



CONTEMPORARY *IJTIHĀD*: AN ANALYSIS OF
INDIVIDUAL AND COLLECTIVE APPROACHES

BY

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the degree of Doctor of Philosophy

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ABSTRACT

This study examines *Ijtihād* in its contemporary manifestation with the premise that there is a need to delimit the boundaries and framework of this process to reduce dispute and allow for more focus on more strategic aspects of *Ijtihād*. The earlier parts of this study focus on prevalent views on the main principles, components and elements of *Ijtihād* while analyzing possible changes and modifications to the theory and practice of *Ijtihād*. The earlier chapters of this study seek a synthesis of existing research on the various issues on *Ijtihād* especially on the more contentious aspects of it. In achieving this, the researcher adopts a comparative analytic method with emphasis on more recent scholarship on the matter. Equipped with this perspective and framework, the researcher proceeds on an analytical comparison of leading contemporary individuals and collective practitioners of *Ijtihād*. At this stage, the aim is to achieve a comparative appraisal of different trends and proposing measures for improvements. The main findings of this study are that a substantial amount of the controversies surrounding *Ijtihād* goes back to terminological differences and that the divide between contending trends may be narrowed down to reasonable degrees. Utilizing these findings the researcher went on to highlight ideal approaches and suggest improvements for contemporary *Ijtihād* in general and to the selected samples covered in this study. In addition, this study has also proved that competing trends emerged partly due to inconsistency with the established theory of *Ijtihād*. These findings should contribute to clarify and reduce disputes that distract from strategic areas of *Ijtihād* and point to the way forward for the *Ijtihād* process in its various dimensions.

ملخص البحث

تتناول هذه الدراسة موضوع "الاجتهاد" بتجليته المعاصرة، مستندةً إلى الفرضية التي ترى أن ثمة حاجة لتحديد أطر وحدود عملية الاجتهاد، للحد من الخلاف، وإتاحة مزيد من الفرصة للتركيز على الجوانب الاستراتيجية للاجتهاد. ركزت الأجزاء الأولى لهذا البحث على التفكير السائد حول المبادئ الأساسية للاجتهاد، ومكوناته، وعناصره محللةً تغييرات وتعديلات الاجتهاد من الناحية النظرية والتطبيقية. ويبحث هذا الجانب من الدراسة خلاصة البحوث المتوفرة حول القضايا المتعلقة بالاجتهاد، وخصوصاً الجوانب الأكثر إثارةً للجدل. لتحقيق هذا، اعتمد الباحث أسلوب التحليل المقارن مع التركيز على كثير من الدراسات العلمية التي أجريت حول هذه المسألة. انطلاقاً من هذا المنظور والإطار، انتهج الباحث المقارنة التحليلية لممارسي الاجتهاد المعاصرين أفراداً وجماعات، وهدف هذه المرحلة هو التعرف على أفضل الممارسات، والمثالب، والمستوى الفعلي لخلافات الاجتهاد المعاصر مع تقديم اقتراحات لتحسين الحالة. توصلت النتائج الرئيسية لهذه الدراسة إلى أن قدرًا كبيراً من الجدل الدائر حول الاجتهاد يرجع سببه إلى الاختلاف في المصطلحات، وأنه يمكن تضييق الهوة بين الآراء المتضاربة إلى درجة معقولة. وفي سعيه إلى استخدام نتائج هذه الدراسة، قام الباحث بتسليط الضوء على الطرق المثلى، وقدم مقترحات لتحسين عينات معينة من الاجتهاد المعاصر وقد أثبتت هذه الدراسة أيضاً أن ظهور الاتجاهات المختلفة يرجع جزئياً إلى التناقض الحاصل مع النظرية التي تم وضعها للاجتهاد وكما يمكن أن تسهم نتائج هذا البحث في التوضيح، وتخليص الخلافات التي صرفت الأنظار عن الجوانب الاستراتيجية للاجتهاد، وكذلك يمكن أن تسهم في تمهيد الطريق للمضي قدماً في عملية الاجتهاد بأبعاده المتعددة.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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To All My Esteemed Teachers,

