (falcons, hawks, etc.). Jurists argue that a bird's beak, consisting of bone matter, is pure. This argument is supported by textual evidence (*dalīl*). Through particularization, they contend that the food touched by such material is clean and, therefore, lawful.

Having provided the definitions of *qiyās, istiḥsān and takhṣīṣ al-ʿilla*, we can see that Ibn Taymiyya attempted to provide a clear presentation of *istiḥsān* that never contradicts *qiyās;* specifically, he argued that *istiḥsān* can be determined through *takhṣīṣ al-ʿilla.* We can conclude that Ibn Taymiyya's *istiḥsān* differs in its definition and composition from Bazdawī's and Sarakhsī's; however, these were differences of procedure and, in fact, their legal norms were often similar. Because of the centrality of *takhṣīṣ al-ʿilla* in Ibn Taymiyya's presentation, we need to address the various arguments regarding its implementation.

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[32] Hallaq, "Considerations," 683.

[33] Sarakhsī, *Uṣūl*, II, 208; Hallaq, *Islamic Legal*, 161.

B. The Controversy Around *Takhṣīṣ al-ʿIlla*

As mentioned earlier, there is considerable debate regarding the definition of *istiḥsān* as the particularization of the cause. Its proponents include Karkhī, Jaṣṣāṣ[34] and Ibn Taymiyya. As Hallaq points out: "A number of Ḥanafī and Ḥanbalī lawyers held that *istiḥsān* emanates from a special group of *ʿilal* which require particularization (*takhṣīṣ*)."[35] On the other hand, jurists such as Sarakhsī, Bazdawī and Baṣrī reject the idea of *takhṣīṣ al-ʿilla.*

According to Hallaq, although the idea of particularization is considered admissible by some jurists, the majority continue to reject its viability. Particularization results when a jurist strongly suspects an unexpected condition interfering with the relationship between the cause and the legal norm; consequently, he is forced to consider the unexpected condition in his legal analogy. To be valid, such a condition must find support in the revealed texts. Hallaq maintains that the interference of this condition necessitates the particularization of the cause. The "new" condition "changes a part of the content of the *ʿilla* or some of its properties." As a result, the legal norm reflects the

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[34] Those who accept the view say that it is possible to particularize the range of application of a legal cause (*ʿilla*). However, this kind of particularization often clashes with the required unconditional recurrence of the cause, while the judgement exists whenever the cause exists and will disappear when the cause also disappears. The following example given by Jaṣṣāṣ is the case of particularization of the cause in this context. There is a general legal norm that Muslims are prohibited to consume the meat of unlawfully slaughtered animals. However, under certain conditions such a consumption is allowed for Muslims. Jaṣṣāṣ then contends that the cause can only be so particularized in the religious sciences, while in the rational sciences no such particularization can be performed. Nabil Shehaby, "*ʿIlla* and *Qiyās* in Early Islamic Legal Theory, "*JAOS*, 102, no. 1 (1982): 83.

[35] Hallaq, "Considerations," 683.

altered cause.[36] The illustration of this issue can be seen in the case of consuming meat of an unlawfully slaughtered animal (*mayta*). According to the revealed texts, this is forbidden. But with extenuating circumstances, this prohibition is repealed. The danger of starvation permits one to eat an unslaughtered animal since, according to Islamic law, the preservation of human life is critical. In this case, hardship or starvation is the condition that particularizes the original cause which, subsequently, results in a legal norm that is might contradict the ruling of a *qiyās*.[37] By adopting this method, a jurist comes intricately close to the Ḥanafī and the Ḥanbalī approaches of *istiḥsān*, that is to say "abandoning a judgement in favor of another."[38]

Unlike his predecessors, Karkhī and Jaṣṣās, who admit the particularization of the cause, Sarakhsī denies any such approach. He argues that sanctioning such action is akin to betraying the way of the *ahl al-sunna*. Thus, Sarakhsī refuses to associate *istiḥsān* with the particularization of the cause. He also argues that the particularization corrupts the cause and distorts its relationship with *istiḥsān*. For Sarakhsī, *istiḥsān* was simply the jurist's preference for one type of *qiyās* over another. Furthermore, he conjectures that proponents of *takhṣīṣ al-ʿilla* are also adherents of Muʿtazilī.

Sarakhsī cites the Ḥanafī acceptance of *takhṣīṣ al-ʿilla* since it does not contradict the path of the predecessors (*salaf*) and the schools of *ahl al-sunna*.[39] He refutes this by

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[36] Ibid.

[37] Ibid.

[38] Ibid.; Ibn Taymiyya, *Masʾalat*, 457-58.

[39] Sarakhsī, *Uṣūl*, II, p. 208. In this respect, Nasafī (d. 710/1310) mentions that among the Ḥanafīs who advocate *takhṣīṣ al-ʿilla* are Karkhī, Jaṣṣāṣ and Qāḍī al-Imām Abū Zayd. Ḥāfiẓ al-Dīn al-Nasafī, *Kashf al-Asrār Sharḥ al-Muṣannif ʿalā al-Manār fī al-Uṣūl*, II (Būlāq: Maṭbaʿat al-Kubrā al-Amiriyya, 1316/1898), 175.

arguing that the cause only becomes valid if it is extended to new cases. Otherwise, the cause would not have the corresponding legal norm. If we are to accept an impediment (*māniʿ*) as a part of the cause, how can a jurist possibly limit other part of the remaining impediments within the same cause?[40]

Sarakhsī then comments that if such an argument is followed, it suggests that "since impediments necessitate a ruling different from that which would have been generated by the otherwise integral *ratio* (in the original *qiyas*), allowing for them would amount to having a presumably sound and valid *ratio* but without this latter generating its own ruling in new cases."[41] The particularization of the cause, if the cause is lacking impediments, will result in a different ruling from a case where impediments do exist. Moreover, any impediments must be bolstered by the revealed texts. Otherwise, "it would not be fit to limit a *ratio* [cause] of a higher epistemic value."[42] According to Sarakhsī, if both the cause and the impediment are equal in strength, then the latter can independently function and may be extended as a cause to new cases. On the ground of this argument, Sarakhsī concludes that both cause and impediment must be independent and cannot be intermingled in a case. If the impediment is stressed "to limit the scope of the former, thereby changing its ruling altogether, then this would amount to abrogating a *ratio* [cause] by another -- an idea no theorist tolerates."[43]

Sarakhsī continues contestation by arguing that *takhṣīṣ* linguistically differs from

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[40] Hallaq, *Islamic Legal*, 162.

[41] Ibid.

[42] Ibid.

[43] Ibid., 163.

munāqaḍa. Linguistically, *naqḍ*[44] is the annihilation of a previous concept with the implementation of a new one. *Takhṣīṣ*, on the other hand, is used to distinguish the object being particularized from the case. Therefore, can one assume that *takhṣīṣ* is equivalent to *naqḍ* ? Legally speaking, a *takhṣīṣ* made in the Qurʾānic text or Sunna is allowed over other texts in Islamic law: contradicting it (*tanāquḍ*) is absolutely prohibited. *Ijmāʿ* holds that *qiyās* can be relegated if there are superior arguments from the revealed texts (*naṣṣ*), consensus or necessity. These approaches belong to the category of *takhṣīṣ*, not *munāqaḍa*.[45] By highlighting these arguments, Bazdawī stresses the discrepancy between *takhṣīs* and *munāqaḍa*. Bazdawī contends that *takhṣīṣ* cannot be subsumed under *munāqaḍa* since *takhṣīṣ* is an integral component of every mujtahid's justification. Essentially, Bazdawī is arguing that by paralleling *takhṣīṣ* and *munāqaḍa*, you are permitting the concurrent existence of both prohibition and sanction.[46]

Likewise, Ibn Taymiyya asserts that *munāqaḍa* must offer two different opinions i.e., certainty (*ithbāt*) and negation (*nafyī*). Therefore, this can lead to two cases with diametrically opposed legal norms. Both are considered valid since every mujtahid is considered a right doer (*muṣīb*) and is never prone to whimsical rulings.[47] It should be noted that both Bazdawī and Sarakhsī do not dispute the concept of *takhṣīṣ al-ʿilla* in

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[44] Ibn ʿAqīl defines *naqḍ* as the existence of the cause (*ʿilla*) with the absence of a legal norm. It contradicts the so-called *taʾthīr*, which is the existence of legal norm without its cause. This is the explanation of those who reject *takhsīṣ al-ʿilla*. Abū al-Wafāʾ ʿAlī b. ʿAqīl, *Kitāb al-Jadal ʿalā Ṭarīqat al-Fuqahāʾ* (Jīza: Maktabat al-Thaqāfat al-Dīniyya, 1980), 56.

[45] Sarakhsī, *Uṣūl*, II, 208; Bukhārī, *Kashf*, IV, 59.

[46] Bukhārī, Ibid.

