

**AL-BID'AH VERSUS AL-MASHLAHAH AL-MURSALAH AND AL-ISTIHSÂN: AL-SYÂTHIBI’S LEGAL FRAMEWORK**

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**Kata Kunci:** al-istihsân, bidah, al-mashlahah al-mursalah, faqîh, teori hukum

**Abstract:** al-Bid'ah versus al-Mashlahah al-Mursalah and al-Istihsân: Al-Syâthibi’s Legal Framework. This paper discusses with the juridical basis of Abû Ishâq al-Shâthibi’s (d. 790/1388) argument against those who considered al-mashlahah al-mursalah (public interest) and al-istihsân (juristic preference) to be forms of innovation. The present discussion will examine the efficacy of al-Syâthibi’s distinction between al-bid’ah (innovation), which is foreign and even contradictory to the shariah and the validity of the legal principles of al-mashlahah al-mursalah and al-istihsân as subsidiary, yet valid sources of law under the Quran, the Sunnah, ijma’, and qiyâs (ratio legis). In addition, it will be shown how al-Syâthibi’s epistemological reliance on legal theory distinguished him from jurists who shared quite different views on the same matter. In the concluding remarks, the relevance of this theory with contemporary Muslim society with respect to pursuing legal practices is underlined.

**Keywords:** al-istihsân, al-bid’ah, al-mashlahah al-mursalah, faqîh, legal theories

**Introduction**

In order to avoid innovations which are not pre-ordained in the divined law, the Prophet has advocated Muslim to strongly be committed to his Sunnah and following his example. In making all acts are firmly guided by the Prophet, the Sunnah of Prophet informed us which is narrated by Muslim from Jâbir ibn ‘Abd Allâh, “Allah’s Messenger would say in his sermon, “The best of statements is (from) the Book of Allah and the best of guidance is the guidance of Muhammad. The worst of matters are innovations and all innovations are al-bid’ah (heresy) and all al-bid’ah leads to misguidance.”1 This statement is very predominantly acknowledged as the foundation of censuring al-bid’ah.

The essence of innovation is the creation of some-thing that has no precedence or any evidence as to its existence. In the Quran, it is said that Allah is al-Bâdi’ (The Originator) because He created this world without there being anything similar to it before, “The Originator of the heavens and the earth. When he decrees a matter, he only says to it: ‘Be!’–and it is” (Q.s. [2]: 117). The Prophet said, “Whoever innovates something concerning our affairs, which has nothing to do with us, is indeed rejected.” Similarly, he said, “Whoever carries out an action that we have not ordered is indeed rejected.” Both Hadiths declare a censure against al-bid’ah: the first with regards to its innovation and the second with regards to its acceptance and implementation.2

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1 Shahîh Muslim, Book of Friday Prayer, Hadith No. 1435.
2 Aslam Farouk Ali, “A Translation of Muhammad al-Ghazali’s Study on Bid’a with an Introduction on Author and His Thought”
In comparing between religious matters and the mundane ones, Najm al-Dîn at-Tûfî said:

“We only consider the public welfare in matters of conduct and not in matters of worship and the like, because these fall within the rights of the Lawgiver and are specific to Him. It is not possible to have knowledge of His rights, in relation to time, space, quantity, etc., except as He has directed and the servant is therefore compelled to comply to the stipulations set by Him. This is because a slave is only regarded as obedient if he complies with the directions of his master and does only that which he knows will please him. This is exactly the case here; when philosophers rejected the law and approached religious devotion as an application of their intellects, they incurred the wrath of Allah and were misled and led others astray. This is, however, not the case with commissioned right, as these concern political rulings implemented for the general welfare and determined by it.”

This means that whatever outside religious matters albeit having no precedence and the text is silence on it are not al-bid‘ah.

‘Izz al-Dîn ibn ‘Abd al-Salâm stated in relation to this, “Whoever considers the general purposes of the law, which are based on the obtaining of welfare and the repelling of perversity, realizes that it is not permissible to be lax in obtaining welfare or in overlooking perversity even if it is not stipulated by ijma‘ or qiyas or any specific text; the understanding of the law makes this an obligation.” This statement can be inferred that enactments dealing with acts of worship is not the same as enactments dealing with mundane and social conducts. The Lawgiver takes the responsibility of stipulating the realities of worship with regard to form, time, place, quantity, method, what is general and what is specific, etc. This is specified by His wisdom and there is no room for the exertion of our own opinions; we are only required to fulfill these obligations. The acts of worship should remain the same as they have been from the era of the Prophet (Saw.) to the end of time, with no difference between our predecessors and the generations to come. Complete compliance has to be shown in this matter, from beginning to end. The rules of maslahah mursalah and istihsan are served to respond to in the Quran and the Sunnah. Al-mashlahah al-mursalah (public interest), on the other hand, although not rooted in a certain dalil (indicant), was regarded by al-Syâthibi as legal and in no way to be counted as al-bid‘ah. Yet he acknowledged that the validity of al-mashlahah al-mursalah is disputed by jurists. In this section we will discuss the argument of al-Syâthibi against those who deemed al-mashlahah al-mursalah an example of good al-bid‘ah (al-bid‘ah al-hasanah).”

Before we discuss further on the concept of al-mashlahah developed by al-Syâthibi, we need firstly analyze the formulae of al-mashlahah developed by some jurists before him. It attempts to highlight the ramifications of Syâthibi’s approach which may offer a different paradigm in coming to a legal solution for the cases that have no precedence in the Quran nor the Sunnah.

The limit of Islamic jurisprudence in solving the cases at hand and the silence of the Quran and the Sunnah on a variety of social problems forces Muslim jurists to exert their efforts in finding legal solutions by reconciling the dilemmatic and ambiguous issues in the field of religious-cum ritual matters on the one hand and the benefit of social affairs on the other. Doing ijtihâd is one alternative to be exercised by circumventing the legal corpus (fiqh) and its methodology. The practice of ijtihâd as a principal means for reviving Islamic law, increasing its flexibility, and adapting it to contemporary needs of Muslim societies is the area of legal theory in

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6 Al-Syâthibi, al-I’tisâh, p. 111.
which the concept of al-mashlahah was discussed. The use of al-mashlahah, first introduced through the word al-istisblah, was created by Mâlikite school.

