

Ijtihad in the Contemporary Fiqh of Medicine From Malaysian Experians

¹Basri Ibrahim, ²Rahimah Embong, ³Kamariah Yunus, ¹Mohd Ali Mohd Yusuf,
²Fadzli Adam, ¹Engku Muhammad Tajuddin Engku Ali and ¹Ahmad Jazlan Mohd Jusuf
¹Faculty of Islamic Contemporary Studies, UniSZA, Kuala Terengganu, Malaysia
²Research Institute for Islamic Products and Civilization, UniSZA, Kuala Terengganu, Malaysia
³Faculty of Languages and Communication, UniSZA, Kuala Terengganu, Malaysia

Abstract: This study aims to examine ijtihad standings and its importance in the field of Islamic legislations as well as to uncover its connection to the modern medical field in this contemporary world. This study is designed as a qualitative approach and the secondary data were collected from a body of literature comprising the books of fiqh, usul fiqh and contemporary fiqh. It was found that ijtihad is highly needed in the medical field to solve current issues, especially when it is established by authoritative figures such as the Department of Islamic Advancement Malaysia (JAKIM), the state fatwa council and others. Ijtihad in the fiqh of medicine may be applied in the areas of Zanni al-Thubut and Zanni al-Dilalah, requiring only experts in the area. The study concluded that ijtihad jama'i (collective) is more suitable to be implemented nowadays. This study has implications for JAKIM and other authoritative figures to produce proper ijtihads in resolving some contemporary issues in medicine as guidelines for the ummah (nation).

Key words: Ijtihad, Ijtihad Jama'i, contemporary issues, fiqh of medicine, Islamic jurisprudence, Malaysia

INTRODUCTION

Ijtihad plays an important role in Islamic jurisprudence. Many contemporary issues which do not have clear proofs in the al-Qur'an, al-Sunnah, Ijmak (consensus of the scholars in establishing a law on religious law) as well as qiyas (the process of deductive analogy) can be resolved. Ijtihad portrays the flexibility of Islamic jurisprudence to resolve contemporary issues that do not have clear proofs in dealing with the Muslims globally. The great secret of Islam being accepted worldwide is due to the flexibility of ijtihad.

However, ijtihad can only be exercised by experts in the field, not by the laymen or non-scholars. One has to meet all the standards set by the Islamic scholars before ijtihad can be performed. This is done so for the purpose of leaving the matter to the experts, as mentioned in Allah SWT's commandment:

“And We sent not before you except men to whom We revealed (Our message). So ask the people of the message if you do not know”

The fiqh of medicine is a current knowledge field that attracts the attention of the Muslim community nowadays. This fiqh cannot be separated from ijtihad because it normally involves new issues which call for

ijtihad practice in Islam. Ijtihad in the fiqh of medicine has become a crucial issue that is being discussed by the Muslims especially among their intellectuals in this era. The questions are: What is ijtihad and fiqh of medicine and to what extent is ijtihad essential in the fiqh of medicine including ijtihad jama'i?

This study purports to examine ijtihad standings and its importance in the field of Islamic legislations as well as to discern its connection to the modern medical field. It also aims at identifying the authorities deemed eligible in establishing ijtihad in the medical field in Malaysia.

Literature review: There is vast literature in the field of ijtihad written in the form of small chapters in the books of Usul fiqh or in complete and separate work, being old or modern. The fiqh of medicine is a current knowledge field and thus the literature relevant to it is still scarce and covers mainly the literature established by Islamic scholars and modern medical experts. Among the books that have been discussed on ijtihad and the fiqh of medicine are Usul al-Fiqh al-Islami (Zuhayli, 1986), al-Manhaj al-Farid Fi al-Ijtihad Wa al-Taqlid (Kamil, 1999), al-Ijtihad al-Jama'i Wa Dawr al-Majami' al-Fiqhiyyah Fi Tatbiqih, Tafsir al-Nujaba' Bi Haqiqah al-Ijtihad Wa al-Taqlid Wa al-Talfiq Wa al-Ifta' (Hafnawi, 1995), Abhath Fiqhiyyah Li Qadaya Tibbiyah Mu'asirah (Yasin, 1996)

and Adillah Tahrim Naqli al-A' da', (Makki, 1995) *al-Fikr al-Islami Wa al-Qadaya al-Tibbiyyah al-Mu'asirah, Perubatan Moden Menurut Perpekstif Islam (Modern Medicine From Islamic Perspectives)* (Basri, 1999), *Pemindahan Organ Dan Pelaksanaannya Di Malaysia (Organ Transplantation and Its Practice in Malaysia)* (Basri, 2004), *Fiqh al-Qadaya al-Tibbiyyah al-Mu'asirah* (Yusuf, 2006) and others. Despite the vast topics of books available on *ijtihad*, majority of them discuss *ijtihad* issues implicitly and did not touch on the issue of *ijtihad* in the *fiqh* of medicine explicitly. For that reason, there is urgency for the muslims to examine the true *ijtihad* in the *fiqh* of medicine and to identify the true authorities eligible to exercise *ijtihad* in resolving various issues in the medical field.

MATERIALS AND METHODS

This research is designed as a qualitative study. The secondary data were collected from the books of Hadiths, *fiqh muktabar* (venerated), books related to *ijtihad* and contemporary *fiqh* of medicine written in this era which were written in Arabic or Malay language.

RESULTS AND DISCUSSION

The following studies present the findings based on the reviewed literature.

