



METHODS OF *IJTIHĀD* IN ISLAMIC JUDICIAL
PROCEEDINGS WITH SPECIAL REFERENCE TO THE
PRACTICE OF THE *SYARIAH* COURTS IN MALAYSIA

BY

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ABSTRACT

It has been unequivocally accepted that *ijtihād* assumes a very significant position in the Islamic judicial proceedings. However, the practice of *ijtihād* in such a process has not received the deserving attention compared to the attention given to the practice of *ijtihād* in the law adducing process (*istinbāt al-aḥkām*) or in the legal verdicts issuing process (*al-iftā'*). Hence, with the purpose of exploring and constitutionalising the proper practice of *ijtihād* in the Islamic judicial proceedings, the thesis examines the methods of *ijtihād* in relation to the main constituents of the judicial proceedings; the facts, the evidence, the law as well as the judicial judgment. In view of keeping in touch with the local practice, reference has also been made to the practice of the Malaysian *Syariah* Courts, whenever deemed relevant and necessary for comparative as well as compatibility analysis. Approaching this doctrinal and practical research on library data and decided cases, the thesis proves that the practice of *ijtihād* is indispensable in the judicial proceedings and that Islam has proffered feasible and systematic methods of *ijtihād* to be employed in the judicial proceedings. Further, contrary to the negative perception and unfounded criticisms of the western traditions, the judges, according to Islamic law, are regulated by a systematic and dynamic divinely-inspired adjudication process with the ultimate view of dispensing justice and preserving the well-being of the people. Finally, it is believed that the discussions of the thesis and its recommendations have contributed significantly towards enriching the scholarship of *ijtihād* and enhancing its professional practice in the Islamic judicial proceedings.

خلاصة البحث

قد ثبت بشكل قاطع أن الاجتهاد يفترض وضعاً هاماً في عملية التقاضي الإسلامي. وبالرغم من ذلك، فإن ممارسة الاجتهاد في مثل هذه العملية لم تحظ باهتمام مناسب كما حظيت به في عملية استنباط الأحكام الشرعية أو في عملية إصدار الفتاوى. ومن ثم، وبهدف استكشاف وتنظيم الممارسات الاجتهادية السليمة في عملية التقاضي الإسلامي، فإن هذا البحث يسعى إلى تحقيق أساليب الاجتهاد فيما يتعلق بالمكونات الرئيسة والأساسية في عملية التقاضي الإسلامي؛ وهي الوقائع، والبيانات، والقانون، فضلاً عن الحكم القضائي. وللوقوف على الممارسات المحلية، يشير هذا البحث كذلك إلى الواقع العملي في المحاكم الشرعية الماليزية كلما كان ذلك ضرورياً ومناسباً لإجراء التحليل المقارن والملائم. وقد أثبت هذا البحث العقائدي والتطبيقي الذي اعتمد على المعلومات المكتوبة والقضايا القانونية السابقة أن الاجتهاد شيء لا غنى عنه في عملية التقاضي الإسلامي، وأن الإسلام قد قدّم الأساليب الاجتهادية الحيوية والمنظمة في هذه العملية. وإضافةً إلى ذلك، أثبت هذا البحث، وهذا على النقيض من التصور السلبي والالتزام الذي لا أساس له من التقاليد الغربية، أن القضاة في الإسلام منظمون في أثناء عملية التقاضي بالمنهج الإلهي المرن والمنظم. وذلك من أجل تحقيق العدالة والحفاظ على مصالح الناس. وأخيراً أرجو أن تكون هذه الأطروحة وتوصياتها قد أسهمت إسهاماً كبيراً في إثراء دراسة الاجتهاد وتعزيز ممارساته المهنية في عملية التقاضي الإسلامي.

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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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LIST OF ABBREVIATIONS

CLJ (sya)	: Current Law Journal (Syariah)
CLJ	: Current Law Journal
d.	: died
DBP	: Dewan Bahasa dan Pustaka
ed. /eds.	: editor/editors
edn.	: edition
etc.	: and so forth
et al.	: and others
H.	: Hijrah
i.e.,	: that is
Ibid.	: in the same place
IKIM	: Institut Kefahaman Islam Malaysia
JH	: Jurnal Hukum
JMCL	: Journal of Malaysian and Comparative Law
MLJ	: Malayan Law Journal
n.d.	: no date
n.p.	: no place: no publisher
no./no.s	: number/numbers
p.	: page
Print.	: Printing
Prof.	: Professor
S.A.W.	: Ṣalla Allāh ‘Alayhi wa Sallam
S.W.T.	: Subḥānahu wa Ta‘āla
ShLR	: Shariah Law Report
Trans.	: Translation/translated by
v.	: versus
vol./vols.	: volume/volumes