*My beloved Mother,
Datin Hajjah Nik Zahrah Binti Nik Yahya,*

*My late beloved Father,
Dato' Haji Mohamad Bin Che Wook, raḥimahuLLāh*

*My beloved Wife,
Hamiliya binti Mustafa,*

*And my beloved children,
Hani, Iman, Adlan, Nida', Minyati and Muhsin.*

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TABLE OF TRANSLITERATION

Table of the system of transliteration of Arabic words and names used by the
International Islamic University Malaysia

CONSONANT

أ = A	ر = r	ف = F
ء = '	ز = z	ق = Q
ب = B	س = s	ك = K
ت = T	ش = Sh	ل = L
ث = Th	ص = ṣ	م = M
ج = J	ض = ḍ	ن = N
ح = ḥ	ط = ṭ	ه = H
خ = kh	ظ = ḏ	و = W
د = D	ع = '	ي = Y
ذ = dh	غ = Gh	

VOWELS

Short Vowels: a = َ ; i = ِ ; u = ُ

Long Vowels: ā = َآ ; ī = ِي ; ū = ُو

Diphthongs: ay = َأَي ; aw = ُأَوْ

Doubled: uww (final: ū) = ُؤ ; iy (final ī) = ِئِي

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Regardless of the march of technology and modernity, many observers have noted that instead of being relegated into obscurity, religions have been asserting themselves more than ever.¹ This is especially true with Islam. In the case of Islam, its resurgence in any country often comes with the accompanying call for the implementation of the *Sharī'ah* or the Islamization of existing laws.² This call, which is natural and noble from the Muslim perspective, is however fraught with obstacles.

For one, there appear to be direct contradictions between what has been generally accepted as universal legal standards or norms and the rulings in the *Fiqh* corpus on various issues.³ To various extents, if these contradictions cannot be reconciled, it may weaken the case for the implementation of the *Sharī'ah*. If however the wrong method is adopted in the process of reconciliation, the end product may well lack legitimacy and be rejected by the Muslims.⁴

¹ John Naisbitt in noting this trend in the U.S.A wrote that, "America is in the midst of a religious revival." See *his High Tech High Touch*, (New York: Broadway Books, 1999) pp 6-7. See also the views in Peter L. Berger, ed. *The Desecularization of the World: Resurgent Religion and World Politics* (Washington: Ethics and Public Policy Centre, 1999).

² Two prominent observers, John L Esposito and John.O. Voll noted that, "...Muslims are not willing to simply adopt Western democratic models. The period of unquestioningly borrowing techniques and concepts from western experience has passed (if it ever took place), and now the effort is to establish an authentic Islamic democratic system." *Islam and Democracy*, (New York: Oxford University Press, 1996).

³ In relation to the area of Human Rights see Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, (Syracuse: Syracuse University Press, 1990), Ann E. Mayer, *Islam and Human Rights: Tradition and Practise*, 2nd ed. (Westview: Boulder, 1995) also Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001).

⁴ See An-Naim, supra note 3 p.2 and passim.

Another reality is that, in dealing with new issues emerging with society's march, the Islamic position in any given case has become more contested and divergent. Even though differences of opinion in legal matters in Islam are common but left unchecked, the situation may come to a stage where the implementation process will be hampered. Without a dominant stand on a particular issue, the call for implementation will be much weakened. Even a subject generally regarded to be settled such as the *Hudūd* punishments in Islamic criminal law can still suffer from such a predicament. A recent sample can be seen in the debate surrounding an international call made by a noted Islamic scholar, Dr. Ṭāriq Ramaḍān, for a moratorium on such punishments⁵.

In the light of the above, this study is embarked upon in order to analyse *Ijtihād* as practiced individually and collectively in the more recent period. Individual scholars as well as Institutions at national and international levels have continuously resorted to *Ijtihād* in the process of ascertaining the Islamic verdict of various new issues. It is felt that by analyzing their approaches to *Ijtihād* and legal reform, we will be able to contribute in shedding light on the most appropriate approach in the practice of *Ijtihād* for the present times.

