A Study on Esteshab Principle and its Conformation with the Principles of Possession, Leisure, and Violation and its Application in Statutes

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Abstract

Esteshab principle (presumed existence or continuation of a previous state or fact in disregard of its continuance having been called in question at or beyond a certain point in time) is among the four practical principles which is useful about the doubt for the imposer and determines the apparent duty. It is positively applicable in the sentences and provisions. The difference with other principles is the existence of certainty and Laheq (subsequent) doubt. Since this principle plays an important role in deduction or principles and elimination of surprise in the subjects and understanding of the many legal texts and jurisprudence is dependent on recognition of the principle and its application. The current study has been conducted due to the importance of this subject. After presenting and explaining the meaning of Esteshab in terminology and the constitutive manner and reasons for its validity, the current study will investigate the rules similar to Estehsab such as the principles of certainty, prevention, and regressive Estehsab and distinguishes and confirms their differences with this principle, explaining that due to non-completion of the conditions of Estehsab, they are not titled under this principle. The necessary material has been provided in confirming and conflicting the principles of violation, leisure, and possession. Since the Estehsab content is apparent sentence and most of the principles have not considered it as legal or judicial evidence, the mentioned principles are precedent over it and the Estehsab also takes precedence over other principles. As a preface for defining the Estehsab principle, the categorization of the principles as verbal and practical and their concise elaboration which is necessary for the detailed subject has been provided in the first sections. Since Estehsab is an aid to the priest and a useful means for legislators and judges, it is suggested a high attention be paid to training of this principle in training centers and universities-especially the faculties of law.

Keywords: Estehsab Principle, principles of possession, leisure, violation, Statute book.
Introduction:

What is Estehsab? What are its applications in jurisprudence and interpretation of religious orders and interpretation of rules? In case Estehsab is implemented in interpretation of religious orders, is the ruling as a result of the implementation of the principle of Istishab the proof? What are the reasons behind the validity of the principle of Istishab? In conflict between two Estehsab, which one is precedent? In conflict between Estehsab and other practical principles, which one is precedent? In conflict between Estehsab and possession, leisure, and violation, which one is precedent? What is the difference between Estehsab and appropriate, preventive, certainty, and current doubt principles? The explanation is that when the bound priest investigate the Quran and hadiths about a ruling from religious orders and situational judgment task, three condition can be considered for him: Certainty, suspicion, doubt (Heidari, 1996).

1- He either makes certain about that sentence such as what is obtained from the Quran and successive hadiths. In this case, he announce a fatwa for action if it is mandatory, or refusing if it is unlawful (Akhund Khorasani, 2010, p. 206).
2- Or he becomes suspicious to the sentence such as what is obtained from the public news in which case he again announce the fatwa as the previous case (Nayini, 1988, p.541).
3- Or he is dubious about the sentence, i.e. he cannot find the clear sentence for the case according to the Quran and Sunnah (Akhund Khorasani, Kefayat Al-Osul, 271). For the first two cases, the task is clear, however for the third case, Estehsab is a way to clear the doubt and it is a means for the bound priest to infer the religious orders (Heidari, 1996, 233).

The First Discussion
Concept of Principle
Principle in Idiomatic and Lexical Terms

Principle has an idiomatic and lexical meaning. Literally, principle is a part of something on which other parts of it are built or they are stable by it. From the viewpoint of the late Mozaffar, it is: the principle is something on which other parts are built (Feiz, 2006).

Principle in the Principalist terms is one of the followings 5 meanings:

a) Principle against corollary, such as said about deduction: alcohol is principle for wine, i.e. the alcoholic beverage sentence is used for wine, since the alcoholic beverage is banned because it is so addictive, this is also true for the wine, so wine is also banned due to its being addictive. Therefore, the sentence of alcoholic beverage is principle and wine sentence is corollary.

b) Principle meaning dominating and evident such as saying the principle is truth, i.e. when there is certainty to say something with its real meaning or virtual meaning, i.e. to carry the true meaning of the word is a principle and it is preferred. The truth is the clear and apparent meaning of the word, such as the case the speaker says Ginny bring me Based the Lion in which case the word "lion" has a real meaning and that is the predator animal and a virtual meaning that is a brave man. Therefore, when there is a doubt about the real
and virtual meaning, the principle is the real meaning, i.e. Words that have real meaning and figurative meaning will be used without analogy, and manifest in their real meaning. Whereas they have an analogy to change the meaning from reality to imagery, the principle is not on reality anymore and the figurative meaning is intended. In such cases, the figurative meaning of "lion" is manifested.

c) Principle as the reason , i.e. an evidence of something guiding to something, such as the case when for proving a sentence they say the principle is Ketab (Quran) or Sunnah or consensus or reason. Reason means that the proof of that sentence are these items.

d) Principle as the rule, i.e. a basis on which something is built and this is closer to the word. For example, in the jurisprudence, it is said that principle is the concession objects or purity. This is the general rule, and is derived from texts such as "everything is pure unless its filth is proven" (Sheikh Tabarsi, 1987).

e) Principle as what is issued about for determination of some apparent sentences or the bound duty when he does not have access to the real legal sentence such as the Estehsab and Baraat (innocence) principles (Feiz, 2006).

