

CONTEMPORARY IJTIHAD AS REQUIREMENT FOR MUSLIM JUDGES IN ISLAMIC JUDICIAL SYSTEM (PAKISTAN AS A CASE STUDY)

Muhammad Atiq-ur-Rehman ⁱ Noorfajri Ismail ⁱⁱ

ⁱ (Corresponding author), Faculty of Syariah and Law, Universiti Sains
Islam Malaysia (USIM). marehmanadvocate@gmail.com

Abstract

The present research deals with Contemporary Ijtihad as Requirement for Muslim Judges in Islamic Judicial System (Pakistan as a Case Study) or qualification of a judge in the Islamic Judicial System, whether he must fulfill all the qualifications of Mujtahid or not. The Islamic judicial system is theoretically and practically being considered distinguished from conventional judicial system on the basis of principle difference of ultimate sovereignty. The sovereignty of Allah Almighty is considered the ultimate sovereignty in an Islamic judicial system and therefore, the laws for individual and society is made under the divine guidance, while in conventional states the sovereignty lies in the hands of human beings. In conventional states, these are the men who have to make laws in their understanding and opinion, however in an Islamic state; man is religiously bound to don't prefer their opinion over the divine law.

Keywords: Ijtihad, Qazi, Judge, Judicial System, Qualification of a Muslim Judge. fiqh.

INTRODUCTION

This principal difference of sovereignty brought the Islamic judicial system to compile its law under the guidance of divine law. The source of divine law on the earth is the sole personality of Muhammad (PBUH) in Islamic law; the Quran and the Sunnah are the forms of divine law pronounced by the Prophet Muhammad (PBUH).

During the last Hajj Pilgrimage Prophet Muhammad (PBUH) declared the lives, property and honor of people are sacred over the people. Hence, the purpose of Islamic law to achieve higher, peaceful and heavenly society on the earth and pleasure for human in this world and hereafter through good conduct and by avoiding thebad.

The scope of Islamic judicial system is wider than the conventional judicial system; it includes all aspects of human life. The sources of Islamic judicial system provide the concise principles regarding law and give freedom to human to describe, explore and elaborate in the light of its principles, hence Islamic scholars are assumed to fulfill this duty on theoretical and practical stages.

In the Islamic judicial system, the judicial decree pronouncer or judge in an Islamic state is supposed to decide the cases in the light of the Holy Quran, the Sunnah, and Islamic jurisprudence by using the tools of Qiyas (Analogy). In traditional *Fi'qa* the judges are called

Qa'zi. The *Qa'zi* has different standing as compare to conventional judge regarding its approach to decide the case, he is not free on decide the case on his sole opinion and procedure; he is under duty of sovereignty of Allah hence he has to incorporate the law and procedure prescribed in sources of Islamic law and along with his opinion ifrequired.

The study in hand is related to the requirement for *Qa'zi* or judge in an Islamic judicial system who has to decide the cases in the light of *Fi'qa* and Ijtihad according to Islamic jurisprudence. The term requirement includes the theoretical understanding of Islamic law and as well the practical approach, moreover to resolve the contemporary issues of Islamic society he must have the great sight on the modern knowledge.

In traditional age, the Muslims were in rule on majority and their laws were implemented in the states, and the judicial system was run under Qu'dat (قضاة) but in modern era, Muslim judiciary is highly influenced by the conventional theories and practices. The term Mujtahid is conversant and as well properly appreciates the requirement for a judge in Islamic judicial system.

The Mujtahid is referred to the person who has wisdom of Islamic law and well familiar with the knowledge of Islamic jurisprudence, the Quran, the Sunnah, Ijmaa, Qiyas, Istesan, Istudlal, Istishab, Urf, Arabic language and as well as has a great sight on the contemporary issues. He has the ability to utilize the Ijtihad in proper meaning and facilitate the Muslim society to enjoy the Islamic rule of law. Hence, this study tries to give answer to the question of the requirements for a judge in an Islamic judicial system as a Mujtahid.

The requirements for Muslim judges in the Islamic judicial system are obligatory and mandatory to be explored.

