

Islamic Law and Change: Constants and Variables*

Translated
Article
Çeviri

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The essence of Islam is changeless, and there are religious, practical and moral institutions that keep this essence standing, as well as provisions regarding these institutions. However, in order to ensure its vitality, its institutions are in need of constant renewal (tadjudid), just as how cells in the human body regenerate over time. When these two features cannot be sustained together, either the Islamic law will completely metamorphose in a way that it cannot be called Islamic law anymore or it will become frozen and cannot exist in parallel to life, which will cause it to be pushed left out of life and be functionless. The survival of the completed Islamic shari'a until the end of days will be ensured by the ulema. What is expected from the ulema is to fulfil this responsibility personally.

Keywords: Fiqh, Changing Ahkâm, Canonical Text-Phenomena Relationship, Shari'a, Maqasid, Stability, Tadjudid.

Abstract

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İslâm Hukuku ve Değişim: Sabiteler ve Değişkenler

İslâm yedisinde ne ise yetmişinde de o olacak şekilde asla değişmeyen bir öze ve o özü ayakta tutacak birtakım şer'î itikadî, amelî ve ahlâkî kurumlara ve onlarla ilgili ahkâma sahiptir. Ancak hayatîyetinin sürdürülebilmesi için de vücuttaki hücrelerin sürekli yenilenmesi gibi kurumların yenilenmeye (tecdid) ihtiyacı vardır. Bu iki özellik bir arada tutulamadığı zaman İslâm hukuku ya tamamen başkalaşır ve artık ona İslâm hukuku denemez ya da donuklaşır ve hayata koşut varlığını sürdüremez, hayatın dışına itilir ve işlevsiz kalır.

Özet

Anahtar Kelimeler: Fıkıh, Ahkâmın Değişmesi, Nass-Olgu İlişkisi, Şer'îa, Makâsîd, İstikrar, Tecdid.

Introduction: Fiqh and Its Characteristics

Despite being narrower in meaning, the term Islamic Law is generally used to denote what is known as fiqh. Fiqh, on the other hand, is the systematized form of shari'a that is placed in a certain cultural mould. Fiqh is a human activity and is mentioned in relation to people. Shari'a, however, is the embodiment of religion. This means that there is neither a relationship of being the same, nor a relationship of being different between these concepts.

The belief of tawhid is essential in Islam, and at the core of this belief lies the assignment of the act of creation (khalq) and bidding (amr) to Allah.

The process of Allah's acts of imposal regarding the religion, especially his disposals regarding tahkam is collectively called "tashri" and this authority belongs solely to Allah. No one other than Allah has the authority to perform "tashri".

Creation and adornment, on the other hand, is called "takwin". By its nature, takwin comes before tashri. In the verse "Alaa lahu khalqu wal-amr",¹ takwin and tashri correspond respectively to the words khalqu and amr.

Allah, who is glorious at every moment, is transcendent as well as immanent. Therefore, he intervenes in his creations both through takwin and tashri.

Through tashri, Allah sends down an extract of his absolute realities down to earth in a way that suits the needs of humanity as the "spirit of amr" and² attributes it to the humanity as a "shari'a".³

The aim is to subordinate people to al-amr, not to their whims and desires.

¹ al-A'râf 7/54.

² al-Shūrâ 42/52 (مَنْ عِبَادَتًا وَأَنْتَ لَتَهْدِي إِلَى صِرَاطٍ مُسْتَقِيمٍ).
 (مَنْ عِبَادَتًا وَأَنْتَ لَتَهْدِي إِلَى صِرَاطٍ مُسْتَقِيمٍ)

³ al-Jâthiya 45/18 (ثُمَّ جَعَلْنَاكَ عَلَىٰ شَرِيعَةٍ مِّنَ الْأَمْرِ فَاتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَاءَ الَّذِينَ لَا يَعْلَمُونَ).

However, the tashri is not independent of the takwin: it is placed on the axis of takwin. The relationship between them is like the relationship between a device and its user's manual. Therefore, there is no tashri that does not have a corresponding takwin. If there is, it must be interpreted in some way.

The most fundamental basis in the takwin of humanity is fitrat. All people are equal on this plane. Fitrat is the predisposition that exists inherently within humanity as a potential competency. The whole purpose of tashri is to enable this predisposition towards becoming an actual competency.

