

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

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Abstrak: *al-Bid'ah versus al-Mashlahah al-Mursalah dan al-Istihsân: Kerangka Hukum al-Syâthibi.* Tulisan ini mengkaji pandangan Abû Ishâq al-Shâthibi (w. 790/1388) tentang bidah versus *al-mashlahah al-mursalah* dan *al-istihsân*. Karya al-Syâthibi tentang konsep bidah dalam kitabnya, *al-I'tishâm*, sebagai respons terhadap ulama di zamannya yang menganggap bahwa *al-mashlahah al-mursalah* dan *al-istihsân* sebagai bentuk inovasi (*al-bid'ah*). Tulisan ini akan mengelaborasi signifikansi gagasan al-Syâthibi dalam isu bidah yang memformulasikan kerangka syariah berbasis teks dan rasio dengan non-syariah. Pembahasan tentang bidah sebagai perbuatan yang bertentangan dengan prinsip syariah akan dianalisis dengan prinsip legalitas *al-mashlahah al-mursalah* dan *al-istihsân* sebagai bagian dari metodologi penggalan hukum setelah Alquran, Sunah, ijmâ', dan *qiyâs*. Tulisan ini juga ingin menguraikan keunggulan al-Syâthibi dalam epistemologi hukum dibanding ulama lain yang membahas isu serupa.

Kata Kunci: *al-istihsân*, bidah, *al-mashlahah al-mursalah*, *faqih*, 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 syariah 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, *ijmâ'*, 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*, *faqih*, 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-Badi'* (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

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-Tûfi 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.”³

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 *ijmâ’* or *qiyâs* 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.⁴ The rules of *maslahah mursalah* and *istihsan* are served to respond such debating opinions.

From the standpoint of their lack of an explicit textual basis in the nash, *al-bid'ah*, *al-mashlahah al-mursalah*, and *al-istihsan* are similar. The former was censured by the Sunnah due to its violation of religion, although there was an assumption on the part of scholars that *al-bid'ah* could be good or bad. *Al-mashlahah al-mursalah*, however, was regarded as a legal argument,

even though the text did not elaborate explicitly on its commandments and prohibitions. Due to endless polemics over these two terms, it is necessary for our purpose to examine them from the angle of legal theory and especially with respect to al-Syâthibî's argument. Like *al-mashlahah al-mursalah*, *al-istihsan* generally is accepted as a subsidiary source of law in Islamic jurisprudence, though its position is still opposed by some jurists, such as the Syâfi'îtes. What is important for our purpose however is al-Syâthibî's view on *al-istihsan* in connection with *al-bid'ah*.

Al-Syâthibî's Concept of *al-Bid'ah* versus *al-Mashlahah al-Mursalah*

At first glance *al-bid'ah* denotes to some things new or creating a thing that never existed before. It may cover religious as well as mundane matters. Al-Syâthibî censured *al-bid'ah* in a universal sense (*kulliyah*) and rejected the possibility that there could be such a thing as good or bad *al-bid'ah*. He, however, believed that *al-bid'ah* could only be condoned in matters not attested 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-Syâthibî 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.⁵ In this section we will discuss the argument of al-Syâthibî against those who deemed *al-mashlahah al-mursalah* an example of good *al-bid'ah* (*al-bid'ah al-hasanah*).⁶

Before we discuss further on the concept of *al-mashlahah* developed by al-Syâthibî, we need firstly analyze the formulae of *al-mashlahah* developed by some jurists before him. It attempts to highlight the ramifications of Syâthibî'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 *ijtihad* is one alternative to be exercised by circumventing the legal corpus (*fiqh*) and its methodology. The practice of *ijtihad* 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

(MA Thesis at University of South Africa, 2010), p. 127.

³ Aslam Farouk Ali, “A Translation”, p. 131.

⁴ Aslam Farouk Ali, “A Translation”, p. 131.

⁵ Al-Syâthibî, *al-I'tishâm*, ed. Muḥammad Rashîd Ridhâ (al-Qâhirah, Maktabah al-Tijâriyyah al-Kubrâ, n. d), vol. 2, p. 111.

⁶ Al-Syâthibî, *al-I'tishâm*, p. 111.

which the concept of *al-mashlahah* was discussed.⁷ The use of *al-mashlahah*, first introduced through the word *al-istihlāh*, was created by Mālikite school.⁸

The more comprehensive development of the concept of *al-mashlahah* in Islamic legal theory was then introduced by Syāfi'ī jurist Abū Hāmid Muḥammad al-Ghazālī (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 Abū Ishāq al-Syāthibī (d. 790/1388). Al-Ghazālī argued that *al-mashlahah* was God's purpose (*maqshad*, pl. *maqāshid*) 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-Ghazālī considered a *mashlahah* and what fails to do so is its opposite, namely *mafsadah*.⁹ The introduction of *al-mashlahah*, or *al-mashlahah al-mursalah* which lacks concrete indications in the Quran, the Sunnah, and *ijmā'*, was likely reconciled as approaches on the position of revealed law and the reason behind why the Asy'rite and Mu'tazilite 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.¹⁰ *Al-Mashlahah*, in Ghazālī's eyes, is preponderance over the text once there is a certainty (*qath'i*) of general necessity (*dharūri*) for all community (*kullī*) (religion, life, intellect, offspring and property). Whatever constituted merely a need (*hājah*) or improvement (*tahsīn*) with respect to these elements was unacceptable to al-Ghazālī without concrete reference within the Quran or the Sunnah.¹¹

