

الاستحسان

Juristic Preference

(Istihsan)

I. Definition تعريف الاستحسان

• Istihsan literally لغة means to deem or consider something good حسناً . اعتبار الشيء حسناً

• Technically اصطلاحاً, there are many definitions given by the jurists. Through these definitions, Istihsan can be realized in two situations:

First: in a situation where the jurist found an issue which come under a general text or principle of fiqh and thus the ruling of the issue and its existing precedent are based on these general text and established principle of fiqh. In the same way, there are specific proofs for the issue namely, legal text, ijma', necessity, custom, public interest which indicate another ruling different from the ruling based on general text and established principle of fiqh. The jurist found that the ruling based on specific proofs is more favourable and he acts on it.

Second: where the jurists found an issue which is no ruling in the Qur'an, Sunnah and ijma'. But there are two conflicting proofs of analogies for the issue. One is manifest analogy قياس جلي and another is concealed analogy (hidden qiyas) قياس خفي and he found that the concealed analogy is stronger.

II. Types of Istihsan أنواع الاستحسان

A- Istihsan on the basis of the text. استحسان النص

E.g. forward sale of salam بيع السلم .

There are two proofs for salam: One is general text which indicates that it is not permissible of salam i.e. the Sunnah of Messenger of Allah "sale not what is not with you" لا تبع ما ليس عندك . Another proof is specific text which permitted salam sale i.e. the Sunnah "Whoever concludes salam, let him do so over a specified measure كيل معلوم, specified weight وزن معلوم and specified period of time أجل معلوم."

B- Istihsan on the basis of Ijma'. استحسان الإجماع

E.g. Manufacturing contract (istisna') عقد الاستصناع

According to principle of fiqh, istisna' is not permissible because the subject matter of contract موضوع العقد is absent. However, the Muslims have dealt تعاملوا with this type of transaction معاملة since long and there are no one from mujtahid who oppose it. Thus it is considered as ijma'.

C- Istihsan on the basis of necessity and need. استحسان الضرورة أو الحاجة

E.g. Hearsay evidence بيينة مستندة إلى السماع من الغير

Based on general principle, it is not admissible. Since the witness الشاهد has to observe and listen by himself. But it is exceptional to the case of death and giving birth for

necessity and need. Since it causes hardship to find a person who really observed such happening or event.