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One of The Founders of The Hanafi School Zufar Ibn Hudhayl's Approach to Istiḥsān*

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ABSTRACT

From the earliest times when schools of legal thought (*madhhab*) have started to form, there has been debate whether or not "istiḥsān (juristic preference; moving away from the implications of an analogy to an analogy that has a stronger evidence from the Qurʾān, Sunnah or ijmāʿ)" is a method of "istidlāl (inference)". At the basis of these discussions, the effect of the arbitrariness/subjectivity implied by the term "istiḥsān", which has not yet completed its conceptualization process, is far too much. Therefore, those who adopted "istiḥsān" as a method were subjected to serious accusations. Hanafī jurists are at the forefront among those who adopted "istiḥsān". So much so that the "istiḥsān" method has become known by the Hanafi School. However, we have come across with two opposing arguments about the approach of Zufar ibn Hudhayl, who is one of the leading representatives of the school, prominent with his analogical reasoning, to "istiḥsān". As a result of our research and investigation, it is seen that neither of the claims is right; in addition to the skill of the Zufar to make analogies, he is in favor of analogical reasoning to the full extent on the issue of having recourse to "istiḥsān"; but in cases where analogies are inadequate in producing solutions to the issues or do not give correct outcomes, as a necessity for not to leave the issue without any verdict, he had recourse to "istiḥsān". As a result, it can be said that being bound to the Hanafī method in general terms, Zufar ibn Hudhayl has narrowed the framework for using "istiḥsān" as a method of "istidlāl"; on the issue of having recourse to analogies, on the other hand, he tried to broaden the boundaries as much as possible.

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Islamic Law, Hanafī School, Zufar ibn Hudhayl, Analogy, Istiḥsān, Istidlāl

Hanefî Mezhebi’nin Kurucu İmamlarından Biri Olan Züfer b. Hüzeyl’in İstihsana Yaklaşımı

ÖZ

Mezheplerin teşekkül etmeye başladığı ilk dönemlerden itibaren istihsanın bir istidlal yöntemi olup olmadığı tartışılagelmiştir. Bu tartışmaların temelinde kavramsallaşma sürecini henüz tamamlamamış olan istihsan teriminin çağrıştırdığı keyfiliğin/sübjektivitenin etkisi çok fazladır. Bu yüzden istihsanı bir yöntem olarak benimseyenler, ağır ithamlara maruz kalmışlardır. İstihsanı benimseyenlerin başında Hanefî hukukçular gelmektedir. Öyle ki istihsan yöntemi Hanefî mezhebiyle anılır hale gelmiştir. Bununla birlikte mezhebin önde gelen temsilcilerinden biri olan ve kıyas metodunu kullanmasıyla ön plana çıkan Züfer b. Hüzeyl’in istihsana yaklaşımıyla ilgili iki farklı yaklaşım tespitedilmiştir. Yaptığımız araştırma ve inceleme neticesinde her iki tespitinde isabetli olmadığını; Züfer b. Hüzeyl’inkıyas yapmadaki becerisinin yanı sıra istihsana müracaatta sonuna kadar kıyas taraftarı olduğunu; ancak kıyasın meselelere çözüm üretmede yetersiz kaldığı ya da doğru sonuç vermediği durumlarda ise ızdırârın da bir gereği olarak meseleyi hükümsüz bırakmama adına istihsana müracaat ettiği görülmektedir. Sonuç olarak Züfer b. Hüzeyl’in genel hatlarıyla Hanefî usulüne bağlı kalmakla birlikte istihsanı bir istidlâl yöntemi olarak kullanma hususunda çerçeveyi oldukça daralttığını; kıyasa başvurma konusunda ise sınırları mümkün olduğunca geniş tuttuğunu söylemek mümkündür.

ANAHTAR KELİMELER

İslam Hukuku, Hanefî Mezhebi, Züfer b. Hüzeyl, Kıyas, İstihsan, İstidlâl

SUMMARY

Starting from Hijri 2nd century which was the beginning of the formation of idolatry, in terms of whether it is the nature and the method of stratification, istiḥsān, generally described as “Because of stronger evidence, it would be better to abandon the provision of similar powers to another ruling”, has been argued. So much so that two different approaches have emerged in the form of supporters and opponents.

The opponents of istiḥsān have accused the people who adopted and done sets of fiqh deductions accordingly of judging according to their desires and to establishing a new sharia. However, the effect of the concept of istiḥsān, which has not yet completed its conceptualization process, arbitrary/subjective sense of this oppositional approach is too great.

Imam Shafī was a strong opponent of istiḥsān. However, Shafī, consulted istiḥsān to regard the amount of “mut‘a” (consolation gift) thirty dirham and the period of the “shuf‘a” (right of pre-emption) as three days, he even used this concept by saying “I am doing istiḥsān”. Therefore, it can be said that the opposition of Imam Shafī is aimed at the “logic of exception” which resides in istiḥsān rather than the provision reached by the means of istiḥsān.

Imam Shafī's istiḥsān opposition is more directed to the Hanafis, who are identified with istiḥsān. Particularly, it is seen that the students Abu Yûsuf and Imam Muhammad and Abu Hanifa one of the founder imams of Hanafi School consulted istiḥsān frequently. However, there are not sufficient and clear information about Zufar ibn Hudhayl's view of istiḥsān. Zufar ibn Hudhayl, who is at this point also worth investigating and examining, because he is one of the founding imams of the school and has his own ideas.

Different determinations on Zufar ibn Hudhayl's approach to istiḥsān were done by contemporary researchers. One of these is a proof that Zufar ibn Hudhayl was using istiḥsān largely similarly to other founder of the Hanafi School; and the other is that he falled in line with Imam Shafī in terms of istiḥsān. Since both studies are not directly related to Zufar ibn Hudhayl's approach to istiḥsān, the researchers did not feel the need to point the arguments that they based these assumptions on.

Zufar ibn Hudhayl has passed away after a very short time (d. 158/775) from Abu Hanifa, and he spent the 6 of his last 8 years in Basra. Therefore, there is no detailed information about him like the other founding imams of the school. Moreover, the absence of any work or the lack of knowledge about it, makes it very difficult to determine Zufar ibn Hudhayl's views of istiḥsān. This necessitates the application of Hanafi resources from the initial period for further investigation.

Especially in the examination of the classical period Hanafi School's method and furūʿ al-fiqh (substantive law) literature, we could not reach any knowledge about Zufar ibn Hudhayl's approach to istiḥsān. However, almost all layered authors describe Zufar ibn Hudhayl as a "*qiyās* (analogy) expert" and emphasize his skill and expertise in using analogy. This is also quite remarkable. However, in the works of Pīrī-Zāde and Kawtharī, who directly examine Zufar ibn Hudhayl's fiqh, there is no information about what philosophical background of his was about what is meant by the qualifications of "expert" or "qiyās expert" about him.

Two conclusions can be reached from these characterizations about Zufar ibn Hudhayl: one of them is, he was quite successful and competent in using analogies against the matters where the provision is absent and the other one is his loyalty to istiḥsān where the different provisions can be obtained regarding fiqh matters unlike comparation.

It is highly probable that the second meaning was the one intended. Because the literature shows that other founding imams besides Zufar ibn Hudhayl also were at least as wise and skillful as Zufar ibn Hudhayl in making analogies. In addition, some information contained in the classical Hanafi literature supports this opinion.

Muhammad Biltaji, one of the contemporary researchers, also, says things that confirm the second approach: "*Zufar ibn Hudhayl was trying to reduce the field of judgments via istiḥsān as much as possible; and in regard to qiyās he showed great effort to expand the boundaries as far as possible. The fact that Zufar ibn Hudhayl almost never applies istiḥsān, does not leave him out of the general principles of the Hanafi School that was allied on. Because the*

method of Zufar ibn Hudhayl is in itself was the method itself. Zufar ibn Hudhayl's understanding of fiqh is shaped generally within this procedural framework. That is why his resources were also qiyās and istiḥsān in the same manner. In practice, however, when applying the methods to the occasions, he preferred qiyās more frequently than istiḥsān. He was dissent about applying istiḥsān to the issues. This opposition, however, does not mean fundamentally opposing or rejecting it entirely, either about qiyāsor about istiḥsān."

In the research we have conducted on the classical Hanafi literature, we have found that Zufar ibn Hudhayl was consulting to istiḥsān in a very limited area on only four subjects. Apart from these examples, we could not find any other use of istiḥsān by him. Zufar ibn Hudhayl's preference for istiḥsān here is not because there is no possibility to use qiyās; perhaps, qiyāswas not responding to necessity, or was not able to provide the right result.

However, when Zufar ibn Hudhayl's applications of istiḥsān in fiqh practices are examined, it is seen that all three of the other imams or some of them have passed judgements based on qiyās. This situation makes it very difficult to determine a general rule of Zufar ibn Hudhayl's application of istiḥsān regarding the situations and purpose.

Moreover, Zufar ibn Hudhayl's application of istiḥsān, even in a narrow field, reveals that the findings of researchers today, such as his frequent use or refusal of istiḥsān as the other imams of the school, are far from reflecting the truth.

To put it briefly, while qiyās was fundamental for Zufar ibn Hudhayl, even if for a limited and narrow field, he applied istiḥsān as well.

INTRODUCTION

It is an indisputable fact that Abū Ḥanīfa's (d. 150/767) jurisprudential views and thoughts have played dominant role in formation and efflorescence of method, doctrine and systematization of Ḥanafī School.[1] Besides, Abū Ḥanīfa's prominent students such as Zufar ibn Hudhayl (d. 158/775), Abu Yusuf (d. 182/798), Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805) and al-Hāssan ibn Ziyād al-Lu'lū'iyy (d. 204/819), who were trained in a circle of scholar-student relationship in fiqh academy founded by Abū Ḥanīfa himself in the city of Kufa, had intense efforts in systematic and well-organized conveyance and dissemination of a rich fund of knowledge they inherited.[2] Although Abū Ḥanīfa was the founding imam of the school, the prestigious names such as Zufar ibn Hudhayl, Abu Yusuf, Muḥammad ibn al-Ḥasan al-Shaybānī and al-Hāssan ibn Ziyād maintained their influence in the school with their ideas, and even at times, put forward different views from their masters on certain subjects, which was not found strange within the school. Some

1 Ali Bardakoğlu, "Hanefî Mezhebî", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 1997), 16: 1.

2 Mustafa Uzunpostalcı, "Ebû Hanîfe", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 1994), 10: 137.

of the mentioned ideas were even taken as basis for Fatwā; while others were disapproved and remained discrete views.

Zufar ibn Hudhayl, who was Abū Ḥanīfa's trainee[3] and friend to Abū Ḥanīfa for more than twenty years and who was among the most important names of fiqh academy,[4] was also a member and the head of ten-person committee formed with the objective to note (*tadwīn*) his master's jurisprudential views.[5] Thanks to this duty, Zufar found a chance to compile Abū Ḥanīfa's toughts towards jurisprudential topics and to review and evaluate what he learned during lectures or discussions, which turned him into one of the prominent figures of the school. We consider following finding to be of great significance for the demonstration of Zufar ibn Hudhayl's position in the school: It has been ascertained through research on al-Sarakhsi's (d. 483/1090) *al-Mabsūṭ* that Zufar ibn Hudhayl had 570 individual arguments independent of his teacher and friends.[6] Moreover, his further seventeen remarks on different subjects have been accepted as basis for *fatwā (authoritative legal opinion)*, i.e., "muftā bih" (the chosen authoritative legal opinion).[7] Zufar ibn Hudhayl's thoughts on *usūl al-fiqh* (roots of jurisprudence) and *furūʿal-fiqh* (branches of jurisprudence) are therefore worth to be examined and propounded. No doubt, one of the most important factors in the achievement of

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3 Muhammad Zahid al-Kawtharī, *Lamahāt al-naẓar*, *fi Sira al-Imam Zufar* (Cairo: Maktaba al-Azhariya, nd.), 27; Abdulkadir Şener, "İmam Züfer b. el-Huzeyl", *İslâm İlimleri Enstitüsü Dergisi* 2 (1975): 91; Muhsin Koçak, "Züfer b. El-Hüzeyl (Hayatı ve Eserleri)", *On Dokuz Mayıs Üniversitesi İlahiyat Fakültesi Dergisi* 5 (2008): 126; Murteza Bedir, "Züfer b. Hüzeyl", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 2013), 44: 527-528.

