Legal Pluralism Theories and Their Position in Islamic Law(*)

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Abstract

The concept of "legal pluralism", which emerged as a practice during the Imperial periods in the past, is being widely debated as a critical notion in our current postmodern era. Legal pluralism contradicts the centralized view of law. Therefore, the phenomenon of legal pluralism has been at the center of legal debates in democratic societies due to its undeniable relationship with the concept of democracy. In this article, we will delve deep into the concept of legal pluralism and attempt to trace its evolution throughout history. Additionally, we will refer to in-depth discussions among scholars regarding the position of legal pluralism in Islamic law and the ideas surrounding Islamic jurisprudence.

Keywords

Legal History, Legal Pluralism, Historical Development of Legal Pluralism, Islamic Law, Legal Pluralism in Islam.

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Hukuki Çoğulculuk Teorileri ve İslam Hukukundaki Yeri

Öz

Geçmiş zamanlarda İmparatorluk dönemlerinin bir uygulaması olarak ortaya çıkan "Hukuki çoğulculuk" kavramı, yaşadığımız postmodern dönemin de kritik bir kavramı olarak tartışılmaktadır. Hukuki çoğulculuk, merkeziyetçi hukuk görüşüyle çelişir. Bu nedenle Hukuki çoğulculuk olgusu, onun demokrasi olgusu ile olan yadsınamaz ilişkisi nedeniyle, demokratik toplumlarda hukuki tartışmaların merkezinde yer almıştır. Bu yazıda, hukuki çoğulculuk kavramını derinlemesine incelemeye ve tarih boyunca geçirdiği evrimin izini sürmeye çalışacağız. Ek olarak, İslam hukukunda hukuki çoğulculuğun konumu ve İslam hukuku fikri hakkında akademisyenlerin derinlemesine tartışmalarına atıfta bulunacağız.

Anahtar Kelimeler

Hukuk Tarihi, Hukuki Çoğulculuk, Hukuki Çoğulculuğun Tarihi, İslam Hukuku, İslam İçinde Hukuki Çoğulculuk.

INTRODUCTION AND OVERWIEW

We can describe the state as a system that ensures tribes are legally equal and able to attain their rights[1], protect them, and meet their needs. In some circumstances, it may be possible to establish a multi-law system within the state. This situation has been criticised in terms of citizen equality in both sociological and legal terms. Discussions continue regarding legal rules and practices based on people's beliefs that may lead to human rights violations in various fields. It is important to note that modern state governments are attempting to establish a single legal system based on constitutional law[2].

In the first part of this paper, we examined the concepts of legal pluralism in detail and traced their evolution throughout history. These concepts reflect democracy in society today and in previous administrations. In the second part of this paper, we discussed the concept of Islamic law and explored how legal pluralism manifests within it. The Ottoman legal practices are particularly significant as an example of a central government's multi-law approach to understanding Islamic law.

Legal pluralism is the phenomenon where various groups within a system can create and apply legal rules. Griffiths published the first studies on the subject in the literature in 1986. The researcher underlined that, in the case of multi-law systems, the state is only partially independent of the general rules of law in sub-law systems. In other words, there is no complete autonomy here, even with different legal regulations and practices within various social groups[3].

There are multiple groups of people in a state structure, and the basis of their being a group, as well as individuals' feeling of belonging to the group, is the existence of common pasts, values, and rules. Therefore, in numerous countries, some groups live by their own rules and socially punish or reward their members within the framework of these rules. The ability to discuss legal pluralism within a state relates to the recognition of sub-law practices within the central law of the state. In other words, legal pluralism describes the ability of different types of law to coexist within certain limits and their semi-dependence

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1 Ömer Naci Soykan, 'İnsan Hakları: Kavramsal Bir Çözümleme' (2013) 66 Türk Dünyası Sosyal Bilimler Dergisi 229.

2 Hasan Serdar Hoş, 'Hukuki Çoğulluk Kavramının Osmanlı Millet Sistemi Bağlamında Değerlendirilmesi ve İsrail Uygulamasi' (2020) 42 Türkiye Adalet Akademisi Dergisi 203.

3 Akif Tögel, *Anayasa Hukuku Açısından Çok Hukuklu Sistem* (Adalet 2016) 5.

on each other. To understand more clearly, it is necessary to examine the approaches in the literature, the historical changes in meaning, and the relationship between the idea and democracy.

I. THE CONCEPT OF LEGAL PLURALISM

Legal pluralism is a concept that emerges from the search for an understanding of the essence of law. It can also be seen as a critique of the dominant culture's view of law. Some scholars argue that legal pluralism has emerged as an alternative to traditional legal understandings, reflecting the debates and criticisms that arose from postmodernism in the field of law. The concept has been particularly prominent in Western countries and has been shaped by colonial understandings[4]. Griffiths sought to explain legal pluralism as an empirical concept, while Merry has divided it into "classical legal pluralism" and "new legal pluralism". While classical legal pluralism is viewed as a product of the colonial order, the new legal pluralism is considered a concept that reinforces democracy[5].

Some theorists in the fields of law and sociology examine legal pluralism through two sub-categories: internal and external legal pluralism. Internal pluralism refers to a legal order that contains diversity based on criteria such as religious or sectarian affiliation, ethnic identity, and territoriality. On the other hand, external multilingualism refers to the simultaneous existence of legal systems at certain levels that do not form a part of each other[6].

The most pragmatic approach to legal pluralism is seen as a declaration of state sovereignty, where the validity of societal norms derives from the model itself. This requires widespread representation in the community and the acceptance of differences. Allowing differences to exist will make it possible to construct a society where norms are generally embraced. Listening to the discourses of difference and making peace with them are requirements of legal pluralism[7].

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4 Hoş (n 2) 203.

5 Duygu Hatipoğlu Aydın, 'Hukuki Çoğullukta İktidar Problemi' (2014) 72 (1) İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 487.

6 Çağatay Şahin, 'Hukuki Çoğulluk Bağlamında Alevi Hukuku' (Yayımlanmamış Yüksek Lisans Tezi, Ankara Üniversitesi Sosyal Bilimler Enstitüsü 2015) 28-29.

7 Tögel (n 3) 9 .

According to Griffiths, legal pluralism determines the group-state relationship. In cases where there is solid legal pluralism, the researcher does not recognize the existence of alternative legal systems of the state. In contrast, the researcher acknowledges the existence of alternative legal methods of the state in cases where there is weak legal pluralism. When the state sees soft legal pluralism, it tries to establish a link between its legal and alternative legal systems[8]. Soft legal pluralism, solid legal pluralism, and internal and external legal pluralism lead us to "state law". The structure of state law, with its perspective on the majority and social groups, is the basic structure that enables the concept of legal pluralism to be shaped within a country's borders[9].

As can be seen, it is tough to determine simple lines for legal pluralism. However, once again based on Griffiths, it is possible to explain legal pluralism as "*the situation of relations in behaviour that occurs following more than one legal order for any social area*"[10]. We should underline that the reason why it is difficult to define the boundaries of the concept of legal pluralism is actually due to the nature of the idea of law. The concept of law is also shaped by the way states are governed, the social changes experienced on a global scale (such as colonialism and the development of the knowledge of democracy), the demands of the time, and the evolving consciousness of society. Therefore, it is necessary to interpret what the concepts of law and legal pluralism mean according to the current time. Looking at the historical flow, we will see that the boundaries and classifications of legal pluralism have changed[11]. How ideas are shaped in history is discussed in detail in another paper title.

II. RELATIONSHIP BETWEEN DEMOCRACY AND LEGAL PLURALISM (PLURALIST DEMOCRACY)

The concepts of pluralism and democracy essentially represent two political ideals. The concept of pluralism can be characterised as a claim to form an integrated approach to issues affecting social and social life, such as human rights, justice, sovereignty, democracy, freedom and citizenship, especially in

8 Nadire Özdemir, 'Hukuki Çoğulluk Kavramı ve Görünümleri: Roman Hukuku ve Aborijin Hukuku' in Hayrettin Ökçesiz, Gülriz Uygur and Saim Üye (eds), *Hukuka Felsefi ve Sosyolojik Bakışlar-VI* (İstanbul Barosu Yayınları 2014) 363, 364.

9 Hoş (n 2) 213.

10 Özdemir, (n 8) 363; Aydın (n 5) 487.

