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Application of *Istiṣḥāb* and *Istiḥsān* in Islamic Law of Inheritance: An Analytical Study

تطبيقات الاستصحاب والاستحسان في الميراث الإسلامي: دراسة تحليلية

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Abstract

This paper explores the application of the Islamic jurisprudential principles of Istiṣḥāb (presumption of continuity) and Istiḥsān (juristic preference) within the realm of Islamic inheritance law (Mirāth). The methodology involves a conceptual discourse that explains Istiṣḥāb as the presumption that a previous state or ruling continues to remain valid unless proven otherwise, and Istiḥsān as the departure from strict analogical reasoning (qiyās) or text towards stronger evidence or interpretation that better aligns with the objectives (Maqāṣid) of Sharīʿah. This is followed by a detailed analysis of their application in various inheritance cases, including mass fatalities, obligatory bequests (Waṣiyyah Wājibah), and the inheritance rights of hermaphrodites and fetuses, among others. The research problem revolves around demonstrating how these principles facilitate juristic reasoning (ijtihād) in Mirāth, enabling the law to adapt to evolving familial structures and contemporary challenges, given the inadequate scholarly focus on their comprehensive application in modern contexts. The key research findings include the adaptability of Mirāth to societal changes, the ability to address complex scenarios, and balancing between rigidity and flexibility. It lays a good foundation for future research.

Keywords: *Mirāth*; *Istiṣḥāb*; *Istiḥsān*; *succession*; *application.*

ملخص البحث

تناولت هذه الورقة توظيف أصلين من أصول الفقه: الاستصحاب والاستحسان في الميراث الإسلامي. وتشتمل المنهجية على معالجة مفاهيمية تفسر الاستصحاب على أنه افتراض بقاء الحالة أو الحكم السابق قائما ما لم يثبت خلاف ذلك، والاستحسان هو الخروج عن القياس أو النص نحو دليل أو تفسير أقوى يتوافق بشكل أفضل مع مقاصد الشريعة. ثم تناولت أهمية الاجتهاد في تطور الميراث والدور الذي يؤدي في معالجة المسائل الميراثية التي سكت عنها النص. وقد استطاع البحث أن يطبق توظيف الاستحسان والاستصحاب في مسائل الميراث بالتركيز على نماذج منها: الموت الجماعي والوصية الواجبة وميراث الخنثى المشكل وتوريث الجد مع الإخوة والعمرية والأكدرية والمشتركة وميراث المفقود. ومن إطار هذه النماذج أبرز البحث كيف تكيف الميراث مع التغيرات الزمنية وحقّق مرونة الشريعة الإسلامية مع الالتزام بالمقاصد العليا. واختتم البحث بالتأكد من أن مرونة الشريعة وسعتها جعلتها قادرة على معالجة المشاكل الإنسانية وتقرير العدالة والمساواة والاعتدال. ويكون البحث أساسا للبحوث التابعة في هذا المجال.

الكلمات المفتاحية: الميراث، الاستصحاب، الاستحسان، حق الوراثة، تطبيق.

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1. Introduction

Islamic jurisprudence has developed a sophisticated methodology centered around revealed sources and interpretative principles to derive rulings on all aspects of human life. This ingenious legal theory equips jurists with intellectual tools to engage in juristic reasoning (*Ijtihād*) to address new challenges. Inheritance law (*Mirāth*) represents fertile ground for *Ijtihād*, given its limited coverage in the Qur'an and *Hadith*. Jurists have utilized principles like *Istiṣḥāb* (presumption of continuity) and *Istiḥsān* (juristic preference) to formulate *Mirāth* rulings for complex scenarios. This research explores the application of *Istiṣḥāb* and *Istiḥsān* in *Mirāth*, showcasing the dynamism of Islamic law.

Istiṣḥāb refers to presuming the continuity of a previous ruling or state until evidence proves otherwise (Kamali, 1991). It is invoked in issues lacking explicit guidance, ranging from ritual purity to criminal justice. In *Mirāth*, *Istiṣḥāb* is exemplified in assuming a missing person is alive when inheriting or postponing estate distribution until a fetus' fate is known. Scholars like al-Ghāmidi (2015) and Al-Zuḥayli (1987) trace *Istiṣḥāb* 's validity to Qur'anic verses and Prophetic traditions.

Meanwhile, *Istiḥsān* allows departing from a text or an established analogy (*qiyās*) to a stronger proof (Kamali, 1991). Hanafis consider it a proper interpretive tool aligned with the *Sharīʿah*, while Shafi'is reject it as arbitrary. In *Mirāth*, *Istiḥsān* enables redistributing shares, as in the *Umariyyah* cases, to ensure equity between heirs (al-Ṣābūni, 2002).

Studies on *Istiṣḥāb*'s *Mirāth* applications include al-Sarakhsi's (2000) documentation of juristic views on mass fatality cases. Contemporary research by Manswab (2020) analyzes its role in missing persons' inheritance. Mohamad (2010) also studies the application of *Istiṣḥāb* to a missing person. For *Istiḥsān*, works like al-Ghāmidi (2015) detail its use in redistributing estates among complex heir configurations. However, a holistic study of both principles in *Mirāth* applications is lacking.

This paper, therefore, aims to fill this gap through an expansive exploration of *Istiṣḥāb* and *Istiḥsān*'s manifestations in *Mirāth* rulings on issues like fetus inheritance, interfaith bequests, hermaphrodite heirs, and deaths out of order. The diverse classical and modern scenarios analyzed will showcase the centrality of these tools in enabling Islamic law to adapt to changing contexts while upholding justice and *Sharīʿah* objectives.

2. Conceptual Discourse of *Istiḥsān* and *Istiṣḥāb*

Istiṣḥāb, an Arabic term, literally is translated to the presumption of continuity. It plays a crucial role in Islamic legal theory as a secondary source of law, especially in situations where direct textual evidence from primary sources is absent. *Istiṣḥāb* is defined as the presumption that a situation that existed at an earlier time continues to exist now unless there is evidence to suggest otherwise. It implies that the status quo becomes a source of law in the absence of a compelling reason to the contrary (Da`wah Institute, 2021).

