

ISTISHSĀN AND ISTISHĀB IN ISLAMIC LEGAL REASONING: Towards the Extension of Legal Finding in the Context of Indonesia

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Abstract: This article explores the debate among Muslim jurists on *istihsān* and *istishāb* and the ability of both to solve Islamic legal cases in Indonesia. The research is done through normative legal approach by referring to various literatures in the elaboration of legal concepts. The concepts of law (*istihsān* and *istishāb*) are discussed and become the central topic. At the end, those concepts are applied in the cases to draw normative conclusions. The result of this research shows that though *istihsān* and *istishāb* are still debatable, both of the two have a strong influence and relevance to be applied. In the Indonesian context, *istihsān* and *istishāb* reasoning, may be combined or separated, can be used to promulgate the obligatory registration of marriage, the application of health protocol of Covid-19 during prayer in the mosque in the time of pandemic, and possibility of using credit card and e-commerce for transaction, the acceptance of Pancasila as the basis of the Republic of Indonesia, the legitimacy of 1945 constitution, democracy, and current principles of modern jurisprudence (such as the principles of pre-assumption of innocent). That is due to the fact of their virtues for public life (*maṣlaḥah muḥaqqaqah*), and no exact prohibition is found in al-Qur'an and Hadith (*ibāḥah aṣliyyah*). In short, by using *istihsān* and *istishāb*, such mentioned recent cases may be solved and logics of legal reasoning can be extended.

Keywords: *Istihsān, Istishāb, Istinbāt*, Legal Case, Legal Reasoning

Abstrak: Tulisan ini mendiskusikan perdebatan ulama seputar *istihsān* dan *istishāb* sekaligus menyajikan bukti-bukti relevansi keduanya dalam menyelesaikan berbagai persoalan hukum Islam di Indonesia. Untuk mencapai tujuan tersebut, tulisan ini menggunakan metode penelitian hukum normatif berbasiskan riset kepustakaan dimana *istihsān* dan *istishāb* yang diperdebatkan tersebut kemudian diterapkan dalam suatu kasus untuk mencari kesimpulan normatif. Tulisan ini menunjukkan bahwa walaupun keduanya masih menjadi perdebatan hangat di kalangan ulama, namun pada kenyataannya, keduanya berpengaruh dan sangat relevan dalam penyimpulan hukum Islam. Dalam konteks Indonesia, melalui *istihsān* dan *istishāb*, dikombinasikan

atau secara terpisah, dapat menyelesaikan persoalan hukum seperti kewajiban pencatatan pernikahan, mengikuti protokol kesehatan selama pandemi covid-19 di saat menunaikan shalat di masjid, kebolehan menggunakan kartu kredit, perdagangan digital sebagai alat transaksi, legitimasi penerimaan Pancasila sebagai dasar Negara Republik Indonesia, Undang-Undang Dasar 1945, dan asas-asas perundang-undangan modern (semisal asas legalitas), karena terbukti kuat adanya kebaikan di dalam konsep tersebut, dan tidak ada ayat atau hadits yang secara eksplisit melarangnya (*barā'ah aṣliyyah*). Ringkasnya, melalui penalaran *istiḥsān* dan *istiṣhāb*, pesan-pesan Islam dapat teraktualisasikan, kasus-kasus terkini dapat diselesaikan dan logika penalaran hukum Islam dapat diperluas pijakannya.

Kata Kunci: *Istiḥsān, Istiṣhāb, Istinbāt, Kasus Hukum, Penalaran Hukum*

Introduction

In the study of Islamic jurisprudence, interpretation of the legal texts and even changes of the legal conclusion may occur and sometimes are inevitably have to be done. This is because of the changing times, places and cases.¹ In general, al-Qur'an and al-Hadith as main-sources of Islamic law denote several legal methods, concluded by '*ulamā*', such as *qiyās* (analogy) and *ijmā'* (consensus), *istiḥsān* and *istiṣhāb*.

From generation to generation, the new problems of jurisprudence that arise have never been able to be solved by only referring to the text (*naṣṣ*). It demands the '*ulamā*' to conduct *ijtihād* (legal finding) similar to Mu'ādh ibn Jabal who carried out the *ijtihād* and was legitimized by the Messenger of Allah (Rasūlu'Llāh), to which this concept was continued by the scholars from time to time. The effort of doing *ijtihād*, endorses Muslim scholars to have public academic debate of every creative legal concept, referring to the sacred texts. The debate pushes the creation and emergence of several schools of thought (*madhāhib*). Those *madhāhib* often have specific methods of reasoning, such as *istiḥsān* and *istiṣhāb*.

Due to the dynamic of current problems in public as well as in private matters, the elaboration of the existing *istiḥsān* and *istiṣhāb* as key concepts of legal reasoning is necessary. Hence, the purpose of this article is to prove that as the key concepts, both of the two are logical receipts and can potentially combine the essence of reason and revelation. They are useful to solve Indonesian legal problems, such as the mandatory of written marriage, e-commerce, pandemic prevention of disease (covid-19), Pancasila as fundamental consensus of nation as well as the acceptance of 1945 constitution.

The research problems are: a. the debate on these concepts among Muslim jurists; b. the conventional and expanded application of *istiḥsān* and *istiṣhāb* as a tool of legal reasoning to solve contemporary legal cases, especially within the Indonesian context.

In the light of normative approach, the research will begin by debating the ontological and epistemological concept and arguments of *istiḥsān* and *istiṣhāb* among *madhāhib* as methods of legal reasoning: (for example), why Hanafite are in agreement to *istiḥsān*, whereas Shafi'ite are accusing that people in favour of *istiḥsān* are creating legal norms out of Al-Qur'an and Hadith. After the debate, the writing tries to show the practicality of *istiḥsān* and *istiṣhāb* in day-to-day life: some legal cases mentioned above will be solved by using both methods of legal reasoning. In turn, by doing

¹ Karen Taliaferro, "Ibn Rushd and Natural Law: Mediating Human and Divine Law," *Journal of Islamic Studies* 28, no. 1 (2017): 1.

so, the next step of elaboration will inform that those methods can be proven and derived as a mode of knowledge production and a legitimate framework of legal solution. Lastly, some fundamental remarks as conclusions of the research will be presented.