11 Hoş (n 2) 212.

scientific theories and methodologies. Undoubtedly, pluralism has excellent effects on providing a living environment that is worthy of human dignity, and that stimulates tolerance in terms of both law and state administration and politics. It should be noted that pluralism paves the way for demanding new rights in cultural and religious fields based on the population and the numerical power it creates. While this situation poses the risk of preventing individual participation in democracy and putting the individual under the influence of the mass, it can lead to the emergence of regional differences in people's lives, especially in the context of legal rules, by getting rid of the centralised structure[12]. Of course, the existence of these regional differences can be interpreted as a favourable situation in terms of freedom when viewed from the perspective of tolerance. This situation can also pave the way for the emergence of injustice and the abuse of differences. Therefore, it is necessary to take a two-sided and objective approach to the subject.

The risk that the rulers, who want to shape the societies according to their ideologies by standing back from modern law and lifestyles, rely on various legislation instead of the legal order, especially on human rights, should not be ignored[13]. Because of these problems, it is necessary to examine the concepts of democracy, majority, and pluralism and to seek answers to the question of how the rights and freedoms of the individual are protected against the majority in modern law.

The meaning of democracy can be explained simply as "self-government". In that case, the idea comes to mind that "the more one affects the individual". However, this situation trivialises the thoughts of individuals and pushes them individual to gather supporters and separate from the rest of society. At this point, the concept of an ideal democracy comes into play. In outstanding democratic practice, the right of the majority to rule and the authority of the rulers should be balanced with the rights and freedoms of the governed. It can be said that an ideal democracy is the limited rule of the majority. In other words, in governments with perfect democracy, the individual has the right to choose who represents them. This right allows the establishment of a control mechanism against the majority. This opportunity is the guarantee of

[12] Ata Demir, 'Jean-Luc Nancy'nin Siyaset Felsefesinde Çoğulculuk ve Demokrasi' (Yayımlanmamış Doktora Tezi, Ankara Üniversitesi Sosyal Bilimler Enstitüsü 2019) 3.

[13] Bülent Yavuz, 'Çoğulcu Demokrasi Anlayışı ve İnsan Hakları' (2009) 13 (1) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 292.

democratic states of law. It is to overcome the absolute superiority of the majority, to take place in the administrative mechanism of ideological and social differences, and to give them shares and rights in the administration[14].

In countries where democracy exists and the law is upheld, the majority does not have absolute power over the minority. The law is the most critical control tool that comes into play here. Observing the rights of those who are few in society is possible with legal rules and their operation. However, when the concept of pluralism comes into play, the question arises as to whether the rights of minorities will be respected. First of all, in countries where democracy works in the closest sense to the ideal, especially in the northern hemisphere, there is legal pluralism. It should be kept in mind that a multi-legal system has been adopted, that the state does not have legal control, and that autonomous legal rules are not entirely independent from the general legal regulations of the state. Although legal pluralism is a concept seen as a necessity of democracy today and has an old history, the risks it poses are prevented by the central law of the state. Legal pluralism, common in multicultural societies, is a social phenomenon, as is the case with normative pluralism. In fact, in the modern world, legal pluralism also acts as a brake against the clear legal rules of the central government. In this context, state law gains wealth while its absolute superiority atrophies. However, it should be underlined that the state's legal regulations are not trivialised. Because both the direction of law and the rules of law that the government spreads throughout the country can be read as democratic formations that feed and limit each other, thus laying the groundwork for the highest legal benefit for people[15].

Being legally pluralist and having the right to group within a society for cultural, ethnic or religious reasons did not always imply democracy. Legal pluralism, which can be seen as a right in today's world, has become an element of democracy over time. This situation points to the dynamic nature of the legal phenomenon and its borders. It would be helpful to focus on the historical past of legal pluralism and look at how it has evolved to the present.

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[14] Yusuf Şevki Hakyemez 'Çoğunlukçu Demokrasi Anlayışı, Rousseau ve Türk Anayasaları Üzerindeki Etkisi' (2003) 52 (4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 70-71; Mücella Can 'İnsan Hakları ve Demokrasi Arasındaki İlişkinin Felsefi Analizi' (2019) 23 (Özel Sayı) Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 2162.

[15] Aydın (n 5) 493.

III. MULTI-LEGAL DIVERSITY

Legal pluralism can be seen clearly or indistinctly in many periods of history in almost every society. In the relevant period, many factors, such as the factors that cause the multi-legal situation, the structure and legal attitude of the state, the dynamics within the society, and its relations, also change the manifestation of legal pluralism. Therefore, each multi-legal situation may differ in various aspects. The elements that make up the legal system vary. On the other hand, in cases of legal pluralism, it is also possible for the people/researchers who define it to name them differently. While Gilissen included the concept of rights (drotis) while defining law, Vanderlinden progressed with the idea of legal mechanisms (mécanismes juridiques). Hooker preferred to call it legal systems, and Griffiths and Santos used a concept in the form of legal orders. The perspectives of these researchers on the elements that make up the law have also diversified the images they use. For example, Griffiths called them "rules", especially since the law created by the state does not have a system and logic is not sought in other legal structures in society.

Using the concept of rule, Santos argues that the main element that constitutes society's lifestyle is generally legal rules. Both authors believe that legal rules outside the state cannot be qualified as a legal system. On the other hand, Vanderlinden points out that even when there is a plurality of laws in a society, their starting points may be the same. He argued that the elements that make up the plurality of directions could be a single rule, a set of rules or a legal system. Tamanaha argues that legal pluralism will be systematic because of its relationship with pluralism in society[16].

No matter what definition one starts from or how researchers approach multi-lawfulness, it is observed that each of them has a common point. This means that we must distinguish them before we can subject individuals in a society to the same rules. In a social order, even if the individuals are completely equal in the face of the state's legal regulations, there is a principle of territoriality in practice. There is a consensus that it is impossible to apply the same rules to every individual in a socio-political order. According to them, an understanding of law based on personality, which allows different legal

[16] Mehmet Salih Kumaş, 'Çok-Hukuklu Sistem ve İslam Hukukundaki Yeri' (Yayımlanmamış Doktora Tezi, Uludağ Üniversitesi Sosyal Bilimler Enstitüsü 2007) 122; Saim Üye, Teoride ve Pratikte Hukuki Çoğulluk (Ankara: Turhan Kitabevi 2013) 136.

arrangements to be made as a result of personal preferences and differences, rather than a legal understanding based on territoriality, is an excellent understanding of law in terms of personality development and freedoms of individuals[17].

Tamanaha drew attention to the fact that the law created by the state and the rules operated by the state are not the only points that need to be explained to express the law as a whole[18]. To describe a legal system, it is necessary to be able to talk about the exemptions, recognition policies, individuals and customs of the society. For this very reason, non-governmental organisations that exist on a legal basis within the states are included. These are the common action platforms of individuals united around various purposes and views, and they have critical roles in multi-law[19].

Today, although the state of multi-jurisdiction, freedom and possibilities for living the cultures of various human groups, a state of modernisation can be considered as an environment of tolerance[20], it should be added that many formal aspects affected the formation of the legal structure. It should not be overlooked the pluralistic form that emerges when law differs as domestic-imported, classical-modern, state-non-state, and these different legal structures continue their existence together[21]. In that case, it is necessary to add which types of multi-legality constitute the constitutive elements that cause multi-legalism and to examine these types.

A. Domestic Law-Imported Law

Domestic-law imported-law classification is one of the oldest classifications seen in colonial societies and expresses the existing law and the law duality formed by the colonialist. In particular, due to the western countries carrying their legal understanding to new geographies during their colonial practices, multi-legal systems have begun to appear. In his studies, Griffiths also gave an example of domestic law and imported law; in 1772, the East India Company's

17 İbid 123.

18 Brian Z. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) Journal of Law and Society 299.

19 Seyfettin Aslan, 'Türkiye'de Sivil Toplum' (2010) 9 (31) Elektronik Sosyal Bilimler Dergisi 262.

20 Ömür Aydın, 'Avrupa Ortak Hukuk Mekanında Demokratik Toplum Düşüncesinin İnşası' (Yayımlanmamış Doktora Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü 2008) 3.

21 Kumaş (n 16) 124.

application of both English law and -especially in private law matters- a direction by the caste system and Islamic rules. Another example is the colonial practices in Africa and Asia[22].

B. State Law-Minority Law

State and minority law is also one of the most frequently encountered forms of legality. For minorities living in a state, it is the state's application of different legal rules. Apart from this, some states allow minorities to have a separate legal system within themselves, even if they do not directly implement other practices. In countries such as China, India, and the Philippines, where Muslims live as minorities, Islamic Law is allowed to be applied to Muslims apart from the legal rules of those countries, and each of these is a current example of multi-lawfulness where state law and minority law exist simultaneously[23].