4 In academy, Zufar would sit in line with his master and Abū Yūsuf would sit beside him. See. Abū 'Abd Allah al-Husayn Ibn Ali al-Saymarī, *Akhbār Abī Hanīfa wa-ashabih* (Bairut: ʿAlam al-Kutub, 1985), 111.

5 Saymarī, *Akhbār Abī Hanīfa*,113; Abū Bakr Aḥmad b. ʿAlī b. Thābit b. Aḥmad b. Mahdī al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, ed. Bashār Avvād Ma'rūf (Bairut: Dār al-Gharb al-Islāmī, 2001), 16: 363; Hāfız al-Dīn Muhammad b. Muhammad b. Shihāb al-Kardarī, *Manāqib Abī Hanīfa*, (Bairut: Dār al-Kutub al-Arabī, 1981), 2: 460; Abū Muḥammad Maḥmūd b. Aḥmad b. Mūsā Badr al-Dīn al-ʿAynī, *Maghani al-Akhbār fi Noarh Asami Rijal Ma'ani al-Atsar*, ed. Muhammad Hasan Ismail (Bairut: Dār al-Kutub al-ʿIlmiyye, 2006), 1: 331; Aḥmad b. Muṣṭafā Ṭashkopruzāde, *Miftāḥ al-saʿāda wa-miṣbāḥ al-siyāda fī mawḍūʿāt al-ʿulūm* (Bairut: Dār al-Kutub al- ʿIlmiyye, 1985), 2: 224; Takī al-Dīn b. Abd al-Qādīr al-Tamīmī, *al-Tabaqāt al-saniyya fī tarādjim al-hanafiyya*, ed. Abdülfettah Muhammad el-Hulv (Cairo: al-Meclis al-ʿAla lī al-suūn al-Islāmiya, 1970), 3: 257; Nur ad-Dīn Abu al-Hasan Ali b. Sultan Muhammad al-Hırāwī al-Qārī, *al-Asmār al-Janiya fi Asmā al-Hanafia*, ed. Abd al-Muhsin Abd Allah Ahmad, (Baghdad: Dīvan al-Vakf al-Saniyya, 2009), 1: 261. To find out who formed this ten-member committee see. al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, 16: 363;Kawtharī, *Lamahāt al-naẓar*, 11; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 95; Koçak, "Züfer b. el-Hüzeyl", no. 5: 139; Bardakoğlu, "Hanefî Mezhebi", 3.

6 Koçak, "Züfer b. el-Hüzeyl", no. 5: 132.

7 Muḥammad Amīn b. ʿUmar b. ʿAbd al-ʿAzīz b. ʿĀbidīn, *Radd al-Muḥtār ala al-Dur al-Mukhtār*, ed. Adil Ahmad Abd al-Mevcūd-Ali Muhammad Muavvid (al-Riyāḍ: Dār al-Alām al-Kutub, 2003), 1: 172; Kawtharī, *Lamahāt al-naẓar,* 21; Wahba al-Zuhayli, *al-Fiqh al-Islāmī wa-adillatuh*, (Dimashq: Dār al-Fikr, 1975), 1: 58; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 96; Koçak, "Züfer b. el-Hüzeyl", no. 5: 141. For detailed information on these views see Burhan al-Din Ibrāhim b. Husayn b. Ahmad Pīrī-Zāde, *al-Kavl al-azhar fī mā yüftā fihi bi-kavl al-Imām Zufer*, ed. Umar b. Muhammad b. Abd al-karīm al-Shayhilī (s.l., s.n., 2011), 37-52.

this variety of views in the school is the fact that Abū Ḥanīfa paved the way for his students to move on the principles and to present their ideas freely, in addition to self-confidence he provided for them.[8]

Notwithstanding Zufar ibn Hudhayl's extensive knowledge and importance in the school, none of his works containing his jurisprudential views and thoughts has reached to this day.[9] In fact, the information on Zufar ibn Hudhayl's life given in Ḥanafī Ṭabaqāt (biographical) literature is also relatively limited and repetitive.

It is likely to chance on Zufar ibn Hudhayl's jurisprudential views and ideas in early Ḥanafī literature, even if disorderly. Included in the books as "*Zāhir al-Riwāya*" and "*Nādir al-Riwāya*", which are considered to be the first and fundamental sources of Ḥanafī School, the views belonging to Zufar ibn Hudhayl give us some revealing clues on his jurisprudential method and practice, yet are too meager to allow us to set forth his scholarly point of view in its entirety.

With regard to methods employed and proofs referred in resolution of problems in Ḥanafī doctrine, Zufar ibn Hudhayl seems to have followed broadly the same line with Abū Ḥanīfa and Imamayn, namely Abū Yūsuf and al-Shaybānī. The points he opposed were limited to secondary subjects rather than essential issues.[10] On the other hand, he has been observed to hold a different viewpoint from other imams in the utilization of istiḥsān (juristic preference) as a deductive method.

The motive that prompted us to conduct this study was Zufar ibn Hudhayl's attitude mentioned in sources, which brings his analogical approach to the forefront. In addition, a great variety of inferences on Zufar ibn Hudhayl's approach towards istiḥsān are included in a number of modern studies as well. One of the inferences is that Zufar ibn Hudhayl often used istiḥsān in fiqh practice as a method of deduction as well as other prominent imams of the school,[11] while another one is that he held the same opinion with Imām al-Shāfiʿī, who denied istiḥsān.[12] There might be several reasons behind the emergence of these contrasting theses. As expressed above, Zufar ibn Hudhayl has no work presenting his jurisprudential thoughts, which necessitates a review on early Ḥanafī fiqh literature to be able to determine his attitude towards istiḥsān. Therefore, either the fact that the technological means were relatively unadvanced when these two studies

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8 Abū Ḥanīfa forbade his disciples to imitate him see. Kawtharī, *Lamahāt al-naẓar,* 20; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 95.

9 Zufar ibn Hudhayl has limited writings. See. Kardarī, *Manāqib Abī Hanīfa*, 2: 460; Kawtharī, *Lamahāt al-naẓar,* 7.

10 Muharrem Önder, *Hanefî Mezhebinde İstihsan Anlayışı ve Uygulaması* (Istanbul: Hikmetevi Pub., 2014), 91.

11 There is no information included in Classic literature on whether Zufar adopted istiḥsān as a juristic method of deduction or whether he disapproved it. In modern studies, however, this matter is held only with a number of phrases with no reference mentioned. Besides, the works cited above are not directly related to Zufar's approach towards istiḥsān, but covers the istiḥsān in a broader sense. See. Ali Bakkal, "İstihsanın Mahiyeti ve Çağdaş Problemlere Çözüm Getirmedeki Önemi", *İslâmi İlimlerde Metodoloji/Usûl Meselesi* (Istanbul: Ensar Publishing, 2009), 3: 18. The same author notes in another statement that Zufar ibn Hudhayl would not use istiḥsān unless he would have to. See. Ali Bakkal, "Ebû Hanîfe'nin İstihsan Anlayışı", *İmam-ı Âzam Ebû Hanîfe ve Düşünce Sistemi* (Bursa: Kurav Pub., 2003), 1: 275.

12 See. Koçak, "Züfer b. el-Hüzeyl", no. 5: 140 (This study does not directly cover Zufar ibn Hudhayl's understanding of istiḥsān.)

were carried out or the limited opportunities to access or review these works at that time might be the reason behind the appearance of different two arguments mentioned above.

We have aimed to determine the actual reason why Zufar ibn Hudhayl has shone out this much when in fact the school's other founding imams employed qiyās as often as him. The question is whether this attribution is due to Zufar ibn Hudhayl's skill of doing qiyās or because he embraced qiyās and remained distant from istiḥsān. Besides, we decided to carry out this study in order to find out which one among arguments mentioned above is true or whether a third seperate case is possible and to put this forward with a proper exemplification.

This study seeks to answer the question to what extent Zufar practically gave place to istiḥsān, which was frequently adopted by founding imams of Ḥanafī School in their jurisprudential deductions. The ongoing debates about istiḥsān will be touched by making short citations when necessary, without entering into details.

Although the istiḥsān method forms the main theme of the study, correct comprehension and reliable interpretation of istiḥsān lie behind the accurate understanding of the concept of qiyās.[13] It is therefore necessary to address Zufar's understanding of qiyās in order to be able to read and present his approach towards istiḥsān accurately.

In this article, initially, brief information on the concept of istiḥsān and its types will be given without details, after Zufar ibn Hudhayl's conception of qiyās will be presented and finally his view towards the method of istiḥsān wil be covered.

1. THE TERM OF ISTIHSĀN

Whether istiḥsān is a method of the deduction has always been discussed.[14] Those who adopted istiḥsān as a method in their jurisprudential deductions have not adequately defended themselves against accusations of creating new Sharīʿa and have suffered heavy criticism, neither have they been able to elucidate what they mean by istihsan.[15] However, as a deductive method, istiḥsān is identified as an effort of *mujtahid* (jurist who is qualified to exercise *ijtihād* based on sources and methods of Islamic jurisprudence) to produce juristic solutions within the measures of justice and fairness for the affairs unsettled in *nuṣūṣ*

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13 Şükrü Özen, "İstihsan Hakkında Bazı Düşünceler", *İslâmi İlimlerde Metodoloji/Usûl Meselesi* (Istanbul: Ensar Publishing, 2009), 3: 266.

14 al-Bazdawi argues that the reason why the opposers antagonized istiḥsān is that they read the phrase from a mere literal perspective; all the same, those people used the expression (أستحبّكذا) which carry the same meaning. See. Fakhr al-Islam al-Bazdawī, *Kanz al-wusūl ila ma'rifat al-usūl*, in *Kashf al-asrār* (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, 1997), 4: 18. For similar phrases see Muhammad b. Ahmad b. Abī Sahl Abū Bakr Shams al-A'imma al-Sarakhsī, *al-Usūl*, ed. Abu'l-Wafā al-Afgānī (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, 1993), 2: 201.

15 Remark like "If someone rules by istiḥsān, it means he imposes a new Sharia" is creditted to Imam al-Shāfiʿī. See. Sayf al-Dīn ʿAlī b. Abī ʿAlī al-Āmidī, *al-Ihkām fī usūl al-ahkām* (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, 2005), 2: 390; Alā al- Dīn Abd al-Azīz b. Ahmad b. Muhammad al-Bukhārī, *Kashf al-asrār an Usūl Fakhr al-Islām al-Bazdawī* (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, 1997), 4: 4; Abū ʿAbd Allāh Badr al-Dīn Muḥammad b. ʿAbd Allāh b. Bahādur al-Zarkashī, *al-Baḥr al-Muhīt fī uṣūl al-fikh*, ed. Muhammad Muhammad Tāmir (Bairut: Dār al-Kutub al- ʿIlmiyaDār al-Kutub al-ʿIlmiya, 2007), 4: 386.