The most liberal breakthrough of adopting *al-mashlahah* as a legal solution which differed from the above Muslim jurists was al-Tūfi's concept. Al-Tūfi (d. 716/1316), a Hanbalite jurist, employed *al-mashlahah* on the basis of substantive rationality, rejecting the formal procedure and categories such as necessity (*dharūri*), need (*hājī*) and (*tahsīnī*) improvement. He underscores *al-mashlahah* as being an independent criterion for deriving rulings. According to al-Tūfi, 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-Tūfi 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 (*ibādāt*) from its purview and by stipulating that *al-mashlahah* could neither override fixed textual injunctions (*muqaddarāt*) nor a specific indicant (*dalīl khāsh*) from the Quran, the Sunnah, or consensus.¹²

Abū Ishāq al-Syāthibī 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-Syāthibī, attaining *al-mashlahah* and averting *mafsadah* 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-Shātibī 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 (*rūkhash*) or specifications (*takhsīsh*). In addition, considerations of *al-mashlahah* had no bearing on acts of worship (*ibādāt*), 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. Any other act may be judged according to the *mashlahah* it entails under particular circumstances, which, of course, varies by place, time, and person. Al-Shātibī's theory provided jurists with a comprehensive system to extend and adapt the law to new circumstances.¹³

Some scholars such as Vardit Rispler¹⁴ 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

¹² Opwis, above n 7, 195.

¹³ Opwis, "Al-Mashlahah," p. 196.

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'a into good and bad is made possible to serve as a parallel to the shariah. While in fact, for our understanding *al-bid'ah* 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'a is a doctrine in which theologically it is censured by the Prophetic tradition.

⁷ Felicitas Opwis, "Al-Mashlahah in Contemporary Islamic Legal Theory" (2005) 12(2) *Islamic Law and Society* 182, 187.

⁸ Opwis, *Islamic Law and Society*, 188.

⁹ Opwis, above n 7, 188; Muḥammad al-Ghazālī, *al-Mustashfā min 'Ilm al-Ushūl* (1993) vol. 2, 481-2, 502-3.

¹⁰ Opwis, above n 7, 189-90

¹¹ Opwis, "Al-Mashlahah," p. 194.

some early scholars classified *al-bid'ah* into good and bad, this position of course contradicts al-Syâthibî's belief that any such classification is legally weak. He felt that its justification was purely based on rational (and therefore arbitrary) rather than legal point of view. This was not however the case in his eyes with *al-mashlahah al-mursalah* and *al-istihsân*, which were fully integrated by his time within juridical of the Mâlikite and Hanafite schools. Thus principles such as *al-mashlahah al-mursalah* can be used in instances where the Quran, the Sunnah, *ijmâ'*, and *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 *ijtihad*, which by definition recognizes the superiority of the shariah.

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), since many rulings are unspecific in terms of either commands or prohibitions. *Al-mashlahah al-mursalah* is in this sense very different from *al-bid'ah*. The former is employed to arrive at rulings, based on certain indicants, and in deriving legal judgements,¹⁵ while the latter consists in creating a ruling without any precedent or textual basis.

While *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. Therefore, the function of the general good should be based as much as possible on its conformity with the ratio legis or its suitability. In other words, *al-mashlahah* can be made to function in order to preclude unlawful innovative actions as long as the constraint of necessity (*dharûrî*) exists. Al-Âmidî (d. 630/1232), for example, asserts that "this does not mean that every *al-mashlahah* (general good) is accepted as the basis of rulings; rather it means that *mashâlih* (sing. *al-mashlahah*) can be resorted to only where necessity is clear cut and universal . . ."

Referring to such discourse one should keep in mind about the paradigmatic definition and root of sources of law which may restrict an arbitrary conclusion of every case that may be made. Both *al-mashlahah al-mursalah* and *al-bid'ah* can be used as an instrument

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 *Syar'î* 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 *ibâdah* and *adiyyah* (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 *ibâdah* (religious matters) and aimed at association with divine law (*masyrû'*) which are 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 *ijtihad* 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-Syâthibî rejects it is baseless, since such value judgment

¹⁷ Hammâdi al-'Ubaydî, *al-Syâthibî wa Maqâshid al-Syar'îah*, (1992), 228-9.

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 Tathbiq al-Syar'îah* (1996), 31-132.

²¹ The Indian reformer Syaykh Ahmad Sirhindî (d. 1034/1624) launches vigorous attacks against the distinction between good and bad *bid'a*. He insists that either of them is away from the Sunnah and therefore should be scrupulously avoided. Yohanan Friedman, *Syaykh Ahmad Sirhindî: An Outline of His Thought and A Study of His Image in the Eyes of Posterity* (1971), 43-44.

¹⁵ Abû al-Hasan 'Alî Sayf al-Dîn al-Âmidî, *al-Ihkâm fî Ushûl al-Ahkâm* (1968) vol 4, 37-38.

¹⁶ Al-Âmidî, *al-Ihkâm*, IV, p. 215-6.

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.²² *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 dhalālah*) 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 in mundane affairs falls under the heading of public interest (*al-mashlahah al-mursalah*), not under *al-bid'ah wājibah* or *al-bid'ah mandūbah*.²³

It would appear that the weakness in the reasoning behind the division of *al-bid'ah* into legal values is not only in 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.²⁴ *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”.²⁵ 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-Syāthibī.

To demonstrate how *al-bid'ah* is unacceptable in law and *al-mashlahah al-mursalah* allowed, al-Syāthibī 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-Syāthibī says, *al-mashlahah* would mean contradicting the shariah. One example of *al-mashlahah* at work is in the ordinance of penal retaliation (*qishāsh*) which is applied in order to safeguard life (*ḥifẓ al-nafs*).

