

Deriving Laws:
A Comparison between Ijtihad among Shia Muslims and Istihsan and
Istislah among Sunni Muslims in Contemporary Islamic Thought

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Introduction

Periodically western media warn us of the threat of Muslim communities who demand the enforcement of the Islamic Shari'a in western democracies. They also occasionally report on the atrocities done to civilians in the Middle-East in the name of the Islamic Law. These news reports construct the image of the Islamic Shari'a as a clear, codified legal document. However, there is no single "Islamic Shari'a" and the methods of jurisprudence used to derive the law from the sources differ greatly between legal schools (Maddhabs), especially Sunni and Shia Schools. The enforcement and the codification, as well as the interpretation of Islamic law, are complex. Multiple historical debates surround the Islamic Shari'a, and exploring these debates allows one to better understand the multifaceted nature of this law. For example, Sunni Jurists, since the fourth century, have rejected the use of creative and subjective interpretations of the law.¹ More precisely, they have abandoned the method of ijtihad. Now ijtihad is only officially used by Shia Jurists. Sunni jurists, instead of using Ijtihad, developed Istihsan and Istislah, two very similar methods which consist of favoring a qiyas over another. Qiyas, a method of jurisprudence embraced mostly by Sunni Schools, consists of deriving laws from analogies in the Qur'an or Sunna. Even if Sunni jurists have rejected ijtihad and developed istihsan or istislah, which they claim to be objective, that istihsan and istislah are creative methods of jurisprudence just like ijtihad. Consequently, it is illogical to reject ijtihad and accept istihsan and istislah, since all of these methods are creative. To prove this argument, the definition and the context of these three methods of jurisprudence will first be reviewed. Then, istihsan and Istislah will be confirmed to be creative, like Ijtihad, by proving that they are not a preference of qiyas over others. Finally, an explanation will be given of how istihsan and istislah were

¹ Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16.1 (1984): 2.

thought of as creative by the founders of the schools who developed these methods and conclude by showing that there was a need for creative interpretation for Sunni jurists and that Istihsan and Istislah were developed as an answer to this need.

Terms, context and debates

Ijtihad was an important method of jurisprudence for all maddhabs until the fourth century. Sunni scholars rejected the use of ijтиhad after this time period, and the Caliphs at the time “closed the Gates of ijтиhad”. Founders of the Maliki School and the Hanafi School then created the methods of Istihsan and Istislah. All four Sunni schools of law reject the use of Ijtihad. Contemporary Sunni scholars claim that using ijтиhad makes Islamic law malleable and subject to human interpretation alone. However, all four main Sunni schools use Istihsan, even though both Istihsan and istislah are arguably “more creative,” and to refuse to formally use ijтиhad and allow the usage of istihsan and istislah is inconsistent. A creative interpretation refers to the subjectivity of the jurist. “More creative” means that the jurist takes more freedom, and does not predominantly link his reasoning to verses in the Qur'an and Sunna.

The argument of this paper is founded on concepts which need to be defined and explained extensively. This is why it is necessary to look at the specific meaning of ijтиhad, istihsan and istislah. Defining Ijtihad is a complex matter, and as mentioned by Devin Stewart, in both Sunni and Shia maddhabs, ijтиhad has a “long and complex semantic history.”² Ijtihad is considered a source of law for Shia after the Qur'an and the Sunna of the Prophet, his household and the Imams. Knut Vikor writes that the term ijтиhad is now used in all contexts to define new meanings.³ Ijtihad is normally translated as “interpretation.” Wael Hallaq defines ijтиhad as: “the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort.”⁴ Ijtihad is the interpretation of the sources (Qur'an and Sunna) in order to derive the law. In other words, Ijtihad is a creative

² Devin J. Stewart, *Islamic Legal Orthodoxy : Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City : University of Utah Press, 1998), 226.

³ Knut S. Vikor, *Between God and the Sultan : A History of Islamic Law* (New York : Oxford University Press, 2005), 53.