The necessity of such qualification for a judge being Mujtahid is an issue and especially the relation between Ijtihad and Islamic Judicial system is demonstrated that how and why Ijtihad is compulsory as qualification of a Judge?

There are three levels of judiciary working to dispense the justice to the people of Pakistan. The qualification of judges at each level is different and diverse in its nature, is this qualification is enough to pass a judgment or dispense the justice in terms of Ijtihad.

The cases decided by the judiciary of Pakistan will be evaluated to reach on the conclusion that how to overcome on flaws and faults found in the judgments and orders of the superior courts. This phenomenon indicates the weaknesses of judicial system of Pakistan that needs to be rectified.

METHODOLOGY

The research shall be carried out on the hypothetic-deductive method, simultaneously it shall also take the historical, literature survey methods to achieve the objectives of the study. The study shall be descriptive in nature and shall contribute to understand issue in consolidate perspective. The study shall be followed by different chapters to discuss the introduction of Ijtihad and Contemporary Ijtihad, explore the requirements for a Muslim Judge in an Islamic State, how Contemporary Ijtihad relates to the judicial system requirement for a Muslim judge in an Islamic judicial system, judiciary in traditional era of Islam, discover the position of judges in Pakistan in context to the Islamic Judicial System, evaluation of cases decided by Pakistan Judiciary.

Objectives

The objectives of this study are:

1. To explore the requirements for a Muslim Judge in an Islamic judicial system.
2. To explain how Contemporary Ijtihad relates to the judicial system.
3. To discover the position of Judges in Pakistan in context to the Islamic Judicial System.
4. To evaluate the judicial cases and judgements decided by Pakistan Judiciary and their impact on judicial system.

JUSTIFICATION

It was the duty of the Muslims to incorporate the discipline of Islamic law when they had rule in the states where they had power and ruled. The judiciary has major interaction with general public and plays a major role to incorporate the law with letter and spirit, hence the judge of the Islamic judicial system should be more conversant with the Islamic law, so he may decide the cases and issues in the light of the Quran, the Sunnah by using Qiyas (Analogy) under the Sha'riah law and Islamic jurisprudence. Moreover, the globalization and industrialization has brought the human civilization in a dynamic age of history, now the issues and problems are more divergent, diversified and complicated in nature, hence the judge of an Islamic state should have proper qualification of Mujtahid, so that, he may value the Islamic law in true spirit in the Muslim society. On the other hand, the Ijtihad has vital role to address all the emergent issues, problems and questions in the present age, the modern Islamic scholars are more supporters of the need of Ijtihad and it is being considered the soul of Islamic jurisprudence to revive and reconstruct the Islamic law to survive in present post-modern era as a true Muslim society.

HYPOTHESIS

In the field of Islamic jurisprudence, Islamic epistemology and philosophy requires the qualification of Muslim judges as Mujtahid in Islamic Judicial System. So that, he may understand the spirit of Islamic law and procedure laid down in the Holy Quran and the Sunnah. Islamic Judicial System demands contemporary Ijtihad (اجتهاد) for Judges in Islamic Judicial System, due to which he may be capable to decide cases and issues according to the true essence of Islamic jurisprudence theoretical and practical as well.

REQUIREMENTS FOR MUSLIM JUDGES IN AN ISLAMIC JUDICIAL SYSTEM

There is immense confusion on ground level due to distance and detachment from Islamic law in judicial practice in its true letter and spirit as the judges are less qualified and do not know the concept of Islamic jurisprudence and Ijtihad which is necessary and part and parcel of the Islamic judicial system, therefore, the judge in an Islamic state is supposed to be well-conversant with the original, primary, and secondary sources of Islamic law, Islamic jurisprudence and legislation with special focus on competence in the domain of *Ijtihad* (اجتهاد), as he is supposed to have command over a number of Arabic, English language and sciences—all this in addition to lofty character traits such as piety, righteousness, honesty, selflessness and higher sense of justice and *ihsan*.

