

PRESUMPTION OF CONTINUITY (*ISTISHAB*)

- Definition
- Types and position of *istishab*
- Legal maxim originating from *istishab*
- *Istishab* is the last ground of *fatwa*

Definition

- *Istishab* is derived from the word *suhbah*,
- Literally means accompaniment and keeping close association or attachment.
- Technically means “maintenance of status quo until a proof is furnished in favour of its changes.”
- In other words, *istishab* is the presumption of the continuation of both the positive and the negative until the contrary is established by evidence.
- It concerns either with the presumption of facts or with the established rules and principle of law.

Definition continue...

- -If a specific rule was proved as positive in the past, it will continue to remain positive until an evidence which proves it as negative is furnished.
- -If a specific rule was proved as negative in the past, it will continue to remain negative until an evidence which proves as positive is furnished.

Definition continue...

- Example:
 - 1) If a person leaves his house for a work and does not come back. Nothing is known about his life and death, it will be decided on the basis of the principle of *istishab* that he is alive until an evidence for his death is produced.
 - 2) If A buys a hunting dog from B with the proviso that it has been trained to hunt, but then A claims that the dog is untrained. A's claim will be accepted under *istishab* unless there is evidence to the contrary. For *istishab* maintains the natural state of things, which in the case of animal is the absence of training.

Types of *istishab*

- 1) The general principle with regard to things in their original state is permissible.

This is the presumption of continuity of legal value of things that all things are permissible unless prohibited by *Shari'ah*.

It is only applied to beneficial things. The basis of this principle is verses of the Qur'an.

“He it is who created for you all that is in the earth” (al-Baqarah (2):29)

“And He has subjected to you what is in the heaven and what in the earth” (al-Jathiyah(45):13)

Types of *istishab* continue...

- 2) The presumption of continuity of non existence in the state of affairs. The principle of free from obligation is of this kind. The jurists are in agreement that originally a man is free from liability, of rights and obligations.

For example, if a man claims a right or debt due on another person, he is required to produce evidence for that.

The proof of this principle is based on Sunnah.

“Proof lies on the plaintiff and the oath is to be sworn by the defendant.”

Types of *istishab* Continue...

3) The presumption of existence of what is indicated by Shari'ah.

Example:

- Once a contract of sale is concluded, it is presumed to remain in force until there is a change. Thus the ownership of the purchaser is presumed to continue until a transfer of ownership can be established by evidence. Since the contract is permanently valid under Shari'ah and does not admit any time limit, it is reasonable to presume its continuity until there is evidence to the contrary.

Types of *istishab* continue...

- If a man is sure of his ablution for saying prayer, then he becomes doubtful about the extinction of his ablution, he can observe prayer, for general principle is the presumption of continuity of that which is established by certainty.
- Therefore the jurists assert that “certainty is not extinguished by doubt.”

Istishab as a source of Islamic law

- The majority of legal theorists in general hold that presumption of continuity of existing condition or state of affairs is a proof of Shari'ah that should be followed in fatwa and administration of justice, because presumption of status quo belongs to matter which is taken as a norm by the intellect and the social order proceeds according to it.
- The people still decide about the survival of their relatives who traveled abroad presuming the continuity of their survival as they were alive before their journey.

Continue...

- However, they differ on the scope of the application of this principle.
- According to the Maliki, the Shafi'i and the Hanbali, istishab is a perfect proof, that is, on both sides negative and positive.
- It is a proof for denying something and for establishing a claim.

Continue...

- A missing person will be deemed alive presuming the continuity of his life.
- The rights to which he is entitled to would remain as they are. So no one will inherit him, nor will his wife be divorced.
- Besides, he also will entitle to new rights.

Thus if one of his relatives dies, he will inherit his relatives.

Continue...

- On the other hand, some Hanafi jurists hold that *istishab* is a proof restricted to negative side only. It is a proof for denying something but not for establish a claim.
- Example, the rights already established for missing person will remain as they are, and they will not be extinguished, presuming his as alive, but the new rights will not be established in his favour, because the condition for establishment of these new rights is his being alive.

Legal maxim originating from *istishab*

- It is a fundamental principle that a thing shall remain as it was originally.
- The general principle is that the original state of things is permissible.
- Freedom from liability is a fundamental principle.
- Certainty is not dispelled by doubt.

Istishab is the last ground of *fatwa*

- When the jurists is asked about the ruling of particular case, he must first search for a solution in the *Qur'an*, the *Sunnah*, *ijma'*, *qiyas* and *maslahah*.
- If a solution is still wanting, he may resort to *istishab* in either its positive or negative capacities.