⁴ Hallaq, “Was the Gate of Ijtihad Closed?” 3.

interpretation of the law. Many modern scholars advocating for progressive Islam refer to Ijtihad as the duty for every believer to search for answers for themselves. Without dismissing this modern use of the term ijihad, within this paper the term ijihad will refer solely to its formal meaning in Shia jurisprudence—in a context where a mujtahid, a person entitled to Ijtihad, and a muqallid, a person entitled to practice or taqlid, are involved in a scholar-follower relationship.⁵ Bernard Weiss writes that in the process of ijihad, the mujtahid discovers what is present in the sources, but not self-evident.⁶ Thus, ijihad is a process of deriving the laws only from the texts.⁷ This is important to note considering the common misconception that ijihad is the product of the jurist's opinion only. Some have explained the need to end the use of ijihad in Sunni schools of law to preserve Shari'a from the interference of authorities, while others refer to the closing of the gates of ijihad as the illustration of the "decadence of Islamic institution and culture."⁸ As mentioned by Weiss:

For the Sunni, revelation is the sole source of ethical-legal values; human reason is extraneous to knowledge of such values. Legal knowledge can only be acquired pursuant to the ascertainment of the existence of God, the reality of the revelation, and the authenticity and meaning of those texts in which revelation is contained.⁹

It is for these reasons that Sunni scholars find the results from ijihad too uncertain to be reliable. Ijtihad was a term that emerged from the school of Ra'y. Scholars such as Abu Husayn al-Basri, a prominent scholar of the Mu'tazili school, in his book, *al-Mu'tamad fi Usul al-Fiqh*, established the conditions for the practice of Ijtihad.¹⁰ Al-Shirazi, a Persian Ismaili scholar, also listed some of the conditions for the qualifications of the mujtahids.¹¹ Al-Ghazali built on the works of al-Basri while al-Shirazi and Al-Amidi also added important details.¹² The term ijihad

⁵ Ibid.

⁶ Bernard Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad," *The American Journal of Comparative Law* 26.2 (1978): 200. [Proceeding of an International Conference on Comparative Law in Salt Lake City Utah on February 24–25, 1977]

⁷ Ibid., 201.

⁸ Hallaq, "Was the Gate of Ijtihad Closed?" 3.

⁹ Weiss, "Interpretation in Islamic Law," 204.

¹⁰ Hallaq, "Was the Gate of Ijtihad Closed?" 5.

¹¹ Ibid., 6.

¹² Ibid., 7.

existed before the works of al-Basri, however the conditions for the practice of ijihad were first written by him.

A noted by Mohammad Hashim Kamali, professor of Law at the University of Malaysia, jurists do not agree on a unique definition of the Istihsan.¹³ Istihsan means to approve, or to deem something preferable. It is a derivation from the Arabic word *hasana*, which means good or beautiful. The use of istihsan avoids rigid judgments and unfairness that might result from enforcement of the existing law.¹⁴ A major debate surrounding Istihsan is whether it is rooted in Qiyas or not, and if so, whether it was meant to be when Abu-Hanifa first developed the method. Emile Tyan states that istihsan allows one to establish a hierachal moral code of conduct based on the following: "necessity (*durura*), need (*Haqa*), interest (*maslaha*), convenience (*munasaba*), ease (*suhula*)."¹⁵ According to Tyan, Istihsan can be used for the creation of the new rule, or for the interpretation of a preexisting rule.¹⁶ The aims of the use of Istihsan can be numerous depending on the context. Vikor writes that the main purpose of Istihsan is to allow the jurist to decide on qiyas that are stronger and can override others.¹⁷ Some modern scholars have defined Istihsan as equity, but others, such as John Makdisi from UCLA, think this comparison is based on weak premises. Tyan provides more details and mentions that classical works defined istihsan as either: "the preference for a recognized source of law over reasoning by analogy, or the preference for a reasoning by analogy over another that is considered weaker."¹⁸

There are many examples used by authors to explain the use of Istihsan. A very simple, one mentioned by Vikor stipulates: "No qiyas rule allows a man to see the naked body of a woman he is not related to. But it would cause greater harm for a woman if this were to prevent a doctor from curing her of an illness. So istihsan says that the woman's welfare must override

¹³ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge : Islamic Texts Society, 2003), 248.

¹⁴ Ibid., 246.