The definition of *ijtihad*: *Ijtihad* linguistically means the hardship or efforts exerted by an individual to carry out an activity involving *hissiyah* (physical) activities such as walking, doing business and farming or *maknawiyah* (motion) activities carried out by an individual to decide on the rules of customs, language, mind or *syarak* (Islamic *syariah* rulings); (Hafnawi, 1995).

Technically, there are a few definitions established, but the best definition accepted is the one highlighted by Siraj al-Din al-Armawi and a-Baidawi which is putting an utmost effort to formulate the laws of *syarak* (Zarqa, 1998). Taj al-Din al-Subki R.H.M viewed the aforementioned definition as the best definition (Hafnawi, 1995).

Obligations of *ijtihad*: As known previously, the *syarak* proofs which are available in the Qur'an and Hadiths are limited. They absolutely should not be exaggerated, whereas events in human lives are limitless and have no ending. This requires the necessity for *ijtihad*. *Ijtihad* evolves following the evolution of time and differences in situations and environment. It is an obligatory religious practice which should be established to ensure the achievement of all *syariah* (Islamic canonical law based on

the teachings of the Quran and the traditions of the Prophet (Hadith and Sunna) objectives are parallel with human civilisations, recognising all humans' interests and solving their many problems. Among the known injunctions that verify the obligations of *ijtihad* are. The Qur'an: among them is Allah SWT's commandment:

“And it is He who spread the earth and placed therein firmly set mountains and rivers; and from all of the fruits. He made therein two mates; He causes the night to cover the day. Indeed in that are signs for a people who give thought

Allah (SWT) commanded:

“And within the land are neighbouring plots and gardens of grapevines and crops and palm trees, [growing] several from a root or otherwise, watered with one water but We make some of them exceed others in [quality of] fruit. Indeed in that are signs for a people who reason”.

This above verses clearly acknowledged *ijtihad* by means of *qiyas*, as suggested by some Islamic scholars (Amidi, 1987). Allah SWT ordered:

So, pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him]

Syura means searching for answers for various presented questions, parallel to *syarak* substantiations, whether with the existence of known injunctions or not. This will not occur unless it is performed by means of *ijtihad* by the individuals who think wisely, according to their area of expertise (Qardawi, 1989).

The hadiths: Among them is the Hadiths narrated by al-Syeikhain and Ashab al-Sunan except al-Tirmidhi through Amru bin al-As RA. He heard Rasulullah (PBUH) said: If a judge makes a ruling, striving to apply his reasoning (*ijtihad*) and he is correct, then he will have two rewards:

If a judge makes a ruling, striving to apply his reasoning and he is mistaken, then he will have one reward

Ijmak: The muslims have reached a consensus in the ever-establishment of *ijtihad* and its practical implementations. This is a result of the beauty of *fiqh* that makes us feel so proud.

Qiyas: A sound mind may agree for the necessity of *ijtihad*. The reason being is that the *syariat* Islamiyah is

the closure for all syariats. It caters to all people, at all times and places. The arguments from the Qur'an and Hadith are limited but events that occur among humankind and the wasilah (the means of approach) that can serve their objectives are countless and boundless. It is impossible that such limited arguments are adequate to fulfil the needs of human lives which are always expanding and immeasurable. Therefore, the act of ijthad is highly necessary to be performed through the use of qiyas approach; that is, deducing new events based on previous events available in the known injunctions of the Qur'an and Hadiths.

Reasons for the obligations of ijthad: Other than the factors discussed above, other reasons for the obligations of ijthad include.

Substantial change in human lives, local politics and the world: Among the things that one cannot refute is the post-modernism which has witnessed numerous major changes in people's lives, politics and culture. This has called for the Muslims to revisit certain ijthads and old rulings suggested by Islamic scholars in their books because they are no longer suitable in today's time. The fiqh method has stated: Rules change as time evolves (Zarqa, 1988).

The above method indicates that the rules of syarak established as a result of ijthad by religious scholars may change from one era to another. Organ donation and transplantation, for example, is an issue of ijthad which arises due to the change. Prior to the establishment of advanced medicine, human organ transplantation is considered as something harmful and dangerous to the donor. But now, with the advancement in modern medicine, it is considered as simple and its success is guaranteed based on medical practitioner's experience and expertise. For that reason, rules have to change due to changes in circumstances. The previous ruling suggesting that it is haram (proscribed by Islamic law) to donate and transfer organs on the grounds that it may be fatal to the donor himself is no longer valid. In recent days, the rule has changed and it is considered necessary because it is one of the beneficial treatment methods.

Moreover, most Islamic scholars in the past suggested that it is better for women to perform solat (obligatory prayer) at home and there is no need for them to go to the mosque, especially among young girls. The obligations to teach religious matters also fell on the shoulder of their fathers or husbands. However nowadays, such opinion is no longer fit because women including young girls go out to schools, universities, markets, recreational places and work places. It is

ridiculous if they are still forbidden to go to the mosque and yet at the same time, other women in this world flock to their religious places such Christian women, Jews women as well as the groups who worship statues.

In addition, a mosque is not only the place to perform ibadah (worship) in Islam. It also serves as the place to convey knowledge, the center to strengthen relationship and acquaintanceship ties among the Muslims, as well as the center for many activities. It is the meeting place for the people who live in the city and outside the city. They dig knowledge, learn manners and courtesies, make friends and establish a support network among each other. Both men and women are encouraged to perform solat in the mosque.