Ontology and Epistemology of *Istiḥsān*

1. Definition: Searching Fundamental Meaning

Istiḥsān has the literal meaning of “to consider good”², whereas according to the term, *istiḥsān* is the turning (moving) of a mujtahid from clear deductive analogy (*qiyās jalī*) to vague (*qiyās khafī*) or from general law (*kullī*) to the law of exclusion (*istisnāʾ*) because of the existence of the proposition that favor to move.³

Imām Abū al-Ḥasan al-Karkhī added that *istiḥsān* is a legal determination of a *mujtahid* on an issue that is not in accordance with the existing legal provisions because there are stronger reasons for wanting to apply a law that is not in accordance with the original law.⁴

Agreeing with him, Imām al-Bazdawī, one of the Hanafite scholars, said: *Istiḥsān* is moving from the provision of *qiyās* to stronger *qiyās* or exclusion of *qiyās* based on a stronger proposition.⁵ From the scholars of Malikite, Imām al-Shāṭibī provided the definition of *istiḥsān* as ‘practicing a special benefit when it is contrary

to the general proposition. Indeed, *istiḥsān* is prioritizing the benefits of al-mursalah over *qiyās*’.⁶

The Hanbalite interpreted *istiḥsān* as ‘turning away from a legal provision to other provisions that are stronger than the previous’.⁷ If there is a conflict between *maṣlaḥah* and *qiyās*, then *maṣlaḥah* is taken and practiced. It is also reinforced by Ibn Qudamah with his statement that *istiḥsān* is the transfer of law to a problem from which it has similarities, due to certain arguments (originating from the Qur’an and Hadith).⁸

Therefore *istiḥsān* is always related to one of two things, leaving the real *qiyās* and practicing vague *qiyās* or leaving general laws and practicing exceptions. If there is a problem that is not found by law that comes from the argument of the texts, both from the Qur’an and Hadith, there are two ways, namely first to solve a case by looking at it from the perspective of literalism and secondly looking at it from the perspective of a different perspective, by which another law is found. The latter is named by *istiḥsān*.

From these explanations it can be concluded that *istiḥsān* is sourced from *qiyās* and the purpose of the existence of *istiḥsān* is benefit for humanity and practicing an action in accordance with its conditions. *Istiḥsān* is done in the presence of an argument which is logically acceptable and can be justified.

2. Between Revelation and Reason: Debate on *Istiḥsān*

Istiḥsān is one of the debated legal methods. Thus, there are two groups of scholars who

² Ibn Mandzūr, *Lisān al-ʿArab* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), p. 269; M.H Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 2003); Shaheen Sardar Ali, ‘Resurrecting Siyar through Fatwas? (Re) Constructing “Islamic International Law” in a Post-(Iraq) Invasion World’, *Journal of Conflict and Security Law* 14, no. 1 (2009): 119.

³ ‘Abd al-Wahhāb Khallaf, *ʿIlm al-Uṣūl al-Fiqh* (Indonesia: al-Haramayn, 2004), p. 79.

⁴ Muḥammad Abū Zahrah, *Uṣūl Fiqh* (Kairo: Dār al-Fikr al-ʿArabī, 1958), p. 262.

⁵ ‘Abd al-ʿAzīz al-Bukhārī, *Kashf al-Asrār fī Uṣūl al-Bazdawī* (Beirut: Dār al-Fikr, 1982), p. 1223.

⁶ Al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharīʿah* (Beirut: Dār al-Maʿrifah, 2004), p. 116.

⁷ ‘Abd al-Karīm ibn ‘Alī ibn Muḥammad Al-Namlah, *Iṭḥāf Dhawī al-Basāʾir bi Sharḥ Rawḍat al-Nāẓir wa Jannat al-Manāẓir* (Riyād: Dār al-ʿAṣimah, 1996), p. 289.

⁸ Ibn Qudamah, *Rawḍat al-Nāẓir wa Jannat al-Munāẓir* (Riyād: University of Muhammad ibn Saʿud, 1993), p. 407.

has different views on this legal basis. The first, who consider *istihsān* as a method of legal *ijtihad*, among which are scholars from the group of Hanafite, Hanbalite and Malikite. While the second group, namely Shafiite, Dzahirite, Muktaẓilite and Shiite who does not recognize *istihsān* as a part of Islamic legal method.

Many scholars use *istihsān* as an argument or method in solving new problems in Islamic law.⁹ Some scholars argue that *istihsān* is a very wise method to avoid harm and bring benefit to humans. *Istihṣān* enacts new laws that have values of urgency, making it more responsive and progressive.

Legal experts from the Hanafite, Malikite and some from the Hanbalite stated that *istihsān* is one of the methods used by scholars to perform *ijtihad* and that its legal results can be practiced. The Qur'anic verses that can strengthen their reasoning, among them are surah al-Zumar verse 18: "Those who hear the words then follow what is best among them. These are the people whom Allah has instructed and those who are resourceful".

According to the scholars who justify *istihsān*, particularly Imām Abū Ḥanīfah stated that this verse contains praise and adulation to servants of God who follow good things. The verse also contains the strengthening of *istihsān* as a legal validity (*hujjah*).¹⁰

There is a related argument in surah al-Zumar verse 39: "Say: O my people, work according to your circumstances, in fact I will work (also), then one day you will know", Then strengthened again with al-Zumar verse 55: "And follow well what has been revealed to you from your Lord before the doom comes to you suddenly, while you are not aware of

it". The Prophet also said: "Something that is considered good by Muslims, so it good in the sight of Allah."¹¹ (Narrated by Aḥmad ibn Ḥanbal)

From some of the arguments above, the fiqh experts from the Hanafite and Malikite stated that *istihsān* is included as legitimate arguments (*ḥujjah shar'īyyah*). They use it not to follow their passions but based on strong arguments. Doing *istihsān* is better than *qiyās*, because there is a stronger argument. In addition they also argue that *istihsān* is not only done when there are two arguments that are contradictory, but *istihsān* can also be done when there is an emergency situation. Imām Abū Ḥanīfah used *istihsān* which did not violate texts or *qiyās*. He chooses *istihsān* because it prioritizes the benefit of people.

The method used by Imām Abū Ḥanīfah in responding to the problems of the Iraqi people began with the use of texts from both Al-Qur'an and Hadith, then the statement of companion (*qawl al-ṣaḥābah*), and if it is still could not be solved then he would continue with *qiyās*. Finally, if it is not found, he uses the ratio by referring to the Qur'an and Hadith.¹²

On the other hand, there is a group that clearly rejects *istihsān*. Among them is Imām Shāfi'ī who bases his argument with Surah al-Qiyāmah verse 36: "Does man think that he will be left alone?".