C. Customary Law-Modern Law

The legal pluralism situation in many modern states combines customary and contemporary law. They have a current legal system created by their state governments without pressure or coercion. But generally, this modern legal system is brought above the traditional legal order that society already has, and the dual legal system emerges involuntarily. In such cases, the customary legal rules continue to be seen in various social relations, although they are not as predominant as before. In countries such as Malaysia, Afghanistan, China and Thailand, it is possible to simultaneously see the effects of customary law and modern law on society. It is also important not to confuse the dichotomy between customary and contemporary in these countries with minority law. Customary law does not apply only to the minority. On the basis of this law, there are established facts such as the common values, common history and culture of the people living in that geography, and it is not limited to a specific group. Besides modern and customary law, minority law can also be found[24].

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22 Hasan Serdar Hoş, 'Hukuki Çoğulluk' içinde Hayrettin Ökçesiz, Gülriz Uygur and Saim Üye (eds), *Hukuka Felsefi ve Sosyolojik Bakışlar-VI* (İstanbul Barosu Yayınları 2014) 185.

23 Fehmiye Ceren Akçabay, 'Çoğunluk vs. Azınlık: Demokratik Hukuk Devletinin Gerçekleşme Koşulu Olarak Sivil İtaatsizlik' (2014) 3(6) Anayasa Hukuk Dergisi, 124 .

24 Mehmet Yüksel, 'Modern Toplumda Hukuk Kültürü' (2013) 8 (Özel Sayı) Yaşar Üniversitesi E-Dergisi 3245; Dilek Almas, 'Modern Hukuk Karşısında Örfi Hukukun Varlığını Sürdürmesinin Sosyolojik Nedenleri: Şanlıurfa Örneği' (2019) (Yayınlanmamış Yüksek Lisans Tezi, Necmettin Erbakan Üniversitesi, Sosyal Bilimler Enstitüsü 2019) 48.

D. Local Law-National Law-Supernational Law

As an effect of globalization, countries reorganize their domestic legal systems and comply with supranational legal rules at the same time. For example, due to bilateral or multiple agreements regulating the relations of nations with each other, it is possible to make innovations in domestic law mechanisms. Globalization can also reshape the legal demands of the people. All these cause local, state and international law to exist simultaneously in almost every country. It is inevitable for a government to establish relations with other countries, and this situation also binds it in terms of international legal rules. Today, countries are dependent on each other. Although, in some circumstances, there may be conflicts between these three different laws, it is scarce that there are complete contradictions. In today's world, the individual is a part of national and international legal systems[25].

IV. HISTORY OF LEGAL PLURALISM

Law, especially in Western societies, is a phenomenon created to maintain order in social life and is shaped by the factors that affect the community and lived over time. Here, the existence of the concept of social order can lead to the idea that the state is the only one who reveals and implements the law. However, it is only possible to say this idea is partially correct. Various state oppression-based social mechanisms, especially colonialism, reinforce the idea that the state is the sole ruler of the legal system. However, colonialism is also a situation that is at the basis of the concept of multi-law in the literature. Although there are practices related to multi-lawfulness in many parts of history, it is possible to base the existence of the phenomenon of multi-lawfulness with its current definition on the postmodernism movement and the sociological and legal debates that emerged within this framework[26]. As can be seen, legal pluralism has periodically changed its meaning, transformation and practice. At this point, it should be explained how this concept was shaped in history. But before focusing on its historical formation, it is necessary to mention how multi-law is described in the literature in history. Because after the work of Griffiths, who was the first to introduce this concept to the literature, in 1986, the ways of describing this concept have also changed. Therefore, seeing how fast legal pluralism has developed even within the same centuries becomes essential.

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25 Kumaş (n 16) 126.

26 Hoş (n 2) 206.

Eugen Ehrlich, who works in the field of sociology, is another name that has been influential in the development process of legal pluralism. Ehrlich developed the concept of living law, and this concept has gained an important place in legal pluralism. Living law states that even if different social groups are under the state's authority, they will have internal legal systems that reflect their own cultures and value judgments, where the state uses its own legal rules to solve the problems of the relevant society before the legal regulations. In other words, living law means that all social fields can create and implement their own formal and normative structure outside and sometimes despite the state law[27]. Yet another person to be mentioned here is sociologist Georges Gurvitch. In his work prepared in the 1930s, Gurvitch underlined that cultural influences were reflected in law and said there would be changes in law among human communities. The researcher stated that customs and traditions are among the law sources so different businesses will cause other legal practices. Therefore, legal pluralism is inevitable[28].

John Gilissen was the first lawyer to consider and examine the concept of legal pluralism. According to Glissen, the law shapes the rules of society and the rules of the state. Therefore, the community's powers that have changed or produced over time also cause the formation of various legal figures and practices. According to the researcher, each pluralist structure formed by different legal norms in a society should be considered separate. In this context, Glissen states that an area of action should be created for the community to implement the state's multi-law status.

Similarly, Jacques Vanderlinden, Le Pluralism Juridique: Essai de Synthèse, in his work named, defined non-state law and again stated that different social rules constitute legal pluralism. Leopold Pospisil is another person that should be emphasised in the formation process of the concept of legal pluralism. According to Pospisil, who argues that law is a multi-layered structure, society, whether a tribe or a modern nation, does not consist of inseparable people. A community is more like a mosaic of subgroups. Each subgroup has a legal system that regulates the behaviour of its members[29].

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27 Hubert Rottleuthner, 'Eugen Ehrlich ve Ernst Hirsch Yaklaşımlarından Yaşayan Hukuk' (2013) 3 (1) Akdeniz Üniversitesi Hukuk Fakültesi Dergisi 64.

28 Hızır Murat Köse, 'Georges Gurvitch'in Hukuk Sosyolojisi Alanında Türkiye'ye Etkisi' (2002) 51 (3) Ankara Üniversitesi Hukuk Fakültesi Dergisi 100.

29 Kumaş (n 16) 115.

V. LEGAL PLURALISM IN ANTIQUITY

Although there was a primitive social structure in Antiquity, especially in the Roman period, it is seen that most of today's social phenomena, especially law, began to take shape. It is possible to encounter the effects of Late Antique Roman Law in most legal systems today. When looking at ancient law from the perspective of legal pluralism, especially the Laws of the Twelve Tables will be seen. These are important in terms of being one of the first examples of the transition to a written legal system, and the fact that their binding is specific to Roman tribes[30] can be counted as one of the first examples of legal pluralism.

The Roman law was very impressed by the cultural and social mechanisms of the societies it interacted. It is possible to say that there were changes over the twelve tables law implemented in 449 BC for centuries. For example, since Emperor Theodosius Constantine, the edicts of all emperors were confiscated during the Roman period under the name Codex Theodosianus. Later, it was distributed to all geographies that the state ruled in different languages. After these collection and generalization studies, Justinian's work in AD 533 Corpus Juris Civilis was published, and a uniform legal system was introduced in the cosmopolitan empire. In this period, the primary purpose of the law to take on a central appearance was the search for power as a state of Rome, which lost land and started to experience internal conflicts due to its multiculturalism.

The belief that a universal legal system will emphasize equality and prevent injustice in legal practices has emerged. It should be said that the application area of this legal design could not be formed[31]. It should be noted here that the reason this regulation could not be implemented is, in fact, because of the contradictory statements in it and the differences in interpretation it creates. At this point, although there is a valid legal order throughout the country, it can be said that the way it is implemented constitutes a multi-law system. Of course, the legal pluralism mentioned here should not be perceived in today's sense[32].

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30 Talat Koçak, 'Geç Antik Çağ'da (Doğu Roma) Bizans Hukukunun Tarihi Seyri' (2019) 21 (Özel Sayı) Afyon Kocatepe Üniversitesi Sosyal Bilimler Dergisi 126.

