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## Istishab (Presumption of Continuity) in Islamic Law: A Comparative Study with Western Legal Principles

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### ABSTRACT

Istishab, translated as the "presumption of continuity," is one of the recognized subsidiary sources of Islamic law, employed particularly in the absence of direct evidence. It rests on the principle that a previously established fact is presumed to continue until proven otherwise. This paper examines Istishab from the perspective of various Islamic legal schools, its practical application in matters such as contracts, marriage, and property, and its philosophical foundations in Shari'ah and rational evidence. The study also compares Istishab with analogous doctrines in Western legal systems, such as the presumption of innocence, continuity of possession, and estoppel, highlighting similarities and differences in epistemic reasoning and evidentiary standards.

**Keywords:** Istishab, presumption of continuity, Islamic law, Shari'ah, evidentiary rules, Western law, presumption of innocence, estoppel

### Introduction

In Islamic jurisprudence (*fiqh*), the sources of law extend beyond the Qur'an, Sunnah, *ijma'* (consensus), and *qiyas* (analogy) to include supplementary principles that aid in judicial reasoning. One such source is Istishab, literally meaning "companionship" or "continuity." It serves as a *hujjah* (proof) in cases where no other direct evidence exists, enabling judges to presume the persistence of a past fact until a new fact is established by credible proof.<sup>1</sup>

This concept has been acknowledged, though with varying degrees of acceptance, by schools such as the Malikis, Hanbalis, Zahiris, Shi'ah Imamiyyah, and, in a limited sense, the Shafi'is. The Shafi'i and Hanbali jurists define it as "negation of what has not been proven to exist and the continuation of that which is already established."<sup>2</sup>

### The Concept and Scope of Istishab

Istishab applies both to **positive continuity** (e.g., an existing marriage continues until evidence proves divorce) and **negative continuity** (e.g., a dog is presumed untrained unless proof establishes otherwise). In contractual terms, if a property sale contract specifies a fixed term, it remains valid until the expiry date, after which it automatically terminates unless renewed.<sup>3</sup>

From a Shari'ah perspective, the principle reinforces stability, legal certainty, and the protection of rights. The Qur'anic verse "*And those are the defiantly disobedient*" (al-Nur, 24:5) indicates that judicial decisions must rest on verified evidence, and the absence of such evidence triggers the operation of Istishab.<sup>4</sup>



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### Rational and Shari'ah Foundations

Istishab is supported both by **Shari'ah** and **'aql** (reason). In rational terms, reasonable individuals (*'uqala'*) assume that states of affairs remain unchanged until credible evidence indicates otherwise. This presumption operates as a practical necessity to avoid legal chaos and ensure continuity in social and economic relations.<sup>^5</sup>

In the classical juristic view, Istishab is a *last resort* evidentiary principle, activated only in the absence of conclusive proof. Once a change is proven by valid testimony or documentary evidence, Istishab no longer applies.<sup>^6</sup>

### Comparative Analysis with Western Law

In **Western common law**, the doctrine of Istishab finds parallels in several evidentiary presumptions:

**Presumption of Innocence** – The accused is presumed innocent until proven guilty, mirroring Istishab's protection of an established legal status until contrary evidence emerges.<sup>^7</sup>

**Continuity of Possession** – In property law, possession is presumed to continue in the same person until proof of transfer is shown.<sup>^8</sup>

**Estoppel** – Prevents a party from denying a fact previously established, akin to Istishab's restriction against altering a known state without proof.<sup>^9</sup>

However, differences exist:

In Western law, presumptions are often codified in **statutory evidence law**, whereas in Islamic jurisprudence, Istishab derives directly from juristic reasoning rooted in *usul al-fiqh*.

Western law employs **burden of proof rules** as procedural safeguards, while Istishab functions substantively to maintain legal certainty in the absence of evidence.

### Practical Applications

**Marriage and Divorce:** If a marriage is established, it continues until divorce is proven.

**Contracts:** Valid contracts remain binding until proven void or expired.

**Property Disputes:** Possession is presumed to remain with the current holder until evidence proves otherwise.

**Criminal Law:** An individual is presumed free from liability unless credible proof establishes guilt.

### Conclusion

Istishab serves as a bridge between Shari'ah's emphasis on justice and the pragmatic need for continuity in legal affairs. Its parallel doctrines in Western law demonstrate the universality of presumptions as tools for judicial efficiency and fairness, though the philosophical underpinnings differ. By preserving the stability of legal relations until change is substantiated, Istishab ensures that law remains predictable and socially functional.

### Footnotes

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