Second, if there is a clear indicant of the shariah rejecting it, *al-mashlahah* is clearly invalid. This is because its suitability (*munāsabah*) or lack of it is not seen from the standpoint of human reason *perse*, but rather in terms of the indicants (*adillah*, sing. *dalīl*) of the shariah. Thus, al-Syāthibī 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.”²⁶

Third, the use of *al-mashlahah* is allowable if the *syar'ī* indicant neither points to its acceptance nor rejects it. In any such case, says al-Syāthibī, *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 *dalīl* (indicant). In such instances, al-Syāthibī asserts, this process is called the act of *al-mashālih al-mursalah* (pl. of *al-mashlahah*).²⁷

Al-Syāthibī'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 *nash* is silent, he appears to differ from his predecessors such as Najm al-Dīn al-Tūfī (d. 716), whose theory of *al-mashlahah* is more utilitarian and tends towards liberalism.²⁸ Al-Syāthibī insists that the shariah is still superior to reason a fact that ensures that mankind will not indulge in innovation when precedent cannot be found in the *nash*. Al-Tūfī 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'āmalah* (social relations), whether attested to or not in the *nash*. However, he rejects its use in matter of *'ibādah*, which are clearly spelled out in the *nash*.²⁹ The

²⁶ Al-Syāthibī, *al-I'tishām*, II, 2, 113.

²⁷ Al-Syāthibī, *al-I'tishām*, II, 2, p. 114-115.

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 Muḥammad Musthafā Syalabī, *Ta'līl al-Aḥkām*, (1947), 292-293.

²² Al-Syāthibī, *al-Muwāfaqāt*, I, 76-81.

²³ Al-Syāthibī, *al-I'tishām*, I, 192-7.

²⁴ Ibid, 192. Al-Syāthibī contends that importing legal norms into *al-bid'ah* is itself innovation. *Al-bid'ah* does not tolerate or amalgamated selection (*takhyīr*); but it is prohibited all together.

²⁵ Wael B. Hallaq, *A History of Islamic Legal Theories An Introduction to Sunni Usul al-Fiqh* (1997), 40-41.

mujtahid, he says, undertakes his inquiry for the benefit and on behalf of those who are *mukallafîn* (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-Tûfi tries to explain how the notion was interpreted by al-Qarâfi and al-Ghazâlî. The former divided *al-mashlahah* into three types. First, *al-mashlahah* which is similar to *qiyâs* 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-mursalâh*, 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-Tûfi, then, concludes that *al-mashlahah* is not precluded but is even used according to the demands of *ijtihâd*. For, he reasons, if *al-mashlahah* is omitted, *ijtihâd* 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-Tûfi, 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” (*lâ dharar wa lâ 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-Tûfi seemingly acknowledges the supremacy of reason in cases of public interest.

³⁰ Najm al-Dîn al-Tûfi, *Syarh Mukhtashar al-Rawdhah*, ed. ‘Abd Allâh b. ‘Abd al-Muhsin al-Turki (1989), vol 3, 204.

³¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (1991), 275.

³² Nazly Hanum Lubis, “al-Tûfi’s Concept of al-Mashlahah: A Study in Islamic Legal Theory” (MA Thesis, McGill University, 1995), 47-50.

³³ Hallaq, above n 25, 150-53. Hallaq argues that al-Tûfi 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 sever 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.

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 *syar’î* 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-‘âdiyyah*). 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 *‘adah* 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, *‘adah* 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 *‘adah* 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 (*‘adah*), 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’lîl* (identifying the objectives of a given action) is crucial in light of the discussions about legal principles such as public interest (*al-mashlahah al-mursalâh*) and juristic preference (*al-istihsân*).³⁶

To support his idea of the difference between *al-mashlahah al-mursalâh* and *al-bid’ah*, al-Syâthibî cites ten examples of *al-mashlahah* introduced by the Companions and pious *‘ulamâ’* 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

³⁴ Al-Syâthibî, *al-I’tishâm*, I, 359.

³⁵ Ayman Shabana, “‘Urf and ‘Adah within the Framework al-Shabiti’s Legal Methodology” (2007) *UCLA Journal of Islamic and Near Eastern Law Review*, 87, 89-90.

³⁶ Shabana, “‘Urf and ‘Adah”, p. 98.

injunctions. Second, there is the prison 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-imām al-kubrā*), even though he may not be qualified as a *mujtahid* or *mufī*, 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 (*māl*) when there is great exigency for it in Muslim society.³⁷

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

Before passing judgement on the fact that *al-mashlahah al-mursalah* is different from *al-bid'ah*, al-Syāthibī 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-Syāthibī's justification of public interest is limited to *'adīyyāt* (customs) and excludes *'ibādah*.³⁸ Al-Syāthibī in these instances probably intended to make the law flexible enough to meet the demands of human beings within the constraints of the means (*wasā'il*) of achieving the ends of the shariah (*maqāshid al-syarī'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 *Hūdzaifah* "every *'ibādah* 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-Syāthibī insists that the systematization of Arabic grammar (*ilm al-naḥw*) be typified as *al-mashlahah*, not *al-bid'ah wājibah* as proposed by 'Izz al-Dīn b. 'Abd al-Salām (d. 660).³⁹ Arguing against 'Izz al-Dīn's position, al-Syāthibī insists that its introduction was not based on evidence either from the Quran or the

Sunnah. Rather, al-Syāthibī categorizes such practices on the part of his predecessors as a necessity (*dharūri*) in the field of the means (*wasā'il*), and not that of the *maqāshid* (the ends), of the shariah.⁴⁰ Al-Syāthibī, furthermore, asserts that cases involving customs (*'adīyyāt*) have their basis in reason, such that their benefit or harm can be understood logically. Provided, he reminds us, the application of *al-mashlahah 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 (*mashāliḥ al-'ibād*) 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 *hikmah* (wisdom of God). None of these, he insists, leads mankind into hardship.