The more comprehensive development of the concept of al-mashlahah in Islamic legal theory was then introduced by Syâfi’î jurist Abû Hamîd Muḥammad al-Ghazâlî (d. 505/1111). His paradigm of al-mashlahah inspires many jurists in the latter development of Islamic legal theory to which the al-mashlahah edifice came at its excellent elaboration in the hand of Abû ʿIṣâq al-Syâthibî (d. 790/1388). Al-Ghazâlî argued that al-mashlahah was God’s purpose (maṣḥah, pl. maṣḥîsh) in revealing the divine law, and, more concretely, that this intention was to preserve for humankind the five essential elements of their well-being, namely their religion, life, intellect, offspring, and property. What protects these essential elements and averts them harm al-Ghazâlî considered mashlahah and what fails to do so is its opposite, namely maṣṣâdah. The introduction of al-mashlahah, or al-mashlahah al-mursalah which lacks concrete indications in the Quran, the Sunnah, and ijmâ’, was likely reconciled as approaches on the position of revealed law and the reason behind why the Asy’ârîte and Muṭâzîlîte concluded something as either bad or right. The former sees that right and wrong can only be justified by the revealed law, while the latter leaves that determination as a result of human intellect. Al-Mashlahah, in Ghazâlî’s eyes, is preponderance over the text once there is a certainty (qâti) of general necessity (dharîrî) for all community (kullî) (religion, life, intellect, offspring and property). Whatever constituted merely a need (ḥaṣî) or improvement (tahsîn) with respect to these elements was un-acceptable to al-Ghazâlî without concrete reference within the Quran or the Sunnah.

The most liberal breakthrough of adopting al-mashlahah as a legal solution which differed from the above Muslim jurists was al-Ṭûfî’s concept. Al-Ṭûfî (d. 716/1316), a Hanbalite jurist, employed al-mashlahah on the basis of substantive rationality, rejecting the formal procedure and categories such as necessity (dharîrî), need (ḥaṣî) and (tahsîn) improvement. He underscores al-mashlahah as being an independent criterion for deriving rulings. According to al-Ṭûfî, anything that brought about al-mashlahah or averted harm was commensurate with the purposes of the law. In order to adapt the law according to circumstances, al-Ṭûfî argued that a ruling entailing al-mashlahah should receive priority over a contradictory ruling, be it scriptural or not. He limited the supremacy of al-mashlahah in the law-finding process by excluding acts of worship (ʿibâdât) from its purview and by stipulating that al-mashlahah could neither override fixed textual injunctions (muqaddarât) nor a specific indicant (dalîl khâşî) from the Sunnah, or consensus. Abû ʿIṣâq al-Syâthibî deals with al-mashlahah by referring firstly to the fundamental ground of Meccan and Medinan suras in the Quran. He argued that the Meccan suras embody the general message of Islam in which the universal sources of the law are laid down. The Medinan suras, as well as the Sunnah, constitute the particulars of the law that elucidate, specify, qualify or complement the earlier sura of the Quran: 49 He considered the universal sources of the law to be certain and immutable whereas the particulars of the Quran and the Sunnah were probable and subject to change. For al-Syâthibî, attaining al-mashlahah and averting maṣṣadah at the level of necessities, needs, and improvements was a universal source of the law. A situation that lacked textual evidence could be judged as to its conformity with the law by evaluating its al-mashlahah. In case a particular ruling from the Quran or the Sunnah stood in opposition to a universal source, i.e. al-mashlahah, al-Shãtibi gave preponderance to the universal source. However, he did not consider al-mashlahah to be weightier in every instance. Exempted were those particular rulings that constituted legal licenses (rukhash) or specifications (tahshish). In addition, considerations of al-mashlahah had no bearing on acts of worship (ʿibâdât), acts that happened or could have happened during the lifetime of the Prophet and that had received a ruling, and the continuous practice of the early Islamic community.

Some scholars such as Vardit Rispler have argued that the concept of good and bad al-bid’ah developed as a parallel system to the shariah. While it is true that

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8 Opwis, Islamic Law and Society, 188.
10 Opwis, above n 7, 189-90
12 Opwis, above n 7, 195.
14 Vardit Rispler, “Toward a New Understanding of the Term Bid’a,” Der Islam, 68, 2 (1991), 320-328. Rispler stated that “in order to open the stagnant development of Islamic law, the classification of bid’â into good and bad is made possible to serve as a parallel to the shariah. While in fact, for our understanding al-bid’â itself is not a juridical edifice of system like al-mashlahah mursala stood and derived the conclusion from the shariah matters when the textual basis is absence. On the contrary, bid’â is a doctrine in which theologically it is censured by the Prophetic tradition.”
to only where necessity is clear cut and universal".16

there is no legal or logical reason for the use of good or bad
to yield an answer. In other words, there is no legal or
can be used in instances where
fully integrated by his time within juridical of the

mursalah
Ahkâm

mursalah
al-mashlahah al-mursalah

Al-mashlahah al-mursalah is in fact essential to the
correct functioning of the law. The rulings which are
incumbent upon Muslims cannot all be traced back
to the Quran, the Sunnah, ijmâ’ (consensus), or qiyâs (ratio legis) fail
to yield an answer. In other words, there is no legal or
logical reason for the use of good or bad al-bid’ah as a
foundation for juridical arguments when there is no
need to do so. For, unlike al-bid’ah, al-mashlahah al-
mursalah is legally guaranteed as the outcome of ijtihâd,
which by definition recognizes the superiority of the shariah.

Al-mashlahah al-mursalah is used to implement
al-mashlahah (general good) for human beings
when there is no clear stipulation in the text, this alone
cannot serve as its only claim to authenticity. This is
because its arbitrary use will result in reliance on rational
standards and the inevitable introduction of innovation.
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customs), insisting that the former are illogical
and required an intention (niyyah) while the latter are
entirely logical and need not be prefaced by an intention
(niyyah). Therefore, al-bid’ah in a general sense, al-
Syâthibî contends, consists in the habitual performance of
acts pertaining to ibdâh (religious matters) and
aimed at association with divine law (masyrû’) which are
denied by the Shariah. But when it comes to the division al-bid’ah into
and bad31 or the application to its juridical values,
like wâjib (obligation) and mandûb (permissible) as al-
Syâthibî rejects it is baseless, since value judgment

15 Abû al-Hasan ‘Ali Sayf al-Dîn al-Âmidî, al-Ihkâm fi Ushûl al-
18 Al-‘Ubaydî, al-Syâthibî, p. 229.
19 Al-‘Ubaydî, al-Syâthibî, p. 230.
20 Muhammad ‘Abid al-Jâbirî, al-Dîn wa al-Dawlah wa Tahbîq al-
21 The Indian reformer Syâkh Ahmad Sirhindî (d. 1034/1624)
launches vigorous attacks against the distinction between good and
bad bid’ah. He insists that either of them is away from the Sunnah
and therefore should be scrupulously avoided. Yohanan Friedman, Syâkh
Ahmad Sirhindî: An Outline of His Thought and A Study of His Image in
the Eyes of Posterity (1971), 43-44.