31 Haluk Emiroğlu, 'Roma Hukuku'nun Bilgi Kaynaklarından Corpus Iuris Civilis ve Türkiye'de Hukuk Resepsiyonu' (2002) 51 (3) Ankara Üniversitesi Hukuk Fakültesi Dergisi 87; Frederick W. Dingledy, 'The Corpus Juris Civilis: A Guide to its History and Use' (2016) 123 Library Staff Publications 4-5, <https://scholarship.law.wm.edu/libpubs/123> Erişim Tarihi 19 October 2023

32 Koçak (n 30) 128.

VI. LEGAL PLURALISM IN THE MIDDLE AGES

The historical period, described as the Middle Ages, covers the 5th and 15th centuries. In this period, it is possible to come across customary law rules, legal regulations of feudal principalities, Roman law, and Church law. In the states in this period, religious-based courts ensured social order, royal courts complied with feudal law rules, customary legal rules that shaped inter-communal relations, and courts that mainly dealt with commercial issues but whose rules and practices differed between regions that took place at the same time. It should also be noted that the rules and boundaries of these courts are sometimes unclear and violate the boundaries of each other's jurisdictions from time to time or depending on various conditions. Similar complex legal systems exist in very different geographies because Rome has spread over a vast landscape and has active relations with other countries[33].

It should be thought that the concept of sovereignty in the Middle Ages, where feudal principalities were very common, especially in Europe and Asia, is different from today's modern understanding of sovereignty. Although most of the principalities depend on a central government, it is a natural result of this scattered structure, and the weak state and law ties are weak. The majority of the legal rules of principalities are a manifestation of the social order of their communities. Plato said that the state didn't have to make a legal regulation. As the reason for this, he showed that if the state is mismanaged, the laws will not be obeyed anyway. According to him, if a good administration exists, people will naturally live according to the rules. Therefore, the presence of a legislator is optional in either case.

Most religious rules are sufficient for law. Another name that draws attention to the weakness in the medieval state-law relationship is Ehrlich. Ehrlich emphasized that the rules of the state are generally based on military regulations, and therefore the legal rules that ensure the social order have a weak bond with the state. He also said that the courts of the Middle Ages could not be seen as organs of the state for this reason. These are the organs of the people[34].

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[33] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review 377, <http://www.austlii.edu.au/au/journals/SydLawRw/2008/20.pdf> Erişim Tarihi 20 October 2023.

[34] Tögel (n 3) 11-12.

The Middle Ages is a period in which legal pluralism is pervasive. One of the types of legal pluralism that can be seen in this period is state law and, in turn, a local law that maintains its existence. The caste system was the fundamental element that made the rules clear in society for many principalities, while state law expressed royal law. Even the caste system alone is a state of legal pluralism, sufficient for different legal rules, rights, and freedoms among human groups. In some principalities, in addition to the caste system, a church helped the people in cases of disagreement for a fee. This situation also added a new understanding of the law to the existing ones[35]. The ability to set and enforce legal rules for the church, which expresses its views on so-called secular matters, has also created a new income opportunity.

It should be said that the royal law for the period constituted the main legal rules. However, it was only possible for the lords to make decisions and practices according to these legal rules. Because there are not enough judges for the people's problems, it would not be wrong to say that their problems are unimportant to the royal members. Therefore, the existence of the rules brought by the caste system besides the state law was seen as a facilitating way of maintaining order. The weak multi-law environment tolerated this. There was no support or application proposal for the state to implement the law of religion or tradition within the people. Undoubtedly, it is impossible to discuss equality between the people and the royal members here.

This situation, which continued for many centuries, started to change in the last period of the Middle Ages. States have begun to create rules that are valid for more people and have tried to prevent inequalities in this regard from time to time by applying the law itself. The most significant influence in this is the doctrine of divine justice. Individuals in public have also started to gain importance, and state administrators have begun to understand that their existence cannot be protected if the crowd is restless[36].

VII. COLONISATION PERIOD

The period of colonisation, which survived until the 19th century, is a critical period that goes towards today's state law and legal pluralism. During this period, the colonisations, especially in the West, naturally started the legal

35 Üye (n 16) 194.

36 Tögel (n 3) 14.

pluralism process. In particular, the change in the understanding of sovereignty and colonial activities caused the legal rules in different geographies to encounter each other and start to form the infrastructure of the legal regulations of today's modern states. For this period, Hooker comments that the colonial states had experienced contacting new unwritten law rules. On the other hand, Sally Engle Merry stated that colonial states had to recognise the existing legal order in those new geographies to establish a ruling power over different societies. In other words, confirming a new legal order in the landscapes visited for colonisation is costly. Making small changes by accepting the ratio is a factor that facilitates the process as well as gaining experience. Knowing the existing rules and putting pressure on society according to these customary rules will save time[37].

Portugal and the Netherlands initiated colonisation at the end of the 15th century. England was also involved in the process in a short time. They started to colonise these countries by establishing their colonies in economically weak countries. These activities of the countries have brought about the contact of different legal structures in different geographies. It is not entirely wrong to say that the legal rules of the colonial countries struggled to exist against the legal systems of the colonial states. Legal confrontations in almost every country and geography have given birth to different forms of legal pluralism. For example, weak legal pluralism enforcement was seen in India, a British colony.

The East India Company, frequently encountered as an example of legal pluralism in the literature, has implemented the law of the Qur'an for Muslim employees and the Shaster for Hindus in all disputes related to inheritance, marriage, tribal and religious institutions. In the Mongol-administered courts, where criminal law proceedings were held, Islamic law was applied to all tribes. In contrast, in the civil courts, Muslim and Hindu legal experts used local and religious law as salaried employees of the East India Company. These different legal practices eliminated the confusion that English law would create, and in addition, it facilitated the existence of the British there without conflict with the local people[38].

A similar situation prevailed in Africa. The British operating in the Rhodesia region provided residents with local law in personal and family law; however,

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[37] Sally Engle Merry, 'Colonial Law and its Uncertainties' (2010) 28(4) Law and History Review 1067.

[38] Tamanaha (n 33) 383; Tögel (n 3) 16.

they applied Dutch-Roman-Western law to the whites there. These are examples of the coexistence of customary and modern law, and a similar situation was observed in all geographies during the colonisation process[39].

VIII. 20TH CENTURY

The twentieth century, in which the discussions and research on legal pluralism and related issues increased, is a period in which the legal systems and understanding of the state began to reshape with the effect of globalisation. Especially at this point, growing academic analyses are found about merged legal systems and these[40].

New supra-state legal mechanisms have been established with treaties between states. The most common example of this is the European Union organisation. Thus, the international judicial systems and the responsibilities of states against these systems have become palpable; countries have learned more about each other's legal systems, and the understanding of internal/external sovereignty has begun to replace the knowledge of global international lawwhite[41].

The fact that states are parties to international agreements or become parts of such organisations has made room for a change in the perspectives on the concepts of internal and external sovereignty; Acting by the rules created by the organisations they are in necessitated making high concessions on sovereignty compared to the past. This compromise means the creation of many global legality environments. In the Van Gend en Loos decision of the European Court of Justice, it is expressed that member states have created a new legal system within international law by limiting their sovereign powers in certain areas for their benefit[42].

Globalisation and the change in the perspective of legal systems have shown the necessity of limiting the powers in the line of internal sovereignty in modern states. New and fundamental concepts, such as the central concept of human rights, have begun to become a limiting factor in front of states' powers.

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39 Tögel, (n 3) 17.

40 Tamanaha (n 33) 383.

41 William Burke-White, 'International Legal Pluralism' (2004) 25(4) Michigan Journal of International Law 965.

42 Tögel (n 3) 18.

First of all, the emergence of a global consensus on people's freedom has increased the importance of concepts such as religion, lifestyle, and traditions, forming legal pluralism structures within the states.

It is possible to see clear examples of this situation, especially in Asia and the Far East. For example, Japan has adopted a new legal system in line with the West, in which rights and freedoms are guaranteed, instead of the continuing legal system in the form of state and minority law. Again, China has placed the rules of law taken from the West into the existing system and continued to practice traditions. The expected points of traditional practices and western practices were investigated. This change of countries enabled them to establish new relations and/or root their existing connections by opening their doors to international interactions; thus, it has created a suitable ground for the execution of many different applications in the global environment without conflict with each other.

It is possible to describe this situation as the spread of legal pluralism to the global arena and as a new generation legal pluralism type. International courts within structures such as the United Nations, the World Trade Organization, and the European Union can be compared to a system within states, such as central courts and courts of minorities, just as it was in the past. The most crucial distinction here is that the situation has reached a global dimension from within the country. Today, both countries' own and international legal systems are in effect simultaneously[43].