CONTEMPORARY IJTIHAD IN THE JUDICIAL SYSTEM

The doctrine of Ijtihad was itself based on the application of some distinct principles.¹ Abu Hanifa applied the principle of *Istishan* (equity); the Malikis applied *Istislah* (consideration of public interest), *Istishab* (disclosure of sound precedent). A new principle had to conform in full with the doctrines of a specific school. Instances have been known in which a Muslim had secured some favorable position by picking the principle of another school for a specific exchange and cases also have happened in which the qazi of one school for a specific exchange and cases have also happened in which the qazi of one school had sent group to qazi of another school which was liberal on that point. But that as it may, a man can't combine the doctrine of various schools on a solitary occasion. Such a procedure is known as *talfeeq* (piecing together). This, however, has at some point been resort to. The learned jurists of Islam up till now have been discussing and probing the following questions:

- What is Ijtihad?
- What are the conditions of Ijtihad?
- What is the guarantee for validity of Ijtihad?
- What are the ways and means of Ijtihad?
- What is the ground for investigation?
- What is the ground of scrutiny?
- What is Qiyas (analogy), its origin, its branches (sub-analogy) and what conditions are described for Qiyas?

By indicating these points, there is valid ground for necessity of *Ijtihad* with its terms and conditions which are related to the intellectual and philosophical reason that pertains to the evaluator aspects of Ijtihad. Ijtihad is also necessary² in the area of beliefs, actions and Shariah-based ahkam, as it is essential in the field of what is technically called *ikhlas* (devotion) and *ihsan*, in view of the fact that Shariah is divided into three branches:

- a. The science of beliefs;
- b. The science of Ahkam;
- c. The science of *ikhlas* and *ihsan*.

Shah Waliullah was the first Muslim mastermind to propound a hypothesis of alerts activity of Ijtihad. Then it was trailed by Sir Syed Ahmad Khan and Allama Muhammad Iqbal. According to Allama Iqbal, Ijtihad (اجتهاد) can be attempted by an individual law specialist as well as by an authoritative gathering perceiving the significance of Ijtihad (اجتهاد). In present time, the Sharia law had endowed the errand of making the law in the nation to adjust to the Quran and Sunnah to the judiciary in Pakistan.

It is in view of this apprehension that the learned scholars of Islam have had to resort to Ijtihad. The term *Mujtahidian* applies to those scholars and doctors of Islamic Shariah who undertake the review and examination of the previous applied form of legislation with

¹ Iqbal, Muhammad. 2004. *The Reconstruction of Religious Thought in Islam*. Lahore: Sang e Meel Publications.

² Nadvi, Abu al-Hassan Ali. 1987. *Fikr o Nazar*. Aligarh: Aligarh Muslim University.

amendments so that they become valid for the contemporary time.

From this view point; it is possible to categorize those Mujtahidian into the following categories:

- (a) Mujtahid in the domain of Shariah branches;
- (b) Mujtahid in the area of particular school of thought;
- (c) Mujtahid in the field of jurisprudential problems, issues and questions;
- (d) Mujtahid restricted to certain conditions;
- (e) Muqallid who follows a Mujtahid;

In this way, we may conclude that Ijtihad has special reasons: namely, jurisprudential, intellectual and philosophical.

The Quran and the Sunnah are the chief source of law in Islam. As such, they have permanent constant and unconditional status not liable to change. When an activity of in the process of Ijtihad acquires the degree after continues applications in any course of time, it would be the attained the finality in the eye of Islamic jurisprudence.

Judge in an Islamic judicial system as Mujtahid should have the following distinct traits and characteristics:

1. Strong conviction and courage in condemnation and declaration of somebody as guilty.
2. He must be of sound mind, possessing the understanding and of sufficient intellectual to grasp the subject.
3. The Mujtahid must understand abrogation (Naskh) and identifies the occasions on which rules have been repealed by law-giver.
4. He should have quality of Justice between bad and piety.
5. Complete knowledge of the Quran and the Sunnah and the sciences relevant to the both.
6. Thorough grounding in the science and hadith and other matters related to the sciences of Hadith.
7. Comprehensive understanding of fiqh with its basic principles and other matters related to fiqh.
8. Competence and proficiency in, and hire knowledge of Arabic Knowledge and its literature.
9. Deep knowledge of systems and laws and the spirit of Shariah with their overlapping and complications.
10. Satisfactory understanding of the recent developments and logical evaluation of the contemporary urgent and emergent needs.
11. A Mujtahid must be conversant with the science of Islamic jurisprudence and the rules of law applied in various department.

