

Factors Responsible for Emergence of the Practice of Ra'y

At the most sensitive juncture in the history of Islam when the Muhammadan Shari'ah was in the course of expansion, the process of *wahy* (revelation) was terminated and with it the epoch of *tashri'* (legislation). The losing of the era of *tashri'* and the demise of the Prophet (S) coincided with the emergence of diverse changes in the world of Islam. These changes were the result of the spread of Islam in new territories and alien soils, followed by new situations and problems each one of which required an answer.

The passage of time did not offer any solution to the problems; rather it added to their intricacy and their number as well. For, with time, sometimes even the problems that had received exposition during the period of *tashri'* were lost in the mazes of ambiguity arising from different narrations and *riwayat* (traditions), thus giving rise to new obstacles in the way of determining the laws (*ahkam*).

At this point, while the Islamic Ummah had no access to *wahy* and had lost the biggest source towards which they looked for the solution of their problems, much greater problems cropped up, and this vacuum was felt more acutely than ever before. Two different outlooks emerged in order to confront this difficult situation in the newly-born Islamic society:

(a) The point of view that the authority for determining the Divine *ahkam* and expounding the Qur'anic meanings belonged to the House of the Prophet (S) after him, and that they alone, in accordance with the Prophet's express decree, should be referred to for solution of the problems and determination of the *ahkam* of the Almighty. Those who believed in this outlook did not face any insoluble problem in the wake of the cessation of *wahy*, as they knew well that their duty was to refer to the *Ma'sumun* (A). [1](#)

(b) The view that there was no specified person after the Prophet to interpret and determine the Divine commandments. Its proponents maintained that the Book and the Sunnah of the Prophet (S) were the only sources from which the *ahkam* regarding the new legal issues could be derived.

Those who subscribed to this view later to be known as "Ahl al Sunnah" turned to solve their problems by referring to the Qur'an and the Sunnah; but they soon realized that it is not at all an easy task to extract all the *ahkam* of the Shari'ah from express Qur'anic texts (*nusus*) and the Sunnah of the Prophet, and that they are not adequate to answer many of the new issues.

This led the Ahl al-Sunnah into finding other ways and sources of *ijtihad* and to put their trust in the practice of *ray* and personal judgement and to rely on such sources for basing legal conjectures as *qiyas* (analogy), *istihsan*, *masalih mursalah*, *istislah*, *sadd al-dhara'i'*, *fath aldhara'i'*; *madhhab al-sahabi*, *shari'at al-salaf*, *'urf*, *istidlal* and so on as *hujjah* (possessing legal validity).

This was a sketchy description of what we shall discuss in detail below.

The Factors Which Generated New, Contingent Issues

The emergence of new issues after the termination of the period of *tashri'* depended upon various factors:

1. Natural and ordinary factors related to the day-to-day life of the Muslims.
2. Exceptional or extraordinary factors, like wars.
3. Islamic conquests and victories extended Islamic influence in Asia, Africa and some European regions, and, in this way, diverse cultural traditions stepped into the vast domain of Islam. On account of this, new requirements and needs were felt in the same proportion, and Islamic fiqh was bound to answer all of them, in addition to presenting appropriate *ahkam* which could suit different environmental and social conditions.

All these factors put strains on *ijtihad* and made deduction of the laws of Shari'ah more difficult for the Sunni community. This caused the *Ahl al-Ray*—those who believed in the practice of *ray*—the Iraqi school of jurisprudence, whose founder was Abu Hanifah al-Nu'man ibn Thabit (80–150/699–767), and a large group of Sunni fuqaha' to reach the conclusion that the express texts (*nusus*) of the Qur'an and the Sunnah of the Prophet (S) alone, being limited, cannot provide an answer to the new issues and problems, while the issues of daily life are countless and ever-increasing.

Accordingly, they were forced to rely on an *ijtihad* based on *ray* and other such conjectural instruments that were devised before him. This topic will be discussed in the article "*Sayr al-ta'rikhi-ye qiyas dar manabi-ye ijtihad*" (the Historical development of Qiyas as a Source of Ijtihad).

The Shi'i Encounter With New Problems

In the same period, the Shi'ah, who formed a section of the Islamic society, also encountered the new problems that faced the society. They also considered it essential to find solutions to the new problems.

But due to their particular point of view, they never came across the above-mentioned strains when facing diverse situations, because, during the days of accessibility to an Imam (A) they went to him for solving their problems, and during the days when they could not find an access to him or during his occultation they could solve the problems of daily life by means of the *usul* and by using them in deriving the *ahkam* of the Shari'ah. They never felt the need for having recourse to *ijtihad* by *ray* and depending upon conjectural legal sources.

According to Ahl al-Sunnah, in instances where the *nass* of the Qur'an and the Sunnah was not available, the *mujtahid* can legislate laws by exerting his own personal judgement and *ray* and set them forth as divine laws. But according to the Shi'i point of view, in Islamic law a *mujtahid* has no right to legislate laws regarding new situations and issues, as there is no need for a *mujtahid* to resort to *tashri'* in presence of the general juristic principles which already exist.

Different Points of View Among Ahl al-Sunnah

It is essential to mention this point here that the practice of *ray* was not accepted by the Sunni community without any resistance, and the different Sunni sects were not uniform in this regard. The Ahl al-Hadith (the Hijaz school of fiqh), whose founder was Malik ibn Anas al-'Asbahi (93-179/711-795), were a section of the Sunni community who forbade every kind of *ijtihad* that crossed the limits of the Qur'an and the Sunnah.

Others who held this outlook were the Hanbalis, the followers of Ahmad ibn Hanbal al-Shaybani (164-241/780-855), and the Zahiris, the followers of Da'ud ibn 'Ali al-'Isfahani, known as Abu Sulayman Zahiri (200 or 202-270/815 or 817-883). In the beginning, however, Malik did not subscribe to this outlook and approved the practice of *ray*.

Ra'y and Shi'i Ijtihad

Ijtihad, as accepted by the Shi'ah, involves the application of certain essential and fundamental principles (*usul*) to secondary issues (*furu'*). This results in expansion of fiqh and the laws of Shari'ah in the sense of development and emergence of new instances and diversity of legal applications, and not through legislation of new laws.

But *ijtihad* in the Sunni sense implies *tashri'* or legislation of laws, which forms the part of the *mujtahid's* activity. In other words, in Sunni fiqh, *ahkam* or the laws of Shari'ah also expand along with the expansion and multiplication of the issues. The variety and number of the issues and applications and their external and objective diversity requires variety and diversity of the relevant *ahkam*. Many a time, the general laws that cover those applications are not to be found in the Book and the Sunnah, as if those *ahkam* have no relationship with the *wahy*.