Kamali (1991) emphasizes that *Istiṣḥāb,* in Islamic jurisprudence, signifies the presumption of continuity, where a pre-existing condition is assumed to persist until evidence proves otherwise. This principle is notably

recognized and applied by the Shafi`i, Hanbali, Ẓahiri, and Shi`ah Imamiyyah schools of thought, contrasting with the Hanafi, Maliki, and certain *Mutakallimun* scholars who dispute its standalone validity as proof (Al-Zuḥayli, 1987). The latter argues that the prior existence of a condition does not inherently validate its ongoing presence without direct evidence.

Al-Zuḥayli (1987), discussed that some textual basis for *Istiṣḥāb* is found in various verses of the Qur'an. For instance, the Qur'an 2:29 *"It is He who created for you all that the earth contains; then He turned to the heavens and made them seven skies — and He knows all things*" and the Qur'an 45:13 "*He has subjugated for you whatever there is in the heavens and whatever there is in the earth, all on His own. Surely in this there are signs for a people who reflect",* have been interpreted to establish the premise of permissibility of all things created for human use, suggesting that the status quo of permissibility remains in the absence of evidence to the contrary. The validity of *Istiṣḥāb* is further supported by examples from the Prophet Muhammad's peace be upon him (PBUH) teachings. For instance, the Prophet's guidance on maintaining ablution despite doubts about its nullification and assuming the minimum number of *raka'ah* in *salah* when in doubt (Sahih al-Bukhāri), both reinforce the principle of *Istiṣḥāb*, emphasizing the continuity of a state until proven otherwise (Al-Zuḥayli, 1987).

Istiṣḥāb is applied in various principles, such as the presumption of an action being permissible until proven prohibited, innocence until proven guilty, freedom from responsibility until proven otherwise, and purity until proven impure. These applications demonstrate *Istiṣḥāb*'s aim to achieve certain objectives and purposes (*maqasid*) of *Sharīʿah*, such as maintaining justice through the presumption of innocence (Da'wah Institute, 2021).

Istiṣḥāb operates under the premise that both the presence and absence of conditions are presumed to continue until proven otherwise. For instance, in the context of contracts like marriage or sales, the contract's stipulations are assumed to remain valid until changes are legally proven. However, in cases where contracts are inherently temporary (e.g., leases), *Istiṣḥāb* does not presume their indefinite continuation (Kamali, 1991). The principle also extends to the presumption of the absence of qualities or conditions, such as training in animals, where the default assumption leans towards the absence of training unless evidence suggests otherwise.

Istiṣḥāb's application is multifaceted, involving:

i. Presumption of original absence (*al-`adm al-asli*), where non-existence in the past is assumed to persist.
ii. Presumption of original presence (*al-wujud al-asli*), where existence, indicated by law or reason, is assumed until disproved.
iii. *Istiṣḥāb al-hukm*, concerning the continuity of general legal rules and principles.
iv. *Istiṣḥāb al-wasf*, related to the continuity of attributes or qualities.

Jurists generally agree on the validity of the first three types of *Istiṣḥāb*, although their detailed applications vary. The fourth type, concerning attributes, witnessed a divergence of opinions among schools of law, with Shafi`i and Hanbali schools fully endorsing it, while Hanafi and Maliki schools accept it with conditions (Kamali, 1991). Al-Shawkāni (1999) explain that despite *Istiṣḥāb*'s utility in Islamic jurisprudence, it is considered the last resort in *fatwa* issuance, taking a backseat to the Qur'an, *Sunnah*, consensus (*ijma`*), and analogy (*qiyās*) due to its foundational assumption of continuity rather than direct evidence.

Istiḥsān, or juristic preference, is a method in Islamic jurisprudence where a law derived through a text or analogical reasoning (*qiyās*) is overridden by another evidence believed to be stronger or more appropriate. Kamali (1991) distinguishes between two main varieties of *Istiḥsān*:

1. Analogical *Istiḥsān* (*Istiḥsān Qiyāsi*): A departure from one analogy to another.
2. Exceptional *Istiḥsān* (*Istiḥsān Istithna'i*): Making an exception to a general rule of the existing law, often

supported by a stronger source like the Qur'an or the *Sunnah*.

Istiḥsān has been a subject of controversy, especially between the Hanafi and Shafi`i schools of thought. Al-Shafi`i criticized *Istiḥsān* for being arbitrary and not grounded in the clear texts (*nuṣūṣ*) of the Qur'an and the *Sunnah* (Al-Shafi`i, 1938). In contrast, Hanafi scholars defended *Istiḥsān* as a form of *qiyās* (analogical reasoning) that is grounded in the *Sharīʿah*, arguing that it does not constitute an independent source of law but is a branch of *qiyās* (Al-Sarakhsi, 2000). According to Al-Shanqīti (1973), in the Maliki school of *Fiqh*, the meaning of *Istiḥsān* extends to following the preponderant evidence or specifying a generic word with custom (*'Urf*). It could also be used interchangeably with *Maṣlaḥah*. However, all scholars rejected a very rare and absurd meaning of *Istiḥsān*, which is the unexplainable thought of a *Mujtahid* (Al-Shanqīti, 1973).

Some historical instances where *Istiḥsān* was applied by Islamic jurists and caliphs, including cases adjudicated by 'Umar bin al-Khaṭṭab, demonstrating its practical utility in ensuring fairness and preventing hardship include adjustments to inheritance laws, rulings on *Zaka*, and decisions on legal punishments under specific circumstances, all aimed at serving the higher objectives of Islamic law and ensuring equity and justice (Da`wah Institute, 2021).

It allows jurists to depart from strict analogical reasoning when such adherence would lead to unfair or harmful outcomes. This flexibility is seen as essential for ensuring justice and addressing the unique circumstances of each case. According to Kamali (1991), *Istiḥsān* plays a crucial role in Islamic jurisprudence by offering a means to adapt legal rulings to the changing needs and circumstances of society. While it has faced criticism for potentially introducing subjectivity into the legal process, *Istiḥsān* is defended as a necessary tool for achieving justice and flexibility within the framework of Islamic law.