(explicit texts of the Qur'an and Sunnah), in a way that will not contradict the spirit of *nuṣūṣ*.[16] As you can see, istiḥsān does not produce arbitrary, desultory solutions for the desires of nafs (human soul); in contrast, it is an effort to produce solutions fitting to the framework determined by *nuṣūṣ*and is a phenomenon suitable to the soul and general principles of Islam. In this respect, istiḥsān is an important principle injecting dynamism into Islamic law.

Even those who strongly disapprove istiḥsān are also seen to have employed this method under different names.[17] The reason behind this intolerable opposition against the method of istiḥsān is related to its naming rather than its nature. As an answer to those who accused them of ruling according to "hawā and whim" (fancifully) Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805) stated that istiḥsān is a method based on Sharīᶜ evidence; otherwise it would be kufr (disbelief) anyways, laying emphasis on the fact that the conflict arose from the term.[18] Shīrāzī (d. 476/1083), one of Shāfiᶜī scholars, accentuates the disaccord to be literal by saying "*If istiḥsān is as explained by those who accepts it, then there is no one opposing it. For it is a requisite to abandon the weaker one from two evidences and act over the stronger one. Accordingly, it is necessary to renounce the analogy because of the strong evidence.*"[19] Likewise, Abū al-Muzaffar al-Sam`ānī[20] (d. 489/1096) notes the principal motive behind the opposition to be directly related to its denomination and with his following words "*They (Shāfiᶜīs) do not not accept an istiḥsān conception that has been claimed to be vindicated by Ḥanafīs. Yet we (Shāfiᶜīs) do not object to Ḥanafīs' definition of istiḥsān, which they voice when explaining their thoughts, 'to abandon the former ruling because of an evidence stronger than it',* he indicates that there is not any significant dissent on the nature of istiḥsān and that the opposition is in fact literal.[21]

There is no doubt that the fact that istiḥsān did not complete the process of conceptualization especially during development period of the schools of legal thought, and was assigned with different meanings because of the subjectivity it evoked played a significant role in the emergence of these two fronts. It is therefore of great importance to reveal the conceptional process istiḥsān has gone through.

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16 Şükrü Özen, "Hicrî II. Yüzyılda İstihsan ve Maslahat Kavramları", *Marife Dergisi* 1 (2003): 44.

17 Aḥmad b. ᶜAlī Abū Bakr al-Rāzī al-Jaṣṣāṣ, *al-Fuṣūl fī al-uṣūl*, ed. Ujayl Jāsim Nesemī (Istanbul: Maktaba al-irsād, 1994), 4: 226.

18 See. Abū Zayd ᶜUbaydallāh b. ᶜUmar b. ᶜĪsā al-Dabūsī, *Takvīm al-adilla fī uṣūl al-fikh*, ed. Halil Muhyi al-Dīn al-Mays (Bairut: Dār al-Kutub al-ᶜIlmiyaDār al-Kutub al-ᶜIlmiya, 2007), 404-405.

19 Abū Isḥāḳ, Ibrāhīm b. ᶜAlī b. Yūsuf al-Shīrāzī, *at-Tabṣıra fī uṣūl al-fikh*, ed. Muhammad Hasan Hayto (Dimashq: Dār al-Fikr, 1983), 494.

20 For detailed information on Abū al-Muzaffar al-Sam`ānī see. Abdullah Aygün, "Sem'ânî", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 2009), 36: 463-464.

21 Abu 'l-Ḳāsim Aḥmad b. Manṣūr b. Muḥammad b. ᶜAbd al-D̲jabbār al-Samᶜānī, *Qawāṭiᶜ al-adilla fi al-usūl*, ed. Muhammad Hasan Muhammad Hasan Ismail (Bairut: Dār al-Kutub al-ᶜIlmiyaDār al-Kutub al-ᶜIlmiya, 1997), 2: 270; Özen, "İstihsan Hakkında Bazı Düşünceler", 3: 265.

1.1. Conceptional Development

If literal discussions are put aside, one can see the method of istihsan has been accepted and used by the majority of jurists.[22] The view that Abū Ḥanīfa was the first person to have used istiḥsān as a jurisprudential term is included in the sources.[23] Imam Mālik is also seen to have utilized istiḥsān on juristic affairs.[24] Yet, the information given both in the writings of Hanefî methodologists and in one of Ẓahirī lawyer Ibn Ḥazm's (d. 456/1063) work, which was written to refute istiḥsān, consolidate the argument that Abū Ḥanīfa was the first to have employed istiḥsān.[25] It should be noted that the contributions of later Ḥanafī methodologists also have important place in justification and systemetization of the method of istiḥsān.[26]

Ibn Ḥazm reports that al-Ṭaḥāwī (d. 321/933), who was involved in both Ḥanafī and Shāfiʿī schools, protested utterly against istiḥsān.[27] It can be clearly seen in the sources that even Imam al-Shāfiʿī, who opposed to istiḥsān and was accredited with such expressions as "ruling by it is superstitious,[28] or even means to invent a new Sharia",[29] used this method, it is even seen that he put it to use in settling of *mutʿa* amount (consolation gift given to a divorced woman), which is mentioned in al-Baqarah, as thirty dirhams and fixing the shufʿa (right of pre-emption) duration as three days, using the word istiḥsān itself.[30]

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22 Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd Ibn Ḥazm, *al-Ihkām fī usūl al-ahkām*, ed. Mahmud Hamid Osman (Cairo: Dār al-Hadīth, 2005), 6: 798.

23 Saymarī, *Akhbār Abī hanifa*, 25-26; Muwaffaḳ b Ahmad al-Makkī, *Manāqib Abī Hanīfa* (Bairut: Dār al-kutub al-Arabī, 1981), 1: 81, 84; Önder, *Hanefî Mezhebinde İstihsan Anlayışı ve Uygulaması*, 69; Özen, "Hicrî II. Yüzyılda İstihsan ve Maslahat Kavramları", no. 1: 31. Ignaz Goldziher (d. 1921), reports the principle of istihsan was first introduced by Abū Ḥanīfa himself. See. Abdulkadir Şener, *İslam Hukukunun Kaynaklarından Kıyas, İstihsan ve İstıslah* (Ankara: Diyanet İşleri Başkanlığı Pub., 1974), 116; Özen, "Hicrî II. Yüzyılda İstihsan ve Maslahat Kavramları", no. 1: 33; Bakkal, "İstihsanın Mahiyeti", 3: 15, 18.

24 Jaṣṣāṣ, *al-Fuṣūl*, 4: 229; Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd Ibn Ḥazm, *Mulaḳẖḳẖaṣ ibṭāl al-ḳiyās waʾl-raʾy waʾl-istiḥsān waʾl-taḳlīd waʾ-taʿlīl*, ed. Saʿīd al-Afgānī (Dimashq: Matbaa al-Dimashq, 1960), 9; Önder, *Hanefî Mezhebinde İstihsan Anlayışı ve Uygulaması*, 69.

25 Ibn Ḥazm, *al-Mulaḳẖḳẖaṣ*, 9; Zarkashī, *al-Baḥr al-Muhīt*, 4: 386.

26 Bakkal, "İstihsanın Mahiyeti", 3: 15.

27 Ibn Ḥazm, *al-Ihkām*, 6: 799; Id, *al-Mulaḳẖḳẖaṣ*, 51.

28 Zarkashī, *al-Baḥr al-Muhīt*, 4: 386.

29 Imam al-Shāfiʿī's fierce opposition against istiḥsān is probably not because he disapproves the rules deduced through it, but it should be something against the *"logic of exception"* which istiḥsān is based on. See. H. Yunus Apaydın, "İstihsanın Mahiyeti ve İşlevi", *İslâmi İlimlerde Metodoloji/Usûl Meselesi* (Istanbul: Ensar Publishing, 2009), 3: 130.

30 See. Jaṣṣāṣ, *al-Fuṣūl*, 4: 229; Abd al-azīz al-Bukhārī, *Kashf al-asrār*, 4: 18; Zarkashī, *al-Baḥr al-Muhīt*, 4: 394; Kawtharī, *Fiqh Ahl al-'Iraqwa Hadithuhum*, ed. Abd al-Fattah Abū Gudde (Cairo: al-Maktaba al-azhariyya, 2002), 28.

1.2. Definition

Derived from the Arabic root of "hsn" and used in infinitve form, istiḥsān lexically means *"to see something good and beautiful, to find something beautiful, to assume something is beautiful, to believe something is beautiful"*[31] Terminologically, however, different definitons for the word istiḥsān have been made.

Karkhī (d. 340/951), often mentioned in Ḥanafī sources as the first person to define istiḥsān,[32] identifies the term as *"The case when mujtahid set an opposite rule, abandoning the rulepreviously fixed by him for similar cases, by virtue of a stronger and superior evident that would necessitate the renouncement of that prior ruling".*[33]

One of Karkhī's disciples, al-Jaṣṣās (d. 370/980) gives the description of istiḥsān as *"renouncement of qiyās because of a stonger evident".*[34]

Al-Bazdawī (d. 482/1089), although not giving a full definition, explains istiḥsān as *"giving up an analogy and adopting a stronger one"*,[35] whereas al-Sarakhsī expounds it in his work named *al-Usūl* as follows *"what comes to mind instantly without reflecting on it is the evidence contradictory to clear qiyās, and after a profound contemplation on the ruling of the case along with the orders given to similar cases, this contradictory evident will turn out to be more potent and the ruling must be done with it",*[36]while in *al-Mabsūt,* he sets forth a more substantial definition somehow evocative of a guidance: *"abandoning the complexity, opting for facility".*[37]

The notable point in abovementioned definitions is the presence of a more solid justification that entails the exclusion of the rule deduced through qiyās, in other words, the emphasis laid on the existence of stronger evidence that leaves no choice but to abandon what is imposed by qiyās and to prefer istiḥsān. For all that, the baseline for those who oppose against istiḥsān is "subjectivity" (arbitrariness/fancifulness), which cannot be correlated with juristic logic evoked by the lexical meaning of the term istiḥsān and which causes misperceptions and misinterpretations.[38] To avert this perception and frustrate the assertions against istiḥsān, the emphasis that a rule decided over istiḥsān is not a rule that is not based on any source or put forward arbitrarily and cursorily, but a product of a thourough reflection grounded on more solid and powerful justification[39] has been intended to be brought fore in all definitions.

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31 Dabūsī, *Takvīm al-adilla*, 404; Sarakhsī, *al-Usūl*, 2: 200; Abd al-azīz al-Bukhārī, *Kashf al-asrār*, 4: 3. Ayrıca see. Jawharī, *al-Sıhāh*, "hsn" md.; Jurcānī, *al-Ta'rīfāt,*"Istihsan" md; Fīrūzābādī, *Qāmus al-muhīt*, "Istihsan" md.; Tahānawī, *Kashshāf*, "Istihsan" md.

32 Imam al-Māturīdī (d. 333/944) is reported to be the first scholar before Karkhī to describe istiḥsān. See. Bakkal, "İstihsanın Mahiyeti", 3: 19.

33 Bukhārī, *Kashf al-asrār*, 4: 4.

34 Jaṣṣāṣ, *al-Fuṣūl*,4: 234.

35 Abd al-azīz al-Bukhārī, *Kashf al-asrār*, 4: 4.

36 Sarakhsī, *al-Usūl*, 2: 200.

37 Muhammad b. Ahmad b. Abī Sahl Abū Bakr Shams al-A'imma al-Sarakhsī, *al-Mabsūt* (Bairut: Dār al-Ma'rifa, nd.), 10: 145.