Like laws and regulations formulated by non-Muslim nations of the world for their societies, they are

also the product of the mind and intellect of human individuals. On account of this, it is not legitimate to acknowledge them as Divine commands and the laws of Islam. We shall discuss this matter in detail later in this article in the critique of the *Riwayah* of Mu'adh. However, before that, we shall examine the arguments advanced by believers in the practice of *ray* and its supporters.

Arguments in Defence of Ra'y and Their Refutation

The arguments extended by Sunni fuqaha¹ in favour of *ijtihad* by means of *ray* can be divided into two main parts:

- (1) the arguments derived from the Qur'an, and
- (2) the arguments produced from the tradition and Sunnah.

1. The Arguments Based on the Qur'an

In order to prove the validity of the practice of *ra'y*, the fuqaha¹ of the Ahl al-Sunnah advance certain arguments from Qur'anic verses. Some of them are the following.

﴿ إِنَّا أَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ لِتَحْكُمَ بَيْنَ النَّاسِ بِمَا أَرَاكَ اللَّهُ ﴾

1. Verily, We revealed unto thee the Book with the truth, that thou mayest judge between mankind by that which God showeth thee (araka, from the same root as ray).... (4:105)

..كَذَلِكَ نُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَتَفَكَّرُونَ..

2. Thus We explain the signs for people who think. (10:24)

..كَذَلِكَ نُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَعْقِلُونَ..

3.Thus We explain the signs for people who ratiocinate. (30:28)

Basing any argument upon these verses for proving the validity of the practice under discussion does not appear to be proper. As the first verse is particularly addressed to the Holy Prophet (S), it does not include anyone else. Moreover, the phrase *بما أراك الله*, (by that which God showeth thee) indicates that the Prophet (S) adjudicated among the people of his Ummah according to that which was revealed to him by God in the Holy Qur'an and not according to his own personal judgement and *ray*.

In fact this verse conveys something contrary to the aims of the believers in the practice of *ray*, as it

acknowledges the presence of definite laws revealed to the Prophet (S) as the only criterion and standard. This issue has no relevance whatsoever to the validity of the practice of *ray* in *ijtihad*. As to the second and the third verses, they also are not concerned with the subject of the practice of *ray*.

They specify the significance and value of thinking and reflecting about the Divine verses and the signs of God in creation, for such thought and reflection leads man to the knowledge of God, strengthens faith, and guides him to the cognition of the most fundamental of religious doctrines, which is the knowledge of God.

2. Arguments Based on the Tradition

(A) It is reported in the *Musnad* of Ahmad ibn Hanbal al-Shaybani (vo1.5,p.230) that the Prophet (S) while sending Mu'adh as a judge to Yaman asked him: "On what shall you base your judgements?" Mu'adh replied: "On the Book of God". The Prophet (S) asked: "But what if you don't find it there?" Mu'adh said: "(Then I will act) according to the Sunnah of the Apostle of Allah". The Prophet (S) again asked: "What if you don't find it there [too]?" Mu'adh said: **أجتهد رأيي** (I will exert my own *ray*). The Prophet (S) said: "Thanks to God who gave success to, His Messenger".

This tradition sounds to be explicit in confirming the view that the Prophet (S) gave approval to *ijtihad* by means of exerting personal judgement and *ray*.

(b) 'Umar in his letter to Abu Musa al-'Ash'ari, wrote:

الفهم الفهم فيما يتلجج في صدرك ثم قس الأمور بعضها ببعض.

Concentrate your understanding on that which goes on in your mind (i.e. something which is not to be found in the Book and the Sunnah of the Prophet) and draw an analogy between similar matters.

Ibn Qayyim al-Jawzi has expounded this *Riwayah* in his book *A'lam al-muqi'tn* (vo1: 1, pp. 373–385).

(c) In the *Sahih* of al-Bukhari (*Bab ajr al-hakim*, vol. 4, p. 178) it has been reported from 'Amr ibn al-'As that the Prophet said that whenever a judge gives a verdict according to his *ijtihad*, he will be given two rewards if his judgement is right, and if it is not, he will be given one reward.

Muhammad ibn Muslim also has recorded this *Riwayah* in his *Sahih* (*Kitab al-Aqdiyah*, hadith No. 150). Ibn Majah has recorded it in his *Sunan* (*Bab al-hakim*, hadith No.2314) and Ahmad ibn Hanbal al-Shaybani in his *Musnad* (vol.2, p. 187).

(d) Dr. Mahmasani, in his book on the philosophy of legislation in Islam, quotes a tradition in which the Prophet (S) is reported to have said to Ibn Mas'ud:

إِقْضِ بِالْكِتَابِ وَالسُّنَّةِ إِذَا وَجَدْتَهُمَا فَإِنْ لَمْ تَجِدِ الْحُكْمَ فِيهِمَا إِجْتَهِدْ رَأْيَكَ.

Judge according to the Book and the Sunnah if you find (the judgement) in the two, but if you don't find it there exert your own *ray*.

Critique of the Tradition Narrated about Mu'adh

The tradition about Mu'adh is not acceptable for several reasons:

1. From the point of view of *sanad* (chain of transmission), as it is narrated on the authority of al-Harith ibn 'Amr alone. There is no other line of transmission besides this. Moreover, al-Harith ibn 'Amr is an unknown narrator (*majhul al-hal*) whose character is not known.

This objection was also raised by Abu Muhammad 'Ali ibn Hazm al-'Andalusi al-Zahiri (d.456/1064) in his *al-'Ilham li usul al-'ahkam* (vol.5, pp.373-375). Al-Bukhari has also, in *al-Ta'rikh al-'awsat*, stated that there is no mention of the name of al-Harith in any text of tradition or book of *rijal* except this sole *Riwayah*. Moreover, his character is also obscure. Therefore, it is not proper to consider the *Riwayah* reported from him to be reliable.

2. From the point of view of meaning (*dalalah*), also, the recourse to this tradition for arguing in favour of *ray* is unjustified. Because, *ijtihad* in the sense of legislation of laws and determination of *ahkam* for the new and emergent issues by means of *ray* and personal judgement was not in vogue during the lifetime of the Prophet (S), as the Prophet (S) himself was alive and there was no need for it.

Why would an individual like Mu'adh in spite of having access to the Prophet (S) practice *ra'y* or exercise his personal opinion, when the *ahkam* and the precepts regarding the religious duties, in detail and in every aspect, could have been understood very easily and simply by referring to the Prophet (S)?

The Prophet's contemporaries could also refer to individuals trained under the guidance of the Prophet (S) who had acquired firsthand learning of the Divine teachings and the *wahy*, regarding any problem of scientific, religious, ethical; social, economic, penal, commercial, and agricultural or some other nature, and get a satisfactory and complete answer to it. In such conditions, there were no grounds for practising *ra'y* and personal opinion.

Moreover, during the course of a long journey when it was not possible to contact the Prophet (S) immediately or anyone trained in Islamic teachings, there was still the possibility for Mu'adh to find out the Divine commandment in a certain case by sending a messenger. Hence distance could not be a justification for exercising *ray* and personal judgement.