In his book, *al-Umm*, Imām Shāfi'ī explains a lot about this verse. Lafaz سُدَى shows the meaning of "in vain", so that the above verse has the meaning that humans living in the world will not be abandoned by God in vain. God will not leave the things of the world in vain without a strong legal basis and foundation. While according to him, *istihsān*

⁹ Ḥusayn Muḥammad Mallah, *Al-Fatwā: Nash'atuhā wa Taṭawwaruhā – Uṣūluḥā wa Taṭbiqatuhā* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2001), p. 200.

¹⁰ Eka Sakti Habibullah, "Pandangan Imam Abu Hanifah dan Imam Syafi'i Tentang Al-Istihsan," *Al-Mashlahah Jurnal Hukum Islam dan Pranata Sosial* 4, no. 07 (2017): 456.

¹¹ Aḥmad Ibn Ḥanbal, *Musnad Aḥmad Ibn Ḥanbal* (Cairo: Mu'assasah al-Qurtūnah, 2001), p. 199.

¹² Muḥammad Salām Madhkūr, *Al-Ijtihād fī al-Tashrī' al-Islāmī* (Beirut: Dār al-Naḥḍah al-'Arabiyyah, 1989), p. 37.

includes vain deeds and he refused because there is no argument for underlying it.¹³

He has confidence that the right to use *istiḥsān* is behavior that follows the subjective passions as if it has made a new sharia, whereas only Allah has the authority to make it. Even one of his students, al-Qāḍī al-Bayḍāwī in his book *al-Wuṣūl ilā 'Ilm al-Uṣūl* positioned *istiḥsān* in the chapter of the rejected propositions (*al-adillāh al-mardūdah*).¹⁴

Furthermore, Imām Shāfi'ī said that the Prophet Muhammad in giving guidance had never used lust and also did not use *istiḥsān*. Shafii's schools prefer to use *qiyās* rather than *istiḥsān* when giving legal decisions on issues not found in the Qur'an or Hadith. They assume that *istiḥsān* has no clear boundaries and criteria as a standard for good and bad.¹⁵ Imām Shāfi'ī worries about the chaos caused by *istiḥsān*. For example, if there is a judge who determines a problem that does not have a predetermined text using the *istiḥsān* method (his personal opinion), then there is a high probability that many people will oppose the legal provision using the *istiḥsān* as well.

Naṣr Ḥāmid Abū Zayd illustrates the Shāfi'ī's thought on *istiḥsān*. The 'ulamā' such as Imām Mālik and Imām Abū Ḥanīfah used *istiḥsān* differently from Imām Shāfi'ī who disagreed with it. He reasoned that if the law was adopted using this method, there would be many differences in legal conclusions and opinions about the same legal problem. Every judge or *muftī* in a city will give multiple judgements in a case.¹⁶ Thus, *istiḥsān* jeopardizes the standard of law.

However, further study on Imām Shāfi'ī indicates that in many occasions he also use *istiḥsān* to set various laws. But he did not call it *istiḥsān*. For him all problems that are not contained in the Qur'an and the Hadith can be resolved with *qiyās*.¹⁷ While *istiḥsān* itself is part of the *qiyās*. Indirectly there are similarities between Shafiite and Hanafite. They agreed that *istiḥsān* could be accepted if it was not based on lust and had a strong argument which was used as a foothold in *ijtihād*. They only differ in naming the term.

3. Axiology of Istiḥsān: Conventional Types and Examples

The Hanafite scholars who mention *istiḥsān* as a method of legal conclusion are divide it into several types, namely:

a. Istiḥsān Qiyāsī

This group favours *qiyās khafi* rather than *qiyās jali* based on an argument.¹⁸ When a problem arises which then prompts two conflicting *qiyās* so that a mujtahid will be confronted with explicit argument (*ilhāq zāhir*), which is usually used as the basis for determining the law with implicit argument (*ilhāq khafi*) which is then seen as having stronger influence than *ilhāq zāhir*. Thus, *ilhāq khafi* is preferred because of its strong *athar* (influence).¹⁹ For example, a woman who is about to give birth but there is only one male obstetrician. Sharia law in general says that all members of a woman's body are 'awrat, so it is unlawful to be seen by an unknown and unrelated man. But in this condition, a doctor is allowed to do his job with the excuse of removing difficulties and giving aid to people.

¹³ Muḥammad ibn Idrīs al-Shāfi'ī, *Al-Umm* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2002), p. 267.

¹⁴ Shams al-Dīn Muḥammad ibn Yūsuf al-Jazīrī, *Mi'raj al-Minhāj Sharḥ Minhāj al-Wuṣūl Ilā 'Ilm al-Uṣūl Li al-Qāḍī al-Bayḍāwī* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), p. 237.

¹⁵ Abū Zahrah, *Uṣūl Fiqh*, p. 267.

¹⁶ Léon Buskens and Annemarie van Sandwijk, eds., *Islamic Studies in The Twenty-First Century: Transformations and Continuities* (Amsterdam: Amsterdam University Press, 2016), p. 183.

¹⁷ Noorwahidah Noorwahidah, "Istihsan: Dalil Syara' Yang Diperselisihkan," *Syariah: Jurnal Hukum Dan Pemikiran* 16, no. 1 (10 October 2017): 18.

¹⁸ Khallaf, *'Ilm al-Uṣūl al-Fiqh*, p. 80.

¹⁹ Abū Zahrah, *Uṣūl al-Fiqh*, p. 263.

b. Istihṣān whose driving factors are from outside qiyās khafī.²⁰

In other words, this form of *istihṣān* is a contradiction between 'illat qiyās and propositions other than qiyās. There are three propositions in this *istihṣān*:

1) Istihṣān by Sunnah

There is a Sunnah stipulation that requires leaving the qiyās of the case in question. As is the validity of someone's fasting who eats during the day because of forgetfulness.

2) Istihṣān by ijmā'

Abandoning the qiyās because of the ijmā' al-'ulamā' (the consensus of the ulama) stipulates a different law from the qiyās, for example buying and selling with an order system, buying and selling online, and so forth.

3) Istihṣān by emergency (ḍarūrah)

Istihṣān is done because of a dangerous situation. For example a person eats pork because he does not find other food and if he does not eat then he will die.

The development of science and technology cannot be denied. Renewal of Islamic law needs to be done to answer new problems that have no legal provisions or replace existing laws that are not in accordance with the demand of current times. The flexibility of Islamic law is needed in accordance with the current condition of society, so that the role of Islamic law is to regulate people's lives and ensure their benefits can be realized properly. The condition of the community environment must be made as one of the considerations of Islamic law reform. By doing so, the law is effective and the purpose of benefit can be obtained.