38 See. Bilal Aybakan, "İstihsan", *İslâmi İlimlerde Metodoloji/Usûl Meselesi* (Istanbul: Ensar Publishing, 2009), 3: 134.

39 Özen, "Hicrî II. Yüzyılda İstihsan ve Maslahat Kavramları", no. 1: 45.

2. ISTIHSĀN TYPES IN HANAFI FIQH DOCTRINE

Ḥanafīs, who have attributed value to istiḥsān and adopted it as an inferential method, divided it into several parts. Now let us briefly discuss these types of istiḥsān.

2.1. Istiḥsān on the Basis of Juristic Discretion

Ḥanafī methodologists, al-Jaṣṣās and al-Sarakhsī named the undisputed istiḥsān type as istiḥsān on the basis of juristic discretion with regard to two different meanings ascribed to it. The Lawgiver (*al-Shāriʿī*) as well named this type of istiḥsān as appreciation istiḥsān owing to the fact that the determination of the details and execution of a legal norm with general content, whose frameworks he adjusted by himself in *nuṣūṣ*, were left to mujtahid's appreciation. The calculations of the amounts related to some monetary payments included in Qurʾān were left to mujtahids providing they were within the limits of rightness and fairness are evaluated in the frame of appreciation istiḥsān. This is how the amount of *mutʿa* and alimony to be given to women are fixed.[40] Imam al-Shāfiʿī consulted to this type of istiḥsān as well, while setting the duration of pre-emption as three days and estimating the *mutʿa* amount as thirty dirhams.[41]

2.2. Istiḥsān on the Basis of Concealed Analogy (Qiyās)

Two kinds of qiyās are mentioned in Ḥanafī jurisprudential doctrine, jalī (clear) and khafī (hidden). The qiyās which can be understood immediately without a deep thinking and examination and whose ʿilla (effective cause) can be easily determined was denominated as clear, while the one which necessitates a thorough tafakkur (reflection) and a more meticulous dissection and whose cause cannot be ascertained at a single glance was called hidden. In other words, methodologists have named the clear qiyās with weak effect as jalī and the hidden one with a strong effect as khafī or istiḥsān.[42] Although it contradicts itself in terms of hukm (rule), qiyās al-khafī has been preferred over qiyās al-jalī thanks to the strength of its cause and to its preponderance with regard to its effect.[43]

When the term of istiḥsān is used in an absolute manner, it is referred as qiyās al-khafī.[44]Therefore, istiḥsān of hidden qiyās has also been called istiḥsān al-qiyās.[45] For instance, the fact that the recrements of billed raptors are regarded as clean may be given as an example to the istiḥsān of hidden qiyās.[46]

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40 Jaṣṣāṣ, *al-Fuṣūl*, 4: 233; Sarakhsī, *al-Usūl*, 2: 200; Kawtharī, *Fiqh Ahl al-'Iraqwa Hadithuhum*, s. 29; Önder, *Hanefî Mezhebinde İstihsan Anlayışı ve Uygulaması*, 191; Ali Bardakoğlu, "İstihsan", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 2001), 33: 342.

41 Abd al-azīz al-Bukhārī, *Kashf al-asrār*, 4: 18; Zarkashī, *al-Baḥr al-Muhīt*, 4: 394.

42 Dabūsī, *Takvīm al-adilla*, 404; Bazdawī, *Kanz al-wusūl*, 4: 8; Sarakhsī, *al-Mabsūt,* 10: 145; Id, *al-Usūl*, 2: 203; Bukhārī, *Kashf al-asrār*, 4: 3, 5; ʿUbaydallāh b. Masʿūd al-Maḥbūbī al-Bukhārī al-Ḥanafī Ṣadr al-Sharīʿa al-Thānī, *al-Tawdih ala at-Tanqih*, ed. Sa'īd al-Abras (Dimashq: Maktaba al-Marzuk, 2006), 382.

43 Dabūsī, *Takvīm al-adilla*, 404; Ṣadr al-Sharīʿa, *al-Tawdih*, 382; Bakkal, "İstihsanın Mahiyeti", 3: 35.

44 Ṣadr al-Sharīʿa, *al-Tawdih*, 382.

45 Bukhārī, *Kashf al-asrār*, 4: 3; Abd Al-Wahhāb Khallāf, *Masādir al-tashrī al-Islāmī* (Quwayt: Dār al-Kalam, 1993), 73; Bakkal, "İstihsanın Mahiyeti", 3: 35.

46 Bazdawī, *Kanz al-wusūl*, 4: 9-10; Ṣadr al-Sharīʿa, *al-Tawdih*, 383.

Regardless of its denomination as qiyās al-khafī, istiḥsān is conceptually much more extensive than that.[47] That is to say, every qiyās al-khafī is istiḥsān yet not every istiḥsān is qiyās al-khafī.[48]

2.3. Istiḥsān on the Basis of the Text (*Naṣṣ*)

The renouncement of a rule given to a similar case owing to the naṣṣ that brings expectional rule or bringing an exceptional rule apart from the general rule inferred from the *nuṣūṣ* is called istiḥsān on the basis of naṣṣ.[49] The naṣṣ, which brings exceptional rule, may be a verse as well as a hadith. To exemplify, based on the Sunnah (the tradition of the prophet Mohammed) in opposition to the general rule that forbids the sale of the non-existent, the anticipation and lease contracts are considered permissible.[50]

2.4. Istiḥsān on the Basis of Consensus (*Ijmāʿ*)

Formation of a consensus over an exceptional solution contrary to the rule applied to similar cases after renouncement of a general rule is called istiḥsān on the basis of *ijmāʿ*. Work contracts are given as example for this type of istiḥsān.[51]

2.5. Istiḥsān on the Basis of Necessity (*Dharūra*)

It is the type of istiḥsān in which mujtahid attempts to eliminate the inconvenience caused by the necessity and satisfy the requirement (*rafʿ al-haraj*), abandoning the general rule due to a necessity or a dominant exigence. Cleaning the wells can be shown as an example for this type.[52]

After the brief information about conceptional framework, definition and types of istiḥsān, let us now look into Zufar ibn Hudhayl's approach towards the methods of qiyās and istiḥsān.

3. IMAM ZUFAR IBN HUDHAYL'S APPROACH TOWARDS ISTIHSĀN

The importance of the role of qiyās in Zufar ibn Hudhayl's jurisprudential view is a point unanimously accentuated by the sources that hold information about him. However, the Ṭabaqāt writers, apart from

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47 Bukhārī, *Kashf al-asrār*, 4: 5.

48 Ṣadr al-Sharīʿa, *al-Tawdih*, 382.

49 Bardakoğlu, "İstihsan", 343.

50 Bazdawī, *Kanz al-wusūl*, 4: 6-7; Bukhārī, *Kashf al-asrār*, 4: 7; *Khallāf*, *Masādir al-tashrī*, 74; Bardakoğlu, "İstihsan", 343. Some Islamic jurists saying, "at an istiḥsān based on naṣṣ, the true basis is naṣṣ", points out that this kind of exceptions cannot be named as istiḥsān. See. Mustafa Ahmad al-Zarqa, *al-Madhal al-Fiqhi al-`Am* (Dimashq: Dār al-kalam, 2004), 1: 94; İbrahim Kâfi Dönmez, "İslâm Hukukunda Kaynak Kavramı ve VIII. Asır İslam Hukukçularının Kaynak Kavramı Üzerindeki Metodolojik Ayrılıkları" (Doktora Tezi, Atatürk Üniversitesi, 1981), 148; Ahmet Yaman, "İstihsan Ne Değildir", *Usûl Dergisi* 8 (2007), 170; H. Yunus Apaydın, *İslam Hukuk Usûlü* (Kayseri: Kardeşler Ofset, 2016), 114.

51 Dabūsī, *Takvīm al-adilla*, 405; Bukhārī, *Kashf al-asrār*, 4: 7-8; Bardakoğlu, "İstihsan", 343; Bakkal, "İstihsanın Mahiyeti", 3: 43.

52 Dabūsī, *Takvīm al-adilla*, 405; Bukhārī, *Kashf al-asrār*, 4: 8; *Khallāf*, *Masādir al-tashrī*, 74.

using lucid expressions about his talent and expertise on making qiyās,[53] have not offered satisfying information about his strict adherence to it.

On the other hand, the fact that Zufar ibn Hudhayl's exceptionally limited recourse to istiḥsān, which was utilized amply by his master and friends, is worthy of notice. We attribute the foregoing fact to the importance he attached to qiyās in producing solutions to the problems.

Before passing on Zufar ibn Hudhayl's approach towards istiḥsān, we are going to try to touch on the importance and place of qiyās in his fiqh, because no istiḥsān concept can be imagined independently of qiyās in Ḥanafī School.[54]

3.1. The Place of Qiyās in Zufar ibn Hudhayl's Fiqh Conception

Zufar ibn Hudhayl, who kept attending assemblies of the traditionists (ahl al-hadith) at the beginning yet later participated in assemblies of the rationalists (ahl al-raʾy),[55] has drawn wide criticism.[56] He attended Abū Ḥanīfa's lectures for more than twenty years[57] and was regarded as one of the most prominent

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53 Baghdādī, *Taʾrīkh Baghdād*, 2: 567; Abu 'l-Ḳāsim Aḥmad b. Manṣūr b. Muḥammad b. ʿAbd al-Ḏjabbār al-Samʿānī, *al-Ansāb*, thk. Abdullah 'Umar al-Bārūdī, (Bairut: Dār al-Jinān, 1988), 3: 484; 4: 433; 'Abd al-Qadir b. Abi al-Wafa' al-Qurashī, *al-Jawāhir al-Mudiyya fi Tabaqāt al-Hanafiyya*, ed. Abd al-fattah Muhammad al-Hulv (Cairo: Dār al-Hijr, 1993), 2: 207; Kardarī, *Manāqib Abī Hanīfa*, 2: 461; ʿAynī, *Maghani al-Akhbār*, 1: 330; Ḳāsim b. Ḳuṭlūbughā, *Tāj al-tarājim*, ed. Muhammad Hayr Ramazan Yusuf (Dimashq: Dār al-kalam, 1992), 169; Maḥmūd b. Sulaymān al-Kafawī, *Katāʿib Aʿlām al-Akhyār min fukahāyi maḏhab al-Numān al-Mukḥtār*, Tahran: Kitabhāna-i Meclis-i Shūrā-i Millī, nr. 87846, 111b; Nur ad-Dīn Abu al-Hasan Ali b. Sultan Muhammad al-Hırāwī al-Qārī, *Şerh Musnad Abī Hanīfa* (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, 1985), 45; Tamīmī, *al-Tabakāt al-saniyya*, 3: 254; Abū ʿUmar Yūsuf b. ʿAbd Allāh Ibn ʿAbd al-Barr al-Qurtūbī al-Namarī, *al-Intiqāʾ fī faḍāʾil al-thalātha al-aʾimma al-fuqahāʾ*, ed. Abd al-Fattah Abū Gudde (Bairut: Makataba Matbūa al-Islāmī, 1997), 335; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 1: 142; Abū l-Ḥasanāt ʿAbd al-Ḥayy b. ʿAbd al-Ḥalīm b. Amīnallāh al-Laknawī, *al-Fawāid al-bahiyah fi tarājim al-Ḥanafiyah* (Cairo: Dār al-kitāb al-Islāmī, nd.), 75; Kawtharī, *Lamahāt al-naẓarnaẓar,* 21; Muhammad Abū Zahra, *Abū Hanīfa: Hayatuhu wa-asruhu wa ārāuhu wa fiqhuhu* (Cairo: Dār al-Fikr al-Arabī, nd.), 245; Khayr al-Dīn al-Ziriklī, *al-Aʿlām* (Bairut: Dār al-'Ilm li'l-Malāyīn, 2002), 2: 45; Muhammad Biltāji, *Manāhij al-teşrīʾ al-Islāmī fī al-karn al-sānī al-hijrī* (Cairo: Dār al-Salām, 2007), 1: 291.