The Second Discussion

Concept of Estehsab

Estehsab in Idiomatic and Lexical Terms

Estehsab is from the source gerund "Estefaal" which is derived from "Sahab", "Yashab", "Sahabah" root meaning "taking something as companion", i.e. taking someone or something as companion and attendant. For example you want to go on a trip and you take your friend as companion to talk to. Here, the Arab say: I talked to this person as a companion (this is also true about the things and objects. In the priests applications also the word Estehsab has been used in the same lexical meaning. For example, in the book "Salat", it is stated: Estehsab (not using the flesh productions of Haram (forbidden) animals in Salat), using the parts of Haram animals' body in Salat abrogates it. Here, with Estehsab we mean taking these parts as companion in Salat such wearing them which is banned (Ansari, 1999, 541).

The Idiomatic Meaning of Estehsab

The principalist account various definitions for Estehsab: Allameh Heidari defines it as: “Estehsab is that we assume and build credibility and make sure that something that previously has certainly existed or it has been certain in sentence, when in doubt - whether it exists or has vanished, we validate its survival. For example, the bound is sure he was pure one hour ago and his previous certainty is purity and now he is in doubt whether he is still pure or something happened and eliminated it, he performs Estehsab and assume the previous state which is purity (Heidari, 1996, 233). The author of Saheb Al-Kefaya defines Estehsab as follows: it is the survival of the rule and the subject of a judgment there is no doubt about its survival (Akhund Khorasani, 2010, 199).

Third Discussion

The Reasons of Estehsab

1- Establishment of the wise
1- Establishment of the Wise
The establishment of the wise which is of two introductions:
First Introduction: when we refer the rationalists of the world and consider their practical conduct, we come to the result that the rationalists have put the basis on the past practices in all their conducts and religious and mundane affairs and follow it until the time the opposite to the previous state is proven. Also, even if they travel to March, through the space, sea, or ground, they will return to their main home after the trip is finished. Generally, putting the practical building based on the previous state exists through all the human life and dangerous and trivial affairs. The second introduction: when we refer to the holy religion, we can see it is not rejected by divine laws (but if we dare a bit, we can say: such a conduct is confirmed by the holy religion.

2- The Sentence of Wisdom
The second reason of the Estehsab authority is the wisdom, however it has two branches:
1- Theoretical reason by which man perceives things.
2- Practical reason which is the evidence for practical affairs; it perceives the things that should be done. Moreover, reason does not have two branches and we do not have two evidence powers, but the evidence force is the sketch of a truth, however its evidence are of two types. That is why the reason is divided to theoretical and practical. The reason we intend for Estehsab is the theoretical reason and not the practical one, i.e. the companionship between the certainty about the existence of the thing in the past and Laheq suspicion to the survival when there is doubt about it, is perceived by the theoretical reason since companionship is among the real and self-existing affairs.

When the man acknowledges the thing’s proof in past and then this acknowledgement is inflected by some factors, and he becomes dubious about the thing’s survival. Here, as soon as we consider the certainty background state, the reason sentence to the proof of survival and the man is assured to survival. Therefore, there is a Laheq companionship between the acknowledgement to the previous existence of something and preference over its survival.

3- The Rationalists Consensus
The third reason behind the Estehsab authority is the public consensus: Allame Heidari (Osul Al-Estenbat, p.236) has made consensus on this issue that: Estehsab of the consensus of all scholars of Islam is proof since the scholars have the consensus that whenever a sentence is proved in a given time (for example one hour before purification and ablution) and then we are in doubt whether something happened to eliminate that fixed sentence and remove it (if we are dubious about a thing’s resolver or ablation (for example about the incidence). In such cases that the Estehsab bases are complete, and there are previous certainty and Laheq doubt, it is mandatory to sentence the thing that existed from the first time (i.e. we assume purity). Then Allameh adds: this basis of the clerics is due to the authority of Estehsab or if there is no authority of Estehsab, such a sentence is the definite preference, i.e. when there is doubt about survival, and when the ablation of one of the parties is sides which is the survival is preferred over the other side which
is ablation without any preference and advantage and we know that definite preference is impossible. So, it is revealed that this basis of clerics is due to the desirability of Estehsab.

