

Ijtihād: *Takhti'ah* or *Taswib*

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Introduction

Since Islamic shari'ah (law) is for all people at all times and in all places, it provides for every Muslim all the legal rules regarding whether an act is obligatory, forbidden, disliked, recommended or permissible, which he needs in order to obtain his real salvation.¹ Since the Qur'an and the Sunnah of the Prophet do not deal with all the individual rulings in a very specific and detailed way and contain mostly general rulings, ijtihād, i.e. a total expenditure of effort in the seeking of an opinion regarding a rule of divine law, is often needed.² ³ According to B. G. Weiss, "since the law of God comprehends, in principle, the whole of life, it must be continually expounded as novel life situations present themselves. Consequently, the existence of ijtihād is not a right but a responsibility, one that rests in every age upon the community as a whole."⁴ However one of the controversial problems in ijtihād is that of takhti'ah (fallibilism; admission of the possibility of error in the judgments of the jurist, *mujtahid*) and taswib

(infallibilism; maintenance of the jurist's infallibility and denial of any possibility of error). In other words, there is a question whether jurists holding conflicting opinions can all be said to be above error. Muslim thinking on this issue is truly divided. There are two completely different opinions. Shi'ah scholars and a number of Sunni scholars admit the possibility of error in the fatwas of the jurists and accordingly they are called, "mukhatti'ah (derived from *khata'*, error),⁵ whereas a majority of Sunni scholars believe that the mujtahids are above error, and hence refer to them as *musammibab* (derived from *sawāb*)⁶. In this paper I intend to consider briefly the concept, definition, and types of ijtihād and then examine briefly the criteria and justification of takhti'ah and taswib according to both Shi'a and Sunni scholars. I will also try to present the arguments of both sides in the issue.

It is narrated that the great Hanafī jurist 'Alā' al-Dīn al-Kāshānī (d. 578/1182), once conducted a disputation about the Hanafī doctrine of ijtihād with another Hanafī jurist in Anatolia. Al-Kāshānī's opponent observed that for Abu Hanīfah, every mujtahid was correct. Losing his patience al-Kāshānī finally raised his whip to strike the other jurist.⁷ Commenting on the doctrine that every mujtahid is correct, Aron Zysow quotes Bāqillānī as having said: "Had al-Shāfi'ī not accepted it I would not number him among the *usulīs*."⁸ Consequently one important aspect of the intellectual doctrine of the infallibility of ijtihād is the emphasis it places on the act of the jurist, i.e. on the process of ijtihād as opposed to its product.⁹

In considering this problem, one should define *ijtihād* in detail according to both Shi'a and Sunni scholars in order to see what this word implies. Literally *ijtihād* means "a total expenditure of effort in the attempt to achieve something whose realization is burdensome and difficult."¹⁰ In jurisprudence, according to *Âmidī*, it means "a total expenditure of effort in seeking an opinion regarding a religious ruling such that the one (putting forth the effort) senses within himself an inability to do more (than he has done)."¹¹ Although Shi'a scholars accept the above definition,¹² they nevertheless differ from Sunni scholars in enumerating the authentic sources. According to many Sunni Scholars, there are four sources of law: the Qur'an, the Sunnah, *ijmā'* (consensus) and *qiyās*. After the Qur'an and the Sunnah, instead of *qiyās* which does not lead to certainty, the Shi'a invoke to *'aql* (reason) and believe that decisive rational judgements are approved by religion. The Shi'a also accept *ijmā'* but not as an independent source from the Sunnah; for them it is accepted as a proof if and only if it could unveil the Sunnah.

It has to be noted that among the Sunni scholars especially in the early centuries, *ijtihād* was normally used in the sense of *qiyās*, that is to extend the ruling of one case for which we have proof in religious sources to another case for which we have no proof in religious sources, just because they look similar. Therefore, the Shi'a scholars were reluctant to use the term *ijtihād* for the whole process of exhausting one's talents and abilities to discover a religious ruling from its sources. Ayatollah Mutahhari was of the idea that presumably

“the first among the Shi‘a to use the term *ijtihād* and *mujtahid* in the latter sense was ‘Allāmah al-Hillī (647-726 A.H). In the chapter on *ijtihād*, in his book *Tabdhīb al-Wusūl ilā ‘Ilm al-Uṣūl*, he used the word in the same sense as it is used today.”¹³