Based on this information, it is possible to say that to understand international relations and the phenomenon of globalisation, it is necessary to internalise the legal pluralism system and its content. It should be noted that states had concerns in previous centuries. However, in the 20th century, this situation made it necessary for many states to unite on the same issue simultaneously. While it was up to those two states to find reconciliation in bilateral relations, the concept of plurality began to be sought to achieve reconciliation in multiple unions.

For example, the European Union's legal system was established, and the constitutions of the states that were part of the union were considered in forming this system. Therefore, today in this formation, it is accepted that there

[43] Burke-White (n 41) 977.

are as many centres of law as the number of constitutions of the state parties. While legal pluralism in the European Union countries provides a horizontal relationship between the members, it brings with it a vertical relationship between the constitution of the member state and the EU constitution[44].

Another example is the European Convention on Human Rights. If the practices of the state's party to this convention are contrary to the way, the European Court of Human Rights, also a supra-state authority, is authorised. It should also be underlined that this court's margin of appreciation doctrine is an essential example of global legal pluralism. With this authority, the gaps in the contract are closed. In addition, the differences between the state proceedings of the countries that are party to the convention and the European Court of Human Rights are balanced[45].

As can be seen, from the 20th century to the present, a legal system transcends the borders of countries. This situation has created many global legal systems worldwide by creating countries with both their legal system and international legal responsibility.

IX. ISLAMIC LAW

A. The Foundation of Legal Pluralism in Islamic Thought

Schacht, a scientist who left his mark on contemporary orientalism with his research on Islamic law and is a part of Islamic jurisprudence, wrote: One of the most important legacies Islam has left to the civilised world is its religious law, the Sharia. It is accepted that what law is in Islam theology is in Christianity-the most typical manifestation of spiritual learning. For Muslims, the law is not an element of general Islamic teaching but its functional expression[46].

To understand the concept of Islamic Law, which can be considered as a summary of the effects of Islam on human life in general, first of all, it is necessary to touch on the concept of Fiqh. Fiqh can be explained as the traditional name of Islamic Law because the concept of Islamic Law is a concept

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44 Bertil Emrah Oder, 'Avrupa Birliği'nde Çokmerkezli Anayasacılığın Yapısal Sorunları: Yetki Çatışmaları ve İkincillik İlkesi Işığında Türkiye İçin Karşılaştırmalı Gözlemler' (2005) 21(1) Anayasa Yargısı 168; Tögel (n 3) 20.

45 Oder (n 44) 169.

46 Joseph Schacht, The Legacy of Islam (Oxford Paperbacks 1979) 392.

that has been used chiefly with modernisation and research on the subject. The use of the concept of Islamic Law instead of the word Fiqh, in other words, the existence of a transformation between these two concepts, brought along a presupposition that every phenomenon thought to be in a favourable legal system also exists in Islamic Law. Fiqh should be defined as individuals' knowing their responsibilities for and against them.

So here, the focus should be on the concept of knowing. Since it is a religious infrastructure, knowing also points to the knowledge and consciousness given to man by divine power. In other words, Fiqh moves away from the concept of making judgments; It gains meaning in knowing and interpreting the rules and provisions of the divine will. That's why, for the definition of Fiqh, the understanding and interpretation ability of human beings is brought to the fore, and the explanation is made as "the whole of the rules of shari'a"[47].

The concept of Islamic Law, which has replaced Fiqh in the modern understanding of the law, means "organised sanction tools based on state authority that provide social order" and narrows the boundaries of the concept of Fiqh. However, Fiqh in Islam has a broader picture that deals with and regulates all human behaviour. For this reason, trying to understand the legal structure brought by Islam with modern legal narratives carries the risk of causing both difficulty and confusion[48]. The fact that Islamic Fiqh is different from the new legal system in terms of both concept and nature brings serious problems in one-to-one matching. It causes conceptual confusion[49].

There is another factor that needs to be explained to understand the Islamic-based legal order is the founding power that determines the rules in this system. According to Islam, Allah is the power that determines what individuals and communities should do in human life, sets religious rules and punishes or forgives them if they are not followed. It is the sole authority to set the rules. Therefore, every individual who has chosen Islam himself and accepts this religion must take and internalise the rules set by Allah.

This internalisation; forms the basis of the application of Fiqh in life and removes the hesitations in the individual's behaviour. There are orders and

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47 Vahap Ovacı, 'İslam Hukukunun Karakteristik Özellikleri' (2015) 7(7) Bozok Üniversitesi İlahiyat Fakültesi Dergisi 69.

48 Talip Türcan, 'Fıkıh ve Hukuk-İslam Hukuku Kavramı Üzerine Bir Değerlendirme' (2012) 24 Eskiyeni 20.

49 Ovacı (n 47) 70.

prohibitions, and with the acceptance of religion, the individual or society shows a pre-acceptance to them. However, it should be underlined that the legal order in Islam, which is a heavenly religion, is based on the interpretation of the prohibitions and orders placed by Allah[50]. Jurisprudence, evaluated in Islam, is more a way of serving God, who knows what is best for people, rather than a mechanism of social control. Here, the most basic narrator and interpreter is Muhammad. He is a prophet. Therefore, the life, words and practices of the prophet, who conveyed Allah's prohibitions and orders to people, are the secondary source of Islamic Law rules[51]. These two categories, which differ from each other in terms of quality, have been called "Ius" in the history of law. It creates a legal system based on divine orders called divinum.

When it comes to Islamic Law, it is seen that the source issue is one of the dominant issues of the Fiqh method. It will be seen that this subject is examined under three headings as a procedure (aṣl-usûl), infinitive (masâdır) and evidence (edille) in the books of Fiqh. It should be added here that different definitions have been made for each term. It should be said that the meaning of each definition is similar to each other. The subject of "aṣl-usûl" contains several substances[52].

However, in modern law, these concepts replace "evidence". Here, the Book, Sunnah, Ijma, Qiyas and other pieces of evidence, which constitute the basis and source of the Shar'i Rulings, are meant. It is possible to translate the word "masâdır" into English as "source, the root". Today, the sources related to the Fiqh procedure take place in the meaning of "Masâdıru't Teşrî'i'l-Islami (Sources of Islamic Law)". "Delil-edille", used as a source in Islamic law, is the element that makes it possible to reach the Shari'a judgment with a good view. Although the effectiveness of the evidence in the definition of conveying the shar'i judgment in a definite or conjectural way has been discussed, and it has been claimed that the thing that leads to the shar'i judgment by the conjecture is not evidence. Still, an indication, the majority of proceduralists have argued that such a definitive quality is not necessary for the evidence[53].

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50 Kaşif Hamdi Okur, 'İslam Hukuku Açısından Toplum Hukuk İlişkisi' (2020) 4 (2) Kocaeli İlahiyat Dergisi 9-10.

51 Ovacı (n 47) 70.

52 Ferhat Koca, 'İslam Hukukunda Kaynak Kavramı ve Kaynaklar Hiyerarşisi Üzerine Bazı Düşünceler' İslam Hukuku Anabilim Dalı Eğitim-Öğretim Meseleleri Koordinasyon Toplantısı ve İslam Hukuk Usulünün Problemleri Sempozyumu (Çorum 14-15 Mayıs 2004) 22.

53 Ovacı (n 47) 73.

It is possible to examine the shar'i pieces of evidence in two different categories, primary and secondary. The preliminary evidence mentioned here are the Qur'an, Sunnah, Ijma and Qiyas. Although the evidence does not have an independent character, secondary methods are based on one or more of the four primary pieces of evidence. Evidence in Islamic Law and the sources on which it is based are also guiding. They are resources that teach social life and people. In other words, a person can understand the shar'i rulings from Islamic sources and act accordingly.

To understand Islamic Law, it is necessary to mention its purposes. First of all, this legal system was established with a social effort. Modern legal systems, on the other hand, are state and/or authority-based. Due to social action and Islamic law's nature, it simultaneously has political and legal provisions. In other words, it is possible to comply with the rules of Islamic Law by fulfilling the existing religious requirements of a believer. A legal order is established with the understanding of fulfilling Allah's command. Disobeying the rules means believing that there is an otherworldly punishment besides being punished in society. This is especially important in cases where more evidence is needed. In the case of a crime, if there is too little evidence to allow legal punishment, the possible guilty person suffers from conscience.

Therefore, it should be remembered that Islamic Law also necessitates moral education. Islamic law, which differs from modern legal systems, also shapes the relationship between individuals, the state authority, and the person himself and his beliefs. With this regulative purpose, the aim of getting people closer to the creator is also served. The main goal of Islamic law is to present a human model who believes in the existence of a holy day where all kinds of actions and evaluations will be held accountable and who is concerned about the hereafter with the principles of belief, law and morality[54].

