

***Istihsan* in Contemporary Islamic Family Law Contextualizing Legal Reasoning for Maintenance and Child Custody**

Marwit Irianto¹, Ismail^{2*}

¹Universitas Islam Negeri Sjech M. Djamil Djambek Bukittinggi, Indonesia

²Universitas Islam Negeri Sjech M. Djamil Djambek Bukittinggi, Indonesia

*Correspondence: ismail@uinbukittinggi.ac.id

Abstract

Contemporary Islamic family law increasingly encounters social and economic circumstances that cannot always be resolved through the mechanical application of established legal rules. Maintenance and child custody are particularly important because their implementation involves changing family structures, unequal economic capacities, post-divorce vulnerabilities, and the protection of children's welfare. This article examines the relevance of *istihsan* as a method of Islamic legal reasoning in addressing contemporary family law issues, with particular attention to family maintenance and child custody. This normative legal study employs a conceptual and doctrinal approach by examining classical Islamic legal literature, contemporary scholarship, and relevant legal studies concerning *istihsan*, *nafqah*, *hadanah*, *maslahah*, and judicial discretion. The analysis is conducted through identification of the basic rule, examination of circumstances that make strict application problematic, assessment of the stronger legal consideration, and evaluation of its consistency with the objectives of Islamic law. The study finds that *istihsan* provides a controlled mechanism for moving from a general legal analogy or rule toward a more appropriate ruling when its application produces hardship, injustice, or the loss of a stronger benefit. In maintenance cases, this reasoning supports contextual determination according to economic capacity and actual family needs, while in custody cases it supports prioritizing the child's welfare without abandoning Islamic legal principles. The article contributes a contextual model of *istihsan* that connects classical legal reasoning with contemporary family justice while maintaining normative limits against arbitrary judicial discretion.

Keywords: Child Custody, Islamic Family Law, Istihsan, Legal Reasoning, Maintenance

Introduction

Islamic family law occupies a central position in regulating relationships between spouses, parents, and children while simultaneously responding to changing social conditions. Among the most persistent contemporary issues are the determination of family maintenance and the allocation of child custody after divorce. These issues cannot always be resolved solely by referring to formal legal categories because actual family circumstances differ in economic capacity, family structure, parental involvement, and children's needs. Recent studies on post-divorce maintenance demonstrate that judges must consider economic and social conditions when determining maintenance obligations, while contemporary studies of child custody increasingly emphasize the

child's welfare alongside classical custody principles (Aziz et al., 2024; Putri et al., 2026). Such developments demonstrate that Islamic family law requires legal reasoning capable of maintaining normative continuity while responding to concrete circumstances.

Within *usul al-fiqh*, *istihsan* represents one of the mechanisms through which jurists can depart from an apparently applicable analogy or general rule when another legal consideration is regarded as stronger. The method has historically generated disagreement among legal schools, particularly concerning whether it constitutes an independent source of law or a form of reasoning embedded within recognized principles of Islamic jurisprudence. Abu Hanifah and later Hanafi jurists are particularly associated with the systematic use of *istihsan*, whereas al-Shafi'i famously criticized the formulation of *istihsan* when it was understood as legislation based merely on personal preference (Habibullah, 2016; Noorwahidah, 2017). Nevertheless, contemporary scholarship emphasizes that *istihsan* should not be reduced to subjective preference because its legitimacy depends upon identifiable legal grounds, such as *maslahah*, necessity, custom, textual indication, or avoidance of excessive hardship (Kadenun, 2018; Salma, 2015).

Previous studies have discussed *istihsan* primarily from the perspective of *usul al-fiqh*, its relationship with *maslahah*, and its role in legal reform. Other studies have examined individual family law issues such as maintenance, custody, divorce, and marriage registration. Research concerning *nafqah* has shown that maintenance is connected not only to formal marital obligations but also to economic capacity, family resilience, and contemporary gender relations (Hudaya, 2013; Hermanto et al., 2021). Studies of custody similarly indicate a movement from rigid maternal preference toward consideration of children's welfare and broader social circumstances (Ushalli et al., 2023; Putri et al., 2026). However, the literature still requires a more systematic explanation of how *istihsan* can operate as a controlled legal reasoning mechanism across these family law issues rather than being invoked merely as a general synonym for flexibility or *maslahah*.