al-mashlahah al-
mursalah

15 Abû al-Hasan ‘Ali Sayf al-Dîn al-Âmidî, al-Ihkâm fi Ushûl al-
16 Al-Âmidî, al-Ihkâm, IV, p. 215-6. to justify everything as legal or valid once the two are
put as the equal form of legal basis for coming to the
rulings having no precedents in both the Quran and
the Sunnah. The difference between al-mashlahah al-
mursalah and al-bid’ah is substantially rooted in the
indicants and the ends of the shariah. Al-mashlahah
al-mursalah, al-Syâthibî contends, is principally based
on the indicants of the shariah by which the aim of
the latter, i.e., promoting benefit and averting harm,
are maintained.17 For if al-mashlahah al-mursalah is not
rooted in a dalil, this means that one is construing Sha’rî
matters as good or bad based merely on reason, which
is prohibited. Mâlik (d. 179/795), the outstanding
proponent of al-mashlahah al-mursalah, insisted on
adjudicating matters on the basis of the Shariah, not
merely reason. The shariah, al-Syâthibî asserts, never
tolerates al-bid’ah at all, for there is no good al-bid’ah
tolerable to the Shariah. On the contrary, pointing to
the universality of the censure of al-bid’ah ("every al-
bid’ah is error and every error is in hell"), al-Syâthibî
concludes that all al-bid’ah is blameworthy.18

As al-mashlahah al-mursalah is a legal principle used
when the dalil in the nash is absent, al-Syâthibî makes
clear distinction between the domains of ibdâh and
adîyyah (customs), insisting that the former are illogical
and required an intention (niyyah) while the latter are
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Syâthibî contends, consists in the habitual performance of
acts pertaining to ibdâh (religious matters) and
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not sanctioned by the Quran or the Sunnah.19 Thus all
behavior tied merely to customary matters can legally
resort to al-mashlahah al-mursalah.

In making this distinction, al-Syâthibî stands out, in
my opinion, from other jurists.20 He clearly differentiates
between cases related to public interests (al-mashlahah
al-mursalah) and al-bid’ah itself. Of course the former is
arrived at through the exercise of ijtihâd as it is the
latter. But when it comes to the division al-bid’ah into
good and bad21 or the application to its juridical values,
like wâjib (obligation) and mandûb (permissible) as al-
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in this case is purely arbitrary. The five legal values, after all, are based objectively on the shariah and are regarded as a legal obligation (taklīf) for one who possesses a sound mind (mukallaf). They also carry with the certainty of the shariah. Al-bid'ah, however, if divided into rulings by analogy, is ambivalent whether logically or legally. Logically speaking, if it is reasonable that it should be so divided, how can the censure of al-bid'ah as error (kull al-bid'ah dhakālah) in essence be substantiated? Legally speaking, on the other hand, rulings are related to rewards from God, whereas the warning of the calamity of al-bid'ah itself is universal. Therefore, innovation is undoubtedly a violation of the shariah, whereas novelty of its nature contradictory, but also in its tendency to introduce ambiguity into legal argument. Wājib (obligation), for instance, if attached to al-bid'ah, yields al-bid'ah al-wājibah, which consequently entails the legal norm of obligation. Al-bid'ah, however, is itself epistemologically censured based on the aforementioned Prophetic report. Therefore, it is misleading to qualify al-bid'ah by one of the legal norms such as obligation. For, obligation (wājib) as a legal norm represents “an act whose performance entails rewards, and whose omission entails punishment.” Obviously, the argument over whether al-bid'ah can be wājib or mandūb is debatable from both theological and legal perspectives. All this goes to show that there is a gulf between al-bid'ah and al-mashlahah al-mursalah in the eyes al-Syâthibî.

To demonstrate how al-bid'ah is unacceptable in law and al-mashlahah al-mursalah allowed, al-Syâthibî develops his own theory in distinguishing between the two. He starts by assigning three conditions which al-mashlahah must fulfill in order to be considered valid. First, al-mashlahah is attested to by the shariah in virtue of its essential suitability and epistemology. This is what lends it authenticity. Furthermore, there is no indication that there was any disagreement over this fact. Otherwise, al-Syâthibî says, al-mashlahah would mean contradicting the shariah. One example of al-mashlahah at work is in the ordinance of penal retaliation (qishâb) which is applied in order to safeguard life (hifz al-nafs).

Second, if there is a clear indicant of the shariah rejecting it, al-mashlahah is clearly invalid. This is because its suitability (muamalab) or lack of it is not seen from the standpoint of human reason perse, but rather in terms of the indicants (adillah, sing. dalil) of the shariah. Thus, al-Syâthibî insists, “the meaning of al-mashlahah for us is based on the rationality of its function, in which benefits to mankind are promoted and harms averted; therefore, the capacity of reason in its understanding is dependent on the shariah. On the other hand, if it is not attested to by the shariah in its commission and omission, the agreement of Muslims is applied for its rejection.”

Third, the use of al-mashlahah is allowable if the syar’i indicant neither points to its acceptance nor rejects it. In any such case, says al-Syâthibî, al-mashlahah must meet two conditions to be valid: (a) The case should rely on the indicants of the text in which the suitability is maintained. For instance, someone guilty of murdering the person from whom he or she stands to inherit is barred from receiving this or her proportion of the inheritance. (b) There should be a suitability between the case and the rational meaning of the shariah, even though in fact it may not be sustained by a certain dalil (indicant). In such instances, al-Syâthibî asserts, this process is called the act of al-mashâlih al-mursalah (pl. of al-mashlahah).

Al-Syâthibî’s marriage of reason and the shariah in order to make the law more dynamic on the one hand, while preserving its authenticity on the other, is quite brilliant. Although he employs al-mashlahah al-mursalah as a legal principle when the nasb is silent, he appears to differ from his predecessors such as Najm al-Dîn al-Tûfî (d. 716), whose theory of al-mashlahah is more utilitarian and tends towards liberalism. Al-Syâthibî insists that the shariah is still superior to reason as a fact that ensures that mankind will not indulge in innovation when precedent cannot be found in the nasb. Al-Tûfî as we have noted, is much more liberal in his employment of al-mashlahah. For example, he considers al-mashlahah applicable to all mundane matters, such as mu'amalab (social relations), whether attested to or not in the nasb. However, he rejects its use in matter of 'ibâdah, which are clearly spelled out in the nasb.”

26 Al-Syâthibî, al-’Irshâm, II, 2, 113.
28 Religious utilitarianism and liberalism borrowed from Hallaq indicate the function of Islamic law as merely seen for the benefit of mankind in this world for public interest and also sometimes are manipulated for personal advantages. In the end, religious principles are only seen as substantive assumption. See Hallaq, above n 25, 214-216, 231-233.
29 Muhammad Mustafâ Syalabî, Ta’llî al-Alkhâm, (1947), 292-293.
mujtahid, he says, undertakes his inquiry for the benefit and on behalf of those who are mukallaflin (who possess a sound mind). In other words, he saw al-mashlahah as “promoting benefit and averting harm (jalb naf’ aw daf’ dharar) for the good of mankind in this world and in the hereafter.30