In short, this is because the two premises:

a) The clerics have consensus over the previous state (as Allameh claims).
   b) The clerics’ consensus is also contention, so this consensus and basis is at one contention.

4- The News of Estehsab
The fourth and the last reason among the reasons behind the authorities of Estehsab the latter all insist on it is the news and hadiths on Estehsab such as the public hadiths which are general and the specific hadiths which are or especial cases (Khorasani, Mozaffar, and Ansari).

Fourth Discussion
The Possession
The Principle of Possession

The principle of possession is among the famous and accredited principles which is sighted in most of the jurisprudence and law issues and the basis of many routine transactions.

Definition of Possession
Who finds a property has dominance over it.
“Possession is dominance and power of the individual over the thing in a way that thing is conventionally under his power and dominance and he can apply any changes and modifications on it”.
Mohaqagh Yazdi in defining and meaning the term “possession” puts it: “What is meant by the Sultanate customary and grab different thing depending on resources”.

As it is seen, the factor of convention plays an important role in defining possession and the power and dominance elements depend on the determination of convention. Therefore, possession does not have any specific quality and limit to it, however as the case may be, has various manifestations and different instances (Tabatabayi Yazdi, 1988, 118).

The Manifestations of Possession
Possession which is the sign of power and dominance of man over the things and has various manifestations: sometimes the thing in the man’s hand is a sign of possession, such as the money in someone’s hand and it indicates his possession of the money. Sometimes although the things are not in people’s hands, they are connected to the individual’s body somehow and it indicates that the thing belongs to a specific person. For example, the cloths people wearing indicates their possession over it. Sometimes, there is no direct and physical relationships between the owner and the possessed thing, but due to social and conventional basis, the thing belongs to the individual such as the house ownership documents in a specific person’s hand and belonging to him which indicates the house belong to him. It is true that in contemporary law, the ownership document is among the evidences of lawsuit proof, but its jurisprudence basis can be the
existence of jurisprudence which is proved through the existence of document in a person’s hand as the owner. The possession manifestations can be categorized under two main subjects:

a) The objects belonging to people is determined with the actual connections and physical qualities, such as the money in a person’s hand or pocket or the cloths he wears. In this case, there is direct, physical, actual, and spatial relationship between the owner and the possessed object. These kinds of ownerships mostly belong to the human history is the past and in recent times "the credit and conventional possession" is more or less a substitute for such possessions.

b) The other manifestation of the possession is the existence of documents, signs, texts, and symbols that indicate the possession of the person over the object whose clear example is the existence of ownership documents for immovable properties in a way that the mere existence of the ownership documents in person’s hands and the owner proves his ownership over the immovable property; even if he is not dominant over the property directly and other person has previously taken the dominance over that property.

Among the first manifestations of possession, there are many cases in life some of which are:

a) Existence of the things in the people’s hands
b) The cloths people wear
c) The driver driving a vehicle
d) Taking the reins of something such as the case someone has the reins of a camel
e) Residing in the place
f) The existence of the house or the shop’s keys in a person’s hand even if he has not settled in it yet
g) Some actions on the objects such as plowing and leveling of land or repairing a building.

The ruler or regime political domination of territory, borders, airspace and sea frontage can be regarded as parts of the second group. Installing the flag of a country at specific points or marine signs offshore as exclusive, is a manifestation of possession and domination. Sometimes due to diversity of the manifestations of possession, they are in conflict with each other. For example someone is riding a horse and another person holds its bridle or someone is driving the car and another person has its keys, or someone buys something from the shop and enters another shop which accidentally has the same good. Now if there is a conflict on the ownership of that good, which one can prove its ownership on the good according to possession? All of these happens because there is no specific frame and limit for possession and the main factor for its identification is convention and as of the case, it has various manifestations. Sometimes may also different directions intersect each other on a case such as the case every individual has possession and dominance over a property from different directions. Such cases must be dealt with in court and if one of the possessions is stronger, the court will issue the sentence in favor of him, i.e. it considers him as the “possessor” and in case there is no preference, the possession will be dropped out (Musavi Bojnurdi, 2010, 107).