From the examples cited above, al-Syāthibī 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 (*ushūl*) or its indicants (*dalā'il*, pl. *dalīl*). Second, public interest deals with matters rationally understandable and touching specifically on customs (*'adīyyāt*) are lawful. This is because customs are unlike *'ibādah* which are transcendent and incapable of rationalization—examples being, according to al-Syāthibī, *wudhū'* (ablution) and *hajj* (pilgrimage).⁴² Both ritual practices can only be performed and taken for granted. To distinguish the fundamental bases of *'ibādah* (which are beyond human reason) and of *'adīyyāt* (which are accessible to human intellect), al-Syāthibī positions himself in the tradition of the Mu'tazilites⁴³ in claiming that reason has no place in the domain of *'ibādah*. This is because *'ibādah* (like ablution, 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, *ijtihād*

³⁷ Al-Syāthibī, *al-I'tishām*, II, 115-27.

³⁸ Al-Syāthibī, *al-I'tishām*, II, p. 131-132.

³⁹ 'Izz al-Dīn b. 'Abd al-Salām, *Qawā'id al-Aḥkām fi Mashāliḥ al-Anām*, vol 2, 173.

⁴⁰ Al-Syāthibī, *al-I'tishām*, II, p. 133-34.

⁴¹ Al-Syāthibī, *al-I'tishām*, II, p. 133.

⁴² Al-Syāthibī, *al-I'tishām*, II, p. 129.

⁴³ Mu'tazilites argue that reason ineluctably brings humans to a knowledge of God and thus to the knowledge that what the Quran and the Sunnah require of humans (taklif) is good. Richard C Martin, R Mark Woodward and Dwi S Atmaja, *Defenders of Reason in Islam Mu'tazilism from Medieval School to Modern Symbol* (1997), 17.

has no business in trying to understand any hidden meanings in *'ibâdah*. On the contrary, the objections of *'adiyyah* (customs) are clear, i.e. to preserve benefits (masalahih) and avoid harms (*mafâsid*), whereas those of *'ibâdah* matters are unclear.⁴⁴ In other words, al-Syâthibî insists that *'ibâdah*, being certain and perfect, need neither addition nor subtraction, while *'adiyyah* are rational and may be modified according to necessity and need. Deviations in the performance of *'ibâdah* which are alien or not attested to by a *syar'î* indicant are counted as real *al-bid'ah*, and therefore are to be absolutely rejected.

Al-mashlahah al-mursalah, therefore, amounts to protecting the constraints of dharuri (necessity) and averting difficulty in religion. In stating this, al-Syâthibî contends that a certain element (probably *al-mashlahah al-mursalah*) should be included in a relevant case if its exclusion might otherwise lead to imperfection. This theory, known as *mâ lâ yatim al-wâjib illâ bih*, is an indispensable facet of the means of pursuing the ends (*maqâshid*), rather than constituting innovation. The philosophical basis of this outlook is intended to avert hardship.⁴⁵

Al-Syâthibî agrees that there is a suitability in the maqashid, 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 (*ushûl al-kulliyât*), which ensure that the benefits in this world and in the hereafter will not transgress these limits. Such constraints and limitations, al-Syâthibî⁴⁶ 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 shariah is silent, the employment of *al-mashlahah al-mursalah* is acceptable as long as it conforms to the ends of the Shariah and their indicants (*dalâ'il*, pl. *dalîl*).⁴⁷ This position shows that the superior of the shariah to reason helps to protect the community from adjudication of matters leading to *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-Syâthibî, we could say that he was not himself reluctant to use reason (*'aql*) as the basis for legal decisions. He,

nevertheless, tried to place himself in an intermediate position between *naql* (Shariah)—immutable by virtue of the certitude of divine law—and reason (*'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 shariah 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 shariah is certain.⁴⁸

As Fazlur Rahman⁴⁹ noted, al-Syâthibî was convinced that human knowledge based on reason and experience cannot be trusted at all and, therefore, cannot lead to action. Put differently, al-Syâthibî accepted rational judgment if based on universal truths (*kulliyât*) or on a multitude of probable instances or particular statements (*juz'iyât*). One example of this is his theory of *al-mashlahah al-mursalah* which is fundamentally rational though based on his theory of the ends of the law (*maqâshid al-syar'îah*). Wael B. Hallaq⁵⁰ 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 tawatur as the basis of his general theory. He nevertheless exercised caution by rejecting arbitrarily rational judgment which can ultimately lead to innovation (*al-bid'ah*).

His efforts may be described as an attempt to reconcile the two extremes represented by the shariah and reason, though he gave preference to the former. Al-Syâthibî⁵¹ acknowledged that the shariah 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 *ijtihâd*. Furthermore, al-Syâthibî believed that the validity of *al-mashlahah al-mursalah* and *istih-sân*, 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 (*ushûl al-kulliyah*) is obvious, in that they both benefit human beings in allowing them to perform good ordinances.⁵² Accordingly, the role of reason in the aforementioned process is indispensable. Al-Syâthibî, however, insists that adjudicating good or bad in the *'ibâdah* is the prerogative of the shariah, whereas in mundane affairs, where logic plays a greater role, reason may be favored.