Before elucidating his main argument in support of al-mashlahah as an acceptable source of law, al-Tüfi tries to explain how the notion was interpreted by al-Qarâfî and al-Ghazâlî. The former divided al-mashlahah into three types. First, al-mashlahah which is similar to qiyaṣ in that the rulings of law can be derived through the ratio legis from the nash; Second, al-mashlahah which is irrelevant and contradicts the nash; and finally, al-mashlahah al-mursalah, for which the indication of its rejection or acceptance is not clear in the nash. Al-Ghazâlî, however, asserted that al-mashlahah functioned according to the category of dharûrî (necessity). Al-Tüfi, then, concludes that al-mashlahah is not precluded but is even used according to the demands of ijtiḥâd. For, he reasons, if al-mashlahah is omitted, ijtiḥâd automatically becomes void. His theory of al-mashlahah, however, is only applicable to mundane matters (customs), whereas ‘ibâdah are certain and fall under the prerogative of God.31

The concept of al-mashlahah promulgated by al-Tüfi, however, is perhaps too liberal. He, for example, sets aside the three sources of law (the Quran, the Sunnah, and Ijmâ‘) in favor of the Prophetic report “do not inflict injury or repay one injury with another” (là dharar wa là dhirâr),32 in supporting his theory of al-mashlahah.33 In short, if we compare it to al-Syâthibî’s theory of al-mashlahah, which is predicated on the ends of the shariah itself, al-Tüfi seemingly acknowledges the supremacy of reason in cases of public interest.

The efficacy of al-mashlahah, according to al-Syâthibî, is certain and is essentially different from the adjudication of cases by reason. For, as he frequently states, the seeds of al-bid’ah stem from its reliance on rational judgment which sets aside Shariah justifications. Judgment based merely on reason, if applied to shari‘i matters, leads to prime al-bid’ah.34 He defines al-bid’ah as “an invented way in religion that resembles the way of Shariah. ‘He comments that al-bid’ah commonly occurs in the area of rituals but can also occur in the general area of dealings (al-a‘mâl al-‘adîyyah). With reference to rituals, for example, he cites exaggeration in the performance of rituals. It can also include disregarding or neglecting certain other aspects of shariah such as refraining from marriage. This difference, between the two concepts of ‘âdah and al-bid’ah underlies al-Syâthibî’s approach not only toward the particular issue of custom but toward legal theory and interpretation in general. In al-Syâthibî’s framework, ‘âdah acquires a positive legal connotation; it is to be approved and considered by the jurists. Al-bid’ah, on the other hand, is the opposite of ‘âdah in the sense that it bypasses the limits of shariah or even disregards it altogether. In other words, if a certain practice, habit, or custom is approved by Shariah either directly through the text or indirectly by being in line with its spirit, it is to be approved as a good practice (‘âdah), otherwise, it should be discarded as an unfounded innovation.35 He explains that this distinction between rituals and habits with reference to either ta‘abbud (faith-based acceptance) or ta‘îl (identifying the objectives of a given action) is crucial in light of the discussions about legal principles such as public interest (al-mashlahah al-mursalah) and juristic preference (al-istihlân).36

To support his idea of the difference between al-mashlahah al-mursalah and al-bid’ah, al-Syâthibî cites ten examples of al-mashlahah introduced by the Companions and pious ‘ulama’ in response to cases not clearly mentioned either in the Sunnah or the Quran. For our purposes, we shall look at the five examples which al-Syâthibî elaborates upon in particular. First, there is the agreement of the Companion on the compilation of the Quran in order to preserve it for posterity. This action was obviously neither assigned by the Prophet nor attested to in the Quranic

33 Hallaq, above n 25, 150-53. Hallaq argues that al-Tüfi employs the concept of al-mashlahah superseding consensus, even the Quran and the Sunnah, by maintaining three reasons. First, the efficacy of al-mashlahah is in agreement among all mankind, while consensus and its authoritativeness are subject to disagreement. Second, the textual evidence in the Quran, the Sunnah, and consensus is varied and at time contradictory, leading to severe disagreement among jurists. Al-mashlahah, however, is subject to no disagreement. Third, historical evidence shows that the Companions abandoned the evidence of the texts in favor of public interest arrived at by their own opinion.
34 Al-Syâthibî, al-I’tishâm, 1, 359.
36 Shabana, “‘Urf and ‘Adah”, p. 98.
injunctions. Second, there is the prayer sentence set for a person accused of a crime, even though prison is usually reserved for someone who has been convicted. Fourth, there is the ruling that a person may be employed as the great imam (al-imâm al-kubrâ), even though he may not be qualified as a mujtahid or mujtah, due to the lack of a qualified candidate for this position. Fifth, there is the agreement reached by the majority of ulama on suspending the penalty for taking property/wealth (mâl) when there is great exigency for it in Muslim society.37

The aforementioned examples, quoted by al-Syâthibî to support his views on the validity of al-mashlah al-mursalah, are all issues that are not clearly referred to in the texts. They are all, however, categorized as public interest (al-mashlah al-mursalah) where their compatibility with the ends of the law (maqâshid al-syarî'ah) is unequivocal.

Before passing judgement on the fact that al-mashlah al-mursalah is different from al-bid'ah, al-Syâthibî declares that public interest was always given the highest consideration by the Companions. The compilation of the Quran, for example, was not commanded by the Prophet. Instead, though it was not ordained by the nash, the Companions took the initiative for the sake of public interest, making it therefore lawful. Furthermore, al-Syâthibî’s justification of public interest is limited to ‘adiyyât (customs) and excludes ‘ibâdah.38 Al-Syâthibî in these instances probably intended to make the law flexible enough to meet the demands of human beings within the constraints of the means (wâjîh) of achieving the ends of the shariah (maqâshid al-syarî’ah). The ends of the shariah itself, however, are crucial to preserving the authenticity of the law and to ensuring that the benefits to mankind in this world and in the hereafter are maintained. In support of this he quotes the saying of Hûdzayfah “every ‘ibâdah not performed by the companions is null and void… and take the path of your predecessors.”

Still on the topic of the essence of public interest, al-Syâthibî insists that the systematization of Arabic grammar (‘ilm al-nahw) be typified as al-mashlah, not al-bid’ah wâjibah as proposed by ‘Izz al-Dîn b. ‘Abd al-Salâm (d. 660).39 Arguing against ‘Izz al-Dîn’s position, al-Syâthibî insists that its introduction was not based on evidence either from the Quran or the Sunnah. Rather, al-Syâthibî categorizes such practices on the part of his predecessors as a necessity (dbarîrî) in the field of the means (wâjîh), and not that of the maqâshid (the ends), of the shariah.40 Al-Syâthibî, furthermore, asserts that cases involving customs (‘adiyyâh) have their basis in reason, such that their benefit or harm can be understood logically. Provided, he reminds us, the application of al-mashlah al-mursalah should be in line with the ends of the shariah and that does not contradict the roots of the law.41

This advanced theory of the law which protects the benefits of the servant of God (mashâlih al-‘ibâd) is also put forward by Ibn al-Qayyim al-Jawziyyah (d. 751/1350). Ibn al-Qayyim contends that fatwas can change according to changes of place, time and condition. In his mind, the Shariah itself operates for the benefit of mankind in this world and the hereafter on the basis of rahmah (God blessing), mashlahah and hijmah (wisdom of God). None of these, he insists, leads mankind into hardship.

