

## **Istishab (Presumption of Continuity)**

The original unmodified lecture by Shah Abdul Hannan can be accessed from: [http://www.wponline.org/vil/Books/SH\\_Usul/urf\\_and\\_istishab.htm](http://www.wponline.org/vil/Books/SH_Usul/urf_and_istishab.htm)

Modifications based on Prof. Hashim Kamali's book "Principles of Islamic Jurisprudence"

Istishab literary means courtship or companionship. In Usul-al-Fiqh, Istishab means presumption of existence or non-existence of facts. It can be used in the absence of other proofs (dalil).

It has been validated by a large member of scholars, though not all. In its positive sense, Istishab presumes continuation of a fact (marriage or a transfer of ownership) till the contrary is proved. However, the continuation of a fact would not be proved, if the contract is of temporary nature (for instance, Ijarah or lease). Istishab also presumes continuation of negative.

Because of its basis in probability, Istishab is not a strong ground for deduction of the rules of Shariah. Hence when it comes in conflict with another proof (dalil) the latter takes priority. Istishab is of four types:

- a. Istishab al-`adam al-`asli (presumption of original absence) which means that a fact or rule which had not existed in the past is presumed to be non-existent. For instance, every person is presumed to be innocent (free from liability) until the contrary is established by evidence.
- b. Istishab al-wujud al-asli (presumption of original presence). This means that the presence of that which is indicated by law or reason is taken for granted. For example, if a marriage is contracted, it is valid till its annulment (by divorce for instance) is recognized.
- c. Istishab al-hukm (continuity of rules and enactments) which presumes the continuity of general rules and principles of law. For instance when there is a ruling in the law (whether prohibitory or permissive), it will be presumed to continue.
- d. Istishab al-wasf (continuity of attribute) means to presume continuity of an attribute until the contrary is established. So for example, clean water is presumed to remain as such till a change (in odor or color) is observed. Another example is that after making ablution, the state of ritual purity (taharah) is presumed to continue till it is vitiated. A mere doubt that it is vitiated is not sufficient to nullify the taharah.

The Ulama' of Usul are in general agreement on the first three types of Istishab. There is more disagreement on the fourth. For example, assume a missing man. Since he was alive before his missing, he will be presumed as such (continuity of attribute) unless his death is established by evidence.

Therefore, the four schools agree that his money and property should be left intact and not distributed among his legal heirs. But what if one of his relatives die while he is missing and he is entitled to a share of the deceased relative's property. The Hanbalis and Shafi`is say that his share should be added to his own property because he is presumed to be alive and thus sustaining all his legal rights. The Hanafis and the Malikis, on the other hand, refuse this ruling. They rule that the man's share should be reserved (by the state for example) and not added to his property. The difference is that the Hanbalis and the Shafi`is validate Istishab in its defensive and affirmative capacities, i.e. it defends the already existing rights and validates the acquisition of new rights. The Hanafis and Malikis validate Istishab only in its defensive capacity but not to be used as a basis for the creation of new rights.

Some important legal maxims have been founded on Istishab, such as :

- a. **Certainty can not be disproved by doubt** (al-yaqin la yuzal bil shakk). (see the ablution example above).
- b. **Presumption of original freedom from liability** (bara'ah al-dhimmah al-asliyyah). This is basically the **presumption of innocence**.
- c. **Permissibility is the original state of things** (al-asl fi al-ashya' al-ibahah). Something that is not forbidden by the Quran or the Sunnah (directly or indirectly via Qiyas) is presumed to be permissible (NOT obligatory). The Hanbalis used this maxim to rule that prospective spouses are at liberty to enter stipulations in the marriage contract including a condition that the husband should remain monogamous. The Hanbalis are alone on this because the scholars from other schools consider such a condition to amount to a superimposition on the enactments of the Shari`ah. Polygyny<sup>1</sup> is rendered lawful by the Lawgiver Allah (swt) and it is not up to the individual to overrule it. The Hanbalis, however, argue that the intentions of Allah (swt) regarding marriage are satisfied by monogamy. As it is, polygyny is just a mere permissibility and there is nothing in the sources forbidding stipulating against it. Therefore such a stipulation is valid and the husband is committed to abide by it. **Note that** this maxim is not applied in cases of rituals. For example, one cannot say that we can pray six times a day because there is nothing against it in the sources. Regarding ritual performances and devotional matters, anything is not allowed unless permitted by the Prophet (saw), i.e. no one can invent a ritual.

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<sup>1</sup> Polygamy: The condition or practice of having more than one spouse at one time. Polygyny: The condition or practice of having more than one wife at one time. Polyandry: The condition or practice of having more than one husband at one time.