TRANSLITERATION TABLE: CONSONANTS

Arabic	Roman		Arabic	Roman
ب	B		ط	ṭ
ت	T		ظ	ẓ
ث	Th		ع	‘
ج	J		غ	Gh
ح	ḥ		ف	F
خ	Kh		ق	Q
د	D		ك	K
ذ	Dh		ل	L
ر	R		م	M
ز	Z		ن	N
س	S		هـ	H
ش	Sh		و	W
ص	ṣ		ء	’
ض	ḍ		ي	Y

TRANSLITERATION TABLE: VOWELS AND DIPHTHONGS

Arabic	Roman		Arabic	Roman
َ	A		َ، َّ، ِ	An
ُ	U		ُو	un
ِ	I		ِ	in
َ، ُ، ِ، ِ	Ā		َوَ	aw
ُو	Ū		ِ	ay
ِ	Ī		ُو	uww, ū (in final position)
			ِ	iyy, ī (in final position)

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

Ijtihād occupies a special position in the Islamic Judiciary. There are many significant sayings of the Prophet (S.A.W.) associating *ijtihād* with the Islamic Judiciary. Even the most-referred *ḥadīth* about *ijtihād* was reported in the context of a judicial proceeding. In the *ḥadīth*, the Prophet (S.A.W.) was reported to have asked his Companion, Mu‘ādh b. Jabal, when he was appointed as a governor in *Yamān*, regarding the law to be applied in adjudicating a dispute. The Prophet (S.A.W.) was reported to have said:

By what shall you judge, when you are presented a dispute, O Mu‘ādh? He replied, by the Book of God. He asked again, what if you do not find [the answer there]? He replied, then by the *Sunnah* of His Messenger. He asked again, then what if you do not find [the answer there]? He said, I will exert as to it my opinion. Then the Prophet (S.A.W.) said, praise to Allāh who has blessed the messenger of His Messenger with that approved by His Messenger.¹

In addition to that, there is another *ḥadīth* reported from the Prophet (S.A.W.) which explicitly stipulates the practice of *ijtihād* in judicial proceedings. It significantly indicates that the judges who practice *ijtihād* will be entitled to reward from Allāh even if they have made wrong decisions. This constitutes an assurance

¹ Abū Dāwūd, al-Sajistānī (d. 276H), *Sunan Abī Dāwūd*, translated into English by Ahmad Hassan, (Lahore: Ashraf Press, 1984), vol.iii, *ḥadīth* no.3585, p.1019, Al-Tirmidhī, Abū ‘Īsā Muḥammad ‘Īsā, (d. 279H), *Sunan Al-Tirmidhī*, edited by Aḥmad Shākir et. al., (Beirut: Dār Iḥyā’ al-Turāth, n.d.), vol.iii, *ḥadīth* no.1327, p.616, Al-Bayhaqī, Abū Bakr Aḥmad bin al-Ḥusayn bin ‘Alī, (d. 458H), *al-Sunan al-Kubrā*, edited by Islām Maṣṣūr ‘Abd al-Ḥamid, (Kaherah: Dār al-Hadīth, 2008), vol. 10, *ḥadīth* no.20339, p. 221. Even though the *ḥadīth* has been criticised due to its broken chain of narration, however due to its prevalence (*al-Shuhrah*) as well as the acceptance and constant reliance of the Muslim community (*al-Ummah*) on the *ḥadīth*, some scholars argue that its authority should not be further questioned-see Ibn Qayyim al-Jawziyyah, *I‘lām al-Muwaqqi‘īn ‘an Rabb al-‘Ālamīn*, edited by ‘Iṣām al-Dīn al-Ṣabābiṭī, (Kaherah: Dār al-Hadīth, 2006), p.162, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Selangor: Ilmiah Publisher, 2nd Edn., 2007), p. 372.

from the Prophet (S.A.W.) that every judge should practice *ijtihād* in order to be absolved from the sin. ‘Amr ibn al- ‘Āsh narrated that he heard Allah’s Messenger (S.A.W.) says:

“When a judge gives a decision, after having tried his best to decide correctly and is right, there are two rewards for him; and if he gave a judgment after having tried his best [to arrive at a correct decision] but erred, there is one reward for him.”²