As in modern law, there are issues such as human rights, the rule of law and minorities based on the establishment of legal pluralism in Islamic Law. In that case, it is necessary to look at these concepts from an Islamic point of view to understand how the idea of multi-law is shaped in Islamic Law.

[54] Ahmet Yaman, 'İslam Hukuk İlmi Açısından Makâsid İctihadının ya da Teleolojik Yorum Yönteminin İlkeleri Üzerine' (2002) 2 (1) Marife Journal 32-33.

1. Human Rights in Islam

In modern law, a human being as an individual is a being with various rights. In addition to these rights, some responsibilities come from being an individual. For this reason, man is a direct subject of law. However, it should be underlined that throughout history, human beings did not have rights and responsibilities in the present tense. It should also be noted that throughout history, women, various professional groups, minorities or individuals from other religions have faced inequality. For this reason, agreements prioritising equality among nations, especially the Universal Declaration of Human Rights adopted in 1948, have begun to be made[55].

In the belief of Islam, on the other hand, a human being is a being who came to the world to complete a test, and therefore he must decide of his own free will. As it can be understood from here, a person should not be subjected to pressure during the examination process. Only then he can make the right decision. However, there are things to be done from the outside to get rid of prejudices. It's essential to get him thinking. Thus, it will be prevented that a person creates bias and pressure on another person[56].

Islam law; argues that five essential elements are valid for people to decide their freewill and act with their own will. These are called zarûrat-ı hamse (five critical areas). It is possible to reconcile these with understanding fundamental human rights in modern law. Because zarûrat-ı hamse; It refers to basic human rights (maslahat), including belief (religion), life (soul), mind, generation and property. In fact, according to Islam, even if the individual is himself, he cannot ignore these rights; however, if the person attacks these fundamental rights of another, their rights may be restricted. Another factor that should be added here relates to non-Muslims, especially in the Middle Ages. These five fundamental rights, inviolable according to Islam, are valid for non-Muslims only if they agree with Muslims. In other words, faith or eman (peace treaty) is required for immunity (ismet) for non-Muslims. The continuation of wars, especially between Muslim and non-Muslim countries in this period, can be interpreted as the reason for this situation[57].

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55 Kumaş (n 16) 154.

56 Abdullah Demir, 'İslam'da İnsan Hakları' (2018) II. Türk Hukuku Tarihi Kongresi Bildirileri 518.

57 Kumaş (n 16) 156.

Another issue that needs to be addressed in human rights is the issue of leaving religion and punishing it. Although it is said in various verses that there should be no oppression in Islam[58], the crime of abandoning religion (apostasy) in some sects is death. However, it should be noted that the debate on this issue continues even today, and the issues of apostasy or the death penalty can be interpreted differently. Among the reasons for the differences in interpretation here are the changes in the practices of the sects. For example, Hanafis state that the death penalty cannot be imposed unless one directly denies religion and openly attacks Islam. In other words, leaving religion is not seen as a reason for death; but as a reason to act against Muslims and Islam. Again, Hanafis are of the opinion that committing a crime by a Muslim or non-Muslim will not cause any change. If a person kills another person, whether the murderer is enslaved, free, Muslim or non-Muslim does not change their sentence and/or its rate. In any case, there is a need to retaliate against the murderer. Again, this also applies to bodily harm[59].

2. The Understanding of the Rule of Law According to Islam

There is a distinct understanding of administration in Islam. According to the verses, Islamic scholars believe that the state is necessary for both mental and religion[60]. It should be said that some Mu'tezilî (a person from the Mutezile sect) and Kharijite thinkers do not hold this view. The essence of Kharijite is a community that directly obeys divine revelation, the ideal ummah understanding. However, the general opinion is that the agreements made by the Prophet Muhammad, Messenger of Allah, after the Medina migration and the Medina Convention are examples of a kind of constitution. Starting directly from the life of the Prophet, It is thought that the religion of Islam also contains the concept of state. Again, it should be added that the Qur'an does not directly judge the idea of a state or how it should be.

Therefore, there needs to be direct information about the organisational structure in the holy book. However, tribes are often mentioned, which can be

58 Surah Al-i Imran 86-91. Verses, 54th Verse of Maide Surah and 106th Verse of Nahl Surah.

59 Mehmet Köroğlu, 'İslam Hukukunda Ölüm Cezasını Gerektiren Suçlar' (2015) 43 Atatürk Üniversitesi İlahiyat Fakültesi Dergisi 216; Ahmet Aydın, 'Modern Hukukta ve Hanefi Mezhebinde Öldürme Türlerinin Maddi ve Manev Unsurlar Açısından Mukayesesi' (2018) 7 Mîzânü'l-Hak İslami İlimler Dergisi 27-28.

60 Ömer Menekşe, 'İslam Düşünce Tarihinde Devlet Anlayışı: Mâverdi ve Nizâmülmülk Örneği' (2005) 5 (2) Dinbilimleri Akademik Araştırma Dergisi 193.

associated with a state phenomenon. What the Prophet Muhammad did also gives an idea about how to shape a state structure suitable for Islam. In addition to these, the Qur'an positively mentions the rulers who rule their people in justice and goodness, and in fact, it is emphasised which points should be paid special attention to in the administration of the state. Again, the Qur'an condemns those who govern their people with oppression and violence. It is also stated that the rulers cannot have sanctity[61]. In other words, a state administrator takes this power from the people. They are not appointed by divine power; in this context, their subjects can dismiss or punish them if their rulers act unlawfully. In Islam, the authorities of the rulers are limited both by the Qur'an and sunnah, which is the primary source of legislation and by the will of the society, namely shura. Therefore, according to Islam, legal rules are far superior to the concept of the state.

According to Kumas, as expressed in Mecelle, the principle: "To administrate (saving on) Ra'iyye, in other words, tebe'a (tribes) is menut (connected) on maslahat (common good)" explains the political philosophy of Islam. This principle binds the legitimacy of political authority to the protection of fundamental human rights (ismet). In other words, rulers should protect people's freedom in their beliefs, their life, generation, property and mind being. Otherwise, they may actually exist, but they cannot be legitimate. The struggle between Nimrod and Prophet Ibrahim, the battle of Prophet Musa with the Egyptian ruler Ramses II. (Pharaoh), and the story of the young people who escaped the persecution of the Roman state and took shelter in a cave because of their beliefs are told in the Qur'an. In this way, it explains the political viewpoint of religion for state rulers and those who gave them power[62].

3. Non-Muslim Understanding of Islam

Just like in modern law, there is the phenomenon of the other in Islamic Law. In this context, there are non-Muslims as the infrastructure of multi-law in Islamic law. Before the modern state structure, the other was seen as the enemy in other legal systems and Islamic law. In many parts of the world, race, belief, political opinion, and sexual orientation paved the way for societal hostility. However, with the transformation of human rights, especially in the West, these

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61 Saffet Köse, 'İslam'da Hukuk Devleti İlkesinin Dinamikleri' (1996) 1 (2) İLAM Araştırma Dergisi 13.

62 Kumaş (n 16) 164.

problems have been tried to overcome. But today, it is difficult to say that the hostility to others has been completely devastating. In daily life, the debates continue on two extremes of exclusion and inclusion.

In the modern world and legal structure, there can be many reasons for the phenomenon of the other. As has been said, many factors, such as race, ethnicity, language, and skin colour, determine the relationship between the individual and society. When we look at Islam, it is seen that there is only one factor based on the concept of the other. Characteristics such as where the person comes from and skin colour does not cause him to be the other. In Islamic Law, the religion or disbelief that an individual believes is the only factor that creates the "other" phenomenon. There is a sharp distinction between those who believe in the teachings of Islam and those who do not. Accordingly, characteristics such as the demographic structure of the person do not constitute sufficient reasons for him to be the other. The fact that an individual is not outside of Islam is enough for their social acceptance. However, it should be noted that Islam categorises other people according to whether they are close to the line of belief or not. In addition, even if the pluralist view that Islam has developed about others has religious foundations; It should also be noted that there is no effort to establish a spiritual legitimacy ground for them[63].

