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Evaluating Ijtihad Provision for Judge Including Investigation of the Evidence for How to Prove or Disprove

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Abstract: *An important aspect of valid qualification for the judge, is ijtihad. Based on the popular idea common among Shia and Sunni jurists, the judge must be a mujtahid, and judgment of the mimicker is not accepted. Only a few contemporary jurists have opposed this matter, the most popular of whom is Sahib Javaher who has known the knowledge from imitation to judge as adequate. There are several reasons to make valid ijtihad provision for judge which are expressed in brief.*
Keywords*: judgment, ijtihad, consensus, Qadri mote-yaqqen.*

INTRODUCTION

Given that the judgment is considered one of important topics in Islamic jurisprudence and law, so qualifications of a judge is very important. Discussion on the validity or invalidity of the qualification has been common between Shiites and Sunnis from the outset. It is worth noting that the non-mujtahid's judgment is allowed only if the Imam appointed him for judgment. But for non-appointed one, disinfluencing of his judgment makes his judgment non-blunt.

Statement of the Problem: One of provisions for judge is knowledge, and from jurists' view, knowledge means ijtihad. About judge qualifications, Khomeini writes: maturity and wisdom, being man, faith, justice, and absolute ijtihad are of judge qualifications. The present study discusses about judge's ijtihad; that is absolute ijtihad, meaning that the mujtahid is skilled in all fields of law and has the ability to infer them; otherwise, his judgment is forbidden, and it is forbidden for people to refer him.

Purposes of the Study: In the present study, through library research, by presenting some matters, the reader becomes familiar with the meaning and qualification of ijtihad for the judge and also with ishte'rat evidences in judge.

Hypotheses of the Study: after reading the study, the reader is expected to answer the following questions:
1- What is ijtihad? And whether it is a requirement for judge?
2. If ijtihad is required, so what about judges who judge in courts? Are they not qualified to judge? Are these the same judge who referring them is not permissible?

The Meaning of Judgment

"Qazaa (judgement)" is a derivative of "Qazi", whose present participle is "Qaazi (judge)". Qazaa originally means "to resolve the matter", promise or act of God or of man. "Qazaa" is called with this name, because the judge settles the matter by his judgment (Dehkhoda, 1996: 15).

In the terminology of Shi'ite jurists, "Qazza" means guardianship on decree, legally, for someone who has the competency of fatwa about religious laws for details, for specific individuals in the field of proof and demanding rights for those who are eligible and deserve (Horre Ameli, 962: 2).

The Meaning of Ijtihad:

Ijtihad is derived from "Jahd". Three concepts of power, effort, and difficulty are seen in it. Co-meanings of ijtihad, such as "jahd" and "jihad" imply trying hard and struggling scientifically and practically.

In expressing the meaning of the term "ijtihad", Motahari says: "ijtihad" means wisely and methodically correct effort to understand the rules of Islam by using its resources; that is, Quran, Sunnah, reason, and consensus (Motahari, 1994: 197).

Evidences for Ijtihad Validity for Judge and Criticizing It

One of provisions for judge is knowledge, and from jurists' view, knowledge means ijtihad. As some jurists have pointed, there are several evidences for the provision of the validity for judge which are expressed here. In this section, we investigate some narratives imply judge's ijtihad and mention objections on it.

Magbuleh's of Omar-e-bni Hanzaleh

One of the strongest evidences that have been brought to Ijtihad conditioning for judge, is resorting to Magbuleh's of Omar-e-bni Hanzaleh, the text of which is as follows: Muhammad, the son Yaghoub; of Muhammad, the son of Yahya; of Muhammad, the son of Hussain; of Muhammad, the son of Isa; of Safvan, the son of Yahya; of Davood, the son of Hussain; and of Omar, the son of Hanzaleh, mentions that: I asked Imam Sadiq (hello to him) about two men of Imam's friends who dispute in religion or in heritage issues and refer to king or judge. Is it correct or no? Imam Sadiq says: everyone refers to the caliph and sultan for his dispute or demand; whether is right or wrong, surely, he has referred to tyrant, and if he gets a property of something, although he is right, it is illegitimate and is forbidden; because he has earned it based on tyrant judgment, and God has commanded to blaspheme to idolatrous. In "Nisa" Surah in Quran, verse 60, God says: Some people seem to believe in the Messenger of Allah, but for arbitration, they go to the tyrant and make the sentence invalid, while they are commanded to blaspheme to idolatrous.