[47] Taqī al-Dīn Aḥmad b. ʿAbd al-Ḥalīm b. Taymiyya, *al-Qawāʿid al-Nūrāniyya al-Fiqhiyya*, ed. M. Ḥāmid al-Fiqī (Cairo: Maṭbaʿat al-Sunnat al-Muḥammadiyya, 1951), 127-28.

itself, but, rather, heatedly contest its association with *istiḥsān.*

The idea of *takhṣīṣ al-ᶜilla* was first introduced by the Ḥanafī Abū al-Ḥasan al-Karkhī (d.341/952). In addition, Bukhārī's *Kashf al-Asrār* offers a detailed exposition on the conflict over the theory of *takhṣīṣ al-ᶜilla.* Bukhārī divides the cause into two categories: *ᶜilla manṣūṣa* and *ᶜilla mustanbaṭa.* The core conflict is discussed in terms of particularizing the extracted cause (*ᶜilla mustanbaṭa*).

Unlike Sarakhsī, Bukhārī includes Qāḍī Abū Zayd and Abū Bakr al-Rāzī as proponents of *takhṣīṣ al-ᶜilla;* specifically, he comments on how they permitted the particularization of the extracted cause. Although not considered ardent advocates, Mālik, Ibn Ḥanbal and many Muᶜtazilīs recognize its validity. The Shāfiᶜī school represents the main body of opposition.[48] Bukhārī maintains that jurists who reject the particularization of extracted cause [which, according to Baṣrī, includes particularization of the cause], permit the particularization of a textually mentioned cause (*ᶜilla manṣūṣa*).[49] Others, like Mukhtār ᶜAbd al-Qāhir al-Baghdādī and Abū Isḥāq al-Isfarāʾīnī, reject both models of particularization.[50]

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[48] Bukhārī, *Kashf,* IV, 57-8

[49] Ibid., p. 58; Abū Ḥusayn Muḥammad al-Baṣrī, *al-Muᶜtamad fī Uṣūl al-Fiqh,* II, ed. M. Hamidullah, et al (Damas: Institut Français de Damas, 1964-1965), p. 822. Those who allow the particularization of a textually mentioned cause cite the example of amputation for theft and fornication. They say that God has made the act of theft and fornication as the cause for the cutting of the hand and the *ḥadd* punishment. However, we sometimes find that punishment is not exacted. Similarly, God has made the presence of the enemy and hatred as a cause for prohibiting drinking wine and gambling. Here, the cause continues while the legal norm stays behind. Therefore, if particularization of *ᶜilla manṣūṣa* is permissible, why is *ᶜilla mustanbaṭa* not treated in the same manner? Bukhārī, Ibid, 58.

[50] Ibid.

The Shāfiᶜī Abū al-Ḥusayn Muḥammad al-Baṣrī (d. 436/1044), who is also a Muᶜtazilī, extensively discusses this topic (*takhṣīṣ al-ᶜilla*) in a 14 page section of his *Kitāb al-Muᶜtamad fī Uṣūl al-Fiqh*. There is no discussion of any association between *takhṣīṣ al-ᶜilla* and *istiḥsān* in this chapter. However, one should note that Baṣrī provides a separate discussion for *istiḥsān* in the same source.

According to Baṣrī, it is invalid to define *istiḥsān* as a particularization of *qiyās* through the choice of the stronger element, since its advocates abandoning *qiyās* in favor of *istiḥsān*.[51] Simply put, he rejects *istiḥsān* as the particularization of the cause. Instead, he defines *istiḥsān* as "a departure from the established way of reasoning (*ijtihād*), [and] not particularizing a general rule, owing to a reason stronger than the one found in the established rule, [as] it provides a fresh evidence (*ṭārīʾ*) vis-a-vis the previous one."[52] An example is the prohibition of selling grape with raisins which have not yet been harvested.This judgement is based on an extrapolating from the *qiyās* prohibition against the sale of wet fruit. However, since the bartering of date palms and other kinds of fruit is permissible, jurists use *qiyās* to sanction the selling of grapes. Hence, the previous *qiyās* stipulating the illegality of selling grapes, is superseded. This method, as Āmidī interprets, is broader than the particularization of the cause.[53]

Baṣrī asserts that the particularizatien of the cause "is merely undermining the *ᶜilla*. When one of the *ᶜilla's* properties is cancelled due to inefficiency, and when it becomes clear that the remaining property cannot induce a judgement, the *ᶜilla* is inflicted

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[51] Baṣrī, *Muᶜtamad*, II, 839.

[52] Ibid., 840.

[53] Jamāl al-Dīn al-Isnawī, *Nihāyat al-Sūl fī Sharḥ Minhāj al-Uṣūl*, III (Cairo: Maṭbaᶜat al-Tawfīq al-Adabiyya, n.d.), 125.

with *kasr* (breakage). The inability of *ʿilla* to produce a judgement leads to its refutation (*naqḍ*)."[54] Thus, Baṣrī concludes that because particularization contains two deficiencies (*naqḍ* and *kasr*), it is not qualified to produce a legal norm. The following is an example of how particularization can distort the cause:

> If it is given that the sale of a quantity of gold for a larger quantity of the same metal is forbidden because it is measurable by weight, and if it is also given that a quantity of lead may be sold for a larger quantity, also measurable by weight, it must be assumed that the sale of lead was permitted on the basis of a *ʿilla* stronger than that on the basis of which the sale of gold was prohibited. Here, the *ʿilla* of measurability by weight was particularized in lead by the *ʿilla* of color (the whiteness of lead). Thus, in line with this analogy the sale of a quantity iron for a larger amount of the same metal would be concurrently permitted and forbidden, for being both measurable by weight and white.[55]

Hallaq comments on how these contradictory results have been adopted by Baṣrī as indicating the invalidity of particularization. Baṣrī asserts that "Had God wanted to permit the sale of metals by the exchange of unequal amount of their own kind, He would have made it explicit through a textual *ʿilla* which is transitive in character."[56] Baṣrī clarifies that unless there is evidence which indicates the absence of a legal norm, a cause can exist without its legal norm. He concludes that "it is quite possible that a *ʿilla* could have existed before God had revealed the *Sharʿ*. But since the *Sharʿi* judgement was not as yet decreed, the *ʿilla* could have existed without its judgement."[57]

Ibn Taymiyya presents his theory of *takhṣīṣ al-ʿilla* by examining the previous approaches of other Islamic jurists. Specifically, he delves into the refutation of *takhṣīṣ*

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[54] Wael B. Hallaq, "Development of Logical Structure in Sunnī Legal Theory," *DI*, 64 (1987): 55.

[55] Ibid., 55-6. For further commentary, see Baṣrī, *Muʿtamad*, II, 822-30.

[56] Ibid., 56.

[57] Ibid.

al-ᶜilla by the Shāfiᶜīs and its defense by the Ḥanafīs. Matters are further complicated by the fact that there are some divisions over this matter among the Shāfiᶜīs, the Mālikīs, and the Ḥanbalīs. Ibn Taymiyya specifically refers to scholars of the Ḥanbalī school, such as Abū Yaᶜlā and Ibn ᶜAqīl who, despite their acceptance of the theory of *istiḥsān*, refuse to accept *takhṣīṣ al-ᶜilla*. However, Abū al-Khaṭṭāb, in accordance with some Ḥanafīs, equates *istiḥsān* with *takhṣīṣ al-ᶜilla*. This view, in fact, allows the particularization of the cause inasmuch as there is textual evidence (*dalīl*).[58]

Ibn Taymiyya continues by exploring why Abū Yaᶜlā and Ibn ᶜAqīl reject *takhṣīṣ al-ᶜilla* while concurrently accepting *istiḥsān*. Abū Yaᶜlā explains this dichotomy by suggesting that the two methods are not even comparable. He asserts that Islamic law does not consider the particularization of the cause as valid since it implies inconsistency in a legal norm.[59] To highlight this inconsistency, Abū Yaᶜlā points to Ibn Ḥanbal's opinion: a *qiyās* is advisable when a case shares a number of similarities with a previous one. However, if the two cases do not exhibit a sufficient number of comparable characteristics, *qiyās* cannot be applied.[60]

Ibn Taymiyya suggests that the opponents of *takhṣīṣ al-ʾilla* believe this statement denotes a rejection of particularization; consequently, it serves as the basis of Ibn Ḥanbal's rejection of *takhṣīṣ al-ᶜilla*. According to Ibn Ḥanbal's case of *arḍ al-sawād*, *qiyās* forbids the selling of any Iraqi rural land (*arḍ al-sawād*). In this example, *takhṣīṣ al-ᶜilla* plays no role because it is indeed already a legal norm sanctioned by a

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[58] Ibn Taymiyya, *Masʾalat*, 458.

[59] Ibid.

[60] Ibid.