To an extent, this study would also seek out and evaluate contemporary attempts at renewing or changing aspects of *Uṣūl al-Fiqh* itself. As we shall elaborate, this renewal and reform of *Uṣūl al-Fiqh* is one of the most contentious issues in contemporary Islam since *Uṣūl al-Fiqh* is one of the axis of this religion. A matter as fundamental as this should just not be left in the hands of observers and commentators from outside the field of *Uṣūl al-Fiqh*. On this point, Dr. Yūsuf al-

⁵ This call initially made on the 30th of March 2005 has attracted responses including from the Grand Mufti. of Egypt, Sheikh Dr. ‘Ali Jum‘ah, Dr. Tāḥa Jābir ‘Ulwanī, Ṭāriq Bishrī and the Legal Research Commission of Al-Azhar. The main documents and exchanges on the issue can be found at <http://www.tariqramadan.com/calls>

Qaraḍāwī who is one of the more bold scholars on this issue, hinted on this point, when his *Fatwā* was solicited on the acceptability of renewing *Uṣūl al-Fiqh*,

If *Uṣūl al-Fiqh* was in the past founded, expanded and developed by the Muslims beginning with al-Risālah of Imam al-Shāfi'ī (d 204h) to *Irshād al-Fuhūl* of Imam al-Shawkānīy (d 1255h) to contemporary works...it should then not be too surprising to expect renewal today. *The Muslims had founded it in the past and they are the ones who will renew it.*⁶ (emphasis added)

1.2 STATEMENT OF PROBLEM

In the interaction between *Sharī'ah* and modern life, controversies and disputes persist on numerous and various issues. Even though differences of opinion is a normal and inherent consequence of the nature of *Sharī'ah* itself, left untrammelled and unlimited this phenomenon may lead to undesired consequences. The precise and actual Islamic position on a given issue may be lost in the midst of apparently equally valid claims. In such a situation the most legitimate position can only be identified through a proper approach of *Ijtihād*.

The proper approach and application of *Ijtihād* itself however is still a debated issue. There is an ever-present threat that *Ijtihād* as a term, concept and methodology, can be claimed, utilized and employed too often, too liberally, by too many in manners that are too haphazard and liberal. The issue here is to identify to what exact extent has Individual and Collective *Ijtihād* changed from its traditional formulation.

1.3 OBJECTIVES OF THE STUDY

Having the background and the core issue in mind, the objectives of the present study can be summarized as:

⁶ Yūsuf al-Qaraḍāwī, *Fatāwa al-M'uāṣarah* (Al-Manṣūrah: Dar al-Wafa', 1994) Vol.II, p.142.

1. To analyze the most current and prevalent trends on the main principles, components and elements of *Ijtihād*.
2. To analyze the changes and modifications to the theory and practise of *Ijtihād* of the recent period.
3. To evaluate the application of the theory of *Ijtihād* by leading individual scholars and institutions
4. To examine the range of best practices and the acceptable level of divergences of contemporary *Ijtihād*.
5. To propose measures to overcome weaknesses in the practice and process of contemporary *Ijtihād* at the individual and collective level.

1.4 HYPOTHESES

1. There may be certain shifts in the perspectives and focus in the theory and practice of *Ijtihād* but these changes have not lead to a deconstruction or extensive overhaul of classical legal theory. The main structure and framework of classical Islamic legal theory remains intact.
2. The parameter of most current and predominant thinking on the best practices of *Ijtihād* can be identified and will be useful in reducing legal disputes on various contentious issues. The border limits of *Ijtihād* are not overly porous to the extent of allowing for a free-for-all situation.
3. Both Individual and Collective *Ijtihād* must be accorded due focus since they occupy important distinctive but complementary roles.