Istiḥsān could be compared with the concept of equity in Western law, noting similarities in their reliance on fairness and justice to allow for departure from strict legal rules (Da`wah Institute, 2021). However, there are apparent foundational differences between the two, particularly in their sources of authority and underlying philosophical bases, with *Istiḥsān* rooted in the principles of the *Sharīʿah* and equity in natural law (Kamali, 2005).

3. Mirāth as a Fertile Land for Ijtihād

Mirāth (inheritance) is a crucial aspect of Islamic jurisprudence that governs the distribution of a deceased person's assets. The rules of inheritance are primarily derived from the Qur'an and the *Sunnah*, providing a framework that ensures justice, fairness, and the fulfilment of familial responsibilities. However, *Mirāth* cases often present complex scenarios that demand a nuanced understanding of familial relationships, societal changes, and economic considerations. In this context, *Mirāth* becomes a fertile ground for *Ijtihād*, the process of independent legal reasoning, allowing Islamic jurists to adapt and interpret legal principles to address evolving circumstances (al-Ghāmidi, 2015).

Ijtihād according to Alwāni (1981) refers to a creative but disciplined intellectual effort to derive rulings from other sources while taking into consideration the variables imposed by the fluctuating circumstances of the Muslim society. It involves an intellectual effort by qualified jurists to come up with legal rulings on issues not specified in the Qur'an and *Sunnah*. An example is deriving laws on inheritance by examining the handful of textual evidence on the subject. *Ijtihād* provides a mechanism for Islamic law to evolve. Jurists can apply reasoning to derive new laws or re-interpret existing ones to suit changing contexts. This counters the misconception that Islamic law is fixed and immutable. *Ijtihād* ensures that Islamic law reflects the spirit of divine principles while adapting to human needs (Shabbar, 2017).

Islamic inheritance law is a prime example where jurists have exercised *Ijtihād* over the centuries. The few Qur'anic verses – majorly Qur'an 4:11,12, 176- provide a basic framework but leave many matters unspecified. These Qur'anic verses are:

Allah directs you concerning your children: for a male there is a share equal to that of two females. But, if they are (*only*) *women, more than two, then they get two-thirds of what one leaves behind. If she is one, she gets one-half. As for his parents, for each of them, there is one-sixth of what he leaves in case he has a child. But, if he has no child and his parents have inherited him, then his mother gets one-third. If he has some brothers* (*or sisters*)*, his mother gets one-sixth, all after* (*settling*) *the will he might have made, or a debt. You do not know who, out of your fathers and your sons, is closer to you in benefiting* (*you*)*. All this is determined by Allah. Surely, Allah is All-Knowing, All-Wise".* (Qur'an 4:11)

"For you there is one-half of what your wives leave behind, in case they have no child. But, if they have a child, you get one-fourth of what they leave, after (*settling*) *the will they might have made, or a debt. For them* (*the wives*) *there is one-fourth of what you leave behind, in case you have no child. But, if you have a child, they get one eighth of what you leave, after* (*settling*) *the will you might have made, or a debt. And if a man or a woman is Kalalah* (*i.e. has neither parents alive, nor children*) *and has a brother or a sister, then each one of them will get one-sixth. However, if they are more than that, they will be sharers in one-third, after* (*settling*) *the will that might have been made, or a debt, provided that the will must not be intended to harm anyone. This is a direction from Allah. Allah is All-Knowing, Forbearing.* (Quran 4:12)

They seek a ruling from you. Say, "Allah gives you the ruling concerning Kalālah. If a person dies having no son, but he does have a sister, then, she will get one half of what he leaves. (*On the other hand*) *He will inherit her if she has no child. If they are two* (*sisters*)*, they will get two third of what he leaves. If they are brothers and sisters, both male and female, then, the male will get a share equal to that of two females." Allah explains to you, lest you should go astray Allah has full knowledge of everything.* (Qur'an 4:176)

Through *Ijtihād*, jurists have developed a comprehensive set of inheritance laws and adapted them to changing contexts. This demonstrates the dynamism enabled by *Ijtihād* (Murfit, 2023).

Numerous matters about inheritance (*Mirāth*) exist that are not explicitly addressed in the Qur'an or *Sunnah*. These complexities have been deliberated upon by jurists utilizing the method of *Ijtihād*. Among these issues are inheritance rights concerning a fetus, siblings alongside a grandfather, grandchildren alongside children, individuals with ambiguous gender identity, consecutive or simultaneous deaths, as well as various exceptional circumstances. Additionally, contemporary applications of *Ijtihād* in inheritance law encompass issues such as the inheritance rights of posthumous children, the treatment of inheritance taxes, the inclusion of *Mirāth* in digital currencies like Bitcoin, as well as stocks and bonds, among others.

Therefore, by employing *Ijtihād* in matters of inheritance (*Mirāth*), numerous complexities inherent in *Mirāth* cases have been effectively addressed, with due regard given to *Maqāsid al-Sharīʿah* (objectives of *Sharīʿah*). This approach has played a pivotal role in facilitating the adaptation of *Mirāth* to familial and societal transformations, as well as in navigating the ever-evolving economic and financial landscapes.

In conclusion, *Mirāth*, with its inherent complexity and susceptibility to evolving societal dynamics, serves as fertile ground for *Ijtihād* in Islamic jurisprudence. The application of independent legal reasoning enables Islamic jurists to navigate the complexities of inheritance cases, ensuring that principles of justice, fairness, and the broader objectives of *Sharīʿah* are upheld in asset distribution. *Ijtihād* in *Mirāth* showcases the adaptability of Islamic law, demonstrating its capacity to address contemporary challenges while remaining rooted in the timeless principles of the Qur'an and *Sunnah*.

4. *Istiḥsān* and *Istiṣḥāb* in *Mirāth* Cases

The aspects where the two principles have been applied by expert scholars in Islamic law of succession, though not expressed by them as bases for their position, include mass fatalities, a missing person, *Umariyyah* case, *Akdariyyah*, *Mushtarikah*, sharing formula between siblings and grandfather, hermaphrodite and fetal

inheritance. The discussion on the aforementioned cases follows.