54 Apaydın, "İstihsanın Mahiyeti ve İşlevi", 3: 129.

55 Abū Nuʿaym Aḥmad b. ʿAbd Allāh b. Isḥāḳ al-Iṣfahānī, *Dhikr akhbār Isḥahān* (Dār al-Kutub al-ʿIlmiya, nd.), 1: 317; Abū Isḥāḳ Ibrāhīm b. ʿAlī b. Yūsuf al-Fīrūzābādī al-Shīrāzī, *Tabaqāt al-fukahā*, ed. Ihsan Abbas (Bairut: Dār ar-Rāid al-Arabī, nd.), 135; Muḥyī al-Dīn Abū Zakariyyāʾ Yaḥyā b. Sharaf b. Murī al-Nawawī, *Tahdhīb al-Asma' wa'l-Lughat* (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, nd.), I, 197; Aḥmad b. Muḥammad b. Ibrāhīm Abu 'l-ʿAbbās Shams al-Dīn Ibn Khallikān, *Wafayāt al-Aʿyān wa-Anbāʾ Abnāʾ az-Zamān*, ed. Ihsan Abbas (Bairut: Dār al-Sādr, nd.), 2: 318; Ziriklī, *al-Aʿlām*,2: 45; Kawtharī, *Lamahāt al-naẓarnaẓar,* 4, 27; Koçak, "Züfer b. El-Hüzeyl", no. 5: 126; Bedir, "Züfer b. Hüzeyl", 528.

56 See. Shihāb al-Dīn Abu'l-Faḍl Aḥmad b. Nūr al-Dīn ʿAlī b. Muḥammad Ibn Ḥajar al-ʿAsḳalānī, *Lisān al-Mīzān*, haz. Salman Abd al-Fattāh Abu Gudde (Bairut: Maktaba al-Matbua al-Islāmī, 2002), 3: 501-503; Kawtharī, *Lamahāt al-naẓarnaẓar,* 21-32; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 93-94; Koçak, "Züfer b. el-Hüzeyl", no. 5: 134-138.

57 Kawtharī, *Lamahāt al-naẓarnaẓar,* 27; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 91; Koçak, "Züfer b. el-Hüzeyl", no. 5: 126; Bedir, "Züfer b. Hüzeyl", 527-528.

jurisprudents of his time.[58] Abū Nu`aym al-Fadl ibn Dukayn (d. 219/834) referred to Zufar's jurisprudential knowledge by saying "*He was excellent on fiqh"*[59], while al-Hasan ibn Ziyād laid emphasis on his success in jurisprudent debates.[60] As a matter of fact, Zufar ibn Hudhayl's analogous prowess manifests itself in the resolution of jurisprudential complications.[61]All this information demonstrates his sharp wit as well as his comprehensive knowledge of evidences.[62]

Having stood out with his fiqh knowledge, Zufar ibn Hudhayl also shone out among Abū Ḥanīfa's disciples by using qiyās method.[63] Abū Ḥanīfa's words about him, "*He is the best analogist among my trainees*",[64] the remarks of one of the Shāfiʿī jurisprudents, al-Muzanī's (d. 264/878), about him when asked of the people of Iraq, "*He is the most au fait with qiyās",*[65]along with the unanimous emphasis on his expertise on using the evident of qiyās laid by the sources citing him are worthy of attention.[66]

The following comments included in Ḥanafī Ṭabaqāt books, extolling Zufar ibn Hudhayl are also of great important concerning the demonstration of his perfection in qiyās:

"*The bow of qiyās tensed during his lifetime; it not that tense any more*

In jurisprudential qiyās, he has risen so high a level that goes beyond cognizance

His qiyās was so pure in his own sea of thoughts; yet those of who envied him were rather feculent because of the spite in their nature.

He was struggling to shatter people's perception of qiyās, while, in fact, they were bowing down before him (his success in qiyās).

Whereas the eyes of those who nursed grievance against him were fastened with somnolence, the sleeplessness was latch for his eyes.

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58 Saymarī, *Akhbār Abī hanifa*, 109; Ibn ʿAbd al-Barr, *al-Intiqāʾ*, 335; Kardarī, *Manāqib Abī Hanīfa*, 2: 459, 461; Koçak, "Züfer b. el-Hüzeyl", no. 5: 129.

59 Kawtharī, *Lamahāt al-naẓar,* 6.

60 Kardarī, *Manāqib Abī Hanīfa*, 2: 461; Kawtharī, *Lamahāt al-naẓarnaẓar,* 5.

61 Biltāji, *al-Manāhij*, 1: 312.

62 Kawtharī, *Lamahāt al-naẓarnaẓar,* 20.

63 ʿAynī, *Maghani al-Akhbār*, 1: 330.

64 Abū Bakr Muḥammad b. Ḥibbān al-Tamīmī Ibn Ḥibbān, *Kitāb al-al-Thiqāt* (Ḥaydarābād: Dāira al-Maārif al-Otmānī, 1973), 6: 339; Ibn Khallikān, *Wafayāt al-Aʿyān*, 2: 318; Qurashī, *al-Jawāhir al-Mudiyya*, 2: 207; ʿAynī, *Maghani al-Akhbār*, 1: 330; Ibn Ḳuṭlūbughā, *Tāj al-tarājim*, 169; Kafawī, *Katāʿib Aʿlām al-Akhyār*, vr. 111b; Ali al-Qārī,, *Şerh Musnad Abī Hanīfa*, 45; al-Tamīmī, *al-Tabakāt al-saniyya*, 3: 254; Ibn ʿAbd al-Barr, *al-Intiqāʾ*, 335; Laknawī, *al-Fawāid al-bahiyah*, 75; Kawtharī, *Lamahāt al-naẓar,* 21; Abū Zahra, *Abū Hanīfa*,245; Ziriklī, *al-Aʿlām*, 2: 45; Biltāji, *al-Manāhij*, 1: 291; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 94; Koçak, "Züfer b. el-Hüzeyl", no. 5: 132.

65 al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, 2: 567; Samʿānī, *al-Ansāb*, 3: 484; 4: 433; Kardarī, *Manāqib Abī Hanīfa*, 2: 461; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 1: 142; Abū Zahra, *Abū Hanīfa*,245; Biltāji*, al-Manāhij*, 1: 312; Koçak, "Züfer b. el-Hüzeyl", no. 5: 129, 140.

66 Saymarī, *Akhbār Abī hanifah*, 111; Kardarī, *Manāqib Abī Hanīfa*, 2: 460; al-Zuhayli, *al-Fiqh al-Islāmī*, 1: 31; M. Esad Kılıçer, *İslam Fıkhında Re'y Taraftarları* (Ankara: Diyanet İşleri Başkanlığı Pub., 1994), 109-110; Koçak, "Züfer b. El-Hüzeyl", no. 5: 133.

No one is equivalent to him in qiyās, may ever be the same pure gold and a stone?"[67]

Having had substantial reputation for using the method of qiyās,[68] Zufar ibn Hudhayl never preferred qiyās over hadith even though he attached great importance to it and constantly utilized it for the solutions of juristic issues.[69] He elucidates his view on this matter as follows:*"We do not adjudicate by our own judgement as long as there is a hadith. If a hadith conveyed to us on a certain matter, we would abandon our own stance".*[70]

Two different conclusions can be drawn from the information included in the sources about Zufar's analogous skills: He was considerably successful and competent in applying qiyās to the issues whose rule could not be found in *nuṣūṣ,* and he was firmly attached to qiyās rather than istiḥsān when having treated the issues for which different verdicts could be given over qiyās and istiḥsān. In fact, when Ḥanafī jurisprudential literature is reviewed, it can be seen that the number of the examples showing Zufar ibn Hudhayl to have generally chosen qiyās over istiḥsān is considerably high.[71] We can outline some examples of this as below.

3.1.1. Anointing of Torn Slippers

There must not be any holes or tears on the slippers worn on foots so that they can be anointed. Abū Ḥanīfa and Imamayn share the opinion that only a few wholes and tears would not hinder the anointing as to istiḥsān and the principle of facilitation/ease. Zufar ibn Hudhayl, however, reckons that, according to qiyās, any whole and tear on slippers preclude the anointing regardless of how many they are, because, no matter how few the tears are, the impurity flows in even when a part of the foot is exposed and thus the slipper's function of veiling disappears. Besides, foots are not divisible in washing. Therefore, not a part of the foot, but the whole should be washed.[72]

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67 Kardarī, *Manāqib Abī Hanīfa*, 2: 463;al-Tamīmī, *al-Tabaqāt al-saniyya*, 3: 257-258; Kawtharī, *Lamahāt al-naẓar,* 28; Koçak, "Züfer b. el-Hüzeyl", no. 5: 143.

68 Samʿānī, *al-Ansāb*, 1: 339; ʿAynī, *Maghani al-Akhbār*, 1: 331.

69 Şener, "İmam Züfer b. el-Huzeyl", no. 2: 94.

70 Kardarī, *Manāqib Abī Hanīfa*, 2: 457; ʿAynī, *Maghani al-Akhbār*, 1: 331; Ali al-Qārī, *Şerh Musnad Abī Hanīfa*, 45; Id, *al-Asmār al-Janiya*, 1: 261; Tamīmī, *al-Tabaqāt al-saniyya*, 3: 256; Şener, "İmam Züfer b. el-Huzeyl", no. 2: 94; Koçak, "Züfer b. el-Hüzeyl", no. 5: 137.

71 For information about the examples where Abū Ḥanīfa and Imamayn takes qiyās as basis see Yusuf Erdem Gezgin, "Hanefîler'de Öncelik Açısında Kıyas ve İstihsan Tahlili" (Yüksek Lisans Tezi, Necmeddin Erbakan Üniversitesi, 2016), 41-60.

72 ʿAlāʾ al-Dīn al-Samarḳandī, *Tuḥfat al-fuḳahāʾ* (Bairut: Dār al-Kutub al-ʿIlmiyaDār al-Kutub al-ʿIlmiya, 1984), 1: 57; ʿAlāʾ al-Dīn Abū Bakr b. Masʿūd al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fi Tartīb al-Sharāʾiʿ* (Bairut: Dār al-Fikr, nd.), 1: 16-17; Burhān al-Dīn Abu 'l-Ḥasan ʿAlī b. Abī Bakr b. ʿAbd al-Djalīl al-Farghānī al-Marghīnānī, *al-Hidāya şerh Bidāya al-mubtedī* (Bairut: Dār al-Arkām, nd.), 1: 36; Muḥammad ibn Maḥmūd Akmal al-Dīn al-Bābartī, *al-Ināya* (Bairut: Dār al-Fikr, nd.), 1: 150; Abu Bakr al-Haddād al-Zabidi, *al-Jawharah al-Nayyirah Sharh li Mukhtasar al-Imam al-Quduri,* ed. İlyas Kaplan (Bairut: Dār al-Kutub al-ʿIlmiya, 2006), 1: 79; Zayn al-Dīn b. Ibrāhīm b. Muḥammad b. Muḥammad b. Muḥammad Ibn Nujaym, *al-Bahr al-rāiq sharḥ kanz al-daqāʾiq* (Bairut: Dār al-Kutub al-ʿIlmiya, 1997), 1: 304-305. Al-Qudūrī and Al-Sarakhsī also treats this matter, yet they give the argument that little tears on slippers will preclude the anointing as Imam al-Shāfiʿī's view, without mentioning Zufar. See. Abu'l-Ḥusayn/al-Ḥasan Aḥmad b.