From the examples cited above, al-Syâthibî comes to a conclusion which has certain ramification for his legal theory. For him, mashlahah as practiced by his forefathers (such as Companions) has two facets. First, its conformity with the ends of the Shariah does not fundamentally contradict its roots (ushûl) or its indicants (dalâ'il, pl. da'ilî). Second, public interest deals with matters rationally understandable and touching specifically on customs (‘adiyyâh) are unlawful.

This is because customs are unlike ‘ibâdah which are transcendent and incapable of rationalization—examples being, according to al-Syâthibî, wudhû’ (ablution) and hajj (pilgrimage).42 Both ritual practices can only be performed and taken for granted. To distinguish the fundamental bases of ‘ibâdah (which are beyond human reason) and of ‘adiyyâh (which are accessible to human intellect), al-Syâthibî positions himself in the tradition of the Mu’tazilîtes43 in claiming that reason has no place in the domain of ‘ibâdah. This is because ‘ibâdah (like ablation, for instance, which is irrational) are taken for granted as submission to God, he insists. Cleansing oneself after menstruation, for example, is equivalent to submission (ta’abbud). Therefore, ijtihâd

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37 Al-Syâthibî, al-‘Itibâm, II, 115-27.
38 Al-Syâthibî, al-‘Itibâm, II, p. 131-132.
has no business in trying to understand any hidden meanings in ‘ibādah. On the contrary, the objections of ‘adīyyah (customs) are clear, i.e. to preserve benefits (masalahih) and avoid harms (mafāsid), whereas those of ‘ibādah matters are unclear.\footnote{Al-Syāthibî, \textit{al-Muwaṣṣalāt}, I, 146.} In other words, al-Syāthibî insists that ‘ibādah, being certain and perfect, need neither addition nor subtraction, while ‘adīyyah are rational and may be modified according to necessity and need. Deviations in the performance of ‘ibādah which are alien or not attested to by a syar‘i indicant are counted as real\footnote{Al-Syāthibî, \textit{al-Muwaṣṣalāt}, II, p. 133.} al-bid‘ah, and therefore are to be absolutely rejected.

\textit{Al-maṣlaḥah al-mursalāh}, therefore, amounts to protecting the constraints of dharuri (necessity) and averting difficulty in religion. In stating this, al-Syāthibî contends that a certain element (probably\textit{ al-maṣlaḥah al-mursalāh}) should be included in a relevant case if its exclusion might otherwise lead to imperfection. This theory, known as mā lā ‘āyim al-wujūb illā bīh, is an indispensable facet of the means of pursuing the ends (maqāṣid), rather than constituting innovation. The philosophical basis of this outlook is intended to avert hardship.\footnote{Al-Syāthibî, \textit{al-Muwaṣṣalāt}, IV, p. 20.}

Al-Syāthibî agrees that there is a suitability in the maqṣahid, which constitutes of necessity, need and improvement, which function as a kind of human attempt at understanding the shariah. The suitability of these ends is unequivocally in line with the roots of universality (\textit{ushūl al-kulliyyāt}), which ensure that the benefits in this world and in the hereafter will not transgress these limits. Such constraints and limitations, al-Syāthibî\footnote{Al-Syāthibî, \textit{al-Muwaṣṣalāt}, IV, p. 20.} insists, are not only described in the Quran but also elaborated in the Sunnah. This foundation ensures that as long as there is textual evidence in the Quran and the Sunnah applicable legal rulings should always be taken as the basis of an argument not reason alone. If a certain textual basis of the shari‘ah is silent, the employment of\textit{ al-maṣlaḥah al-mursalāh} is acceptable as longs as it conforms to the ends of the Shariah and their indicants (\textit{dālā‘il}, pl. \textit{dalīl}).\footnote{Al-Syāthibî, above n 44, 26-27.} This position shows that the superior of the shari‘ah to reason helps to protect the community from adjudication of matters leading to\textit{ al-bid‘ah}. This rationale leads to the conclusion that innovation itself emerges through rational assumptions drawn from matters for which the precedent of evidence is lacking.

Judging by the moderate position taken by al-Syāthibî, we could say that he was not himself reluctant to use reason (\textit{‘aql}) as the basis for legal decisions. He, nevertheless, tried to place himself in an intermediate position between\textit{ naql} (Shariah)—immutable by virtue of the certitude of divine law—and reason (\textit{‘aql})—which tends toward relativity. Elsewhere, he ascertains that reason is inferior to the Shariah, since the latter is universally certain. He repeatedly states that good and bad in the shari‘ah cannot be decided solely on the basis of reason, since justification on the basis of reason that something is good or bad is relative, while the shari‘ah is certain.\footnote{Wael B. Hallaq, “On Inductive Corroboration, Probability and Certainty in Sunni Legal Thought,” in \textit{Law and Legal Theory in Classical and Medieval Islam} (1995), 30.}

As Fazlur Rahman\footnote{Fazlur Rahman, \textit{Islamic Methodology in History} (2\textsuperscript{nd} ed, 1984), p. 153.} noted, al-Syāthibî was convinced that human knowledge based on reason and experience cannot be trusted at all and, therefore, cannot lead to action. Put differently, al-Syāthibî accepted rational judgment if based on universal truths (\textit{kulliyāt}) or on a multitude of probable instances or particular statements (\textit{juz‘iyāt}). One example of this is his theory of\textit{ al-maṣlaḥah al-mursalāh} which is fundamentally rational though based on his theory of the ends of the law (\textit{maqāṣid al-syar‘i‘ah}). Wael B. Hallaq\footnote{Wael B Hallaq, “On Inductive Corroboration, Probability and Certainty in Sunni Legal Thought,” in \textit{Law and Legal Theory in Classical and Medieval Islam} (1995), 30.} notes that he even went beyond his predecessors in developing a legal theory of induction, by remaining faithful at the same time to the established theory of tawātur as the basis of his general theory. He nevertheless exercised caution by rejecting arbitrarily rational judgment which can ultimately lead to innovation (\textit{al-bid‘ah}).

His efforts may be described as an attempt to reconcile the two extremes represented by the shari‘ah and reason, though he gave preference to the former. Al-Syāthibî\footnote{Al-Syāthibî, \textit{al-Muwafaqât}, I, p. 184.} acknowledged that the shari‘ah does not elaborate on all rulings in detail, but gives universal guidance in many cases; therefore, it is left to the mujtahid (mujtahid haqîqi) to use his reason in the exercise of \textit{ijtihād}. Furthermore, al-Syāthibî believed that the validity of\textit{ al-maṣlaḥah al-mursalāh} and \textit{istihādān}, for instance, as sources of law is unequivocal, though neither is explicitly referred to in the Quran and the Sunnah. However, their compatibility with the universal roots (\textit{ushūl al-kulliyyāt}) is obvious, in that they both benefit human beings in allowing them to perform good ordinances.\footnote{Al-Syāthibî, above n 46, 66-76.} Accordingly, the role of reason is the aforementioned process is indispensable. Al-Syāthibî, however, insists that adjudicating good or bad in the ‘ibādah is the prerogative of the shari‘ah, whereas in mundane affairs, where logic plays a greater role, reason may be favored.