The term *ijtihad*, however, was in vogue during the time of the Prophet (S) and even during the time of the *Sahabah* and *Tabi'un*—in its literal sense, i.e. striving and making effort in doing something. We find

many instances of its use in this sense (some of which were mentioned in our article entitled: "A Study of the Sources of *Ijtihad*").

The need for *ijtihad* in the sense of exercising *ray* and personal opinion given to it by the Ahl al-Sunnah was felt after the Prophet's demise. This matter will be elaborated under the heading "The Emergence of *ijtihad bi al-ray*" later in this article.

3. There appears to be no connection between the lexical meaning of *ijtihad* and the sense of the practice of *ray* and reliance upon personal opinion. If the lexical meaning of the term *ijtihad* as defined by lexicographers is taken into account, the application of the word to the process of extracting a *hukm* by means of *ray* and personal opinion gives it another sense, for there is no similarity between the two.

The lexicographers define *ijtihad* as an activity accompanied by endeavour and hard effort. Thus, if any individual formulates his personal judgement and presents it to society as a Divine law merely on account of not finding any dictum in the Qur'an and the Sunnah, this exercise of his would not be regarded as an *ijtihad*.

4. The deduction of a law in a legal issue through exercise of *ray* and subjective judgement, if it is not supported by the principles of the Shari'ah and its general laws cannot be acknowledged as a *hukm of the Shari'ah* and a Divine law. Because a *hukm of the Shari'ah* is a Divine commandment revealed to the Holy Prophet (S) through the agency of Jibrail (A), not a rule that is the product of *ray* and subjective opinion of a *mujtahid*. For the personal judgement of an individual cannot be called a Divine injunction and a *hukm of the Shari'ah*.

5. Approving of the tradition concerning Mu'adh and accepting *ijtihad* in the sense given to it by the tradition results in such disastrous consequences as no lawgiver would allow.

Consequences of the Tradition About Mu'adh

The repercussions and evil effects of this tradition are as follows:

a) If a *hukm* formulated by a *mujtahid* by exercising *ray* and subjective opinion is regarded a *hukm of the Shari'ah* and a Divine injunction, it means that all the individuals who exercise *ijtihad by ray*, each of them occupies the high station of a Divine legislator and lawgiver, whereas it is neither possible nor proper to accept this. Because, the source of legislation and *ahkam*, in the light of definite *shari' dicta*, is God alone, and no other being. No *hukm* or law except that which is legislated by Him can be given the status of a *shari' hukm*.

Even the Prophet (S) cannot be considered as a source of legislation of the *ahkam* of the Shari'ah. The belief cherished by the majority of scholars of the Sunni community that the Prophet (S) himself sometimes exercised *ijtihad* and himself legislated laws according to his own *ray* and subjective opinion in some issues and problems, and the traditions narrated in this regard, have no validity whatsoever (an

elaborate refutation of this view will be given in the article "The Prophet (S) and *Ijtihad*").

Accordingly, when the Prophet (S) cannot be considered as the source of the *tashri'* of *ahkam*, is it possible that subjective views and opinions of human individuals with no links with *wahy*, and whose character, behaviour and speech are not considered a norm and model for others, be considered laws of God and they themselves as legislators of the *ahkam* of the Shari'ah?

No doubt, it is possible that occasionally *ijtihad* might have figuratively been referred to as *tashri'* and legislation. For instance, the renowned scholar Abu Ishaq Ibrahim al-Shatibi al-Gharnati al-Maliki (d.790/1388), the author of *al-Muwafiqat*, has also named the task of a *mujtahid* as *tashri'* and legislation.

No doubt, his usage carries only a figurative sense; for naming the activity of a *mujtahid* as legislation was for the reason that *ijtihad* (i.e. application of the *usul* of the *ahkam* and the general principles for deriving other *ahkam* regarding emergent issues and new problems) is an effort to discover a *shar'i hukm*, thereby discovering the intent of the Lawgiver and obtaining the *hukm* of God.

Then, in reality, it amounts to calling 'legislator', in a figurative sense, one who discovers a law. Since in Islamic fiqh there is in fact no provision for anybody except God to lay down laws. Therefore, the Shari'ah is made up of the injunctions and commandments that were revealed to the Prophet (S) by God Almighty through the agency of Jibrail. There are verses in the Qur'an which confirm this fact; they will be discussed in the article entitled "The Prophet (S) and *Ijtihad*".

b) Reliance on *ijtihad* by *ray* and subjective judgement is a kind of admission of the shortcoming of the Shari'ah, and is an implicit declaration that the Islamic Shari'ah is incapable of answering emergent issues and new problems, whereas anyone acquainted with the spirit of Islam and its comprehensiveness cannot concede this.

Because, the process of legislation concerning all the necessary spheres of human life, either in particular detail or in the form of general laws, was completed during the lifetime of the Prophet (S). The following verses of the Qur'an clearly declare this fact:

وَوَزَّلْنَا عَلَيْكَ الْكِتَابَ تَبْيَانًا لِّكُلِّ شَيْءٍ

...And We revealed the Book unto thee as an exposition of all things. (16:89)

مَا فَرَطْنَا فِي الْكِتَابِ مِنْ شَيْءٍ

We have neglected nothing in the Book (of Our decrees). (6.38)

﴿ وَمَا اخْتَلَفْتُمْ فِيهِ مِنْ شَيْءٍ فَحُكْمُهُ إِلَى اللَّهِ ﴾

And in whatsoever ye differ, the verdict therein belongeth to God. (42:10)

الْيَوْمَ أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتَمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيْتُ لَكُمُ الْإِسْلَامَ دِينًا

This day We have perfected your religion for you and completed Our favour unto you and have chosen for you as religion al-islam... (5:3)

With the revelation of the last verse, the *Din* of God attained its perfect form in all aspects: political, ritual, social, economic and ethical. Following that, the process of *wahy* concluded. As such, it does not seem possible that the Prophet (S) of God should have said to Mu'adh: "By what rule will you act, if you find no direction in the Book of God and the Sunnah?" The verse affirming the perfecting of the *Din* was revealed approximately three months prior to the demise of the Prophet (S), during the journey of the Last Pilgrimage. After that no other verses concerning *ahkam* were revealed to him.

During the span of the ten years that the Prophet (S) resided in Madinah, all the *ahkam* of God were revealed by means of approximately 500 verses—the *ayat al-'ahkam* (the verses containing the rules and laws of the Shari'ah) which make approximately one third of the Qur'an (as to their volume) and were already communicated and expounded by the Prophet (S). Not a single issue, small or big, was left without a *hukm* in any of the diverse spheres of human life, not even the *hukm* regarding the *diyah* of a scratch on the skin.