Based on the above authorities, the majority of the four established *Sunni* schools of Islamic law, with the exception of the Ḥanafī School, hold the view that the judges must be a *mujtahid*.³ Accordingly, the judges are required to do *ijtihād* by straining all of their efforts in order to strike the truth in adjudicating disputes. It is only upon fulfilment of this obligation that the judges can expect rewards for their endeavours even if they do not arrive at the correct decisions. On the other hand, if they do not practice *ijtihād* which consequently leads to ignorance regarding the dispute before them, they could fall well within the ambit of the Prophet’s (S.A.W.) saying that:

“Judges are of three kinds, two in the Fire, and one in the Paradise. He who has knowledge and judge by what he knows, he is in Paradise. He who is ignorant, and who judges according to his ignorance, he is in Fire. He who has knowledge and judges in contrast to his knowledge, he is in the Fire”.⁴

In spite of the authority of the *ḥadīths* and the majority opinion on the requirement to practice *ijtihād* in judicial proceedings, the discussion on the practice in light of the modern Islamic judicial system in which statutory legislation has

² Muslim Ibn al-Ḥajjaj al-Qushayrī al-Naysābūrī, *Ṣaḥīḥ Muslim-Kitāb al-Aqḍiyah*, translated into English by Abdul Hamid Siddiqi, (India: Adam Publisher & Distributors, 1999), vol. 3, no. 1716, p.153, Ibn Ḥajr, *Bulūgh al-Marām min Adillah al-Aḥkām (The Attainment of the Objective According to the Evidence of the Ordinances)*, translated into English by Muhieddin al-Selek, (Beirut: Dār al-Fikr,1993), *ḥadīth* no.1414, p. 602, Abū Dāwud, vol. 3, *ḥadīth* no.3574, p. 1013-1014.

³ Muḥammad ‘Abd al-Raḥmān al-Bakr, *al-Sultah al-Qaḍā’iyyah wa Shakhṣiyyah al-Qaḍī fī al-Niḏām al-Islāmī*, (Kaherah: al-Zahrā’ li al-‘Ilām al-‘Arabī, 1988), p.343-345.

⁴ Abū Dāwud, *ḥadīth* no.3573, vol.3, p.1013, Ibn Ḥajr, *Bulūgh al-Marām ...*, *ḥadīth* no.1411, p. 602.

become an integral part of its administration has not been the focus.⁵ As far as Malaysian context is concerned, there has been no clear and comprehensive guideline for the judges to practice *ijtihād* in the judicial proceedings. Irrespective of this, it is plainly believed that *ijtihād* must have been in practice in any of its kind.

On the above note, it is imperative to explicate the theoretical aspects regarding the practice of *ijtihād* in the Islamic Judiciary as propounded by Muslim jurists and to examine the trend of its practice by the Malaysian *Shar‘ī* judges. With that being the concern of the research, it is hoped that no unwarranted charge in the like of the comment made by the U.S Supreme Court justice, Felix Frankfurter in *Terminiello v. Chicago* would resurface. In that case the relevant part of the criticism reads”

“This is a Court of review, not a tribunal unbounded by rules. We do not sit like a *kadi* [*qāḍī*] under a tree dispensing justice according to considerations of individual expediency”.⁶

1.2 PROBLEM STATEMENT

Heedful of the potential negative impacts of inactivity of *ijtihād* on the integrity and feasibility of Islamic legal system, many prominent scholars are advocating for the reopening of the gate of *ijtihād*.⁷ Unfortunately, most of the calls to reopen the gate of *ijtihād* are limited to explaining the justifications for it to be reopened and that the discussion on the methods of *ijtihād* is substantially confined to the process of deducing legal rules from their sources. Discussion regarding the process and methods of *ijtihād* applicable to the judges in the judicial proceedings is generally absent. The

⁵ Mohammad Hashim Kamali highlights that the conditions under which the early jurists practiced *ijtihād* were different from the modern practice of *ijtihād* due to the enactment of various statutory legislation which would impose some sorts of restrictions on the modern practice of *ijtihād*. Hashim Kamali, *Principles...*, p. 391-392.

⁶ *Terminiello v. Chicago*, 337 U.S 1, at 11: 69 S.Ct., 894-899 (1949). The above comment has been quoted in Anver, M. Emon, “To Most Likely Know the Law: Objectivity, Authority, and Interpretation in Islamic Law”, *Hebraic Political Studies*, vol. 4, no. 4 (Fall: 2009), p. 415-440.