Moreover, today's world has witnessed that the suggestion given by medieval islamic scholars for mothers or husbands to teach their wives and daughters themselves rarely takes place. Today's parents and husbands are busy with various tasks at work and others and they do not have a decent opportunity to teach and educate their wives or daughters in true concepts. Besides, they themselves do not possess enough knowledge in such matters (Qaradawi, 1989). Besides, there is an authentic Hadith narrated by Ibn Umar R.A which states that: Do not prevent Allah's servants to pay a visit to Allah's mosques. For that reason, contemporary islamic scholars chose the opinions of the scholars who encouraged women to go to the mosques and doing other activities beneficial to the society and the nation and this opinion should be chosen by the muslims in our country as well as other countries. Besides complying to the rapid changes in the world, going to the mosque did not oppose the known injunctions.

Rapid knowledge explosion: Now a days, all areas of sciences and knowledge which did not exist in historical times have never been discussed in great details by our Islamic scholars especially in the field of natural science and science of the universe. These new knowledge has succeeded in verifying many facts about the natural world, astronomy, chemistry, physics, medicine, bodily organs functions and many others. The rapid changes in science and technology are hastened by the establishment of various higher learning institutions locally or overseas. In our country itself, there are over 20 public universities and hundreds of private higher learning institutions. The presence of such institutions has undoubtedly helped encourage knowledge development and expansion among the Muslims in this country. Graduates from public as well as private institutions reach thousands of population every year. This shows that people with education and great knowledge are increasing in this country year by year.

In a similar vein, the Muslims had to go through far journeys to obtain knowledge or Hadiths from a teacher in the past. However nowadays, the same situation does not happen because teachers gather at one place such as a university and other learning institutions where there are many books on modern fiqh being kept and published. In fact, some can be purchased through compact discs. The books of fiqh published in this age no longer cover the same issues discussed in the past. In fact, they are loaded with contemporary fiqh issues that facilitate students, Islamic scholars and lecturers in Islamic studies to refer to. Some of the books produced by prominent world Islamic scholars whose their knowledge authorities were recognized are *al-Fiqh al-Islami Wa Adillatuhu* by Wahbah al-Zuhaili, *al-Tafsir al-Munir*, also by al-Zuhaili, *al-Fiqh al-Manhaji 'Ala al-Mazhab al-Imam al-Syafi'i* by Mustafa al-Khin and his friends, *Fatawa Mu'asirah* in three volumes by al-Qardawi, *Fatawa Shar'iyah Mua'sirah* by al-Hafnawi, *al-Mu'tamad Fi al-Fiqh al-Shafi'i* by Muhammad al-Zuhaili, *al-Mufassal Fi Ahkam al-Mar'ah* by Abd al-Karim Zaydan and others. It can be concluded that all of the above books have been translated into Malay language, thus facilitating those who are not very good in Arabic to make reference.

The knowledge of science and modern medicine has evolved rapidly. In the same time, contemporary issues requiring *ijtihad* have increased each day. All these require concentrated efforts by our religious scholars to revisit some issues discussed by past scholars in order to select the best and stronger views to cater to the needs of current public interests. In the case of the longest pregnancy period, for example, there are arguments among the four sects in Islam concerning this issue. While the scholars of Hanafi and Hanbali sects have argued that the longest pregnancy period is two year, the scholars of al-Syafi'i sect have determined it to be four years and five or seven years according to the scholars of Maliki sect. Science knowledge and modern medicine refute these opinions because they are not based on any facts and research. In fact, according to Ibn Hazim, they have never been backed up by evidences in the Qur'an and Hadith. He favors to refer to normal pregnancy period among women which is nine months only. According to Abu Zuhrah, the reality of knowledge in today's time does not support past scholars' claims that stated the maximum period of pregnancy is more than nine months, let alone to support the opinion that says it reaches seven years. On the contrary, current science and medical knowledge is more supportive towards the opinion that says the maximum pregnancy period is nine months. If it is more than that, it should not exceed the period of one year. Among past Islamic scholars who support this opinion is

Ibn Rusyd who suggested that it had to be based on normality and the experiences of the pregnant women themselves (Qardawi, 1989).

The emergence of experts in various fields: In this modern era, there exist a generation of scholars who are experts in various fields such as Arabic language, Tafsir (interpretation), Hadith, Fiqh, Usul (foundations), medicine, engineering, astronomy and others (Galigo, 2002). The existence of these experts is in line with the establishment of higher learning institutions in this country or abroad and the amenities provided by the authorities for students to further studies at higher levels. The existence of these experts has helped solving many fiqh issues which were considered hard to be resolved a long time ago. Organ transplantation surgery, for example, is a kind of surgery which has received the highest record of success so far and it has solved many cases for patients under waiting list to receive organs.

A majority of past Islamic scholars forbade human organ transplantation because it means killing innocent people, violating the rights of people who are alive or dead and taking an act that did not guarantee to produce good results. For those reasons, they suggested that organ transplantation should not be performed since it involves violating the honor of the people who are alive or dead (Basri, 2004). The prohibition upon organ transplantation was issued during those times due to the fact that medical knowledge did not reach a level such as today. In recent days, it is proven that such human organ transplantation is not a form of suicide and it does not violate the honor of the people who are alive or dead. The biggest achievement during those times was the permission given by certain Islamic scholars of al-Shafi'i school of thought to reconnect the bones of the people who were still alive with the people who were dead. This was permitted under a condition that the bones can replace the broken parts of the people who were alive and there are no other tools that can be used to replace that.

The facilities to obtain knowledge and information: In this post-modernism and globalization era, knowledge and information can be obtained easily because the world has become small. The globalisation of knowledge and information can resolve many worldly and cultural issues (Qaradhawi, 2000). Information is at one's fingertips and it can be easily retrieved in webpages, Facebook and Twitter. Things that were impossible to be obtained in the past have no longer become the case now a days.