During his journey of the Last Pilgrimage, the Prophet (S) had declared:

أيها الناس والله ما من شيء يقربكم من الجنة ويباعدكم عن النار إلا وقد أمرتكم به، وما من شيء يقربكم من النار ويباعدكم من الجنة إلا وقد نهيتكم عنه.

O people, whatsoever takes you nearer to Paradise and away from Hellfire, I enjoined upon you. And whatever brings you nearer to Hellfire and removes you away from Paradise, I forbade you to do.

The following tradition has been reported in *Usul al-Kafi* ('Ilmiyyah Islamiyyah, Tehran, vol: 1, p:80) from Sama'ah:

عدة من أصحابنا، عن أحمد بن محمد بن خالد، عن إسماعيل بن مهران، عن سيف بن عميرة، عن أبي المغرا، عن سماعة، عن أبي الحسن موسى (ع) قال: قلت له: أكل شيء في كتاب الله وسنة نبيه (ص) أو تقولون فيه؟ قال: بال (كل شيء في كتاب الله وسنة نبيه (ص)).

(Al-Kulayni says): From a number of our companions, from Ahmad ibn Muhammad ibn Khalid, from Isma'il ibn Mihran, from Sayf ibn 'Amirah, from Abu al-Maghra, from Sama'ah from (al-Imam al-Kazim), Abu al-Hasan Musa (A); (Sama'ah) said: "I said to him: 'Is everything in the Book of God and the Sunnah of His Apostle (S), or you have something to say (in addition)?' He said: '(No); rather, everything is in the Book of God and the Sunnah of His Apostle (S)'."

Also in *Usul al-Kafi* (op. cit. vol:1 ,p:77), the following tradition is reported on the authority of Sulayman ibn Harun from al-Imam al Sadiq (A). There, the Imam (A) states:

ما خلق الله حلالا ولا حراما إلا وله حد كحد الدار، فما كان من الطريق فهو من الطريق، وما كان من الدار فهو من الدار، حتى أُرش الخدش فما سواه والجلدة ونصف الجلدة.

God has not created any *halal* (that which is permissible) or any *haram* (that which is forbidden) except that He has determined a boundary for it like the limits and boundaries of a house. That which belongs to the limits of the road is reckoned as the road, and whatever that comes within the boundaries of the house is considered as a part of the house. [This is true] even of a scratch on the skin, a full lash or half a lash.

The following tradition is reported in *Basa'ir al-darajat* (Qumm, 1404 H., p. 143) on the authority of Muhammad ibn Muslim:

حدثنا أحمد بن محمد عن الحسين بن سعيد عن فضالة بن أيوب عن القاسم عن يزيد بن معاوية العجلي عن محمد بن مسلم قال: قال أبو جعفر (ع): إن عندنا صحيفة من كتب علي عليه السلام طولها سبعون ذراعا فنحن نتبع ما فيها لا نعدوها ، وسألته عن ميراث العلم ما بلغ أجوامع هو من العلم أم فيه تفسير كل شيء من هذه الامور التي تتكلم فيه الناس مثل الطلاق والفرائض ؟ فقال : إن عليا عليه السلام كتب العلم كله القضاء والفرائض فلو ظهر أمرنا لم يكن شيء إلا فيه سنة نمضيها.

(Muhammad ibn al-Hasan ibn Farrukh al-Saffar al-Qummi says): Narrated to us Ahmad ibn Muhammad (al-Barqi), from al-Husayn ibn Said (al-'Ahwazi), from Fadalah ibn Ayyub, from al-Qasim, from Burayd ibn Mu'awiyah al'Ijli, from Muhammad ibn Muslim, who said: "Abu Ja'far (the Fifth Imam) (A) said: 'We have the *Sahifah* written by 'Ali (A), whose length is seventy cubits.

We study its contents, not going beyond them'. I asked him about the inheritance of knowledge that had been transferred (to the Imams), whether it consisted of generalities or of detailed exposition of such things as the people talk about, such as divorce and religious duties. He said: 'Ali (A) wrote down all knowledge, including all judicial laws (*al-qada'*) and duties (*al-fara'id*). When our sovereignty is established, we will act according to it in regard to every matter.' "

In *Furu' al-Kafi* (Dar al-Kutub al-Islamiyyah, Tehran, vo1:7, *Kitab al-hudud*, Bab 1, hadith 12) a

Riwayah is reported on the authority of Dawud ibn Farqad from al-'Imam al-Sadiq (A). In it, the Prophet (S) is reported as having said to Sa'd ibn 'Ubadah:

إِنَّ اللَّهَ عَزَّ وَجَلَّ قَدْ جَعَلَ لِكُلِّ شَيْءٍ حُدًّا، وَجَعَلَ لِمَنْ تَعَدَى ذَلِكَ الْحَدَّ حُدًّا.

Verily, God Almighty has determined a *hadd* (limit, punishment) for everything, and for whomsoever that crosses that *hadd* He has prescribed a certain *hadd*.

In another tradition of the same volume (Bab 1, hadith 6), it is reported on the authority of a reliable narrator, Sama'ah, that he heard this statement from al-'Imam al-Sadiq (A):

إِنَّ لِكُلِّ شَيْءٍ حُدًّا وَمَنْ تَعَدَى ذَلِكَ الْحَدَّ كَانَ لَهُ حُدٌّ.

Indeed there is a *hadd* for everything, and whoever transgresses it will be subjected to a certain *hadd*. And the Qur'an declares:

وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ

And whosoever transgresses the bounds of God – those are the evildoers. (2:229)

Therefore, Islamic law prescribes punishment for those who violate the limits prescribed by God.

Accordingly, all the *ahkam* have been described in the Book and the Sunnah of the Prophet (S); the period of legislation closed with the demise of the Prophet of God and nothing was omitted. Thus, we need not rely upon practices like *ijtihad* by ray and other conjectural instruments (such as *qiyas*, *istihsan*, *masalih mursalah*, *madhhab Sahabi*, etc.) for deriving the *ahkam* for emergent issues (we have discussed this matter in elaborate detail in another article).

It is true that the *ahkam* have not been laid down in a uniform way in the Book and the Sunnah of the Prophet (S). Some of them have been set forth as special cases, while some others have been stated in a general way, in such a manner that by applying the general laws to particular cases all the *ahkam* of the Shari'ah regarding emergent issues and events can be derived. Therefore, those who imagine that there are no *ahkam* in the Shari'ah for modern issues and contemporary problems indeed commit a great mistake; such a notion is contrary to the express statements of the Qur'an and conclusive dicta.