From Allah's perspective, tashri is akin to writing a user's manual for a device, and from the perspective of our prophet and his successors, tashri and humanity are akin to a project that is under construction. In order for the structure to emerge as planned, it is necessary to comply with the project during the construction process. In this context, the undertaker of the project does not have the authority to make amendments: he is limited to the permissions granted by the project's owner.⁴

Any changes to the Islamic law must be based on and balanced around this principle.

1. Fiqh and Change

After this general introduction, it would be appropriate to discuss the following issues on fiqh and change:

1. The sources of Islamic law is a singular thing, as required by the principle of tawhid: Revelation (Kitâb).

Sunnah is the expansion of the Quran and it is immanent to the Quran. In other words, Sunnah is the form of the Quran that is embodied within a certain cultural and social structure. It therefore cannot be considered to be separate from the Quran.

Ijma (consensus of the scholars) is a kind of a protective authority, which determines how divine revelations should be understood. Through this authority it possesses, it aims to establish and protect the main body of Islam, as well as its fundamental institutions.

Qiyas (comparison), on the other hand, is the method that allows us to reach the unknown through what is known. It is not a thing that provides evidence but is a thing that guides. It does not bring something into existence; rather, it discovers new things.

The reason, though always in play, is not the source. However, it is the most fundamental device for understanding, interpreting and applying the

⁴ Regarding takwin and tashri, see Mehmet Erdoğan et al. "Teşri ve Hz. Peygamber'in/Sünnetin Dindeki Yeri", *Kur'an Sünnet İlişkisi-Kur'an'da Risâlet ve Sünnetin Teşriî Değeri*, (İstanbul: Kuramer, 2020), 311; Mehmet Erdoğan, "İslam Hukukuna Göre Şeriat Nedir Ne Değildir?", *Şeriat Nedir Ne Değildir?*, ed. Adnan Demircan (Ankara: Fecr Yayınları, 2019), 121.

evidence. It is a tool for measuring and evaluating, but it is not the source of values and criteria.

Thing such as istihsan, istislah, sadd al-zariah, urf, darura, and so forth, which are written in the books of method and termed as auxiliary evidence, on the other hand, are actually methods or principles rather than resources. For example, the principle of maslahah is a principle that is applied to determine whether the results that will be achieved with valid means of evidence will fulfil the goals or not. Otherwise, the maslahah is not the evidence (means) that leads us to the verdict (result).

2. Although Islamic fiqh is divine in terms of its sources, it is the product of human beings in its institutionalized and systematized form. Therefore, fiqh formations that have emerged as a process are referred to by the names of leading imams of interpretation schools such as Hanafi, Shafii, Maliki, and Hanbali, and not by divine or prophetic names (that is, with names that belong to Allah).⁵

3. Islamic law aims to achieve justice. Essentially, the law is the system that serves justice with its entire means. This means that this system is essentially a means, not an end. In this context, if justice cannot be achieved if the canonical texts are implemented as they are, it will become necessary to seek and find new solutions. The clearest example of this is the implementation of inheritance jurisdiction (awal) by Caliph Omar. Under certain circumstances, the total of the shares can exceed the total of the inheritance, if they are divided according to the verse on inheritances. In such cases, giving a full share to an inheritor can mean a reduction in the number of shares given to the remaining inheritors. Under such circumstances, justice requires that this reduction of shares be reflected proportionally to everyone, and that is what is done.⁶

⁵ Meanwhile, Ibn Taymiyyah's conceptualization of descended munazzal shari'a, muawwal shari'a, munaddal shari'a can be remembered in this context. See Ebü'l-Abbâs Takıyyüddîn Ahmed b. Abdilhalîm İbn Taymiyyah, *Evliyâu'r-Rahmân ve evliyâu's-Şeytân* (Dımeşk: Mektebetü Dâru'l-Beyân, 1985), 107. Also see. same editor: *Mecmû'u'l-fetâwâ* (Medine: Mecmeu Melik Fehd, 1995), 1/67, 109; 11/268, 507; 37/366. Abû Abdullâh Şams ad-Din Muhammad b. Abû Bekr İbn Qayyim el-Jawziyya, *et-Turuku'l-hükmiyye* (Dımeşk: Mektebetü Dâri'l-Beyân, ts.), 137.