4.1 The Application of *Istiṣḥāb* in the event of Mass Fatality

The dilemma of mass fatalities, where numerous individuals perish, including legal heirs to each other, presents a complex challenge marked by considerable confusion. This stems from the difficulty in determining the order of deaths to establish who becomes the inheritor and who is deemed an heir. In modern times, mass fatalities are commonly caused by road incidents, including car and train accidents, as well as airplane crashes. Other causes include building collapses, accidental fires, drownings, bombings, etc. Given these circumstances, the inheritance issues concerning those deceased who are legal heirs to one another are encapsulated in five scenarios (al-Ghāmidi, 2015):

i. When it is established that all deceased individuals died simultaneously, scholars are in agreement that in such instances, inheritance does not apply, as the principle of inheritance requires confirmation that the heir succeeds the deceased, which cannot be determined in this scenario.

ii. When it is known that some individuals died prior to others: In this context, there is a unanimous scholarly agreement that those who died later are entitled to inherit those who died earlier, based on the temporary survival of the heir over the deceased.

iii. When it is known that some died before others without clarity on the order of deaths.

iv. When it is known that some died before others, but the details are subsequently forgotten.

v. When the sequence of deaths is uncertain, and it is unclear whether the deaths occurred simultaneously or at different times.

In the latter three scenarios, there exists significant scope for probability, legal reasoning (*Ijtihād*), and speculation among scholars, who have proposed two differing opinions (Ibn Qudāmah, 1997):

1. The first opinion asserts that in all three cases, no inheritance occurs among the deceased. This position is supported by the views of some of the Companions of the Prophet (PBUH), including Abu Bakr Al-Siddiq, Zayd bin Thabit, and `Abd Allah bin `Abbas, as well as the three Imams, Abu Hanifah (Ibn Ābidīn, 1966), Malik (Ibn ‘Arafah, 1999), and Al-Shafi‘i (Ash-Shīrāzi, 2001). This stance is predicated on the requirement for certainty that the heir has outlived the deceased, a condition not met in these scenarios, thereby precluding inheritance due to the presence of doubt.

2. The second opinion advocates for mutual inheritance among the deceased, reflecting the stance of some Companions, including `Umar bin al-Khaṭṭāb and `Ali bin Abi Ṭalib, and is the approach taken within the Hanbali School (Al-Bahūti, 2000). This perspective relies on the presumption of continuity (*Istiṣḥāb*) or the presumption of the continuity of life (*Istiṣḥāb al-Hayāh*), applying it to the uncertain circumstances surrounding the timing of deaths. The status quo is the existence of each of them before the incident and the death of one before the other is a matter of doubt. Therefore, certainty should not be overruled by doubt. This approach is exemplified by `Umar’s decision during a plague in Al-Sham, ordering the estimation of deceased’s estates based on their mutual shares, with the surviving heirs inheriting accordingly, provided there is no dispute over the order of deaths among them. In cases where each heir claims the other died later without evidence, oaths are required, and inheritance is withheld. According to this view, each heir inherits from the original estate of the other deceased, excluding any new estates acquired posthumously (al-Ghāmidi, 2015).

This second perspective according to al-Sarakhsi (2000) clearly demonstrates the application of the principle of *Istiṣḥāb* to the inheritance issues arising from mass fatalities, showcasing the role of legal reasoning (*Ijtihād*) among scholars in the Islamic Law of inheritance.

4.2 The Application of *Istiṣḥāb* in Fetal Inheritance

In the complex and nuanced realm of the Islamic Law of Inheritance, the question of a fetus's entitlement to inheritance represents a particularly intriguing area ripe for scholarly exploration and the application of *Ijtihād*. This issue arises from the absence of explicit directives within the foundational texts of Islam—the Qur'an and *Hadith*—regarding the rights of a fetus to inherit. Consequently, this lack of direct scriptural guidance has led Islamic jurists to develop diverse interpretations and rulings concerning how an estate should be managed if a potential heir is yet unborn at the time of the decedent's passing.

Scholars have delineated three primary viewpoints on how to approach the distribution of an estate that includes a fetus among the potential heirs (al-Ghāmidi, 2015):

1. Postponement of Estate Distribution Until After the Fetus's Birth: Advocates of this stance argue that the division of the deceased's estate should be deferred until the birth of the fetus. This delay allows for a clear determination of the fetus's eligibility for inheritance, contingent upon its survival following birth. It also allows a clear determination of what is to be inherited by the fetus and other legal heirs (Ibn Qudāmah, 1997).

This perspective is deeply rooted in the principle of *Istiṣḥāb al-`adm al-aṣli*, or the presumption against inheritance in the absence of clear entitlement, as defined by divine decree. Proponents of this view emphasize the uncertainty surrounding the fetus's characteristics (e.g., gender, number of fetuses, survival) as justification for withholding the estate's distribution until these factors can be conclusively determined.

2. Immediate Estate Division with Reservation of the Fetus's Share: According to this viewpoint, the estate is to be divided immediately after the death of the decedent, with the share that would potentially belong to the fetus being set aside until its birth. This approach aims to safeguard the interests of the unborn child while ensuring its share is protected should it be born alive (Ibn Qudāmah, 1997).

This method does not adhere strictly to the principle of *Istiṣḥāb* but instead leans on the principle of *Maslaḥah*, or public interest, by preventing undue harm to the other heirs due to prolonged waiting periods for the estate's distribution.

3. Estate Distribution Based on the Expected Delivery Date (EDD) of the Fetus: This approach introduces a consideration of the fetus's expected delivery date in deciding whether to distribute the estate immediately or to wait until after the birth. If the EDD is imminent, the estate's distribution is postponed until post-birth. Conversely, if the birth is not expected imminently, the estate may be divided beforehand (al-Ṣābūni, 2002).

This nuanced stance attempts to strike a balance between the necessity of prompt estate distribution and the rights of the unborn child, again prioritizing the principle of *Maslaḥah* over *Istiṣḥāb*.

Furthermore, Al-Ghāmidi (2015) explains that Islamic jurisprudence specifies certain conditions that must be met for a fetus to be considered in the distribution of an estate:

i. The fetus must have been in the womb at the time of the decedent's death, ensuring that it was potentially alive when the inheritance issue arose.

ii. The fetus must be born alive for it to be entitled to inheritance, reinforcing the principle that heirs must be living to receive their share.