1.5 SCOPE AND LIMITATION

Since this study concentrates on Contemporary *Ijtihād*, the period covered is mainly limited to Second World War onwards with more focus on the most recent works. Other than being sufficiently contemporary this period is chosen because most of the Muslim majority countries only began to govern themselves after this war and this reality has a bearing on the state of the *Sharī'ah* and society. The leading ideas and views of this period would constitute the primary data to be scrutinized. The sources for the data are manuals and writings coming from this period. Classical works have only been referred as the backgrounds and more as they are perceived and understood by these contemporary works, as required by the objectives of the study. The subject matter of this study, contemporary *Ijtihād* is inter-connected to social, economic and political context therefore views and works not strictly legal and *Sharī'ah* in nature also inform this study and making it purely legalistic in character.

In view of the fact that this study aims to analyze main trends on the subject which requires wide coverage, its approach will be more horizontal than vertical. By this we mean that there will naturally not be space to embark upon a full individual assessment of each chosen sample of Individual and Collective *Ijtihād*. The coverage will be further narrowed down to a selected group of prominent individuals and institutions. However, we have endeavored in the selection in the hope that the findings of this study will sufficiently portray the reality in mainstream of the world of Islam and Islamic scholarship.

With the aim of comparing contemporary trends another constraint would be to further limit this study to those issues and areas that will be more potent in highlighting the nuances between our chosen samples. Therefore, we have intentionally limited our choice of issues and *Fatwā* to those that we term as 'marker

issues'. These issues are usually contentious but not too novel which would leave the scope of *Ijtihād* more open and making our task of comparing trends more difficult.

1.6 LITERATURE REVIEW

Although the issue of *Ijtihād* has received substantial attention from researchers, it is submitted that the present study approaches the subject from a novel angle and significantly expands upon existing data on the issue.

Existing works in this area come in various categories. Firstly, there are a number of works by contemporary authors dealing directly with *Ijtihād* but from various angles. Some such as *Al-Ijtihād fi al-Sharī'ah al-Islāmiyyah* by Prof. Dr. Yūsuf al-Qaraḍāwī, *Buḥūth fi al-Ijtihād* by Prof. Dr. Diyāb Salīm Muḥammad 'Umar and *Āliyāt al-Ijtihād* by Prof. Dr. 'Ali Jum'ah provides general coverage of the subject including the definition, historical background, division, condition, legal status of *Ijtihād*.⁷ These works are general manuals and therefore do not go into great details on the aspects covered. They however still represent the prevalent thinking on the subject by these noted scholars. Another work, *Al-Ijtihād fi al-Islām* by Dr. Nādiyah Sharīf al-'Umarī also largely fall into the same category although it deals with some aspects such as the conditions of a *Mujtahid* at a more analytical level.⁸ This area of study is also fortunate to be augmented by a four-volume compilation of conference papers on *Ijtihād*. From the 19th until the 26th of July 1983, the Ministry of Religious Affairs of Algeria had organized a Conference on *Ijtihād* attracting the contributions of noted scholars, which bore fruit to this compilation.⁹ The present study treats the

⁷ Yūsuf al-Qaraḍāwī, *Al-Ijtihād fi al-Sharī'ah al-Islāmiyyah* (Kuwait: Dārul Qalam, 1996), Diyāb Salīm Muḥammad, 'Umar *Buḥūth fi al-Ijtihād*, (Cairo: Dārul al-Nahḍah al-'Arabiyyah, 1995), 'Ali Jum'ah, *Āliyāt al-Ijtihād*, (Cairo: Dārul al-Risālah, 2004)

⁸ Nādiyah Sharīf al-'Umarī, *Al-Ijtihād fi al-Islām*, (Beirut: Muassasah al-Risālah, 1985)

⁹ *Multaqā al-Ijtihād* (Algeria: Muassasah al-'Asr, 1983).

ideas found in this compilation as also constituting important materials from which can be derived the dominant contemporary thinking on *Ijtihād*.