Having reviewed the legal principles held by al-Syâthibî, we will look at the different arguments of other scholars which lean one way or the other in the contest between the Shariah and reason. Our account will show that al-Syâthibî is certainly more objective in the sense that his middle way reflects a more reasonable balance between the rational and the scriptural camps.

Unlike the Mâlikîtes, for whom al-mashlahah al-mursalah could be employed as a source of law in the complete absence of textual indicants, the Zâhirites, and especially Ibn Hazm, strenuously objected to such an approach in religious matters.35 The rigidity of Ibn Hazm on this topic strictly delimited the role of reason in understanding divine law. He equated the practice with râ’y (reason), basing himself on the Quranic passage “obey Allah and obey the messenger […] if ye have any disputes[…]refer it to Allah and the messenger” (Qs. [4]: 59) and “Umar’s saying “beware the people of râ’y (ahl al-râ’y)” as objectionable due to the possibility of contradicting the divine law and creating innovation: how then does one resolve the nass which is still universal or ambiguous? And how does one negate ta’âlîl (ratio legis)?34 which is counted as legal principle? On the contrary, we can argue that the Shariah is not entirely based on ‘ibâdah, which are certain, but also on customs (‘adîyyât), which have to be elaborated in conformity with the benefits and harms that face human beings. As Fazlur Rahman contends, the shariah, whether in the form of ‘ibâdah or mu’tâmâdah (social relation), is not devoid of ‘illah (ratio legis), and li‘kma (wisdom). For the Quran, he affirms, usually gives an explicit or implicit reason for a pronouncement when it concerns a moral and legal judgment or principle therefore, the main reason underlying legal understanding is li‘kma, which is a bearer of benefit (al-mashlahah) for mankind.35

Al-Syâthibî too frequently proclaims the maqâṣhid al-syari‘ah as universal roots (ushûl al-kulliyât) and as a legal basis justifying the al-mashlahah approved in the practices of the companions mentioned above. Yet, he also turns his attention to another theory besides al-mashlahah al-mursalah which is likewise not counted as innovation. This is al-istihsân (juristice preference), which can be utilized as a legal means. Thus while al-bid’ah, which is not based on the ends of law and even contradicts the shariah, is entirely rejected, al-istihsân in the eyes al-Syâthibî, which commands good is lawful and can be adopted as a method of reasoning, and is espoused by al-Syâthibî himself as a tool of legal argument.

**Al-Bid’ah and al-Istihsân**

For al-Syâthibî, al-istihsân, in terms of literal meaning i.e. to presume something to be good or bad, was utilized by the people of innovation (ahl al-bid’ah) as their argument. Unlike pure al-istihsân, which is somewhat arbitrary in determining what is good or bad, the shariah leaves no doubt about its position. Any assessment of good or bad (or pure al-istihsân) in syarî’i matters which is not based on a certain dalîl (indicant) constitutes innovation (al-al-bid’ah al-latî tasta’âlîn).56

Bearing this arbitrary use of al-istihsân in mind, al-Syâthibî nevertheless, characterizes it as a legitimate source of law applied in cases where the nash is silent. For him, the use of sound al-istihsân is not based on one’s own feelings or speculative reason. On the contrary, al-istihsân espoused in Islamic jurisprudence must be seen from the perspective of the objective of the law giver (qasab al-syari‘i).57 The validity of al-istihsân, according to him, is recognizable in cases where there is a duality between relying on necessity (al-harûrî) on the one hand and using qiyâs on the other. Exclusive reliance on the latter in a given case may, however, lead to hardship, and therefore is to be avoided; instead, al-istihsân (juristic preference) should be used. For example, the ‘araya contract by which unripe dates on the palm-tree are bartered against their value calculated in term of edible dried dates, is considered lawful. If it were left to qiyâs, it would be unlawful, but die to great exigency and hardship, the solution by al-istihsân makes it lawful. In this particular case, al-istihsân promotes a particular al-mashlahah in maintaining the universal dalîl (“al-akhdz bi-mashlahah zu‘jiyyah fi muqâbalah dalîl kulli”).58

The validity of istihâsan as a legal principle was also defended by al-Shirazî (d. 476/1083). He selectively accepted istihâsan as long as it was approved by a dalîl (indicant) and when the use of qiyâs was less than certain. He, however, rejected al-istihsân when deemed to be a limitation of the ‘illah (ratio legis) by a dalîl (takhsib al-‘illah bi-al-dalîl). The former is illustrated by the example of a person who out of forgetfulness proceeds to eat something when he is supposed to be fasting. Qiyâs (ratio legis) dictates that the fasting would become void, for the fundamental consideration in qiyâs is that food has entered his body, whether intentionally or not. This judgment is however abandoned on the


36 Leghari, “The Malikite Doctrine,” p. 84.


39 Al-Syâthibî, al-Muwaṣṣafatîn, IV, p. 148-149.

40 Al-Syâthibî, al-Muwaṣṣafatîn, IV, p. 149.
basis of a Prophetic report which declares fasting to be valid if the eating was the result of forgetfulness. This prophetic report is thought to be “preferred” because it takes into account a text that would not otherwise have been employed in qiyâs and which results in a different rule.99

The above example is regarded by al-Shîrâzî as a sound al-istihsân, given the weakness of qiyâs in this case. Al-Shîrâzî, however as we have seen, objects to limiting the ‘illah by dalîl. Al-istihsân in this case is not tolerated and must be regarded as unsound. In addition, for him, the use of istihbân is based on the prophetic report “what Muslims deem good, it is good before God” (mā ra’âh al-Muslim hasana fa huwa ‘ind Allâh hasana). The report, according to al-Shîrâzî, connotes the goodness which may be identified through the consensus of ‘ulamâ‘; not individual preference. Any justification by rational preference without a dalîl is in error. Qiyâs, accordingly, is only to be used as a tool if no explicit text pronounces on the relevant matter.60 A similar argument rejecting al-istihsân when it involves limitation of the ratio legis (takhshîsh al-‘illah) is also made by Sarakhsî (d. 490/1097). He cites the case of the difference between predatory animals and predatory birds. The beaks of the later are analogized as bone, which therefore cannot transmit impurity to the food. The former, however, use their tongues when eating and consequently transmit impurities to the food they consume. This example, al-Sarakhsî says, is not to be regarded as takhsish al-‘illah (the limitation of ratio legis) but rather as a “preferred qiyâs” (al-qiyâs al-mustahsân). This is because, he concludes, the use of al-istihsân follows the Quran, the Sunnah, and pious predecessors.61