These diverse opinions and conditions underscore the complexity of addressing fetal inheritance rights within Islamic law, reflecting a broader commitment to justice, fairness, and the well-being of all potential heirs.

4.3 The Application of *Istiṣḥāb* in the Inheritance of Missing Persons

The phenomenon of a missing person, while physically absent, engenders a multifaceted dilemma in the realm of Islamic Inheritance Law. The prevailing ambiguity

regarding their status engenders a spectrum of scholarly discourse on the most judicious approach to undertake. Central to this debate is the contention over the appropriate duration for a waiting period prior to the distribution of the estate (Manswab, 2020).

This discourse bifurcates into several schools of thought (al-Ṣābūni, 2002):

1. A faction advocates for vesting the determination of this period within the judicial discretion of a judge, highlighting the necessity for a case-by-case analysis due to the unique circumstances surrounding each disappearance.
2. An alternative perspective proposes the establishment of specific timeframes for the waiting period, with suggestions spanning a wide range, including until the demise of the missing person's contemporaries or specifying durations such as 90, 70, 120, 75, or 80 years. This perspective is further nuanced by considerations of the context of the disappearance, be it during times of conflict or peace. For instance, disappearances under conditions of warfare or maritime misadventures may necessitate a condensed waiting period of merely four years, in stark contrast to the extended duration of up to 90 years advised for disappearances under peaceful circumstances.

The quandary of a missing person as a potential heir to a decedent's estate unfolds into several potential scenarios (Mohammad, 2010):

1. Exclusive Inheritance: In instances where the missing individual is the singular legal beneficiary, the estate is preserved in its entirety until a definitive resolution concerning their fate is achieved. Upon their return, they are entitled to claim their inheritance. Conversely, a declaration of their demise would see the estate transition to their lawful successors. This scenario typically arises when the decedent is survived exclusively by a missing offspring.
2. Preclusion from Inheritance: Situations may arise where the missing individual is barred from inheritance due to legal constraints, facilitating the distribution of the estate in their absence. An illustrative case involves a decedent leaving behind a son and a missing full brother, with the former proceeding to inherit in the absence of the latter.
3. Co-Inheritance alongside Other Heirs: The scenario of shared inheritance rights among the missing individual and other heirs introduces a divergence in scholarly opinion:
    i. Assumption of Death: A segment of the academic community endorses the notion of presuming the missing individual deceased, thereby negating the allocation of assets in their name.
    ii. Presumption of Survival: Contrarily, another faction contends for the presumption of the missing individual's survival, advocating for the reservation of a segment of the estate for them. This stance is informed by the principle of *Istiṣḥāb al-Wujud al-Asli* (the presumption of original existence), which posits that the uncertainty of death should not override the prior certainty of life.
    iii. Comprehensive Approach: A prevalent scholarly opinion favors a multifaceted strategy that accommodates both possibilities of the missing person being alive or deceased. This approach entails the provisional distribution of the estate under both assumptions, with the minimal shares being allocated to the heirs until a definitive conclusion regarding the missing person's status can be ascertained. This methodology offers a balanced and thorough resolution to the myriad potential outcomes inherent in such cases (Uddin M, 2021).

4.4 The Application of *Istiḥsān* in *al-Waṣiyyah al-Wājibah* (Obligatory Bequest)

The concept of *Wasiyyah Wajibah*, or obligatory bequest, within the framework of Islamic jurisprudence, stands as a testament to the religion's dedication to fostering social justice and equity, with a particular emphasis on the

realm of inheritance rights. At its core, a *Wasiyyah*, or bequest, is an act voluntarily undertaken by an individual before his demise, intended to bestow benefits upon those who are not his direct heirs. This act is not only seen as a way to extend one's benevolence beyond the grave but also as a means to attain spiritual rewards from Allah (SWT). Traditionally, this voluntary bequest is arranged to be fulfilled before the estate is formally divided among the rightful heirs according to Islamic law (Muhammad Khalaf et al, 2017).

In contrast, *Wasiyyah Wajibah*, the obligatory counterpart, mandates the execution of certain bequests from the deceased's estate prior to its distribution. *Wasiyyah Wajibah* (obligatory bequest) is a new concept that evolved precisely in 1946 in Egypt. It moved from being a contemporary juristic concept to becoming a legislative law in many Arabian countries. Sultan (2006) defines *Waṣiyyah Wajibah* as a fraction of property that the grandchild of the deceased deserves when his father dies in the lifetime of his grandfather. After that, he takes the portion of his father the same as he lives, which shall not exceed one-third, and the law requires that. Khalifah (2009) defines *Waṣiyyah Wajibah* as the obligatory *Waṣiyyah* in one-third of the legacy of the child of the deceased's son. The latter died in the deceased's lifetime or died with him legally. So, *Waṣiyyah Wajibah* is something required by the law for the next of kin who does not inherit like the grandchild from son and daughter within the ambit of one-third of the legacy. To execute this *Waṣiyyah*, no initiation is required. If the deceased initiates it by his free will, it will be executed, and if he ignores it, the law will take its course. (Rahman and Monawer, 2020, 3). *Waṣiyyah Wajibah* was enacted by Egyptian law in 1946, followed by the Syrian Family Law in 1953, Tunisian Family Law in 1956, Moroccan Family Law in 1958, Palestinian Law in 1962, Kuwaiti Law in 1971, Jordanian Law in 1976, and so forth (Rahman and Monawer, 2020, 3).

The relevance of *Wasiyyah Wajibah* becomes particularly pronounced in scenarios involving grandchildren who risk being omitted from the inheritance of their parent (the inheritor's child) passes away before the grandparent (Muhammad Khalaf et al, 2017). It also finds application in situations of interfaith inheritance (Nasution et al, 2018), where a non-Muslim heir might otherwise be excluded from receiving an inheritance, and in considerations surrounding adopted children (Wayhuni, 2022).