Fifth Discussion
The Conflict between the Estehsab and Possession
Sometimes, there is a conflict between Estehsab and possession principles. In such cases, it must be seen in the case of conflict, which one rules? All the clerics unanimously state that in case of
conflict, the possession has dominance over the Estehsab; since Estehsab is “principle” and possession is “presumption”. In addition, the priority of possession over Estehsab is that the possession is accredited by the lawgiver and since there are very rare cases Estehsab should not have conflict, if we consider it ruling in all cases, due to the wide inclusion, there will be o space for the possession principle. The explanation is that possession and ownership are often preceded by absence and there are few cases it is not preceded by absence, i.e. the principle is that the properties under possession of the people are preceded by lack of occupancy and occupying them is accrued. So, regarding the background of absence, if the Estehsab is performed, almost in all the cases, we must be dubious about the possession credit and consider it attached to the past and come to the result that the current possession is not valid while we know that the lawmaker accredit the possession and even believe that failure in accrediting it will lead to chaos between people. Therefore, since the lawmaker does not cancel it, there is definitely a credit and rule for the possession. This is where the possession as the specific title limits Estehsab which is general and has dominance over it in cases of conflict (Khorasani, 2010, 271).

The Sixth Discussion
Estehsab Conflict with Leisure, Violation, and Validity
In this discussion, the relationship between Estehsab and leisure and violation will be discussed. We have rules in religious orders that are specific to the topical doubts such as the place violation law which is performed during the action and while doing it, for example after the Sejdah (prostrations) he doubts if he has performed Rokue (bowing) or not, here because he has passed the order of Rokue and entered the nest Rokn, he does not count for his doubt and perform the break law and put the basis on performing Rokue and the leisure principle will be run after finishing the action, for example after vacancy from the ablution, washing, prayer, or Haj, … in a part of ablution or washing parts or a part of prayer, and … he doubts if he has performed one of them or not? The vacancy principle says that do not count for this doubt such as the rule that says the Muslim’s action is valid. According to this rule, if a muslim says prayer for a dead body or he does any business and we doubt if he has read it correctly or has done the transaction correctly, we assume his action is valid we apply the rules for it. Now, what should we do if one of these rules has a conflict with the Estehsab? For example, the break principle says that do not consider the doubt in Rokue and continue the prayer and it is correct; however the Estehsab of absence says that you definitely did not perform Rokue at a time and now he is dubious about it, perform the absence Estehabs and restore the prayer. About the break and validity principle also the absence Estehsab of suspicious action is assumed however the mentioned principles have priority over the Estehsab. In other words, about the religious orders, all other principles, except for the lot act, have priority over Estehsab and the reason behind this is the allocation; since the reason of Estehsab is general and does not allocate to the mentioned cases, and it can be formed in all of religious orders including the topical and sentential doubts such as issued and mandatory sentences, however the reason of every mentioned principles is specific and the definite law is that the specific has priority over general. So, for each of the mentioned principles, we specify the reason of Estehsab and there won’t be any limitations (Khorasani, 2010, 271).
Seventh Discussion
The next discussion is about the relationship between Estehsab and lot act. Assume that a sheep from a flock has been raped by a man and by lottery, it is determined which one it was. On the other hand, the absence Estehsab says that this specific sheep has not been penetrated once upon a time and now that we are in doubt, we perform the absence Estehsab and these two mean that the Estehsab and lot act have conflict. Here, contrary to many religious orders which were mentioned before, the late Akhund believes that Estehsab has priority over lottery since the Estehsab is specified from the lot reason because firstly, the lot reason says: it may have certainty background or not, but the Estehsab is specific to the suspicion which has certainty background and it is special in this regard and the law is priority of the specific over the general, so the lot act becomes useless (Khorasani, 2010, 271).

Eighth Discussion
The Conflict between Estehsab and the Presumption of Innocence
The relationship between the two is general, i.e. they have unity and differentiation, however the differentiation from the presumption of innocence side is the cases of doubt in the principle of the task without any previous encounter and the Estehsab differentiation clause in doubts of the bound and circulation of the impediments in presence of the previous certainty. The unity clause is the doubt in the principle of the task in case of previous encounter such as the grape juice which is pure and Halal before boiling and before vanishing two-third of it, it is both unclean and banned. After vanishing two-third of it by fire is definitely pure and Halal however if it is vanished by air (something other than fire, for example by sunlight,…) we doubt if it is pure and Halal or unclean and banned? Here, the path of the both principles is available, i.e. with consideration for the previous state that we believed before vanishing two-third it was unclean, now the path is Estehsab and its result is apparent ban and uncleanness.