Types of Ijtihād

According to the Shi‘a scholars, *ijtihād* is of two types; one is legitimate and the other is forbidden. The forbidden *ijtihād* has the sense of legislation; i.e. when a *mujtahid* formulates a rule by his own personal judgment which is neither based on the Qur'an nor the Sunnah.¹⁴ This is called, “*ijtihād bi al-ra'y*”. Unlike some Sunni scholars who consider this permissible and count it as an independent source of legislation parallel to the Qur'an and the Sunnah, the Shi‘a have forbidden it.¹⁵ In this regard B. G. Weiss states:

The use of analogical reasoning (*qiyās*) to deduce additional rulings from rulings established through exegesis of the texts has been a matter of considerable controversy among Muslims. The main living adversaries of this method are *Twelve Shi‘i* scholars. Among *Sunnīs* of all four surviving schools of law, the method is universally accepted...In any case, *ijtihād* is clearly not to be identified solely with *qiyās*.¹⁶

Ijtihād bi al-ra'y is not considered legitimate by the Shi‘a and their Imāms. They reject it primarily on the basis that the general principles

and guidelines given in the Qur'an and the Sunnah are sufficient. For example, there are many hadiths in *Al-Kāfi*, a major collection of Shi'a hadith, stressing on the fact that there is no *harām* or *halal* and nothing needed by the people except that it is present in the Qur'an or in the Sunnah.¹⁷ Discussing this point, J. Calmard states that "Imāmi methodology remains broadly anchored in *al-ijtihād al-sbar'i*, based on revelation and on the sciences of *hadīth* and its major authorities (*rijāl*) and not on *al-ijtihād al-'aqlī*, related to *qiyās*."¹⁸ However it is beyond the limits of this paper to bring these considerations forward and discuss them.

For the Shi'a, who define *ijtihād* as the effort to discover the real law from the sources of the Shari'ah, it is difficult to imagine that every mujtahid is always right. According to Mutahhari, "it is not possible that whatever any mujtahid may judge should be correct and his judgment should be the real law; for it is possible that different mujtahids may hold divergent opinions simultaneously about the certain subject and the same mujtahids may hold different opinions at different times about the same issue. How is it possible that he should always be right?"¹⁹ To elucidate the real significance of this idea, I must explain briefly the criteria of the opposite view i.e. *taswib* and the historical background of this subject.

Ijtihād and Taswīb

The main issue between musawwibîn and mukhatti'in is this: when we have no certain text which is applicable to an event then is there truly a Divine law related to it and should the mujtahid try to draw it out? If he succeeds he is musib, if not, he is mukhti. Or perhaps God has no real law for every event or problem and the mujtahid's solution is entirely of his own devising. Thus, in a case where we have no text or proof, God's law is a function of the mujtahid's reasoning.²⁰ According to B. G. Weiss, "Though this way of thinking had at least one great Ash'ari divine among its supporters, it could clearly be disturbing to anyone who built his entire jurisprudence around the notion of a single correct rule as the object of the whole enterprise of ijtihād. ...if the law did not reside in an original intent of the Legislator, what was the mujtahid striving for in the first place? Was there an original intent that he should seek to understand."²¹

According to Mutahhari, the main element of the theory of taswib lies in a certain theory of ijtihād which is held by those who defined ijtihād as the practice of qiyās and ra'y. They point out that the laws sanctioned by the Prophet through revelation are limited, whereas issues and problems which require legislation are unlimited in number. Therefore, the laws given by the Divine Lawgiver are not sufficient to meet the requirements. Accordingly, God has given the right to the scholars of the Ummah, or a group of them, to employ their personal taste and intelligence in cases where there are no

religious dicta and select something which resembles other Islamic laws and is closer to the criteria of justice and truth. In accordance with this view of *ijtihād*, Mutahhari says, they accept the theory of *taswib*, for, according to this view, *ijtihād* itself is one of the sources of Divine Law.²²

However, this idea is unacceptable to Shi'a scholars because they believe that there is a real divine ruling pertaining to every problem and the most a jurist needs to do through *ijtihād* is to discover it with the help of reliable canonical sources. So, in the light of such an understanding of *ijtihād* it is impossible that every mujtahid should be right.²³ In this regard 'Allāmah Hilli states:

The scholars are in agreement that there is only one correct opinion in rational matters (*al-‘aqliyyāt*),²⁴ except al-Jāhiz²⁵ and al-‘Anbari,²⁶ who were of the opinion that every person who practiced *ijtihād* with respect to rational issues produced a correct opinion, not in the sense of a correspondence with the truth but in the sense of a reprehensible error being eliminated. But the true opinion is the first, because God made the search for knowledge a duty and set up a proof for it, and whoever is incorrect therein still has to discharge his duty.²⁷

