

## Modes of Ijtihad in the Judgements of the Khulafa al-Rashidun

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Ijtihad literally means 'exertion'. Defined by the *fuqaha'* as the endeavour of the qualified jurist to discover the legal injunctions of the *shari'ah*, it is accepted as a valid source of law.<sup>1</sup> The early *fuqaha'* such as Ibn Abi Layla, Abu Hanifah, and Malik b. Anas use the term *ijtihad* in a broad sense of *al-ra'y*, considered opinion or sound judgement.<sup>2</sup> The *fuqaha'* generally apply various methods of *ijtihad* only when it becomes absolutely necessary to do so. In the areas dealing with '*ibadat* or *huquq Allah*, there is generally no need to apply the secondary sources of law, particularly in regard to the basic principles of Islam. However, social and political problems lend themselves to continual application of *ijtihad*. To keep pace with development in the social, political, legal and economic fields it was felt necessary that a corresponding and more sophisticated development of the principle of *ijtihad* should take place. Thus the new modes of *ijtihad* like *qiyas*, *istihsan*, *al-masalih al-mursalah*, and *istidlal*, came into existence to cope with problems faced by the jurists.

In the beginning, *ijtihad* was also, like *ijma'*, a sociopolitical and administrative requirement. The word *ijtihad* appeared during the last years of the Prophet's life and came into wide use after expansion in Islamic realms during the caliphs' rule over Madinah. The term seems to have appeared after the sixth year of *Hijrah*, when the Prophet (SAAS) sent

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emissaries to the tribal chiefs and the rulers of sovereign states. As a result, many clans and tribes became associated with Madinah, some even accepted Islam.<sup>3</sup> The Prophet (SAAS) appointed governors, tax collectors, and special envoys in different regions and provinces. At that time, there evolved the idea of *ijtihad bi al-ra'y*, which was well-considered opinion (not a mere *ra'y*) and was resorted to in tackling practical problems of administration. *Ijtihad bi al-ra'y* was first approved by the Prophet (SAAS) on his appointment of Mu'adh b. Jabal, who held judicial authority as well as administrative responsibilities, and who obviously could not consult the Messenger on sociopolitical or administrative issues calling for immediate attention.<sup>4</sup>

A *hadith* attributed to 'Amr b. al-'As encourages the *hakim* or *qadi* to exercise his independent judgement when he does not find specific instruction in the Qur'an or the Sunnah.<sup>5</sup> According to that *hadith*, he will be doubly rewarded if his judgement is correct and singly rewarded even if his judgement is mistaken. The *hadith* also makes clear that permission to exercise *ijtihad* is an administrative and social requirement, which is why the permission was given to the *hakim*, '*amil*, or *qadi* - someone who holds administrative and political authority. To emphasize this aspect, Bukhari discusses the *ijtihad* of the *qadi* together with his consideration of the caliph's responsibility to consult experienced and learned people,<sup>6</sup> and *Ijtihad* of the '*amil* or *hakim* in the same chapter (*kitab*).<sup>7</sup>

The caliph, *hakim*, '*amil*, and *qadi* were all politically significant in Arab society. Their discussions of problems with those familiar with the relevant issues and their investigations of facts are all considered to be part of the process of their *ijtihad*.<sup>8</sup> On this basis, some '*ulama*' confine the exercise of *ijtihad* to rules and judges. Al-Ghazali describes the opinion of a group of scholars who believed that the use of *ijtihad* was permitted only to the rulers and judges in the absence of the Prophet (SAAS), but not in his presence.<sup>9</sup>

In the following discussion of the Companions' decisions, the phrase *ijtihad bi al-ra'y* will not be used in a technical sense but in the sense in which it was employed at the time of the Prophet (SAAS) and of the *Rashidun* caliphs. It will discuss only those judgements to which the '*fuqaha*' have referred as examples or that have had an impact on the development of the various modes of *ijtihad*.

Historical record shows the existence of judgements on the basis of reason ('*aql*) in the first generation of Islam. The Prophet (SAAS) made decisions based on *al-ra'y* and accepted the views and opinions of his Companions on various occasions. However, there was no specific method or system of reasoning used to reach such decisions.

Imam Malik relates a tradition in *al-Muwatta'* in which 'Umar uses the word *ijtihad* to indicate a discretionary opinion or judgement. This

helps us to understand the meaning of *ijtihad* in the *Rashidun* period. It is reported on the authority of Khalid b. Aslam that 'Umar b. al-Khattab once broke the fast on a cloudy day thinking that it was evening and that the sun had set. When a man came to him and said, 'Amir al-Mu'minin, the sun has come out', 'Umar replied, 'that is an easy matter, we exercised *ijtihad*'.<sup>10</sup>

## ***Ijtihad* by Abu Bakr**

The most important decision made by the Companions was the choice of Abu Bakr as first caliph, and several of the arguments presented on that occasion have influenced early *fuqaha'*. Abu Bakr, for example, addressed the people and said that, since the Messenger of Allah (SWT) had passed away, it was absolutely necessary that the caliphate be instituted for the protection and establishment of the *din*.<sup>11</sup> The *fuqaha'* argued along the same lines in discussing the necessity of the caliphate.<sup>12</sup>

Another strong argument on the same occasion came from 'Umar, who, in proposing the candidature of Abu Bakr for the office of caliph, observed that Abu Bakr was the person whom the Prophet (SAAS) had designated as leader for the prayers. Since Abu Bakr's leadership for the prayers was approved of by the Prophet, (SAAS) he ought therefore, by analogy, to be accepted as the leader in worldly affairs as well. According to al-Tabari, 'Umar wondered who would like to reject the one who was appointed by the Prophet (SAAS).<sup>13</sup> This argument seems to have drawn the attention of the *fuqaha'* to the development of the procedure of analogical reasoning (*qiyas*), in which the *fuqaha'* consider a common reason or cause between original and parallel cases. 'Umar's argument points out the reason (i.e., the approval of Abu Bakr by the Prophet as leader of prayers) and extends it to leadership in temporal affairs. The *fuqaha'* mention this argument as an example of good reasoning.<sup>14</sup>