In our country, the facilities to obtain knowledge and information do not only come from higher learning institutions but also through personal internet

subscriptions and private internet cafes that impose certain charges on their customers. There are also internet service facilities offered by Celcom, DIGI and others. Besides, there are hundreds of webpages and social pages that represent the Muslim's prominent organizations and bodies as well as the ones personally owned by the world's prominent Islamic scholars that can be easily accessed. Amongst them are the webpages owned by al-Azhar University, Islamic University Madinah, Majma' al-Fiqh al-Islami, Majma' al-Buhuth al-Islamiyyah, Islam Online, Islam Web, Islam al-Yaum, Mawaqi' Islamiyyat, al-Qardawi, al-Uthaimin, Faisal Maulawi and others. Indeed, the existence of Maktabah Syamilah (a software incorporated with a huge number of Islamic books), has greatly helped students and the Muslims who want to go deeper into the fields of Islamic studies. In our country, the same Islamic webpages are owned by JAKIM, the Islamic council in every state, Islamic Studies Academy of University Malaya, Fatwa Management and Research Institute of Justice (INFAD) owned by the Islamic Science University Malaysia, ah-Ahkam Online, Ibn Qayyim Institute, Darul Kawthar and others. Therefore, when facing certain issues, it is no longer a problem for the Muslims, religious teachers and experts to refer to.

In cases where people do not have Islamic background but they have strong interest in Islamic studies, a lot of things can be done. They may learn from the people who have good backgrounds in Islamic studies, read a lot of translated books, learn Arabic and visit various seminars that discuss numerous contemporary issues related to the Muslims. Some of them even succeeded in mastering the field of Islamic studies very well and have written books related to the issues of the people. One example is Hafiz Firdaus (<http://hafizfirdaus.com>, 2011), a pilot of the Malaysia airlines, who has successfully published over 30 books. When examined, his books are proven to be of high quality, even better than some literature produced by the people who have religious studies backgrounds, despite various comments for improvements. Besides, Dr. Danial Zainal Abidin (<http://danielzainal.com>, 2008), a medical doctor with qualifications from Alexandria University, Egypt, has also successfully produced some excellent literature in the field of Islamic studies, particularly in illustrating the relationship between the Qur'an and science facts. This group of people is better known as 'protaz', a combination of two Malay words, professional (professional) and ustaz (teacher). A person is said to be a 'protaz' when he firstly holds a professional position such as a doctor, an engineer, a lawyer, a pilot and others before venturing into the field of Islamic studies.

Ijtihad branches: The division of ijtihad can be viewed from various aspects including: The Aspect of Taklifi Laws (Defining Laws that consists of decrees that demand something from the legal person who binds himself to shariah rulings) From this aspect, ijtihad is bound to five laws which are Wajib Aini, Wajib Kifa'i, Ijtihad sunat, Ijtihad makruh and Ijtihad haram. Wajib Aini is defined as something which is ruled by the shariah to be implemented by every pubescent and sane Muslim, for example solat, alms and hajj. This happens in situations in which a person who has reached the level of ijtihad is asked about a certain issue that occurs, but there is no other mujtahid (an individual who is qualified to exercise ijtihad in the evaluation of Islamic law) who can provide answers and rulings in the subject. It also occurs when the mujtahid himself is facing an issue which he himself does not know about the the rulings of Allah SWT that is related to it. Under these circumstances, it is compulsory for the parties involved to conduct ijtihad or research on various injunctions to search for Allah's ruling on that issue.

In addition, Wajib Kifa'i (collective obligation) is defined as something that is governed by shari'ah to be implemented regardless of who implement it, for example performing prayers for the people who are dead. When there exists a few mujtahid to whom the people can refer to when facing an issue that has no arguments in the Qur'an or Hadiths and when one of them produced a fatwa (religious rulings) related to that issue, the others are spared from sin and if none of them do it, then all of them are sinned.

Furthermore, Ijtihad sunat (recommendable reasoning) is performed when a mujtahid puts an utmost effort to search for the laws of syarak on certain events that do not happen but there is a high chance of happening and not impossible to happen, so that the rulings are known before the events actually take place. Ijtihad makruh (better to omit), on the other hand, occurs in a situation when a mujtahid exercises ijtihad on assumption matters which normally do not happen and make himself busy with it which is more like wasting time. Finally, ijtihad haram (forbidden reasoning) occurs in a situation when ijtihad is done based on qat'i thubut and qat'i dilalah arguments to produce rulings which are not related at all to those arguments, for example, the laws which the muslims already reached a consensus. Ijtihad cannot be done for the laws where qat'i proofs already exist and agreed by the ulamas.

The aspect of approach: There are two approaches in doing ijtihad-ijtihad fardi (personal reasoning) and ijtihad jama'I (collective reasoning). Ijtihad fardi is an ijtihad

exercised by one individual who meets all the standards to exercise *ijtihad* without sharing with others. It is also an *ijtihad* that does not have the consensus of *mujtahidin* scholars on a certain issue that calls for *ijtihad*. This has been mentioned in the Hadith narrated by Mu'az bin Jabal from Abu Bakar R.A.

