

الاستصحاب

PRESUMPTION OF CONTINUITY (ISTISHAB)

I. Definition

- **Literally:** Istishab is derived from the word subbah, 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.

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

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 based on 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.

II. 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: 29) “And He has subjected to you what is in the heaven and what in the earth” (alJathiyah: 13)

2- The presumption of continuity of nonexistence in the state of affairs. The principle of free from obligation is of this kind. The jurists agree 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.”

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.

- 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, "certainty is not extinguished by doubt."