In his capacity as caliph (11-13H), Abu Bakr made a number of significant decisions that were followed by the *fuqaha'* as well. The evidence presented by the Companions against the groups refusing to pay *zakah* deserves to be analyzed here in order to understand the reasoning and the exercise of *al-ra'y* by them. Some of the Companions raised objections to Abu Bakr's intention to take military action, arguing that such action could not be justified because these groups admitted that there is no god but Allah and that Muhammad is Allah's messenger. Abu Bakr, in return, argued from the same *hadith*, stressing the last part of it: 'unless they do acts that are punishable in accordance with Islam'. He also said

that there was no difference between *salah* and *zakah* and that he would therefore fight against anyone who made a distinction between them or refused to pay what they owed, even a thing as small as a cord (*iqal*).<sup>15</sup> Along the same lines the *fuqaha'* argue that the sentence of death or war against those who deny the fundamentals of Islam is lawful.<sup>16</sup> Al-Ghazali's discussion of the method of *ijtihad* refers to the argument of the Companions and the reasoning of Abu Bakr and emphasizes that consultation and discussion was the process by which they reached a decision.<sup>17</sup>

There are also examples of Abu Bakr's decisions based on considerations of public policy. Abu Yusuf reports that Abu Bakr used to distribute stipends equally among youth and the elderly, freemen and slaves, men and women. When some people requested that he give preferential treatment to those who had acceded Islam earlier or who were notables, Abu Bakr said that, concerning nobility and the virtue of being Muslim at an early stage, it was upon Allah to reward them, but that whatever Abu Bakr himself gave them was merely a livelihood (*ma'ash*) and equality in subsistence was better than preference.<sup>18</sup> Both al-Ghazali and al-'Amidi refer to his decision in their discussions on *ijtihad*.<sup>19</sup>

The collection of the Qur'an into book form was also a decision of Abu Bakr on the advice of 'Umar. Abu Bakr took into consideration the interests of the *ummah* by preserving the Qur'an in one volume. According to Imam Bukhari, it was 'Umar who first felt the need for compilation, when the battle of Yamamah (11H) caused great loss of Muslim life, including a large number of reciters of the Qur'an (*qurra'*). 'Umar was afraid that some of the passages of the Qur'an might be lost, and he asked Abu Bakr, who was hesitant to do what the Prophet (SAAS) himself had not done, but 'Umar repeatedly reminded him that this collection would be in the interest of Islam and the Muslim community. Once convinced of the need, Abu Bakr acceded to 'Umar's request. The collection of the various pieces constituting the Qur'an was completed during Abu Bakr's time under the supervision of Zayd b. Thabit, one of the secretaries of the Prophet (SAAS) who used to write down the revelations of the Qur'an for him.<sup>20</sup> The justification for this decision was the preservation of the Qur'an, which in fact was the preservation of Islam, and this was in the interests of the Muslim community. This decision has been discussed by al-Ghazali as an example of the *ijtihad* of Abu Bakr.<sup>21</sup>

Abu Bakr's nomination of 'Umar was also a significant decision and was described by Abu Bakr himself as *ijtihad bi al-ra'y*, meaning that it was not merely an opinion but a well considered view.<sup>22</sup>

Abu Bakr consulted his notable colleagues on this matter and reflected carefully over it before taking the final decision.<sup>23</sup> This decision of Abu

Bakr's made a great impression on the views of the *fuqaha*' regarding the *ikhtiyar* of 'Umar as caliph.<sup>24</sup>

## **Ijtihad by 'Umar b. al-Khattab**

'Umar b. al-Khattab, the second caliph (13-23H), made extensive use of judgement. His judgements or *ijtihad bi al-ra'y* were not confined to making laws, but applied to social, economic, and public administrative affairs as well. 'Umar's judgements are many and varied, but this study will consider only those judgements that have been referred to by the *fuqaha*'.

An explicit example of 'Umar's *ijtihad* is his revision of the punishment for intoxication. The change in the quantum of punishment from forty to eighty lashes was decided by the application of *al-ra'y*. The interesting point is that 'Ali, who suggested eighty lashes, drew his inference from *hadd al-qadhf* stating that 'when a person drinks wine he gets intoxicated, and when he is drunk he speaks nonsense and slanders. The punishment for slandering (*qadhf*) is eighty lashes. Therefore, the punishment for intoxication should be the same'. The analogy presented by 'Ali was accepted by 'Umar and the other Companions.<sup>25</sup> The *fuqaha*' applied the same reasoning to everything that causes intoxication.<sup>26</sup>

Al-Sarakhsi and Ibn Hazm report that some slaves of Hatib b. Abi Balta'ah slaughtered a camel that they had stolen from a Muzani man. The case was submitted to 'Umar, who decided upon amputation, in accordance with the *shari'ah*. Upon reviewing the case, however, he withdrew the judgement and instead rebuked Hatib for exploiting their labour, but failing to feed them as he was obliged to do. 'Umar then ordered Hatib to pay eight hundred dirhams, double the price of the camel, to the Muzani man.<sup>27</sup>

It was also 'Umar's judgement to suspend the *hadd* for theft during a period of drought. No clear injunction was available in the Qur'an or the Sunnah in this regard, but 'Umar applied his sense of justice and took into consideration the nature of the social circumstances and the interests of the people. The *fuqaha*' also suggested the suspension of *hadd al-sariqah* during drought on the basis of 'Umar's decision.<sup>28</sup>

Umar also banned, in the interests of the slaves, the established practice of selling a slave mother (*umm al-walad*). After the change of practice, the owner could set the slave mother free, but he had no right to sell her. Moreover, upon the death of her master, she became free automatically.<sup>29</sup>