The conclusiveness of these proofs is so certain that if a tradition attributed to the Prophet (S) counters their import, it should be discarded in accordance with the criteria and standards of the science of hadith and *dirayah*. This, because a statement whose origin from the Prophet (S) is not certain can never contest express texts of the Book, or reliable traditions of the *Ma'qumun* (A) whose authenticity of origin

as well as import are definite. This, undoubtedly, holds true in the case of the present tradition which is of doubtful authenticity and is opposed to the express text of the Qur'an.

c) Above all, this tradition implies a confession on the part of the Prophet (S) of the insufficiency of law regarding the religious and nonreligious needs of mankind. How can we accept such a thing when the verse stating the perfection of the religion was revealed to him?

6. This tradition also implies that Mu'adh possessed the knowledge of all the *ahkam* present in the Book of God and the Sunnah of the Prophet (S), whereas neither the Shi'ah nor the Sunnis believe this. Nobody among the Prophet's Companions was known to possess such a merit except Imam 'Ali (A); he was the only person who had perfect knowledge of the Divine Law. It was for this reason that the Holy Prophet (S) enjoined upon the Ummah to follow him and to take their knowledge from the Ahl al-Bayt (A).

The Prophet instructed them to consider the traditions of the Ahl al-Bayt (A) as their guide and to follow them as a model of practice and behaviour in all the modes of life. No doubt, Amir al-Mu'minin's source of knowledge and information was no other than the *wahy* revealed to the Prophet (S) and taught to 'Ali (A) by himself. The leading and profound thinkers among Sunni scholars acknowledge this distinction of Imam 'Ali (A).

7. This tradition implies that at the time when Mu'adh was being sent to Yemen, the process of *tashri'* was already complete and all the Divine *ahkam* had been set forth. However, the verse pronouncing the perfection of the *Din* counters this presumption and indicates that the perfection of the *Din* was declared three months prior to the demise of the Prophet (S), on the occasion of *Hajjat al-Wada'*.

8. If it is said that *ijtihad* (in the sense of exercising *ra'y* and personal judgement) was permissible for Mu'adh alone and others should not follow him, it is evident that nobody has held such an opinion.

And if it is presumed that this style of *ijtihad* was permissible for everyone, it means that every *mujtahid* has a right to legislate laws by means of *ray* and personal judgement whenever he fails to find a *hukm* in the text of the Book and the Sunnah. Moreover, laws thus legislated should be accepted and acknowledged as the real (*waqi't*) Divine laws in accordance with the doctrine of *taswib*.

This means that whenever *mujtahidun* express a number of contradictory and conflicting opinions in a case, all of them should be recognized and given the status of the real *hukm*. Evidently, no one would be ready to accept this, as it will necessitate that the real *hukm* be identified simultaneously with a number of contradictory views and opinions, reducing Islamic law to a mass of contradictions.

Here, it will be appropriate to cite a tradition reported from Amir al-Mu'minin in *Bihar al-'Anwar* (vo1.2, chapter 34, p.284; also see *Nahj al-balaghah*, *Khutbah* No. 18):

ترد على أحدهم القضية في حكم من الأحكام، فيحكم فيها برأيه، ثم ترد تلك القضية بعينها على غيره، فيحكم فيها

بخلاف قوله، ثم يجتمع القضاة بذلك عند الإمام الذي استقضاهم فيصوب آراءهم جميعاً – واللهم واحداً! وكتابهم واحداً! فأمرهم الله – سبحانه – بالاختلاف فأطاعوه! أم نهاهم عنه فعصوه! أم أنزل الله ديناً ناقصاً فاستعان بهم على إتمامه! أم كانوا شركاء له، فلهم ان يقولوا، وعليه أن يرضى!؟ أم أنزل ديناً تاماً فقصر الرسول (ص) عن تبليغه وأدائه، والله سبحانه يقول: ((ما فرطنا في الكتاب من شيء)) وفيه تبيان لكل شيء، وذكر أن الكتاب يصدق بعضه ((بعضاً، وانه لا اختلاف فيه فقال سبحانه ((ولو كان من عند غير الله لوجدوا فيه اختلافاً كثيراً

When a case relating to one of the *ahkam is* put before any one of them he passes judgement on it according to his ray. Afterwards, when the same problem is placed before another of them, he passes an opposite verdict. Then these judges go to the chief who had appointed them and he confirms all the verdicts, although their God is One, their prophet is one and the same and their scripture is one and the same.

Was it *God-subhanahu*—who enjoined them to differ (while laying down the *ahkam*), and they obeyed Him? Or He forbade them from it and they disobeyed Him? Or, did God Almighty send His *Din* in a defective and imperfect form and asked for their help and assistance in order to make it perfect?

Or, were they His partners and assistants (in performing legislation) so that He has to concede to whatever judgement they pronounce? Or is it that God Almighty made His *Din* perfect, but the Prophet (S) fell short of communicating it (to the people)?

The fact is that God states in the Qur'an:

﴿ مَا فَرَطْنَا فِي الْكِتَابِ مِنْ شَيْءٍ ﴾

We have not neglected anything in the Book, (6:38)

تَبَيَّنَا لِكُلِّ شَيْءٍ

and that in it is all things, (16:89)

and that one part of the Qur'an verifies another part and that there is no contradiction in it. And the Almighty has said:

وَلَوْ كَانَ مِنْ عِنْدِ غَيْرِ اللَّهِ لَوَجَدُوا فِيهِ اخْتِلَافًا كَثِيرًا

If it had been from other than God they would have found therein much incongruity, (4:82).

Abu Muhammad 'Ali ibn Hazm al-'Andalusi al-Zahiri (d.456/1064) in his book *al-Ihkam li usul al-ahkam* (vol: 5, p.775) writes: "Some ignorant people believe that Mu'adh had the right to make a thing

halal or *haram* by exercising his *ray* or to make something *wajib* or otherwise according to his own judgement and taste. Such a notion is preposterous, and no Muslim would believe it."

9. If it is said that by *ijtihad bi al-ray* Mu'adh meant to say that whenever he could not find a *hukm* in the express texts of the Book and the Sunnah of the Prophet (S), he would use his effort in deriving it from the sources of the Shari'ah and its general principles, if we interpret the tradition in this way, the term *ijtihad* conveys the same lexical meaning described earlier (in another article), not a new sense of legislation and *tashri'*. When interpreted in this sense, there will be no problem with it, and it would be acceptable to the Shi'ah.

But the problem is that the fuqaha' of the Ahl al-Sunnah have not interpreted this tradition in this manner. The character of their arguments shows that they conceive the term *ijtihad* in the sense of relying upon *ray* and subjective opinion; not in the sense of deducing the laws from the principles and basic sources of the Shari'ah.

10. Apart from all the objections raised above, this significant problem still remains that the tradition is about judgement and adjudication; it has nothing to do with the problem at hand, since what we are concerned with is the matter whether a *mujtahid* has a right to legislate laws and *ahkam* concerning emergent issues by exercising his *ray* and employing any of the instruments for deriving legal conjectures. It is evident that there is a clear difference between these two things.