Now we should see which one has priority? Is Estehsab prioritized and as a result the grape juice is banned and unclean? Or the presumption of innocence is prioritized and as a result the juice is Halal and pure? Or the two principles have conflict and collapse and other principles must be referred to? However the priority of presumption of innocence over the Estehsab is void since Estehsab if be a principle, is among the established principles and innocence is among the unestablished principles. So, the established principle is priority and due to the very same reason, there no room for conflict and collapse, since established principle is prioritized in terms of the ranking and they are not at the same path to intersect each other and so, the first probability remains and that is the priority of Etstehsab over innocence. The quality of Estehsab priority over presumption of innocence: is Estehsab priority over presumption of innocence in terms of entering? Or in term of dominance? Or in terms of specification? However the possibility of allocation is ruled out since as it was mentioned in the beginning of this discussion, the innocence and Estehsab are partially general not purely general or specific. So, there remain two possibilities:
1- Acceptance
2- Dominance and we must see which one is right
Generally, presumption of innocence has two branches:
1- Intellectual innocence whose subject is lack of expression.
2- Religious innocence whose subject is lack of knowledge or simple ignorance or doubt, and each has an account: but the relationship with the intellectual innocence: Estehsab is accepted about it and acceptance is that one of the two reasons (accepted) eliminate and obviate the subject of the other reason (Murud) and Estehsab also plays the same role for intellectual innocence since as was mentioned, the subject of the intellectual innocence is lack of expression and there is no doubt Estehsab is the religious expression and when there should be expression, lack of expression is obviated. Expression is of two types:

1- Actual expression
2- Apparent expression (Estehsab is among this type).

And about the religious innocence: it is an innocence which is understood by the religion and news. Again, the news language is of two types: the language of some hadiths is the same as the reason sentence and it emphasizes on the reason sentence and merely for the expression of permit and it obviates the ban and in terms of superficiality of the apparent sentence, it is not allowable and lawful such as obviating what is not known whose aim is obviation of punishment, People in what capacity did not know with the aim of development and freedom, and etc. The relationship with this category is also the reason for the accepted Estehsab and obviates the subject of them which is lack of expression.

Ninth Discussion
The Conflict between Estehsab and Precautionary Principle
The relationship between these two principles is general and partially specific. The differentiation clause is the precautionary for the brief knowledge cases in which our doubt has not any background. The Estehsab differentiation clause is the non-brief knowledge cases. The unity clause is also the cases we have both brief knowledge and our doubt has a background and the conflict happens due to this. Some examples:

a) In the time of presence of innocent Imam, Joma Salat is definitely mandatory and now which is the time of absence and we doubt if Zohr Salat is mandatory or Joma Salat, definitely we have only two states. So, we have brief knowledge however we do not know the details. Now, according to Estehsab background, the Joma Salat is mandatory and we cannot integrate them and on the other hand, according to the brief knowledge, we are allowed to integrate them and it is precautionary, so the two principles have conflict.

b) A person goes four parasang, stays one night and returns the next day. Now he must say his prayer complete or incomplete? The incumbency background state is complete but now we have brief knowledge about the parasang and we should say the prayer incompletely and according to the background it must be said completely. However according to the brief knowledge, we must integrate them and do not suffice one of them, so the two principles have conflict (these two examples were among the sentence doubts).

c) Someone intends to go on a trip up to the religious limits which is 8 parasang. This person, as soon as reaching the exit limit (the point Azan cannot be heard and the city walls cannot be seen), must say his prayers incompletely, however now he is at a point he does not know whether it is exit limit to say incompletely or it is exit limit to say it completely? On the other hand, before, at this point completely saying the prayers was
incumbent and with this consideration, now the complete Estehsab is performed however
the brief knowledge is complete and incomplete and the circulation is contradictory and the
person must integrate them and run the original precautionary.

d) The opposite of the previous assumption, he returns from the trip and unless he is not at
the exit point, the incompletely saying prayers is incumbent, but the person does not
know whether he has reached the exit limit. On the other hand, the survival of the
incompleteness is performed and there is a brief knowledge and the original
precautionary is current, so they have conflict. Now, which one is dominant?
The late Seikh Ansari stated that Esyehsab is prioritized over precautionary in terms of
acceptance (Ansari, 1999).