The Qur'an prescribes eight categories of the recipients of *zakah*, with the *mu'allafat al-qulub* as the fourth category.<sup>30</sup> The Prophet (SAAS) acted

according to the Qur'anic injunction granting them property, cash, and food.<sup>31</sup> Al-Sarakhsi gives examples of how the Prophet (SAAS) spent on them from this category. Although the people of Makkah opposed and caused the Muslims great trouble, forcing them to leave their homeland, properties, relatives and friends, Prophet Muhammad (SAAS) nevertheless secured them from famine. On one occasion he sent the poor people of Makkah five hundred dinar to be distributed by Abu Sufyan.<sup>32</sup> 'Umar, however, suspended this practice, arguing that the Muslims, being now strong enough and Islam sufficiently well established, they no longer needed to become reconciled with these people.<sup>33</sup> 'Umar seems to have considered the social and political situation existing at that time, particularly the role of some of the *mu'allafat al-qulub* during the *riddah* wars.<sup>34</sup> Whatever the reason, many of the *fuqaha'* accept 'Umar's judgement. The Hanafi *fuqaha'*, Imam al-Sha'bi, Imam Malik, and Imam al-Shafi'i all maintain that the *mu'allafat al-qulub* are not to be paid from the *sadaqat*. Ahmad b. Hanbal and the *fuqaha'* of his school, however, differ from them.<sup>35</sup> Al-Mawardi, a Shafi'i *faqih*, disagreed with al-Shafi'i, suggesting that they be paid from *al-fay'* and *al-ghanimah*.<sup>36</sup>

The settlement with the Banu Taghlib on the payment of *zakah* at double the rate was another exercise of 'Umar's judgement made in a political context. The Banu Taghlib, were a Christian Arab tribe living in northern Iraq and were advanced in agriculture and dairy farming. When 'Umar first tried to impose *jizyah* on them, they regarded it as a disgrace. To escape paying this tax, the tribe decided to scatter and disperse to several areas, which in the long run would have led to the neglect of good agricultural land. At the same time, it was also feared that the tribe of Banu Taghlib would join forces with the enemies of Islam. Zar'ah b. al-Nu'man told 'Umar that the tribe of Banu Taghlib disliked the payment of *jizyah* and that they were also prejudiced against the enemy, so that Muslims should not let Banu Taghlib go to the enemy. 'Umar accepted his argument, and considering these two aspects, he levied *zakah* at a double rate, to which the Banu Taghlib agreed. Abu Yusuf and Abu 'Ubayd have indicated this in their works.<sup>37</sup> The *fuqaha'* also regarded this decision of 'Umar's as holding the field.<sup>38</sup> Even at the time of al-Rashid, when he wanted to cancel the contract with the Banu Taghlib, Abu Yusuf stood on the side of Banu Taghlib, giving the *fatwa* that, although the Banu Taghlib had not followed the conditions strictly, the caliph should honour the contract made by 'Umar.<sup>39</sup>

The most remarkable judgement implemented by 'Umar was the reform in agricultural land. Abu Yusuf discusses the issues of *sawad* land at length. After the conquest of Iraq (14H), 'Umar wanted to make some

changes that he considered necessary for the economic development and welfare of the community. 'Umar took into consideration the impact of land distribution among the army and, perhaps, also the problem of the resulting unemployment of the old peasants. He therefore decided to leave the land under the cultivation of its previous landowners and to impose a land tax (*kharaj*) on them, a move that would not only benefit the whole community but would also provide good economic prospects for future generations. Although there was strong opposition to his point of view, particularly from the army, because it went against earlier tradition, 'Umar was able to convince the people by way of reasoning and interpretation.

It is worth mentioning that 'Umar's decision regarding the *sawad* land was at first based exclusively on *al-ra'y*. He did not produce, in the beginning, evidence from the Qur'an or the Sunnah. According to Abu Yusuf, however, 'Umar later found a verse (59:10) - 'And [there is share for] those who came [into Islam] after them' - that he presented in support of his view. 'Umar argued from this verse that there was a share for those future generations who would be prepared to accept Islam at a later date. The verse, in fact, relates to share of what is gained without fighting (*fay'*), not to booty taken as a result of fighting (*ghanimah*). The argument of 'Umar may be interpreted as being an inference from the principle of *fay'* and application to *ghanimah*. 'Umar also relied on some other verses in support of his point of view, one of which was:

The spoil that Allah gave to his Messenger from the township, it is for Allah and his Messenger and for kinsfolk and orphans and the poor and the wayfarer, so that it may not become a circuit between the rich among you. (59:7)

Thus, 'Umar mentioned the prevention of the accumulation of wealth by one particular sector of the Muslim community as the reason behind the judgement he made. After three days of lively discussion he won the confidence of the notables and implemented the decision.<sup>40</sup> In the process of judgement and implementation on this issue, the following principles were underlined: the inference was drawn from the practice of *fay'*; in the case of *sawad* land, 'Umar preferred the common interests of the people to those of individuals; however, the most weighty reason was to avoid the circulation of wealth only among the wealthy. Abu al-Walid al-Baji considers it an example of good reasoning from the *nass*. He says that on the basis that 'wealth should not circulate among the wealthy people', 'Umar gave up the distribution of land.<sup>41</sup> This decision remained in effect throughout the *Rashidun* period.<sup>42</sup>

Umar also decided that if a person possessed a large piece of land that he could not cultivate it might be taken from him to be given to a

landless person for cultivation. On this basis, 'Umar acquired land from Bilal b. al-Harith al-Muzani, who had been granted a long and wide tract of land by the Prophet (SAAS).<sup>43</sup>

Another decision made by 'Umar that had important social implications was the prohibition of marriage with the *kitabiyyah*. According to the Qur'an, a Muslim man is permitted to marry a woman of *ahl al-kitab*:

And [marriages to] the virtuous women of the believers and the virtuous women of those who were given scripture before you are lawful for you, provided you give them proper dowries and live with them in honour, not in fornication nor taking them as secret concubines.(5:5)<sup>44</sup>

Taking advantage of this Qur'anic permission, Hudhayfah b. al-Yaman, the governor of al-Mada'in, took a Jewish woman in marriage. 'Umar reacted immediately against the move and asked him to divorce her. Hudhayfah argued from the Qur'anic verse and managed to persuade the caliph of the permissibility of such action. 'Umar nevertheless had to consider the social impact of the action itself. He was afraid that other Muslims might follow this precedent of their governor, and that it would create problems in society. Al-Tabari reports that 'Umar pointed out that *'ajami* women, because they had attractive manners (*khilabah*), would overcome the Muslim women.<sup>45</sup> Al-Jassas, however, says that 'Umar told Hudhayfah that the Muslim women would take to corruption because of them.<sup>46</sup> In any event, Hudhayfah b. al-Yaman understood the view of 'Umar and divorced his Jewish wife.