⁶ This event occurred for the first time under Caliph Omar. A woman passed away, leaving behind a husband and two sisters (her own blood relatives). According to the division made in the Qur'an with definite wording, it is necessary to give half of the (½) inheritance to the husband, and two thirds (2/3) to the sisters. For example, if the total of shares is accepted to be six, three shall be given to the husband, and four to the sisters. In reference to this event, Caliph Omar said: "By Allah, I couldn't make sense of the situation. If I give what the deserved shares to the husband, then the sisters will be aggrieved. But if I give the sisters' right first, then the husband's would be incomplete!" Thereupon, he consulted the Companions and Abbas İbn Abd al-Muttalib said, "Just as when a man has six dirhams and owes three to one man and four to another, we pay by making six seven. We should do the same in this situation". Thereafter, the implementation of Awliya was decided upon. Comission, "İrs", *el-Mevsûatü'l-fıkhiyyetü'l-kuveytiyye* (el-Kuveyt: Vizâratü'l-Evkâf ve's-Şuûni'l-İslâmiyye, 1983), 3/37.

Likewise, the matter of Himariyya is also a good example in regards to seeking new solutions in the jurisprudence for inheritance.⁷

4. Ahkam al-shar'iyya (furu al-fiqh), which constitutes the Islamic law, is based overwhelmingly on supposed evidence. Supposed evidence requires actions, but not the creed. Usul al-fiqh (in the sense of the foundations of fiqh) is certain/must be certain. As also mentioned by Shatibi (in his first three preambles⁸), this certainty is achieved via the induction of the evidence. These are the essentials that we call the necessities of religion: such as the prayers, fasting, zakat, and pilgrimages being farḍ, and adultery or usury being haram. After these general principles are accepted, it is seen that most of the information about their details are indefinite. Therefore, their denial does not necessarily mean blasphemy.

5. According to the principle of tawhid, Islamic fiqh has a feature that embraces life. As he is the master of the universe, all disposition regarding the universe shall belong to Him. As such, it is not possible to determine and limit an area in terms of Islamic law. In the presence of the Malik al-Mulk (The Owner of All), no other being can own anything. Just as the slaves and their wealth belong entirely to their master, the servants, along with the universe in which they live, belong to Allah.

This is not an obstacle to the possibility of the administration of worldly affairs and otherworldly affairs separately. The only requirement here ensuring that both authorities are bound by the same Book. Likewise, there is no harm in pools being different and numerous in terms of tawhid, provided that they are being fed by the same source.

Prophet Muhammad's existence both as a prophet and as a leader of the state is not a religious obligation.

6. This general acceptance does not mean that there is no distinction between areas according to the fiqh. For example, while the rules that a servant will obey in fulfilling his responsibilities to his Lord are more specific, the rules

⁷ Muhammad Abū Zahra, *Malik ḥayātuḥu wa-ʿaşruḥu, ārāʿuḥu wa-fuqḥuḥu* (Egypt: Matbaatu'l-i'tisām, n.d.), 324. If a woman passes away and if she leaves behind a husband and a mother, or a mother and two brothers or sisters, or a mother, a brother and a sister, or two parents and a (blood) brother... Then this matter is called "al-Masalat al-Tashrik". Because, as determined by the relevant verse, the siblings born from the same mother share one-third part of the inheritance that shall be given to the siblings from the same mother. This matter is also called the matter of Himariya, Hajariya, and Yammiyya. The reason for this is the following event: Someone visited Caliph Omar with a similar issue of inheritance. He gave a fatwa, stating that siblings from the same parents shall not be included in the inheritance shares of siblings from the same mother. Thereupon, those siblings with the same parents said: "Suppose our father was a donkey!" Or, according to another rumour: "A stone thrown into the sea". Aren't we all from the same mother? "Thereupon, Caliph Omar said: "You said it right!" Thereafter, he changed his opinion and gave the fatwa to allow them to participate in the one-third inheritance.

⁸ Ebū İshak İbrahim b. Mûsâ eş-Şatibî, *el-Muvâfakât İslâmi İlimler Metodolojisi*, trans. Mehmet Erdoğan (İstanbul: İz Yayınları, 2015), 1/23.

regarding his daily life are not detailed and clear enough. The distinction between worship and habit (itiyat) is quite clear.

7. The acts of those who are responsible constitute the subject of fiqh, and in terms of religious address, they are not all in the same category. Demands of the religious law (Khitap al-Shari) come in the forms of direct demands (demands of action and demands of abandonment), as well as things that are optional. It includes in its scope farḍ, wajib, mandub, mubakh, tanzihan makruh, tahriman makruh, and haram. Therefore, all things ranging from obligatory to optional included within this scope. This means that the fiqh presents a flexible structure.