⁷ Rahimin Affandi Abdul Rahim, “The Concept of Taqlid in the Reformist's Point of View”, *Journal of Fiqh*, no. 1, January 2004.

real practical issues pertaining to the practice of judicial *ijtihād* particularly in relation to the determination of the governing law, the dealing with the facts and evidence, and the methods of judicial reasoning have not been sufficiently dealt with. In the local context, the issues relating to the methods of *ijtihād* currently applied by the *Shar‘ī* judges in Malaysia and whether they are compatible with the methods expounded by the Muslim jurists, are also inadequately discussed. It is believed that failure to address the questions sufficiently would lead to the paradox of arbitrariness being attached to Islamic judicial system and a gross laxity being lamented to Islamic judicial practice. Therefore, it is the concern of the research to examine the methods of *ijtihād* that must be undertaken by the judges in the judicial proceedings, together with the exposition of its practice in the Malaysian *Syariah* Judiciary.

1.3 RESEARCH QUESTIONS

In light of the problem statement, the research seeks to answer the following inquiries respecting the practice of *ijtihād* in the judicial proceedings.

- i. What is the position of *ijtihād* in the Islamic judicial proceedings?
- ii. How and in what manner to deal with the facts of the cases?
- iii. How to deal with the adduced evidence?
- iv. What are the methods adopted by the judges to determine the law to be applied in the Islamic adjudication process?
- v. What are the applicable methods of reasoning in the judicial judgments?

1.4 HYPOTHESIS

- i. That *ijtihād* is indispensable in the Islamic judicial proceedings regardless of the status of the judges whether they are jurist (*mujtahid*) or non-jurist (*muqallid*).⁸
- ii. That Islam has proffered feasible and systematic methods of *ijtihād* to be applied in the judicial proceedings.

1.5 OBJECTIVES OF THE STUDY

The objectives of the study are as follows:

- i. To identify the position of *ijtihād* in the Islamic judicial proceedings and the Malaysian *Syariah* judiciary.
- ii. To accentuate the methods of *ijtihād* in dealing with the facts of the cases.
- iii. To highlight the processes of *ijtihād* in dealing with the evidence.
- iv. To find out the methods to ascertain the applicable laws according to the Islamic judicial theory and the practice of the Malaysian *Syariah* Courts.
- v. To identify the methods of judicial reasoning according to the Islamic judicial theory and the practice of the Malaysian *Syariah* Courts.

1.6 SCOPE AND LIMITATION OF THE STUDY

In the Islamic legal tradition, the scope of study regarding *ijtihād* is relatively too wide. The current study, in particular, examines the methods of *ijtihād* in the Islamic judicial proceedings. It is fairly understood that, in the judicial proceedings, the judges are required to apply the law to the facts of the cases to come to legal judgments. Besides that, the judges are also expected to provide legal reasons for their decisions.

In light of this, the discussions of the research specifically focus on the methods

⁸ Throughout the writing of the thesis the word 'jurist' is used to mean '*mujtahid*', whereas the words 'non-jurist' or 'imitator' is used to mean '*muqallid*'.

applied by the judges to determine the governing laws, the methods of dealing with the facts of the case and the evidence as well as the methods of judicial reasoning.

Apart from examining the theoretical aspects of *ijtihād* in the judicial proceedings from the *Sharī'ah* perspective, the research also examines the practical aspects of judicial *ijtihād* as practiced by the Malaysian *Syariah* Courts. The discussion covers the practice of the Malaysian *Syariah* Courts in relation to both types of cases; civil and criminal. To achieve this, a bulk of decided cases will be carefully selected and analysed particularly those cases that have impacts on the practice of *ijtihād* in the Malaysian *Syariah* Courts.

The research restricts its discussion on the above issues within the Islamic judicial theoretical framework and the practice of the Malaysian *Syariah* Courts.

1.7 LITERATURE REVIEW

Based on the reading of the past literature, there is no writing that critically focuses on the practical application of *ijtihād* by the judges in the Islamic judicial proceedings in the context of the modern practice of *Sharī'ah* judiciary, particularly in the context of Malaysia. However, there are studies, which are indirectly relevant to the current research, can be found in the existing literature. The segments of the literature can be categorized as follow:

1.7.1 Literature on *Ijtihād*

It was found that the studies about *ijtihād* encompassing its definition, nature, legality and rules, the subject-matters of *ijtihād*, the types of *ijtihād*, the methodology and means of practicing *ijtihād*, the procedure of *ijtihād*, the issue of the divisibility of *ijtihād*, the qualifications of jurists (*mujtahidūn*) and the categories, the practice of *ijtihād* during the early periods of Islam, the truth and fallacy of *ijtihād*, its