JUDGES IN PAKISTAN AND NATURE OF ISLAMIC JUDICIAL SYSTEM

Judicial System in Pakistan:

There are three levels of judiciary in the judicial system of Pakistan.

- a. Subordinate Judiciary
- b. High Courts
- c. Supreme Court of Pakistan

Subordinate Judiciary: Subordinate Judiciary consists of two stages;

- i. Civil Judges / Magistrate
- ii. District Judges / Session Judges

High Courts: There are five High Courts in Pakistan;

- i. Lahore High Court
- ii. Peshawar High Court
- iii. Sindh High Court
- iv. Baluchistan High Court
- v. Islamabad High Court³

Supreme Court of Pakistan⁴: The Highest Court of Pakistan is called Supreme Court of Pakistan. It has its main court at Islamabad including Registry offices at Lahore, Karachi and Quetta.

Federal Shariat Court⁵: The Court shall consist of not more than eight Muslim judges, among them; there shall be a Chief Justice, who shall be a person who is qualified, to be, a Judge of the Supreme Court or who is or has been a permanent Judge of a High Court.

The requirement for four judges; who are qualified to be a judge of a High Court.

And not more than three shall be Ulema (علماء) [Islamic Scholars who has fifteen years' experience in Islamic law, research or instruction].

The expression "Islamic law is large connected to allude to the entire arrangement of law associated with Islam. It is in this way utilized as a broad term incorporating both the essential source of law, which is additionally alluded to as the *shariah* and the principles which are gotten from the *shariah* by Islamic legislative science.

Allah Almighty is the sole master and sovereign of universe, as well as He is the sovereign of the entire kingdom. He, who is the sovereign over all animals. All members of humanity equal before Him, and none appropriate special privileges and rights – a concept which is recurrently mention in the *Quran*, for example the *Quran* says:

Say; individuals of the Book! Come now to a word regular in the middle of us and you, that is we serve none but God, and associates none with him, and that we take none for master besides Allah.

According to the Divine concept, the source of law cannot be other than the power that has created the entire universe and ruling it. In this connection the *Quran* explains:

To Him belongs creation and directive command.

³ The Islamabad High Court Act 2012.

⁴ The Constitution of the Islamic Republic of Pakistan 2018.

⁵ The Constitution of the Islamic Republic of Pakistan 2018.

He manages the directive command from the sky to the earth.

As such, it is God's will which is the source of ultimate laws both natural and social. The Arabic expression *shariah* in the religion setting alludes to the way Allah Almighty has stipulated for men which are heralded by his messenger, the Prophet Muhammad PBUH. The *sharia* is composed of the two primary sources the *Quran* and the *Sunnah*. The first is the blessed book of Islamic confidence though the second term alludes to customs of the life of Muhammad PBUH in his capacity as the flag-bearer of Allah Almighty, i.e. actions, sayings, implicit endorsements or oversights ascribed to him. In his capacity as prophet, Muhammad PBUH is viewed as flawless by Islamic regulation.

EVALUATION OF JUDICIAL CASES & JUDGMENTS AND THEIR IMPACT ON JUDICIAL SYSTEM

There are many judgments of superior courts i.e. High Courts, Supreme Court and Federal Shariat Court, in which the flaws and faults are found. They are not comprehensive in their nature because the decree pronouncer is not qualified as mentioned in Islamic judicial system.