Omar-e-bni Hanzaleh asks: So what do they do? Imam says: they should come to those from themselves, who narrates our Hadith and is aware of what is permitted and what is forbidden; so, satisfy with his judgment, because I put his judgment over you and if you do not accept his judgment, you rejected the command of Allah and command of us, and who has rejected our command, has denied God Almighty, and this is considered blasphemy.

Discussing about the Text of Ijtihad Provision's Hadith

In the hadith "Nazara fi halalana, arrafa ahkamana va fiqh", there are three interpretations which are applicable to ijtihad bot not to mimetics. Here, we explain and interpret these terms as follows:

The term "nazara" is interpreted as the person who is appointed by the Imam, should think and contemplate; this is not true about the mimicker.

Some jurists' remarks are used. Although some jurists maintain that ijtihad is provision for judgment, they consider using it out of question (Ashtiani, 1991: 10).

The Commonlaw of Commandment

The problem is more convenient in commonlaw of commandment, because the care and attention which are present in the term "nazara", do not exist in "commonlaw". Usually, commonlaw means "knowledge". It is said in Misbah-o-Almonir that: what commonlaw knows (Fayoum, 662: 3), has been come in Ragheb; that is, understanding something with thinking (Raqib, 654: 4).

Even if the commonlaw has co-meaning _ one general meaning "knowledge" and one specific meaning with thoughtful_ it cannot be used for the meaning of ijtihad. Even the specific meaning does not imply ijtihad.

The question now is that whether jurisprudence means ijtihad or not?

It seems that this interpretation cannot be used for conditioning ijtihad, as in narratives, a jurist not only means mujtahid. Non-mujtahid can also be a jurist. In Islam outset, jurist had been devoted to mujtahid only (Hurre Ameli, 650: 27).

So, any of these interpretations in narrative cannot be used for ijtihad qualification in judge.

Consensus

The second evidence that many jurists have appealed to it and what they think is important, is the claim of consensus on the issue. They say ijtihad conditioning for judge is a consensus issue. Many jurists in outset of Islam and very few last ones claimed the consensus.

In ijtihad conditioning for judge, Saani claims consensus among jurists. He continues: The judge must be absolute mujtahid to settle disputes (Hurre Ameli, 651: 1).

Jurists like Saani, Sahib Riyaz, Tabatabai, and Ashtiani, believe that in addition to the verses and hadiths, consensus also indicate the validity of the judge's ijtihad (Ashtiani, 1991:1).

Sahib Javaher says: Consensus that jurists have claimed, does not exist; but the opposition have been proven for us. Especially, with the advent of the arguments on the validity of knowledge qualification in judge, it is proven that there is no reason for ishter'at of ijtihad for judge (Najafi, 651: 42).

As a result, such a consensus is not valid from our view; because the consensus is valid if it has been cited by Imam.

Objections of Consensus

So, according to jurists' remarks, it is implied that ijtihad is not of judge's qualifications, but whether the consensus is realized through the remarks? There are several objections which consensus believers should answer them correctly.

The First Objection

Some jurists have used some interpretations for judge through which, ijtihad cannot be understood. For example, Abul-Salah-e- Helli has mentioned "knowledge" for judge qualification which is a common interpretation and includes non-mujtahid (Helli, 644: 53).

The Second Objection

Jurists' remarks indicate that at first, they have raised knowledge provision and then, they have said: judgment of the person who has not knowledge, is not blunt. "The person who has not knowledge" is referred to the mimicker. However, this possibility is strong and even higher; to the extent that it will ensure human beings that disinfluence of the mimicker's judgment as an ijtihad is of knowledge provisions. Answer to the question that whether or not a judge should be specialist, is clear; surely, he must be specialist. But the other question is that whether "knowledge" means ijtihad, or whether it will also include the mimicker's knowledge? A claim of consensus is on knowledge and the other one is on ijtihad. But here, there are not two independent provisions, such as "knowledg and being man" or "knowledge and justice", but the provision is the same knowledge and ijtihad is the interpretation of knowledge; that is, the provision is knowledge but to what level? It is said: to ijtihad. Because the knowledge qualification is agreed, it is on consensus. It is said that ijtihad is also agreed by jurists and is on consensus.