¹⁵ Émile Tyan, "Méthodologie Et Sources Du Droit En Islam (Istihsān, Istiṣlāh, Siyāsa ṣar'īyya)," *Studia Islamica* 10 (1959) : 84. [Quotations from Émile Tyan are a personal translation]

¹⁶ Ibid.

¹⁷ Ibid., 65.

¹⁸ Ibid., 88.

the rule from the text here.”¹⁹ Here the “good” is preferred; the welfare of the woman overrides the principle of men being forbidden to see an unrelated woman naked. According to Tyan, there are different categories of *istihsan*. The first is the “*ijma istihsan*”, which is an interpretation of *istihsan* with which scholars find consensus.²⁰ The second kind of *istihsan* favors rules, contradicting *Qiyas*, or even Qur’anic texts and examples from the Sunna. It is not opposed to the revelation, but is guided by overarching rules.²¹ For the founder of *istihsan*, Abu-Hanifa, Shafi’i became his main source of criticism, condemning its use.²² It appears, however, that Shafi’i scholars, such as Al-Amidi, have stated that Shafi’i himself used *Istihsan*. Even Al-Ghazali, another Shafi’i, accepted some forms of the use of *istihsan*, though he described it as an “imaginary source of law.”²³

While *Istihsan* was developed by the Hanafi maddhabs, the concept of *istislah* is a Maliki one. *Istislah* is derived from the word *maslaha* which can be translated as “common good”. Imran Ahsan Khan Nyazee defines *Istislah* as “distinguished from the broader principle of the *maslaha* and mentions that it is a principle that permits a more flexible type of analogy as compared to *qiyyas*.²⁴ The Maliki School accepts the method of *istihsan*, but brings precision with the creation of *istislah*. However, both methods are in the same spirit. Tyan elaborates on the concept of *Istislah* and writes that it refers to the concept of common good, or interest.²⁵ The interests for a society and a government can be divided into three categories. The first category of interests is mentioned in the text, the second category of interests can be found in the text but has been rejected, and the third category has not been mentioned in the text at all. For this third category, because there is no mention in the text, human reason is left on its own to protect the common good in the interests of the society. Finally, there is very little scholarship on *istislah*; most scholars talk about *istihsan* and *istislah* as one method.

¹⁹ Vikor, *Between God and the Sultan*, 66.

²⁰ Tyan, “Méthodologie,” 84.

²¹ Ibid., 85.

²² Ibid., 91.

²³ Ibid.

²⁴ Imran Ahsan Khan Nyazee, *Theories of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003), 248.

²⁵ Tyan, “Méthodologie,” 89.

Within the schools, Istihsan varies in meaning and usage. The Hanafi School, the Malaki School and Hanbali School have validated istihsan as a subsidiary source of law while the Shafi'i and Shia maddhabs reject it completely as a method of Usul al-fiqh.²⁶ For Hanbali Muslims, istihsan has to clearly be rooted in the Qur'an and Sunna. In fact, they believe istihsan is only valid if rooted in the texts. It is hard to prove that Hanbali Scholars use istihsan in a more creative manner than the use of ijтиhad by Shia Scholars. For this reason, the main focus will be on the three other Sunni Schools, which represent the vast majority of Sunni Muslims. Istihsan, Istislah, and Ijtihad all give some freedom of interpretation to the jurists at different levels. Imam Ahmad Ibn Hanbal as well Al-Shafi'i could be considered the "stricter" scholars when it comes to the use of interpretive methods of jurisprudence. Although the Malikis recognize the close relationship between Istihsan and Istislah, their main emphasis is on Istislah. Hanafi Scholars, however, embrace the use of Istihsan in all its forms.²⁷ According to Kamali, Malikis and Hanafis started using Istihsan-Istislah to depart from Qiyas.²⁸ Also, Malikis differ from the other schools in that the legal reasoning of istihsan for Maliki scholars is more flexible and less rooted in the revelation and in the Sunna than for the Hanbalis and Hanafis.²⁹

Istihsan, Istislah, and Ijtihad: Three Similar Methods

Even though the four Sunni maddhabs claim to be against creative interpretation by mujtahids, the use of istihsan and istislah are creative just like the use of ijтиhad by Shia in contemporary Islamic thought. Istihsan and ijтиhad are very closely related. Abdur Rahman Doi writes very clearly that "istihsan is an important branch of ijтиhad, and has played a prominent role in the adaptation of Islamic law to the changing needs of society."³⁰ Raham does not mention istihsan as an extension of Qiyas, but rather as a branch of ijтиhad. Also, modern scholars, refer to the historical emergence of istihsan from Ra'y. They define istihsan as a method of deriving the law that is creative and that is a legacy of ahl Al-Ra'y. Al-Khudari, a

²⁶ Kamali, *Principles of Islamic Jurisprudence*, 246.

