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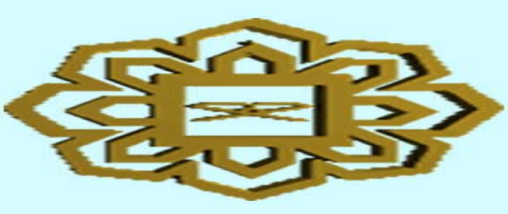
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IJTIHAD IN THE TIME OF THE KHULAFAT AL-RASHIDUN:
A REVIEW OF SELECTED CASE STUDIES.



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G 9210725

THIS DISSERTATION IS SUBMITTED IN PARTIAL FULFILMENT OF
THE DEGREE OF MASTER OF COMPARATIVE LAWS.

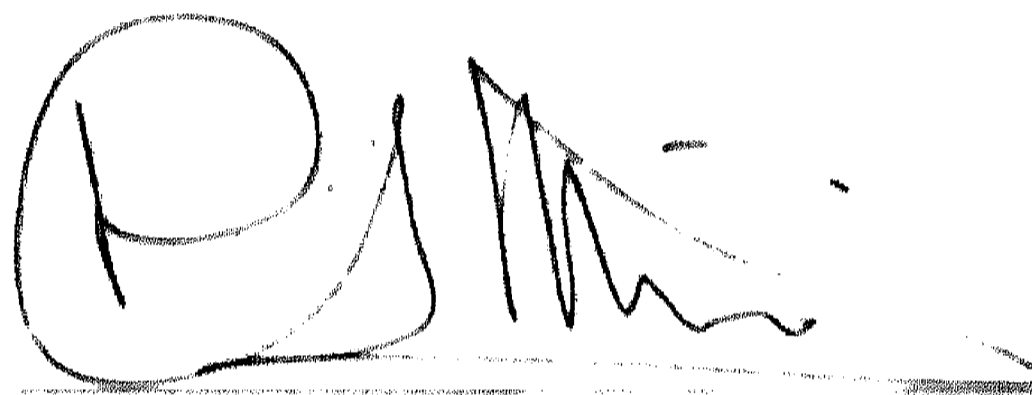
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A handwritten signature in black ink, appearing to read 'Mogamad Faaik Gamieldien', written over a horizontal line.

MOGAMAD FAAIK GAMIELDIEN.

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All praise is due to Allah and salutations upon His Holy Prophet Muhammad (SAW). I thank Allah for having inspired me to tread the path of the acquisition of Islamic learning. I pray that this humble effort be accepted by Him, Inshallah.

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ABSTRACT

Every human society creates its own system of laws in order to regulate human behaviour to ensure order and stability. These laws are essentially derived from the cultural and normative patterns developed by human society over the ages.

Islamic society is unique in the sense that its legal system is divinely postulated. Although the Quran lays down immutable foundational principles of law, it has allowed freedom of development in the branches of law. This freedom granted by the Lawgiver in the construction of the edifice of Islamic law, is beautifully expressed in the Prophetic example of Muhammad (SAW) and his illustrious Companions.

The purpose of this study is two-fold, namely:

[1] to analyse the foundational principles of the Quran and Sunnah, and its purposes and intent for the regularization of human society and,

[2] to review those instances in the life of the Prophet (SAW) and those of his Companions to illustrate the methodology which they employed in constructing the edifice of Islamic law upon the principles of the Quran and Sunnah.

Readers not familiar with the history of the development of Islamic Law will be, I am sure, impressed by the legal acumen of the Prophet (SAW) and especially his Companions after him. There can be no doubt that the Ijtihad of 'Umar, in particular, stands out as an eternal beacon of light to guide Muslim scholars along the arduous path of extracting and formulating laws, to answer the demands of an ever-changing human society. And Allah knows best.

IJTIHAD IN THE TIME OF THE KHULAFÄ

AL-RASHIDUN:

A REVIEW OF SELECTED CASE STUDIES

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CHAPTER 1 TOWARDS A DEFINITION OF IJTIHAD.

1.1 Linguistic meaning .

Ijtihad, linguistically, is taken from the word *al-Juhd* - exertion, effort, trouble or pain. Allah Almighty declares in Surah al-Nahl, verse 37:¹

*"As it is , they swear by Allah
with their most solemn oaths."*

The above verse and all other verses in the Quran where reference is made to *al-Juhd*, the word refers to exercising without measure, one's capacity, ability, power or strength and expending one's utmost in the correct and righteous way.

In the *Lisan al-'Arab* the definition of Ijtihad is rendered as follows:

"Al-Ijtihad and Al-Tajahud: the utmost exercise of one's capacity and effort. And in the hadith of Mu-'ath b. Jabal : 'I will exercise my opinion (Ajtahidu ra'i).'