The central question of this article is how *istihsan* can be applied as a method of legal reasoning in contemporary Islamic family law, particularly in determining maintenance and child custody. The article argues that *istihsan* is relevant when the direct application of a general rule or analogy fails to accommodate significant differences in circumstances and risks producing hardship or undermining a stronger legal objective. Its application, however, must remain connected to recognized principles of Islamic law and cannot be reduced to judicial preference. The purpose of this research is therefore to reconstruct the operational logic of *istihsan* in family law by identifying its forms of application, the factors that justify departure from a general rule, and its implications for contemporary family justice.

Method

This research employs normative legal research because its primary object is the legal reasoning embodied in Islamic jurisprudence concerning *istihsan* and its relevance to contemporary family law. The study does not rely on interviews, field observations, or survey data. Instead, it examines legal concepts, doctrinal arguments, and scholarly

interpretations concerning *istihsan*, *nafqah*, *hadanah*, *maslahah*, and judicial discretion. A conceptual approach is used to clarify the meaning, structure, and limits of *istihsan*, while a doctrinal approach is employed to examine how the method relates to established principles of Islamic family law. This approach is appropriate because the main problem concerns the relationship between a classical method of legal reasoning and contemporary family law problems.

The primary sources consist of classical and contemporary Islamic legal literature discussing *istihsan* and related principles of *usul al-fiqh*. Secondary sources include peer-reviewed journal articles addressing maintenance, child custody, Islamic family law reform, *maqasid al-shari'ah*, and judicial discretion. Recent studies concerning post-divorce maintenance and child custody are also used to identify contemporary legal problems that require contextual reasoning (Aziz et al., 2024; Putri et al., 2026). Sources were selected based on their relevance to the research question, scholarly credibility, and contribution to understanding the relationship between legal norms and changing family circumstances. Legal materials were organized according to the themes of *istihsan*, maintenance, custody, hardship, *maslahah*, and family justice.

The analysis was conducted in four stages. First, the study identifies the general legal rule or dominant doctrinal position applicable to each family law issue. Second, it examines circumstances in which strict application of that rule may generate hardship, injustice, or insufficient protection of a legally recognized interest. Third, the analysis identifies the alternative legal consideration that may justify departure from the general rule and evaluates whether that consideration has a legitimate basis in Islamic legal reasoning. Fourth, the resulting reasoning is examined in light of *maqasid al-shari'ah*, particularly the protection of life, lineage, property, dignity, and family welfare. This analytical process prevents *istihsan* from being treated as unrestricted discretion and instead positions it as a structured form of contextual legal reasoning.

Result

Istihsan and the Contextualization of Family Maintenance

The determination of maintenance according to the concrete circumstances of the family rather than through a completely uniform monetary standard. Classical Islamic law establishes the husband's responsibility for providing maintenance, but the amount and form of maintenance are closely related to ability, customary standards, and the actual needs of the wife and children. The Qur'anic principle of providing according to one's capacity provides an important normative foundation for contextual determination. Contemporary studies similarly demonstrate that judicial consideration of maintenance increasingly involves balancing the payer's financial capacity with the legitimate needs of family members (Aziz et al., 2024). From the perspective of *istihsan*, this contextualization illustrates the possibility of preferring a ruling that better realizes justice when a rigid application of a general formulation would disregard significant differences between families.

Several factors influence the relevance of *istihsan* in maintenance disputes. Economic inequality between families is particularly important because the same nominal amount of maintenance may have substantially different consequences depending on

income, employment, living costs, and the number of dependents. Post-divorce circumstances create additional complexity because the dissolution of marriage does not necessarily terminate parental responsibilities. Contemporary research shows that maintenance after divorce may remain difficult to implement because of economic constraints, conflict between parents, limited legal awareness, and weak enforcement mechanisms (Putra et al., 2025; Fatimawali, 2026). These circumstances indicate that the legal determination of maintenance requires more than the identification of a formal obligation. It requires an assessment of whether the legal arrangement effectively protects the rights for which the obligation exists.