On the other hand, although they are the same in characterizing what is farḍ and what is haram, not all provisions are on the same level. In this context, there are three levels:

Daruriyyat, hajiyyat and tahsiniyyat. Covering oneself during prayer, five daily prayers, and prayers themselves being farḍ is an excellent example of this phenomenon. Although all of these are farḍ, they are not at the same level (strength). Therefore, the ones in lower orders can be discarded in the favor of those in the higher levels, provided, of course, that both cannot be fulfilled at the same time.

The fact that the provisions have such a hierarchy within themselves provides the opportunity to easily adapt oneself according to necessities or circumstances at hand.

8. Similar to the allegory of shajara al-mutayyibah,⁹ fiqh is like a magnificent tree that consists of usul (roots), furu (the branches), and thamara (fruit). Accordingly, fiqh judgments are not just necessary rules of ahkam. They must be placed on the axis of faith. They are ultimately aimed at achieving results. This magnificent tree, which was called tafaqquh in the olden days of the religion, came to be called fiqh al-akbar, fiqh al-zahir and fiqh al-batin in time. However, these three branches grew distant from one other and became separate areas of science.

However, this distinction is only possible in the mind, and the fact this distinction is being perceived as actually existing has caused fiqh to lose its integrity. Thus, with the loss of its foundations of belief and less interest being shown towards achieving its moral fruits, it lost its status as a lively, magnificent tree. This causes fiqh to lose its vitality. Efforts to revive the Islamic sciences are meaningful in this respect.

⁹ Ibrāhīm 14/24-25 (أَلَمْ تَرَ كَيْفَ ضَرَبَ اللَّهُ مَثَلًا كَلِمَةً طَيِّبَةً كَشَجَرَةٍ طَيِّبَةٍ أَضَلُّهَا ثَابِتٌ وَفَرْعُهَا فِي السَّمَاءِ تُؤْتِي أُكْلَهَا كُلَّ حِينٍ) "Do you not see how Allah makes comparisons? A good word is like a good tree whose root is firm and whose branches are high in the sky, yielding constant fruit by its Lord's leave. Allah makes such comparisons for people so that they may reflect".

9. For the vitality of fiqh, it is necessary for it to have the opportunity to constantly renew itself. Like all living organisms that cannot renew themselves, fiqh becomes inanimate when it cannot renew itself and can no longer progress in parallel with life. If this happens, it will be left behind, and it will be deemed something of the past. However, fiqh has to be an answer to the throes of life that is formed on the basis of religion. In the absence of this, other systems shall replace it, as there cannot be vacuums in this area of human life.

10. From another perspective, fiqh has two dimensions, one of which is religious and the other is judicial. The fatwa represents the religious dimension. It is up to the person to commit (altizam) to its provisions. This religious aspect represents the subjective experience of religion. The judicial dimension is constituted by the "provisions that are close to the orders of the ulu-al amr". It is represented in the courts by the judgments of the qadis. It becomes effective (reaches alzam) due to the external forces that bind.

11. Ijtihad of the mujtahid is relative to one other. That is, none has superiority over the other. This superiority can only be achieved through altizam and alzam. This means that, if I commit to an ijthihad related viewpoint of a mujtahid, then that will become my religion, and I will be obliged to practice it. Unless I commit to it, it will not have this characteristic of being binding, and I will always have the opportunity to request wisdom from other muftis. However, complying with my own desires and whims will never become an alternative to this. An alternative to a fatwa is another fatwa.

The second way of superiority is through alzam. If ulu-al amr (the caliph/group/institution holding the power of al-amr, that is, the authority) puts forward one of these ijthihads on the basis of public interest and establishes a political will to have it practised, then that view will cease to be an ijthihad and become a provision of law that binds the public. When examined retrospectively, we can see that the need for law in the world of Islam has been met with phenomena that are called maddhabs. Thus, in the past, the maddhab was our civil law. Therefore, changing maddhabs was once upon a time seen as a negative behaviour that should be punished, which damaged the stability and safety of the law and caused chaos.

Before the enactment, the legal rules in force were written in the books of the sect and were determined by the expert (the works titled Uqud Rasm al-Mufti are works that address this subject). The fact that *Majallah* became the law of the Ottoman Empire is the result of the political will, and this is evidenced by the preamble written to it by Sultan Aziz: "Let it practised by those who are concerned." With the legal revolution of 1926, maddhabs also stopped being law (at least for Turkey). This means that Hanafi maddhab stopped being the alzam law for the Muslims of Turkey, and it became our way of religion based on altizam. "Directorate of Religious Affairs" was established instead of the Ministry of Shari'a. As the name suggests, the Directorate is authorized only for matters regarding the religious dimension of Islam. This

means that the Directorate of Religious affairs only explains religious provision in terms of their faith and moral aspects, but it does not act in an attempt to have these provisions be followed.