Another category of works on *Ijtihād* deals with specific aspects of the subject such as *The Methodology of Ijtihad* by Imran Ahsan Khan Nyazee.¹⁰ This study mainly explores *Ijtihād* as a mean of interpretation on divine texts with the objectives and purposes of law in mind. Another work in the same class, *Adawāt al-Nazar al-Ijtihādī al-Manshūd* by Quṭub Muṣṭafá Sāno studies the theories of the ideal preconditions of *Ijtihād* as they developed throughout the history of Islam until the present day.¹¹ Undoubtedly these specialized studies will facilitate the present one which will build upon and synthesize their findings with other works to form a bigger picture on the subject.

This field of research is also fortunate to have recent contributions at the level of doctoral dissertations. In one thesis, Quṭub Muṣṭafá Sāno mainly focused on the role of *Ijtihād* in deciphering the imports of legal texts.¹² He has also covered related matters including the development of *Ijtihād* and the conditions of Mujtahids. More recently, we have the thesis titled *Nazariyyah al-Ijtihād fī al-Fikr al-Uṣulī* by Saīd Buhrāwah.¹³ This thesis can be regarded to have followed through and expanded the previous one with more stress on the historical and contextual roots of the theory of *Ijtihād*. It also analyses and discussed at length approach of later scholars to the theory in comparison with the early masters of *Usul*. Both these important studies have the cumulative result of clarifying the real factors and principles behind the

¹⁰ Imran Ahsan Khan Nyazee, *The Methodology of Ijtihad* (Kuala Lumpur: The Other Press, 2002).

¹¹ Quṭub Muṣṭafá Sāno, *Adawāt al-Nazar al-Ijtihādī al-Manshūd*, (Beirut: Dārul al-Fikr al-Mu'āsir, 2000).

¹² Quṭub Muṣṭafá Sāno, *Al-Ijtihād fī Faḥm al-Naṣ: Ma'ālim wa Ḍawābiṭ*, Phd dissertation accepted at the Kulliyah of Laws of the International Islamic University, Malaysia.

¹³ Phd Dissertation presented to the Kulliyah of Revealed Knowledge and Human Sciences, International Islamic University, Malaysia. August 2002.

formulation of the theory of *Ijtihād*. We are also guided to the paramount considerations to be observed in the current application of *Ijtihād*. The present study seeks to benefit from these findings on the general theory of *Ijtihād* and utilize them in the comparative analysis of case studies of contemporary individual and collective approaches of *Ijtihād*.

Besides title or dedicated works, *Ijtihād* is of course one of the traditional components of classical and modern treatises on *Uṣūl al-Fiqh*. However, the views found in these works suffer from substantial divergence of opinion.¹⁴ Without a synthesis and a sifting process of the existing material, the actual scope and modus operandi of *Ijtihād*, especially one required in the process of contemporary legal reform is still not within grasp. Since Islamic jurisprudence is the foundation of the *Shari'ah*, a relatively standard body of principles and approaches should be extracted from the *Uṣūl al-Fiqh* literature. We do have works on *Uṣūl al-Fiqh* surveying the various schools but since they are more explanatory in nature, they do not provide a definitive answer to this.¹⁵ Chapters two and three of the present study attempts to remedy this situation by a comparative and analytical survey of the main issues of *Ijtihād* as dealt with by major contemporary works.

There are also several more recent works looking to various extends at contemporary legal theory and attempts at reformulation. Of these, Wael B. Hallaq's two more recent works, *A History of Islamic Legal Theories and Authority, Continuity*

¹⁴ See Wael B. Hallaq, "Usul Al-Fiqh: Beyond Tradition", *Journal Of Islamic Studies*, vol.3(2), 1992, pp 172-202, "Considerations on the Function and Character of Sunnī Legal Theory", *Journal of the American Oriental Society*, vol 104, 1984, pp. 679-689 and Mohd. Daud Bakar, "A Comparative Study of Islamic Legal Theory" 1995 *IIUMLJ* vol.5 (No.1 & 2), pp 51.

