

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 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 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: «حَرَمَتِ الْخَمْرَ 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),

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: "جُلد النبي □ أربعين، وأبو بكر أربعين، وعمر ثمانين، وكلُّ 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>