When he does not found a concrete basis in the book of Allah or even *athar* (remnants) in *al-Sunnah*, not also from among the companions RA, he exercises *ijtihad* with his own opinions and then said; This is my opinion. If it is right, it comes from Allah and if it is wrong, it comes from myself (my weaknesses) and I seek forgiveness from it (Qayyim, 1996). This kind of *ijtihad* can be found in *fiqh* encyclopedia which involves the opinions of Prophet's (PBUH) companions, the *tabi'in* (the second generation of the carriers of Islam, as they were the students of the Companions), leaders in *fiqh* as well as the *mujtahidin* intellectuals. Meanwhile, *ijtihad jama'i* is an approach that involves meetings or consultation by a group of scholars and intellectuals to answer all kinds of issues, especially the ones that touch the general livelihood of the people (Qardawi, 1989).

The scope of *ijtihad*: *Ijtihad* can only be exercised under these scopes: *Zanni Thubut* (not authenticated but certain) and *Zanni Dilalah* (not authenticated and not certain) Injunctions An example is the one narrated by Jabir R.A who said: Rasulullah (SAW) said: There is no *talaq* (divorce) unless after matrimony contract and there is no release unless after ownership (Baihaqi, 1923). The above Hadith is put under *Zanni al-Thubut* status because the visible narration shows that Jabir narrated that Hadith based upon what he himself heard it directly from Prophet Muhammad (PBUH). At the same time, there is also a huge possibility that he only heard about the Hadith from someone else who heard it from Rasulullah (PBUH). The above hadith is hadith *Ahad* (narrated by only one narrator) and hadith *Ahad* that has no sustenance falls under the law of assumptions.

The above Hadith can also be put under *zanni* status in terms of *dilalah* because Rasulullah's (PBUH) statement "there is no divorce" is a *nakirah* (indefinite) and a negative statement and it bears a general definition. Since, it has a general definition, it stays under a general state until it is specified as *talak munajjaz* (a divorce made directly without being associated to any conditions) or *talak mu'allaq* (a divorce associated to certain conditions). It has caused a clash of opinions among the Islamic scholars whereby some scholars suggested divorce did not come into effect in absolute manner and some others suggested divorce did come into effect.

Qat'i al-Thubut (authenticated and certain) but *Zanni al-Dilalah* Injunctions. An example is based on Allah SWT's commandment: Divorced women remain in waiting for three periods. This above verse is in the form of *Qat'i al-Thubut* and this is no longer being disputed. It is *qat'i* in terms of *dilalah* based on the aspect of the obligations to observe *iddah* ((waiting period after divorce) for the women in *iddah*. At the same time, it is also *zanni* in terms of *dilalah* in explaining the meaning of *al-Quru'* whether it means menstruation or no menstruation. It causes the scholars to differ in opinions between both aspects.

Zanni Al-Thubut but Qat'i Al-Dilalah (authenticated but not certain) Injunction

One instance can be observed from the Hadith: Allah (SWT) has given each person who has rights his rights and there is no bequest for an heir. The above Hadith possesses the characteristics of *Zanni al-Thubut* because it is a hadith which is *Ahad*. Yet its *dilalah* is *qat'i* and based on the practice of the Muslims. There is no bequest for an heir who receives inheritance. This above Hadith, even though it has the status of *Ahad*, the Islamic scholars accepted it and the Muslims reached a consensus on the authorization to use it.

The injunctions that contain sound meanings: An injunction can be inferred from another injunction when all conditions are met, the conditions which serve as the reasons for the requirements of rules. In this case, a *Mujtahid* puts his utmost efforts to recognize meanings that become the sources of rulings in fundamental areas. It becomes a reality when there exists the same meaning in contrast areas. Therefore, a law is transferred from fundamental areas to contrast areas through *qiyas*.

General methods taken from the fundamental areas as pervasive in the qur'anic verses and Hadiths: The methods which include *maslahah* (public interest), *istihsan* (the principle that permits exceptions to strict and/or literal legal reasoning in favor of the *maslahah*), *Sad al-Zara'i* (blocking of the means) and others bring to the prioritization of public interest and preventing harm. In this case, a *Mujtahid* puts an utmost effort to apply these methods on new events happening in the Muslim lives where clear and specific arguments did not exist on such issue such as *Istisna* (a contract of exchange with deferred delivery, applied to specified made-to-order items). These methods are allowed because they are advantageous to the Muslims.

As a conclusion, *ijtihad* areas that have been permitted are the ones that involve *syarak* issues which do not have *Qat'i al-Thubut* and *Qat'i al-Dilalah* proofs or

no proof at all. They cover the issues of basic iktikad (faith and conviction) or the issues in practical areas, even though some ulamas tied iktikad issue with the issues in practical areas in order to avoid them from being categorized into issues that need ijthad.

The importance of ijthad jama'i: The presence of many opinions by scholars and Islamic intellectuals attending to many issues happening among the muslims is a blessing, even though it may cause confusion and disunity. This may occur in situations when the muslims fail to establish an accord especially when they are bound by obsession towards a certain sect, groups, clans and others. However, establishing ijthad by a group of scholars rather than an individual has more advantages than disadvantages. In the case of investment certificate introduced by the banks, for example, it has drawn a surge of opinions by the Muslim scholars on verifying its halal and haram status, up to the point of using bad and inappropriate languages among them. Therefore, as suggested by Sha'ban Muhammad Ismail, collective opinions established by many scholars on certain issues are more accurate and suitable to be adopted rather than basing on individual opinions (Jayb, 1988).