In the understanding of religion in the West, there is the idea that all religions deserve equal respect. Therefore, no religion can be said to be superior to the other. However, Islam is the last religion and is seen as inclusive of all others. Therefore, it is not wrong to say there is a distinction between Islam and other religions in Islamic law. When the primary sources related to the Qur'an and Islam are examined, it will be seen that there is a two-way approach to the phenomenon of the other in religion and law based on it[64]. These are in the form of religious and worldly perspectives[65]:

a. The Other Phenomenon from a Religious Perspective

There are expressions in the Qur'an that confirm the religions and prophets before it. That is, the Qur'an accepts other faiths. In addition, there is no effort

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63 Cemal Özel, 'İslam ve Öteki: Erken Dönem Müslüman Toplumlarında Öteki İmgesi Üzerine Bir İnceleme' (2021) 7(2) Yakın Doğu Üniversitesi İlahiyat Fakültesi Dergisi 258.

64 Cafer Sadık Yaran, İslâm ve Öteki: Dinlerin Doğruluk, Kurtarıcılık ve Birarada Yaşama Sorunu (Istanbul: Kaknus Publications 2001) 11.

65 Kumaş (n 16) 172-173.

to abolish previous religions or to destroy their followers. Therefore, Islam has a structure that defines itself not with beliefs that it considers enemies but with its friends. Religiously, everyone is descended from the same mother and father; therefore, everyone has kinship/brotherhood. It also aims to reveal common points with other religions. Thus, an environment of dialogue is established between Islam and other religions. While presenting its values and teachings, Islam sometimes criticises different beliefs but does not contain hostile discourses against them. So much so that creator said to the Prophet, "Call to the way of your God with wisdom and good advice, and fight them in the best way." It was commanded, and he was advised to explain religion to people. The fact that the Prophet made an agreement (Medina Convention/Document) with the Jews and formed the political basis of living with them right after he came to Medina can be considered an indication that there was no hostility and that the lifestyles of others were respected.

Based on the information in the Qur'an and Sunnah, it is possible to explain the groups that can be considered other: Polytheists, Jews, Christians, Sabians, Magi, Dehris, Hypocrites and Apostates.

b. The Concept of the Worldly Other

All people interact with each other. Apart from religion, people from different faiths coexist in various fields. The concept of the other, which people who live in multiple groups in worldly life only by contacting each other, use to describe those who are not their own, is also valid for groups that have adopted the Islamic belief. They lived, believed, acquired property, married, had children, etc. It is necessary not to interfere with the most fundamental rights.

4. Human-Centered Law in Islam

Even if people do not have the same religion or values, they must have various rules to live together and maintain this without conflict. Based on the belief that Allah is the Creator of all living things, Islam advises that every living thing should be given this value. However, as a requirement of the human understanding of Islam, all individuals, Muslim-non-Muslim, free-slave, male-female, and child-adult, are subjects of law and have certain rights and powers. Again, although the rights are equal according to religion, there is no requirement to have the same legal order.

According to Islam, although all people have the same fundamental rights, the reflection of these rights in practice may be different due to the religion or culture of the individual. Undoubtedly, it is difficult to say that equality is used in every segment of society in every Islamic legal order. However, although correct practices are not applied in practice, the primary sources of Islam, the Qur'an, the life of the Prophet[66] and the Sunnah's, suggest equality and good communication. Due to the different practices in historical processes, the claims of some orientalists that non-Muslims living in Islamic society are deprived of fundamental human rights and are subject to law continue today[67].

5. Example of Legal Pluralism in Islamic Law: The Medina Convention

The primary purpose of the Prophet Muhammad, who migrated to Medina after 12 years of Mecca, which passed with various troubles and uneasiness after he became the messenger of Allah, was to tell people about the hereafter, belief in Allah, worship and basic moral rules. As a matter of fact, during the period of immigration to Medina, the current social conditions of Mecca were a place where suitable needs could not be provided for the dissemination and correct understanding of religion. While Islam advises believers to socialise, this could not be achieved in Mecca, and the hijra took place in 622. This new settlement environment is where theoretical knowledge can be put into practice for the socialisation of Muslims. But since this migration has the potential to cause conflicts between Meccan immigrants and Medina's Ansar (In Islamic literature, "Ansar" was used for the Muslims of Yathrib -Medina- who belonged to the Aws and Khazraj tribes, who helped them immensely by sheltering and protecting the Prophet and the immigrants in their homes); after the migration, brotherhood was declared between these two groups.

Prophet Muhammad was trying to create an organisation that included everyone living in Medina here. A large meeting was organised with the participation of both Muslims and non-Muslims to prevent the problems that may arise in Medina, as well as to solve the existing instability; Here, blood feuds were forbidden, and it was decided that all groups of the society should join

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66 For example, In the agreement that the Prophet made with the Christians of Najran, their property, lives, lands, religion, ready and absent tribes, their churches are in the embezzlement of Allah and his messenger Muhammad, and no uskuf (bishop) can be prevented from his duty, no priest from his priesthood, and that no soothsayer can be prevented from being a priest. (See: Ebû Yûsuf, Yâkub b. İbrahim (d. 182/798), Kitâbu'l-Harâc).

67 Kumaş (n 16) 166.

forces for the protection of Medina. In this meeting, a consensus was reached on the main topics and the principles that will re-establish the social structure; "Kitab (Book)" with its classical name and the Medina Convention with its name in the literature[68].

In addition to ensuring that different tribes respect each other's lifestyles, this contract includes additional legal considerations on rulership and judiciary. For example, according to the convention, a person who commits a crime against a tribe will be deemed to have committed a crime against all segments of society. The provisions on murder are a clear example of this. For a person killed in a tribe, it will not be considered a crime only in that tribe, but it will be a crime for the whole society. The common attitude of all parties towards those who plan and implement crime is valuable in terms of socialisation and is an actual example of crime and central law[69].

The new formation in Medina has three foundations. The first is the construction of a masjid where Muslims can come together and sometimes discuss the state's most critical issues. The second step is the establishment of a true brotherhood between the refugees from Mecca and the Ansar Muslims from Medina. The third step is to prepare and announce a text that regulates the life order of Muslims among themselves and their relations with non-Muslims. With this text, the provisions that made the groups in Medina a society but considered these groups equal and left them free in their religion were mutually accepted.

Naming the text in question the 'Convention/Constitution of Medina', Hamidullah argues that with this constitution, the procedure for individuals and tribes to establish their rights has been abandoned, and the power of judgment and execution has been transferred to the central authority. This determination may give the impression that a single legal system valid for everyone has moved from a plural structure. However, the foremost authority adopted an understanding that listens to the plural structure instead of accepting a standard legal system valid for all people. Therefore, non-Muslim tribes also preserved the opportunity to apply to their jurisdictions according to their laws[70].

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68 Okur (n 50) 27-28.

69 İbid 28-29.

70 Tögel (n 3) 78-79.

B. The Application of the Concept of Pluralism in the Context of the Ottoman Millet System

The Ottoman Empire was founded in 1299 and has hosted many changes in the field of law throughout its existence. Especially in the period when modern law emerged and developed in the Western world, even though it was affected by this change, it continued to adopt the rules of Islamic Law. Its attempt to blend Western and Eastern legal systems places the Ottoman Empire at the centre of research as an actual example.

Undoubtedly, there have been periods of divergence from the ideal regarding implementing Islamic Law in the process of change and transformation. But especially after the Tanzimat period, necessary steps were taken in the field of human rights and equality in the Ottoman Empire. Ottoman Turks began to capture universal human rights standards at their classical age (14th Century-19th Century). In sum, in the Ottoman Era, personal rights and freedoms were fundamental; the Qur'an provided their legal basis. Even in the early 16th century, before medical surgery was popular, patients had to sign a paper waiving their rights to the courts before any medical operations were performed, and jobs in the public service sector under the Ottomans, were equal for Muslims and non-Muslims[71]. Like other Islamic states, the founding element of the state in the Ottoman Empire were Muslims.

Although non-Muslims who deserve to live in Islamic society by agreeing with Muslims are equal regarding rights and responsibilities, political supremacy belongs to Muslims[72]. However, it should be noted that during the Ottoman era, many Vezirs (State ministers) or Grand Vezirs (Prime Ministers) were appointed non-Muslims or other Muslim races who were not Turks[73]. Sharing the highest political positions with non-Muslim citizens was a great discovery at that time.

Islamic law was accepted as the official legal order of the state; The legal status of non-Muslims was determined as suggested by this legal system. Of course, although living conditions, foreign policy and socio-political conditions are influential in determining the place of non-Muslims in the legal order; The area created for them to decide on their fundamental rights and freedoms or

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71 Fatih Öztürk, 'The Ottoman Millet System' (2009) 16 Güneydoğu Avrupa Araştırmaları Dergisi 75.