As exemplified by corneal transplant from an old man to someone who suffers from blindness. For the sake of maintaining the

benefits of urgency (*hājiyah*), it is permissible to take part of the body of the deceased with greater kindness and benefit, namely to heal the blindness of a living person so that the person is able to carry out his daily life perfectly.²¹

Istishāb: Ontological and Epistemological Aspects

Al-Qur'an and Hadith as a source of Islamic law are not as comprehensive as the growing problems of the Ummah. Both of these literature are very limited in number, while the complexity of problems in daily life is unlimited. Therefore we need another source to solve the problems that arise. It is *istishāb*.

1. Definition

Istishāb in the literal Arabic translation means طلب المصاحبة, which is looking for friendship or اعتبار الصحابة (assuming friends), or طلب الصلبة (looking for friends). The intention of الصلبة is to compare things and bring them closer.²² If we pay attention to the meaning of the language above, *istishāb* can be interpreted as an effort to approach one legal event with another, so that both possess the same legal value.

In its terminology, *istishāb* has a few different meaning according to a few dissenting scholars of *uṣūl al-fiqh*. Such as Al-Asnawī, who stated that *istishāb* is the application of the law to a problem that exists in the future by referring to the previous applicable law, because there is nothing that causes changes (the legal problem).²³ While Al-Shawkānī argues that *istishāb* is something permanent (law),

²¹ Farid Naya, "Mengurai Titik Temu Antara Istihṣān dan Pembaharuan Hukum Islam," *TAHKIM* 12, no. 1 (2017): 116.

²² 'Alī Ḥasbullāh, *Uṣūl al-Tashrī' al-Islāmī* (Cairo: Dār al-Ma'ārif, 1971), p. 197.

²³ 'Abd al-Raḥmān ibn Ḥasan al-Shāfi'ī al-Asnawī, *Sharḥ Minhāj al-Uṣūl* (Beirut: 'Ālam al-Kutub, 1982), p. 131.

²⁰ Ibid., p. 264.

as long as there is no other argument that changes it.²⁴ Wahbah al-Zuhaylī in his book *al-Wajīz* said that *istiṣhāb* is the creation of law or the elimination it, both in the present and the future, that is in accordance with the provisions of the law in the past because there is no argument that changes the law.²⁵ While Imām Ibn al-Subkī interpreted *istiṣhāb* as establishing the law on the second legal issue, based on the first law because there was no proof that changes it.²⁶ This is in line with Imām Ibn al-Qayyim al-Jawziyah who believes that *istiṣhāb* is preserving the law by establishing laws based on existing ones, or nullifying laws on the basis of the absence of previous laws.²⁷

In the book of *al-Ashbah wa al-Nazā'ir*, it is also explained that *istiṣhāb* is: establishing a clear law that is beyond doubt (will never loss).²⁸ Imām al-Ghazālī also gave an understanding of *istiṣhāb*, namely the determination of the law by holding on to the mind that had done the research and finding no argument that changed the initial law of a case.²⁹

From the description above, it can be concluded that *istiṣhāb* is to establish or confirm a law on the basis that the law had already existed beforehand, and eliminating a law if it did not exist before or there is no argument. In other words, *istiṣhāb* is not a matter of formulating new laws, but rather looking for current laws based on the old laws.

2. Model of Reasoning of Istiṣhāb: Fundamental Implication in Legal Ruling

Istiṣhāb is the determination of the law of a case, be it a legal case or a case of an object in the present or future based on what has been established or applied before. According to the explanation of the scholars in the hierarchy of *ijtihād*, *istiṣhāb* is the last grip or proposition of a mujtahid in establishing or confirming a law, when no proof is found in the Qur'an, Sunnah, *ijmā'* or *qiyās*. This is reinforced by Al-Shawkānī's opinion who stated: "*istiṣhāb* is the last method used in devotion. If there is a fatwa (*muftī*) faced with a legal question, then he is obliged to look for the answers in the Qur'an, then the Sunnah, then the *ijmā'*, then the *qiyās*. If he has not obtained (the law there), then he (may) set his law by appealing to the enforcement of the past law in the present (*istiṣhāb al-hāl*). If he doubts that the law will not apply the original principle, then the law still can be applied..."³⁰

Then, to find out whether *istiṣhāb* can be a *hujjah* for the process of determining the law, the '*ulamā*' of *uṣūl al-fiqh* experts in this case are divided into three groups, namely: The first group that says *istiṣhāb* is the legitimate proposition (*hujjah*) in the determination or disclaimer of a law. Among the scholars included in this group are the number of scholars from the Malikite, Hanbalite, Majority of Shafiite scholars, and some Hanafite. The propositions that strengthen their opinions (include surah al-An'ām verse 145): "Say: Have I do not received in the revelation revealed to me, something which is forbidden to those who want to eat it, except if the food is carcass, or blood is flowing or pork - because actually it is dirty - or animals slaughtered in a name other than Allah, whoever is in a state of compulsion, while he does not want it and does not (also) exceed the limits, then surely your Lord is Forgiving, the Most Merciful".

²⁴ Muḥammad ibn 'Alī ibn Muḥammad al-Shawkānī, *Irshād al-Fuḥūl Ilā Taḥqīq al-Ḥaq Min 'Ilm al-Uṣūl* (Beirut: Dār al-Fikr, 1992), p. 396.

²⁵ Wahbah al-Zuhaylī, *al-Wajīz fī Uṣūl al-Fiqh* (Damaskus: Dār al-Fikr, 1999), p. 113.

²⁶ 'Alī 'Abd al-Kāfī al-Subkī, *Al-Ibhāj* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1404), p. 173.

²⁷ Muḥammad ibn Abī Bakr ibn Qayyim Al-Jawzī, *I'lam al-Muwaqqi' in* (Beirut: Dār al-Jil, 1973), p. 339.

²⁸ Zayn al-'Ābidīn ibn Ibrāhīm Ibn Nujaym, *al-Ashbāh wa al-Nazā'ir 'Alā Madhhab Abī Ḥanīfah al-Nu'Mān* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1980), p. 73.

²⁹ Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mustaṣfā Min 'Ilm al-Uṣūl* (Lebanon: Dar al-Kutub al-'Ilmiyyah, 1993), p. 410.

³⁰ Al-Shawkānī, *Irshād Al-Fuḥūl Ilā Taḥqīq al-Ḥaq Min 'Ilm al-Uṣūl*, p. 237.