Critique of the Second Riwayah

The second *riwayah* is also infirm with respect to its chain of transmission. As Abu Muhammad 'Ali ibn Hazm al-Zahiri points out in his book *al-Ihkam li usul al-ahkam* (vol. 5, p. 1003), there are two chains of transmission through which this *Riwayah* has been reported; none of them is trustworthy.

In one *sanad*, one of the narrators is 'Abd al-Malik ibn al-Walid ibn Ma'dan. He has not been considered as trustworthy by the experts of the science of rijal, and no hadith narrated by him has been acted upon. And as for the second *sanad*, it contains names of persons of unknown identity, thus technically making the *riwayah* one whose chain of transmission is broken (*maqtu' al-sanad*).

Critique of the Third Riwayah

This *riwayah* has no relation with the issue under discussion, as it is about judgement and adjudication, and not concerned with the privilege and right of a jurisprudent to legislate *ahkam* of the Shari'ah by means of *ray* and by employing conjectural instruments.

Critique of the Fourth Riwayah

Firstly the fourth *Riwayah* is *mursal* (one whose first narrator is not mentioned in the chain of

transmission), which deprives it of the requirements for being legally relevant.

Secondly, apart from its being *mursal*, such a *riwayah* has no strength to resist the force of the arguments based on definite proofs (*adillah*) of the Book and the Sunnah, which do not permit *tashri'* and legislation by means of *ray* and through instruments for deriving conjectures.

Thus, we reach the conclusion that these ahadith are not adequate for vindicating the practice of *ijtihad* by means of *ray* and subjective opinion; they lack the requirements of validity and the probability of their being fabricated is strong.

The Emergence of Ijtihad bi al-Ray

The beginnings of the emergence of *ijtihad* and its general outlines can be traced back to the migration of the Prophet (S) from Makkah to Madinah.

But the emergence of *ijtihad* in the sense of exercising *ray* was after the conclusion of the era of *tashri'* with the demise of the Prophet (S). For, as long as the Prophet (S) was alive, with the continuity of the revelation of the Qur'an and *wahy*, there was no ground for exercising *ra'y*; as mentioned earlier, the *ahkam* could be understood and known easily by referring to the Prophet (S).

But after his demise and the termination of *wahy*, during the reign of the Caliphs, and subsequently during the Umayyad rule and in the early years of the 'Abbasids, the fuqaha' were confronted with new issues and subjects for which they had to find answers. If they could not find the solution by referring to the Book and the Sunnah of the Prophet (S), they had to determine a *hukm* by consulting other fuqaha'. As a result of this they either reached a consensus or each one of them arrived at a separate *hukm* by exercising *ijtihad* and his own individual judgement.

The View of al-Dawalibi

Al-Dawalibi, in his book *al-Madkhal ila 'ilm usul al-fiqh*, states in this connection: "Whenever the Companions of the Prophet (S) faced an impediment in such situations or issues for which they could not find an express decree in the Book and the Sunnah, they resorted to *ijtihad* (identifying in this manner the *ahkam* for new situations). They named this practice *ray*. Abu Bakr and 'Umar were among those who used this method".

Later on al-Dawalibi cites a *Riwayah* in which 'Umar ibn al-Khattab is reported as having written to Shurayh and Abu Musa al-'Ash'ari: "Companions of the Prophet (S) did not rely in their *ijtihad* upon fixed laws and established criteria; rather, they relied upon something which they considered as the spirit of the Law".

This statement has also been quoted in different words from 'Umar ibn al-Khattab, such as: "Identify similar and analogous cases and use *qiyas* (analogical method) in matters." (We will elaborate on this

topic in the discussion about the historical development of *qiyas*, which is the fifth source of Sunni *ijtihad*.)

In any case, it was after the demise of the Prophet (S) that some of the *Sahabah* raised the issue of *ray* and opened its doors. In this way, they deduced a certain *hukm* for every issue and problem for which there was no specific *nass*. The *Tabi'un* and a majority of Sunni jurists followed their example.

Besides the practice of *ray*, other instruments for deriving legal presumption (such as *qiyas*, *istihsan*, *masalih mursalah*, etc.) also entered the realm of *ijtihad* and the Sunni fuqaha' relied upon those sources, although they were not uniform in their reliance on such instruments (this will be elaborated further while discussing the sources of *ijtihad*).

It was the result of the difference of opinions between the fuqaha' of the Ahl al-Sunnah regarding the trustworthiness of these sources that diverse legal schools came into being. Among perhaps more than twenty of such schools that emerged, four of them became more popular: the Hanafi school, under the leadership of Abu Hanifah; the Maliki school, under the leadership of Malik ibn Anas al-'Asbahi; the Shafi'i school, under the leadership of Muhammad ibn Idris al-Shafi'i; and the Hanbali school, under the leadership of Ahmad ibn Hanbal al-Shaybani.

These schools emerged during the reign of the 'Abbasids (132-656/750-1258) (an elaborate discussion about these schools will be done while discussing the various periods in the history of *ijtihad*). The practice of *ra'y* was called "*ta'wil*" during the era of the *Sahabah* and not "*ijtihad bi al-ray*". This was true of the early days of the era of the *Tabi'un* as well.

The term *ta'wil* was used by Khalid ibn al-Walid, who killed Malik ibn Nuwayrah, and also by Abu Bakr. In order to examine this usage, we will have to go into the details of the episode involving Khalid.²

After the Prophet's demise, a group of people gathered in Saqifat Bani Sa'idah and chose Abu Bakr for the caliphate. Khalid ibn al-Walid was one who had played an active role in the affair. After the event, he was dispatched with a force to collect *zakat* from the dissidents. During the course of his assignment, he went to a tribe inhabiting the region of Batch and demanded *zakat*.

They declined to pay, stating that they did not acknowledge anybody except 'Ali ibn Abi Talib as the Prophet's successor, as the Prophet (S) had nominated 'Ali (A) to succeed him at Ghadir Khum while returning from the Last Pilgrimage.

They stated that on this ground they would not pay *zakat* to anybody except someone appointed by 'Ali (A). Khalid ibn al-Walid responded to the position taken by the people of that tribe by committing a horrible crime. He ordered Dirar ibn Azwar al-'Asadi to behead Malik ibn Nuwayrah, the chief of the tribe.

Khalid did not stop at this; he slept with the wife of Malik the same night. To celebrate the occasion, he

slaughtered a sheep and ordered Malik's head to be put in the fire under the cooking pot.

After his return, in order to justify his inhuman act and to make it appear something legitimate, he said: "Since this tribe had apostatized, I had to treat them in this manner." But within a short time, facts of the case came out. Abu Qatadah and 'Abd Allah ibn 'Umar gave witnesses in favour of Malik ibn Nuwayrah. Khalid had no alternative except to confess. While apologizing, he said to Abu Bakr:

إني تأولت وأخطأت

I exercised *ta'wil* and made a mistake.