²⁷ Ibid., 249.

²⁸ Ibid.

²⁹ Ibid., 248.

³⁰ Abdur Rahman I. Doi, *Shari'ah: The Islamic Law*, (London, United Kingdom: Ta Ha Publishers, 1984), 246.

renowned Egyptian scholar, pointed out that Companions and Successors of the Prophets, when discussing possible solutions for a question, obviously referred to the Qu’ran, and then the Tradition of the Prophet. And, with the spirit of the Shari’ā in mind, they interjected their own opinion (ra’y).³¹ Kamali says that this part of the tradition cited here by Al-Khudari justifies the use of Istihsan. There is, obviously, for many contemporary Sunni Scholars, a clear connection between istihsan and Ra’y. Weiss also argues that istihsan and istislah are vestiges of the ra’y which played a role in classical jurisprudence. According to his writings, modern Sunni scholars wrongly associate the use of istihsan with qiyas, or with the principle of maslaha.³² This association would hide the true independent nature of istihsan as a source that does not rely on Qiyas. Tyan studied the use of istihsan among contemporary Sunni scholars and concluded that most times, scholars use Istihsan without referring to qiyas. He writes that jurists have much freedom in the creation of rules.³³ Of course, some scholars would disagree with this thesis and argue that istihsan means giving preference to a qiyas over another. According to them, qiyas are fundamentally an extension of elements of the Qur’an or the Sunna.³⁴ Consequently, if istihsan places qiyas in a hierarchical order depending on the contexts, and if qiyas are rooted in the text, istihsan is obviously not creative. The problem with this argument is that istihsan is not only, or not at all, a method of favoring qiyas over others. It has been proven by many contemporary scholars such as Kamali, that the attempt at linking istihsan and qiyas is twisted. Such scholars argue that istihsan is much closer to ijтиhad than to qiyas.³⁵ Tyan also reveals that even if one of the usages of istihsan is to favor a qiyas over another, generally, it is not the way it is used (88).

Istihsan and Istislah as Originally Creative

Istihsan and Istislah are creative because they were thought to be by the founders of the maddhabs who developed these methods. Imam Malik wanted to emphasize the necessity of

³¹ Kamali, *Principles of Islamic Jurisprudence*.

³² Weiss, “Interpretation in Islamic Law,” 203.

³³ Tyan, “Méthodologie,” 87.

³⁴ Kamali, *Principles of Islamic Jurisprudence*, 250.

³⁵ Ibid., 261.

using human knowledge and developed the principle of *istislah* on that premise. In other words, different terms are used to refer to very close methods of jurisprudence. Kamali writes that Abu-Hanifa did not think of *Istihsan* as a method of jurisprudence based in analogy.³⁶ In fact, Vikor also argues that Abu-Hanifa created *Istihsan* to reduce the role of *qiyyas*, not to expand it.³⁷ Furthermore, Shafi'i, when he published the *Risalah*, probably never thought of *Istihsan* and *qiyyas* as linked, because he totally rejected the concept of *Istihsan*. *Istihsan* is then antithetic to *qiyyas*, and, therefore, much closer to *ijtihad*. Hallaq attempts to explain these derivations in the meaning of *Istihsan* and writes:

The broad outlines of the evolution of *istihsan* from the second/eighth-century arbitrary or semi-arbitrary mode of reasoning—severely attacked by Shafi'i—to a coherent and systematic doctrine during the fifth/eleventh century and thereafter are well known.³⁸

Hallaq explains that there have been changes in the practice of *istihsan* since the eleventh century, and that certain jurists have decided that *istihsan* is a not creative method anymore (such as Pazdawi, Sarakhsī, and, later on, Ibn Taymiyya), but that some have continued practicing *istihsan* and *istislah* as a creative method.³⁹ And this is where the confusion emerged. With these different citations of scholars, it is easy to conclude that the main difference between creative reasoning in contemporary Islamic thought between Sunni and Shia maddhabs is a difference in terminology, and not in method of jurisprudence.