⁴⁸ Al-Syâthibî, *al-I'tishâm*, I, p. 184.

⁴⁹ Fazlur Rahman, *Islamic Methodology in History* (2nd ed, 1984), p. 153.

⁵⁰ Wael B Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunni Legal Thought," in *Law and Legal Theory in Classical and Medieval Islam* (1995), 30.

⁵¹ Al-Syâthibî, above n 46, 66-76.

⁵² Al-Syâthibî, *al-Muwafaqât*, IV, p. 148-58; I, p. 27-34.

⁴⁴ Al-Syâthibî, *al-Muwafaqât*, I, 146.

⁴⁵ Al-Syâthibî, *al-I'tishâm*, II, p. 133.

⁴⁶ Al-Syâthibî, *al-Muwafaqât*, IV, p. 20.

⁴⁷ Al-Syâthibî, above n 44, 26-27.

Having reviewed the legal principles held by al-Syāthibī, 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-Syāthibī 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 Mālikītes, for whom *al-mashlahah al-mursalah* could be employed as a source of law in the complete absence of textual indicants, the Zaharites, and especially Ibn Ḥazm, strenuously objected to such an approach in religious matters.⁵³ The rigidity of Ibn Ḥazm on this topic strictly delimited the role of reason in understanding divine law. He equated the practice with *ra'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 *ra'y* (*ahl al-ra'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'lil* (ratio legis)⁵⁴ which is counted as legal principle? On the contrary, we can argue that the Shariah is not entirely based on *'ibadah*, which are certain, but also on customs (*'adiyyat*), 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 *'ibadah* or *mu'āmalah* (social relation), is not devoid of *'illah* (ratio legis), and *hikmah* (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 *hikmah*, which is a bearer of benefit (*al-mashlahah*) for mankind.⁵⁵

Al-Syāthibī too frequently proclaims the *maqāshid al-syarī'ah* as universal roots (*ushūl al-kulliyāt*) 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-istihsān* (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-istihsān* in the eyes al-Syāthibī, which commands good is

lawful and can be adopted as a method of reasoning, and is espoused by al-Syāthibī himself as a tool of legal argument.

Al-Bid'ah* and *al-Istih̄s̄an

For al-Syāthibī, *al-istihsān*, 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-istihsān*, 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-istihsān*) in *syar'ī* matters which is not based on a certain *dalil* (indicant) constitutes innovation (*al-al-bid'ah al-latī tastaḥsin*).⁵⁶

Bearing this arbitrary use of *al-istihsān* in mind, al-Syāthibī nevertheless, characterizes it as a legitimate source of law applied in cases where the *nash* is silent. For him, the use of sound *al-istihsān* is not based on one's own feelings or speculative reason. On the contrary, *al-istihsān* espoused in Islamic jurisprudence must be seen from the perspective of the objective of the law giver (*qashd al-syarī*).⁵⁷ The validity of *al-istihsān*, according to him, is recognizable in cases where there is a duality between relying on necessity (*dharūrī*) on the one hand and using *qiyās* 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-istihsān* (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 *qiyās*, it would be unlawful, but due to great exigency and hardship, the solution by *al-istihsān* makes it lawful. In this particular case, *al-istihsān* promotes a particular *al-mashlahah* in maintaining the universal *dalil* ("*al-akhdz bi-mashlahah juzi'iyah fi muqābalah dalil kullī*").⁵⁸

The validity of *istihsān* as a legal principle was also defended by al-Shīrāzī (d. 476/1083). He selectively accepted *istihsān* as long as it was approved by a *dalil* (indicant) and when the use of *qiyās* was less than certain. He, however, rejected *al-istihsān* when deemed to be a limitation of the *'illah* (ratio legis) by a *dalil* (*takhshīsh al-'illah bi-al-dalil*). 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. *Qiyās* (ratio legis) dictates that the fasting would become void, for the fundamental consideration in *qiyās* is that food has entered his body, whether intentionally or not. This judgment is however abandoned on the

⁵³ Noor-Ul-Amin Leghari, "The Malikite Doctrine of Mashlahah Mursala," (MA Thesis, McGill University, 1984), p. 91-88.

⁵⁴ Leghari, "The Malikite Doctrine," p. 84.

⁵⁵ Fazlur Rahman, "Toward Reformulating the Methodology of Islamic Law," New York University Journal of International Law and Politics, 12, 2, (1979), p. 219-224.

⁵⁶ Al-Syāthibī, *al-I'tishām*, II, p. 136.

⁵⁷ Al-Syāthibī, *al-Muwāfaqāt*, IV, p. 148-149.

⁵⁸ Al-Syāthibī, *al-Muwāfaqāt*, 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 *qiyās* and which results in a different rule.⁵⁹

The above example is regarded by al-Shîrâzî as a sound *al-istihsân*, given the weakness of *qiyās* 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 *istihsân* is based on the prophetic report “what Muslims deem good, it is good before God” (*mâ ra’âh al-Muslim ḥasana fa huwa ‘ind Allâh ḥasana*). 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. *Qiyās*, 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 *takhshîsh al-‘illah* (the limitation of ratio legis) but rather as a “preferred *qiyās*” (*al-qiyās al-mustahsan*). 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’y*). Al-Syâfi’î (d. 204/820) is famous for his dictum “who practices juristic preference, legislates.”⁶²

⁵⁹ Abû Ishâq Ibrâhîm al-Shîrâzî, *Syarḥ al-Lumâ*, ed. Abdel Majid Turki, 2 vols (1988) vol 2, 969; see also Hallaq, *A History*, p. 107-111.