'Umar ibn al-Khattab and some of the Companions were of the view that Khalid should be stoned to death for *zina* (adultery). However, since Khalid had played a significant role in the episode of Saqifah, efforts were made to exonerate him and justify his deed accordingly. Abu Bakr said:

ما كنت أرحمه فإنه تأول فأخطأ

I would not stone him, for he exercised *ta'wil* and committed an error.

After this incident the term *ta'wil* was used in such cases by others.

The Term Ta'wil During the Days of Tabi'un

In the era of the *Tabi'un*, also, the word *ta'wil* was used in the sense of the practice of *ra'y*. Al-Zuhri is reported in *al-Sahih* of al-Bukhari (vol.1, p.134, *Bab taqdir al-salat*) as saying that he asked 'Urwah ibn al-Zubayr as to why 'A'ishah says full prayers during journey (while *qasr* is specified in *riwayat*). He replied "She makes *ta'wil* of the *Riwayah*, in the same manner as 'Uthman used to do."

The Usage of Ta'wil by Tabi 'un

The history of the term *taw'il* indicates that it started by the *Sahabah* and continued to be in use until the middle of the 5th/11th century, as can be seen from the writings of some Sunni scholars. But after this date the term *taw'il* was gradually replaced by other terms.

Abu Muhammad 'Ali ibn Ahmad, known as Ibn Hazm al-Zahiri (384-456/994-1064), in his book *al-Fasl fi al-milal wa al-'ahwa' wa al-nihal* (vol.4, p.161), has this to say about Abu al-'Adiyah, the killer of 'Ammar ibn Yasir:

بأنه متأول مجتهد مخطى باغ عليه مأجورا أجرا واحدا.

He was an errant *muta'awwil* (one who exercises *ta'wil*) and *mujtahid*, and committed a wrong against 'Ammar ibn Yasir (because of the *hukm* that he derived and the *ijtihad* that he made). He deserves reward, but only one.

In another place, he writes in his book that the killer of 'Ammar was not similar to the killer of 'Uthman, as the latter's killer did not have any ground for *ijtihad*. He further says that Mu'awiyah and those who were with him were men of *ijtihad*, although in error, and they deserved one reward.

Taqi al-Din Ahmad ibn 'Abd al-Hakim ibn 'Abd al-Salam (661-728/ 1263- 1328) known as Ibn Taymiyyah, while justifying the acts of Mu'awiyah, writes that he was a *mujtahid*.

Ibn Kathir, in his history (Vol. 7, p.297), writes that Mu'awiyah was a *mujtahid* and deserved reward. In the same volume of the book (p: 283) he writes that *ijtihad* sometimes leads to error and sometimes to the truth and:

للمجتهد المصيب أجران وللمجتهد المخطيء أجر واحد.

For the *mujtahid* who is right, there are two rewards, and for the *mujtahid* who errs, one reward.

Ibn Hazm in *al-Muhalla* (vol.1,p.484), Shaykh 'Ala' al-Din 'Ali ibn 'Uthman al-Hanafi, known as Ibn al-Turkumani (d.750/1349), in his *al-Jawhar al-naqi*, as stated in footnotes of al-Bayhaqi's *Sunan* (vo1.8, pp.58-59), describe the assassin of Ali ibn Abi Talib **إنه كان متأولاً مجتهداً** (To be sure, he was a *mujtahid* and a *muta'awwil*!).

Ahmad ibn Ali al-Shafi'i, famous as Ibn Hajar al-'Asqalani, while describing the *Sahabah*, says that they exercised *ta'wil* and that in cases that the *mujtahid* errs he is not only not liable to any censure and punishment but deserves one reward.

What is more interesting is that some who claim to be Muslims consider even such a vicious character like Yazid with his irremediable crime, which has no parallel in history, as a *khalifah* of the Prophet (S). Moreover, they justify his heinous crime and say that he exercised *ijtihad* and erred in his *ta'wil*; therefore, he cannot be blamed!

In Ibn Kathir's history (vo1. 13, p.9), Abu al-Khayr Ahmad ibn Isma'il ibn Yusuf al-Shafi'i al-'Ash'ari is reported as having made this statement about Yazid: (He was an *imam* and *mujtahid*). Ibn Kathir himself writes (Vol .8, p.223) that some people justify the evil and heinous deeds of Yazid and state the he erred in exercising *ta'wil* and *ijtihad*. In another place (vo1.6, p.323) he says: "Khalid continued to hold his office with the approval of Abu Bakr (and therefore his assignment was legitimate), though he took part in the killing of Malik ibn Nuwayrah. But since he exercised *ijtihad* and erred, he cannot be blamed."

In the above-mentioned cases, the exercise of *ray* is referred to with the name of *ta'wil*, and this usage

continued until the Sunni community gave it the name of *ijtihād*, developing special rules and terms for it and opening new chapters in the realm of *'ilm al-'usul*. Consequently, the act of deriving a *hukm* by this means was called "*ijtihād*", and its practitioner "*mujtahid*".

As stated, the practice of *ray* emerged after the demise of the Prophet (S) and the term continued to be in use for *ijtihād* in the writings of the Sunni fuqaha' until the early years of the 6th/12th century. Abu Hanifah al-Nu'man ibn Thabit (80–150/699–767) and his followers used the term *ijtihād* in the same sense.

Their approach met with the outright rejection of the Shi'i Imams (A) and fuqaha'; who denounced it in the strongest terms (details will come in the discussion about the sources of *ijtihād*). The use of this term however continued through centuries, till the time when it underwent a change.

The Use of "Ijtihad" in Another Sense

From the 6th/12th century till the beginning of the 7th/13th, the term *ijtihād* underwent a change in the writings and statements of Sunni scholars; they now gave it a wider and more comprehensive meaning. It will be proper to quote here some of them.

Abu Hamid Muhammad al-Ghazzali al-Shafi'i (450–505/1058/1111) has defined the term *ijtihād* in his book, *al-Mustasfa fi usul al-fiqh* (vol.1.2, p.350): "*ijtihād* means the effort and endeavour on the part of the *mujtahid* in acquiring the knowledge of the *ahkam* of the Shari'ah."

Muhammad Khidri Bek has defined *ijtihād* in his history of Islamic legislation (p.87) as: "The endeavour and effort undertaken for deducing a *hukm* of the Shari'ah through means and sources (*adillah*) which the *Shari'* (Lawgiver) considers as valid proofs."

Ahmad Mustafa Zarqa' al-Suri, the author of *al-Madkhal al-fiqhi al'amm*, defines the term *ijtihād* in these words: "*ijtihād* means deduction of *ahkam* of the Shari'ah by means of their elaborate *adillah* from the Shari'ah."