Scholars have debated the exact proportion of the estate that should be allocated to *Wasiyyah Wajibah*, with opinions varying from a strict one-third limit to more generous interpretations that aim to replicate what the beneficiary might have received under different circumstances (Muhammad Khalaf et al, 2017). This reflects a broader application of the principle of *Istiḥsān* (juristic preference), which involves favoring the stronger evidence or considering the public interest (*Maslahah*) and the overarching objectives of *Sharīʿah* (*Maqasid al-Sharīʿah*), aimed at the preservation of faith, life, intellect, lineage, and property.

By instituting an obligatory bequest for those potentially excluded from direct inheritance, such as grandchildren, contemporary Muslim legal experts not only adhere to the injunctions in the Qur'an 2:180, but also champion the objectives of *Sharīʿah* by fostering social solidarity and mitigating the risks associated with financial hardship. This approach has been extended to address challenges related to interfaith inheritance and the inclusion of adopted children, underscoring Islam's commitment to social justice and the protection of vulnerable community members.

Wasiyyah Wajibah exemplifies the Islamic ethos of comprehensive welfare, extending beyond mere financial support to include emotional, social, and spiritual well-being. It employs the concept of Exceptional *Istiḥsān* (*Istiḥsān Istithnā'i*), which involves creating an exception to a prevailing legal norm, typically underpinned by a more authoritative source such as the Qur'an or the *Sunnah*. The standard regulation dictates that a non-Muslim heir, an adopted child, and grandchildren, in the presence of direct offspring, do not inherit. However, through the application of Exceptional *Istiḥsān*, these groups are exempted from this rule, a stance bolstered by

the Qur'anic verse 2:180. It aims to rectify disparities within families, ensuring wealth distribution that supports the collective welfare of all members, thus reflecting the Islam's holistic view of human welfare.

Moreover, the concept showcases the adaptability of Islamic law to contemporary challenges, illustrating how the foundational principles derived from the Qur'an and *Sunnah* can be dynamically applied through *Ijtihād* (independent reasoning) to meet the evolving needs of society. In essence, *Wasiyyah Wajibah* is emblematic of the profound principles of justice, equity, and compassion that underpin Islamic law. It highlights the religion's nuanced understanding of welfare, advocating for the care of vulnerable family members in a manner that encompasses material, social, and spiritual dimensions. Through its alignment with the objectives of *Maqasid al-Sharī'ah*, this practice not only reaffirms the enduring relevance of Islamic legal principles in contemporary society but also invites a broader contemplation of the values guiding inheritance and wealth distribution practices. This, in turn, emphasizes the potential of religious principles to forge a more equitable and just world for all.

4.5 The Application of *Istiḥsān* in the Inheritance of Hermaphrodite

The concept of a hermaphrodite encompasses an individual, an animal, or a plant that possesses both male and female reproductive organs or traits. Within the Islamic tradition, the Qur'anic verses delineate the principles of inheritance for males and females, whether they are children, parents, siblings, or spouses. However, the specific case of hermaphrodites, whose gender may not be distinctly classified as either male or female, lacks explicit guidance in both the Qur'an and the *Hadith* of Prophet Muhammad (ﷺ). This absence of direct reference necessitates the application of *Ijtihād*, or juristic reasoning, by Islamic scholars to navigate the complexities of inheritance rights for hermaphrodites within the framework of Islamic law.

Through their diligent application of *Ijtihād*, Islamic scholars have identified five distinct scenarios pertaining to the inheritance rights of hermaphrodites in the distribution of an Islamic estate) (al-Ghāmidi, 2015):

1. Exclusion from Inheritance: In certain instances, hermaphrodites may be excluded entirely from the inheritance process, neither inheriting as males nor as females. This is exemplified in situations where the deceased leaves behind a son and a hermaphrodite sibling, with the latter receiving no portion of the inheritance.
2. Inheritance as the Sole Legal Heir: When a hermaphrodite stands as the sole legal heir, he is entitled to inherit the entire estate, thereby excluding any other potential heirs. For example, in the case where the deceased is survived solely by a hermaphrodite child and two maternal brothers, the entire estate goes to the hermaphrodite child, leaving the maternal brothers without any inheritance.
3. Equal Inheritance Regardless of Gender: There are scenarios where the share of inheritance allocated to a hermaphrodite is equal, irrespective of their gender classification. This consensus among scholars is demonstrated in a case where the deceased is survived by a mother and three maternal siblings, including a hermaphrodite.
4. Inheritance Specifically as Male or Female: In this scenario, the hermaphrodite inherits either as a male or as a female, leading to scholarly debate regarding the appropriate allocation. An illustrative example is a situation where the deceased leaves behind a mother, a daughter, and a hermaphrodite child, with the inheritance shares varying based on the gender designation of the hermaphrodite.
5. Inheritance as Both Male and Female: This represents another contentious issue, where it is debated whether a hermaphrodite can inherit as both male and female.

Scholars have proposed various approaches to the dilemma in the last two situations, ranging from assigning the hermaphrodite the minimum possible share to

adjusting the shares of the hermaphrodite and other heirs to the least possible amount or calculating the median share based on male and female entitlements (al-Sarakhsi, 2000).

Given the lack of explicit textual guidance from the Qur'an and *Hadith* on hermaphrodites' inheritance rights, scholars have ventured beyond the direct application of texts that mention males and females to explore alternative perspectives. These efforts aim to ensure that hermaphrodites are neither oppressed nor deprived of their rightful inheritance. They necessitate the derivation of specific rulings for hermaphrodites from the general principles governing male and female inheritance (al-Ṣābūni, 2002). Such juristic endeavours are guided by the principle of *Istiḥsān*, or juristic preference, reflecting the adaptability and depth of Islamic juridical thought in addressing complex social realities.

4.6 The Application of *Istiḥsān* in Grandfather-Sibling Inheritance

Islamic jurisprudence meticulously addresses the estate distribution among heirs, including scenarios that involve a grandfather and the siblings of the deceased, known as *Mirāth al-Jadd Ma'a al-Ikhwah*. The complexity of these cases arises from the lack of direct guidance in the Qur'an and *Sunnah*, necessitating reliance on *Ijtihād* (independent reasoning) to navigate the distribution of inheritance in such circumstances. This issue arises in instances where the deceased is survived solely by a grandfather and siblings or by a grandfather, siblings, and other heirs entitled to fixed shares of the estate. Scholars have thus engaged in extensive debate, deliberating whether the grandfather should be accorded the same status as a father, effectively precluding the siblings from inheriting, or if the siblings should be entitled to inherit alongside the grandfather, given their common lineage through the deceased's father. This connection posits the father as the central link between both the siblings and the grandfather of the deceased (al-Nawawi, 1928).

