

Answer to Question

Adoption and Analogy in Usul ul-Fiqh

To: Yahya Abu Zakaria
(Translated)

Question:

Assalamu Alaikum wa Rahmatullahi wa Barakatuh,

May Allah protect you our Sheikh, help you to carry the trust, and support you with His near victory, with His (swt) permission.

Allow me Sheikh to ask you this question may Allah Almighty protect you and increase your vastness in knowledge and health.

A question in the Usul ul-Fiqh (principles of jurisprudence).

It came in the book, *The Islamic Personality* Volume 1, under the subject of Ijtihad:

[A further example of Ijtihād is what ‘Ali (ra) said regarding punishment (Hadd) for the crime of drinking alcohol. He said: "من شرب هذى ومن هذى افتري فأرى عليه حد المفترى" 'Whoever drinks it will speak nonsense, and who did so would fabricate lies, so I see that he must be punished like the fabricator of lies'.

‘Ali (ra) made an analogy between drinking and fabrication of lies because he understood from Shar’a that which is likely to happen is treated the same as that which happens. This is like when the Shar’a treated sleeping the same as ritual impurity, and the act of sexual intercourse in requiring the Iddah (legal period a woman waits after divorce for marriage) the same as if the womb had become engaged (pregnant). All these are examples of Ijtihād by the Sahabah and Ijma’a as-Sahaba on the issue of Ijtihād].

End quote.

The question is: we adopt that no analogy (Qiyas) can be made on matters of punishments (Hudud), expiations (Kaffarat), permit (Rukhsa), and worships (‘ibadat).

So how can we make analogy between the punishment (hadd) for drinking khamr and the punishment of fabricating lies by the Illah (reason) that the one who is drinking Alcohol is likely to fabricate lies.

And if the Sharia has made sleep an invalidator of ablution and has treated it to the same as ritual impurity because impurity is likely to happen... Is it possible to make Qiyas (legal analogy) between it and fainting, drunkenness and insanity because of the likelihood of impurity even though these are considered acts of ‘ibadat (worships)?... Allah bless you.

Answer:

Wa Alaikum Assalam wa Rahmatu Allahi wa Barakatuh,

First: Yes, there are things we do not make adoption on them:

1. In the book Mafaheem (Concepts of Hizb ut Tahrir) (on page 31-32 PDF / on pages 36-41 (Word file, Arabic edition) it is mentioned:

[The Islamic systems are composed of Ahkam Shari’ah related to ‘ibadat, morals, foodstuffs, clothing, mu’amalat (transactions) and penal code. The divine rules related to ‘ibadat, morals, food-stuffs, and clothing cannot be reasoned by ‘illah (legal reason). The Messenger (saw) said: «حَرَّمَ الخمرَ لِعَيْنِهَا» **“Wine (khamr) was forbidden for itself.”**

However, the AHkam Shara’iah related to transactions and penal code are are reasoned by an ‘illah. This is because the Hukm Shar’ai in these matters are built upon an ‘illah, which is the reason for legislating the rule... Therefore any rules where the text included an ‘illah are reasoned and Qiyas may be made to them; whereas for the rules whose text is without an ‘illah, an ‘illah is not sought and Qiyas cannot be used.] **End.**

In the book, *The Islamic Personality*, Volume 3, chapter “THE CONDITIONS OF THE ORIGINAL VERDICT” (page 346-347 of the Word file, Arabic edition) it is mentioned:

[The fifth condition: the original verdict should not be made as an exception from the rules of the Qyaas, and that which had been excepted from the measurement rules is of two divisions:

The first: it is that which has no (ma'qool al nass) text reasoning ('illah), and it is either excluded from a general rule, or it is initially originated (not excepted from a general rule). As for that which is excluded from a general rule, this is like the acceptance of the testimony of Khuzaimah alone (instead of two witnesses),

as Al-Bukhari narrated, despite that it has no text reasoning, it is excluded from testimony rule. And the initially originated is like the numbers of the prayer pillars, the limits of the quorums (nisaab) of the Zakaat, and the limits of the punishments and the expiations. Despite that they don't have a ma'qool of text ('illah), they are not excluded from a general rule, and in both cases the Qyaas on them is prevented.] **End.**

Second: As for the practicalities of adoption, to clarify this we mention the following points:

1. It is stated in the explanation of Article 3 in al-Muqadimmah (The Draft Constitution) reads the following:

[This is so because the Shari'ah rules, which represent the address of the Legislator related to the actions of the worshippers, have come in the Quran and in the narrations, and many of these can have a number of possible meanings according to the Arabic language and according to Shari'ah. For that reason, it is natural and inevitable that people differ in their understanding of the address of the Legislator...