Ijthad Jama'i is closer to the truth, easier to be accepted and closer to the maslahah (Zuhayli, 1986). The aspects which are more prominent and prevalent normally take place for overall rulings. This can be seen in Allah SWT's words:

“And if you asked them (the musyrik), “Who sends down rain from the sky and gives life thereby to the earth after its lifelessness?” they would surely say “Allah.” Say (O Muhammad), “Praise to Allah” (for their admittance); but most of them do not reason (the truth of tauhid and the meaning of syirik)

The above verse states that most Musyriks (one who ally Allah, confessing there is God besides Allah or equalizing something with Allah) did not use their mind for reasoning in assessing Allah's greatness. For that reason, they did not obey what they acknowledged. They recognized that Allah gives provisions from the sky and brings barren earth into live but they did not worship Allah in a real sense.

In the above verse, the Qur'an passed judgements based on the attitude of most musyriks but not to all of them. It attempts to show that sometimes reasoning came to some of them; that is, about the needs to obey what they acknowledged. However, this consciousness sank in

the majority who did not fulfil what they acknowledged. Because of that, it is said that the laws of majority assume the overall law (Qardawi, 1989).

What was mentioned above is consistent with the fiqh method: Majority law assumes the place of overall law.

And the method: The majority of something assumes the overall of something. The above method is the basic method under practice in the past and nowadays. This practice is recognized by the leaders of the four schools of thoughts (Kamil, 1999). The resolutions proposed by Islamic organizations such as Islamic Fiqh academy, the Muzakarah (Convocation) of Fatwa committee, national council for islamic religious affairs, state fatwa committees and others are some instances of ijthad jama'i. Even though it is not compulsory for the muslims to practice these resolutions, they are solutions which serve as excellent guidelines that the Muslims can embrace.

The contemporary scope of ijthad: The contemporary scope of ijthad that call for the practice of ijthad involves the following areas: The ijthad exercised by contemporary ulamas to solve many newly-found issues in the community which did not exist in the past by utilizing all ijthad tools as outlined by scholars of Usul fiqh in Usul fiqh books such as the issues of organ donation and transplantation, family planning, in-vitro fertilization, the establishment of breast milk bank and others. The selection of ijthad results and past scholars which are more accurate and appropriate for modern Muslims on issues such as wuduk (ablution) becoming void when a person comes into contact with mahram women (unmarriageable women with whom sexual intercourse would be considered incestuous, a punishable taboo) while performing tawaf (circumambulating the Kaaba) in Baitullah, casting stones at Jamarat before noon and taking an injection during Ramadhan daytime and others.

The fiqh of medicine: The Fiqh of Medicine, known as Fiqh al-Tibbi is derived from the combination of two words-Fiqh and Tibb. Fiqh literally means understanding. Allah (SWT) said:

“So what is [the matter] with those people that they can hardly understand any statement?”

Technically, it is defined as: Knowing the laws of syarak related to actions performed and words spoken by a mukallaf (a person who is obliged to act in accordance

with Allah's orders and to perform worshipping). Those laws are derived from detailed proofs based on the arguments from the Qur'an, Hadiths, Ijmak and ijthah. In the case of niat (the intention one evokes in one's heart) when initiating wuduk, for example, it is compulsory based on the sayings of Rasulullah (PBUH) in a Hadith narrated by al-Bukhari through Umar bin al-Khattab (RA).

Translation: Actions are based on intentions. The laws of syarak itself such as the laws regarding wuduk, solat (prayers), trade, marriage, suckling, war, jihad (the struggle against unbelievers) and others (Khin *et al.*, 2013). Meanwhile, Tibbi refers to treatment and medicine (Jayb, 1988). The Fiqh of Medicine refers to the knowledge of syarak laws that involve specific matters related to humans from the aspect of treatment and medicine of all sorts that covers the use of medicines, surgical operations, genetics treatments as well as all the practice being used by the medical experts involved in medical practice (Daghi, 2006). Therefore, when the fiqh of medicine is mentioned, it refers to deep understanding on the religious laws related to the issues of treatment and medicine.

THE POSITION OF THE FIQH OF MEDICINE

Fiqh of medicine is a category of fiqh classified by the scholars of fiqh as other fiqhs such as Fiqh of worship, Fiqh Muamalah (relations between people such as the Islamic commercial law), Fiqh of Family, Fiqh of Criminal, Fiqh of Judiciary and Fiqh of Etiquette. In the past, it was not widely discussed as achievements in the medical world were very limited and there were very few experts in the field. On the contrary, today's medical world is undergoing rapid development, be it in the western countries or in Islamic countries. There are numerous medical issues which had never been heard of in the past but have emerged in this age. Hospitals and other excellent treatment places owned either by the government or private sprang up like mushrooms after rain. The fiqh of medicine began to be studied by the Islamic scholars in more systematic and orderly ways only in recent days. In fact, some even succeeded in producing organized and strong literature related to it. The debate in the fiqh of medicine has become a crucial area which ought to be known by the Muslims, as in the case of other fiqhs.

Maqasid (purposes) of the fiqh of medicine

Among the purposes of the fiqh of medicine are:

- Preserving and preventing human bodies from any injuries or harms

- Protecting from any harms caused by diseases including infectious diseases from affecting humans, thus making them weak
- Taking care of and maintaining self-health as an important component that helps human perform activities to make this world prosper by the rules of God (Daghi, 2006)
- Safekeeping human lives so they will not be lost in vain because they are a gift from Allah which must be thanked for by taking care of them and using them optimally
- Preserving humans' descendants so they will not become extinct due to the attack of various malicious diseases and epidemics. If the descendants cease to exist, then this will diminish the efforts to uphold Allah's laws on His earth

THE PREREQUISITES FOR IJTIHAD IN THE FIQH OF MEDICINE

The prerequisites for ijthah in the Fiqh of medicine are similar to the prerequisites normally discussed in the field of ijthah. The authorities who exercise ijthah must be the ones who are:

- Pious and competent whereby his competency cannot be argued
- Qualified regardless of age
- Of sound mind. Ulama agreed that a mujtahid must be of sound mind. A crazy person and children without sound mind cannot produce ijthah
- knowledgeable. There is no clear rule mentioning that mujtahids must be amongst the believers but the history shows that ijthah are asked by the Muslims only. Furthermore, ijthah involves syarak laws; therefore, it should involve the believers
- Fair because unfair mujtahids are rejected and disqualified to become a source of reference with regards to syarak laws
- Both independent and dependent persons
- Both men and women. In fact, A'isyah (R.A) is well-known among the Prophet's companions as a person who produced many fatwas (Ilmi, 1997)
- Knowledgeable on two venerated sources - the Qur'an and Hadith

Memorizing the Qur'an is not a must though memorizing it is an added bonus. Indeed, the authoritative persons must possess comprehensive knowledge of the Qur'an including the verses on rulings, the meanings of

the verses, the stories, lessons and others. They also must master the reasons for the verses' revelations and recognize the verses of nasakh (the abrogating one) and mansukh (the abrogated one). Nasakh includes am (general), khas (specific), mutlak (absolute), muqayyad (restricted), mubham (ambiguous), mubayyan (clarified) and others.

Besides the knowledge of Qur'an, the authoritative persons must also have a broad knowledge about the Hadiths and the laws of the Hadith. Istinbat is the process of deriving certain rules or meanings from a text which does not depend upon the laws of the Hadith only. It is not compulsory to memorize the laws of the Hadiths; however, it is enough just to know the whereabouts of the laws of Hadith when making references. The persons also must have the knowledge of dirayah (understanding), nasikh and mansukh which are related to the Hadiths and they must know the reasons for the revelations of a certain hadith (Yusuf, 2006):

- Proficient in Arabic language and its balaghah in order to understand the language and stylistics of the Qur'an and Hadith
- Skilful in understanding the views of fiqh scholars in order to recognize the bases of laws and techniques employed by those scholars to produce the laws
- Able to appreciate books and opinions of past scholars and to observe any disagreements as well as the various sources from which laws are derived. This is because the ones who could not recognize the differences of opinions among scholars will not taste the true essence of fiqh
- Observant and taking into considerations of humans' lives since fatwa produced is closely connected to people's lives. What written is not merely an empty theory and ijtiḥad is not conveyed into an empty space. It is to be implemented, executed and practiced by the people and the country
- Able to differentiate between the accepted and rejected Hadiths, the authentic and deformed Hadiths. Similarly, they must know when to exercise istinbat, choose the strong opinions, coordinate certain arguments with other arguments and coordinate maqasid syariah (the objective of Islamic laws) with qawa'id kulliyah (legal maxim)
- knowledgeable about the matters pertaining life and the universe, history and Allah's creations so much so that the mutjahids who produce ijtiḥad are not ignorant about the phenomena taken place around them

THE SCOPE OF IJTIHAD IN THE FIQH OF MEDICINE

The scope of ijtiḥad in the Fiqh of Medicine covers the ijtiḥad practiced by contemporary scholars to solve numerous new medical issues that take place within the society and which did not exist in the past by using all ijtiḥad tools outlined by the Usul scholars in the books of Usul Fiqh such as the issue of organ donation and transplantation, family planning, in-vitro fertilization, the establishment of breast milk bank and others.

It also involves the selections of ijtiḥad work and opinions of previous scholars which are more suitable and more fulfilling towards the public interest of modern Muslims such as the issue of wuduk, striking in tayammum (dry ablution), performing solat without wuduk, not taking ablution prior to wrapping a patient's wound, taking injections during Ramadhan daytime and others.

IJTIHAD JAMA'I RELATED TO THE ISSUES OF THE FIQH OF MEDICINE BY JAKIM

As previously mentioned, the ijtiḥad practiced in the field of medicine has succeeded in answering many issues and eased the Muslims affairs especially for medical experts and medical practitioners, be it in the government or private hospitals. The JAKIM's Fatwa Committee discussion is one example of ijtiḥad performed in a group involving experts and authorities. Medical Issues where Ijtiḥad were Conducted by JAKIM Among the issues discussed are:

THE LAWS GOVERNING THE USE OF MENVEO MENINGITIS VACCINE

The Muzakarah of Fatwa Committee, the National Council for Islamic Religious Affairs of Malaysia taking place on 17th of July 2013 had discussed the Laws Governing the Use of Menveo Meningitis Vaccine. The law was decided based on the quote below: "After hearing the briefings and explanations by the National Pharmaceutical Control Bureau (BPFK) and analyzing the presented reports, arguments as well as opinions, the Committee agreed to conclude that the use Menveo Meningitis Vaccine is permissible". The Laws Governing the Use of DNA Profiling to determine parental status of a child and the time period to reject fatherhood status of a child in the case of Li'an (sworn allegation that is the mutual act of swearing which is carried out before a judge when a husband accuses his wife of adultery and cannot prove it with four witnesses).

The 101th Muzakarah of Fatwa Committee, the National Council for Islamic Religious Affairs Malaysia taking place on the 27th of September 2012 had discussed the Laws Governing the DNA Profiling to Determine Parental Status of a Child and the Time Period to Reject Fatherhood Status of a Child in the Case of Li'an. The ruling was established based on the following jurisprudence: After analyzing the presented reports, arguments and opinions, the Muzakarah asserted that Islam stressed highly on the question of nasab (patronymic) and when there exist injunctions that ratify nasab, then their repudiation are unacceptable except in the case of Li'an because Li'an has been established through the Qur'an, Hadiths and Ijma' and it is a form of taabudiah (obedience) practice.

