

# *Usul al-Fiqh*

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## **10. Istihsan and Maslaha**

**Istihsan (Juristic Preference):** Istihsan literally means to deem something preferable. In its juristic sense, Istihsan is a method of exercising personal opinion (*ray*) in order to avoid any rigidity and unfairness that might result from literal application of law. Istihsan as a concept is close to equity in Western law. However equity in Western law is based on natural law, whereas Istihsan is essentially based on divine law.

Istihsan is not independent of Shariah, it is integral part of Shariah. Istihsan is an important branch of law to the changing needs of society. Istihsan has been validated by Hanafi, Maliki and Hanbali jurists. Imam Shafi, Shii and Zahiri Ulama have rejected it as a method of deduction. However, in effect Majority have accepted Istihsan.

It has been mentioned that decision of Umar Bin Khattab to suspend "hadd" penalty (penalty prescribed by the Quran and Sunnah) of amputation of hand during famine is an example of Istihsan. Here positive law of Islam was suspended as an exceptional measure in an exceptional situation (for other examples see text book). A major jurist Al-Sarakhsi considers Istihsan as a method of seeking facility and ease in legal injunctions and is in accord with the Quran (2:183). Kamali says that companions (Sahabi) and successors (Tabiun) were not merely literalist. On the contrary, their rulings were often based on their understanding of the spirit and purpose of Shariah. Kamali gives a new example. Oral testimony was the standard form of evidence in Islamic law. However, now in some cases photography, sound recording and laboratory analysis have become more reliable means of proof. Here is a case of Istihsan by which method we can prefer these means of proofs over oral testimony in many cases.

Hanafi jurist Abul Hasan al Karkhi defines Istihsan as a principle which authorizes departure from an established precedent in favor of a different ruling for a stronger reason. The Maliki jurists are more concerned with Istislah (consideration of public interest) than Istihsan. They validate Istihsan as more or less similar to Istislah or as a part of Istislah. (See Maliki and Hanbali definitions in the Text book).

There is no Qati (definitive) authority for Istihsan in the Quran and the Sunnah. However, verses 34:18 and 39:55 of the Quran have been quoted in support. Similarly, a very famous Hadith: "La darara wa la dirara fil Islam" [no harm shall be inflicted or tolerated in Islam] has been quoted in support. Istihsan is closely related to 'ray' (opinion) and Qiyas (analogical deduction). Both in Qiyas and Istihsan, 'ray' is an important component, more heavily in case of Istihsan.

Sahabis were careful not to apply 'ray' at the expense of Sunnah. Ahlal Hadith mostly avoided using 'ray'. Most Fuqaha, on the other hand, liberally used 'ray' in deducing law and they came to be known as "Ahlur Ray".

Many hold that one kind of Istihsan is essentially Qiyas Khafi (Hidden analogy). They think that Istihsan is a departure from Qiyas Jali (obvious analogy) to Qiyas Khafi. There is another form of Istihsan in which exception is made to the general rule for the sake of equity and justice on the basis of some 'nass' (textual evidence), approved custom, darurah (necessity) or Maslahah (public interest). Examples of Istihsan of the above two types may be seen in the text book (Kamali - pages 254-257).

Al-Shafii has criticized Istihsan on the basis of Quranic verses 4:59 and 75:36. However, these verses are not categorical on Istihsan. Al-Ghazali has criticised Istihsan but stated that Shafii's recognize Istihsan based on detail from the Quran and the Sunnah. Al-Amidi (a Shafii jurist) has stated that Al-Shafii also resorted to Istihsan. Modern jurists have stated that the essential validity of Istihsan is undeniable.

**Maslahah Mursalah:** Maslahah literally means benefit or interest. When qualified as Maslahah Mursalah it refers to unrestricted public interest. Maslahah Mursalah is synonymous with Istislah which is also called Maslahah Mutlaqah. Al Ghazali thinks Maslahah consists of considerations which secure a benefit or prevent a harm. Protection of life, religion, intellect, lineage and property is Maslahah.

On the basis of Maslahah, the companions decided to issue currency, to establish prisons and impose Kharaj (agricultural land tax). The Ulama of Usul are in agreement that Istislah is not a proof in respect of devotional matters (Ibadah) and in respect of specific Shariah injunctions, for example, shares of inheritance. The majority of Ulama maintain that Istislah is a proper ground for legislation. Al-Shatibi points out that this is the purpose of Quranic Ayat No. 107 of sura Al Anbiya that "We have not sent you but as a mercy for all creatures". There is support for Maslahah in the Quran in Sura Younus (10:7), in Sura Hajj (22:78) and in Sura Al-Maidah (5:6).

The Ulama have quoted a number of Hadith in support, such as the following :

- a. "No harm shall be inflicted or tolerated in Islam".
- b. "The Prophet (SM) only chose the easier of two alternatives so long as it did not amount to a sin".
- c. "Allah loves to see that His concessions (rukksah) are observed, just as He loves to see that His strict laws (azaim) are observed".

The above would confirm that no unnecessary rigour is recommended in the enforcement of Ahkam and that the Muslims should avail of the flexibility and concessions of Shariah.

All the Khulafa-I-Rashidun acted in pursuance of Maslahah. Abu Bakr (RA) compiled the Quran. Umar (RA) held his officials responsible for abuse of public office. Usman (RA) distributed the authenticated copy of the Quran and destroyed the copies of variant texts. Ali

(RA) held the craftsmen and traders responsible for the loss of goods that were placed in their custody.

Maslahah has been upheld by the majority of Ulama. However, strong support for it comes from Imam Malik (See Kamali). Maslahah has been divided into three types by Shatibi and some other scholars -

- a. essentials [daruriyyat],
- b. the complementary [hajjiyat] and
- c. beautifications [tahsiniyyat].

From the point of view of availability or otherwise of textual authority, Maslahah has been further sub-divided into the following :

- a. al-Maslahah al-Mutabarrah [accredited Maslahah] which has been upheld in the Shariah such as defending the right ownership by penalizing the thief.
- b. Maslahah Mursalah is that which has upheld nor nullified by the Shariah such as provision in law in many Muslim countries for documentary evidence to prove marriage or ownership of property.
- c. Maslahah Mulgha which has been nullified either explicitly or by indications in Shariah (for examples of all these, see Kamali).

To validate Maslahah the following conditions have to be met :

- a. Maslahah must be genuine,
- b. Maslahah must be general (Kulliyah) - that is it secures Maslahah for all.
- c. it must not be in conflict with clear Nass.

In his book "Masalih al Mursalah", Al Tufi maintains that except for Ibadah (devotional matters) or specific Shariah injunctions, Masalih (plural of Maslahah) should take precedence over other proofs. [See Kamali for full explanation]. However, this view is not held by majority.

As regards relation among Qiyas, Istihsan and Istislah, it may be stated that Qiyas and Istihsan are essentially based on Illah in the Nasus (hidden or obvious). Law is expanded by Qiyas or Istihsan on the basis of Illah of Nasus. But when law can not be made on the basis of Nasus or through Qiyas and Istihsan, law is made on the basis of Maslahah or public interest. A group of scholars have seriously disagreed with Maslahah. But they are a minority and their arguments are not very solid (see Kamali). To meet the new situations in the changing world, Maslahah is a major instrument in the hands of jurists of Islam.