Prophetic tradition.[61] However, Ibn Taymiyya interprets Ibn Ḥanbal's statement differently. He contends that Ibn Ḥanbal's argument is founded on because of a textual contradiction. As a result, advocates of *takhṣīṣ al-ʿilla* offer *istiḥsān* as a viable method.[62] However, this has been severely criticized by Sarakhsī on the grounds that *istiḥsān* does not even belong in the domain of particularization of the cause. In this sense, *istiḥsān* follows the recommendations of the Qurʾān, Sunna and previous scholars (*al-ʿulamāʾ min al-salaf*).[63]

While rejecting the idea of *takhṣīṣ al-ʿilla*, Abū Yaʿlā adopts a similar approach to the Ḥanafī Sarakhsī. He argues that the proponents of *takhṣīṣ al-ʿilla* are influenced by the *uṣūl* of the Muʿtazilīs and, in fact, transgress the opinion of *ahl al-sunna.* Regarding Abū Yaʿlā and others' attack on proponents of *takhṣīṣ al-ʿilla*, Hallaq remarks that their rejection of *takhṣīṣ* is more related to theological affiliation than any legal concerns since its proponents are charged of imitating "the doctrines of the rationalist Muʿtazilis whose theology was shunned by a good number of Sunni theorists."[64]

Ibn Taymiyya's survey reveals that some jurists permit the particularization of a textually mentioned cause and deny the admissibility of an extracted one. The majority of particularization proponents assert that when the textually mentioned cause is particularized it clearly demonstrates a refutation of the cause; otherwise, it is strictly forbidden to implement *takhṣīṣ al-ʿilla.*[65] Ibn Taymiyya then makes it clear that this

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[61] Ibid., 459.

[62] Ibid.

[63] Sarakhsī, *Usūl*, II, 207.

[64] Hallaq, *Islamic Legal*, 161.

[65] Ibn Taymiyya, *Masʾalat*, 459.

dispute evolves when there is strong evidence of a cause's validity, such as effectiveness (*taʾthīr*) and affinity (*munāsaba*). However, if the dispute is solely based on drawing a similar cause (*ṭard*) where the absence of its cause is not distinguished from its effectiveness, nor is it known to be free from deficiencies, such a cause is unanimously abrogated by particularization. However, particularizing a cause on the basis of co-extensiveness, which clearly lacks logical meaning, is not disputed by any jurist or logician.[66]

According to Bukhārī, the proponents of *takhṣīṣ al-ʿilla* argue that the cause of Islamic law (*ʿilla sharʿiyya*) offers textual evidence of a legal norm ultimately derived from a specific decree from God (*bijaʿli jāʿilin*). Therefore, it is possible to have a textual documentation in one case and none in another. The absence of a legal norm in one aspect does not necessarily preclude the possibility of textual evidence. Conversely, existing textual signs do not necessitate a legal norm for every aspect.[67]

Bazdawī and Sarakhsī refuse to acknowledge any relationship between *takhṣīs al-ʿilla* and *istiḥsān*. They believe that if the particularization of the cause is applied, the cause of the original case will be erased because of the influence of fallible human reasoning. Subsequently, it is not surprising when "another source of law opposes the application of the legal norm to a new case."[68] According to Makdisi, the theory expounded by Bazdawī and Sarakhsī does not actually contradict Ibn Taymiyya's. Unless, Ibn Taymiyya adopts a new meaning for the particularization of the cause thus making it suitable as a definition of *istiḥsān*. Differing from Makdisi, Hallaq offers a

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[66] Ibid.

[67] Bukhārī, *Kashf*, IV, 58.

[68] Ibid.

more detailed analysis of the theoretical differences between Sarakhsī and Ibn Taymiyya. What is more important is that they both agreed upon "the undisputed necessity of a textual evidence in any procedure of *istiḥsān*."[69] For Ibn Taymiyya, the operation of *qiyās* by way of co-extensiveness must be based on a valid cause (*ʿilla saḥīḥa*); furthermore, this valid cause cannot contradict a text of Islamic law. If such a contradiction takes place, the text supersedes the *qiyās*.[70] Hence, Ibn Taymiyya refutes the premise that *istiḥsān* is contrary to strict analogy; he declares that a valid *istiḥsān* does not necessarily constitute a breach of valid *qiyās*. He qualifies his position by reiterating that it is illegal to digress from a valid *qiyās* in any case whatsoever.[71] Thus, Ibn Taymiyya believes his stance to be consistent with the general precepts of Islamic law. Let us proceed to Ibn Taymiyya's rationale for *istiḥsān* and its appropriate application.

C. Ibn Taymiyya's Perception of *Istiḥsān*

In defending his theory of *istiḥsān*, Ibn Taymiyya argues that it is possible that the texts of the Qurʾān or Sunna do not always provide a cause for a particular legal norm in a case. He contends that, in this situation, the cause may be determined by a) looking for an affinity in the *Sharīʿa* or b) by examining the existing types of relationship between causes and legal norms reflected from the basic principle of legal

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[69] As for their dispute on the issue of particularization, Hallaq asserts that "It seems that the difference between the two parties about particularization are, in the final analysis, trivial. Both agree that in *istiḥsān* the original *ʿilla* is replaced by another that has been also derived from the sources. But they differ as to whether the first *ʿilla* must be replaced in toto or only in part." Hallaq, "Considerations," 684.

[70] Makdis, "Legal Logic," 83.

[71] As stated by G. Makdisi in the introduction of his edited work *Masʾalat al-Istiḥsān* by Ibn Taymiyya, 447. Compare to the Arabic text page 465.

norm (*manāṭ al-ḥukm*). Human deliberation ultimately induces the meaning behind the cause in these procedures. While, ultimately the eventual legal norm cannot contradict previous texts, the cause of the new case can be particularized. In effect, the original cause may be modified or completely changed.[72]

According to Ibn Taymiyya, the key factor as to whether the cause is to be modified or completely changed is the presence of meaning (*maʿnā*). This meaning can be deduced from the *Sharīʿa*, ultimately delineating the new case from the original case. Hypothetically speaking, if the two cases can be divided, the cause of which case may be particularized without resorting to the confines of the original cause. If there is no clear boundary between the two cases, the cause of which case must be insufficient in scope.[73]

Ibn Taymiyya identifies *istiḥsān* with the particularization of the cause; this can be done after the particularization's modification or complete abrogation. This conclusion is not clearly evident in Ibn Taymiyya's *Masʾalat al-Istiḥsān;* however, both John Makdisi and Ridwan Y. Aremu infer that such a conclusion is valid. Ibn Taymiyya asserts that if neither the law giver nor the *qiyās* explicitly stipulates the cause of a case, jurists may find an affinity with the basic principle of legal norm. This, in turn, allows the particularization of the cause which is further supported by textual evidence.[74]

Even though Ibn Taymiyya does not define *istiḥsān* as part of *qiyās* (*qiyās al-khafī*), he insists that it will never contradict a valid *qiyās*. If an incongruency results,

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[72] Makdisi, "Legal Logic," 83.

[73] Ibid., 83-4; idem, "Hard Cases," 197-98.

[74] Ibn Taymiyya, *Masʾalat*, 464.

the *istiḥsān* must be invalid. He also castigates those who in implementing *qiyās* by co-extensiveness (*ṭard*) do not examine any contradicting element in its cause (*ʿilla*).[75]

Ibn Taymiyya equates *istiḥsān* with *takhṣīṣ al-ʿilla*. He does not restrict *takhṣīṣ al-ʿilla* to situations where there are no extenuating circumstances or there might be impeding elements. *Takhṣīṣ al-ʿilla* has much a larger scope. He believes that the argument of a particularization only being valid when there is a lack of conditions or impediments is erroneous. In fact, such a stance contradicts the consensus of all previous jurists. They permitted *takhṣīṣ al-ʿilla* in particular situations which necessitated a disparity (*li maʿnan yūjib al-farq*).[76]

Ibn Taymiyya believes it is impossible to support an *istiḥsān*, which contradicts *qiyās*, without referring to *takhṣīṣ al-ʿilla*. This statement is supported by many jurists on the grounds that when the text contradicts the *qiyās*, it is simply an indication of *takhṣīṣ al-ʿilla*. This is explained by the fact that the nature of the cause is generally prone to accepting particularization. The conflict over a *qiyās* -contradicting *istiḥsān* centers on allowing the particularization of a cause because of a textual evidence. These jurists permit this particularization without clarifying the existing differences between the case of *takhṣīṣ* and others. According to Ibn Taymiyya, this represents the weakest version of *istiḥsān*. It is this particular definition of *istiḥsān* that drew so much criticism from the Shāfiʿīs and Ḥanbalīs. They contended that only personal opinion can support the validity of an explained cause. However, this cause is considered null and void if any incongruencies are discovered and identified. Similarly, whenever the text contradicts a legal norm established by *qiyās*, the community agrees, through consensus,

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[75] Idem, *Qawāʿid*, 135.