Therefore, in the period following 1926, the maddhabs stopped being binding and being the law for Turkey (in terms of al \bar{z} am). In terms of altizam, all ijti \bar{h} ads are now on the same, equivalent level.

12. As was the case with the example of the *Majallah*, the need for change that became ever-present in the last couple of centuries were met with difficulties due to maddhab-based concerns. As a consequence, a very flexible, wide and rich opportunity was found in the principle of benefiting from mujtahids outside of the four sects, as can be observed in the examples of the 1917 Family Law Decree, and 1923 and 1924 drafts. Although the regulations introduced and presented as innovations do not belong to any of the four madh \bar{h} abs, the fact that they belong to historical mujtahids, such as Ibn Shabrama and Abu Bakr al-Asam, demonstrates the richness of the heritage of fiqh.

This appraisal stands quite strong, as when some of our scholars attempted to find answers to modern problems within the framework of the ijti \bar{h} ads of the mujtahids, they often found what they were looking for.

13. Although we proclaim that the source of fiqh is al-Adilla, this does not mean that relevant judgments are made in accordance with a piece of evidence. Sometimes, the mujtahid reaches a judgment in his mind or in the face of the event he has personally experienced and then tries to find evidence that will be compatible with this decision/the image that has formed in his mind. For example, Caliph Omar thought about what he would do after the conquest of Iraq and Syria, and consulted with the Companions in regards to the solution he came up with. They mostly supported his solution. However, a group of Companions including Zubayr ibn al-Awam and Bilal ibn Rabah opposed him and insisted on the division of the conquered Iraq and Syria among the warriors, just as Prophet Muhammad divided the conquered land of Khaybar. Being tired of their insistent demands, Caliph Omar had not been able to put his own thought into practice because of this insistence for two or three days. Then Caliph Omar said: "Be sure that I have found evidence against them" and actually used the following verse about Bani Nadir as evidence to prove his point:

مَا آفَاءَ اللَّهِ عَلَى رَسُولِهِ مِنْ أَهْلِ الْقُرَى فَلِلَّهِ وَلِلرَّسُولِ وَلِذِي الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسَاكِينِ وَابْنِ
السَّبِيلِ كَيْ لَا يَكُونَ دُولَةً بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا
وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ

"Whatever gains Allah has turned over to His Messenger from the inhabitants of the villages belong to Allah, the Prophet and his kinsfolk, orphans, the needy, and the traveller in need. This (has been decreed so by Allah) so that they (wealth and power) do not just circulate among those of you who are rich. So accept whatever the Messenger gives you, and abstain from whatever

he forbids you. Be mindful of Allah. For He is severe in His punishment." (al-Hashr 59/6-7).¹⁰

This exemplary application clearly shows that the evidence of the issue was found after the verdict was adopted. As such, it may be wrong to evaluate all the provisions put forward in the name of fiqh as if they were the necessary consequences of the evidence.

13. Relationship between provisions and phenomena. It should be kept in mind that canonical texts, which form the basis of the ahkam, were made to descend or were revealed based on certain phenomena. If the content of the phenomena or its legal results has changed, then insisting on this new phenomenon bearing the old name and being stubborn in regards to the matter of protecting the old provisions within it, is an erroneous approach. For example, as described in fiqh books, a religious marriage contract is concluded with the request and agreement of competent parties in the presence of two witnesses. And even though it contains the exact form and carries the same name, it has become a completely different phenomenon since it will not have any official legal consequences. In this respect, in order for such a marriage to have legal consequences, the necessity of it being registered must also be adopted and moreover, it must be stated that such marriages can only be valid by fulfilling this condition (at least, this being the case should be explicitly stated).

Of course, evaluations about fiqh are not limited to these. However, we desire to be content with what we have discussed here and move on to evaluating provisions especially in the context of change.