The above proposition (according to them) explains the principle of origin, that everything is permissible until it comes to a proposition that shows its prohibition. This is indicated in the fragment of Surah al-An'ām verse 145; "Say (O Muhammad) I did not find ..." where the meaning can be interpreted as if when there are no new provisions, the old provisions will apply.

Then, the above opinion is not only strengthened by the argument of the Qur'an, but also reinforced by the words of the Prophet who said: "Verily, Satan goes to one of you (in his prayer) and then says: you have a heart, you have a body then (if so), do not leave your prayer until you hear the sound or smell (fart)." (narrated by Ahmad).

This hadith shows that the Prophet Muhammad taught us to be sure of our sacred condition, when we were about to pray, even though satan whispered doubts about the ablution. And the Prophet forbade us to leave the prayer, if we have not found concrete evidence of the abolition of ablution like the sound of a voice or the smell of farts from us. This is called the essence of *istishāb*.

Out of the two arguments above, namely al-Qur'an and Hadith, there are other arguments that support this opinion with *ijmā'* and rational theorem. Where, the scholars have consented on the basis of *istishāb* on some *fiqh* issues that have been determined, that is if in someone there is doubt whether he has done the purification (by ablution/bathing), then the person is declared as unpure and cannot perform prayers. This is predictable, because it refers to the original law that is not purified. Conversely, if someone doubts whether the ablution that he did was annulled or not, then he can be still categorized as clean and holy (no ablution canceled).³¹

Furthermore, the argument of '*aqlī*' or logic that confirms and reinforces this opinion (*jum-*

hūr al-'ulamā') is the stipulation of a law in the previous period where there is no factor that requires the abolition of the law which makes the allegations of the law very strong (*al-zann al-rājiḥ*). A strong allegation in Islamic law is a legal argument (*ḥujjah*), therefore *istishāb* is *ḥujjah*. Vice versa, if a law is established in the past on the basis of belief, then the abolition of the law must also be based on faith, this is based on the legal maxim of *al-yaqīn lā yuzāl bi al-shakk* or a strong assumption is not erased by a weak allegation.³²

The second group states that *istishāb* must not be used as an absolute *ḥujjah* (argument), both in establishing or denying the law. This opinion was widely followed by the majority of Hanafite scholars.³³ The propositions that reinforce their reasons are:

- 1) Using *istishāb* is tantamount to doing something without any argument, and is considered vanity. Thus, *istishāb* is something that is considered as vanity.
- 2) *Istishāb* will cause an opposition because of the absence of proof. Everything without the argument is vanity. It means that when someone is allowed to set the law using the *istishāb* method, then others can also set laws that are contrary to the *istishāb* method as well.

The third group says that *istishāb* is a *ḥujjah* that is used when disputing someone who views the occurrence of the law in the past (*barā'at al-dhimmah*), and *istishāb* is not a *ḥujjah* (argument) if it is used to establish a new law. This opinion came from the majority of recent Hanafite scholars and some Malikite scholars.³⁴

The arguments explained by the three opinions are actually very clear. Among these

³¹ Sha'bān Muḥammad 'Ismā'īl, *Uṣūl al-Fiqh al-Muyassar* (Cairo: Dār Al-Kitāb al-Jamī'i, 1415), p. 112.

³² Umar Muhaimin, "Metode Istidlal Dan Istishab (Formulasi Metodologi Ijtihad)," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 8, no. 2 (8 April 2018): 342.

³³ Muḥammad Amīr Badsah, *Taysīr al-Taḥrīr* (Beirut: Dār al-Fikr, n.d.), p. 176.

³⁴ Al-Bukhārī, *Kashf al-Asrār fī Uṣūl al-Bazdāwī*, p. 390.

three opinions, the first opinions have strong arguments and a very strong basis in making *istiṣhāb* as an argument (*ḥujjah*) in establishing or denying a law. Because, *istiṣhāb* is something that is understandable for human, which if no evidence or an evidence is found that changes the origin of the law into another law, then the first law applies. Therefore, *fuqahā'* agreed on the principles of jurisprudence اليقين لا يزال بالشك (*al-yaqīn lā yuzāl bi al-shakk*) where these rules became the strong foundation of *istiṣhāb*.

Axiology of *Istiṣhāb*: Conventional Types and Examples

According to Abī Sahl al-Sarakhsī and Muhammad Abū Zahrah, *istiṣhāb* is divided into four types:

1. *Istiṣhāb al-barā'at al-aṣliyyah*

That is *istiṣhāb* which is based on the law of origin of something that is *mubāḥ* (permitted). Legal provisions of *mubāḥ* as the law of origin are based on the verses of al-Qur'an surah al-Baqarah verse 29: "He is the God who made everything on the earth for you".

In this verse Ibn Jarīr al-Ṭabarī interpreted that everything created by Allah on this earth are for human to be used for their lives.³⁵ In addition, the scholars then formulated the principles of *fiqh* which read: الْأَصْلُ بَرَاءَةُ الذَّمِّ (everyone is basically free from dependence (obligation)). An example for the implementation of that formulation is Toni's words that Rosi has a debt of one million rupiahs, but Rosi was evasive and did not admit that he had a debt. So in this issue, it was Rosi's acknowledgement that was considered true and valid, since Toni has no reasonable proof of the debt.

2. *Istiṣhāb al-ibāhah al-aṣliyyah*

These are *istiṣhāb* rules which are based on the original law. For example, the permissibility to eat giraffe meat because of the absence of the characteristics of the animals in the giraffe's uncleanness. The rules related to this type are: الْأَصْلُ فِي الْأَشْيَاءِ الْإِبَاحَةُ (the original law in all things is *mubāḥ* (permissability)).

3. *Istiṣhāb al-ḥukmī*

This is the determination of law which is based on existing law and applies until there is another argument that changes it. This rule reads: الْأَصْلُ بَقَاءُ مَا كَانَ عَلَى مَا كَانَ (basically, something that already has certain legal provisions will remain as it is). As in the case of a person who intends to fast and eats *sahūr* and he doubts whether it is dawn or not, so he can still fast because there is no evidence that dawn has come.

4. *Istiṣhāb waṣf*

This is the determination of the law based on the presumption of the nature of something that is known and believed. The rule is لا يزيل اليقين لا يزال بالشك (strong knowledge cannot be dispelled or defeated with doubt). For example the law of holy water will not change as long as there is nothing that makes it unclean, the status of a person's life is categorized lost until the body is found as evidence that he died.