Contrary to one derived by analogy to the textual sources of the law, this legal finding needs a further identification clearly from the text and ends of the law. What is problematic in this way of law-finding is that the jurist has to justify why he disregards a correct ruling arrived at by analogical reasoning in favor of the preferred ruling. Critics of this procedure frequently denounce the ruling adopted in the name of juristic preference on the grounds that it is not rooted in a firm textual basis or a formal way of reasoning. Such decisions are often rejected by other jurists as being arbitrary personal opinions (ra‘î). Al-Syâfi‘î (d. 204/820) is famous for his dictum “who practices juristic preference, legislates.”62

There are many opinions among jurist scholars over istihbân to be used as the method of finding the rulings. Ibn ‘Aqîl defines al-istihsân as “abandoning of legal analogy due to an indicant (dalîl) stronger (aqwâ) than it.” This definition furthers a certain requirements that avoid human passions based merely on reason. He avoids the subjectivity of the undefined term “more appropriate” and emphasizes that the jurist gives preference to an indicant that occupies a higher rank in the hierarchy of legal evidence. Abû al-Khaththâb is even more specific in his criticism of Abû Ya’lâ’s definition. He states that one ruling cannot be more appropriate or stronger than another, rather, only their indicants can be considered as such. Hence, for him juristic preference means abandoning a ruling derived by analogy on account of an indicant stronger than analogy, namely the Quran, the Sunnah, or consensus. Both Ibn ‘Aqîl’s and Abû al-Khaththâb’s comments on juristic preference imply that they understand this methodology not as one in which two analogically derived rulings are contradictory but that the conflict is between an analogy and a quranic text, Sunnah, or a consensus. The preferred ruling then would be valid on account of its higher rank as legal evidence. Nevertheless, Ibn Taymiyyah is correct in portraying these three Hanbalî scholars as supporters of the practice of juristic preference in the sense of one ruling being given preference over one derived by analogy.63

According to Hanbalî scholars such as Ibn Taymiyyah sees juristic preference as an alternative way of finding the rulings. He opines that juristic preference is not contrary to a correct legal analogy that can equally apply to the case under consideration; rather, the ruling based on analogy does not apply in this instance because the jurist has found a textually supported ruling that better fits the case in question, namely the “preferred” ruling. He added that the difference between the two rulings is elucidated by textual evidence. The preferred ruling specifies the general ruling of the analogy in a manner that invalidates its application for the particular case.64 Such another perspective makes us a critical understanding that al-istihsân is quite different from al-bid‘ah.

Al-istihsân in Malikîte doctrine, according to al-

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60 Al-Shîrâzî, Syarîh al-Luma‘, p. 70-74.


63 Opwis, above n 62, 226

Syâthibi is equivalent to *al-mashlahah al-mursalab* (public interest); such *istihsân*, therefore, is not alien to stipulated indicants (*muqaddâh adillah*). In making such a statement, al-Syâthibi may have been trying to stress that *istihsân* itself is different from arbitrary rational judgment in instances where textual evidence is lacking, and therefore it is not to be counted as innovation (*judgment in instances where textual evidence is lacking, dharârî maqâshid al-syarî'ah*). Legal cases should primarily be in line with the ends of the law (*maqâshid al-syarî'ah*) rather than with pure reason. The ends of the law, where necessity (dhârâtî) is a key element, depend on divine wisdom (*hikmah*), a solid basis on which to draw when there is lack of conformity between *qiyyâs* (ratio legis) on the one hand and *al-istihsân* on the other.

As the difference between *ibâdah* and mundane matters (*awâ'id*) is fundamental point in al-Syâthibi’s view, the function of *al-istihsân* in these two domains has to be treated separately. As we have seen *ibâdah* are considered perfect in Islamic law as well as impossible to justify on the sole basis of reason. Mundane matters, however, are not only rationally understandable but they may also change in accordance with time, place and condition. Al-Syâthibi, therefore, tolerates the use of *al-istihsân* in mundane matters insofar as the *dalîl* neither stipulates nor contradicts the shariah. Employing *al-istihsân* in the shariah without any *dalîl* is categorized as innovation (*al-bid'ah*), for in al-Syâthibi’s words, not every *al-istihsân* is true. The cases of *al-istihsân* which al-Syâthibi rejected appear to have been efforts at using pure reason to judge actions as good or bad without a *dalîl*. On the contrary, if *al-istihsân* is ruled as conforming to a certain *dalîl*, it is lawful.

Ibn ‘Arabi, as quoted by al-Syâthibi, defines *al-istihsân* as setting aside a certain *dalîl* temporarily on the condition that hardship is present or as an exceptional solution when the laws applying to a certain case ambiguous; on the one hand applying a particular legal norm can lead to difficulty, while on the other the reduction of hardship is of prime importance. For these reasons, *al-istihsân* can be applied as law in the following instances: first, in matters of *urf* (local custom); second, in *al-mashlahah*; third, in order to ease human burdens; and fourth, to eliminate hardship. Ibn Rusyd, moreover, characterizes *al-istihsân* as abandoning *qiyyâs* where reliance solely on the latter may lead to transgression of the law.

Having elaborated the issue of *al-istihsân* as it is treated by these two Andalusian-born scholars, al-Syâthibi concludes that *al-istihsân* is in conformity with the universal indicants (*adillah*, sing. *dalîl*) of the shariah insofar as no clear *dalîl* from the Quran or the Sunnah is expressed. Indicants function to bring clarity to words which have a plethora of meanings such as when the meaning of the Quran is specified by the Sunnah. Al-Syâthibi agrees that reason can be employed to interpret the Shariah when used in conjunction with *al-istihsân*. He, however, rejected the use of *al-istihsân* where rational judgment is allowed to dominate the shariah. This is because the Companions, he insists, only employed reason if there was no clear indicant from the *nash* and only by referring it to their understanding of the roots of the shariah. They never came to the point of saying, “I decided this because my mind tended towards this conclusion.” The subjectivity of pure *al-istihsân*, al-Syâthibi states, lies in the fact that decisions as to what is good or bad in the human mind may change depending on purposes and conditions. This was evidenced by the people of innovation who rejected the search for truth in the shariah. They resented the people of science (*ahl al-'ilm*) because of the latter’s consistency in applying the shariah.

Just as reason is a subjective factor in pronouncing *syâri’* matters, al-Syâthibi also doubts the validity of the heart (qalb) when used as a measure to justify good or bad in the sight of the shariah. Arguing against the Prophetic report “ask your heart” (*istafti qalbak*), he declared he could not see a third facet to the Shariah other than the Quran and the Sunnah. Any third means of justifying good or bad, he insists, probably refers to those issues which are beyond religious concerns.

