



**ISLAMIC UNIVERSITY
IN
UGANDA
COMPARATIVE LAW JOURNAL
(IUIUCLJ)**

IUIUCLJ. VOL 7, ISSUE 1, 2022

IJTIHAD AS A LEGAL TOOL: THE 21ST CENTURY QUESTIONS

BADR MOHAMMED BASHIR,LLM¹

Abstract:²

The first step toward opening the door of ijtiḥād should be the liberation of religious establishments from the influence of political regimes. Old interpretations no longer provide suitable answers to the difficult questions facing the Muslim world. Many Muslims believe that they must choose between Islam and modernity, or Islam and democracy. Muslims are obliged to abide by the rules of Allah in every aspect of their lives, always and wherever they live. However, the actual rules of Allah as given in the Qur'an and the Sunnah are limited. This paper explored the need for the revival of Ijtiḥād to address pertinent contemporary questions. It is the understanding of the author that the prevalence of plethora of emerging issues cannot be left unaddressed and therefore refuted the idea of closure of the doors of Ijtiḥād.

Key words: Ijtiḥād, contemporary meaning, Islamic economic system, Twenty-First Century

Introduction:

In Islamic legislation Ijtiḥād plays an important role and has central position in the whole process. Demands of life change day by day thus it become necessary to take on the structural review of Islamic laws keeping in mind the spirit and discipline of Islamic. Ijtiḥād thus play as a perfect tool for legislation. Regarding fatawas the jurists followed the methodologies of companions, tabieen, and taba Tabaeen. In cases in which they did not find any legal opinion of their teachers related to a specific problem they themselves tried to find out the solution for that problem from the relevant Texts and formulate their own fatawa.³

The question of Ijtiḥād is considered as settled law in Islamic Jurisprudence. This view is the predominant view amongst the Sunni Madahibs (Hanafai, Shafai, Malaki, Hambali). The Sunni Madahibs consider that the doors of Ijtiḥād closed by the 10th Century AD.⁴ The Shia scholars have a different view. According to Shia Madhab, it

¹ Lecturer, Department of Islamic & Customary law, Faculty of Law, Nigeria Police Academy, Wudil – Kano (Doctoral Candidate with Bayero University Kano)

² Nigeria Police Academy, Wudil-Kano bashirbadr@polac.edu.ng; badrembee@yahoo.co.uk; +234 813 482 1247

³ Shahzadi Pakeeza & Fariha Fatima, 'Ijtiḥād as a legislative function: Role of Ijtiḥād, Ifta and Taqleed in Legislative Process', Journal of Islamic & Religious Studies, Jan-Jun 2016, I:I

⁴ Wael Hallaq: "Was the Gate of Ijtiḥād Closed?", International Journal of Middle East Studies, 16, 1 (1984), 3–41

is a rational reasoning that continues with the needs of the people with time continuum.⁵

What is Ijtihad?

In Islamic law the use of individual reasoning in general is called Ijtihad or Ijtihad al-ra'y, and Mujtahid is the qualified personnel preferably Jurist/lawyer who uses it. "Exertion" or "Deductive Reasoning" is the literal meaning of Ijtihad. In general usage, this Arabic word denotes the utmost effort, physical or mental, expended in a particular activity. In its Islamic and technical legal connotation, it denotes the thorough exertion of the jurist's mental faculty in finding a solution for a case of law. Ijtihad therefore is 'the logical deduction on a legal or theological question by a Mujtahid or learned and enlightened jurist, as distinguished from Ijma, which is the collective opinion of a council of Scholars.'⁶

Closure of the gate of Ijtihad:

Towards the tenth century some wanted to put a stop to further elaboration and controversies that were becoming prevalent, some claimed that the need for Ijtihad and Tafsir had been exhausted.

Around 1305 some jurists in Iraq even decided to close the door of Ijtihad.⁷ Although the power of absolute Ijtihad was completely abolished, a relative Ijtihad was allowed, giving a scope for limited expansion in details. There are others who accept that direct Ijtihad on the matters which are not touched upon by earlier Mujtahidun can still be considered by a Muslim who has all the qualifications of a Mujtahid. Thus within the Sunni world of Islam the decisions of Judges in certain domains over the years represent small increments of Ijtihad in the body of knowledge held by the Schools of Law. Ijtihad was further restricted to exclude those cases that had become the subject of consensus, Ijma.