The historical accounts tell that 'Umar, as matter of principle, was against marriage with the women of *ahl al-kitab*. He discouraged everyone he knew from entering into such relationships.<sup>47</sup> According to some *fuqaha'*, marriage with a *kitabiyyah* is lawful because it is allowed by the Qur'an, but because of 'Umar's opinion they also regard it as undesirable.<sup>48</sup>

In *Kanz al-'Ummal*, al-Muttaqi mentions a case in which 'Umar took the interests of the people into consideration and changed former practice. It was the rule in practice and approved of by the Prophet (SAAS) that trustees were not held liable for any loss or damage if incurred without deflection from their side. According to the new rule implemented by 'Umar, however, artisans, tailors, dyers, painters, and the like were held responsible for any damage incurred to their clients' properties while in their possession, even though these properties were regarded as trusts in their possession. 'Umar changed the rule in accordance with the public interest when he realized that the craftsmen were not taking proper care of their clients' wares. Thenceforth they were held liable for damage.<sup>49</sup>

The decision of 'Umar provided one of the bases upon which the Hanafi *fuqaha'* developed the doctrine of *istihsan* and the Maliki *fuqaha'* evolved

the principle of *al-masalih al-mursalah*. The Hanafi *fuqaha'* neglect *qiyas* and prefer what is good for the people. They call it *istihsan*, while the Maliki name it *al-masalih al-mursalah*. In the above-mentioned case 'Umar neglected the established practice, considering the interests of the people. He did not make any argument from the *nass*.

Al-Sarakhsi says that 'Umar was of the opinion that the wealth of an orphan should be invested in *mudarabah*.<sup>50</sup> Also in holding this opinion, 'Umar took into consideration the interests of the orphan.

It is related that at the time of the Prophet (SAAS) and Abu Bakr, pronouncement of three divorces in a single phrase was considered to be a single declaration of divorce. This practice gave a husband the right to return to his wife within the waiting period ('*iddah*). 'Umar noticed that people were not taking divorce seriously, so he decided that the pronouncement of three divorces in a single phrase be considered as constituting three declarations of divorce, so that the husband would no longer have a right to withdraw.

The *fuqaha'* differ on this issue.<sup>51</sup> According to Abu Hanifah and Malik, pronouncement of three divorces in a single phrase is regarded as three declarations, and the husband has no right to withdraw or remarry the woman. Al-Shafi'i and Ahmad b. Hanbal consider it as one declaration and give the husband the right to withdraw and return to her within the '*iddah*. According to these two, 'Umar only declared it to be three declarations to make people realize that divorce is something serious, that they should not take it lightly.<sup>52</sup>

'Umar not only exercised *al-ra'y* himself, he also encouraged his governors and judges to make decisions by applying their own *al-ra'y* in case they failed to find injunctions in the Qur'an or the Sunnah of the Prophet (SAAS). In one of his letters to Abu Musa al-Ash'ari, the governor of Basra, Umar wrote:

Try to understand matters that perplex you and to which you do not find instruction either in the Qur'an or in the Sunnah of the Prophet. Acknowledge precedents and similar cases and apply analogy to them, and take the decision that is most pleasant to Allah and most corresponding with justice so far as you can see.<sup>53</sup>

In this letter, 'Umar directs his governor, who was invested with judicial power as well, to understand similar cases and precedents (*al-ashbah wa al-amthal* or *al-naza'ir*) before him and to draw conclusions by analogy (*qis al-umur* or, according to Ibn Khaldun, *qis al-umur bi naza'irih*). The *fuqaha'* in later periods often refer to this paragraph while discussing *ijtihad* and *qiyas*.<sup>54</sup>

A second letter worth considering is addressed to Shurayh, whom 'Umar designated as judge in Kufah. Shurayh was directed to make

judgement according to the Book of Allah and the Sunnah of the Prophet (SAAS). In cases where he did not find any injunction in the Qur'an or the Sunnah, he must decide what the righteous people had decided before him. Failing this source, he should exercise his own judgement (*fajtahid ra'yaka*).<sup>55</sup>

The point worth considering in both letters is 'Umar's instruction to compare similar cases and look into precedents before making a final decision. It may be assumed that this instruction encouraged the *fuqaha'* to develop the method of *qiyas*, by which a rule is extended from an original case to parallel cases on the basis of similarity between them. Al-Khatib al-Baghdadi and other *fuqaha'* cite extracts from both letters when they discuss *ijtihad* and *qiyas*.<sup>56</sup>

### ***Ijtihad* by Uthman and Ali b. Abi Talib**

It was not easy for the *Rashidun* caliphs to cope with problems that arose in an expanding society without taking the initiative of applying reason and making decisions accordingly. 'Uthman b. 'Affan and 'Ali b. Abi Talib also followed, more or less, the trend set by Abu Bakr and 'Umar. The most important decision of 'Uthman is that of the preservation of the Qur'an in accordance with the dialects approved of by the Prophet (SAAS).<sup>57</sup>

The Arab tribes, particularly those that lived in remote areas, had different and various dialects.<sup>58</sup> Since it was easier for the tribes to recite the Qur'an in their own dialects, the Prophet (SAAS) had allowed them to do so. However, when Hudhayfah b. al-Yaman reported to 'Uthman that this permission was causing differences among the Muslim forces on expedition to Armenia and Azerbaijan, which could create serious problems, the caliph constituted a commission, under the supervision of Zayd b. Thabit, to standardize calligraphy of the Qur'an in the Qureshite dialect. Having preserved various copies of the Qur'an in one dialect, 'Uthman destroyed all other scripts.<sup>59</sup> There are many references to this decision in the works of the *fuqaha'*. Al-Ghazali, for example, mentions it as an example of 'Uthman's *ijtihad*.<sup>60</sup>

The *fuqaha'* also refer to another of 'Uthman's judgements based on his own discretionary opinion (*al-ra'y*). He gave a share from the inheritance of a husband to the woman who was given definite divorce (*talaq ba'in*).<sup>61</sup> Perhaps 'Uthman realized that her husband wanted to deprive her of inheritance rights by divorcing her.