¹⁵ See for example, Waḥbah al-Zuḥaylī, *Uṣūl al-Fiqh al-Islāmī*, (Damascus: Darul Fikr, 1986) and Muhammad Fathī Al-Duraynī, *Buḥūth Muqāranah fī Fiqh al-Islāmī wa Uṣūlihi*, (Beirut, 1994).

and Change in Islamic Law offers invaluable insights.¹⁶ In the earlier study, as the title denotes, Hallaq's main goal was to present the theoretical and philosophical foundation of Islamic law covering variations resulting from the gradual development of the subject as well as differing approaches to it. In doing so he not only dealt with the subject as prevalent in the mainstream works but also analyzed innovative ideas from al-Qarāfī, al-Ṭūfī and al-Shāṭibī. Hallaq focused most of his attention on these parts, dedicating four out of the total six chapters of the book. Insights from these chapters would contribute towards understanding the nature of *Uṣūl al-Fiqh* and its susceptibility to change and innovation. Hallaq went on in the last chapter to look at a select group of scholars who have been forwarding new ideas and methodologies in the theory of Islamic Law in the face of what he termed as 'Crises of Modernity'. Admitting the space constraint that he faced, Hallaq chose to focus on two groups, which he perceived as most active in this endeavor. While benefiting from his analysis and approach, this present study explore more up-date range of ideas and scholars and have adopted a different perspective on the categorizations of these trends of Contemporary *Ijtihād*.

Hallaq's latter work provides an in-depth study what the title suggests i.e. the concept and construct of authority in Islamic Law. This is achieved by looking at issues pertinent to the *Madhāhib* infrastructure of Islamic Law such as the significance of juristic typologies and operative terminologies in promoting continuity and change within the corpus of Islamic Law. Hallaq's findings here may well open up further avenues for the *Mujtahids* of today to navigate through the seemingly immutable block of inherited rules of *Fiqh*. He argues that in the internal operations of the

¹⁶ Wael B. Hallaq's, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh*, (New York: Cambridge, 1997), Wael B. Hallaq's, *Authority, Continuity and Change in Islamic Law*, (New York: Cambridge, 2001).

Madhāhib, there are already in place certain mechanisms of change and reform long practiced and accepted amongst the jurists. This study plans to place in context and to possibly extend Hallaq's findings in this respect to contemporary *Ijtihād*.

Another informative work studying trends and schools of in contemporary Muslim society that has emerged recently is Muḥammad 'Abdul Laṭīf Mahmūd's, *Al-Ikhtilāfāt al-Fiqhiyyah lada al-Ittijahāt al-Islamiyyah al-Mu'āṣirah*.¹⁷ This work looks at the differing legal views across various subject matters of eight institutions and socio-political groupings based or prominent in Egypt. The author surveys the reasons, nature, as well as extent of the conflicts of opinion amongst these groups in order to identify the best opinions on a given issue and to gauge the actual severity of such conflicts. This work is a broad survey in nature and does not attempt an in-depth study of the selected groups. In the selection of its scope of study, it has left out unconventional voices that are not masses-based. It also falls short of a dedicated a jurisprudential approach required to evaluate angles of legal theory and methodology involved. The present study plans to make-up for some of these shortcomings.

Another group in the genre on *Ijtihād* is works studying it in relation to religious reform. For instance, we note the studies by Malcom H. Kerr and Muneer Gholam Fareed.¹⁸ Kerr's often quoted study focuses on 'Abduh and Riḍā whereas Fareed's treatment does not go beyond the beginning of the 20th Century. Furthermore these works are not strictly legal-jurisprudential in nature. The current study would attempt to remedy that by covering the developments from roughly the Second World War onwards and by focusing on the analysis of the legal methodology

¹⁷ Muḥammad 'Abdul Laṭīf Mahmūd, *Al-Ikhtilāfāt al-Fiqhiyyah lada al-Ittijahāt al-Islamiyyah al-Mu'āṣirah*, (Al-Manṣurah: Dar al-Wafa', 2000).

¹⁸ M.H.Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida*, (Berkeley and Los Angeles, 1966), Muneer Gholam Fareed, *Legal Reforms in the Muslim World*, (Bethesda: MD: Austin & Winfield, 1996).