2. Addressing Provisions in the Context of Change

2.1. Overall Assessment: Maqasid (Purposes)

When viewed in the context of change, it is seen that the provisions are not always on the same level. Upon the examination of the entirety of the Ahkam, it has been concluded that the general purpose that is being observed in tashri is¹¹ "achieving the improvement of all servants in both the earthly life, as well as afterlife". In other words, the purpose of religion and fiqh, which has become a system based on the provisions of religion, can be summarized as "improvement (salah) on earth, happiness (falah) in the afterlife". The word "Salah" means to improve. Its purpose is to meet all of the needs that the human species can have, both as living beings and as eminent entities that possess nafs al-natiqah (a rational soul). The purpose of religion is to protect people and to transform their natural predispositions into perfection. To quote al-Shatibi, it is to make it (human nature) achieve glory by moving "from

¹⁰ See Abû Yusuf, *Kitâb al-Kharâj* (Beyrut: Dâru'l-Ma'rife, 1979), 116.

¹¹ Şatibi, *el-Muvâfakât*, trans. Mehmet Erdoğan, 2/36.

compulsory servitude to voluntary servitude".¹² This is the only way for human beings to improve themselves. Those who have improved themselves on earth will find happiness in the afterlife. That is to say, they will find what they were hoping for there, instead of their deepest fears.

The world has been equipped with all possibilities and necessities to meet the needs of men (not their passions). These opportunities were offered for people to benefit from and were considered blessings in return. As a result of the stability of ahkam, it has been seen that the ultimate aim is the protection of five basic principles (al-qulliyat al-khamsah). These are the principles of protection of life, protection of the religion, protection of the generation, protection of the mind and protection of the property, respectively. There are also principles called second degree hajiyyah and third degree tahsîniyyât for their collection and protection. However, each of them has the characteristic being complementary to the previous, which act to make them function and to protect them.

The entirety of the ahkam has been shaped first to embody these universal principles, to give them existence, and then to protect them. Some of these are, due to their individual value, are ends (maqasid) and some of these are means (wasail). As such, neither can these principles can contradict each other, nor can they come into conflict. Means are valid as long as they are functional in fulfilling the ends, and the means that have lost their functionality are replaced with ones that can better fulfil this purpose. A good example of this is determining prayer times based on observing the movement of the sun and moon or determining it according to calculations.¹³

These general principles do not differ between nations or their laws.¹⁴ For this reason, it is imperative to always have these criteria on the preservation of the general purposes of Islam in consideration in all kinds of ijtihađ.

Following this general introduction, it becomes necessary to examine whether it is possible to determine an area in relevant law in the relation to change.

2.2. The Possibility of Determining an Area in the Laws Concerning Change

2.2.1. Worship

The fact that the matter of worship occupies a quarter of our resources and fiqh books should be an indication that they are given a great deal of importance. Just as the amphora holds water, there is a need for a shape to

¹² Şatibî, *el-Muvâfakât*, trans. Mehmet Erdoğan, 2/169.

¹³ For extensive information and resources on the difference between maqasid and wassail, and its results, see. Mehmet Erdoğan, *İslâm Hukukunda Ahkâmın Değişmesi* (İstanbul: MÜ İlahiyat Fakültesi Vakfı Yayınları, 2017), 100 etc.

¹⁴ Şatibî, *el-Muvâfakât*, trans. Mehmet Erdoğan, 2/9.

preserve the essence in the context of shari'a, especially in the matter of worship. The matter of religious experience being lived only through a certain form is extremely important for religious law. Otherwise, it would exist like a soul without a body. Since worship is a purely subjective experience, fiqh must concern itself with the objective aspect that is the form. However, these forms only exist to ensure that the purpose of worship is carried out in the best way. In cases where the form requirement determined for worship causes damage to the worship itself, it may become necessary to abandon that form and seek *replacements*, despite the inherent importance of form. In this respect, saying that the farḍ of al-wudu is reduced to three for those without feet and saying that the number of daily prayers falls to four for those who dwell in locations where night prayers cannot occur is dissimilar.

In the area of worship, ahdat is known as bid'ah and counted as mardud.

On the other hand, there have been different applications in terms of "regulation". A good example of this is tarawih prayer being performed collectively under the leadership of an imam, which was called "What a beautiful innovation is this" by Caliph Omar.

2.2.2. The Matters of Haram and Halal

The matter of haram is quite important, as there are certain borders (hududullah) in regards to this concept. For this reason, they were determined by tadat (that is, they were named and counted). Apart from these, it is stated that there are no other harams and it is clearly stated that no one can transform haram into halal or vice-versa.