Such cases were not subject to further juristic interpretation. Thus Ijtihad in legal matters was confined to the grey areas of the law, where textual certainty was absent but where human reasoning on the basis of the texts might uncover the law as intended by God. Some believe that restriction was needed to put a stop to the 'conflicts of opinions and doctrines' through which Islam had passed during the preceding three centuries and 'had finally attained stability, through the emergence of orthodoxy, only

⁵ Hassan Syed: 'Ijtihad - The Question of Islamic Jurisprudence and Scientific Thought, ResearchGate journal 2019, available at: <https://www.researchgate.net/publication/330738803>

⁶ Hughes, Dictionary of Islam, p. 197

⁷ Doi, Shari'ah: The Islamic Law, p.68-69

towards the beginning of the 10th century (CE).⁸ However, nowadays some say that such a decision pushed Muslim intellectual activity 'towards stagnation.' Others believe that the reason for the curtailment of Ijtihad was 'the difficulty which occurred in practice: for if such a right were to continue [for any great length of time], especially if ta'awwul and the precedence of something over the texts were to be permitted, and everyone were permitted to change or interpret according to his own opinion, nothing would remain of the way of Islam. In the opinion of this author such a sweeping conclusion may be adequate at a time when the decision was taken but grossly inappropriate at 21st Century Islam with the contemporary challenges.

Ijtihad as a Legal Tool:

The purpose of performing ijthâd is to try to derive and interpret new rules from the Qur'an by analogy, i.e. by comparing the *ayats* and hadiths with implied meanings to overtly expressed ones' opinion. For instance, the meaning of the *ayat* commanding to obey your parents is, "Do not say, 'Fie on you', to them!" No mention is made of battery or invective. Since the exclamation "Fie on you," which is by far milder than these forms of maltreatments, is expressed literally, mujtahids have deduced by ijthâd that it must certainly be haram (forbidden) to beat or curse or insult one's parents.

Development of Ijtihad by scholars/Jurists after the demise of the Holy Prophet (SAW) was as a result of the need to cater for emerging challenges which Muslims may encounter in the future. Sharia (Islamic law) is also subject to interpretation and to the ever-changing needs of society. Its guiding principles were designed to protect the individual and the society, but it was not established as a set of fixed rules. To respond to the changing needs of Muslim societies, Muslim jurists and scholars have relied on the well-established process of innovation, ijthihad. This process is based not only on the Qur'an and religious tradition (sunna), but also on reason, deduction, and prioritization. The following examples illustrate the use of ijthihad. Fifteen years after the death of Prophet Muhammad (SAW), Caliph Omar ibn-al-Khattab stopped cutting off the hands of thieves because most of them were stealing out of necessity due to hunger, poverty, and drought. While this contradicted a verse from the Qur'an, he justified his decision by stating that the principles of justice and fairness were supreme.⁹

Negative implications of closing the gate of Ijtihad

⁸ Azeem Mian, 'Ijtihad as A Source of Law- Islamic Jurisprudence', a project submitted to the faculty of Law, Jamia Millia Islamia University,

⁹ Ijtihad: Reinterpreting Islamic Principles for the Twenty-first Century. A Special Report by the United States Institute of Peace, 2004

The present deficiencies in the world of Islam, the failure to confront the contingent issues in a proper way, the issuing of baseless and irrational fatawa, the improper attitude towards new ideas - all these are consequences of the closing of the gates of ijtihad by the *Ahl al-Sunnah*. It has been instrumental in allowing dubious hands, with the aid of tyrannical governments, to instill unhealthy ideas into the people's minds and to insinuate the feeling that Islamic fiqh cannot fulfil the demands of the present age and the modern civilization.¹⁰

These insinuations have left undesirable effects on the minds of short-sighted and self-alienated persons unaware of the spirit of Islam, to the extent that they servilely follow the aliens and prefer Western laws to the laws of Islam. According to Qazwini, closing the doors of ijtihad is one of the gravest mistakes Muslims have committed. They have by this action limited legal interpretation to only four prominent scholars: Malik Ibn Anas, Abu Hanifa al-No'man, Muhammad Ibn Idris al-Shafi'i, and Ahmad Ibn Hambal—the heads of the Maliki, Hanafi, Shafi'i, and Hambali schools of thought. The motivation for this was political. During the Abbasid Dynasty (750–1258 CE), the Abbasids decided to outlaw all other sects in order to strictly control religion and worship, as well as political matters.¹¹

The implication of this undesirable closure of the gate of Ijtihad is that many Muslims believe that they must choose between Islam and modernity, or Islam and democracy. Even where some Muslims would reluctantly pick Islam against any other choice, the only way out of this predicament is renewing the concept of ijtihad and using the process to develop modern interpretations of Islamic principles compatible with both the word of God and the situations, ideas, and values that have emerged over the past several centuries. The matter is made worse when viewed from the draconian rules by the head of governments of Muslim states.¹²

Qualification of a Mujtahid:

To protect Islamic law from the dangers of innovation and distortion the great scholars of usul laid down rigorous conditions to be fulfilled by anyone wishing to claim the right of Ijtihad for himself. A jurist must be a master of the Arabic language.