So according to the Shi'a viewpoint, there is only one correct opinion, which is that which corresponds in reality to God's commandment. In other words the rule is specific and there is only one correct opinion, and one who opposes it is in error.²⁸

The Idea of Taswib and Its Justification

Those who believe in taswib have mentioned many arguments of which two are very important. The first argument which they employ is based on the following verses:

And David and Solomon-when they gave judgment concerning the tillage, when the sheep of the people strayed there, and We bore witness to their judgment and We made Solomon to understand it and unto each gave We judgment and knowledge. (21:79 & 80)

Those who believe in taswib argue that the final statement in this passage could not be true if one of the two men (let us assume David) was in error; therefore, both Solomon and David must be considered to have been right (*musib*) even though their judgments differed.²⁹ Âmidî answers this argument by saying that the main point in this statement is that both David and Solomon possessed judgment and knowledge that God had given them. And this judgment and knowledge did not, in the case of David, necessarily support the case mentioned in this passage. The judgment and knowledge referred to could very well have consisted merely of judgment and knowledge

relating to the employment of indicators of the law and the methodology of derivation of law from texts, namely *ijtihād*.³⁰

The second argument mentioned by Sunni scholars is based on the Prophet's saying, "My Companions are like stars; whomsoever you follow you will be guided". This statement makes the opinions of the Companions a source of guidance even if they differ from one another. It follows that if it were possible for any companion to err he could not therefore have been described as "like a star" in the sense intended by the Prophet; namely as a guide.³¹ However the argument based on this hadith was criticized by Muslim scholars. Ayatollah Riḍā Sadr makes several points here:³²

1. This hadith is weak, since it is not well documented.
2. To accept this report from a companion because every companion is to be taken as a guide is a clear circulation.
3. The expression "whomsoever you follow" requires possibility of following any companion, even the most ignorant of them. Clearly this is an injustice to the more learned companions.
4. If we accept this argument we should accept that guidance could be given even by two contradictory traditions, for, we often see that sometimes there are differences in the companion's views.
5. The comparison in this hadith does not take place between every one of the companions and every star, rather it is made between the

entirety of the companions and the entirety of the stars, which implies that we have to follow companions only in their totality, that is, when they are in complete agreement. For, although the stars have different locations and appear at different moments, all stars agree in indicating celestial time.

6. Âmidî also responds³³ to this problem by saying that although the Prophet's saying applies to all the companions, it cannot be taken to mean that we are to follow their example in all matters.

Finally according to A. Zysow some of the objectionable consequences of taswib are:

- a) rejection of the systematic quality of the legal process;
- b) the anti-systematic character of taswib appears in its relativism;
- c) taswib appears equally anti-systematic when looked at from the point of view of the lay followers (*muqallid*).³⁴

The Idea of Takhti'ah

As was mentioned before, the main idea of the mukhatti'ah is that there is only one correct opinion, which corresponds in reality to God's commandment. In other words, the rule is specific, and there is only one correct opinion, just as the one who opposes it, is in error.³⁵ According to Tusi, God has only one ruling for each problem, and a qualified jurist may err in discovering the real divine ruling, but he is

excused, if he has done his best.³⁶ According to Arthur Pap, in contrast to *taswib* which introduces into the law a discontinuity between the revealed texts and the product of *ijtihâd*, *takhtî'ah* holds that just as there can be no inconsistencies between the revealed texts, there can be none in the rules derived from those texts.³⁷ Pap also says: "Infallibilism is thus a form of pragmatism as opposed to the realism of fallibilism. It is essentially an extension of utilitarian ways of thinking (or speaking) from ethics to epistemology."³⁸

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2 Wael Bahjat Hallaq, "The Gate of Ijtihād: A Study In Islamic Legal History", Ph. D. dissertation University of Washington, 1983, p.13. See also Muhammad ibn Musā Shātibī, *al-Muwāfiqāt fī Ahwāl al-Sharī'ah*, vol. 4, (Beirūt: Dār al-Kutub al-'Ilmiyyah, 19--), p. 66.

³ Bernard G. Weiss, *The Search for God's Law: Islamic jurisprudence in the writing of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), p. 683. See also Sayf al-Dīn al-Āmidī, *al-Ihkām fī Usūl al-Ahkām*, Vol. 4, (Cairo: Dār al-Hadīth, 19--), p. 218, where this definition of *ijtihād* can be found: "Istifrāghu al-wus' fī tahqīq-i amrin min al-umūr mustalzimin lil-kulfati wal-mashaqqah."