[76] Idem, *Masʾalat*, 460.

to invalidate the *qiyās*.[77]

Ibn Taymiyya argues that Ibn Ḥanbal's version of *istiḥsān* is founded on the belief that you can make a clear distinction between *istiḥsān* and other methods (*qiyās*). This, in fact, falls under the category of *takhṣīṣ al-ʿilla*. Conversely, Ibn Ḥanbal refuses *istiḥsān* whenever it particularizes a cause without indicating a decisive discrepancy (*farq muʾaththir*) from *qiyās*. Shāfiʿī seems to be in agreement with Ibn Ḥanbal on this issue. That is why Ibn Ḥanbal opposes the Ḥanafī practice of implementing *istiḥsān*, in opposition to *qiyās*, without acknowledging the proper procedure of determining the decisive discrepancy between the two methods. In other words, he opposes the Ḥanafī adoption of an *istiḥsān* which is not based on scriptural texts.[78] For this, Ibn Ḥanbal quotes the verse "What! Have they partners (in godhead), who have established for them some religion without the permission of Allah?"[79]

Nevertheless, Ibn Taymiyya discusses how the cause of *qiyās* is not specifically or generally mentioned by the law giver (*shāriʿ*) but is, instead, observed through the opinions of jurists; this is done through its suitability or resemblance to the basic principle of legal norm. From this basic principle, they can construct a particularization.[80]

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[77] Ibid.

[78] Ibid., 464.

[79] Ali, *Qurʾān* (42: 21), 1311. Ibn Taymiyya, in many examples, quotes this verse in an effort to show the importance of having guidance from the source of law and not from opinion.

[80] This has been approved by the Prophetic tradition that "If a judge strives and succeeded in discovering the ruling, he has two rewards; and if he failed, he has one reward for his effort" (*Idhā ijtahada al-ḥākim fa ʾaṣāba fa lahu ajrāni wa idhā ijtahada wa akhṭaʾa fa lahu ajrun*). See Taqī al-Dīn Aḥmad b. ʿAbd al-Ḥalīm b. Taymiyya, *Majmuʿ Fatāwā*, XX, ed. ʿAbd al-Raḥmān b. Qāsim (Rabāṭ, Maktabat al-Maʿārif,

Ibn Taymiyya is adamant that a jurist using *istiḥsān* with particular descriptions, must ensure that these descriptions are substantiated. In that situation, he cannot depart from the stronger *qiyās*. Similarly, due to the exclusiveness of *istiḥsān*, it is impossible to adopt *istiḥsān* that is isolated from a text or *qiyās*.[81] Ibn Taymiyya explains that this is why Shāfiᶜī, Ibn Ḥanbal and others objected so strenuously to *istiḥsān*. Because particularization dictates this marked discrepancy, they interpret *istiḥsān* as a deviation from *qiyās*. Ibn Taymiyya insists that there is nothing in the *Sharīᶜa* which contradicts the valid *qiyās*. He eventually concludes that the cases of *istiḥsān* where the legal norms have diverged from *qiyās* can be accepted as a solution of Islamic law. However, this *istiḥsān* is only accepted if the underlying meaning of the legal norm is known. This has been approved by the Mālikīs, Shāfiᶜīs and Ḥanbalīs.[82]

Ibn Taymiyya also examines the Ḥanafīs objection to the method of *qiyās* which shows a decisive discrepancy; they reject to consider this method as part of *takhṣīṣ al-ᶜilla* and *istiḥsān*. They maintain that *takhṣīṣ al-ᶜilla* and *istiḥsān* can co-exist without having a decisive discrepancy. The Ḥanafīs insist that deviating from *qiyās* does not necessarily result in a discrepancy, consequently, there is no need to base *istiḥsān* on it because *qiyās* can only be activated in the presence of the cause and its discrepancy. Conversely, the advocates of *qiyās* maintain that it is impossible to form an *istiḥsān* without a decisive discrepancy and, once it is known, *qiyās* should be applied.[83]

Ibn Taymiyya's position can be inferred from his statement, "Whoever advocates

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1961), 19.

[81] Idem, *Masᵓalat*, 464.

[82] Ibid., 465.

[83] Ibid.

istiḥsān and *takhṣīṣ al-ʿilla* without having a decisive discrepancy and prohibits *qiyās* on the specified case, is similar to affirming legal norm against *qiyās*." These errant jurists occasionally reject the validity of *qiyās* in favor of *istiḥsān*. However, they also deny any opposition to a *qiyās* which, in fact, is associated with an *istiḥsān*.[84]

Ibn Taymiyya relates, in turn, the concept of *istiḥsān* to *maṣāliḥ mursala* (public interest). In addition to providing *maṣlaḥa*, Ibn Taymiyya argues that *maṣāliḥ mursala* might also comfort people during the performance of their religious duties. Ibn Taymiyya explains that the concept of *maṣāliḥ mursala* is not only dedicated to preserving life, property, progeny, intelligence and religion, but is also intertwined with any matter which is beneficial and prevents harm (*jalb al-manāfiʿ wa dafʿ al-maḍār*).[85] This concept is somewhat similar to *istiḥsān* since they both embellish one's intelligence (*ʿaql*).

Linguistically speaking, *istiḥsān* regards something as "good," while "good" itself is categorized as beneficial (*maṣlaḥa*). Jurists will always take *maṣlaḥa* into consideration when deliberating a legal norm.[86] Ibn Taymiyya makes it clear that although *qiyās* may be subsumed in favor of *istiḥsān*, the legal proof of the *qiyās* must be confirmed. In addition, Ibn Taymiyya considers *istiḥsān* as a viable means of providing *maṣlaḥa* for the community.[87] For a further understanding of Ibn Taymiyya's

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[84] Ibid., 468.

[85] Idem, *Majmūʿat al-Raṣāʾil wa al-Masāʾil*, V, ed. Muḥammad Rashīd Riḍā (Cairo: Maṭbaʿat al-Manār, 1349/1930), 22.

[86] Ibid., 23; Abu Zahra, *Ibn Taymiyya*, 499.

[87] Ibn Taymiyya does recognize that the *Sharīʿa* is in accordance with *maṣlaḥa*, "but when human reason finds *maṣlaḥa* in a certain case where there is no supporting citation in the text to be found, only two things are meant. Either there definitely is a text which the observer does not know or one is not dealing with a *maṣlaḥa* at all." This

concept of *istiḥsān*, we shall continue our discussion by examining his application of *istiḥsān*.

D. The Application of *Istiḥsān*

Ibn Taymiyya often discusses *istiḥsān* in relation to the Ḥanafī jurists. On a number of occasions, he cites examples of how Abū Ḥanīfa and his disciples applied *istiḥsān*. In this section, we will examine these applications in addition to those of the Ḥanbalīs. By understanding their arguments, in addition to Ibn Taymiyya's response, we can better appreciate the role of *istiḥsān*.

In *Ḥaqīqat al-Ṣiyām*, Ibn Taymiyya discusses the dispute among jurists concerning the ritual of fasting. According to some jurists, fasting Muslims who eat, drink or have sex due to forgetfulness are not obliged to compensate (*qaḍā'*). Other jurists, including Mālik, believe that the sanctity of the fast is broken and compensation is obligatory. Abū Ḥanīfa, Shāfi'ī and Ibn Ḥanbal, all argue that people should be penalized for mistakes, not forgetfulness. Abū Ḥanīfa states that "Mālik's opinion was based on a strict *qiyās*, however I adopt its contrary on the basis of the Prophetic tradition."[88] Ibn Taymiyya asserts that Abū Ḥanīfa places the case of fast-breaking due to forgetfulness in the domain of *istiḥsān*; while Shāfi'ī and Ibn Ḥanbal deem that forgetfulness does not violate the sanctity of fasting since it is a very common

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statement indicates two clear assumptions: "all the possible *maṣāliḥ* are already given in the Text" and "all of God's commands are based on *maṣlaḥa*." The latter assumption, Masud explains, "is of particular significance to Ibn Taymiyya, as it has to do with the moral responsibility of man, a matter which he stressed very much." M. Khalid Masud, *Islamic Legal Philosophy* (New Delhi: International Islamic Publishers, 1989), 163-64.

