ISTIHSĀN

The Doctrine of Juristic Preference in Islamic Law



Saim Kayadibi

ISTIḤSĀN

The Doctrine of Juristic Preference in Islamic Law

Saim Kayadibi

IBT Islamic Book Trust Kuala Lumpur

© Islamic Book Trust 2010

All rights reserved. No part of this publication may be produced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Published by Islamic Book Trust 607 Mutiara Majestic Jalan Othman 46000 Petaling Jaya Selangor, Malaysia www.ibtbooks.com

Islamic Book Trust is affiliated with The Other Press.

Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Kayadibi, Saim

İstihsan : the doctrine of juristic preference in Islamic law / Saim

Kayadibi.

Includes index

Bibliography: p. 309

ISBN 978-967-5062-46-9

ISBN 978-967-5062-47-6 (pbk.)

1. Presumptions (Islamic law)--Research. 2. Islamic law-- Research.

I. Title.

340.59072

Printed by

Academe Art and Printing Services Sdn. Bhd.

7, Jalan Rajawali 1A

Bandar Baru Puchong

Batu 8, Jalan Puchong

47100 Selangor

For my wife Yasemin and our children Zeynep Pınar, Mehmet Edip Taha, Mevlana Musa & İsmail Yahya who are the joys of our life.

Contents

Glossary	ix
Preface	xxi
Acknowledgements	xiii
Introduction	xvii
1 The Sources of Islamic law	1
Definition of some juristic terms	3
Unanimous sources of Islamic law	14
The Qur'an	14
The Sunnah	16
<i>Ijmā</i> '(consensus)	18
Qiyās (analogical deduction)	22
Controversial sources of Islamic law	29
Definition of istishāb	30
Maşlahah Mursalah (public interest) or al-istişlāh	33
<i>'Urf (customary law)</i>	38
Sadd al-Dharā'i' (blocking the means)	40
Qawl ṣaḥābī (the saying of a Companion of the Prophet)	42
Shar' man qablanā (revealed laws preceding to the Sharī'ah)	44
Istigrā' (induction)	45
Conclusion	45

viii	Istiņsān
2 Development of <i>Ijtihād</i> by <i>Ra'y</i> Concept of <i>ijtihād</i> Validity of <i>ijtihād</i> Implementations of <i>ijtihād</i> at the time of the Prophe Conclusion	57 63 69 et 75 99
3 Definition of <i>Istiḥsān</i> and Analysis <i>Istiḥsān</i> —a historical perspective View point of <i>istiḥsān</i> amongst the scholars Further evidences of the validity of <i>istiḥsān</i> Application of <i>istiḥsān</i> in the early Ḥanafi school Conclusion	114 115 128 169 185 207
4 Various Types of <i>Istiḥsān Istiḥsān</i> in the sense of departing from one ruling <i>Istiḥsān</i> based on <i>sanad</i> in terms of the departure Conclusion	237 240 250 281
Conclusion Bibliography Index	298 309 339