In addition to the examples above, there are still many more examples of cases that can be solved using the *istiṣhāb* method, including:

- 1) The heir status of a missing person.
- 2) The marital status of a man and woman. They may engage in marital relations if it can be proven by a marriage certificate.
- 3) Status of a defendant who is considered innocent until there is evidence that states he is guilty.³⁶

³⁵ Muḥammad Ibn Jarīr al-Ṭabarī, *Jāmi' al-Bayān fī Ta'wīl al-Qur'ān* (Beirut: Mu'assasah al-Risālah, 2000): 7.

³⁶ Husnul Haq, "Penggunaan Istishab Dan Pengaruhnya Terhadap Perbedaan Ulama," *Al Hurriyah : Jurnal Hukum Islam* 2, no. 1 (2017): 25–27.

- 4) Lawful for tambourines as long as it does not lead to evil.
- 5) It is permissible for a contract of buying and selling fruits that are still unripe.³⁷

Some of the examples above shows how influential *istishāb* in solving problems that have just arisen in the midst of society, especially Islamic society. Rapid development of the times is a demanding requirement for Muslims to always be ready to face problems that are progressive in accordance with the development of everyday life. Awareness and thorough knowledge of emerging problems, especially social ones, is needed.

Expanding Legal Reasoning: New Cases and Current Indonesian Context

In the book *Bidāyat al-Mujtahid*, Ibn Rushd gave motivation to Muslims to always implement *ijtihād* by saying that the Qur'an as God's revelation (*kalām Allāh*) and Sunnah as the explanation is very limited to be a source of Islamic law, because the problems of the people are always developing and there is no limit.³⁸ So that new ideas and varied methods of extracting the law are needed to overcome emerging problems. Actualization of the law must always be done and professionalism in *ijtihād* continues to be developed so that the dynamics of the law are able to become a foothold in overcoming proportional problems.

Istishāb is one of the breakthroughs' of *ulama'* who are expected to be able to give a different view in responding to existing problems, especially concerning the field of social interaction (*mu'āmalah*), since in this field, benefit is the main consideration.³⁹ The

'*ulamā'* in *mu'āmalah* affairs have the initial rule that everything is basically a *mubāḥ* (الأصل في الأشياء الإباحة). Unlike the field of worship that is *ta'abbudī* and emphasizes the text. They are based on the principle that worship is basically *ḥaram* (الأصل في العبادة التحريم).

The influence of the *istishāb* method in the positivization of Islamic law is very visible in several cases of state legislation. Both in the field of *al-aḥwāl al-shakhṣiyyah* (marriage and family), criminal law and civil law.

In the field of marriage law, for example is Law Number 1 of 1974, precisely in article 2 paragraph 1 and 2 which reads:

- 1) Marriage is legal, if it is done according to the law of each religion and that belief.
- 2) Each marriage is recorded according to the applicable laws and regulations.

This law, which was promulgated by the president on January 2, 1974, shows the success of the *ijtihād* of the '*ulamā'*. Islamic marriage law is a legal law in the Indonesian state based on the Pancasila and the 1945 Constitution.⁴⁰ The '*ulamā'* applied the *istiḥsān* and *istishāb* methods in compiling these laws. Especially in paragraph 2 "Every marriage is recorded according to the applicable laws and regulations". In the Islamic rule, marriage does not require a marriage book/marriage certificate. However, the Indonesian contemporary '*ulamā'* considered good (*istiḥsān*) the existence of marriage records in order to minimize the existence of behaviors that are not in accordance with religious norms, such as contract marriages, *sirri* (unregistered) marriages and so forth.

The initial legal determination (male and female are free, in the sense that there is no marriage bond) is still valid until there is evidence of a marriage certificate stating that the two of them were married. This is where

³⁷ Maskur Rosyid, "Istishab Sebagai Solusi Pemecahan Masalah Kekinian," *Syariah: Jurnal Hukum Dan Pemikiran* 18, no. 1 (30 June 2018): 59.

³⁸ Muḥammad ibn Aḥmad ibn Rushd al-Qurṭubī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Indonesia: Dār Iḥyā' al-Kutub al-'Arabiyyah, 2003), p. 2.

³⁹ Mustafā Zayd, *al-Maṣṣalāh fī al-Tashrī' al-Islāmī wa Najm al-Dīn al-Ṭūfī* (Cairo: Dar al-Fikr, 1964), p. 125.

⁴⁰ Arso Sosroatmojo and A. Wasit Aulawi, *Hukum Perkawinan Di Indonesia* (Jakarta: Bulan Bintang, 1978), p. 11.

the role of *istiṣhāb* takes place in compiling the article.

Marriage registration required by the state is not without purpose, instead there are many benefits to be achieved by state law with a marriage certificate. Among them is as evidence of guarantees from the government to those who carry out marriages, especially for the wife to avoid the behavior of the husband who is less responsible and for the benefit of their children. Thus, all their rights are fulfilled, since there are many negative implications that are feared will arise in the future if marriage records are not carried out, especially for women when she cannot inherit her husband's wealth if there is no official record stating that the two of them are married.

Marriage is the first step in establishing social relations. Therefore, it is necessary to have formal legality as proof and footing given by the government on a marriage bond so that no party is harmed in the future. Formally a marriage cannot be proven without written evidence. Abandonment of a wife and child is an example of a case which would be sufficient to be a solid foundation for building the concepts of rules in marriage.⁴¹

The rule of الأصل براءة الذمة (basically every human being is free from dependents /-obligation) seems also to be one of the inspirations in criminal law in Indonesia.⁴² This is proven by the existence of the presumption of innocence in the Criminal Code article 1 paragraph 1 which reads:

"An act cannot be convicted, except based on the strength of pre-existing criminal provisions."