The Muzakarah also explained that Majma' Fiqh al Islami convened on the 21st-26th of Syawal 1422 (5-10th Januari 2002) had decided that to determine nasab, the use of DNA profiling is allowed and performed under court's order only in the case of dispute on the questionable status of a child for various reasons such as cases of confusions and exchange of babies in hospitals or child care centers, cases of in-vitro babies and the case of missing children due to natural disaster and others. However, Majma' al-Fiqh al-Islami had also decided that DNA profiling should not be used to repudiate a child's nasab let alone to be used prior to performing li'an. The Muzakarah mentioned that the Fuqaha' (the experts in Islamic law) had reached an agreement that repudiation of a child's nasab through the method of li'an has to be done in the quickest manner and if such repudiation is not done within the given time period, then that repudiation becomes void.

The laws governing the use of ICL lens (implantable collamer lens) in eye treatment: The 99th Muzakarah of Fatwa Committee, the National Council for Islamic Religious Affairs Malaysia taking place on the 4-6th of May 2012 had discussed the Laws Governing the Use of ICL (Implantable Collamer Lens) in Eye Treatment. The Muzakarah has agreed based on the excerpt as follows.

After analyzing the presented reports, arguments and opinions, the Muzakarah suggested that Islam puts a high emphasis on maintaining a healthy body as one of the principals in maqasid syariah. However, the use of medicine from a haram source to cure an illness is generally prohibited according to the Hadith of Rasulullah (PBUH): From Abi Darda' R.A, Rasulullah (PBUH) said:

Verily, Allah sends down illness and the cure and had made for every illness a cure. So seek treatment but do not treat with things that are of haram. However, under emergency situations or forced acts, there is a leniency in the prohibition in order to eliminate pain from the body

The laws governing euthanasia or mercy killing: The 97th Muzakarah of Fatwa Committee, the National Council for Islamic Religious Affairs Malaysia taking place on the 15-17th of December 2011 had discussed the Laws Governing the Practice of Euthanasia or Mercy Killing. The Muzakarah decided on the ruling as below: After hearing the briefings and explanations by the experts and analyzing their presented reports, arguments as well as opinions, the Muzakarah believed that cutting the life line of a person before he is being confirmed as dead by any means or reasons is haram and forbidden in Islam. Consequently, the Muzakarah also decided that the act of quicken one's death through the practice of euthanasia (whether Voluntary or non-voluntary/involuntary euthanasia) or mercy killing is haram in Islam because it resembles the act of killing and it opposes the Medical Ethics in Malaysia.

The laws on organizing the human anatomy specimen exhibition: The 93rd Muzakarah of Fatwa Committee, the National Council for Islamic Religious Affairs Malaysia taking place on the 21st of February 2011 had discussed the Laws on Organizing the Human Anatomy Specimen Exhibition: The Muzakarah concluded that:

- After analyzing the presented explanation, arguments and opinions, the Muzakarah suggested that the body of a person who is dead has honor, value and subject to human rights which must be respected and preserved as in the case for the people who are still alive. The surgery and embalmment of the corpse for the purpose of exhibition and displayed in numerous forms and actions are against syarak provisions
- Therefore, in parallel to syarak regulations, the Muzakarah agreed that holding a human anatomy specimen exhibition is prohibited in Islam
- However, for educational purposes to the public with regards to human anatomy, it can be done via other exhibition means such as pictures and artificial things without the use of real corpse

The laws governing the vaccination of Human Papilloma kirus (HPV): The 92nd Muzakarah of Fatwa Committee,

the National Council for Islamic Religious Affairs Malaysia taking place on the 15-17th of December 2011 had also discussed the Laws Governing the Vaccination of Human Papilloma Virus or HPV. The Muzakarah had decided that:

- After the briefings by the National Pharmaceutical Control Bureau as well as the opinions and arguments which had been presented, the Muzakarah stressed out that Islam urges its believers to take care of their health because healthcare of an individual determines the level and quality of healthcare for the community in general. Vaccination is a method of early prevention taken by the government in an effort to prevent virus spread among women
- Accordingly, the Muzakarah agreed that HPV Vaccination which has been ensured did not contain ambiguous elements and will not inflict harm is permitted in order to prevent cervical cancer among women

The Muzakarah also decided that such vaccination does not contain the elements of exploitation for the users or used for the purposes which are against the syarak.

CONCLUSION

It was concluded that ijthad is an important component in Islamic jurisprudence. It is a platform used by Islamic scholars to establish new laws involving new issues which do not have clear arguments from al-Qur'an, Hadith, Ijmak or Qiyas. However, ijthad cannot be established by the non-experts and non-scholars for they may ruin Islamic jurisprudence system and damage the process of deriving certain syarak laws from the available arguments. This can cause people's misunderstanding towards the teachings of Islam. Similarly, in the field of the fiqh of medicine, the person who can exercise it must meet certain requirements in order to conduct ijthad as set by Usul scholars and discussed by contemporary scholars. Ijthad in the fiqh of medicine takes the form of ijthad juz'i (partial) or ijthad in certain areas or topics only. Finally, making use of the results of collective ijthad is closer to heart and safer. This study has implications for the Ministry of Education of Malaysia and Islamic NGOs to produce a generation of Muslim scholars capable of performing ijthad in various fields. This study

recommends that ijthad experts in the field of medicine be placed in every state hospital to resolve conflicts and issues pertaining to medicine.

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