[88] This is narrated by Abū Hurayra that the Prophet said: "*Man nasiya wa huwa ṣā'im fa 'akala aw shariba falyutimma ṣawmahu fa'innamā aṭ'amahu Allāh wa saqāhu.*"

phenomenon.[89]

Ibn Taymiyya's *al-Masāʾil al-Māridīniyya* documents how the advocates of *istiḥsān* often set aside an overly strict *qiyās* in difficult or strenuous circumstances. For instance, *qiyās* rules that it is not permissible to use water for ritual purification which has undergone change. However, this case has been granted an exception (*rukhṣa*) since it is hard to preserve water from change.[90] All jurists agree on the impurifying quality of contaminants on water. However, there is significant debate regarding to what degree water can be contaminated. This is especially the case when a small amount of contaminants are introduced to a significantly larger body of water. This situation can still be tolerated since it is hard to prevent the water from being contaminated by impure elements. There are, according to Ibn Taymiyya, some Shāfiʿīs and Ḥanbalīs who ascribed this ruling to *istiḥsān* process.[91]

In addition to arduous circumstances, Ibn Taymiyya asserts that *istiḥsān* can be applied on the basis of a pressing need. He uses the examples of purifying a utensil which cannot be entirely cleaned after having contact with an impure element (*najs*). In order to be utterly clean, a utensil needs to be purified with rose water (*māʾ al-ward*). By implementing *istiḥsān*, the utensil could be cleaned with normal water, pressing circumstances dictate that rose water is not always necessary for purification.[92]

In explaining the position of *muḍāraba's* contract (joint-partnership), Ibn

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[89] Taqī al-Dīn Ahmad b. ʿAbd al-Ḥalīm b. Taymiyya, *Risāla fī Ḥaqīqat al-Ṣiyām*, ed. M. Nāṣir al-Dīn al-Bānī (Damascus, al-Maktab al-Islāmī, n.d.), 36-7.

[90] Idem, *al-Masāʾil al-Māridīniyya* (Damascus: al-Maktab al-Islāmī, 1964), 14.

[91] Ibid., 15-6.

[92] Ibid., 55.

Taymiyya specifically associated it with the idea of *takhṣīṣ al-ʿilla*. Like Ibn Ḥanbal, Ibn Taymiyya uses the case of a manager conducting a business transaction without informing his employer. If the transaction fails, the manager (who originally initiated the transaction) is responsible for reparation. If the transaction succeeds, the manager should be rewarded. Ibn Ḥanbal said: "I used to maintain that the profit belongs to the owner of the capital, but now I prefer (*astaḥsinu*) the contrary." According to Ibn Taymiyya, this preference is supported by a decisive discrepancy. In this case, both *qiyās* and *istiḥsān* are extracted; whereby a particularization of the cause is extracted with a distinctive deduction. Ibn Ḥanbal does not reject this *istiḥsān* but it is possible that one or two *ʿilla* are invalid. In the same vein, he does not refuse the particularization of the textually mentioned cause (*ʿilla manṣūṣa*) due to a discrepancy with a textually mentioned Sunna, in the case of *tayammum*, which has made one prayer permissible.[93]

In the case of *muḍāraba*, Ibn Taymiyya asserts that although the manager is an employee, he significantly contributes to the business's profit. Jurists have two opinions regarding the right of the manager in an invalid joint-partnership: either he is entitled to an equivalent share of the profit or he is entitled to an estimated wage.

According to Ibn Taymiyya, the first opinion is correct, a stance which is also approved by the Ḥanbalī school. All these business relations are based upon the joint-partnership concept; according to *qiyās*, such a *muḍāraba* is valid.[94] Jurists who believe in giving a similar pay (*ujra*) to the manager consider *muḍāraba* a sort of contract of hire (*ijāra*). Ibn Taymiyya stipulates that *qiyās* renders this contract invalid; and that the manager should be paid accordingly. His work is not charitable donation to the

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[93] Ibn Taymiyya, *Masʾalat*, 472.

[94] Ibid., 472-73.

employer; on the contrary, his share of the profit is a reward for his work. If he steps outside the boundaries of the agreement, his share will not be confiscated; however, he will be held responsible for breaking the contract.[95]

The issue of someone who usurping and cultivating land is also appraised by Ibn Taymiyya. He cites Ibn Ḥanbal's opinion that "The plant belongs to the owner of the land and its expenses are incumbent upon him, although this is against *qiyās*, but I prefer (*astaḥsinu*) that the owner pays the expenses of the cultivator."[96] Ibn Ḥanbal bases this opinion on the text narrated by Rāfiᶜ b. Khudayj from the Prophet: "Whoever plants in other people's land, the crops belong to the owner of the land and he is responsible for the expenses."[97] This indicates that a *qiyās* which contradicts this text is invalid; however, if the *qiyās* is supported by another text indicating, a decisive discrepancy (*farq muʾaththir*) is created.[98]

Moreover, the contention that "*qiyās* reveals that the crop belongs to the one who plants it," is refuted by Ibn Taymiyya due to lack of textual proof. What is really inferred from *qiyās*, in this case, is that the crop is either to be shared between the two, like in the contract of *muzāraᶜa*, or it belongs to the owner of the land. To be precise, Ibn Taymiyya advances the analogy of Ibn ᶜAqīl: if a male slave lives with a female slave, the child belongs to the female's master.[99] Ibn Taymiyya's argument is also based on Ibn Ḥanbal's statement, "On him (the landowner) lies the expense of the crop" (*ᶜalayhi*

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[95] Ibid.

[96] Ibid., 475.

[97] Ibid., 457.

[98] Ibid., 475.

[99] Ibid.

nafaqatuhu); this implies that the landowner is responsible for both the cultivator's wages and the cost of planting the crop. Ibn Ḥanbal acknowledged that his decision would contradict *qiyās*; however, he preferred that the cultivator receive payment for his labor and expenses. By referring to the previous *qiyās*, a jurist can argue that the usurper has no right to receive wages. However, Ibn Ḥanbal contends that since he covered the planting expenses, the usurper should receive payment from the landowner.[100]

Ibn Taymiyya subsequently examines the similarities between the vending of Holy Qurʾāns and the sale of unowned rural areas (*Sawʿād*). According to Ibn Ḥanbal, a person can purchase unowned land. However, when he was asked how one can purchase something that does not have an owner; he replied: "What you claim is the domain of *qiyās*, but this is *istiḥsān*."[101] He based this view on the authority of the Companions who allowed the purchase of the Holy book but forbade its sale. These two subjects are different, Ibn Taymiyya emphasizes, in terms of selling and purchasing because the *ʿilla* exists in their sale and not in their purchase. The purchasing of a Holy Qurʾān is deemed as a worthy deed while selling one is considered as profiting on the word of God.[102] It is worth noting that it is acceptable for the Holy Qurʾān and rural areas to be given freely.

According to the reliable opinions of the Prophet's Companions, the sale of the Qurʾān is reprehensible; occasionally, Ibn ʿAbbās approved since the vendor is simply the mediator and he deserves a reward for his effort. This demonstrates, Ibn Taymiyya contends, that selling the Qurʾān is a blameless disapproval (*karāha tanzīh*). However,

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[100] Ibid., 476.

[101] Ibid., 456-57.

[102] Ibid., 476.

there is still a dispute as to whether the purchase or exchange of the Qur'ān is permissible. Looking to Ibn ʿAbbās' example, some jurists argue that one can sell the Qur'ān if the proceeds are used to purchase a replacement. Since there is no legal evidence (*dalīl sharʿī*) of its prohibition, the sale of the Qur'ān is not forbidden.[103]

By the same token, the sale of *kharāj* land (*al-arḍ al-kharājiyya*) is permitted since there in no legal evidence forbidding it. Jurists rejecting such a sale declare the land an endowment (*waqf*), and, thus, cannot be sold. According to Ibn Taymiyya, this prohibition is restricted to cases of endowment where the owner will lose his hereditary rights with such a sale. This endowment cannot be inherited or accepted as a gift. On the contrary, *kharāj* land, on the whole, can be both bequeathed and given as a gift.

The Companions rejected the purchase of *kharāj* land did so to a) prevent Muslims from intervening in the *kharāj* (land tax) of the *dhimmī* (non-Muslims living under the protection of Muslims)[104] and b) protect the rights of Muslims to utilize the land. Indeed, if a *dhimmī* landowner substitutes the *kharāj* land with *jizya* (tax), he is entitled to do so; however, if he does not pay his tax, the Muslim community suffers. For this reason, ʿUmar and other Companions disapproved and prohibited such a purchase.[105]

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[103] Ibid., 476-77.

[104] To be precise, this term is designated to "the unbeliever who submits to Muslim rule, accepts Muslim protection, and pays the poll tax to the Muslim state." The term basically comes from the *dhimma*, "a kind of contract between the Muslim state and the leader of a non-Muslim community, by which members of that community are granted certain status, with certain duties and privileges, under Muslim authority." B. Lewis, *The Political Language of Islam* (Chicago & London: The University of Chicago Press, 1988), 77.

[105] Ibn Taymiyya, *Masʾalat*, 477.

Dhimmīs are allowed to preserve their right not to sell the land of *kharāj*. This was designed to prevent Muslims from only engaging farming careers and consequently neglecting their duty to perform *jihād*. However, as Muslim conquests reached their limit, the *dhimmī* contribution of *kharāj* became more advantageous. The humiliation that was reserved for *dhimmī* sellers of land was now assumed by Muslims who preferred to cultivate land. This phenomena is not exclusive to the case of cultivable land, since the Prophet said: "No nation will enter into this profession except that humiliation will abide with it." Nonetheless, the Anṣār became accustomed to farming their lands and ignored their obligation to perform *jihād*.

