II. Types of Istihsan   أنواع الاستحسان

D- Istihsan on the basis of custom. استحسان العرف
E.g. Endowment (waqaf). الوقف
According to the established principle in Hanafi school regarding waqaf, it should be permanent in nature. Thus based on this principle, the waqaf of movable property is not permissible since it may be easily damage. However, Muhammad Shaybani allows waqaf of movable property وقف المنقولات because it is customarily practiced by the people.

D- Istihsan on the basis of public interest. استحسان المصلحة
E.g. Contract of Muzara'ah (agriculture). عقد المزارعة
According to the established principle in Hanafi School, the contract of muzara'ah is terminated with the death of both contracting parties i.e. the owner of the land and the farmer or any one of them. But the Hanafi jurists made an exception in one situation i.e. in case of the death of the owner of the land and the crops have not yet ripe. This is for the protection of the interest of the farmer.

E- Istihsan on the basis of concealed analogy. استحسان القياس الخفي
E.g. Mortgage of minor property by guardian. رهن ملكية الصغير
According to Hanafi jurists, the guardian is allowed to carry out some kind of dispositions regarding minor's property and he also is not allowed to carry out some kind of dispositions. Among the disposition that is allowed is deposit minor's property for safe keeping. And the disposition which is not allowed is to take minor's property for the payment his own debt. The issue in question is whether the guardian is allowed to mortgage minor's property.

III.   Istihsan as a source of Islamic Law الاستحسان كمصدر للأحكام
There are three different opinions of Muslim jurists on istihsan.
• The majority hold that istihsan is a source of Islamic law.
• However, the Shafi'i has objected to the use of the principle of istihsan. Imam al-Shafi'i asserted that it means to make law by its arbitrary opinion and a doctrine based on desire.
• According to some jurists, istihsan is a source of Islamic law but it is not an independent source.