The transformative implication is that *istihsan* can contribute to a conception of maintenance that emphasizes substantive family justice rather than merely formal compliance. The method does not eliminate the husband's or father's legal responsibility; instead, it provides a framework for determining how that responsibility can be implemented proportionately and effectively. In this sense, *istihsan* connects the normative obligation of *nafqah* with the objectives of protecting family members from deprivation and hardship. Recent discussions of maintenance also question approaches that excessively connect financial support to hierarchical understandings of marital obedience and instead emphasize justice, family resilience, and protection of vulnerable family members (Nuraini & Sopyan, 2026). Therefore, *istihsan* can support a contextual understanding of maintenance while retaining the fundamental obligation established by Islamic law.

Istihsan and Contemporary Child Custody

Classical jurisprudence contains detailed rules concerning *hadanah*, including the priority of certain relatives and conditions associated with custody. However, contemporary families present circumstances that may not correspond to the social conditions in which classical rules were formulated. Parents may have different employment patterns, children may have particular educational or psychological needs, and allegations of neglect or conflict may alter the suitability of a particular custodial arrangement. Contemporary Indonesian scholarship increasingly identifies the child's best interests as a significant consideration in custody disputes, while still maintaining the normative framework of Islamic family law (Ushalli et al., 2023; Putri et al., 2026). This development creates an appropriate space for examining *istihsan* as a method for reconciling general custody rules with specific circumstances.

The factors that justify contextual reasoning in custody disputes include the child's age, physical and psychological condition, educational needs, parental capacity, family environment, and the possibility of harm resulting from a particular custodial arrangement. Recent studies indicate that Indonesian and Malaysian legal systems both recognize the importance of children's best interests, although their institutional and procedural mechanisms differ (Putri et al., 2026). A contextual approach does not necessarily reject the classical preference for maternal custody during particular stages of childhood. Rather, it asks whether applying the general preference in a specific case continues to realize the underlying purpose of custody. Where the general arrangement

would expose the child to substantial harm or fail to protect the child's welfare, another legally stronger consideration may justify a different determination.

The transformative implication is that *istihsan* can facilitate a transition from rule-centered custody toward purpose-oriented protection without severing contemporary reasoning from Islamic jurisprudence. The child's welfare becomes significant not because classical rules are considered obsolete, but because the purpose of *hadanah* is the protection and proper development of the child. This reasoning is consistent with scholarship that proposes integrating child-centered justice with Islamic legal principles (Ushalli et al., 2023). The use of *istihsan* therefore provides a methodological bridge between established doctrinal categories and contemporary realities. Nevertheless, the method must remain constrained by evidence, recognized legal principles, and the objectives of Islamic law so that judicial flexibility does not become arbitrary decision-making.

Discussion

The results demonstrate that *istihsan* can be understood as a structured mechanism for contextualizing Islamic family law rather than as unrestricted legal flexibility. In both maintenance and custody, a general rule provides the initial legal framework, but concrete circumstances may reveal that mechanical application of the rule does not adequately achieve justice or protect the intended legal interest. The significance of *istihsan* lies in its capacity to identify a stronger consideration without discarding the normative structure of Islamic law. This interpretation is consistent with the broader relationship between *istihsan* and Islamic legal reform, in which the method is associated with the realization of *maqasid al-shari'ah* rather than with personal preference (Salma, 2015).

The need for contextual reasoning arises because family relationships are inherently dependent upon social, economic, and personal circumstances. Maintenance illustrates this clearly. A formal recognition of the husband's obligation is insufficient if the amount imposed cannot be connected to actual capacity and legitimate needs. At the same time, a purely economic approach could weaken the rights of wives and children if the payer's claim of financial difficulty is accepted without adequate examination. The function of *istihsan* is therefore not simply to reduce obligations but to identify a legally justified balance between competing interests. The same principle applies to custody, where formal priority rules must be assessed against the actual condition of the child and the capacity of each parent.

