

THE FUNCTION OF JURISPRUDENTS (FAQIH) IN THE DEVELOPMENT OF
ISLAMIC JURISPRUDENCE

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1. Introduction

Islamic jurisprudence attaches great importance to the contribution this system made through the interpretation of jurists. This point will become apparent when the main sources of Islamic jurisprudence are taken into consideration. Here a distinction should be made, in order to render the introduction clearer, between the three main groups of experts in Islamic jurisprudence:

- a. **Mujtahids**, i.e., those who have the authority to interpret the Islamic law.
- b. **Muftis**, i.e., those who give opinion (fatwa) on legal matters.
- c. **Judges (kazis)**

a. **Mujtahid** is the title given to those who are qualified for expounding on Islamic laws. For them *ijtihad* is not only a right, but also a responsibility, because in so doing they are, in effect, rendering their knowledge and talent bestowed upon them by the grace of God into the service of Muslims.

b. **Muftis** are appointed by the state in order to give answers to the questions of people on religious issues. *Fatwa*, in its basic meaning, is an answer to a question. In its technical sense, it means a decision made by an expert in Islamic law in reply to a question on religious issues. The Qur'an requires that one should ask expert about matters of which one is ignorant:

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"If you do not know, then ask of those who possess the message." (16:43.)

Here we do not deem it necessary to expound on the distinction between fatwa and ijthihad. Muftis, in fact, are supposed to be selected from among those qualified for ijthihad. But it is quite impossible in practice to find as many mujtahids as are needed for the fulfillment of the duties of muftis. This is why it has been accepted as sufficient to those who are able to reply question in the light of fatwas already in existence, or to expound on legal issues by simply imitating former ijthihads.

c. Judges have the same status in Islamic jurisprudence as in other legal system in that they are appointed by the state to hear and decide cases or settle disputes in legal questions, namely, to exercise legal authority. Although they too are supposed to be qualified for ijthihad, this again has not always been found possible.

It is seen that Islamic jurisprudence, unlike other system of secular states, has established the existence of a third group of experts, muftis, in addition to judges and mujtahids.

Faqih, in its general sense, means "lawyer." From the viewpoint of their respective educational background, there is no difference between any of the three groups of experts mentioned above. Differences are to be found only in the nature of their particular practices and the extent of their authorities. It is due to this fact that the intellectual efforts of faqihs have greatly contributed to the development of Islamic jurisprudence. The injunctions of the Qur'an and the Prophetic traditions that require Muslims to be in constant progress should not be overlooked in discussing this subject, for they also require the constant progress of mujtahids in their studies.

A tradition of the Holy Prophet states, "He who spends two days equally is deceived." And God commands man repeatedly to use his intellect:

"Thus does God make clear to you His signs in order that you may consider their bearings in this world and the hereafter." (2:219-20.)

"Verily in this is a message for he who has a heart and understanding or gives ear and honestly witnesses the truth." (50:37)

"And none will grasp the message except men of understanding."
(3:7.)

The Holy Prophet, by describing religion as "admonition," ordered in effect the exploration by experts of matters profitable to humanity and making them known to men.

In addition, the Islamic principle of consultation (Qur'an, 3:159,42:38) clearly sheds light upon the role played by mujtahids in the administration of government. It can easily be claimed that the modern Islamic state is to be administered only through councils constituted by experts in every field.

2. The Necessity of Ijtihad and Its Principles

We have already stated that ijtihad is a necessity and constitutes a responsibility on those qualified for this job. Other established conditions with respect to ijtihad can be stated as follows:

1. Ijtihad can be made only on those subjects that are not definite in nature or are not explained by Qur'anic verses or by Prophetic traditions.

2. It can be made only on matters concerning the religious law. There is no room for ijtihad in matters philosophical or sentimental in nature.

3. Ijtihad is an explanation of opinion and encouraged by Islam.

4. Ijtihad is a need and should be made only when the need arises. In fact, a close examination of ijtihads will reveal that they have been made in order to meet the needs of Muslims.

5. Ijtihad is a duty.

6. It can be resorted to not to satisfy one's own inclinations but with the intention of meeting a definite and unavoidable need.

The need for ijtihad does not mean that every new matter that arises in everyday affairs calls for an ijtihad. The resulting decrees from ijtihads that have been made through centuries may well suffice

the ninety percent of the needs of Muslims, leaving only ten percent where need for ijtihad may arise.