Tenth Discussion
The Conflict between Estehsab and Takheer Principle
The Takheer principle (the liberty of a Muslim to do or not to do something when he or she has
reasonable doubt about the specific dictate of the canon law on that instance) is the sentence of
reason about the bound person is optional to do something or omission or he is optional in doing
one of them with lack of possibility of precautionary and it is an intellectual sentence and has a
subject and is predicate. Its subject is the two actions that none of them has priority over the
other and there is no precautionary and its predicate is the optionality of one of them. For
example: the Yom Al-Shak (the last day of Ramadan month which is doubted) and the moon is
not sighted and it is not proven by the religious methods, is fasting incumbent or banned? If it is
a Ramadan day, it is incumbent and if it is from Shavval month, it is banned. So there is a
circulation of canoeing (two things that cannot be integrated). In such cases the reason is optional
to select between omission and action however on the other hand, Etehsab of the survival of
Ramadan and lack of Shavval entrance (no crescent of Shawwal), the survival of fasting
incumbency and the respect of breakfast which is a chain of topical, sentential, presence, and
absence principles is performed and it determines the traditions and fasting and sentence to non-
optionality and as a result conflict with the optionality. Now which one is prioritized? To make it
short, Esteshab has dominance and this is due to its acceptance since the subject of optionality
principle with the reason is the astonishment and skepticism and by performing the Estehsab and
accredited reason, skepticism is obviated and the trust is replaced and this is the meaning of
acceptance. So, in the hadith we have: there is no doubt in the certainty which means the same
Estehsab principle. We have the reason: the fasting is with the sight of moon and breakfast is
also with the sight of moon, so unless the moon is not sighted we should not break the fast, but
the Yom Al-Shak must be also fasting (Ansari, 1999).

Eleventh Discussion
The Conflict of the two Cause and Effect Estehsabs with each Other
The important issue in principles conflict is the very same. Where one Estehsab is causative and
the other is Effect and doubt in one of them lead to doubt in another, for example a few water
which was definitely pure and temporarily due to mixing with the impure water we doubt the
survival of its purity and a cloth that was definitely impure and it was washed by the few water
two or three times, and we doubt the survival impurity, here the basis of the two Estehsab are
definite:

http://www.ijhcs.com/index.php/ijhcs/index
a) Estehsab of the Survival of Water Purity
b) Estehsab of the Survival of Cloth Impurity

By the way, doubt in survival and obviation of the cloth impurity is caused by the doubt in survival and obviation of water purity.

Now what is the sentence in this case?

The famous Mokhtar and the late Sheikh on which he claims integration is that he prioritize the causative doubt over caused doubt and we perform the Estehsab for the causative doubt and the cause state will be clear spontaneously and the priority is because of dominance.

The first reason is the resultant consensus: if we search all of the religious orders, we will see whenever the religious means and necessities, the religious causes, the effecting factors and religious effects was discussed, the clerics have went for the religious means and the causes and performed Estehsab for them and have not considered the means and effects and this is the best reason for priority of the causative principle over the caused. Here some examples of religious means and causes are provided:

We give two examples from the book of purity:

1- There was a water which was definitely short. Then some amount was reduced from it and now we doubt it still remained short or it is obviated? By the way, we have washed an impure cloth by this water (we have soaked it in this water). Now we doubt the survival or obviation of the cloth impurity and the source of our doubt is that we do not know whether the water remained short or it is obviated? If the shortness which is the previous state remains, the cloth is definitely pure and if the shortness is obviated, the impurity still remains. Here nobody is to perform Estehsab for the necessity, i.e. the survival of the impurity of cloth or lack of its impurity, but all perform the Estehsab for the shortness of the water.

2- We have a water that was previously definite and now we doubt if it is mixed with something. Then we make ablution with this water or wash the impure body by it or wash the impure cloth with it and we doubt if we are pure now and the source of this doubt is the survival of the certainty of water…. The case will be the same as the short water.

c) We give two examples of the Book of Salat:

1- Someone has been definitely pure and after a while he is dubious about its survival and with the same state, he enters Salat or Tawaf or any other action that requires purity and now he is in doubt about its validity or lack of validity, acquittal or non-acquittal and the source of the doubt is the survival of purity that if remained, so the validity and acquittal are also given and nobody comes to perform it for the cause and necessity of the principle and say the principle is is lack of validity and lack of acquittal. However all people perform the principle for the cause and obligation which is purity from happening and the necessary state is clarified spontaneously, so the causative principle is prioritized.

2- Same comments are applicable for certainty in purity from vice and doubt in its survival for Salat.

d) An example of Haj: a person has some property as he can afford and if he is not obliged for people right or Allah right, he could definitely afford and he is obliged to do the Haj.
Now he is in doubt about the incumbency of Haj and the person’s obligation to Haj. The source of his doubt is that he does not know if he is in debt or not if he is in debt, the Haj will not be incumbent and if he is not, it will be incumbent.