The consequences of this approach extend beyond individual disputes. When *istihsan* is applied responsibly, it can strengthen substantive justice in Islamic family law by ensuring that legal rules continue to serve the purposes for which they were established. In maintenance cases, this may strengthen protection against economic vulnerability. In custody cases, it may prevent the formal application of parental priority from overriding the child's welfare. Contemporary studies of divorce in Indonesia demonstrate that parental obligations continue after marital dissolution, while implementation can be affected by economic inequality, parental conflict, weak legal awareness, and institutional limitations (Putra et al., 2025). Consequently, contextual

legal reasoning should be accompanied by effective institutional mechanisms so that legal principles are translated into enforceable family protection.

The present analysis also differs from approaches that equate *istihsan* with *maslahah* in a broad and unrestricted sense. Although *maslahah* can constitute an important basis of *istihsan*, not every beneficial outcome automatically qualifies as *istihsan*. Classical debates concerning the method show that its legitimacy depends on the existence of a stronger legal consideration that can justify departure from an apparently applicable rule (Noorwahidah, 2017; Kadenun, 2018). This distinction is important for contemporary family law because excessive reliance on abstract notions of welfare may create uncertainty and undermine legal predictability. The application of *istihsan* should therefore be accompanied by an explicit explanation of the original rule, the specific difficulty created by its application, the alternative consideration, and the legal principle supporting the alternative.

Recommendation of this research is that the use of *istihsan* in contemporary Islamic family law should be developed through a transparent four-part reasoning model: identifying the general rule, establishing the exceptional circumstance, demonstrating the stronger legal consideration, and verifying consistency with *maqasid al-shari'ah*. Religious court judges, legal scholars, and policymakers can use this model to explain why a particular family law outcome departs from a general doctrinal position. Such transparency is especially important in maintenance and custody disputes because these cases involve vulnerable parties and have direct consequences for family welfare. *Istihsan* should therefore be positioned neither as unrestricted judicial discretion nor as a mechanism for abandoning classical jurisprudence, but as a disciplined method for maintaining the relevance of Islamic family law under changing social conditions.

Conclusion

Istihsan remains relevant as a method of Islamic legal reasoning for contemporary family law because it provides a structured way to respond to circumstances in which strict application of a general rule may produce hardship, inadequacy, or injustice. In the context of family maintenance, the method supports contextual consideration of economic capacity, family needs, and the continuing protection of wives and children. In child custody, it allows legal decision-making to consider the child's actual welfare and circumstances while maintaining the normative foundations of *hadanah*. The method therefore offers a means of connecting classical legal reasoning with contemporary family realities.

The significance of *istihsan* lies not simply in its capacity to produce flexible outcomes but in its ability to preserve the objectives of Islamic law while accommodating differences in circumstances. Its application can strengthen substantive justice when it is based on identifiable legal considerations and directed toward protecting legitimate interests. The approach also demonstrates that Islamic family law need not choose between doctrinal continuity and contemporary relevance. Instead, contextual legal reasoning can operate within the broader framework of *usul al-fiqh* and *maqasid al-shari'ah*.

This research is limited by its normative and literature-based character and therefore does not empirically examine how judges actually formulate *istihsan*-based reasoning in individual cases. Future research should examine religious court decisions, judicial reasoning, and comparative family law practices in different Muslim jurisdictions to determine how contextual legal reasoning is operationalized institutionally. Such research would strengthen understanding of the relationship between *istihsan*, judicial discretion, and contemporary family justice while providing a more concrete basis for developing methodological guidelines for Islamic family law adjudication.

Credit Authorship Contribution Statement

Marwit Irianto contributed to Conceptualization, Methodology, Investigation, Data Curation, Formal Analysis, Writing – Original Draft, and Writing – Review & Editing. Ismail contributed to Conceptualization, Methodology, Supervision, Validation, Formal Analysis, Writing – Review & Editing, and Project Administration. Both authors approved the final version of the manuscript and agreed to be accountable for all aspects of the work.

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The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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Data Availability Statement

The data supporting the findings of this study are derived from publicly available legal documents and published scholarly sources. All materials used in the analysis can be accessed through relevant legal databases and academic databases.

Declaration of Generative AI and AI-Assisted Technologies in the Writing Process

Artificial intelligence tools may have been used during the language-editing and drafting process. The authors remain fully responsible for the accuracy, interpretation, originality, and final content of the manuscript.

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