The primary thing in this regard is the principle of ibaha (allowable) in objects. Evidence is needed not for an object being halal, but rather for it being haram.

An object being haram can only occur in a certain way. For example, a dead, unclean animal is only haram for the purposes of eating it. It is halal to use it for another purpose, such as removing its skin and tanning it. The haram in the context of alcohol is in regards to drinking it. Other uses of ethanol alcohol, which makes the beverage haram,¹⁵ would be halal.

The source of many problems in this regard is the use of words such as "rijs", "fisq" or "najis" out of their theological contexts to construe that the objects that are characterized by these words are dirty, unclean or impure in their essence. Thus, these objects are considered to be materially impure and therefore, anything containing these objects is called dirty or "najis" to express that they are haram.

¹⁵ This organic compound, which is a very useful and useful chemical substance, is widely used as a solvent in the synthesis of all other organic chemicals, especially in the automotive, cosmetics and medicine industries.

In our opinion, this is the very mindset that lies at the root of the recent phenomena of "Halal food" certification. Whether something is haram or not is an essential subject for Islam. But whether something is dirty or clean is above all something about related to our humanity.

2.2.3. The Matters Regarding Family Law

Issues related to family law such as marriage, talaq, zihâr, illa, inheritance are among the subjects that the Quran addresses in detail. However, in these regulations, there are also such references that we can call mostly binding or unanimous, as well as those at the principal level. In such matters, those regulations that constitute concrete rules should be evaluated in line with the principal regulations. For example, in the field of family law, an extremely general and fundamental principle is given in the form of "walahunna mith'lu alladhi alayhinna bil-ma'ruf", which is followed by an extra "degree" for men.¹⁶ In the verse regarding "qawwam" status of men (maintainer), it is expressed that this degree is dependent on the fulfilment of two conditions. Accordingly, if a man fulfils both of these conditions by himself, then he is rightfully a "qawwam" and he holds the degree of being the leader, which includes the right to punish and discipline.¹⁷ The two conditions are as follows: the assumption of all works related to the marriage and the provision of the family's subsistence. If the woman participates in the fulfilment of the above conditions in a similar manner, then the principle of "walahunna mith'lu alladhi alayhinna bil-ma'ruf" will require her also to be authorized in the matters of leading the marriage or exercising authority (guardianship) over it.

2.2.4. In the Area of Criminal Law

In addition to the principles such as innocent until proven guilty, equivalence between crime and punishment,¹⁸ (an-Nahl 16/126), and use of the evidence in favour of the defendant, there are also detailed regulations within the Quran. It is widely accepted that those punishments that are set out as limits (hadd) cannot be altered. However, it can be said that there is an extreme amounts of precision in this regard. As a matter of fact, there is a widespread perception that a sign of how devout a Muslim a person is can be determined by whether he accepts punishments such as the cutting of hands or not.

In this regard, how laws are applied can show us the facts surrounding the circumstances.

¹⁶ al-Baqara 2/228 (وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَىٰهِنَّ دَرَجَةٌ وَاللَّهُ عَزِيزٌ حَكِيمٌ).

¹⁷ al-Nisā' 4/34 (الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالضَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِن أَطَعْتِكُمْ فَلَا تَجْعَلُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا).

¹⁸ al-Nahl 16/26.

In the Ottoman application, for example, if the crime is determined to be fixed under the rules of shari'a, punishments involving cutting hands could be given. However, an option was also provided to pay off this crime with a certain number of coins.¹⁹

It is well known that Abu Hanifa interpreted the ²⁰"Aw yunfaw mina'l-ard" (exile from the earth) expression in the verse regarding brigands as "imprisonment". Because, in an environment where prisons exist, imprisonment provides more effective results than exile.

Likewise, it is determined by the Quran that the punishment of those women who commit the crime of prostitution is²¹ "house arrest". With the emergence of correctional houses, there would hardly be any objection to the practice of rehabilitation in such cases.

It would be wrong to construe that the penalties foreseen in such regulations as a purpose. No matter how effective they are, it must be stated honestly that they are tools. If they act as a means towards an end, it should be at least theoretically possible to add other means that can be used alongside them, or, as their replacement. However, in order for these substitutions to hold on to the common conscience of the Muslim society, the fact that they are more effective, more prevalent, easier and superior than the old ones must be based on scientific data, as well as the common experience, and this must be proven in practice. Otherwise, the sense of fairness that must be felt by the public in legal matters will be lost (which, most legal systems today appear to lack) and the "finger cut by the shari'a shall begin to hurt".