Another point to be taken into account here is that during the centuries when these ijtihads were made, the minds, spirits, and hearts of all were directed in their full capacity at a better understanding of the decrees of God and of His Prophet. Social life provided an atmosphere that lent support to the exceptional talents of mujtahids, making it possible for them to practice their art freely and pureheartedly. Where as in our time it is hardly possible for a mujtahid to do the same with the same speed and accuracy, owing to the confusion imposed on hearts and minds by various political or intellectual currents on the one hand, and the complexity of contemporary knowledge on the other. While a mujtahid needed in former times to be expert in, say, 20 sciences, this figure has now amounted to at least 200. And this situation clearly points out to the need for the ijtihad not of a single mujtahid, but of a council.

Anyhow, the need for ijtihad is by no means the first necessity of today's Muslims. Their first and foremost need is to be sought in the protection of their thoughts and beliefs and the progress of their religious practices toward the aim of attaining God's pleasure. The most valuable aid for a man who is struggling between belief and unbelief is one that directly aims at strengthening his life both in this world and the hereafter.

Widening the area of practice through ijtihad symbolizes a progress based on a sound foundation. But when such aspirations are not completely free from the harmful influences of materialistic philosophies that prefer worldly life over the hereafter, as is the case in our time, they are bound to have destructive effects on religion and capable of driving Muslims away from the essence of religion.

In short, the door to ijtihad is not closed, but it is in our time.

3. Historical Development

While pointing to the function of lawyers in the progress of Islamic jurisprudence, we deem it useful to mention briefly some historical facts.

Following the demise of the Holy Prophet, may peace be upon him, there were two schools of knowledge centered mainly in two different places.

a. **School of Hicaz:** embraces the practices of scholars of the area where our Prophet lived and died. Basically, these scholars attempted to expound on legal disputes relying on the Qur'anic verses and Prophetic traditions.

b. **School of Iraq:** Once the expansion of Muslims began, there appeared in lands such as Iraq scholars and faqihs who did not have as much access to the traditions of the Prophet as did those in Hijaz area. Those scholars found themselves in having to recourse to their own judgments in matters not explicitly described by the Qur'anic verses. Thus did the practice of *ijtihad* begin in Islamic jurisprudence. Later in those lands were born such *mujtahids* as Abu Hanifa, Shafi'i, Malik, and Ahmad bin Hanbal.

As their expansion continued, Muslims came into contact with various nations and states, which gave rise to the need for *ijtihad* in certain matters. Especially prior to the invention of printing, the restriction of the scholars in other Muslim lands. Hence the appearance of a very rich repertory of *ijtihads* in Islamic jurisprudence.

The works of *mujtahids* of the Abbaside era have largely been resorted to until our time in regulating various legal matters or solving disputes. Among them the works of ash-Shaybani, al-Kasani, and as-Saraj have helped for centuries to regulate the relations between Muslims and non-Muslims, while al-Mawardi's work has provided a basis for constitutional and administrative laws of Muslim states.

4. The Cessation of Practice of *Ijtihad*

The practice of *ijtihad* can be said to have come to a stop after the Abbaside era, for which there were two main reasons:

a. As peace and calm prevailed, there did not arise so many legal disputes that would have required *ijtihad*.

b. *Mujtahids*, may be out of lack of enthusiasm, contented themselves with following the *ijtihads* of former scholars, which they deemed brilliant and perfect, rather than having recourse to their own judgment.

However natural and desirable an outcome the former may have been, the latter cannot be accepted as natural so easily. Imitation is, of course, a choice within the rights of a *mujtahid*, but this does

not rule out the profitability of new intellectual activities with respect to the needs of Muslims. However, when a mujtahid sees no necessity for a new ijtihad because he really endorses the former ijtihads, then this is nothing worthy of blame. We have already discussed this point above.

5. The Era of Decline

It is possible to claim that the lack of new ijtihads that would have facilitated the familiarity of Muslims with contemporary developments has resulted in the backwardness of Muslims. Especially the close contact of Muslims with the West, which brought about an industrial revolution in the nineteenth century, exposed this backwardness quite clearly. It is hard to imagine that once the import of the printing press in to the Ottoman state was not permitted by religious scholars, and many years passed until they allowed the printing of only nonreligious books! Clearly, Muslims were deprived of intellectual activities that would have provided a ground for their adjustment to innovations in science and technology, and this situation played a major function in their backwardness.

The innovation of steam engine, discovery of electricity, mass employment, new techniques in communication and transportation, and new commercial practices (such as drafts and stocks) could have been employed in the adjustment of Muslims to the modern world. Mujtahids could have resorted to their own judgments, or, at least, could have reached a solution by means of comparison with former ijtihads (qiyas). Since it was out of question for Muslims to live in seclusion from the outside world, they could have adjusted their position and behavior accordingly.