A Need for Creative Interpretation in Sunni Schools

As mentioned throughout the paper, there is a huge discrepancy between Sunni and Shia jurisprudence in the use of *ijtihad*. Shia jurists are without a doubt allowed to use *ijtihad* as a source of the law. And even if many scholars such as Hallaq claim that Sunni Scholars have been using *ijtihad* throughout history, it is normally assumed that *ijtihad* is not allowed in Sunni schools. The term *mujtahid* is, in Sunni Schools, restricted for early scholars and founders of the Maddhabs, while *Mujtahids* in Shia Islam are Doctors of Law and the ones responsible for

³⁶ Ibid.

³⁷ Vikor, *Between God and the Sultan*, 65.

³⁸ Wael B. Hallaq, "Usul Al-Fiqh: Beyond the Tradition," *Journal of Islamic Studies* 3.2 (1992): 196.

³⁹ Ibid., 197.

interpreting the texts during the occultation of the Mahdi.⁴⁰ The emergence of the concepts of Istihsan and Istislah can be explained by a few reasons, and one of them is this interdiction of the use of ijтиhad for Sunni Scholars. Of course, as mentioned before, ijтиhad is used in many different contexts and is defined differently by scholars. Because Ijtihad was forbidden by the Caliphs, they had to come up with a new interpretive method to create laws. This would mean that Istihsan and Istislah have the same aims as ijтиhad, and that the main difference is the terminology used. Istihsan and istislah, if both are a source of law standing on their own and not related to qiyas, would be as creative as ijтиhad in Shi'ism for obvious reasons. Some, such as Tyan, go as far as arguing that Istihsan and Istislah are at times more creative than ijтиhad. Sunni maddhabs have, because Scholars disagree on the number, about less than a hundred reliable hadiths. Hadiths, in order to be considered reliable, need to be transmitted through a chain of Companions of the Prophet. Because of the limited number of hadiths, Sunni scholars need analogies to find solutions to legal problems not mentioned in the Qur'an or Sunna. At times, however, analogies do not suffice and rules need to be created to protect the interests of the society, as mentioned by Tyan, with little relation to the Qur'an and the actual Sunna. Shia Muslims, however, define Sunna differently, and not only should the Tradition of the Prophet be accepted as a model, but also the tradition of Fatimah, and of the descendants of the Prophet—the twelve Imams—should be considered. For these reasons, Shia Muslims have many more hadiths and the need for qiyas or for ijтиhad outside of the text is nonexistent. In other words, Sunni scholars need to practice istihsan and istislah without referring to the text and interpret accordingly, because many legal details are not mentioned in the Qur'an, or in their hadiths.

Conclusion

The use of istihsan and istislah is a creative process that does not only emerge from the Qur'an or the Sunna, but often from the jurist's reasoning. Historically, but also contemporarily, Scholars wrongly associated Qiyas with Istihsan and Istislah. It is obvious however, when

⁴⁰ Stewart, *Islamic Legal Orthodoxy*, 226.

looking at the writings from the perspective of Abu Hanifa, Malik or of Shafi'i, Istihsan and was intended as a source of law independent from the Qiyas. The last main point is that Sunni Scholars need to use a method of interpreting the sources which is creative and subjective because of their limited number of hadiths. Shia Scholars practice ijтиhad and can easily ground most of their reasoning in the texts, since they have a much larger collection of hadiths. Istihsan and Istislah are more creative and at times, as mentioned by Tyan, less rooted in the Revelation and the Sunna than ijтиhad. However, this thesis does not undermine the use of istihsan or istislah as a less valid way for jurists to derive law than ijтиhad. Both methods are interpretive, and their validity should be questioned by scholars and believers. The main difference in Sunni methods of jurisprudence from Shia methods is often the terminology and not the actual practice.