⁶⁰ Al-Shîrâzî, *Syarḥ al-Lumâ*, p. 70-74.

⁶¹ Muḥammad b. Aḥmad Abû Sahl al-Sarakhsî, *Ushûl al-Sarakhsî*, ed. Abû al-Wafâ al-Afghanî, 2 vols. (al-Qâhirah: Dâr al-Kitâb al-‘Arabî, 1373/1954), p. 204-208.

⁶² Felicitas Opwis, “The Construction of Madhhab Authority:

There are many opinions among jurist scholars over *istihsân* 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‘lâs’ 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 Ḥanbalî 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 Hanbalite 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 Mâlikîte doctrine, according to al-

Ibn Taymiyya Interpretation of Juristic Preference (Istihsan)” (2008) 15 Islamic Law and Society 219, 224. See also his quotation of Abû Ḥâmid Muḥammad b. Muḥammad al-Ghazâlî, *al-Mustashfa‘ min ‘Ilm al-Ushûl* (1995), 1:254. Cf. Muḥammad b. Idrîs al-Syâfi’î, *al-Risâlah*, ed. Aḥmad Muḥammad Syâkir (al-Qâhirah: Maktabah Dâr al-Turâts, 1979/1399), 507, where al-Syâfi’î explicitly rejects juristic preference. *Man istahsan fa qad syara’u*.

⁶³ Opwis, above n 62, 226

⁶⁴ Opwis, “The Construction of Madhhab Authority”, p. 233.

Syāthibī⁶⁵ is equivalent to *al-mashlahah al-mursalah* (public interest); such *istih̄s̄an*, therefore, is not alien to stipulated indicants (*muqtadhâ adillah*). In making such a statement, al-Syāthibī may have been trying to stress that *istih̄s̄an* itself is different from arbitrary rational judgment in instances where textual evidence is lacking, and therefore it is not to be counted as innovation (*al-bid'ah*). For, according to al-Syāthibī's understanding, legal cases should primarily be in line with the ends of the law (*maqâshid al-syarī'ah*) rather than with pure reason. The ends of the law, where necessity (*dharârî*) is a key element, depend on divine wisdom (*hikmah*),⁶⁶ a solid basis on which to draw when there is lack of conformity between *qiyâs* (ratio legis) on the one hand and *al-istih̄s̄an* on the other.

As the difference between *'ibâdah* and mundane matters (*'awâ'id*) is fundamental point in al-Syāthibī's view, the function of *al-istih̄s̄an* 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-Syāthibī, therefore, tolerates the use of *al-istih̄s̄an* in mundane matters insofar as the *dalîl* neither stipulates nor contradicts the shariah. Employing *al-istih̄s̄an* in the shariah without any *dalîl* is categorized as innovation (*al-bid'ah*), for in al-Syāthibī's words, not every *al-istih̄s̄an* is true.⁶⁷ The cases of *al-istih̄s̄an* which al-Syāthibī 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-istih̄s̄an* is ruled as conforming to a certain *dalîl*, it is lawful.

Ibn 'Arabî, as quoted by al-Syāthibī, defines *al-istih̄s̄an* 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-istih̄s̄an* 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-istih̄s̄an* as abandoning *qiyâs* where reliance solely on the latter may lead to transgression of the law.⁶⁸

Having elaborated the issue of *al-istih̄s̄an* as it is

treated by these two Andalusian-born scholars, al-Syāthibī concludes that *al-istih̄s̄an* 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-Syāthibī agrees that reason can be employed to interpret the Shariah when used in conjunction with *al-istih̄s̄an*. He, however, rejected the use of *al-istih̄s̄an* 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".⁶⁹ The subjectivity of pure *al-istih̄s̄an*, al-Syāthibī 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.⁷⁰

Just as reason is a subjective factor in pronouncing *syar'î* matters, al-Syāthibī 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.⁷¹

Al-Syāthibī'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-dzîkr*). Finally, al-Syāthibī draws the conclusion that every man should his lesson from God's signs in conformity with His indicant in the Quran.⁷²

⁶⁹ Al-Syāthibī, *al-I'tishâm*, II, p. 150.

⁷⁰ Al-Syāthibī, *al-I'tishâm*, II, p. 151.

⁷¹ Al-Syāthibī, *al-I'tishâm*, II, p. 157.

⁷² Al-Syāthibī, *al-I'tishâm*, II, 157-158. For final remark, al-Syāthibī insists on the rectitude of God's oneness through understanding with God's sign from the Quran, not from the heart. In that, he quotes the Quranic verse saying, "do they not look at the camel- how they are

⁶⁵ Al-Syāthibī, *Al-Muwâfaqât*, IV, p. 151.

⁶⁶ Hallaq, "Inductive Corroboration," p. 28.

⁶⁷ Al-Syāthibī, *al-I'tishâm*, II, 136. He said, "*Lays kull al-istih̄s̄an haqq*"

⁶⁸ Al-Syāthibī, *al-I'tishâm*, II, p. 138-139.