72 Hoş (n 2) 215.

73 Öztürk (n 71) 74.

their own legal rules have also been shaped according to Islamic rules. Especially after Fatih Sultan Mehmet (1451-1481), a central administrative mechanism called the millet system was tried to be developed. For the period of the Ottoman, the most crucial thing was religion and family supremacy; in other words, the millet system favoured the "fusion of family and the community"[74].

So, first of all, it is necessary to explain in what sense the Ottomans used the word millet. Accordingly, the concept of millet (nation) is far from its current meaning, expressed not by those from the same ethnic group but members of the same religion. In other words, in the Ottoman Empire, tribes were classified according to their faith, and as a result, the state established a hierarchy. While the Ottoman Millet System consisted of three great nations (millet-i Erbia), first of all, Greeks, Armenians and Jews, Catholic and Protestantism were accepted as separate nations in the 19th century. These groups are allowed to be led by their chosen spiritual leaders.

Even when these people do not have the authority determined by law, they can use the state's law enforcement. Thus, conflicts between groups were tried to be prevented, aiming to establish healthier internal relations. In some periods of the Ottoman Empire, spiritual leaders were chosen and appointed by the state by individuals belonging to the relevant religion. In the eyes of the state, these are the people who have the authority to defend their communities' rights and convey their wishes to the institutions of the state. In return for this authority, these leaders were also requested to maintain order in their communities on behalf of the state. The community members' disrespect and collective revolts against these leaders were deemed to have been made against the state[75].

It is possible to collect the powers given to the spiritual leaders by the state during the Ottoman periods under different classes as judicial and criminal, administrative, financial, and personal. From this point of view, the Ottoman Millet system is an essential and long-term example of legal pluralism. In the Millet System, nations "were treated like corporate bodies and allowed their internal structures and hierarchies; indeed, the Ottoman State encouraged this by dealing exclusively (most of the time, but not all the time) with their head figures rather than the individual members[76].

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74 ibid 72.

75 Kumaş (n 16) 198.

76 Öztürk (n 71) 74.

Non-Muslims depended on their leaders in matters directly related to law, such as marriage, divorce, alimony, inheritance, and foundation establishment within their communities. The central legal system refrained from imposing a sanction on these issues in other religions. In addition to the above matters, within the Ottoman Empire, the solution authority in the cases of non-Muslims related to their faith was their leader. By adopting their legal system, especially the Greeks, who are a vast group, it is known that they continued the Roman law and the Byzantine judicial tradition[77].

Another information that needs to be conveyed is that spiritual leaders do not have the authority to hear criminal cases. When it comes to a criminal case for anyone living in the Ottoman lands, the Shari 'a Courts are authorised. Crimes such as killing, adultery, stealing or extortion are punished according to the provisions of Sharia. Based on this, the logic of the related crimes against society was found. However, although it is a crime in terms of Islam, matters that are not considered crimes in other belief systems or crimes that are not committed are excluded from the central legal rules. In some cases, it is seen that various other exceptions and facilities were made for non-Muslims within the Ottoman Empire. Although it was not implemented during the Fatih period, it was observed that non-Muslims were subjected to a distinction in the form of paying half of the penalty given to Muslims, especially in financial penalties with Kanuni[78].

As a result of the codification activities that started in the last period of the Ottoman Empire, the pluralist legal structure based on the millet system was terminated, and a legal form was created in which all tribes were seen as having equal status with a centralised understanding. Even in family law, where non-Muslims were always treated differently throughout the Ottoman Empire, there was a need for the state to regulate and issue a new decree binding all tribes. The justification of the Law of the Family Decree published on October 25, 1917, contains the following statement: "It has been stated that it is easy for Muslims to base the law based on the inventions of civilisation on the principles of Fiqh, and for non-Muslims, the necessary provisions will be taken from the laws of their religion and sect, and the law will be compiled to apply the common rules to everyone".

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[77] İbrahim Durhan, 'Tanzimat Döneminde Osmanlı Yargı Teşkilâtındaki Gelişmeler' (2008) 12 (3-4) Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 58-59.

[78] Kumaş (n 16) 198.

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With the regulation in the Fatih period, it was decided that non-Muslims could sell alcohol in taverns in their neighbourhoods. Although the dhimmis had the right to use religious symbols publicly, they were not allowed to perform loud rituals, ring bells, or erect crosses on the roads. In addition, some regulations on the dress, which were applied in previous Islamic countries, prohibitions such as not riding horses in the city and not employing enslaved Muslims and concubines were also used in the Ottoman state. But the Tanzimat Edict declared by Mahmud II. in 1838 abolished the distinction between Muslims and non-Muslims in the context of fundamental rights. The idea of equality defended by this edict, by the idea of Hanafi "ismet", offered equal rights and powers to everyone[79].

CONCLUSION

Researchers, who think that the multi-legalism that emerges with the simultaneous application of different legal systems existing in geography has positive effects on people, argue that the state does not have absolute dominance over individuals and groups and that people thus gain the ability to direct the power holders and the institutions of the state. According to researchers who have this idea, only the application of state law can lead to a distance between the state and society over time. The law can become a tool for the domination of the power holders in such cases. Again, the understanding of the law, which is far from the conflicts in the state's social life, will not be

[79] Kumaş (n 16) 199; Hoş (n 2) 214-215.

realistic for solving the problems. Creating an environment where people will want to avoid resorting to the law for an answer is inevitable. Whereas as long as the relationship between law and culture continues, the way for expressing identity and freedom will be cleared. In this way, the movement area of many liberties of individuals will naturally be formed. The existence of a fixed and single legal system will cause the cultural and identity elements of people to change over time and will pave the way for the loss of values.

A single legal system will appear as one of the most critical obstacles to multiculturalism. This is also an essential obstacle to the discovery of individual potential. In addition, leaving the law to the state's monopoly may cause the law to become an element of fear and punishment. Based on all these, legal pluralism is a key that opens the way for freedom and development. But this is not the only advantage. In a social order that allows different groups of people to have their own legal rules, there is also the possibility of increasing mutual respect and tolerance. It will be possible to minimise conflicts between different groups or people belonging to other groups and to get the support of various groups for competence and state administration simultaneously. Legal pluralism is only sometimes sufficient to obtain these benefits. In cases where many different groups live together, there is a need for legal rules that everyone must comply with simultaneously for the state's authority to be felt.

Although applying legal rules that overlap with culture and identity in social life can be tolerated, it is necessary to create social awareness by giving common duties and responsibilities. Otherwise, there is a possibility that an endless number of legalities will emerge and that they will break out of control. This approach may not create a realistic situation for solving problems. As a result, even if legal pluralism does not lead separate blocs in society to live in harmony, it is essential to stabilise their legal status against each other and live in peace. In the historical process, the state machine has become stronger daily. The concept of the nation-state emerged with the modern state, and in this context, ideas developed in parallel with the concept of the nation-state. While some national state perceptions and practices disregard the values mentioned above, which are the achievements of humanity, some give importance to the rule of law to protect these values. The understanding of legal pluralism in nation-states has been evaluated negatively as it will weaken the authority and create an uncontrolled space. Because in such wild areas, the values in question can be violated, representing a return from the gained values.

Considering that law has a purposeful and normative structure, it can be accepted that it has purposes such as justice, social order and security. For these purposes, ensuring social order and security are phenomena that can be realised with the organised mechanism of the state. To achieve this, the state machine has to implement practices without referring to distinctions such as religion and ethnicity. However, the awards that deepen due to cultural and religious differences may be questioned in understanding legal pluralism. In the historical process, these socio-political differentiations have been used by colonial states to create new power relations.

Especially in societies where tolerance is not dominant and there is a risk of internal conflict, understanding legal pluralism may cause disputes between groups. These practices may lead to the deterioration of social order and peace. While it is foreseen that the understanding of legal pluralism will alleviate the judicial burden of the central state, the confusion that will arise due to the desire of each culture to apply its own rules is ignored. It will be possible for each individual or group that sees themself as different from other people in the society to have partially or entirely different rules of law, in which case, as the fragmented structure increases, the powers that we can call legal rules will also increase, maybe after a while, the rules will become uncountable. It will be utterly inextricable which group's rule will be applied to which concrete event. Legal turmoil will arise if such an understanding is realised, and significant problems may occur in the proceedings[80].

[80] Hoş (n 2) 188-189.

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