Al-Nawawi (1928) explains that this discourse has crystallized into two predominant perspectives:

1. The first perspective advocates for treating the grandfather as if he were the father, thereby disqualifying the siblings from inheritance. This standpoint is predicated on the principle that the grandfather assumes the father's role, situating both the grandfather and father within the same paternal category, which is prioritized over sibling relationships. Proponents of this view lean on the interpretation of Qur'anic verse 4:11, which stipulates a specific share for the mother in the absence of the father and presence of siblings, implying that the presence of the father—or, by extension, the grandfather treated as a father—renders the siblings ineligible for inheritance.
2. The second perspective challenges the exclusion of siblings from inheritance by the grandfather's presence. This opinion encompasses both full siblings and paternal half-siblings, explicitly excluding maternal half-siblings, and is supported by a departure from the strict implications of the aforementioned Qur'anic verse towards a more comprehensive evaluation of the grandfather's and siblings' positions. Such scrutiny reveals an equivalence in their relationship to the deceased, all being directly connected through the father. This observation questions the rationale behind favoring one party over another when both occupy analogous positions. This shift away from a literal interpretation of the verse towards a principle-based analysis, known as *Istiḥsān* (juristic preference), aims to align with the objectives (*Maqasid*) of *Sharīʿah*, thereby endorsing this view to prevent injustice towards the siblings.

Advocates of this perspective suggest various methods for distributing the estate between the grandfather and siblings to eliminate any potential unfairness, embodying the *Sharīʿah's* overarching goal of ensuring equitable treatment among heirs (al-Ṣābūni, 2002).

4.7 The Application of *Istiḥsān* in *'Umariyyah* Cases

The '*Umariyyah* cases represent two complex scenarios within the framework of Islamic inheritance law, highlighting the nuanced approach taken to ensure fairness among surviving relatives. These cases are distinguished by their specific configurations of heirs:

1. In the first scenario, the surviving relatives include the husband, father, and mother.
2. In the second scenario, the composition comprises the wife, father, and mother (al-Ghāmidi, 2015).

A key aspect of these cases is the allocation of the estate's shares, particularly concerning the mother's inheritance. According to Islamic inheritance law, the mother is entitled to one-third of the entire estate in such circumstances. However, implementing this rule directly leads to an imbalance: in the first case, the mother would inadvertently receive a larger portion than the father, and in the second case, her share would amount to more than half of what the father receives. This outcome contrasts with a fundamental principle in Islamic inheritance law, where males and females of the same category are present, the male heirs are entitled to twice the share of female heirs.

To address this disparity and ensure a more equitable distribution, Umar bin al-Khattab deviated from the strict application of the rule outlined in the Qur'anic verse 4:11, which assigns one-third of the whole estate to the mother in similar cases. Instead, he adopted a modified approach based on the principle of *Istiḥsān* (juridical preference), which allowed for a recalibration of shares in pursuit of fairness, aligning with the overarching objectives (*Maqasid*) of *Sharīʿah*, which emphasizes justice in the distribution of inheritance (Marybeth, 2015).

Under Umar's adjusted framework: In the first case, the husband is allocated half of the estate, while the mother receives one-third of the remaining estate after the husband's share has been deducted, with the father receiving the residue.

In the second case, the wife is allocated one-fourth of the estate, while the mother receives one-third of the remaining estate after deducting the wife's share, with the father receiving the residue (al-Ṣābūni, 2002).

These adjustments in the *Umariyyah* cases, also known as the *gharrāwin* cases, underscore the complex and thoughtful application of Islamic inheritance laws. They demonstrate how specific configurations of heirs necessitate careful consideration to ensure that the distribution of shares adheres to *Sharīʿah* principles, thereby guaranteeing a balanced and just allocation of inheritance that accounts for the rights and needs of all immediate family members. This approach underscores the adaptability and depth of Islamic juridical thought in addressing real-world issues, ensuring that the principles of justice and equity are upheld in the distribution of an estate among heirs.

4.8 The Application of *Istiḥsān* in *Al-Akdariyyah* Case

Al-Akdariyyah case presents a complex scenario in which the distribution of an estate must be navigated through the provisions stipulated in the Qur'anic verses Q4:11-12. In this case, the deceased is survived by a husband, mother, grandfather, and a full sister. Under the standard procedural application of these verses, the estate division would result in the husband receiving half of the estate, the mother one-third, and the grandfather the remaining one-sixth. This allocation leaves the full sister without any portion of the estate, a situation that raises significant concerns regarding equitable treatment and fairness.

The strict adherence to the aforementioned Qur'anic verses, in this instance, seems to inadvertently perpetrate an injustice towards the full sister. This is particularly contentious given the interpretations that suggest the grandfather's presence should not preclude the siblings from their rightful inheritance. In response to this apparent disparity, Zaid bin Thabit, alongside other erudite scholars, has proposed a refined approach to ensure the equitable distribution of the estate that respects the rights of all parties involved.

These scholars' approach upholds a nuanced application of Islamic juristic principles, and in this context, the concept of *Istiḥsān* (Juristic

preference/equity), to rectify this imbalance. Their proposition involves the recalibration of the estate's distribution after the husband and the mother have received their prescribed shares. According to their analysis, a residue of one-sixth remains, which, under conventional interpretation, would be allocated to the grandfather, excluding the full sister from her inheritance. Contrary to this, their opinion suggests that the full sister should receive her designated share of half. This necessitates a reconfiguration of the remaining estate, combining the full sister's rightful half with the grandfather's one-sixth share, to be subsequently redistributed between the two, with the grandfather receiving twice the amount allocated to the full sister (Ibn Qudāmah, 1997).

This scholarly perspective underscores a rigorous application of *Istiḥsān*, diverging from the literal interpretation of the Qur'anic verses towards a reliance on overwhelming evidence that champions justice and fairness, particularly for the full sister in this case. Through this approach, the scholars' endeavour to align the distribution of the estate with the foundational Islamic principles of equity and compassion, thereby ensuring that all heirs receive their due share in a manner that is both just and reflective of the overarching ethical directives of Islam.