As is seen, Zufar ibn Hudhayl, unlike other three imams, does not find it appropriate to appoint a rule over istiḥsān by making an exception under the principle of facilitation/ease. He therefore as a result of qiyās (i.e. established rule) that anointing would not be acceptable when the slippers are pierced or torn no matter how many the wholes and tears are and that the washing of the foots is indispensable for the correctness of ablution. Zufar ibn Hudhayl, unlike Abū Ḥanīfa and Imamayn, adopts the idea that *"few and small things should not be null and void"*.[73]

3.1.2. Intent for Imamate upon Women

According to Abū Ḥanīfa and Imamayn, intent towards imamate is not necessary for a community comprised of men only. In that case, it is accurate for community to obey the imam. However, when it comes to imamate upon a community including women, one has to intend separately to imamate for their obedience to be valid. Zufar ibn Hudhayl does not agree on this view analogizing women with men and saying there is no need for a further intent towards imamate by woman.[74] Nonetheless, this rule Zufar reached by analogizing women and men has been criticized on account of the inaccuracy of the qiyās made.[75]

3.1.3. A Muslim Person's Incognizance of Islamic Judgement in Dār al-Ḥarb (Territory of War)

For Abū Ḥanīfa and Imamayn, in case a Muslim is not aware of the imposition of services such as prayer, fasting and alms, pursuant to istiḥsān, does not have to make up for the duties he omitted when he finds it out. Zufar ibn Hudhayl, on the other hand, argues that that person is obliged to make up for these duties omitted before. He states that a person automatically consents to the Islamic provisions by being Muslim. And religious duties such as prayer, fasting and alms are among the principal provisions of Islam. Although unawaraness can be accepted as an excuse concerning the sins, it does not rule out the responsibilities to fulfill obligatory rules. Just as unawareness does not eliminate the responsibility in Dār al-Islām (territory of Islam), neither does it in Dār al-Ḥarb.[76]

Muḥammad b. Aḥmad b. Jaʿfar b. Ḥamdān al-Baghdādī al-Ḳudūrī, *al-Tajrīd*, ed. Muhammad Ahmad Siraj, Ali Cum'a Muhammad (Cairo: Dār al-Salām, 2004), 1: 320;Sarakhsī, *al-Mabsūt*, 1: 100.

[73] al-Dabūsī, *Taʾsīs al-naẓar,* ed. Mustafa Muhammad ad-Dimashqī (Bairut: Dār Ibn Zeydūn, nd.), 95; Id, *Mukâyeseli İslam Hukuk Düşüncesinin Temellendirilmesi*, translated by Ferhat Koca (Ankara: Ankara Okulu Pub., 2002), 176; Bedir, "Züfer b. Hüzeyl", 529. For Zufar ibn Hudhayl's similar view that smaller things would not be counted as void see al-Jaṣṣāṣ, *Mukhtasar Ikhtilāf al-fuqaha,* ed. Abd Allah Nazır Ahmad (Bairut: Dār al-Basha'r al-Islāmiya, 1995), 1: 131.

[74] Ḳudūrī, *al-Tajrīd*, 2: 866; Sarakhsī, *al-Mabsūt*, 1: 185; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*,1: 191; Majd al-Din Abu al-Fadl Abdullah b. Mahmud b. Mawdud al-Mawṣilī, *al-Ikhtiyār li ta'lil al-mukhtār,* haz. Halid Abdurrahman al-Ak (Bairut: Dār al-Ma'rifa, 1998), 1: 82; Fakhr al-Dīn Uthmān b. 'Alī al-Zayla'ī, *Tabyīn al-ḥaqā'iq: sharḥ kanz al-daqā'iq*, (Bulak: al-Matbaa al-Kubra al-Amiriyye, 1313/1896), 1: 138.

[75] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 1: 191-192.

[76] Sarakhsī, *al-Mabsūt*, 2: 181-182; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 1: 202; Burhān al-Dīn Mahmūd b. Ahmad b. Abd al-Azīz Bukhārī Ibn Māza, *al-Muhīt al-burhānī fi al-fiqh al-Nuʿmānī* (al-Riyad: Maktaba al-Rushd, 2000), 3: 127; Abd al-azīz al-Bukhārī, *Kashf al-asrār*, 4: 179; Ahmet Özel, *İslam Hukukunda Ülke Kavramı: Dârulislam Dârulharb* (Istanbul: İz Pub., 1998), 195; İbrahim Kâfi Dönmez, "Cehâlet", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 1993), 7: 220.

Analogizing the lack of knowledge in Dār al-Islām to unawareness in Dār al-Ḥarb, Zufar ibn Hudhayl, in contrast to Abū Ḥanīfa and Imamayn's ruling, which they base on istiḥsān, holds the idea that this shoud not constitute a pretext and the person's responsibility thereby cannot be dismissed.

3.1.4. Sacrificing Someone Else's Sacrificial Animal without Permission

Pursuant to istiḥsān, in case of an animal bought to be sacrificed is butchered by someone else without permission from its owner, it remains acceptable for sacrifice.[77] The one who slaughters the animal without permission does not even have to repay the value of the animal because the purchase of the animal by the owner for sacrifice is already a sort of criteria by its own. Even if in sign, this would be counted as permission for butchering. And permission by sign replaces express permission.

Zufar ibn Hudhayl, on the other part, claims this action is not allowed as to qiyās, thus the one who slaughter the animal without permission has to compensate the owner for the cost of the animal. He compares this case with the phenomenon that a person compensates the butcher for his animal slaughtered without permission and points out that sacrificial ritual will be fulfilled only with person's own intent and action. Though owner's intent and action is not present when his animal is slaughtered without permission. Therefore, since the animal butchered without permission could not be counted as sacrifice, the slaughterer has to pay the price of the animal.[78]

3.1.5. Incorporation of Partners to the Sacrifice of an Animal Bought for Oneself

Pursuant to istiḥsān, it is permissible for a person who has bought cattle for sacrifice to partner six people subsequently. Zufar ibn Hudhayl, however, advocates this act to be illicit according to qiyās and justifies his view with the argument that the purpose of buying an animal for sacrifice is to get closer to Allah. Yet making partners for cattle prepared for sacrifice signifies welshing on worship set out to with the intention of making money, that is to say, selling it of, which is prohibited by religion. And its being a religious duty precludes it to be sold and its expense to be shared.[79]

3.1.6. Making Exceptions in Confession

For Abū Ḥanīfa and Abū Yusuf, when someone says "*I owe thousand dirhams to someone except for one dinar or a bundle of wheat*", it is acceptable as per istiḥsān. After subtracting the price of one dinar or a bundle of wheat, the remaining cost is paid. According to Zufar ibn Hudhayl, this kind of exclusion is not permissible as to qiyās.[80] Because for the exclusion to be admissible, the thing excluded and the word followed by the

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77 Mawṣilī, *al-Ikhtiyār*, 5: 26.

78 Ḳudūrī, *al-Tajrīd*, 12: 6341; Sarakhsī, *al-Mabsūt*, 12: 17-18; Marghīnānī, *al-Hidāya*, 2: 358; Mawṣilī, *al-Ikhtiyār*, 5: 26; Ibn Māza, *al-Muhīt al-burhānī*, 8: 474; Haddād, *al-Jawharah al-Nayyirah*, 2: 458; Ibn Nujaym, *al-Bahr al-rāiq*, 8: 328; Ayşe Çeşme, "el-Mevsılî'nin el-Muhtâr'ında Züfer'e Ait Görüşlerin Tahkîki" (Yüksek Lisans Tezi, Selçuk Üniversitesi, 2010), 34.

79 Sarakhsī, *al-Mabsūt*, 12: 15; Marghīnānī, *al-Hidāya*, 2: 353; Ibn Māza, *al-Muhīt al-burhānī*, 8: 477; Zaylaʿī, *Tabyīn al-ḥaqāʾiq*, 6: 4;Ibn Nujaym, *al-Bahr al-rāiq*, 8: 319.

80 Sarakhsī, *al-Mabsūt*, 18: 87; Mawṣilī, *al-Ikhtiyār*, 2: 189; Muḥammad Ibn Farāmurz Mulla Khusraw, *Durar al-ḥukkām fī sharḥ ghurar al-aḥkām* (Istanbul: Fazilet Publishing, 1978), 2: 364.

subtraction should be of the same sort.[81] In this example, however, mentioned dinar and wheat are of different sorts from dirham from which the formers are subtracted. Subtractions made are therefore void.

3.1.7. Mentally Deranged Person's Obligation to Fast

According to Ḥanafī jurisprudents, a mentally handicapped person is not obliged to make up afterwards for the fasting he/she has omitted in Ramadan.[82] But if this person recovers from mental derangement during the month of Ramadan, whether he/she is obliged to make up later for the days he/she has omitted the fasting is under dispute.

Abū Ḥanīfa and Imamayn applied istiḥsān on the subject over the verse "*So whoever sights the month, let him fast it*,"[83]. What is implied in the verse is not sighting entire month but a point of it. In other words, reaching to a part of Ramadan is the reason why fasting is obligatory in entire month. Therefore, as to istiḥsān, the necessity for recuperated person to make up for the days he/she has omitted fasting is binding.

Zufar ibn Hudhayl is of the view that the one who loses his/her mental health at one point in Ramadan neither has to make up for the whole month in case the disability continues entire month nor has to compensate only for the days he/she omitted. Comparing the situation of mentally disabled person with the case of a teenager entering the period of adolescence, Zufar ibn Hudhayl argues that just as the quality of being juvenile which lasts until adolescence precludes making up for the fasting omitted in those days, mental derangement likewise rules out the compensation for previously omitted fastings.[84]

3.1.8. Marriage Contract of an Apostate Couple

According to the majority of Ḥanafīs, the marriage of a husband-wife who apostatised from the religion and then converted to Islam again remains legitimate pursuant to istiḥsān.[85] Zufar, however, claims they have to split up and grounds it on qiyās because the apostasy of either husband or wife annuls the marriage contract. If both of them abandon Islam, one of them's apostasy and an addition comes into question. Therefore, as their apostasy priorly obstructs the constitution of marriage, it should also prevent its continuation.[86]

3.1.9. Emancipation of a Slave for *Ẓihār* (Type of Divorce in Which the Husband Likens His Wife to His Mother) Expiation

In Abū Ḥanīfa and Imamayn view, in case of *ẓihār* if someone intends to recompense by buying and freeing his father (who is a slave), this would be enough according to istiḥsān. On the contrary, Zufar holds the idea that it would not be lawful with respect to qiyās. The duty of man in *ẓihār* expiation is emancipating

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81 Rifat Uslu, "İmam Züfer b. Hüzeyl'in Hayatı ve Fıkhî Görüşleri" (Yüksek Lisans Tezi, Selçuk Üniversitesi, 1992), 127-128.