There were other fuqaha' at that time who used the term *ijtihād* in the aforementioned sense. Though the term *ijtihād* acquired a wider and more comprehensive denotation, nevertheless, the Shi'i fuqaha' still did not approve of the kind of *ijtihād* practised by the Ahl al-Sunnah as a reliable source from which *ahkam* of the Shari'ah could be derived. They rejected it and considered it invalid. As in the previous ages, to them the term *ijtihād* denoted an undesirable and forbidden practice; they discussed it in their writings and expressly rejected it as invalid.

This antagonism continued until the 7th/13th century, and the writings of the original researcher and *mujtahid* Muhammad ibn Ahmad ibn Idris al-Hilli (555 or 558–598/1160 or 1163–1201) bear evidence to this. He writes in his precious book *al-Sara'ir* that "*qiyas, istihsan* and *ijtihād* are from our viewpoint invalid practices". These words of Ibn Idris indicate that the word *ijtihād* was still current at the time in the

sense of the practice of subjective opinion and *ra'y* as a source of law, like the Book and the Sunnah.

The New Denotation of Ijtihad

In the 7th/13th century the term *ijtihad* was used in a new sense by Imamiyyah fuqaha' which afterwards, with a little amendment, assumed its genuine and desirable form: the sense of referring new *furu'* to the fundamental principles, the *usul*. In this way, the term *ijtihad* came to be accepted by the Shi'ah.

The oldest texts which throw light on this matter are the writings of the great al-Muhaqqiq al-Hilli (d.676 or 680/1277 or 1281) and his *Ma'arij al-'usul* (p.117). In it, while defining *ijtihad*, he states: "In the vocabulary of the fuqaha', *ijtihad* means making effort and endeavour in order to deduce *ahkam* of the Shari'ah from its valid (*shari'*) sources (*adillah*)."

He continues to say that since the deduction of *ahkam* and their determination is conceptually a theoretical activity, and in most of the cases they cannot be derived from the apparent meaning of the texts, there was drawn no line of demarcation in the definition between *qiyas* and other *adillah*. Therefore, on this basis, *qiyas* can also be considered to be one of the types of *ijtihad*.

He further says that it is possible that some may say that it means that the Shi'ah also practice *ijtihad*. The answer is in the affirmative, with the qualification that *ijtihad* to them has never meant, nor does it mean, the practice of *qiyas*.

A study of the views expressed by al-Muhaqqiq al-Hilli in *Ma'arij al-usul* reveals that in those days the term *ijtihad* was not yet fully accepted by the Shi'ah due to its former connotations. The writings of al-Muhaqqiq al-Hilli show that there were still certain individuals in those days who could not digest the term.

They were not inclined to assign the appellation '*mujtahid*' to any of the Shi'i fuqaha'. Accordingly, al-Muhaqqiq al-Hilli decided to draw a line between the two concepts of *qiyas* and *ijtihad* and declared that *ijtihad* as a new term adopted by the Shi'ah possessed a meaning acceptable to them, that its use did not have any harm—for the term *ijtihad* meant to making an effort for deriving a *hukm* from *shari'* sources (i.e. the Book, the Sunnah, *ijma'* and '*aql*')—and that it does not have any connection with the *ijtihad* practiced by the Ahl al-Sunnah.

Difference between the Two Conceptions and its Consequences

There is an obvious difference between the two conceptions of *ijtihad*, because the first sense implies that whenever there is no express statement in the text of the Qur'an and the Sunnah the *mujtahid* can innovate and legislate a law according to his own *ray* and subjective opinion, and if he is asked as to the source on which he has based this *hukm*, he will answer: "On my own personal *ray*".

But in the second sense (accepted by the Imamiyyah), *ijtihad* is an endeavour and effort on the part of

the *mujtahid* in deriving a *hukm* of God from the sources of the Shari'ah. When asked as to the sources from which the *hukm* is derived, he answers: "The sources whose validity and reliability is posited by the Lawgiver."

Accordingly, the role of the *mujtahid* in deducing the *ahkam* regarding new issues and *furu'* involves reverting the new *furu'* to the basic principles of the Shari'ah and applying its general laws to corresponding particular cases. There is an essential and real difference between these two meanings of the term, since *ijtihad* in the Sunni sense of practising *ray* means invention (*ibda'*) of *ahkam* and legislation. And the Shi'i *ijtihad* is a means of discovering the Divine *ahkam* through the valid sources of the Shari'ah (the Book, the Sunnah, *ijma'* and *'aql*).

Delimitation of the Meaning of Ijtihad by al-Muhaqqiq al-Hilli

As mentioned earlier, al-Muhaqqiq al-Hilli delimited the new sense of the term *ijtihad* to research effort in deducing *ahkam* from the sources, so that the *hukm* derived is not based on the literal meanings (*zawahir*) of the texts of the Qur'an and the Sunnah. Accordingly the deduction of a *hukm* from *zawahir* of the Book and the Sunnah was not a part of *ijtihad* to him.

Perhaps this restriction in the meaning of *ijtihad* had to do with its original lexical background, which carried the sense of hard effort and labour. Thus, the derivation of a *hukm* from *zawahir* of the Book and the Sunnah, which did not involve any great effort, was not counted by him as part of *ijtihad*.

However, after his era, the meaning of *ijtihad* grew in scope and came to include deduction of *ahkam* from *zawahir* of the *nusus* (texts) of the Qur'an and the Sunnah. This was because the scholars of *'ilm al-usul* came to recognize that even deduction from the *zawahir* required a lot of scholarly effort; that it could not be done without the knowledge of the principle of *hujjiyyat al-zawahir* (the legal validity of literal meanings) and the mode of its application and the related problems.

The meaning of *ijtihad* did not remain within these limits; it underwent a further development until it came to include all the forms of legal deduction and every kind of endeavour and effort on the part of the *mujtahid* to determine and define practical obligations vis a vis the Shari'ah on the basis of valid proofs.

Accordingly, in latter times, some scholars have defined *ijtihad* as effort and endeavour for establishing the legal basis of real *ahkam* or attainment of legal evidence for determining the apparent obligation in a case, or something to that effect. Other definitions have also been advanced, but since they are close in meaning and content to the one mentioned above, we shall refrain from citing them in order not to prolong this discussion any further.³

¹. Of course, it doesn't mean that *ijtihad* was not practiced during this era, for in its authentic and legitimate form *ijtihad* existed even during the Prophet's lifetime, as discussed by us in another article.

². For further information regarding the incident relating to Khalid ibn al-Walid, see: al-Isabah, III, 337; Tarikh al-Ya'qubi, II, 110; Kanz al-'ummal, III, 132; Wafayat al-'a'yan, V, 66; Fawat al-wafayat, II, 627; Abu al-Fida', Ta'rikh, 158.

3. Editor's Note: This is a translation of "Ra'y gera'i dar ijtiḥād", published in the Persian bimonthly journal Kayhan al-Andisheh No. 9, Adhar & Day) and is second of a series of articles by the author.

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