Al-Syâthibî'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-Syâthibî even goes beyond the boundary of his *madzhab*, that is Mâlikîte school of law, but rather has accommodated some credible and valid approaches from other school, i.e. Hanafite *madzhab*, to the extent it is in line with the spirit of shariah. Unlike al-Syâfi'î (d. 204/820) who rejected altogether *al-istihsân*, al-Syâthibî 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-Syâfi'î, on the other hand, rejected *al-istihsân* on the ground that it is similar to indulging pleasure (*taladzdzudz*).⁷³

In addition, al-Syâfi'î sees *istihsân* as equivalent to *ra'y* (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 *qiyâs* (ratio legis). To admit opinion not based on these sources means accepting the reasoning of non-specialists.⁷⁴ It is reasonable to assume that al-Syâfi'î was playing it safe when he rejected *istihsân* by equating it with *ra'y* (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-Syâfi'î's polemics are obviously against *al-istihsân* and arbitrary *ijtihad* and in favor of disciplined *qiyâs* as a corrective for those who juxtaposed reason and the shariah. Yet, al-Syâfi'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, *ra'y*, which is significant as an expression of rationalist and utilitarian tendencies, was wholly opposed by al-Syâfi'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 *ra'y* and moulded them into arguments that could be used in the law, but only insofar as they

derived their premises from revelation.⁷⁷ Al-Syâthibî, 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-Syâthibî deemed its suitability to be unquestionable, provided its injunctions in *syar'i* matters are not based on personal judgment or speculation. The sound *al-istihsân* which al-Syâthibî agreed with had the characteristic of relying upon the end of the law-giver (*qashd al-Syâri*), such as setting aside *qiyâs* (ratio legis) in favor of a stronger *al-mashlahah* or to avert a greater danger. Such *al-istihsân* is seen, al-Syâthibî states, from the fact that its efficacy clearly promotes the ends of the shariah, *dharûrî* (necessity), *hajjî* (need) and *tahsînî* (improvement). This is because, according to him, in some cases reliance on a rule merely on the basis of *qiyâs* (ratio legis) might give rise to some sort of harmful consequence for human beings. Al-Syâthibî, 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 *istishlâh* as perceived by al-Syâthibî, 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-Syâthibî as one means of performing *ijtihad*. 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 *tarjih al-adillah* (the preponderance of the indicants).⁸⁰ The pure *istihsân* 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-al-bid'ah*) take the opposite position by using *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

created?" (Q. 88: 17)

⁷³ Muḥammad b. Idrîs al-Syâfi'î, *al-Risâlah*, ed. Muḥammad Sayyid Kaylânî, (al-Qâhirah: Musthafâ al-Bâb al-Halabî, 1969), 220.

⁷⁴ Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (1950), 121.

⁷⁵ This statement used by Schacht is to indicate al-Syâfi'î's critique against his predecessor's position in using reason. Schacht notes that al-Syâfi'î in his earliest period uses *ra'y* in the same loose way as the ancient schools. Schacht, however, does not elaborate in detail which the ancient school belonging to. But it is probably directly to Hanafite and Mu'tazilite schools. Schacht, above n 74, 120.

⁷⁶ Schacht, above n 74, 20

⁷⁷ Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence," 597.

⁷⁸ Mâlik b. Anas as quoted by al-Syâthibî designates that *istihsân* is deemed as nine-tenth of human knowledge. Mâlik's characteristic statement grasps the true essence of *istihsân* as a method of finding better and more equitable alternatives to existing problems both within and beyond the confines of *qiyâs* (ratio legis). Al-Syâthibî, *al-Itishâm*, II, 138.

⁷⁹ Al-Syâthibî, *al-Muwâfaqât*, IV, 148-149. See also Bernard G Weiss, *The Spirit of Islamic Law* (1998), 187.

⁸⁰ Bernard G Weiss, *The Search for God's Law* (1992), 673.

⁸¹ Ahmad Haris, "Innovation and Tradition in Islam: A Study on Bid'a as Interpretation of the Religion in the Indonesian Experience," (PhD. Diss., Temple University, 1998), p. 233.

pure *al-istih̄s̄n* (reason were also proclaimed by the Syrian-born reformist thinker Muḥammad Rasyīd Ridhā (d. 1935). Prefacing his position on *al-bid'ah* and arbitrary reason, Ridhā 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, Ridhā convincingly rejects arguments based solely on assumptions of good or bad (pure *al-istih̄s̄n*) in *syar'ī* matters. *Al-istih̄s̄n*, he insists, which is not based on sound *qiyās* (ratio legis) or which fails to promote *al-mashlahah* or avert danger is counted as unsound *al-istih̄s̄n*, and therefore foreign to the Shariah.⁸²

Closing Remarks

As the ends of the law (*maqāshid al-syarī'ah*) are the hallmark and characteristic of al-Syāthibī's legal theory, the validity of *al-mashlahah al-mursalah* and *al-istih̄s̄n* 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'ī* matters is clear, al-Syāthibī is in faithful with the superiority of the *nash* over reason. Over the cases dealing with mundane matters, al-Syāthibī tolerates rational judgment as the means of way solution insofar as it is in accordance with human welfare and averts danger. []

Bibliography

- Ali, Aslam Farouk, "A Translation of Muhammad al-Ghazali's Study on Bid'a with an Introduction on Author and His Thought" (MA Thesis at University of South Africa, 2010).
- Āmidī, al-, Abū al-Ḥasan 'Alī Sayf al-Dīn, *al-Iḥkām fī Usūl al-Aḥkām*, 4 vols, al-Qāhirah: Mathba'ah 'Alī Subayh, 1968.
- Friedman, Yohanan, *Syaykh Ahmad Sirhindi: An Outline of His Thought and A Study of His Image in the Eyes of Posterity* (1971).
- Ghazālī, al-, Abū Ḥāmid Muḥammad b. Muḥammad, *al-Mustashfā min 'ilm al-ushūl* (1995).
- Hallaq, Wael B, "On Inductive Corroboration, Pro-

bability and Certainty in Sunni Legal Thought," in *Law and Legal Theory in Classical and Medieval Islam*, Aldershot: Variorum, 1995.