82 Sarakhsī, *al-Mabsūt*, 3: 87; Mawṣilī, *al-Ikhtiyār*, 1: 174.

83 al-Baqarah, 2/185.

84 Sarakhsī, *al-Mabsūt*, 3: 88; Marghīnānī, *al-Hidāya*, 1: 154; Abd al-azīz al-Bukhārī, *Kashf al-asrār*, 4: 372; İbrahim Kâfi Dönmez, "Cünûn", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Istanbul: TDV Pub., 1993), 8: 127.

85 Sarakhsī, *al-Mabsūt*, 5: 49; Marghīnānī, *al-Hidāya*, 1: 155; Mawṣilī, *al-Ikhtiyār*, 3: 141.

86 Ḳudūrī, *al-Tajrīd*, 9: 4551; Sarakhsī, *al-Mabsūt*, 5: 49; Marghīnānī, *al-Hidāya*, 1: 155; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 2: 201; Ibn Māza, *al-Muhīt al-burhānī*, 3: 132.

a slave. Yet to buy a slave does not mean to set him free. Buying brings the property while setting free takes the possession away. The difference between these two actions constitutes an ultimate contrast. On the other hand, due to the blood relationship between them, father obtains the right to be free by getting into his son's possession. And hence, this cannot be counted as expiation.[87]

3.1.10. Emancipating Only One Slave for Multiple *Ẓihār* Expiations

For Ḥanafīs, if one frees one slave for two *ẓihār* divorces he did before, he can count this as recompense for one of his wives, whichever he wants, and it is lawful as to istiḥsān for him to intercourse with her. It is same as for expiation by fasting and feeding someone. It is because intent of determination in the things of same sort is invalid and unnecessary. The determination here is not therefore paid regard to. In the things of different sorts, however, the situation is not same. For instance, if someone who omitted fasting a couple days in Ramadan intents to recompense, this is licit even if it does not ascertain what days he/she has to fast. Contrariwise, if one has missed and voluntary fastings, he/she has to make a precise fixing as the types of the fastings are different.

Zufar ibn Hudhayl is in the opinion that it would not be lawful pursuant to qiyās. For him, the intention of the man given in the above example is not to determine one of the two *ẓihār* divorces. In this case, that man turns out to have freed a half slave for each *ẓihār*, because none of the *ẓihār*s a man does is superior than another. It is similar to freeing one slave for expiations of killing and *ẓihār* at once.[88]

3.2. General Overview on Zufar ibn Hudhayl's Approach towards Istiḥsān

From the middle of the second century AH, when fiqh made rapid progress, an opposition began to show itself against istiḥsān, which were used by some schools as a method of deduction. As expressed before, this counteraction towards istiḥsān was primarily caused by the fact that the meaning frame of istiḥsān had not yet settled outright during its process of conceptualization, as well by the perception of "*subjectivity*", which the term istiḥsān etymologically evokes and which is not seen to be possible to be associated with jurisprudential logic. Nevertheless, istiḥsān carries the characteristic of being a deductive method having the potential to provide jurisprudents with wide horizons and new gateways in producing solutions for the emerging problems.[89]

Besides, the fact that the term istiḥsān was often used within the doctrine as an antonym to qiyās or as the name of abandoning it can be said to have played a part in the generation of this perception.[90] It is quite possible to find the correct answer, above all in Ḥanafī jurisprudential doctrine, to the question whether istiḥsān was actually an alternative to qiyās or it was a way out for the interpreters in meeting society's needs and finding an answer to their juristic problems when qiyās was not able to respond their requirements or when it led to deadlocks or negative results.

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87 Sarakhsī, *al-Mabsūt*, 7: 8.

88 Jaṣṣāṣ, *Mukhtasar Ikhtilāf al-Fuqaha*, 3: 255; Sarakhsī, *al-Mabsūt*, 7: 10; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5: 148; Mawṣilī, *al-Ikhtiyār*, 3: 204; Ibn Māza, *al-Muhīt al-burhānī*, 3: 335-336; Zaylaʿī, *Tabyīn al-ḥaqāʾiq*, 3: 13.

89 Hamza Aktan, "İslam Hukukunda İstihsan Ufku", *İslâmi İlimlerde Metodoloji/Usûl Meselesi* (Istanbul: Ensar Publishing, 2009), 3: 76.

90 Özen, "Hicrî II. Yüzyılda İstihsan ve Maslahat Kavramları", no.1: 41.

In his juristic interpretations, Zufar ibn Hudhayl uses qiyās where *nuṣūṣ* are not found mostly as a deductive method. Innumerable examples are available for the foregoing fact. On the other hand, in a problem where Abū Ḥanīfa and his companions present different views as to istiḥsān and qiyās, Zufar is observed to firmly embrace qiyās, preferring it over istiḥsān; yet he sometimes, although rare, is seen to lean towards qiyās al-khafī (hidden), renouncing qiyās al-jalī (clear) because of documentary evidence, companions' sayings and common practice.[91]

From this aspect, it can be said that, in general terms, Zufar adhered to Ḥanafī method; yet regarding the usage of istiḥsān as a deductive method, he tried to narrow down the frame; while in terms of consulting to qiyās, he intended to expand the limits as much as possible.[92] As a matter of fact, Zufar ibn Hudhayl limited istiḥsān to a considerably straitened scope merely regarding it sometimes as the renouncement of qiyās due to Prophet Muhammad's Sunnah or sometimes as abandonment of qiyās al-jalī because of common practice or seldomly of qiyās al- khafī.[93] After all, the author who depicts Zufar to have frequently employed istiḥsān also notes in a different writing that he did not resort to istiḥsān unless he had to.[94]

There is not any information neither from founding imams of Ḥanafī School nor from Zufar himself, claiming Zufar to have rejected istiḥsān. Such information has never been encountered neither in subsequent Ḥanafī jurisprudential and methodological literature, nor in the sources belonging to Shāfiʿī School, which were in the forefront of the opposition against istiḥsān, and to remaining schools having stood against istiḥsān. Albeit unconfirmed, Ibn Ḥazm remarks al-Ṭaḥāwī (d. 321/933), a Ḥanafī member, to have disapproved istiḥsān totally.[95] Had Zufar frowned on istiḥsān too, Ibn Ḥazm or another objector would have certainly mentioned it in order to consolidate the stance against istiḥsān or to promote his own thought. However, we have not come accross such record during our research. Even if we accept the assumption for an instant that such information was never conveyed to Ibn Ḥazm because of the geography he lived in and thereby he could not have included it in his works, this would have still served as a vital argument for, above all, Imam al-Shāfiʿī, who objected to istiḥsān and defined it as "*adjudicating fancifully and inventing a new sharia"* and for other Shāfiʿī scholars opposite to istiḥsān to refute the justifications put forward by Ḥanafīs on the purpose of vindicating istiḥsān. And they should have used it as a rigid cornerstone and reference point in proving istiḥsān to be wrong. However, such information is not referred to in any Shāfiʿī work on jurisprudence or the principles of jurisprudence. Furthermore, within the examination we have made on Ḥanafī

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91 Biltāji, *al-Manāhij*, 1: 311; Muharrem Önder, "İstihsan Kavramının Ortaya Çıkışı", *İslam Hukuku Araştırmaları Dergisi* 7 (Nisan, 2006): 206; Uslu, "İmam Züfer b. Hüzeyl'in Hayatı ve Fıkhî Görüşleri", 28. For the examples showing Zufar to prefer the method of qiyās on several matters to which istiḥsān is applied see. Sarakhsī, *al-Mabsūt*, 1: 182; 2: 203; 3: 88; 5: 49; 7: 5-6; 18: 87; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 1: 16-17, 119, 191-192, 202, 353; Marghīnānī*, al-Hidāya,* 1: 155; 2: 353, 358; Kamāl al-Dīn Muhammad b. Abd al-Wāhid b. Abd al-Hamid Ibn al-Humām, *Fath al-qadīr* (Bairut: Dār al-Fikr, nd.), 7: 114; 9: 511, Mawṣilī, *al-Ikhtiyār*, 1: 155; 174; 2: 46, 189; 3: 141; 5: 26; Çeşme, "el-Mevsılî'nin el-Muhtâr'ında Züfer'e Ait Görüşler", 21, 34.

92 Biltāji, *al-Manāhij*, 1: 311-312.

93 Biltāji, *al-Manāhij*, 1: 312.

94 Bakkal, "Ebû Hanîfe'nin İstihsan Anlayışı", 1: 275.

95 Ibn Ḥazm, *al-Ihkām*, 6: 799; Id, Mulaḵẖḵẖaṣ, 51.

literature are instances demonstrating Zufar to employ istiḥsān, even if just a hint. Therefore, the claim is not seen to be accurate.

Apart from all these analyses, Muhammad al-Biltāji explains Zufar ibn Hudhayl's approach towards istiḥsān as below:

"Zufar ibn Hudhayl is in an effort to narrow down the limits of ruling byistiḥsān as much as possible, while concerning the utilization of qiyās, he intends to maximize the area.Zufar ibn Hudhayl's almost total avoidance from using istiḥsān does not rule him out of agreed general principles of Ḥanafī School because Zufar ibn Hudhayl's method is in fact the same as this very method in general terms. His jurisprudential understanding is shaped largely around these principles. Therefore, he takes qiyās and istiḥsān as a source as well. However, he mostly adopts qiyās when practically approaching to the problems, while preferring istiḥsān seldomly. He stays aloof from istiḥsān only in its application to problems. And this opposition does not signifiy radical objection or total rejection of utilizing either qiyās or istiḥsān."[96]

As al-Biltāji notes above, Zufar does not repudiate istiḥsān in an absolute manner, even accepts it as a method of deduction; still, unless he has to, he does not recourse to istiḥsān in creating solutions for problems, adopting qiyās instead. As a matter of fact, Zufar has been unanimously designated by Ṭabaqāt and Manākib authors as analogist. It will be more accurate to read this designation as, apart from his ability to analogize, he indeed favored qiyās all the way unless istiḥsān was inevitably required; in some cases, however, when qiyās failed to satisfy in producing solutions for the problems or when it brought incorrect results, he turned to istiḥsān, even infrequently, by force of necessity and in order not to leave problems unsolved. Let us now look into applications of istiḥsān Zufar performed in his jurisprudential practice.

3.2.1. Examples to Zufar ibn Hudhayl's Istiḥsān Practice

We have tried to carry out an extensive research in available Ḥanafī jurisprudential literature in an attempt to determine the istiḥsān examples in Zufar ibn Hudhayl's juristic practice. And we have seen that the matters on which he resorted to istiḥsān are quite limited. Now let's see these examples together.

3.2.1.1. Recitation of an Illiterate Person at Salah (Prayer)

For Abū Ḥanīfa, if a person that does not know how to recite the Qurʾān performs a part of salah without recitation, then learns a sūrah (chapter) and recites it at the remaining part of salah or if he/she recites only in first two rakaʿāt (units) and forgets the remaining recitation, in both cases his worship is not accepted. According to Imamayn, in the first case, that person has to reperform the salah over again, but in the second case, he/she can go on as to istiḥsān.

Zufar ibn Hudhayl, on the other hand, is in the view that the salahs in both cases will not be disrupted pursuant to istiḥsān, basing it on the fact that the recitation is obligatory only in two rakaʿāt. Just as it is enough for a person acquainted with the recitation of Qurʾān to omit the recitation in initial two rakaʿāt and recite in last two rakaʿāt instead; likewise, if he/she performs the obligatory recitation in first two rakaʿāt, passing over the recitation in final two rakaʿāt would not spoil the salah. Similarly, the illiteracy in initial two rakaʿāt of a person who recites in last two rakaʿāt after learning something from Qurʾān would not spoil his worship either.[97]

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[96] Biltāji, *al-Manāhij*, 1: 312.