Qadri Mote-yaqqen

Another reason adduced for ijtihad and some jurists such Khoei have accepted it is that ijtihad provision has been placed in qadri mote-yaqqen. As a result, according to the principle of "non-guardianship of one person on another", only mujtahid's judgment is blunt and non-mujtahid's one is non-blunt. In its explanation, Khoei says judgment is essential, because otherwise, violation of rights, hardship and chaos, and loss of life become necessary.

Therefore, it is essential that Imams permit the judgment. But about to whom permission is given by the Imam, no remark is provided. As a result, it will be held between mujtahid and non-mujtahid, in which case, permission to the mujtahid is certain, and to other than mujtahid is questionable. Here, the principle of the principle of "non-guardianship of one person on another" will be governed. The mujtahid is removed of this principle, but non-mujtahid is remained in this principle. So, non-mujtahid judgment is not blunt.

After applying some objections of document and evidence type, Khoei gives his attention to qadri mote-yaqqen and considers ijtihad as provision and places mujtahid in the qadri mote-yaqqen; and through this principle, accepts the principle of jurist's guardianship.

Objections on Qadri Mote-yaqqen Theory

After stating this argument for ijtihad conditioning, there are two conflict and two objections in this argument.

The First Objection

Firstly, this argument works in some cases but not in some others. If the assumption is that two persons are the same in terms of different conditions, such as wisdom, sagacity, acumen, and experience and the only difference between them is ijtihad; that is, one of them is mujtahid and another one is non-mujtahid, in this case, we can resort to qadri mote-yaqqen and mention that in any case, the mujtahid is permitted; so, only his judgment is blunt. However, if the assumption is that two persons are also different in non-ijtihad conditions, although they are the same in some characteristics such as being man and justice, but only one of them is specialist in judging and settling dispute, reaches to fact too fast; and due to extensive experience in the judiciary, recognizes right very comfortable, but he is not mujtahid, but another one is mujtahid; however, he can be bypassed easily. Now, here the first one has one scores and the second one, too; in this case, how it can be claimed that qadri mote-yaqqen is mujtahid?. So, here qadri mote-yaqqen does not work through which certainty can be achieved, but in this case, the blockage is reached.

The Second Objection

With the assumption of being correct, resorting to qadri mote-yaqqen has some limitations which should be considered. In the first section of his book named "Kifaya al-fiqh principle", Akhund Khurasani has stated the definition of "jurisprudence principles": Imam is asked, if two men who dispute, each one choose a man, and are satisfied that each of them judge their dispute, and judges dispute due to difference in the hadith which they quote of you, what should be done? Imam says: the judgment is blunt and accepted which is fairest and the most supreme and the most honest in hadith and the most pious one (Khorasani, 638: 2). He adds the latter term to enter the practical principles into the science of principle; because through only practical principles, religious order is not implied and only the practical one will be determined. Now, we should be precautious in the period between determination and selection. That is, we should adopt qadri mote-yaqqen and say that in the period that both mujtahid and non-mujtahid can settle the dispute, it is said that resorting to the practical principle, only the mujtahid can be judge.

Conclusion

The collection of evidences which have been provided for judge's ijtihad, were reviewed. One of the arguments for ijtihad provision's believers was Magbuleh's of Omar-e-bni Hanzaleh. Firstly, this narrative implies for the mujtahid who has the power to deduce the commandments. Secondly, this narrative is related to normal conditions, but in an emergency and despite the interest in determining non-mujtahid person to judge, this requirement is not in place.

Firstly, in new judgment, the judge is not mujtahid, but the documentary and evidence is warrant and letter of the law before him, and he is only matcher, and there is no need to implication and investigation and legal evidence by judge; Secondly, appeal courts have been minimized in number.

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