Ibn Taymiyya addresses Abū Yaʿlā's argument that a *dhimmī* can be used as a witness for a bequeathing testimony in special circumstances, such as during traveling. The evidence of clear distinction places this case within the methodology of *istiḥsān* and *takhṣīṣ al-ʿilla*. The prohibition against accepting non-Muslim testimony as well as permission to use them due to pressing circumstances are stipulated by the revealed texts.

However, the views that prohibit such a testimony, are probably due to, Ibn Taymiyya argues, either an ignorance of the common cause or the inability to particularize the cause on the basis of pressing necessity. Rejection of cases like this is usually founded only on the explicit arguments, while neglecting the underlying meaning of the revealed texts. So far, in the case of testimony, the general articulation (*lafẓ ʿām*) in both the Qurʾān and Sunna do not represent the prohibition, but it remains in the *qiyās* which prefers the presentation. For instance, the order to present of two Muslims as witnesses. In fact, the following verse stipulates " ... (take) witnesses among yourselves when making bequest, two just men of your own (brotherhood) or

others from outside if ye are journeying through the earth."[106] This verse should not be interpreted that the permission to take witnesses from outside (non-Muslims) is exclusively during traveling, but is also in any other pressing circumstances.

It is generally understood that two Muslims are needed for a viable testimonial. This rule is also required to traveling Muslims. The Qur'ān, however, does not indicate any prohibitions if no Muslims are available. Consequently, when there is no textual evidence from either the Qur'ān and Sunna, the *qiyās* of allowing a non-Muslim witness is not contradictory. In fact, the Companions and the majority of *tābi'ūn* did implement this rule. According to Ibn Taymiyya, those who did not allow the *qiyās* had no acceptable foundation for doing so.[107]

Furthermore, Ibn Taymiyya questions the rule of "It is not permissible to have the *dhimmī* as witness on Muslims under any circumstances." These jurists have no basis for claiming such a *ḥukm* without scriptural proof. Ibn Taymiyya contends that God commanded the use of Muslim witnesses whenever possible. According to him, this discussion is based on the distinction between ability (*qudra*) and inability (*'ajz*) to find Muslims witnesses. Adopting this line, Ibn Taymiyya cites how women's testimonies are admissible for areas that men cannot access. Ibn Ḥanbal has pointed out the admissibility of their testimony concerning cases of injury (*jarrāh*) that took place in washrooms, wedding parties, etc. In Ibn Taymiyya's view, this is correct since there is no precedence from the revealed texts, consensus, or *qiyās* that forbids the testimony of women in such situations. Likewise, they may testify in cases of punishment.[108] To

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[106] Ali, *Qur'ān* (5: 106), 275.

[107] Ibn Taymiyya, *Mas'alat*, 478.

[108] Ibid.

sum up this section, we can safely maintain that, in solving the problems of law, Ibn Taymiyya always looks for textual substantiation in permitting or forbidding any particular act.

E. Ibn Taymiyya's Critique of the Ḥanafī *Istiḥsān*

Ibn Taymiyya disagrees with the Ḥanafī approach of *istiḥsān*. He contends that they presented cases which blatantly contradicted *qiyās* (*khilāf al-qiyās*) and continued to label the procedure of *istiḥsān*.[109] As articulated in *al-Qiyās fī al-Shar*ᶜ *al-Islāmī*, [110] the following are several cases appraised by Ibn Taymiyya as *khilāf al-qiyās* :

1. Purifying water which has already been contaminated by an impure element (*najāsa*).
2. The removal of impurity.
3. The contract of *salam* .
4. The contract of *ijāra, muḍāraba, muzāra*ᶜ*a, musāqāt, ḥawāla* and the validity of continuing to fast due to forgetfulness.

Although Ibn Taymiyya presents his arguments to these cases in random order, we will attempt to present a systematic discussion.

Ibn Taymiyya grapples that the prohibition against purifying contaminated water must be based on an invalid original case. *Qiyās* itself states that water is basically clean as long as its nature has not been changed. The legal norm is not changed if the original cause is removed. Consequently, if the cause is the changed nature (*taghayyur*) of the

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[109] The Hanafīs refer to several transactions like *salam, ijāra, muḍāraba* and the product of a manufacture as the domain of *istiḥsān* due to pressing need (*ḥāja*). See M. Yūsuf Mūsā, *Ibn Taymiyya* (Beirut: al-ᶜAṣr al-Ḥadīth, 1988), 188.

[110] A similar exposition can also be found in his *Majmūᶜat al-Rasā'il al-Kubrā*, II, 217; idem, *Majmūᶜ Fatāwā*, XX, 504.

water and there is no evidence to indicate that this cause exists, we can deduce that the water is clean.[111]

With regard to the removal of impurities (*izālat al-najāsa*), Ibn Taymiyya contends that such action is not contrary to *qiyās*. Some jurists assert that when an impure element is introduced to a body of water, all the water is compromised. Moreover, this impurity cannot be rectified by simply adding more water. These jurists insist that the original contaminant will continue to taint any additional water. Ibn Taymiyya explains that when an impure element is introduced to a body of water, it does not necessitate disposing of all the water. The revealed texts (*naṣṣ*) and consensus state that an element is no longer impure once it is purified with water. Also, if the nature of water does not change after being mixed with impurity, it is still considered clean water (*ṭayyīb*).[112] He then quotes the verse "[H]e allows them as lawful what is good (and pure) and prohibits them from what is bad (and impure)."[113] In both cases, Ibn Taymiyya makes it clear that on the basis of *qiyās*, water is regarded clean as long as its nature does not change and the impure element can be purified with normal water.

As for the contract of *salam*, it is recognized as a kind of debt where payment for services is provided in advance. Ibn Taymiyya scrutinizes the difference between being paid in advance upon completion of sevices and being paid at a later date. He then quotes the verse: "When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing."[114] This demonstrates that

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[111] Ibn Taymiyya, *Qiyās*, 15.

[112] Ibid., 12.

[113] Ali, *Qur'ān* (7: 157), 388-89.

[114] Ibid. (2: 282), 113-14.

such a contract is in accordance with *qiyās*.[115] However, Ibn Taymiyya mysteriously ignores the Prophetic tradition, narrated by Ibn ᶜAbbās: "When Allah's Prophet came to Medina, they were paying one and two years in advance for fruits, so he said: Those who pay in advance for anything must do so for a specified weight and for a definite time."[116] This tradition seems much more relevant and useful to Ibn Taymiyya's argument.

In a similar fashion, the contract of *ijāra* (hire) is considered in opposition to *qiyās* because it involves the sale of abstract benefits and its object does not exist at the time of the transaction. The Qurʾānic verse "If they suckle your (offspring), give them their recompense"[117] validates the *ijāra* of a wet nurse (*ẓiʾr*) for breast feeding a baby. The majority of jurists consider this form of contract to be contradictory to *qiyās* since the *ijāra* appears as a transaction for a benefit. The hiring of a wet nurse represents a transaction of milk, hence incorporating material object (*aᶜyān*) and not of an immaterial benefit (*manfaᶜa*). Interestingly, that verse is the only Qurʾānic provision for the permissibility of such a contract of hire. Ibn Taymiyya insists that this case can only be contrary to *qiyās* if there are two contradictory texts on the issue. While *qiyās* forbids this *ijāra*, the text (*naṣṣ*) exhibits no evidence regarding this matter.[118]

Strictly speaking, Ibn Taymiyya states that a contract is lawful when the two

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[115] Ibn Taymiyya, *Qiyās*, 19-20.

[116] Muslim b. Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, trans. ᶜAbdul Ḥamīd Ṣiddīqī, XI (Lahore: Kashmiri Bazar, 1973), 844-45. In Arabic, *Qadima al-nabiyyu ṣallā Allāhu ᶜalayhi wa sallam al-Madīnata, wa hum yuslifūna bi al-tamr al-sanatayn wa al-thalāth, fa qāla: "man aslafa fī shayʾ fa fī kayl maᶜlūm wa wazn maᶜlūm ilā ʾajal maᶜlūm."*

[117] Ali, *Qurʾān* (65: 6), 1564-565.

[118] Ibn Taymiyya, *Qiyās*, 20.

parties agree on the specific terms of the contract; this includes proper terminology, definitions, and a mutual sense of understanding. It is incumbent, henceforth, upon the law giver (*shāriᶜ*) to use generalities and to avoid overly specific terms. Consequently, every contract will be valid regardless of the terms being used, inasmuch as the two parties agree on the purpose of the contract. He compares this to the rite of marriage. In this case, the objective of the contract is understood by the two parties; however, we find no applications of overly strict terms, such as *inkāḥ* or *tazwīj*.[119] In this respect, we see Ibn Taymiyya's concern with the purpose of the contract and his advice to avoid excessive analytical approaches. To name a particular concept as *bayᶜ*, or, as *ijāra*, is only leads to disputes over terminology.[120] This particular argument is endemic of Ibn Taymiyya's overall respect for the role of legal purpose (*maqāṣid sharᶜiyya*) in any case which corresponds to the legal maxim *al-umūr bi maqāṣidihā*.