'Ali, the fourth caliph (35-40H), had a good understanding of Islam. His judgements concerning individual cases are generally mentioned by the

*fuqaha'*. He applied his own *al-ra'y* to judicial matters. Some of his judicial decisions, however, had great social impact and were considered by the *fuqaha'* as well.

Ibn Qayyim mentions, on the authority of Abu Dawud, that 'Ali was of the opinion that if a poor person borrowed money from a rich person but failed to pay him back in due time because of poverty, he should not be held liable to punishment or imprisonment. According to 'Ali, the punishment of the poor man in such a case is unjust and unfair. Whenever such a case was submitted to 'Ali by some moneylender, he never arrested the poor man who owned nothing. Sometimes moneylenders claimed that the debtor had money but had hidden it in case the court were to force him to pay. 'Ali would let the debtor go after his taking an oath that he had nothing to pay. Further, if moneylenders threatened a poor man or importuned him for his debt, 'Ali interceded and gave him protection from the moneylenders.<sup>62</sup>

Another example in which 'Ali considered the interests of the people is mentioned by al-Shafi'i. According to 'Ali, blood-money (*diyah*) should be paid from the *bayt al-mal* if a person died while *hadd*<sup>63</sup> or *ta'zir*<sup>64</sup> was being enforced against him.

Abu Hanifah relates another considered opinion of 'Ali, that *zakah* is not obligatory on a camel used for the purpose of transportation or on an animal employed in some work (*'awamil*).<sup>65</sup> Abu Dawud also relates a statement from 'Ali laying down that nothing is obligatory on the animal employed in work.<sup>66</sup> Thus 'Ali sought to reduce economic stress on the people.

## ***Ijtihad* by Prominent Companions**

The *Rashidun* caliphs were not alone in giving their opinions and judgements on religious or social issues. Other prominent Companions were also open to making judgement on such matters. The opinions of Mu'adh b. Jabal, 'Abd Allah b. Mas'ud, Ubayy b. Ka'b, Abu Musa al-Ash'ari, Zayd b. Thabit, and 'Abd Allah b. 'Abbas, for example, are often referred to in works on *fiqh*. These Companions not only reported *hadith* from the Prophet but also made their own judgements on issues for which they did not find instruction in the Qur'an or the Sunnah. Because of their opinions regarding *shari'ah* rulings, al-Ya'qubi considers them as *fuqaha'* of their times.<sup>67</sup>

Mu'adh b. Jabal, as mentioned above, was encouraged by the Prophet (SAAS) to exercise *ijtihad bi al-ra'y*. Abu Musa al-Ash'ari, who

accompanied Mu'adh to Yemen, was also included in this encouragement. It has been mentioned that 'Umar directed Abu Musa al-Ash'ari to draw analogous conclusions in his judgements.

'Abd Allah b. Mas'ud is reported to have said that one who has been assigned judicial responsibility must judge according to the Qur'an; that if he does not find instruction in the Book of Allah (SWT), he must then decide according to the decisions of the Prophet (SAAS); that if he failed to find guidance from the judgements of the Prophet (SAAS), he should then look into the decisions made by the good people before him; and that if he still could not find a solution to the problem in hand, he should make his own judgement.<sup>68</sup> According to a tradition attributed to the Prophet (SAAS), 'Abd Allah b. Mas'ud was directed by the Prophet (SAAS) to make independent judgements provided there was no ruling available from the Qur'an or the Sunnah.<sup>69</sup>

Al-Darimi mentions in his chapter on *ikhtilaf al-fuqaha'* that whenever 'Abd Allah b. 'Abbas was asked a question, he would answer from the Qur'an. If there was no answer in the Qur'an, he answered from the Sunnah of the Prophet (SAAS). If the Sunnah was also silent about the question under consideration, he looked at what Abu Bakr and 'Umar had decided. If 'Abd Allah b. 'Abbas failed to find a solution from these sources, he declared his own opinion. Al-Darimi also narrates the statement of Ta'us that 'Abd Allah b. 'Abbas sometimes held one opinion and sometimes another, indicating that 'Abd Allah b. 'Abbas applied his own judgement according to the available sources and that he changed his mind when he came across different evidence.<sup>70</sup>

Zayd b. Thabit is also reported to have exercised his own judgement. 'Ikrimah says that 'Abd Allah b. 'Abbas sent him to Zayd b. Thabit to ask about the inheritance of husband and parents. Zayd b. Thabit answered that the husband would inherit half of the property, the mother would take one third and the rest would go to the father. When 'Ikrimah inquired whether this decision was from the Qur'an, Zayd replied that it was his opinion.<sup>71</sup>

## Conclusion

An analytical survey of the judgements and views of the Companions discussed above shows that they exercised their judgement based on reasoning and analogy whenever it was considered necessary. Although some of the Companions took a strictly analogical approach toward making judgments, there is evidence that other Companions also took existing

circumstances into consideration before reaching a final conclusion. They changed their decisions when new circumstances arose or further facts came to light. The amendment in the law of intoxication and the imposition of *zakah* on horses at the time of 'Umar are good examples of reconsideration of existing practices in different circumstances.<sup>72</sup> Collective and individual interests were also taken into consideration, though the public interest was preferred to that of individuals.

