

A New Reading of the Condition of Judicial Ijtihad in Legislation: From Legislative Function to Purely Judicial Function

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ABSTRACT

The condition that a judge be a mujtahid has long been debated in Islamic fiqh and, by extension, in Iran's contemporary judicial system, which is based on Islamic standards. The issue is especially important given the rarity of mujtahid judges and the large number of cases before the courts. This article offers a new reading of the evidence for this condition. It argues that in the period when the relevant reports were issued, the judge also performed a legislative function: he had to derive the rule for the dispute from the primary proofs before resolving the case. In the modern period, however, the legislative function has been separated from the judicial function through statutory law. Therefore, the condition of ijtihad should be understood in light of the historical role of the judge rather than treated as an absolute requirement for all contemporary adjudication.

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Introduction

The requirement of *ijtihad* for judges is one of the most debated judicial conditions in *fiqh*. According to the well-known view, a non-mujtahid may not occupy judicial office, and a judge must possess sufficient scholarly competence to derive legal rulings from the proofs. The principal textual bases are the report of Abu Khadijah and the accepted report of Umar b. Hanzalah. Much of the disagreement turns on the interpretation of terms such as knowledgeable, aware, and narrator, and on whether they indicate *ijtihad* as a condition.

Methodology

This article uses a descriptive-analytical method to examine the requirement of *ijtihad* in contemporary adjudication. It studies primary *fiqhi* sources and the relevant reports, then evaluates the condition with attention to the element of historical time and the transformation of the judicial institution.

Literature Review

Previous works have generally addressed the condition of *ijtihad* without sufficient attention to the historical circumstances in which the reports were issued. They have tended either to affirm or deny the condition by direct reference to the reports. The present study differs by examining whether the judge's historical legislative function was part of the reason for the requirement.

Findings

The findings support the famous juristic view in its historical setting: *ijtihad* was required because the judge had to extract and infer the rule from the Qur'an, Sunnah, consensus, and reason before resolving the dispute. In a period without a separate legislative body, adjudication included a form of lawmaking or rule-finding. A judge who lacked *ijtihad* could not properly perform that combined function.

Conclusion

In the absence of a legislative institution, the judge bore both legislative and judicial responsibilities. He first had to derive the rule from the religious proofs and then settle the dispute. Since deriving rules requires *ijtihad*, the condition was justified in that setting. In contemporary systems where legislation has been institutionalized and the judge primarily applies enacted law, the condition should be re-read as tied to the former legislative function rather than the bare act of judging. This reading allows the *fiqhi* evidence to be preserved while explaining the operation of modern judicial systems.

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