Ibn Taymiyya continues his critique by deliberating on the status of *muḍāraba* (profit sharing), *musāqāt* (land watering) and *muzāraᶜa* (sharecropping).[121] The Ḥanafīs assume that these contracts belong to the category of *ijāra* since they involve an exchange (*ᶜiwaḍ*) of payment; however, the term *ijāra* is only used when the parties are cognizant of the specific prices and merchandise. Since the terms of this type of contract are somewhat vague, the Ḥanafīs insist that these contracts are contrary to *qiyās*.

In response to this view, Ibn Taymiyya affirms that all these contracts belong to the domain of *mushārakāt* (partnership). He distinguishes between the three contracts on

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[119] Ibid., 21.

[120] Ibid., 30.

[121] Coulson extensively discusses the notion and admits this classification. See his *Commercial Law*, 22-4.

the basis of delivery of payment. Firstly, *ijāra* involves a transaction where both the payment and the service is determined. Secondly, *jiᶜāla* deals with case where the success of the service somewhat vague. For instance, a master offers a reward of a 100 dirhams for locating a renegade slave. While the activity itself has been determined, there is some ambiguity regarding how long this task will take or whether it will be accomplished at all. Finally, *muḍāraba* dictates cases where the service is undefined, but a system of payment has been established.

Mentioned earlier, *muḍāraba* deals with the right of a proprietor to demand all the profit from a failed business transaction. Ibn Taymiyya argues, on the basis of joint-partnership, an owner cannot demand profit from his manager in this instance.[122] It seems that Ibn Taymiyya is trying to equalize the concept of partnership; by recognizing the symbiotic relationship between capital and profit, he hopes to establish a balance of sorts. One way of accomplishing this, Ibn Taymiyya contends, is to avoid determining a specific wage or pay for the labor involved.[123]

Having said this, Ibn Taymiyya incorporates *muzāraᶜa* and *musāqāt* [124] into the

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[122] Ibn Taymiyya, *Qiyās*, 7-8.

[123] Ibid., 8; Abdul Azim Islahi, *Economic Concept of Ibn Taimīyah* (Leicester, UK: The Islamic Foundation, 1988), 158.

[124] According to some accounts, there are general similar features in the procedures of the contracts of *muzāraᶜa* and *musāqāt*, unless the latter differs in four respects: "(1) it is binding on both sides by the mere conclusion of the contract (whereas a contract of *muzāraᶜa* may be cancelled by the provider of the seeds for the crop, up to the time they are actually sown); (2) if the term of *musāqāt* falls before the fruit has ripened, the husbandman has to cultivate the trees or vines without wage until the fruit ripen; (3) if ownership of the plantation is successfully claimed by a third party, and the trees are in fruit, the husbandman may claim a wage for the time he has been working from the other party to the contract; and (4) a declaration of the period of the contract is not a necessary condition for the validity of *musāqāt* (since the ripening period of any particular fruit is known in advance, and there is little variation between any two

category of partnership. In *muzāraᶜa*, production is divided between the landowner and the cultivator. The landowner provides the necessary land, while the cultivator supplies labor and equipment. Both components share in the ultimate gain or loss of profit. This process is similar to the practice of *musāqāt.* Ibn Taymiyya suggests that these practices share principles of justice and differ remarkably from the unjust practice of *ijāra.*[125] It is unfortunate that Ibn Taymiyya does not provide a further explanation regarding *musāqāt.* However, one can assume that he would place *musāqāt* along side with *muḍāraba* and *muzāraᶜa*, practices where the principle of justice is maintained and preserved in the partnership contract.

Moreover, Ibn Taymiyya argues that *muzāraᶜa* is not a speculative hire (*ijārat al-gharar*) where one party secures the profit while the other works for a fixed salary. If there is no crop, the landowner cannot demand reparation from the cultivator since there is no stipulating clause. Speculative hire, according to Ibn Taymiyya, only benefits one party. This arrangement is unfair and often leads to resentment and enmity between the two parties.[126] To support his argument, Ibn Taymiyya quotes the legal maxim that the primary element of every contract is justice (*al-aṣl fī al-ᶜuqūd jamīᶜihā huwa al-ᶜadl*); the sayings of the Prophets and revealed scriptures strive to implement this element in humanity. He then cites the verse "We sent aforetime our messengers with clear signs and sent down with them the Book and the Balance (of right and wrong), that men may stand forth in justice."[127] Accordingly, Ibn Taymiyya maintains that there is no element of gambling in *muḍāraba, musāqāt* and *muzāraᶜa*, except the sole effort to facilitate

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crops)." *EI.*, VII, s. v. "musāqāt," (by M. J. L. Young): 658.

[125] Ibn Taymiyya, *Qiyās*, 9.

[126] Islahi, *Economic*, 160.

[127] Ali, *Qurʾān* (57: 25), 1505.

justice. In *muzāraᶜa*, for instance, if the laborer provides the necessary seeds, he deserves an increased share of the profit. Those who stipulate that the seed must be provided by the landowner look to analogy of *muḍāraba*, where the capital is provided by the business owner.

By the same token, *muzāraᶜa* cases stipulate that the seed should be provided by the landowner, though the cultivator may also provide it. This is analogous to the case of *muḍāraba* where the employer provides the capital. Such a *qiyās*, Ibn Taymiyya asserts, contradicts the Sunna and the opinions of the Companions and is, therefore, invalid. Such a case will rule that the capital in *muḍāraba* returns to the employer and that they (the employer and manager) would share in the profit only. Whereas in the case of *muzāraᶜa*, the owner of the seeds is not compensated for the expense. Ibn Taymiyya clarifies that whoever compares the seeds to the capital, he should provide in return a similar price to its owner.[128]

Ibn Taymiyya justifies all kinds of human transactions (*muᶜāmalāt)*, including the contract of hire, sale, *muḍāraba, muzāraᶜa* and *musāqāt*, in accordance with the procedure of *qiyās* and partnership rationale.[129] Human transactions, he suggests, are intrinsically connected with the communicative type of contract (*muᶜāwaḍa*), like sale and rent. There is a sense of partnership with contracts of this variety. For this reason, many jurists believe that while one partner acts as the owner of the property, the other dedicates himself to its maintenance. Furthermore, Ibn Taymiyya cites the relationship

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[128] Ibn Taymiyya, *Qiyās*, 10.

[129] Ibn Taymiyya also makes a reference to the Mālikī school which supports the idea of *mushārakāt* (partnership) for the basis of transactions in *muḍāraba, muzāraᶜa* and *musāqāt*. Taqī al-Dīn Aḥmad b. ᶜAbd al-Ḥalīm b. Taymiyya, *Ṣiḥḥat Uṣūl Madhhab Ahl al-Madīna* (Beirut: Dār al-Nadwat al-Jadīda, n.d.), 58.

between traders and workers as a symbol of partnership. In order to compliment each other's objectives, they need to cooperate and coordinate their activities. He concludes that most human transactions are founded on this model of partnership.[130]

Likewise, *ḥawāla* (debt transfer) is considered contradictory to *qiyās*. Ibn Taymiyya attacks this rejection on two points. Firstly, there is no legal proof to forbid *ḥawāla*. Secondly, the *ḥawāla* does not constitute a sale since the debtor has not fulfilled his part of the transaction. Therefore, if he transfers his debt to another, the latter is responsible for the debt. This is clearly stated in the Prophetic tradition, "Delaying (in the payment of debt) on the part of a rich man is injustice, and when one of you is referred to a rich man, he should follow him" (*Maṭl al-ghaniyy ẓulm wa idhā utbiᶜa aḥadukum ᶜalā malīᵓ falyatbaᶜ*).[131] Here, the Prophet prohibits a wealthy debtor from delaying payment since such action leads to injustice. Ibn Taymiyya also derives a similar meaning in the verse "[T]hen grant any reasonable demand, and compensate him with handsome gratitude."[132] Ibn Taymiyya interprets this verse as a command to diligently serve the person you owe and to settle matters in a gracious fashion.[133]

Ibn Taymiyya also addresses the situation where Muslims forget their fasts while performing religious duties. He maintains that this error, by no means, contradicts *qiyās* since it does not taint their worship before God. He substantiates his argument by

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[130] Idem, *Talkhīṣ Kitāb al-Istighātha* (Cairo: al-Maṭbaᶜa al-Salafiyya, 1346/1927), 85.

[131] Qushayrī, *Ṣaḥīḥ Muslim*, III, ed. Mūsā Shāhīn Lāshīn and A. ᶜUmar Hāshim (Beirut: Muᵓassasat ᶜIzz al-Dīn, 1987), 383; Ṣiddīqī's trans., XI, 823.