Therefore, it is obligatory upon every Muslim to adopt a specific Shari'ah rule when taking rules for actions, irrespective of whether he or she was a Mujtahid or a Muqallid (someone who follows the opinion of a scholar in an issue rather than deriving it themselves) or whether they were the Khalifah or other than the Khalifah.]

2. The explanation of Article 4 in al-Muqadimmah (The Draft Constitution) reads the following:

[However, it emerged from the events of Al-Ma'mun (pertaining the Fitna (strife) of the creation of the Quran), that adoption in the thoughts related to 'Aqa'id (beliefs, plural of 'Aqeedah) caused Fitna for the Khalifah and Fitnah amongst the Muslims. Therefore, the Khalifah deems it fit to abstain from adopting in matters related to 'Aqeedah and in rules related to rituals in order to avoid problems and to gain the consent and tranquility of the Muslims. However, abstaining from adopting in matters of 'Aqa'id and in rituals does not mean that it is forbidden for the Khalifah to adopt in them, it rather means that the Khalifah chooses not to adopt in them for he can either adopt or abstain from adopting. Thus, he may choose not to adopt. That is why the article stated that the Khalifah "does not adopt" rather than stating that the Khalifah is "forbidden from adopting", which indicates that he may choose not to adopt]. **End.**

3. The leaflet on adoption published on 14/7/1998 stated:

(...it is not possible for the Hizb to be based on the thought with all its differences in origins and branches, and the linguistic meaning of Hizb (party) will not apply to it, as the term Hizb means the group of the man. Thus, the idea of adoption is imperative for the Hizb. Hence, the first characteristic of Hizb ut Tahrir as an ideological party is the adoption. This adoption is what makes it a Hizb, because the party does not become a Hizb unless it has one opinion in every thought, opinion, or Hukm Shari' obligatory for it. because if there is no unity of thought, it will not be a coherent unit ... (20 Rabi' I 1419 AH 14/7/1998 CE))

Third: As you see from the aforementioned, the Muslim may **adopt** in all what is necessary for him, whether he is the Khalifah or head of a party or an individual, and this is in terms of origin in every issue. This is in accordance to the provisions of Sharia for his powers, and the allowed limits of adoption... but after the events of Al-Ma'mun, the Hizb considered it fit not to adopt in matters of 'Aqa'id and in rituals with some exceptional cases... and then it made adoption in some matters and abstained in others for the reasons it mentioned ...

Fourth: As for your question about Ali's Ijtihad on the issue of the punishment (Hadd) for drinking alcohol it was during the era of the Companions, and they were performing a legal Ijtihad in every matter. So, when Omar consulted with them about the maximum punishment for drinking alcohol, these ijtihaads were received, including the opinion of Ali mentioned above. This issue we had explained it in the book, *The Islamic Personality* Volume 1, where the following was stated:

[And this is what has reached us in successive reports (tawatur) in which there is no doubt. One such report is the saying of Abu Bakr (r.a) when he was asked about the Kalala (الكلالة). He said: 'I will speak about it according to my opinion. If it is correct then it is from Allah (swt). If it is a mistake then it is from me and from Shaytan and Allah (swt) has nothing to do with it. Kalala is the one who has no children or parents left.' His statement: 'I will speak about it according to my opinion' does not mean this opinion is from him. Rather it means I will say according to what I understand from the expression 'Kalala' in the verse...

Consider also the case when a Muslim, named Samrah took from a Jewish merchant a tenth portion of alcohol (as customs), bottled it and then sold it. So 'Umar (r.a) said: «لعن الله» **May Allah (swt) fight Samrah. Does he not know that the Prophet (saw) said: 'May Allah (swt) curse the Jews. The fat was made Haram upon them, so they ornamented it and sold it'.**

In this case, 'Umar (ra) made the analogy between the alcohol and the fat, and that prohibition of it meant prohibition of its selling price.