Al-Syâthibi’s rejection of the heart’s judgment when the *nash* is silent is based on four considerations. First, where a case arises for which no certain *nash* can be found, the judgment should be based on a relevant indicant (*dalîl*) as derived from the Shariah. A fatwa *al-qalb* (asking the legal decision to the heart), however, cannot be used as a *dalîl*. Second, all the cases disputed by Muslims should be referred to the Quran and the Sunnah, not the fatwa of the heart. Third, it is agreed among Muslims that cases which are not solved should be referred to the people of knowledge (*ahl al-dzikr*). Finally, al-Syâthibi draws the conclusion that every man should his lesson from God’s signs in conformity with His indicant in the Quran.
Al-Syâthîbî’s consistency in championing the supremacy of the shariah is not only reflected in his concept of al-bid’ah, but it also conveyed in his effort to preserve the authenticity of the shariah from any deviation. Al-Syâthîbî even goes beyond the boundary of his madehâb, that is Mâlikite school of law, but rather has accommodated some credible and valid approaches from other school, i.e. Hanafite madehâb, to the extent it is in line with the spirit of shariah. Unlike al-Syâfî’î (d. 204/820) who rejected altogether al-istihsân, al-Syâthîbî accepted al-istihsân insofar as it was in line with the indicants and rejected those who treated religious matters on the basis of pure al-istihsân (reason). Al-Syâfî’î, on the other hand, rejected al-istihsân on the ground that it is similar to indulging pleasure (talażeldzeed).75

In addition, al-Syâfî’î sees istihân as equivalent to nay (opinion) and hence cannot tolerate it. Legal judgment in the shariah, according to him, can only be based on the Quran and the Sunnah, ijmâ’ (consensus) and qiyyâs (ratio legis). To admit opinion not based on these sources means accepting the reasoning of non-specialists.76 It is reasonable to assume that al-Syâfî’î was playing it safe when he rejected istihân by equating it with nay (opinion). This position, which he espoused in the latter half of his career, was probably inspired by a wish to condemn those in “the ancient schools”75 and those among his contemporaries who were too free in their use of reason. In other words, al-Syâfî’î’s polemics are obviously against al-istihsân and arbitrary ii’tihâd and in favor of disciplined qiyyâs as a corrective for those who juxtaposed reason and the shariah. Yet, al-Syâfî’î was ultimately forced to recognize that one has to make decisions on points of detail for which there is no clear evidence from the nash.76

In short, nay, which is significant as an expression of rationalist and utilitarian tendencies, was wholly opposed by al-Syâfî’î; this was what fuelled his vehement opposition to al-istihsân. Nevertheless, while the unequivocally insisted on the overriding status of the Quran and the Sunnah, he still tolerated certain elements of nay and moulded them into arguments that could be used in the law, but only insofar as they derived their premises from revelation.77 Al-Syâthîbî, on the other hand, accepted al-istihsân as long as it did not deviate from the indicants of the shariah. Following the example of Mâlik,78 the eponymous founder of his school, al-Syâthîbî deemed its suitability to be unquestionable, provided its injunctions in siyar matters are not based on personal judgment or speculation. The sound al-istihsân which al-Syâthîbî agreed with had the characteristic of relying upon the end of the law-giver (qasba al-Syârî), such as setting aside qiyyâs (ratio legis) in favor of a stronger al-mashlahah or to avert a greater danger. Such al-istihsân is seen, al-Syâthîbî states, from the fact that its efficacy clearly promotes the ends of the shariah, dharûrî (necessity), haṣâ (need) and taḥsînî (improvement). This is because, according to him, in some cases reliance on a rule merely on the basis of qiyyâs (ratio legis) might give rise to some sort of harmful consequence for human beings. Al-Syâthîbî, however, is still convinced that it can be undertaken in perfect consistency with the foundational texts and without any intrusion of merely human proclivities (dzawq).79

Having discussed the differences between al-bid’ah (innovation) and al-istihsân and ii’tihâd as perceived by al-Syâthîbî, we can say that his aim was, on the one hand, to preserve the authenticity of the shariah, and on the other to ensure that the role of reason is well defined in line with the spirit of the law. The sound al-istihsân, for instance is regarded by al-Syâthîbî as one means of performing ii’tihâd. This legal principle, however, can be used on the condition that conflicting indicators exist. Al-istihsân itself, we assume is procedure rather than an indicator in its own right; al-‘Âmidî (d. 630/1232) after all refers to it as tarjîh al-adillah (the preponderance of the indicants).80 The pure istihân however, if used arbitrarily, can lead to the subjectivity of human judgment. While the shariah is deemed as the superior reference for legal injunctions, the people of innovation (ahl al-bid’ah) take the opposite position by using al-istihsân on the basis of pure reason to justify al-bid’ah practices.81

Both the violence of al-bid’ah and the rejection of

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77 Hallaq, “Was al-Shâfi’i the Master Architect of Islamic Jurisprudence?” 597.
78 Mâlik b. Anas as quoted by al-Syâthîbî designates that istihans is deemed as nine-tenth of human knowledge. Mâlik’s characteristic statement grasps the true essence of istihân as a method of finding better and more equitable alternatives to existing problems both within and beyond the confines of qiyyâs (ratio legis). Al-Syâthîbî, al-Itishâm, II, 138.
pure al-istihsân (reason were also proclaimed by the Syrian-born reformist thinker Muḥammad Rasyid Ridhâ (d. 19350). Prefacing his position on al-bid’ah and arbitrary reason, Ridhâ points out that opinions on legal matters can be divided into three categories: first, the valid, second the invalid, and third the ambiguous opinion. Of these we are most concerned with the second one. In spite of his censure against al-bid’ah, which he regarded as invalid or evil opinion, Ridhâ convincingly rejects arguments based solely on assumptions of good or bad (pure al-istihsân) in syar’i matters. Al-istihsân, he insists, which is not based on sound qiyâs (ratio legis) or which fails to promote al-maslahah or avert danger is counted as unsound al-istihsân, and therefore foreign to the Shariah.82

Closing Remarks

As the ends of the law (maqâshid al-syarî’ah) are the hallmark and characteristic of al-Syâthibî’s legal theory, the validity of al-maslahah al-mursalah and al-istihsân is tied to this concept. These two methods of reasoning are essentially different from pure reason. Moreover, al-bid’ah strictly speaking is inferior to these two legal principles. In my opinion, al-bid’ah absolutely disregards the ends of the law in favor of pure rational judgment. While the syar’i matters is clear, al-Syâthibî is in faithful with the superiority of the nash over reason. Over the cases dealing with mundane matters, al-Syâthibî tolerates rational judgment as the means of way solution insofar as it is in accordance with human welfare and averts danger. []

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82 Muḥammad Rashid Ridhâ, Yusr al-Islâm wa Ushâl al-Tasyrî al-Âmn, (al-Qâhirah: Mathbâ’ah Nahdhah Mishr, 1950), 42-43, 72. In this case, Ridhâ seemingly trods the footsteps of al-Syâthibî in treating al-istihsân as both sound and unsound. The former is counted as valid, while the latter is invalid, and the rational judgment is dominant. In the latter, the innovation frequently espoused unsound al-istihsân of his/her justification.

---------, al-Muwafaqât fî Ushûl al-Syarî’ah, 4 vols.