[132] Ali, *Qurᵓān* (2: 178), 70-1.

[133] Ibn Taymiyya, *Qiyās*, 10.

citing the verse, "Our lord! condemn us not if we forget or fall into error."[134] All jurists agree that absentminded errors do not necessarily constitute sinning. However, there is some dispute regarding the validity of one's worship while concurrently forgetting certain mandatory rules. Some insist that, since there was no intention involved, the defendant cannot be accused of sinning. These violations include talking during prayer, certain acts during pilgrimage, and eating during fasting. This particular act is relevant to the tradition "Whoever eats or drinks due to forgetfulness, he should pursue fasting for it is a mercy from God to feed him."[135]

Ibn Taymiyya's clarification of a *qiyās ṣaḥīh* does not necessarily imply a contradiction of the concept of *istiḥsān.* He strongly emphasizes that the latter should never contradict *qiyās ṣaḥīḥ;* but, if it is does, the *istiḥsān* is neglected by the *qiyās ṣaḥīḥ.* This premise implies that Ibn Taymiyya possibly classified *istiḥsān* as a component of *qiyās ṣaḥīh.* This assumption is also supplemented by his contention that a valid *qiyās* and a valid *istiḥsān* cannot be combined in a case unless there is a decisive discrepancy in the *shar*ᶜ.[136]

We have discussed Ibn Taymiyya's theory of *istiḥsān* in which he not only clarifies this method within Islamic jurisprudence, but also redefines other methods closely related to it, including the concept of *qiyās* and *takhṣīṣ al-*ᶜ*illa.* One can sense his strong conviction that every argument must be substantiated by a reliable source, be it the Qurʾān, the Sunna, consensus or *qiyās.* In reappraising the role of *istiḥsān,* Ibn Taymiyya strongly adheres to this belief. As a result, there are many cases of *istiḥsān*

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[134] Ali, *Qurʾān* (2: 286), 116-17.

[135] Ibn Taymiyya, *Qiyās,* 38-9.

[136] Ibn Taymiyya, *Masʾalat,* 472.

whereby Ibn Taymiyya questions their reliability. Moreover, on these principles, Ibn Taymiyya does not hesitate to challenge many well-entrenched opinions of previous jurists. Above all else, Ibn Taymiyya was deeply motivated to reinterpret these rulings out of a need to preserve the welfare of the community. We can conclude, on this basis, that Ibn Taymiyya represents a model figure of the Islamic legal reform movement. This, in turn, has sparked some controversy as to whether he was a true follower of the *salaf.*[137]

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[137] In this respect, the work of Manṣūr M.ᶜUways entitled *Ibn Taymiyya Laysa Salafiyyan* published in Cairo: Dār al-Nahḍat al-ᶜArabiyya, 1970 and the work of M. Khalīl Harās entitled *Ibn Taymiyya al-Salafī* published in Beirut: Dār al-Kutub al-ᶜIlmiyya, 1984, are useful references.

CONCLUSION

Ibn Taymiyya's theory of *istiḥsān* has contributed greatly to the breadth of Islamic law. Well trained in academic thought and cognizant of previous juristic thought, Ibn Taymiyya rejected complacency and blind acceptance by challenging the present definition of *istiḥsān.* Although adhering to conventional legal thought, Ibn Taymiyya introduced subtle changes to *istiḥsān.*

The theory of *istiḥsān,* inherited from renowned jurists of the formative period, still needs to be examined and clarified. In early Islam, *istiḥsān* had been conceived simply as a method of implementing an antidote to *qiyās. Istiḥsān* was understood to be based on the general spirit and purpose of the *Sharīᶜa* and was not necessarily constrained to the narrow and literal meaning of its definition. Many jurists looked to *istiḥsān* as a viable method of locating the inherent justice of a legal norm. This understanding had been rooted in the reign of ᶜUmar b. al-Khaṭṭāb and continued into the era of Abū Ḥanīfa and his disciples. However, since this perception of *istiḥsān* often involved arbitrary opinion and inconsistency, some jurists, such as Shāfiᶜī, Shīrāzī, Ghazālī and Āmidī, worked hard to reject the concept. According to the Shāfiᶜīs, a legal norm produced by *istiḥsān* is clearly based on individual preference and is without reference to textual evidence (*dalīl*).

Despite the rejection of the theory of *istiḥsān* by the Shāfiᶜīs, the Mālikīs and Ḥanbalīs agreed with the Ḥanafīs on certain terms. The Mālikīs recognized *istiḥsān* as a valid method of implementing the general purpose of *Sharīᶜa,* but they preferred to apply *maṣāliḥ mursala.* With regard to the Ḥanbalīs, we only have the information from Ibn al-

Ḥājib who recorded their tendencies to use *istiḥsān*. But later sources, Ṭūfī's and Ibn Taymiyya's, show a distinct use of *istiḥsān* by the Ḥanbalīs.

However, due to the tremendous criticism of their approach, particularly by the Shāfiᶜīs, later Ḥanafī jurists in the post-formative period tried to include *istiḥsān* within the parameters of Islamic law. They primarily did this through the process of redefinition. According to Bazdawī and Sarakhsī, the implementation of *istiḥsān* based on individual preferences was no longer appropriate and, instead, it must be bolstered by the revealed texts, consensus or necessity. Even though later Ḥanafīs had prevented *istiḥsān* from being arbitrary concept, there is still a criticism of their justification of *istiḥsān* as a part of *qiyās* (*qiyās khafī*). This inevitably attracted jurists to re-consider and re-examine the theory of *istiḥsān*, one of the most prominent of these intrigued jurists was Ibn Taymiyya.

According to Ibn Taymiyya, jurists dealing with a case of *istiḥsān* must explore the methods of *qiyās* and *takhṣīṣ al-ᶜilla*. Without a clear demarcation between these two methods, one will only attain a superficial understanding of the theory of *istiḥsān*. In this respect, Ibn Taymiyya promotes *takhṣīṣ al-ᶜilla* as a solution for the complexity of *istiḥsān*. By determining *takhṣīṣ al-ᶜilla*, *istiḥsān* can be easily defined. However, some jurists, such as Baṣrī, Bazdawī and Sarakhsī, refuse to equate *istiḥsān* with *takhṣīṣ al-ᶜilla* on the basis that this process removes the cause of the original case.

Similar to the majority of jurists, Ibn Taymiyya contends that *istiḥsān* must be substantiated by the revealed texts, consensus or necessity. He then associates these sources with the particularization of the cause. In addition, *istiḥsān* cannot contradict a valid *qiyās* (*qiyās ṣaḥīḥ*); if it does, the *istiḥsān* should be disregarded. However, Ibn Taymiyya remarks that as long as particularization can be established, the distinction

between *istiḥsān* and *qiyās* can be clearly determined. Unlike some Ḥanafīs, Ibn Taymiyya refuses to equate *istiḥsān* with *mukhālif li al-qiyās.* He insists that a valid legal norm will never contradict a valid *qiyās.* Hence, when *istiḥsān* is implemented in the cases of the contract of *salam, muḍāraba, ijāṛa,* or *muzāraᶜa,* which are all sanctioned by consensus, one cannot conclude that they are contrary to *qiyās;* rather, they imply particularization of the cause (*takhṣīṣ al-ᶜilla*).[1]

Furthermore, Ibn Taymiyya makes it clear that the underlying cause for such contracts being forbidden is the absence of any material merchandise being exchanged during the transaction. However, the cause has been left behind through particularization by consensus or necessity. A new cause, based on necessity, is given priority and thus supersedes the previous cause. In this sense, Ibn Taymiyya concludes that *istiḥsān* is particularization of the cause.

One can conclude that the controversy over *istiḥsān* in the formative period and post-formative period was strictly semantic. However, as Islamic jurisprudence evolved, jurists began to deliberate on the very essence of *istiḥsān* and its role in the field of substantive law. Ibn Taymiyya's work can be considered one of the key inquires into *istiḥsān* during later development of Islamic legal thought.

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[1] The attitude adopted by Ibn Taymiyya is relevant to his principle, as H. Laoust concludes, that "nothing is to be regarded as imposing social obligations but the religious practices which God has explicitly prescribed; inversely, nothing can be lawfully forbidden but the practices which have been prohibited by God in the Qurᵓān and the Sunna." This is the dual principle which he resumes in the formula; *tawqīf fī al-ᶜibādāt wa ᶜafw fī al-muᶜāmalāt* (the most rigorous strictness in regard to religious obligations and a wide tolerance in all matters of transactions). In a sense that "[a] wide liberty should therefore be left to both parties in drawing up the conditions of a contract, especially in regard to transactions, in which no stipulations can be nullified except those contrary to the formal interdiction in the Qurᵓān and the Sunna of speculation (*maysir*) and usury (*ribā*)." *EI,* I, s.v. "Aḥmad b. Ḥanbal" (by Henry Laoust): 277.

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