¹⁰ Muhammad Ibrahim Jannati, 'Ijtihad: Its Meaning, Sources, Beginnings and the Practice of Ra'y', al Tawhid Islamic Journal Vol. 5 No. 2 &3, Vol. 6, No. 1, Vol. 7, No. 3 (2013)

¹¹ Ahmad. S, Ahmad, Discovering Islam, p.24

¹² Sudan case of Blasphemy: On 18 April 1997, another "blasphemy" charge was leveled. This time the alleged offending words were from a quoted passage, contained in the report of Special Rapporteur on Racism, under "Islamist and Arab Anti-Semitism". This new "blasphemy" charge succeeded after the representative of Indonesia intervened on the last day of the Commission - in the name of the OIC's 56 Islamic States, that Islam had been defamed and "blasphemy" committed against the holy Qur'an. This led to the 53-member-state Commission's consensus decision 1997/125, obliging the Special Rapporteur to take a "corrective action. (Islamic perspectives on the 1948 Universal Declaration on Human Rights, Article Published in the Journal Midstream, (1999), New York, at 8).

He must have proficient knowledge of theology, the revealed texts and the four schools of thought. A jurist must have a comprehensive knowledge of legal theory, *usul al-fiqh*, which governs the interpretative principles of legal language and the method of investigating the texts, the *asbab al-Nuzul* and the *asbab alwarud*, the *naskh wal mansukh* etc. He should have thorough knowledge of the Qur'an and Hadith and in the exegesis. He must know what parts of the law have become subject to consensus. He must be a pious and practicing Muslim. He should first seek the solution of a legal problem in the specific terms of the Qur'an and the Sunna, applying the accepted methods of interpretations and construction, including, the doctrine of *Naskh*, *asbabetc.*, before considering *Ijtihad*.¹³

Scholars who have aired their views against closure of the door of Ijtihad:

Jurists like Jamal al-Din Afghani (d. 1893) and his disciple Shaykh Muhammad Abduh (d. 1905) wrote about reopening of the door of *Ijtihad*. A similar stance was adopted by Shaykh Rashid Ridwa (d. 1935) and Bashir ud-Din Mahmud Ahmad (d. 1965). They claimed that to perceive the true essence of Islam one must free oneself from *taqlid* and blind dependence on the traditional interpretations of the four classical schools of thought and return to the religion of the forefathers (*Salaf*). It was argued that the *Ijma* of a few scholars to close the gate of *Ijtihad* was merely the result of fear of disunity among Muslims in a period of political instability and above all the decision was made in a period of 'intellectual stagnation' and now fresh *Ijtihad* is needed. There are other Muslims who ask: Was the door of *Ijtihad* ever closed? Allama Shaykh Mahmud Shaltut (d. 1963), the mufti and rector of Al-Azhar University claimed that the door of *Ijtihad* 'is open and that there is nothing objectionable about a follower of one school referring to the judgements of another school.' In one of his fatwa he went so far as to say that it 'is correct to follow the Ja'fari school of *fiqh*, just like the other schools.' Subsequently, a chair of comparative legal studies was established at Al-Azhar.

Issues calling or may be subjected to Ijtihad in contemporary today:

Many issues facing Muslims today require *ijtihad*, and the following ones, have been so picked from contemporary challenges faced by Muslims daily:

1. The role of women. The role of women in Islam needs to be reviewed by carefully examining the original texts.
2. Sunnis and Shiites. The gap in doctrine between various Islamic *madhahib* (schools and sectarian positions) should be narrowed.
3. The spirit of globalization. Using modern *ijtihad*, Muslims should reinterpret the classical division of the world into *darul Islam* (the world of Islam) and

¹³ Coulson, A History of Islamic Law, p.76

darul Harb (the world of non-Muslims). Emphasis should be placed on a one-world view and responsible citizenship in our global village. Ijtihad should also be used to foster better relations between people of diverse faiths and cultures by promoting dialogue among various groups rather than encouraging the notion of a clash of cultures and civilizations.