Many petitions had been filed in the Federal Shariat Court in 1990 against the interest, (usury ربا), and against those acts and ordinances which carry the interest like Cooperative Societies Laws,⁶ Insurance Laws,⁷ State Bank of Pakistan Laws,⁸ West Pakistan Money Lenders Laws,⁹ West Pakistan Money Lenders Rules,¹⁰ Punjab Money Lenders Laws,¹¹ Sindh Money Lenders Laws,¹² NWFP Money Lenders Laws,¹³ Balochistan Money Lenders Laws,¹⁴ Agricultural Development Bank Rules,¹⁵ Banking Companies Laws,¹⁶ and interest laws¹⁷ in the year 1991, those were decided by three members bench of Federal Shariat Court and interest (usury ربا) held repugnant to the Injunction of Islam. The government filed an appeal before the Shariat Appellate Bench which hold the decision of the Federal Shariat Court, the case remanded back by saying that the interest (usury ربا) had not been defined properly in the judgment of Federal Shariat Court and directed the Court to define the interest (usury ربا) with complete explanation and details.¹⁸

What is the basic reason to remand back the case? The sole reason is that; the Bench of Federal Shariat Court was not competent and qualified, not as per the qualification of written in the constitution, but the judges were not competent as they were not scholar of Islamic jurisprudence, Islamic law, even they did not know the concept of Islamic legal thought and

⁶ Cooperative Societies Act 1925.

⁷ The Insurance Act 1938.

⁸ State Bank of Pakistan Act 1956.

⁹ The West Pakistan Money Lenders Ordinance 1960.

¹⁰ The West Pakistan Money Lenders Rules 1965.

¹¹ The Punjab Money Lenders Ordinance 1960.

¹² The Sindh Money Lenders Ordinance 1960.

¹³ The NWFP Money Lenders Ordinance 1960.

¹⁴ The Balochistan Money Lenders Ordinance 1960.

¹⁵ Agricultural Development Bank Rules 1961.

¹⁶ Banking Companies Ordinance 1962.

¹⁷ The Interest Act 1839.

¹⁸ Khan, Khalil ur Rehman. 2008. *The Supreme Court's Judgments on Riba*. Islamabad: Shariah Academy.

philosophy and have knowledge of classical scholars like Ibn Arabi¹⁹ etc. and also did not have the basic knowledge of the Quran, the Sunnah, Ijmaa, Qiyas (Analogy) and Ijtihad.²⁰

CONCLUSION

The current study is first in its nature, the contemporary Islamic scholars are undertaking the studies on the understanding, need and importance of Ijtihad theoretically but rare literature is being produced on its practical orientation especially in judiciary.

On one hand, the contemporary era requires revival of Islamic legal and judicial system and on the other hand, there is ample need to reconstruct the legal thoughts and judicial system in Islam as well, this study will contribute in both prospective. It is also the core and central point of the study and main target and goal of the research that the gap must be filled and the system may be reconstructed as the appeal of the Federal Shariat Court goes to the Supreme Court and the Supreme Court does not comprise on such kind of judges who have the knowledge of Ijtihad or Islamic Law. The study is about the gap which has been mentioned above.

¹⁹ Ibn Arabi, Abd Allah Muḥammad. 2012. *Ahkam ul Quran*. Cario: Dar al-Maarif.

²⁰ *M/S Farooq Brothers v UBL etc.*

REFERENCE

- Iqbal, Muhammad. 2004. *The Reconstruction of Religious Thought in Islam*. Lahore: Sang e Meel Publications.
- Nadvi, Abu al-Hassan Ali. 1987. *Fikr o Nazar*. Aligarh: Aligarh Muslim University.
- The Islamabad High Court Act 2012.
- The Constitution of the Islamic Republic of Pakistan 2018.
- The Constitution of the Islamic Republic of Pakistan 2018.
- Cooperative Societies Act 1925.
- The Insurance Act 1938.
- State Bank of Pakistan Act 1956.
- The West Pakistan Money Lenders Ordinance 1960.
- The West Pakistan Money Lenders Rules 1965.
- The Punjab Money Lenders Ordinance 1960.
- The Sindh Money Lenders Ordinance 1960.
- The NWFP Money Lenders Ordinance 1960.
- The Balochistan Money Lenders Ordinance 1960.
- Agricultural Development Bank Rules 1961.
- Banking Companies Ordinance 1962.
- The Interest Act 1839.
- Khan, Khalil ur Rehman. 2008. *The Supreme Court's Judgments on Riba*. Islamabad: Shariah Academy.
- Ibn Arabi, Abd Allah Muhammad. 2012. *Ahkam ul Quran*. Cario: Dar al-Maarif.
- M/S Farooq Brothers v UBL etc.*