A further example of Ijtihād is what ‘Ali (ra) said regarding punishment (Hadd) for the crime of drinking alcohol. He said: «من شرب هذى ومن هذى افترى فأرى عليه حد المفترى» **‘Whoever drinks it will speak nonsense, and who did so would fabricate lies, so I see that he must be punished like the fabricator of lies.’**

‘Ali (ra) made an analogy between drinking and fabrication of lies because he understood from Shar’a that which is likely to happen is treated the same as that which happens. This is like when the Shar’a treated sleeping the same as ritual impurity, and the act of sexual intercourse in requiring the Iddah (legal period a woman waits after divorce for marriage) the same as if the womb had become engaged (pregnant). All these are examples of Ijtihād by the Sahabah and Ijma’a as-Sahaba on the issue of Ijtihād]. **End.**

As you see a person may adopt on everything necessary for him ... But based on our understanding of events in the era of Al-Ma’mun we have seen appropriate that we do not adopt in matters and to adopt in other things ... and the subject of Ijtihad of Ali (r.a) which you asked about was at the time of the companions, that is before the events of Al-Ma’mun.

As for the matter of the punishment (Hadd) for drinking alcohol, the evidence in the Sunnah and the consensus of the Sahaabah indicates that the Hadd is either 40 or 80, and is affirmed with authentic evidence.

It is authentic on the authority of Ali (ra) as it came to Ibn Abi Shaybah, on the authority of Abu Abd al-Rahman al-Sulami, on the authority of Ali, who said:

“A group of people from Ash-Sham drank wine and they wrongly interpreted the noble Ayah, so he (meaning Omar) consulted about them and I said: I think you should give them time for repentance. If they repent, I will lash them eighty, otherwise I will strike their necks because they have made lawful what is forbidden. So he gave them time for repentance and they repented, and he lashed them eighty each.”

Also Muslim extracted in the hadith of Hudhain bin Al-Munhir on the incident of lashing Alwaleed that Ali bin Abi Talib (r.a) said: "جاء النبي ﷺ أربعين، وأبو بكر أربعين، وعمر ثمانين، وكل سنة" **“Allah's Apostle (saw) gave forty stripes, and Abu Bakr also gave forty stripes, and Umar gave eighty stripes, and all these fall under the category of the Sunnah.”**

These are the two punishments (Hudud) for the one drinking alcohol. And it is not permissible other than these two punishments at all, because it was not reported from the Prophet (saw) nor from the Companions (ra) that people were flogged by other than forty and eighty... However, it is permissible for the Caliph to command one of them, i.e. it is permissible for him to mandate one of the two punishments and make it obligatory, because if he enjoins eighty (lashes), it includes the forty affirmed in the Sunnah and the permissible increase according to the estimate agreed upon by the Companions, which is eighty. And if forty is mandated, then it is established in the Sunnah, and what exceeds it is permissible for the imam, and is not obligatory for him, so nothing on him by obligating forty (lashes) only.

Fifth: As for your other question: [And if the Sharia has made sleep an invalidator of ablution and has treated it to the same as ritual impurity because impurity is likely to happen... Is it possible to make Qiyas (legal analogy) between it and fainting, drunkenness and insanity because of the likelihood of impurity even though these are considered from the ‘ibadat (worships)?...] The answer is that we do not make Qiyas (legal analogy) here, but we answer as in the Rules of Salah: (Wudu is also invalidated by sleep, and when the mind is overwhelmed without sleep... As for the loss of the mind without sleep, it is if a person to go mad, pass out, intoxicate, or become ill, and his mind is lost and his ablution is invalidated... The evidence for that is the consensus (of the Sahabah) as narrated by Ibn Al-Munhir) **End.**

This is my opinion in these matters and Allah is Most Wise and He Knows Best.

Your brother,

Ata Bin Khalil Abu Al-Rashtah

27th Rabii’ Al-Awwal 1443 AH

03/11/2021 CE

The link to the answer from the Ameer’s Facebook page:

<https://www.facebook.com/HT.AtaabuAlrashtah/posts/3063071833938820>