Again Ijtihad is seen as the striving after something;

¹See also Surahs al-Nur : 53 and al-Fatir : 42.

it is the launching of creative energy embedded in one's intellect."²

Al-Sa'ad Al-Taftazani defines Ijtihad as follows :

"Linguistically Ijtihad means the assumption of a burden which has a difficulty-value. It is hence said that: I am exerting myself to the utmost in carrying the millstone, but I cannot say I am exerting myself to the utmost in carrying a bag of oranges."³

In the light of the above it may be said that the word Ijtihad in its linguistic sense, is the exertion of oneself to the utmost to achieve a particular objective: whether such objectives are physical, such as walking or working, or whether such objectives are mental, conceptual or abstract, such as the extraction of a legal value (*hukm*), or a legal or linguistic theory.

The other indispensable ingredient of Ijtihad is the necessary presence of difficulty (*al-mashaqqa*) and burdensomeness in the process of Ijtihad.

²IBN MANZUR, Muhammad. *Lisan al-'Arab*. 1\521.

³AL-TAFTAZANI, al-Sa'ad. *Hashiya 'ala Mukhtasar Ibn al-Hajib*. 2/289.

1.2 The Technical / Legal Meaning of Ijtihad.

We find a plethora of legal definitions of the term Ijtihad in the law. Most of these definitions do not materially differ from each other except in the manner of their syntactic construction.

Our task would be to come to terms with the essence of the meaning of Ijtihad. We cannot achieve this unless we discover the rationale behind these various definitions. The student will find that the *Usuliyun* have proceeded along two paths in defining Ijtihad namely:

Firstly, definitions which stress that which arises from, or is a result of Ijtihad. This has been one of the major factors which gave rise to the multiplicity of definitions of Ijtihad.

Secondly, definitions which embody some of the limitations or qualifications of the *mujtahid*, or those which do not mention these at all.

This is another factor which gave rise to the many definitions of Ijtihad that abound in the books of *Usul*.

1.3 The Construction of a Definition: The First Method.

This method of 'definitioning' which considers the results or consequences of the definition is divided into two:

(1) that Ijtihad is the work of the Mujtahid. Those who followed this line of thinking included in their definitions the words *badhl* (exertion) or *istifragh* (doing one's best) and other words of similar import.

Al-Ghazali⁴ was one of those who chose the word *badhl* and defined Ijtihad as follows:

"The exertion of the Mujtahid of his mental faculties to arrive at certain knowledge [al-'Ilm] of legal values. And complete Ijtihad means that he ought to exert himself to such a degree that he realizes within himself that he is not capable of exerting himself any further."

In concert with Al-Ghazali on the use of the word *badhl* are Ibn Qudama, al-Bazdawi⁵ and al-Kamal b. al-Humam.

Saif al-Din Al-Amidi uses the word *istifragh* and defined Ijtihad as follows:

⁴AL-GHAZALI, Abu Hamid Muhammad b. Muhammad.
Al-Mustasfa Min 'Ilm al-Usul. 2/350

⁵AL-BAZDAWI. *Usul al-Fiqh.* 16.

"The exertion of one's capacity to the utmost in search of an opinion [al-Zan] about legal values, to the extent that he feels he has reached the limits of his exertion."

The Shafi-'i Scholar Abu Ishaq Al-Chirazi⁶ combined the two words *badhl* and *istifragh* when he defined Ijtihad as follows:

"Ijtihad in the language of the jurists, is the exertion to the utmost, [al-Istifragh] and the full exercise, of one's capacity [badhl al-Juhd] in arriving at a legal value."

From the above definitions we may extract the principle element which is: the utmost exercising one's mental capacity to reach a legal value to the extent where one becomes aware that one has reached the limit of one's exertion. Hence the absence of 'total and utmost exertion' will render the Ijtihad invalid or incomplete.

(2) The second mode of definition focuses on aptitude as the focal point of the definitions and we therefore find that these definitions include the word *malaka* or 'special talent'. We find many of the

⁶AL-SHIRAZI, Ibrahim b. Ali b. Yusuf b. Abdullah. *Al-Lum'a fi Usul al-Fiqh*. 75

Muhadithun and the Shi'ah resorted to this mode of definitioning which generally reads as follows:

"To possess the faculty which empowers one to extract legal values from its detailed evidences or proofs."¹

Very few jurists have adopted this kind of definitioning and therefore we do find very common.

The Shi'ah jurists further hold that a person may possess the aptitude without necessarily having practiced it. This interpretation is in conformity with their belief that their Imams are born with the aptitude to practice Ijtihad.