4.9 The Application of *Istiḥsān* in *Al-Mushtarikat* Case

Al-Mushtarikat Case presents a complex legal scenario within Islamic jurisprudence, particularly dealing with inheritance laws as outlined in the Qur'anic verses Q4:11-12. In this case, the deceased's survivors include a husband, a mother, two maternal brothers, and full brother(s). Under standard Islamic inheritance laws, the distribution of the estate would allocate half to the husband, one-sixth to the mother, and one-third to the two maternal brothers, consequently leaving the full brothers without any share of the inheritance.

This distribution, however, raises concerns about equity and justice, particularly in the context of full brothers who share the same mother as the deceased but may have different fathers. To address this potential injustice and ensure a more equitable distribution of the estate according to (Ibn Qudāmah, 1997), `Umar bin al-Khaṭṭab, a distinguished figure in Islamic history, innovated a solution. He proposed the amalgamation of the full brothers with the maternal brothers in the distribution of the one-third share initially allocated to the latter. This adjustment allows for an equal division of this portion among both sets of brothers, thereby acknowledging kinship ties and providing a more balanced approach to inheritance.

This strategic deviation from the strict interpretations of the Qur'anic verses embodies the application of *Istiḥsān*, a juristic principle that prioritizes equity and the overarching objectives of *Sharīʿah*, emphasizing the importance of justice and fairness in Islamic law. This approach not only rectifies what could be perceived as an inequitable outcome but also highlights the adaptability and depth of Islamic legal thought in addressing complex familial relationships and the distribution of estates.

The case is alternatively referred to as the *Himariyyah*, *Yammiyyah*, and *Hajariyyah* cases, names that derive from a poignant analogy made by the full brothers during their appeal to `Umar. They argued metaphorically, questioning if their worth was diminished if their father was considered as insignificant as a donkey (*himar*), a stone (*hajar*), or thrown into a river (*yamm*), emphasizing their shared maternal lineage with the deceased. `Umar's contemplation and subsequent application of *Istiḥsān* demonstrate a nuanced understanding of justice, underscoring the importance of equitable treatment and the recognition of shared maternal bonds in inheritance laws (al-Ghāmidi, 2015).

This historical case illustrates the dynamic interplay between Islamic jurisprudence, ethical considerations, and the pursuit of justice within the framework of *Sharīʿah*.

5. Conclusion

This research has explored the sophisticated utilization of the jurisprudential principles of *Istiṣḥāb* and *Istiḥsān* by Islamic jurists within the domain of inheritance law (*Mirāth*). Through an analysis of diverse classical and contemporary scenarios, it has demonstrated how these intellectual tools enable the derivation of *Mirāth* regulations for complex circumstances lacking explicit textual injunctions.

The discussions and examples analyzed underscore how *Istiṣḥāb*, through its presumption of continuity, allows jurists to account for missing information and avoid rigidity in estates involving fetus heirs, mass fatalities, and disappearances. Meanwhile, *Istiḥsān* provides flexibility to depart from texts and analogical deductions (*qiyās*) and redistribute shares in ways that align with *Sharīʿah* objectives of justice and equity. As highlighted in cases like the *`Umariyyah*, *Al-Akdariyyah*, and *Al-Mushtarikat* scenarios, etc., this principle is pivotal in adapting *Mirāth* to evolving family structures. While this research has focused on some applications of *Istiṣḥāb* and *Istiḥsān*, further exploration of modern bioethical, financial, and familial scenarios would also showcase their contemporary utility in handling evolving *Mirāth* complexities.

The key findings that distinguish this study from others include:

1. Adaptability of *Mirāth* to Societal Changes: The research demonstrates how the principles of *Istiṣḥāb* and *Istiḥsān* enable Islamic jurisprudence to adapt *Mirāth* rulings to evolving familial structures and contemporary challenges, showcasing a dynamic application of Islamic law in the face of societal changes.
2. Comprehensive Application in Modern Contexts: Unlike previous studies, this research provides a holistic examination of both *Istiṣḥāb* and *Istiḥsān*'s roles in *Mirāth*, particularly in novel scenarios like mass fatalities, the rights of hermaphrodites, and the inheritance claims of fetuses, thus filling a significant gap in the academic discourse on Islamic inheritance law.
3. Balancing Rigidity and Flexibility: Through detailed case analyses, the study illustrates how *Istiṣḥāb* and *Istiḥsān* strike a balance between adhering to the core principles of *Sharīʿah* and introducing flexibility to ensure justice and equity in inheritance distribution, thereby offering a nuanced understanding of these jurisprudential tools.
4. Future Research Foundation: By laying a comprehensive groundwork on the application of *Istiṣḥāb* and *Istiḥsān* in various contemporary and complex *Mirāth* scenarios, the research opens avenues for future studies to explore these principles in the context of modern technologies, financial instruments, and changing family dynamics.
5. Utility in Handling Evolving *Mirāth* Complexities: The study highlights the potential of *Istiṣḥāb* and *Istiḥsān* to address modern bioethical, financial, and familial challenges within *Mirāth,* suggesting their relevance in crafting jurisprudential responses to issues arising from advancements in technology and shifts in societal norms.

Overall, the research reveals how principles like *Istiṣḥāb* and *Istiḥsān* empower Islamic jurisprudence to balance adherence to revelatory sources with adaptability to novel contexts. By anchoring *Ijtihād* in the higher objectives (*Maqāṣid*) of *Sharīʿah*, they enable the law to extend Divine guidance to issues unaddressed in primary texts. Their skillful deployment by erudite jurists allows responding to social changes and avoiding hardship.

The study provides a framework for applying *Istiṣḥāb* and *Istiḥsān* to contemporary *Mirāth* dilemmas associated with modern technologies and family configurations. Further research could explore the integration of these tools with other jurisprudential maxims to develop holistic approaches. Overall, this research affirms the enduring legacy of Islamic legal theory in enabling Muslims to practice their faith while confronting the challenges of any time and place.

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