- , "Was al-Shafi'i the Master Architect of Islamic Jurisprudence," in *International Journal of Middle East Studies*, 25, 1993.
- , *A History of Islamic Legal Theories An Introduction to Sunni Usul al-Fiqh*, Cambridge: Cambridge University Press, 1997.
- Haris, Ahmad, *Innovation and Tradition in Islam: A Study on Al-bid'ah as Interpretation of the Religion in the Indonesian Experience*, PhD. Diss., Temple University, 1998.
- 'Izz al-Dīn b. 'Abd al-Salām, *Qawā'id al-Aḥkām fī Mashāliḥ al-Anām*, 4 vols. al-Qāhirah: Matba'ah al-Istiqamah, n.d.
- Jābiri, al-, Muḥammad 'Abīd, *al-Dīn wa al-Dawlah wa Tathbiq al-Syarī'ah*, Bayrūt: Markaz Dirāsah al-Wahdah al-'Arabiyyah, 1996.
- Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, Cambridge: Islamic Texts Society, 1991.
- Leghari, Noor-Ul-Amin, "The Malikite Doctrine of Mashlahah Mursala" (MA Thesis, McGill University, 1984).
- Lubis, Nazly Hanum, "al-Tufi's Concept of Al-mashlahah: A Study in Islamic Legal Theory," (MA Thesis, McGill University, 1995).
- Martin, Richard C, R Mark Woodward, and Dwi S Atmaja, *Defenders of Reason in Islam Mu'tazilism from Medieval School to Modern Symbol* (1997).
- Khwarazmī, al-, Muḥammad b. Aḥmad *Mafātīḥ al-'Ulūm*, ed. G. van Vloten, Leiden: E.J. Brill, 1895.
- Opwis, Felicitas, "Maslaha in Contemporary Islamic Legal Theory" (2005) 12(2) *Islamic Law and Society* 182.
- , "The Construction of Madhhab Authority: Ibn Taymiyya Interpretation of Juristic Preference (*Istih̄s̄n*)" (2005) *Islamic Law and Society* 15.
- Rahman, Fazlur, "Toward Reformulating the Methodology of Islamic Law," (1979) *New York University Journal of International Law and Politics* 219.
- , *Islamic Methodology in History* (2nd Edition, 1984).
- Ridhā, Muḥammad Rasyīd, *Yusr al-Islām wa Ushūl al-Tasyrī al-'Ām*, al-Qāhirah: Mathba'ah Nahdha Misr, 1956.
- Rispler, Vardit, "Toward a New Understanding of the Term *Al-bid'ah*," *Der Islam*, 68, 2, 1991.
- Sarakhsi, al-, Muḥammad b. Aḥmad Abū Sahl, *Ushūl al-Sarakhsī*, ed. Abū al-Wafā al-Afghānī, 2 vols. al-Qāhirah: Dār al-Kitāb al-'Arabī, 1373/1954.
- Schacht, Joseph, *The Origins of Muhammadan Juris-*

⁸² Muḥammad Rashīd Ridhā, *Yusr al-Islām wa Ushūl al-Tasyrī al-'Ām*, (al-Qāhirah: Mathba'ah Nahdha Misr, 1956), 42-43, 72. In this case, Ridhā seemingly treads the footsteps of al-Syāthibī in treating *al-istih̄s̄n* 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-istih̄s̄n* of his/her justification.

- prudence*, Oxford: the Clarendon Press, 1950.
- Shabana, Ayman, “*Urfand ‘Adah* within the Framework al-Syâthibî’s Legal Methodology, *UCLA Journal of Islamic and Near Eastern Law Review*, 87 (2007): 87-100.
- Shîrâzî, al-, Abû Ishâq Ibrâhîm, *Syarh al-Lumâ’*, ed. Abdel Majid Turki, 2 vols, Bayrût: Dâr al-Gharb al-Islâmî, 1988.
- Syâfi’î, al-, Muḥammad b. Idrîs, *al-Risâlah*, ed. Muḥammad Sayyid Kaylâni, al-Qâhirah: Musthafâ al-Bâb al-Halabi, 1969.
- Syalabî, Muḥammad Musthafâ, *Ta’lîl al-Aḥkâm*, al-Qâhirah: Mathba’ah al-Azhâr, 1947.
- Syâthibî, al-, Ibrâhîm b. Mûsâ, *al-‘Iṭishâm*, ed. Muḥammad Rasyîd Ridhâ, 2 vols. al-Qâhirah: Maktabah al-Tijâriyyah al-Kubrâ, n. d.
- , *al-Muwafaqât fî Ushûl al-Syarî‘ah*, 4 vols. al-Qâhirah: Dâr al-Fikr al-‘Arabî, n. d.
- Tûfi, al-, Najm al-Dîn, *Sharḥ Mukhtashar al-Rawdhah*, ed. ‘Abd Allâh b. ‘Abd al-Muḥsin al-Turkî, 3 vols., Bayrût: Mu’assasah al-Risâlah, 1989.
- Ubaydî, al-, Hammâdî, *al-Syâthibî wa Maqâsid al-Shari‘a*, Tripoli: al-Jamâhir al-‘Uzmâ, 1992.
- Weiss, Bernard G, *The Search for God’s Law*, Salt Lake City: University of Utah Press, 1992.
- , *The Spirit of Islamic Law*, Athens: The University of Georgia Press, 1998.