JURISTIC PREFERENCE
(Istihsan)

- Definition
- Types of Istihsan
- Istihsan as a source of Islamic law
Definition

- Istihsan literally means to deem or consider something good.
- Technically, there are many definitions given by the jurists.
  - According al-Imam al-Karkhi, a Hanafi jurists: Istihsan is to depart from the existing precedent, by taking decision in a certain case different from that on which similar case has been decided, for a reason stronger than the one that is obtained in those cases.”
  - While quoting al-Karkhi’s definition, Al-Sarakhsi added: the precedent that is set aside by istihsan normally consists of an established analogy which may be abandoned in favour of superior proofs, namely the Qur’an, Sunnah, necessity or stronger qiyas.
- Al-Halwani defines it as “the giving up of analogy for stronger evidence from the Book, the Sunnah or ijma’.

- Ibn al-Arabi, a Maliki jurist, has defined istihsan as to abandon the requirement of the proof as an exception and to make concession when the proofs conflict. He elaborated that the departure in question may be justified by custom, public interest or ijma’.

- According to Ibn Taymiyyah and also Ibn Qudamah, the Hanbali jurists, istihsan is the abandonment of one legal ruling for another which is considered better on the basis of the Qur’an, Sunnah or ijma’.
Zakiy al-Din Sha’ban, a contemporary Muslim scholar, defines Istihsan as the jurist departs from a ruling of an issue as according to the existing precedent, to another ruling on account of specific proof which requires such departure as according to his view, whether such specific proof is the text, ijma’, necessity, custom, public interest or hidden qiyas, and whether the ruling as according to the existing precedent is based on the general text, established principle of fiqh or apparent qiyas.
Thus according to Zakiy al-Din, 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 jurists found that the ruling based on specific proofs is more favourable and he act on it.
Definition Continue...

• 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 and another is concealed analogy and he found that the concealed analogy is more stronger.
Types of Istihsan

1) Istihsan on the basis of the text
e.g. Forward sale of salam

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’

Another proof is specific text which permitted salam sale i.e. the Sunnah “Whoever concludes salam, let him do so over a specified measure, specified weight and specified period of time.”
Types continue...

2) Istihsan on the basis of Ijma’

   e.g. Manufacturing contract (istasna’)

   According to principle of fiqh, istisna’ is not permissible because the subject matter of contract is absent.

   However, the Muslims have dealt with this type of transaction since long and there are no one from mujtahid who oppose it. Thus it is considered as ijma’
Types Continue...

3) Istihsan on the basis of necessity and need.

E.g. Hearsay evidence.

Based on general principle, it is not admissible. Since the witness 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 cause hardship to find a person who really observed such happening or event.
4) Istihsan on the basis of custom e.g. Endowment (waqaf)

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 Saybani allow waqaf of movable property because it is customarily practised by the people.
5) Istihsan on the basis of public interest.

e.g. Contract of Muzara’ah (agriculture)

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.
6) Istihsan on the basis of concealed analogy

   e.g. Mortgage of minor property by guardian.

   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.
Istihsan as a source of Islamic Law

• There are three different opinion of Muslim jurists on istihsan.
• The majority hold that istihsan is a source of Islamic law.
• However, the Shafi’is have objected to the use of the principle of istihsan. Imam al-Shafi’i asserts 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.
Proofs of *Istihsan*

- It is established by observation of the fact of the situation that the application of the general principle of fiqh or general text to some cases (issues) would cause disadvantage or not bring benefit to the people. Because each issue has its own characteristic and it is surrounded by different environment. Therefore, it would be mercy and fair to the people that allow the jurists to depart from the ruling which is based on general text or general principle of fiqh to another ruling that would bring benefit to the people.
Proofs of *Istihsan*

- It is established by observation of the texts of the Qur’an and Sunnah that there are examples of the principle of departing from one ruling to another. e.g., “He hath only forbidden you dead meat and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity without willful disobedience, nor transgressing due limits, then is he guiltless. For Allah is Oft-Forgiving most Merciful.” (al-Baqrarah (2): 173)
Continue...

- “Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with Faith...”

  (al-Nalh (16): 106)