Here also nobody has issued Fatwa to perform Estehsab for the lack of obligation and say:

The principle of lack of incumbency of Haj, but all say: perform Esteshab for the reason and say: “the principle of the clearance from the religious obligation and other rights” and come to the result: so I can afford and Haj is incumbent.

e) An example of marriage-divorce, and inheritance: someone is missing and there are no news and tracks of him, we doubt whether he is alive or dead? Followed, we doubt whether the alimony is incumbent for him? if now he has lost his father, he will be inherited or not? The doubt in inheritance is the cause of doubt in life. If he is alive, he will be definitely inherited or again nobody has said to perform Estehsab for the cause and the obligation: the principle is lack of inheritance, but all refer to the correlative and perform the Esteshab for them and say the principle is survival of life, so he is inherited and his property must be regarded. The four mentioned examples were among the instances of the necessities and supplies and you consider the rest.

So, by consensus, the principle of the reason and correlative has priority over the principle of the cause and the obligation.

Another example: each of us may enter a shop daily and make transactions with the salesman, the shop owner partner or his representative while we consider the possibility that at that moment, the shop owner might have died or is incapable of capturing, or … but nobody counts for these possibilities and the Esteshab of the lack of the necessities, i.e. non-validity of transaction, but the Esteshab of the correlative which are life, incapability, and etc. are performed.

Second reason among the reasons of Sheikh which is the priority of reason Esteshab over causative Esyeshab:
The reason principle is dominant to the causative principle “lesser” and the dominating reason or principle is prioritized over the dominated reason or principle “major”. So the reason Esteshabs are prioritized over the causative ones “result”.

The lesser expression: we have a general named news of Seteshab which says: Does not invalidate the certainty with skepticism and even overturn certainty Last, and we have two persons each by ignoring the other, are included in these generals:

1- Reason Esteshab which is the survival of purity of water.
2- Causative Esteshab which is the survival of the cloth impurity.

Now, there are four possibilities here:
- The undoubted generals does not include any of the two Esteshabs and the reason and causative doubts and there is allocation for both of them.
- Both of the persons are included in the undoubted news in which case it requires conflict, since the result of Esteshab of the water purity is the purity of the washed cloth and the
result of the impurity of the cloth is sentence of survival of the cloth impurity and these two results are opposite and contradictory and the integration of the opposites on the same subject is impossible.

- The causative doubts be included in the generals and Esteshab is performed for them, but is the reason doubt it is not performed i.e. we do perform Esteshab of impure cloth and we do not reach the water purity Esteshab turn. The problem is that the allocation and obtaining is without the reason and we have excluded reason Esteshab in vain and such an allocation is flagrant.

- The reason doubt cannot be violated in all the news and the causative doubt is obviated and this is right.

The assumption is that for reason doubt, there are no obstacles in terms of unviolated news inclusion and when there is no such an obstacle, the news obtain this vase whose contents is that in this case, you do not violate the previous certainty to Laheq doubt, i.e. assume the survival of purity as if you are certain about it and the meaning of unviolated is that perform the religious effects of Mostasheb on it. Among the religious effects of water purity is obviation of the cloth impurity and obtaining purity for it. It is clear that according to Esteshab sentence, this effect is manifested and when found, there will be no room for the causative Esteshab, since we have no doubts, and we make certain about the purity of cloth and for the cause, there is no violation of the certainty by doubt but it is a violation of certainty by another certainty. So, the inclusion of unviolated to the reason prevents its inclusion of cause and such a prevention cannot be denied, since it is due to dominance and dominance means that the dominating reason eliminate the subject of the dominated reason which is the doubt. The reason Eteshab plays the same role, so the reason Esteshab dominates the causative Eteshab. Now the major proof: the fact that dominating reason has priority over the dominated reason, there is no room for further discussion and the issue is consensus since the dominator is the interpreter of the dominated and the interpreter has priority over the interpreted (Ansari, 1999, 737).

Twelfth Discussion
Application of Esteshab principle in Islamic Republic of Iran Statute Book

In the Islamic Republic of Iran law, including Civil Law, Civil Procedure Code, Code of Criminal Procedure and the Islamic Penal Code, the Esteshab principle has been considered by the legislator among which some cases will be noted as follows: In Clause 3 of Article 155 of the former Code of Criminal Procedure, we have: Anyone who has a history of debauchery and corruption, if repentas to testify, his testimony will not be accepted until we are ensured about a change in his actions and his competence and justice and we will use Esteshab. The Article 872 of the Civil Code provides: the property of a missing person will not be divided unless his death is proved or the time he can live is expired. In such cases also the legislator considers the Esteshab of the living of the missing person and considers the religious and legal effects of his life. So, his property should not be distributed among his inherited and the conjugation relationship between him and his wife still remains and his wife cannot marry another man. The Article 457 of the Civil Code provides: each commutative contract is obligatory unless one of the rescinding is proven. Therefore, the requirement of commutative contract is the obligation and lack of cancellation permit by one of the two parties and the means of rescinding such as lesion.
and defect are an obstacle to the obligation of contract. Now if a commutative contract is done and the defect of the contractors is doubted, according to the proper and preventive principle, the sentence will be the obligation of the mentioned contract and lack of cancellation permit, since the proper contract is a necessity and the existence of the obstacle (defect) is not proven. The Article 212 of the Civil Code provides: transaction with people who are not mature or wise is cancelled due to lack of capacity and the article 1213 of the same code provides: the permanent insane absolutely and the periodical insane while he is in insanity state, cannot make any changes in property and legal rights even with the permission of his ward or legal guardian, however the periodical insane legal actions while recovery are accepted unless his recover is certain.