In our time the means provided by speedy communication and transportation gives the Muslim states a chance to gather their scholars from time to time in order to establish their views on recent developments. On certain topics could be announced in advance, providing ample time for research and thinking, and then a consensus could be attempted to reach by the scholars on these topics. This consensus will shed light upon the management of Muslim states and at the same time will secure unity on the subject at least until another consensus is needed.

There was, indeed, an institution established in order to meet this end during the latest years of the Ottoman Empire—Dar al-Hikmat

al-Islamiya, which embraced the highest scholars of the time. But its lifetime was not long enough (1919 through 1922) to produce the expected result.

Now the gathering together of the leaders of Muslim countries since 1969 and their summit meetings have contributed to the development of economic, political, and cultural relationships between these countries. It is our hope that the Islamic Conference of Foreign Ministers should reach a decision that will bring Muslim scholars together in their attempts to unite their views on certain topics.

6. Some Contemporary Topics That Call for Ijtihad

Here we wish to point out to some topics that either have been solved through ijtihad or need to be thus clarified.

1. **Differences in maturity of bills, cost, and inflation:** Taking into consideration the fact that sales by installments have been widespread, it has been a matter of dispute for a long time whether the amount of extra profit in such sales should be regarded as interest or not. In fact, putting the same price on an article without any regard to whether it is paid in advance or by installments works to the disadvantage of the dealer. As a result of inflation, the effect of which has been felt considerably for nearly a century, a merchant finds himself unable, after some time, to replace an article he has sold, far from making a profit on it. Where and the high rate of inflation results in such consequences, Muslim scholars find it quite logical to raise the price in sales by installments and permit it.

There are, on the other hand, other factors that have come out recently and affected the cost of products—such as side benefits for workers, handling costs, insutiry etc. This situation gave rise to the need for a new definition of the theory of interest. There has been some discussion on what constitutes interest and what does not through various meetings, some of which I attended, and it has been stated that the merchant should be protected under the light of well-known principle, "no loss, no infliction with loss." Nowadays no one claims that the difference in prices almost a consensus has been established in practice.

2. **Interest-free banks:** The function of banks in commercial life is too obvious to explain. But it never becomes possible to found and operate a bank in this sense because banks always work on a basis of

interest. Which resulted in a new *ijtihad* that provided the ground for founding a bank and operating it without giving or receiving interest. The Islamic Conference has already reached a decision to establish an Islamic Development Bank, which has started lending credits on an interest-free basis.

3. **Insurance:** As the factors responsible for the existence of insurance multiply, the popularity of insurance increases accordingly. But then, insurance companies also work on the basis of interest. And this situation has called for another *ijtihad*. At the conferences that were held in damascus in 1961 and 1965, various views were presented. It seems for the time being that, once the nature of interest has clearly been defined in the light of modern principles of economics, then it will be possible to found insurance companies that will work without giving or receiving the forbidden interest.

4. **Birth control:** Birth control is related mainly to economic considerations, as well as those concerning health, education, etc. Thus, it is one of the issues that have received too much attention in our time. The intellectual or legal activities of Europe in this respect have also influenced Muslim *mujtahids*. This issue has also been discussed from the Islamic point of view in a conference. Now in almost every Muslim country, scholars are expressing their views on the subjects and writing books. It may be more or less said that these *ijtihad*s have succeeded in defining which parts of birth control methods agree with Islamic principles.

5. **Structure of constitutions:** At a time when the number of independent Muslim nations has reached 45, it is a frequently faced question how the constitution of a Muslim state should be arranged. Various Arab states, Pakistan, and recently Iran, have adopted constitutions that vary greatly from one another. I expect that in the near future the main principles of an Islamic Constitution should be defined and agreed upon, which may become possible through the *ijtihad* of scholars in Islamic jurisprudence.

6. **Legislation:** The organization and administration of state affairs in various fields has been a source of worry for the leaders of Muslim nations. The usual practice in this respect is the imitation of the West, as is the case with Turkey. But the "Islamic" content of the statutes that are supposed to regulate economic or social life is far from being solved.

7. **Labor relations:** Another great problem of the contemporary world is how to find a fair and stable solution to the relations between employees and employers. The rules of Islam, which is the religion of justice, peace, and tranquillity, have not yet been formulated in a way that would provide answers to contemporary questions and be shared by mujtahids. It should be borne in mind that collective labor legislation is a relation is a relatively new subject, which was born after the introduction of machinery that made mass employment possible. Since the Muslim nations fell far behind the West in their industrial revolutions, the opinions of mujtahids on this subject are not frequently encountered.