⁴ Bernard G. Weiss, "Ijtihād", *The Encyclopedia of Religion*, vol. 7, (New York: Macmillan Publishing Company, 1987), p. 92. See also W. B. Hallaq, "On the Origins of the Controversy about the Existence of Mujtahida and the Gate of Ijtihād", *Studia Islamica*, vol. 63 (1986), pp.132-3.

⁵ Āmidī, *al-Ihkām*, p. 247. Āmidī himself is in this group. I will discuss his ideas below. According to Āmidī, Ibn Furak and Abū Ishāq al-Isfarā'inī are also members. See John Cooper, trans. "'Allāmah Hillī on the Imamate and Ijtihād", in *Authority and Political Culture in Islam*, ed. S. Amir Arjomand (Albany: State University of New York, 1988), p. 245. Hillī adds to this group Bishr al-Marīsī (d. 218/833).

⁶ Āmidī, *al-Ihkām*, p. 246. Among those who supported this position Āmidī mentions Abū Bakr al-Bāqillānī, Abū al-Hudhayl al-'Allāf (d. 226/840-41 or 235/849-50), the first systematic theologian of the Mu'tazilī school, Abū Alī al-Jubbā'ī (d. 303/915-6), and his son Abū Hāshim (d. 321/933) the famous Mu'tazilī theologians. See also John Cooper, "'Allāmah Hillī on the Imamate and Ijtihād", p. 245.

⁷ Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Cambridge Mass. : Harvard University, 1984), p. 459.

- ⁸ al-Bâqilânî, *Mankhûl*, p. 453 (quoted in A. Zysow, *The Economy of Certainty*, p. 459).
- ⁹ A. Zysow, *The Economy of Certainty*, p. 460.
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- ¹¹ B. G. Weiss, *The Search for God's Law*, p. 683. See also Âmidî, *Ihkâm*, p. 218.
- ¹² See al-'Allâmah Hillî, *Mabâdi al-Wusûl 'ilâ 'Ilm al-Usûl* (Beirut: al-Dâr al-Islâmîyyah, 1970), p. 24. See also Sheikh Hasan b. Zayn al-Dîn Shahîd Thâni, *Ma'âlim al-Usûl*, ed. Mahdî Muhaghgh (Tehran: Shirkat-i Intishârât-i 'Ilmî wa Farhangî, 1985), p. 268. See also al-Âkhûnd Muhammad Kââim al-Khurâsânî, *Kifâyat al-Usûl* (Qum: Mu'assisah Âl al-Bayt, 1990), p. 464.
- ¹³ Murtadâ Mutahharî, "Ijtihad in the Imâmîyah Tradition", trans. Mahliqâ Qarâ'î, *Al-Tawhîd*, vol. 4 (1986-87), pp. 29-30.
- ¹⁴ The *Sunnah* is the narrative recording the divinely sanctioned customs of the Prophet (and thirteen infallible members of his household).
- ¹⁵ M. Mutahharî, "Ijtihad in the Imâmîyah Tradition", pp. 26-7; A. Zysow, *The Economy of Certainty*, p. 462. Zysow states that the objection against analogy had been raised earlier (than Abû Ya'lâ b. al-Farrâ) by al-Shaykh al-Mufîd in a disputation with al-Bâqilânî.
- ¹⁶ Bernard G. Weiss, "Ijtihâd", *The Encyclopedia of Religion*, vol. 7, p. 91.
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- ¹⁸ J. Calmard, "Mudjtahid" in *The Encyclopedia of Islam*, 2nd ed. (Leiden: E. J. Brill, 19--), vol. 7. p. 297.
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- ²⁰ R. Sadr, *al-Ijtihâd wa al-Taqlîd*, p. 33.
- ²¹ B. G. Weiss, *The Search for God's Law*, p. 700.
- ²² M. Mutahharî, "The Role of Ijtihad in Legislation", p. 28. See also Muhammad Bâqir al-Sadr, *al-Ma'âlim al-Jadîdah lil-Usûl* (Tehran: Maktabat al-Najâh, 1975) pp. 38-9.
- ²³ Ibid.
- ²⁴ I believe this term al-'Aqlîyât has the connotation that no text is available to aid in rendering a judgment.
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- ³⁰ Ibid.
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³³ B. G. Weiss, *The Search for God's Law*, p. 702. See also Âmidî, *al-Ihkâm*, p. 262.

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³⁸ Arthur Pap, *Elements of Analytic Philosophy* (New York: Macmillan, 1949), pp. 372-73 (quoted in A. Zysow, *The Economy of Certainty*, p. 483).