The juxtaposition of the judgements and views of the Companions with the legal principles of *ijtihad* discussed by the *fuqaha'* makes it evident that there is a strong accord between them. The considerations underlying the Companions' decisions were systematized by the *fuqaha'* in terms of specific modes and principles of *ijtihad* and developed different categories of *ijtihad* in the light of the decisions of the Companions on various aspects of life from time to time.

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## NOTES

Al-Ghazali, *al-Mustasfa fi 'Ilm al-usul* (Cairo : al-Amiriyyah, 1322H) 2:350; al-Amidi, *al-Ihkam fi usul al-Ahkam* (Cairo : al-Ma'rifah, 1322H/1914CE) 3:218.

2. In Arabic Lexicon *al-ra'y* means sound opinion. A person of sound judgement was known as *dhu al-ra'y* or *ahl al-ra'y*. See Ibn Manzur, *Lisan al-'Arab* (word *ra'y*).
3. Al-Ya'qubi, *Tarikh al-Ya'qubi* (Beirut Dar Sadir, 1379 H/1960 CE), 2:645-55.
4. Al-Baladhuri, *Futuh al-Buldan* (ed.), R.M.Ridwan (Beirut : Dar al-Kutub al-'Ilmiyyah, 1398 H/1978 CE), 80, Abu Dawud, *al-Sunan* ed. 'Izzat 'Ubayd (Hims : M. 'Ali al-Sayyid, 1388 H/1969 CE), 4:18-19; al-Nasa'i *al-Sunan* (Beirut : Dar Ihya al-Turath al-'Arabi, 1348 H/1930 CE), see ch. Qudat II; al-Tirmidhi, *al-Sunan* (Hims: Dar al-Da'wah, 1385 H/1965 CE), 5:7.
5. Al-Bukhari, *al-Jami' al-Sahih* (Cairo : Dar wa Matabi' al-Sha'b, n.d.), v.3, pt.9, pp. 132-33; al-Muslim; *al-Jami' al-Sahih*(Cairo: Matba'ah M.A. Sabih, n.d.), 5:131-32; Abu Dawud, *op. cit.*, 4:6-7; al-Tirmidhi, *op.cit.*, 5:7.

6. Al-Bukhari, *op. cit.* v.3, pt.9, p. 126.
7. *Ibid.*, p. 133.
8. *Ibid.*, p. 126 (see Bab 13).
9. Al-Ghazali, *op. cit.*, 2:354; al-Amidi, *op. cit.*, 4:235.
10. Malik b. Anas, *al-Muwatta' Sharh Tanwir al-Hawalik, al-Suyuti* (Cairo : Mustafa al-Babi al-Halabi, 1370 H/1951 CE), 1:222.
11. Ibn al-A'tham al-Kufi, *Kitab al-Futuh* (Hyderabad Dakkan : Da'irat al-Ma'arif al-'Uthmaniyyah, 1388 H/1968 CE), 1:2-3.
12. 'Abd al-Rahman bin Ahmad al-Iji, *al-Mawaqif fi 'Ilm al-Kalam* (Beirut: 'Alam al-Kutub, 1979) 395; Sa'd al-Din al-Taftazani, *Sharh al-Maqasid* (Lahore : Dar al-Ma'arif al-Nu'maniyyah, 1401 H/1981 CE), 2:271.
13. Muhammad bin Jarir al-Tabari, *Tarikh al-Rusul wa al-Muluk*, ed. Abu al-Fadl Ibrahim (Cairo: Dar al-Ma'arif, 1961), 3:202; Abu al-Hasan 'Ali bin al-Karam ibn al-Athir, *al-Kamil fi al-Tarikh* (Beirut : Dar al-Kitab al-'Arabi, 1387H /1967 CE) 4:490; see also the edition of Dar Sadir (Beirut, 1385 H/1965 CE).
14. Ibn al-Farra' Abu Ya'la Muhammad bin al-Hassan, *al-Mu'tamad fi Usul al-Din*, ed. W. Zaydan Haddad (Beirut: Dar al-Mashriq, 1974) 223, Imam al-Haramayn 'Abd al-Malik al-Juvayni, *Ghiyath al-Umam*, ed. Mustafa Hilmi (Alexandria: Dar al-Da'wah, 1402 H/1979 CE), 32.
15. Al-Bukhari, *op.cit.*, v. 1, pt.2, p. 131 (see also commentary by al-'Ayni, *'Umdat al-Qari*, 8:243-46); Abu 'Ubayd al-Qasim bin Sallam, *al-Amwal*, ed. Khalil Harras (Cairo: Maktabah Kulliyat al-Azhariyyah, 1395 H/1975 CE), 23; 'Ali bin Muhammad al-Mawardi, *al-Ahkam al-Sultaniyyah* (Cairo: Mustafa al-Babi al-Halabi, 1966), 57-58; al-Tabari, *op.cit.*, 3:244-74.
16. 'Abd Allah bin Muhammad ibn Qudamah, *al-Mughni* (Cairo: Dar al-Manar, 1396 AH), 2:572-74.
7. Al-Ghazali, *op.cit.*, 2:242-43.