According to these two articles, one of the basic conditions of the transaction validity is the parties' wisdom and the transaction of the insane person is cancelled. Now, if the validity of a transaction the person has done one year ago is doubted in terms of the seller wisdom while contracting the sale, his previous wisdom can be proved by topical Esteshab. The article 1108 of the civil code provides: whenever the wife fail to do her conjugal duties without any legal obstacles, she will not have the right for alimony. Now if there is doubt about the spouse has done anything which is among the instances of disobedience or not and as a result the alimony sentence survival is doubted, the Esteshab is performed for it.

Article 177 of the Islamic penal code: the religious witness must meet the following conditions for testimony:
Maturity, wisdom, justice, faith and purity, lack of interest in the subject and ...
Article 1313 of the Civil Code: the maturity, wisdom, justice, faith and purity is required for the witness.
If someone whose justice was certain, commits an action that question his justice, by the aid of Esteshab, his justice remains and his testimony can be heard.
Article 198 of the Civil Procedure Code: If the right or debt upon someone was proven the principle is its survival unless its opposite is proven.

This article also clearly emphasizes the existential Esteshab principle.
Article 359 of the Civil Code: whenever the inclusion of a thing in a sale is conventionally suspicious, it will not be included in the sale unless it is specified. For example, while selling a car, if we there is a doubt that the tools box and the car jack are included in the sale, the principle is exclusion of it.

According to the civil code, some rights are urgent such as:
Article 415 of the Civil Code: the right of sight and description violation after the sight is urgent.
Article 420 of the Civil Code: postoperative lesion option after knowing it is urgent.
Article 435 of the Civil Code: the defect right after knowing it, is urgent.
Article 44 of the Civil Code: the subreption right after knowing it, is urgent.
In such cases, the right owner is optional to cancel the transaction.

However, in some rights of the civil code, their urgency is not specified:
The article 441 of civil code on the right of dealership discrimination: the right of dealership discrimination is obtained when the transaction contract to some sales is void in some ways in
which case the customer will have the right to cancel the sale or accept it to the extent the sale is performed and refund the price for the section of the sale which was void. In such options, if the right owner at the first time, does not apply his right, does the right laps or it remains? In this case the doubt and suspicion is resulted from the doubt in proper and the Esteshab can be performed since the continuance capability of the right after the first time is doubted.

Article 1120 of the civil code: Marriage may be terminated by divorce, or by waiver period in temporary marriage, now the permanent marriage happened two years ago and we doubt its survival and is there any obstacles such as divorce to terminate it or not? Doubt in this regard is the doubt in ablation since we are certain that by performing the permanent marriage, the congugal relationship between the man and wife starts and it is not terminated without any reasons. So we perform the Esteshab for the survival of the conjugation. According to the clause 4 of the article 803 of the civil code: in case there are any changes in the originality of the Hiba, the Waheb cannot return it. Now assume that the one who receives the farm as Hiba cultivate it. Is the mere cultivation regarded as a change? If it is a change, it obviates the Waheb right for return? In case of doubt and suspicion, in which there is doubt in ablation, the Waheb’s return right is performed by Esteshab.

Result

Regarding what was mentioned, Esteshab is merely a practical principle and not the reason and cause, i.e. it is issued just for the bound who is dubious and suspicious to the religious sentence and does not have access to it in order to obviate his doubt, since there are differences between these two:

1- Principle is not an action separate from the reality but it is just a way for identification of the duty where the bound person does not have access to the real religious sentence. However the reason and cause are separate from the reality.

2- A sentence obtained from the practical principle is the apparent religious sentence but a sentence the reason and cause approves it. The religious sentence is real.

3- Doubt strengthens the subject of practical principle however it does not strengthen the cause and reason.

It was proved that Esteshab is a definite reason and since it is reason, the bound person is obliged to after investigation and research, if no opposite in the Quran and Hadiths is found, follow it.
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