In this article several important points are explained, namely, first, criminal actions that

can be sanctioned are only actions that have been regulated and formulated by the law before the action is carried out. Second, if there is a person suspected of committing an act of violation of criminal law, they should not be sentenced to a sentence as long as there is no concrete evidence incriminating and declaring that he is guilty. These two points have something in common in the principle of legality of Islamic criminal law: the existence of strong legal evidence. لا حكم لأفعال العقلاء قبل ورود النص.⁴³ In other words, there are no penalties for people who have sense (adults) before the provisions of the applicable legislation. This principle is also in accordance with the formulation of Paul Johan Anselm von Feuerbach written in Latin, namely *nullum delictum noela poena sine praevia lege poenal*.⁴⁴

Thus, it can be concluded that all *mu'āmalah* (social) activities carried out by Muslims are allowed as long as there are no legal rules that prohibit and do not contain elements that are detrimental to other parties. Among *mu'āmalah* that is prohibited is:

- 1) Buying and selling goods that are addictive such as marijuana
- 2) Conducting transactions that contain elements of fraud or harm to other parties, such as the existence of elements of tyranny, fraud, usury, bribes, gambling and inappropriate contracts.⁴⁵

The popular mode of *mu'āmalah* done by modern society today is e-commerce. That is one use of the internet which in this case relates to activities in the economic field. More clearly, e-commerce is a trading activity in the form of goods or services carried out with

⁴¹ Aisyah Arsyad, "Menuju Fikih Gender: Analisis Hadis Tentang Perintah Mengumumkan Pernikahan," *Tahdis: Jurnal Kajian Ilmu Al-Hadis* 8, no. 2 (31 January 2019): 144.

⁴² Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Putra, 2000), p. 1.

⁴³ 'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī Muqāranan Bi al-Qānūn al-Waḍ'ī*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1968), p. 122.

⁴⁴ P. A. F. Lamintang, *Dasar-dasar untuk Mempelajari Hukum Pidana yang Berlaku di Indonesia* (Citra Aditya Bakti, 1997), p. 132.

⁴⁵ Fathurrahman Azhari, *Qawaid Fiqhiyyah Muamalah* (Banjarmasin: LPKU Banjarmasin, 2015), 151–54.

internet access or other digital technologies.⁴⁶ Digital trading activities (online) are developed in the current era because they are considered to have great prospects for the future. E-commerce is considered to be an effective way of trading because it covers a very broad and unlimited market.

This trading system emerged along with time, especially the rapid development of science and technology. The sophistication of technology is very helpful towards activities that were originally difficult to be easy. Technology can alleviate geographical challenges, making everything to be more accessible and eliminating any impediment of distance. The world is easier to reach with these technological capabilities and innovation.

The current legislation has been implemented by the government to protect online businesses. The Ministry of Communication and Information who is responsible for this case has officially issued Law No. 11 of 2008 concerning Information and Electronic Transactions (ITE) and Government Regulation (PP) No. 82 of 2012 concerning the Implementation of Electronic Transactions and Systems.⁴⁷ The purpose of these regulations is to protect business parties, especially consumers who are vulnerable to fraud.

This legal guarantee does not necessarily make e-commerce run smoothly without obstacles. There are several problems that still becomes a polemic and rise from the online trading system. One of them is e-commerce status in a review of Islamic law. When viewed in terms of Islamic law, this online trading system has no legal clarity either from the Al-Qur'an or the Sunnah because it is a contemporary problem that only arises before the 4.0

era. But in *mu'āmalah* rules: الأصل في المعاملة الإباحة إلا أن يدل دليل على تحريمها (the basic principle in *mu'āmalah* is permissible (*mubāḥ*), unless there is an argument that shows its prohibition).

Therefore, e-commerce is still permitted since there is no prohibition on the system. Besides, e-commerce when viewed in terms of understanding and layout, these purchases have many similarities with buying and selling agreements.⁴⁸ Among the similarities is the similarity of the seller, buyer, medium of exchange or money (although suspended) and the goods being traded (both limited to description or characteristics).⁴⁹ In addition, *bay' al-salam* and e-commerce have a fundamental difference, namely *bay' al-salam* carried out conventionally face-to-face while e-commerce uses a digital or online system. But this difference is not really a problem. The most important thing is the absence of elements that harm the consumer such as fraud, gambling and other elements. So that this *mu'āmalah* law is still permitted by equating the *bay' al-salam* law in accordance with the rules: ما قرب الشيء يعطى حكمه (Something approaching him was punished with the same law (*istishāb* model)).

Likewise, the application of the democratic system in Indonesia. Various pros and cons emerge on the existence and relevance of the government system. Many consider that democracy is the result of Western thoughts that are not in accordance with the teachings of Islam, so it must be replaced with a system that is in accordance with the teachings of Islam remembering Islam is the religion that dominates in Indonesia.

However, the actual democracy in Indonesia is not a system adopted from the West, but democracy that is implemented as a family

⁴⁶ Annisa Dwi Kurniawati, "Transaksi E-Commerce Dalam Perspektif Islam," *El-Barka: Journal of Islamic Economics and Business* 2, no. 1 (16 June 2019): 94.

⁴⁷ Larasati Dhinarti and Firda Amalia, "E-Commerce Dalam Perspektif Fiqh Muamalat," *Proceeding of Conference on Islamic Management, Accounting, and Economics* 2, no. 0 (23 August 2019): 163.

⁴⁸ Muḥammad ibn Qāsim al-Ghāzī, *Fath al-Qarīb* (Indonesia: Dār Iḥyā' al-Kutub al-'Ilmiyyah, n.d.), p. 31.

⁴⁹ Azhar Muttaqin, "Transaksi E-Commerce Dalam Tinjauan Hukum Jual Beli Islam," *Ulumuddin* 7, no. 1 (10 January 2013): 463.

democracy that was born from the conscience and characteristics of Indonesian society based on consultation.⁵⁰ So it cannot be denied that democracy is in accordance with the principles of the Islamic order that is deliberation, al-Shūrā verse 38 is explained: *وَالَّذِينَ اسْتَجَابُوا لِرَبِّهِمْ وَالَّذِينَ اسْتَجَابُوا لِرَبِّهِمْ وَأَقَامُوا الصَّلَاةَ وَأَمْرُهُمْ شُورَىٰ بَيْنَهُمْ وَمِمَّا رَزَقْنَاهُمْ يُنفِقُونَ* (And (for) those who accept (obey) the call of their Lord and establish prayer, while their business (is decided) with the deliberation between them; and they spend part of the fortune that we give them).

Indeed, during the reign of the Prophet and his companions there was no such thing as democracy, but when seen from the similarity of the contents of the verse and the principles of democracy that exist in Indonesia, it is very clear that the Islamic order affected the course of democracy in Indonesia. So that democracy can still be implemented and must always be maintained.

One of the national issues which is also widely discussed in the Islamic world is about Pancasila. Many questions that arise from Islamic thinkers are about the relevance of the values of Pancasila with the goals of life of Muslims. So that not a few people or groups who try to weaken and even depose the position of the Pancasila as one of the pillars of the Indonesia. They consider that Pancasila is no longer able to unite and regulate Muslim life in accordance with the teachings of the Qur'an and Sunnah.