The Sunni jurists on the other hand maintain that the twin ingredients of *al-badhli* and *al-istifragh* are the *sine qua non* for the Mujtahid in his practice of Ijtihad.

1.4 The Construction of a Definition: The Second Method.

This group of *Usuliyun* when defining Ijtihad, either places a restriction, or places no restriction on the goal

¹TAQI AL-HAKIM, Muh. *Al-Usul Al-'ammah Li al-Fiqh al-Muqaran*. 256.

of the mujtahid.

The following definitions will clarify the point of restriction within their definitioning:

(1) The definition of al-Qadi al-Baydawi:

*"Total exertion [istifragh al-Juhd]
in the attainment of legal values ."⁸*

(2) The definition of al-Ghazali:

"The exertion of the Mujtahid of all his (mental) faculties in the attainment of certain knowledge [al-'Ilm] of legal values."⁹

(3) The definition of Ibn al-Hajib:

"The exertion of the jurist of all his mental faculties

⁸See AL-ASNAWI. *Nihaya al-Soul*. 3/169.

⁹AL-GHAZALI. *op.cit.* 20

to extract a speculative legal value."¹⁰

(4) The definition of ibn al-Humam:

"The exertion of the jurist of all his capacity [al-Taqqa] to reach a legal value through reason, ['aqliyyan] or through textual evidence, [naqliyyan] whether definitive [qat'i] or speculative [zanni]."¹¹

An examination of the above definitions reveal the following salient points:

(1) Their agreement in including the words *al-badh* and *al-Istifragh* with the words *al-Taqqah* or *al-Was'a* or *al-Juhd* in their definitions. This highlights their unanimity as to the ingredients of *Ijtihad* and that it must include utmost exertion of the mind. They also agree that the 'uncovering' of a legal value (*hukm*) is the ultimate objective of the *mujtahid*.

¹⁰Ibn al-Hajib. op. cit. 2/289

¹¹IBN AL-HUMAM. *Al-Tahrir Fi Usul al-Fiqh*. 3/523.

(3) We note that Ghazali confines his definition to the search for *al-'Ilm* or certain knowledge and in the pursuit thereof excludes *al-Zan* or speculative knowledge.

The exclusion of speculative knowledge from his definition makes his definition weak and exclusive, because many legal values are, in practice, based upon speculative knowledge.

On the other hand, Ibn Hajib confines his definition to the attainment of speculative knowledge only, to the exclusion of certain knowledge. Again this is a major flaw as many of the legal values are definitive in nature.

While we find that Ghazali confines his definition to *al-'Ilm* or certain knowledge, and Ibn al-Hajib to *al-Zan* or speculative/assumptive knowledge, we note that al-Baydawi imposes no such restrictions.

However, we find that the definition of al-Kamal ibn al-Humam is inclusive of both the speculative and definitive elements in the process of Ijtihad.

Not only that, but his concept of Ijtihad embraces both the realm of ideas (*al-'Aqliyaat*) and the realm of textual evidence (*al-Naqliyaat*) whether these be of a definitive or speculative nature.

A reconstruction of the definition of Ibn al-Humam to include all the ingredients of Ijtihad would render it as follows:

"The exercise of one's total abilities in the attainment of a legal value whether it be purely rational or based on textual evidence , definitive or speculative." ¹²

CHAPTER 2 IJTIHAD OF THE PROPHET (SAW).

2.1 Ijtihad and Prophetic Licence

The question about which there is a difference of opinion, is whether the Prophet (SAW) had Prophetic licence to exercise Ijtihad in matters mundane and religious, or

¹²AL-UMARI, Nadia Sharif. *Al-Ijtihad fi al-Islam*. 18-27.

whether only mundane and not religious.

Muslim scholars are in agreement that the Prophet (SAW) had Prophetic licence to practise Ijtihad in matters mundane. Mundane or worldly matters include advice on agricultural matters, such as when the Prophet (SAW) advised the date farmers of Madinah not to manually cross-pollinate their palm trees.¹³ He (SAW) also suggested to Sa'd b. Abi Waqqas the utilization of some special ¹⁴ dates for a malady, and advised some other people to use honey.¹⁵

'Abd al-Aziz al-Bukhari say that all the jurists agree that the Prophet (SAW) was permitted to use his own personal judgement in worldly matters .¹⁶

¹³MUSLIM. *Al-Sahih*. 2/223

¹⁴ABU DAWUD. *Al-Sunan*. 4/7

¹⁵AL-BUKHARI, Muh. b. Ismail. *Al-Jami' al-Sahih*. 7/107

¹⁶AL-BUKHARI, 'Abd al-'Aziz. *Kashf al-Asrar*. 2/206