18. Abu Yusuf, *Kitab al-Kharaj* (Cairo: al-Maktabah al-Salafiyah, 1976), 45; Abu 'Ubayd, *op. cit.*, 244-45; al-Muttaqi al-Hindi, *op. cit.*, 5:357-58.
19. Al-Ghazali, *op. cit.*, 2:243; al-Amidi, *op. cit.*, 4:53.
20. Al-Bukhari, *op. cit.*, v.2, pt.6, pp.66-68; Ibn Hajar al-'Asqalani, *Fath al-Bari* (Cairo: Mustafa al-Babi al-Halabi, 1378 H/1959 CE), 9:9; Badr al-Din M. b. 'Abd. Allah al-Zarkashi, *al-Burhan fi 'Ulum al-Qur'an* ed. M. Abu al-Fadl Ibrahim (Cairo: 'Isa al-Babi al-Halabi, 1391 H/1972 CE), 1:233; *Encyclopaedia of Islam*, s.v. 'al-Kur'an,' by A. T. Welch.
21. Al-Ghazali, *op. cit.* 2:243.
22. Al-Tabari, *op. cit.*, 3:428-29.
23. *Ibid*, Ibn al-Athir, *op. cit.*, 4:69.
24. Muhammad Yousuf Faruqi, 'Early Islamic History as a Model for the Development of Some Legal Categories' Unpublished Ph.D. thesis (London: University of Exeter, 1988), pp. 224-26.
25. Al-Mawardi, *op. cit.*, pp. 228-29; Malik; *op. cit.*, 2:178.
26. Muhammad bin Ahmad al-Sarakhsi, *Al-Mabsut* (Beirut: Dar al-Ma'rifah, n.d.), 4:4; Abu Muhammad 'Abd Allah 'ibn Qudamah, *al-Mughni* (Maktabah al-Riyad al-Hadithah, n.d.), 8:304-08.
27. Malik, *op. cit.*, 2:124; Muhammad bin Idris al-Shafi'i, *al-Umm*(Beirut: Dar al-Ma'rifah, 1393 H/1973 CE), 7:231; 'Ali bin Ahmad Ibn Hazm, *al-Muhalla* (Cairo:Maktabah al-Jamhuriyyah, 1387 H/1967 CE), 2:343; al-Sarakhsi, *op. cit.*, 9:140.
28. Al-Sarakhsi, *op. cit.*, 9:140.
29. *Ibid.*, 7:149.
30. Al-Qur'an, 9:60.
31. Abu Ubayd, *op. cit.*, 537; Abu Bakr Ahmad bin 'Ali al-Jassas, *Ahkam al-Qur'an* (Constantinople : Matba'ah al-Awqaf, 1335 H), 3:123-24; Muhammad bin Jarir al-Tabari, *Jami' al-bayan fi Tafsir al-Qur'an* (Beirut

: Dar al-Ma'rifah, 1392 H/1972 CE), 10:112, Abu al-Fida Isma'il ibn Kathir, *tafsir al-Qur'an al-'Azim* (Cairo: 'Isa al-Babi al-Halabi, 1342 H), 2:356; Muhammad bin 'Ali al-Shawkani, *Nayl al-Awtar* (Beirut: Dar al-Jil, 1973), 4:233-34; see Muhammad ibn Habib, *al-Muhabbar* ed. Ilse Lichtenstadter (Beirut: Maktabah al-Tijari, 1361 H/1941 CE),

32. Al-Sarakhsi, *op. cit.*, 10:92.
33. Al-Tabari, *op.cit.*, 10:113; al-Jassas, *op. cit.*, 3:123-24; Muhammad bin Ahmad al-Qurtubi, *al-Jami' li Ahkam al-Qur'an* (Beirut: Dar al-Kitab al-'Arabi, 1387 H/1967 CE) 8:178-81; Ibn Kathir, *op. cit.*, 2:365.
34. For the role of 'Uyaynah bin Hisn and Aqra' bin Habis in the *riddah* wars, see Ibn al-Athir, *op. cit.*, 2:342.
35. 'Abd Allah bin Muhammad ibn Qudamah, *al-Mughni* (Cairo: Dar al-Manar, 1368 H) 2:666.
36. Al-Mawardi, *op. cit.*, 123.
37. Abu Yusuf, *op. cit.*, 129-31; Abu 'Ubayd, *op. cit.*, 32-33; al-Sarakhsi, *op. cit.*, 3:178-79; al-Mawardi, *op. cit.*, 144.
38. Yahya bin Adam, *Kitab al-Kharaj* ed. Ahmad Shakir (Beirut: Dar al-Ma'rifah, 1399 H/1979 CE), 12.
39. Muhammad bin al-Hasan al-Shaybani, *al-Siyar al-Kabir Sharh al-Sarakhsi* (Cairo: Matba'ah al-I'lanat al-Sharqiyyah, 1971), 48.
40. Abu Yusuf, *op. cit.*, 26-29; Abu 'Ubayd, *op. cit.*, 59-63; al-Tabari, *op. cit.*, 3:586-87; Ahmad bin Yahya al-Baladhuri, *Futuh al-Buldan* ed. R. M. Ridwan (Beirut: Dar al-Kutub al-'Ilmiyyah, 1398 H/1978 CE), 265-68; al-Shafi'i *op. cit.*, 4:181; al-Sarakhsi, *op. cit.*, 10:15-16; al-Qurtubi, *op. cit.*, 12:33; al-Shawkani, *op. cit.*, 8:162-64.
41. Abu al-Walid al-Baji, *Kitab al-Minhaj fi Tartib al-Hijaj* ed. Abd al-Majid Turki (Paris, 1978), 26.
42. Ibn al-Qayyim, *Zad al-Ma'ad* (ed.), Taha 'Abd al-Ra'uf Taha (Cairo: Mustafa al-Babi al-Halabi, 1290 H/1970 CE), 2:193; al-Shawkani, *op.cit.*, 8:173.