But in fact the values contained in Pancasila really reflects the characteristics of Indonesian Muslims. For example, in the first point, Pancasila has the intention of preserving the religion (*hifz al-dīn*), which is to guarantee the freedom of its citizens to embrace a religion they believe in and is not allowed to discriminate against people of different faiths. Even the first precepts that read the Almighty God is very much in accordance with the content of

the Qur'an in surah al-Ikhlās which explains about monotheism which is believed by Muslims that there is only one God in the universe.

Then the second point of fair and civilized humanity means that every Indonesian citizen has freedom of human rights, so that the purpose of protecting the soul (*hifz al-nafs*) can be carried out properly. Mutual respect and good deeds regardless of ethnicity, race and religion is one way for human relations to work in accordance with the guidance of religion and the state.

Furthermore, the third principle of the unity of Indonesia is that they want all citizens to unite and create a comfortable, safe and prosperous life. So that future life can go well and children and grandchildren can feel a better life (*hifz al-nasl*). The fourth precepts aims at deliberation as a middle way to solve any problems that arise. Then it takes a healthy mind to make wise and fair decisions. This is the relevance of the value of Pancasila with the preservation of the function of reason (*hifz al-aql*). While the latter is the culmination of the four precepts, which is to realize the four precepts so that social justice for all Indonesian people can be created. This is in accordance with *maqāṣid al-sharī'ah*, namely guaranteeing the assets (*hifz al-māl*) of each individual so that social inequality does not occur which makes people dissatisfied with the government.

These are the five precepts that serve as guidelines for the lives of Indonesian citizens who are very much in accordance with *maqāṣid al-sharī'ah*. Both between Pancasila and *maqāṣid al-sharī'ah* want benefit for every individual living in Indonesia, both benefit protecting the religion (*hifz al-dīn*), protecting the soul (*hifz al-nafs*), protecting the offspring (*hifz al-nasl*), protecting the reason (*hifz al-aql*) and protecting the property (*hifz al-māl*).⁵¹

⁵⁰ Inna Junaenah, "Kontribusi Tatanan Islam Terhadap Demokrasi Permusyawaratan di Indonesia", *AHKAM: Jurnal Ilmu Syariah* 16, no. 2 (11 December 2016): 170.

⁵¹ Umi Kulsum, "Konstelasi Islam Wasathiyah Dan Pancasila Serta Urgensinya Dalam Bernegara

Therefore Pancasila is one of the foundations of the Indonesian state that must remain upright so that the goals of the benefit of life can be realized. The *istihsān* method acknowledges the way to the goodness as the best way. A Fair e-commerce system and Pancasila as a state foundation lead to such practicality and goodness. Hence they are permissible and legally binding. Whereas *istishāb* postulate concludes that what is not regarded as *haram*, remains permissible. No single Qur'anic verse regards an individual as well as social contract as *haram*. Even it is suggested for the sake of prosperity. E-commerce is done through individual or collective contract and Pancasila is created through social deliberation. Therefore, both are permitted, suggested and are legally binding.

Istihāsān and *istishāb* are also applied by 'ulamā' of the MUI (Indonesian Ulama Council) in responding and dealing with the corona virus problem (Covid-19).⁵² Covid-19 disease is a disease caused by a group of viruses that can be transmitted to animals or humans. This disease causes infections in the respiratory tract from the flu, cough to Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS).⁵³ One of these viruses can be transmitted by interacting directly with people exposed to covid-19.⁵⁴ Therefore, the government made efforts to

implement social distancing and lock down to prevent the virus from spreading.

With the automatic social restrictions and lockdown of religious activities in the form of congregation which must be temporarily prohibited; including prayers. Friday prayers are not performed in congregation at the mosque. This is done for the good of the people, so that the virus can be suppressed and for the sake of the public health. Maintaining public health is good (*istihsān*), applying method to suggest and promote social involvement and to combat the spreading of Covid-19 is not prohibited. It definitely remains to be permitted (*istishāb*).

Conclusion

From the research and understanding of some previous points, it is evident that since the time of the Prophet Muhammad there have been sources of thought on the methods of *istinbāt* of law which were only composed by the scholars long after the Prophet's passing. They were the *ulamas'*, especially the experts of *uṣūl al-fiqh* who compiled the rules related to *istihsān* and *istishāb* as model of legal reasoning associated in 'ilm al-uṣūl by referring and considering Quranic texts and the ways that had been done by the Prophet Muhammad.

From the formative years of *istihsān* and *istishāb*, there were intensive debates of their ontology, epistemology, axiology, acceptance and refusal as methods of legal reasoning. Hanafite and Mailikite tended to be in favor of *istihsān*, whereas Shafiite refused it. However, the need to solve the actual problems, encouraged people to make use of *istihsān* and *istishāb*, creating very little room to reject these methods.

In the Indonesian context, because of public virtues (*istihsān*) and no exact texts of prohibition of Qur'an and Hadith (*istishāb ibāḥah aṣliyyah*) Pancasila as state basis, the 1945 constitution, democracy, the principles of pre-

Perspektif Maqasid Al-Syari'ah," *Journal of Islamic Civilization* 2, no. 1 (30 April 2020): 57.

⁵² Majelis Ulama Indonesia, "Penyelenggaraan Ibadah Dalam Kondisi Terjadi Wabah Covid-19," Majelis Ulama Indonesia, 2020, <https://mui.or.id/wp-content/uploads/2020/03/Fatwa-tentang-Penyelenggaraan-Ibadah-Dalam-situasi-Wabah-COVID-19.pdf>.

⁵³ "Novel-Coronavirus", n.d.

⁵⁴ Waleed Alhazzani et al., "Surviving Sepsis Campaign: Guidelines on the Management of Critically Ill Adults with Coronavirus Disease 2019 (COVID-19)," *Intensive Care Medicine* 46, no. 5 (2020): 854-87; Julio Torales et al., "The Outbreak of COVID-19 Coronavirus and Its Impact on Global Mental Health," *International Journal of Social Psychiatry* 66, no. 4 (2020): 317-20.

assumption of innocent, written document of marriage, the practice of digital transaction are well-accepted and in confirmation to Islamic law. Thus, *istihsān* and *istiṣhāb* as methods of legal thinking pave the wider extending ways and opportunities for legal discovery. Further research on *istihsān* and *istiṣhāb* could be done in order to enlarge the flexibility of Islamic law in critical and analytical perspectives.

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