[97] Sarakhsī, *al-Mabsūt*, 1: 182; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 1: 353; Ibn Māza, *al-Muhīt al-burhānī*, 2: 189; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 1: 358; Id, *Minha al-ḥāliq ala'l-Bahr al-rāiq* (Bairut: Dār al-Kutub al-ʿIlmiya, 1997), 1: 650.

3.2.1.2. When One of the Victims Forgives the Offender after Diya (Bloodwit) and Qiṣāṣ (Retaliation) is Ruled

Ḥanafī School applies qiṣāṣ against one who cuts more than one person's same organs to which qiṣāṣ is applicable. The offender also must pay half of the diya for the relevant organ to each victim.[98] To exemplify, for the implementation of qiṣāṣ penance to the one who has cut two people's right hands simultaniously or separately, victims must apply to the court, and, after the judge rules qiṣāṣ and diya before the victims, if one of the victims renounces his right to claim qiṣāṣ after receiving diya and pardons the offender, this pardon will be lawful and the other victim's right to demand the execution of qiṣāṣ is ruled out automatically. He only receives the remaining half of diya. In case when one of the victims forgives the offender before receiving his share of half diya, for Abū Ḥanīfa and Abū Yusuf, other one's right to demand qiṣāṣ remains as to qiyās, according to Zufar ibn Hudhayl and Imam Muhammad, however, his right to request qiṣāṣ would also be forfeited pursuant to istiḥsān. Embracing the rule deduced over istiḥsān, Zufar ibn Hudhayl and Imam Muhammad analogizes this situation to the case when one of those whose hands are cut renounces qiṣāṣ after receiving diya because the arbiter can validly rule either qiṣāṣ or diya for the victims. As a necessary consequence of the foregoing, qiṣāṣ right is conjunct between them. When one of them forfeits his right, the other one should be entitled with half of the right of qiṣāṣ, yet of course, cutting the half of the hand as retaliation is unthinkable.[99]

3.2.1.3. Punishment for Cutting the Nails During State of *Ihrām*

For Abū Ḥanīfa and Zufar ibn Hudhayl, if a person in *ihrām* (sacred state which a Muslim must enter in order to perform the pilgrimage) cuts three of his fingernails, he/she will be sentenced to sacrifice an animal as to istiḥsān. Though al-Sarakhsi remarks Abū Ḥanīfa to have backed down from this argument later.[100] This argument is justified as follows: As is known, a person who cuts all the nails of one hand is unanimously punished with animal sacrifice. And the better part of the nails is like its whole. Therefore, the one who cuts not less than three of his/her nails during ihram is considered to have cut all of them and thereby he must sacrifice an animal as penalty.

According to Imamayn and Abū Ḥanīfa's posterior view, for each nail, a *ṣadaqah* (charity) must be paid, which is grounded as: The animal sacrifice penalty is actually given when all the nails of both hand and foot are cut. One hand, however, constitutes merely the quarter of the whole, which reminds of quarter of the head in shaving. This proportion is the lower limit for the sacrifice penalty to be obligatory. In nailcut, however, it is not possible to regard three nails as whole. If so, an unpreventable infinite vicious circle would

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98 Sabri Erturhan, *İslam Ceza Hukukunda İçtima* (Istanbul: Rağbet Publishing, 2003), 155.

99 Abū ʿAbd Allāh Muḥammad b. al-Ḥasan b. Farḳad al-Shaybānī, *Kitāb al-Asl=al-Mabsūt*, tsh. Abu'l-Wafā al-Afgānī (Bairut: ʿAlam al-Kutub, 1990), 4: 443; Sarakhsī, *al-Mabsūt*, 26: 141;Zaylaʿī, *Tabyīn al-ḥaqā'iq*, 6: 116; Ibn Nujaym, *al-Bahr al-rāiq*, 9: 52; *al-Fatāwā al-Hindiyye*, ed. Shaykh Nizam (Bairut: Dār al-Kutub al-ʿIlmiya, 2000), 6: 16-17; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 10: 208. The information that this view also belongs to Zufar is only included in al-Sarakhsī's *al-Mabsūt*. Others credit this view only to Imam Muhammad.

100 Sarakhsī, *al-Mabsūt*, 4: 77.

occur. So a charity penalty for each nail will solve this problem. As a matter of fact, a juristic rule given for what is little in quantity cannot be applied to what is less.[101]

3.2.1.4. Unspecified Divorce

According to the majority of Ḥanafīs, if someone divorces one of his two wives before witnesses, yet witnesses say in court afterwards that they have forgot which spouse the man divorced, in this case testimonies of both witnesses will be deemed invalid. The divorce will therefore be illegitimate.

Zufar ibn Hudhayl, on the other hand, is in the view that as per istiḥsān the testimonies of these two people would be accepted and the man would be forced to repudiate one of his spouses because uncertainty on the testimony does not constitute an impediment to the legitimacy of the testimony regarding its purpose. Moreover, the testimony towards divorce is considered under "amr bi al-maʿrūf" (encouraging righteous behaviour). Here, the testimony of both witnesses proves that the husband has divorced one of his wives. In other words, there is indeed a case of divorce. Uncertainty is that which one of the women was divorced. Therefore, the judge will be considered to have heard the husband's words for divorce and the husband will be obliged to divorce one of his wives.[102]

3.2.2. Evaluation of the Examples Related to Zufar ibn Hudhayl's Istiḥsān Practice

When we examine the jurisprudential rulings done by Zufar ibn Hudhayl through the method of istiḥsān, we can see that the remaining imams usually appealed to qiyās and held different views compared to that of Zufar. However, as Zufar was prominent with his commitment to qiyās, his practice of istiḥsān instead of qiyās in such case, along with the rule he deduced over it is somehow striking, even seems like a strange attitude.

As a matter of fact, the reason why Zufar chose istiḥsān in cases, which could already be solved through qiyās might be that the latter does not answer the requirement or leads to wrong conclusion. However, as for the question whether the recitation of an illiterate person would be accepted in salah, Zufar turns to qiyās to ground istiḥsān, which may be called qiyās al-khafī. From the viewpoint that the recitation is obliged only in first two rakaʿāt, he analogizes the recitation of an illiterate person to the recitation in the last two rakaʿāt by the one who knows how to recite and he remarks his prayer is accurate. Here, Zufar ibn Hudhayl may have aimed to facilitate salah, the prayer occupying an important place in Muslim's life, especially for those who have newly become Muslim and who is not yet been able to recite Qurʾān by heart, and as well to encourage them.

Zufar seems to have reached to the rule that if one of the victims, in a case where diya and qiṣāṣ is ruled, forgives the offender before receiving his share of half diya would rule out other victims right to demand qiṣāṣ as to istihsan, basing it on qiyās. Just as when the one whose hand has been cut renounces qiṣāṣ after receiving diya, it factors out the other victim's right demand qiṣāṣ; his forgiving the offender before getting diya would also eliminate the other victim's right. Here, he compares the forgiving before

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[101] Sarakhsī, *al-Mabsūt*, 4: 77-78. Züfer b. Hüzeyl'in görüşü için see. Jaṣṣāṣ, *Mukhtasar Ikhtilāf al-Fuqaha*, 2: 199; Ḳudūrī, *al-Tajrīd*, 4: 1821; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 2: 291-292; Marghīnānī, *al-Hidāya*, 1: 196; Ibn al-Humām, *Fath al-qadīr*, 3: 39; Haddād, *al-Jawharah al-Nayyirah*, 1: 404.

[102] Shaybānī, *Kitāb al-Asl*, 3: 29 (Imam Muhammad does not mention Zufar ibn Hudhayl's name here.); Sarakhsī, *al-Mabsūt*, 6: 145; Ibn Māza, *al-Muhīt al-burhānī*, 5: 156.

taking diya to forgiving after taking it. In this example qiyās forms a ground for istiḥsān. That is to say, here also qiyās al-khafī is a matter of question.

For the case where a person in the state of *ihrām* cuts his three nails, Zufar predicates his ruling on the principle of majority and defends that this person must sacrifice an animal as penalty. The other Ḥanafī imams, however, take the total number of both finger and toe nails into consideration and assert that one must pay charity for each of nails he cuts, grounding this on the idea that cuttig three nails represents the minority. Here, an important question comes to mind: "Why do not Ḥanafī scholars hold the same perspective when they rule that for the anointing to be legitimate, it must be done with at least three fingers of one hand and the tears on slippers must not amount to three; or when they evaluate the tears on each slipper separately, adding them together?"

Most Ḥanafīs defend the view that the divorcement will not be accepted, grounding it on the case at which testimonies are counted invalid when husband forget or can't remember which of his wives he has divorced. Zufar ibn Hudhayl, however, basing upon the presence of the divorce act, states that invalid testimony of the witnesses will not prevent the fact of divorcement, and that in this case the judge can prevent the husband from approaching to his wives until the he ascertains which of his spouses he divorced.

Here, in an important matter such as divorcement, Zufar ibn Hudhayl finds it sufficient for the husband to use one of his divorce rights; stating that the fact that witnesses has forgotten which of his wives was divorced by the husband will not spoil the divorcement because divorce is an action regarded in the form of *isqātāt* (release). So as per the basic principle suggesting, "what is dropped cannot be brought back",[103] one of the divorce rights will drop even it is unwitnessed. Besides, Zufar may have aimed through this approach to prevent unwitnessed divorces from being misused and hinder some negative consequences that could occur as a result of this misusage.

CONCLUSION

The examples included in Classical Ḥanafī literature demonstrate the important role qiyās played in Zufar ibn Hudhayl's jurisprudential path. They also display his mental agility and that he fully deserved the exaltations and qualifications attributed to him on his application of qiyās, which requires a wide fund of jurisprudential knowledge.

When Zufar's employments of istiḥsān in his jurisprudential practice are examined, one can see that it is exceptionally difficult to settle a comprehensive formula unraveling when and why he resorts to istiḥsān. It seems extremely difficult to ascertain his methodological course for the reason that he passed away at an early age shortly after Abū Ḥanīfa's death, when the institutionalization of the school had not yet been completed and also because he has left no work to explain his juristic thoughts. Besides, neither subsequent methodologists nor jurisprudents have any significant explanations on his approach towards istiḥsān. In fact, considering that the jurists of his period wasted all their energy to ground istiḥsān and the instances based on istiḥsān thanks to its extremely controversial nature and tried all the time to convince the opposers, the above fact does not seem to be odd at all.

In the cases where Zufar ibn Hudhayl adopted istiḥsān, remaining three imams seem to have recoursed to qiyās, yet sometimes not all of them. The fact that Zufar preferred istiḥsān over qiyās is not

[103] See. Majalla, 51.

because the latter was inapplicable, but maybe because it did not sometimes answer the questions or because it sometimes led to inaccurate conclusions. Then again, Zufar's limited usage of istiḥsān should not leave the impression that he contravened unanimously agreed general principles of Ḥanafī School.

The arguments that Zufar ibn Hudhayl frequently turned to istiḥsān the same as the school's other imams or totally opposed it do not reflect the reality. He intented to expand the scope of qiyās while applying istiḥsān in limited number of cases and in a narrow field.

As conclusion, what was essential for Zufar is qiyās. Yet he is known to have adopted istiḥsān as well, even seldomly, which demonstrates he was not against istiḥsān in principle.

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