43. Abu 'Ubayd, *op. cit.*, 267-68; Yahya bin Adam, *op. cit.*, 60-67.
44. See also al-Tabari, *op. cit.*, 6:66-69; al-Mawardi, *al-Nukat wa al-'Uyun* ed. Khidar Muhammad Khidar (Kuwait: Wizarat al-Awqaf, 1402 H/1989 CE), 1:449-50.
45. Al-Tabari, *op. cit.*, 3:588
46. Al-Jassas, *op. cit.*, 3:324-25.
47. Al-Tabari, *op. cit.*, 6:66-69.
48. Ibn Qudamah, *op. cit.*, 6:590.
49. Al-Muttaqi, *op. cit.*, 3:530.
50. Al-Shafi'i, *op. cit.*, 7:108; al-Sarakhsi, *op. cit.*, 2:18.
51. Al-Muslim, *op. cit.*, 4:183-84; Abu Dawud, *op. cit.*, 2:649-51; Badr al-Din 'Ayni, *'Umdat al-Qari* (Beirut Dar Ihya' al-Turath al-'Arabi, n.d.), 10:233; Ibn al-Qayyim, *al-Turuq al-Hukmiyyah* (Maktabah al-Thariyyah, reprint of Cairo edition of 1217 H), 16-17; al-Shawkani, *op. cit.*, 7:14.
52. Ibn Qudamah, *op. cit.*, 7:102-04; Ibn al-Qayyim, *I'lam al-Muwaqqi'in* ed. Muhyi al-Din A. Hamid (Beirut: Dar al-Jil, 1973), 3:41-44.
53. Quoted in 'Amr b. Bahr al-Jahiz, *al-Bayan wa al-Tabyin* ed. A. al-Salam M. Harun (Cairo: Mua'assasah al-Khanji, 1367 H/1948 CE), 2:48-49; see also Muhammad bin Yazid al-Mubarrad, *al-Kamil* ed. M. Abu al-Fadl Ibrahim (Dar Nahdah, Misr, n.d.), 1:13; 'Abd Allah bin Muslim ibn Qutaybah, *'Uyun al-Akhbar* (Cairo: al-Mu'assasah al-Misriyyah al-'Ammah, 1383 H/1963 CE), 1:66; 'Ali bin 'Umar al-Daraqutni, *Sunan al-Daraqutni* ed. 'Abd Allah Husayn al-Yaman (Cairo: Dar al-Mahasin, 1396 H/1966 CE), 4:206; Abu Bakr Ahmad bin 'Ali al-Khatib al-Baghdadi, *al-Faqih wa al-Mutafaqqih* ed. I. al-Ansari (Beirut: Dar Ihya' al-sunnah al-Nabawiyyah, 1395 H/1975 CE), 1:200; al-Mawardi, *op. cit.*, 71; al-Suyuti, *al-Ashbah wa al-Naza'ir* (Cairo, 1378 H/1959 CE), 6-7; Ahmad bin 'Amr al-Khassaf, *Adab al-Qadi* (ed.), Farhat Ziyadah (Cairo: American University Press, 1978) 45-46.
54. Al-Khatib al-Baghdadi, *op. cit.*, 1:200; al-Ghazali, *op. cit.*, 2:244; al-Amidi, *op. cit.*, 4:54; Ibn al-Qayyim, *op. cit.*, 1:86.

55. Abu Muhammad 'Abd Allah al-Darimi, *Sunan al-Darimi* (Beirut: Dar al-Kutub al-'Ilmiyyah, n.d. ), 1:60 Ahmad bin Shu'ayb al-Nasa'i, *Sunan al-Nasa'i* (Beirut: Dar Ihya' al-Turath al-'Arabi, 1348 H/1930 CE), 8:231; Waki' Muhammad bin Khalaf, *Akhbar al-Qudat* (Beirut: 'Alam al-Kutub, n.d.) 2:189.
56. Al-Khatib al-Baghdadi, *op. cit.*, 1:199-200; al-Ghazali, *op. cit.*, 2:244; al-Amidi, *op. cit.*, 4:54.
57. Al-Suyuti, *Al-Itqan fi 'Ulum al-Qur'an* (Beirut: Dar al-Fikr, 1399 H/1979 CE), 1:61.
58. Taymur, *Lahjat al-'Arab* (al-Hay'at al-Misriyyah, 1973), gives many examples of dialectal differences; see also Mahmud Fahmi al-Hijazi, *al-Lughat al-'Arabiyyah 'abr al-Qurun* (Cairo: Dar al-Thiqafah, 1978).
59. Al-Bukhari, *op. cit.*, v. 2, pt. 6, p. 266; al-Suyuti, *op. cit.*, 1:60-61; Badr al-Din Muhammad bin 'Abd Allah al-Zarkashi, *al-Burhan fi 'Ulum al-Qur'an* ed. M. Abu al-Fadl Ibrahim (Cairo: 'Isa al-Babi al-Halabi, 1391 H/1972 CE), 1:236; Ibn al-Qayyim, *op. cit.*, 18-19; *Encyclopaedia of Islam*, s.v. 'al-Kur'an', by A.T. Welch.
60. Al-Ghazali, *op. cit.*, 2:243.
61. *Ibid.*, 244; al-Amidi, *op. cit.*, 4:55.
62. Ibn al-Qayyim, *op. cit.*, 62.
63. Al-Shafi'i, *op. cit.*, 7:108; al-Sarakhsi, 21:18; al-Shawkani, *op. cit.*, 5:394.
64. Al-Sarakhsi, *op. cit.*,
65. Nu'man bin Thabit Abu Hanifah, *Jami' Masanid al-Imam* (Abu Yusuf's version) ed. Muhammad bin Mahmud al-Khawarzami (Hyderabad Dakkan: Da'irat al-Ma'arifat-Nu'maniyyah, 1332 H), 1:460-61.
66. Abu Dawud, *op. cit.*,
67. Al-Ya'qubi, *op. cit.*, 2:138-61

68. Al-Nasa'i, *op. cit.*, 8:230-31; al-Khatib al-Baghdadi, *op. cit.*, 1:203; al-Ghazali, *op. cit.*, 2:244; al-Amidi, *op. cit.*, 4:56.
69. Abu al-Husayn al-Basr, *al-Mu'tamad fi Usul al-Fiqh* ed. Hamidullah (Damascus: al-Ma'had al-'Ilmi al-Faransi, 1385 H/1965 CE), 2:735.
70. Al-Darimi, *op. cit.*, 1:59.
71. Al-Khatib al-Baghdadi, *op. cit.*, 1:202; al-Ghazali, *op. cit.*, 2:245.
72. At the time of the Prophet (SAAS) horses were kept only for purposes of travelling or for *jihād*, and so the Prophet (SAAS) exempted them from *zakah* (see Abu Dawud, *op. cit.*, 2:215). When 'Umar noticed that people started to have horses for breeding purposes, he imposed *zakah* on them.