4. Issues of Islamic Law of evidence and the presentation of four witnesses in the case Zina with the presence of Close Circuit Camera Television (CCTV)
5. Economics. There is a need to radically rethink Islamic economic theories, in the process incorporating elements of modern economic theories. Why is the Muslim world impoverished and how can this be changed? What kind of collaboration is possible between Muslims and world economic bodies without compromising authentic Islamic values and principles of justice, equity, and fairness? (Example is Speculative Trading, Forex et al.)
6. Unity among Muslim states. Islamic political thinking and statecraft should also be reviewed. How can Muslim states be brought together to collaborate more closely, and what new structures are needed to promote unity among Muslim states? Ethical and moral standards of the Islamic state need to be examined, as does the promotion of individual freedom, especially that of religious minorities and branding of others as Kafirs.

Reopening of the door of Ijtihad, how to go about it

It must be said that, Governments in Muslim countries today, many of which are corrupt, greatly benefit from the absence of ijtihad. Moreover, these governments help keep the doors of ijtihad closed in order to control the religious establishment. Since religious bodies in Muslim countries rely on government financing, this makes them captive to government policies. The domination of the religious establishments by secular governments has been so powerful that it has often made religious authorities look inept.

Hence, the first step toward opening the door of ijtihad should be the liberation of religious establishments from the influence of political regimes. Religious authorities should dissociate themselves from political regimes so that they can independently issue and interpret religious law.

Freedom of expression by scholars of religion cannot be overemphasized. Freedom of expression is inherent in the concept and practice of ijtihad. This means that the democratization of Muslim societies and basic freedom for scholars is sine qua non for this process to work.

Another important step is reforming Muslim educational systems is also essential, including revising the curricula of religious schools and seminaries. Instead of learning about only a single school of interpretation, which is common practice, students should be exposed to all such schools. Instead of studying only the rulings and interpretations of the schools, students should also learn about the evidence used to arrive at these interpretations, as well as other methods of interpretation. Students should also study comparative religion, modern logic, philosophy, psychology, and history, as well as economics and political theory as background for improved interpretation. Islamic schools and seminaries should also pay more attention to the great Islamic literature on the objectives of sharia.

Conclusion:

The increasing attention paid to *ijtihad* by Muslim scholars can be attributed to the fact that it remains the only means of legitimate rational reasoning within the house of Islam. Islam is a religion of revelation, in which God spoke to the Prophet Muhammad, who, in turn, transmitted this speech of God, fleshing out its details and providing commentary on its application. In Islam, truth is both divine and divinely absolute, and so there is little room for rational inquiry.

Ijtihad flourished in two periods of Muslim history, the ninth and the nineteenth centuries. During the first period, *ijtihad* functioned as legal reasoning. During the second period, however, some scholars looked to *ijtihad* as the “creative impulse” necessary to unleash Muslim potential and create a new world, one that would allow Islamic civilization to thrive. But this movement was thwarted by the *ulama*. These custodians of the tradition were disinclined to accept *ijtihad* as creative impulse. In addition, the movement itself was a threat to their status and even to their livelihood.¹⁴

Ijtihad is the main interpretive model available to Islamic jurists to answer and legislate for new legal problems. The principles of *Ijtihad* firmly rests upon the rests Principles of ‘*Faqih*’ and vice versa.¹⁵ The aftermath of the collapse and ruins of the last Caliphate in Turkey was responsible for the quest for ideology that would allow Muslims to think freely and proffer solution to emerging challenges and *Ijtihad* presents itself as a ready legal tool. However, the area of caution in adopting and approving the use of *Ijtihad* will be avoidance of its substitution with the main Text, The Quran. Islam cannot afford to have Jurists sit at one place in a conference table to draft Muslim Laws! Hence, desiring a better future, imagination is more likely to get us the answer that legal reasoning.

¹⁴

¹⁵ Hassan Syed, ‘*Ijtihad* - The Question of Islamic Jurisprudence and Scientific Thought’ *supra*.

Ingrid Mattson¹⁶ opined, ‘We must first have a vision of a different tomorrow and know that there is the possibility of the world being different. Even when we are so mired in our own emotions, our own day-to-day struggles, our own difficulties that we cannot imagine a way out, faith and creativity help us know it is possible for God to create a different future. It is possible for God to put love between you and your enemies. So imagination is key to a better future. It is the key to a good society. It must work hand in hand with but not be superseded by legal reasoning. Reason by itself, when misused, can lead to disastrous conclusions and actions’.¹⁷

¹⁶ Professor of Islamic studies and director of Islamic Chaplaincy at Hartford Seminary

¹⁷