2.2.5. The Area of Procedures

Liberty is essential in the field of procedures. As with objects, optionality is essential in our actions. The regulations in this area are completely on a principal level. As in the verse regarding debtors (al-Baqarah 2/282), detailed regulations are also in the way of exemplifying those principles. These principles include the following:

- Execution of justice and providing every right to its holders.
- Compliance with contracts.
- Not cheating or deceiving in measuring and weighing.
- The prohibition of usury (riba), a tool of exploitation.
- Prohibition of bribery and unfair earnings.
- Providing convenience in transactions and procedures.

¹⁹ See Ahmet Akgündüz, *Osmanlı Kanunnâmeleri ve Hukukî Tahlilleri 3. Kitap Yavuz Sultan Selim Devri Kanunnâmeleri* (İstanbul: FEY Vakfı Yayınları, 1991), 92.

²⁰ al-Mā'ida 5/3 (إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ (جَلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ حِزْبِي فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ).

²¹ al-Nisā' 4/15 (وَاللَّائِي يَأْتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَأَسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةٌ مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَقَّأَهُنَّ (الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا).

Distribution of inheritances on the basis of merit.

Equality in law, and the principle of need in the context of²² pleasure.

If we examine the books of fiqh in addition to the principles above and those that in similar nature, we can see that all procedures are addressed under their own, unique headings. It is also seen that it was attempted to base the provisions discussed here on one or more of the series of evidence defined as the book, sunnah, ijma, qiyas (or makul).

The existence of these procedures, which are titled "'Uqud al-Musamma", in our legal books leads us the problem regarding how new contracts should be handled.

For example, the induction of the provisions and pieces of evidence that are put forward in this area in a certain way has led to the establishment of general rules (qiyas), such as "it is not permissible to sell what does not exist". Then, in order to ensure that these rules remain effective, either certain exceptions, which are sometimes titled "juristic preference", were established, or, in other circumstances, conclusions such as they are not permissible were drawn. For example, those who consider insurance contracts impermissible are the ones who have attempted to evaluate this new contract under the guidelines of this rule. Likewise, concepts such as risk (gharar) and ignorance are also considered under this topic. This has led to discussions regarding how property should be described and what objects should be considered property. And, due to the assessment that interests cannot be considered as property, it was concluded that their theft or destruction did not require the provision of compensations. Today, the status of immaterial objects, such as copyrights, are still being discussed.

We are faced with digital currencies that have emerged and proliferated one after the other, when we still have not decided, on the basis of gold and silver being currency due to their creation, whether paper currency is actually money or not.

3. Gates of Stability and Ijtihad

This and other similar examples show that staying within the well-established rules and forms of the fiqh is dissimilar to the position of being flexible against the canonical texts.

Change has been approved for the provision of the stability of maddhabs (which are closely related to the thesis of ijthad gates being open or closed) and the continuation of legal security, provided that the borders of maddhabs are adhered to closely. Accordingly, closing the doors of ijthad has been the price of stability, from a certain point of view.

²² "Huzuz" is the plural of hazz (pleasure). This is akin to a father giving pocket money to his children or the state paying those in need. It is, essentially something that is given in the form of atiyya/bestowal, as a requirement of being a father or a state, without the need for it being deserved. The term "hazz" is also used for inheritance shares (see al-Nisā' 4/11).

These doors are closed for a location if the activities have not yet begun in it. After the commencement of the activities, they are closed, and sometimes, a guard is placed next to them prevent people from entering and leaving. When the activity is concluded, the doors opened once again.

4. The Process of Reconstruction

In our opinion, a new construction period is taking place after 1926. At this stage, there is not even a door yet. This means that it is impossible to discuss whether they are open or closed. The necessity of manoeuvring while remaining within the bounds of the maddhab has thus come to an end. At this stage, we are again faced with the canonical texts as well as the existing ijtihaads. This can be observed quite clearly in newer fiqh studies. However, it is not yet possible for these studies to be the integral parts of a large project. As a political leader has once stated, we wouldn't have the materials to construct a simple shack if we combined all of our doctorate studies, because everyone is focusing on producing doors and windows.²³ As of now, neither a project exists, nor any detailed, well-planned and systematic studies or well-planned division of labours, to realize it. As our deceased teacher, Sabahattin Zaim has stated in a symposium, the studies that currently exist are not in the form of yarns that we can weave fabrics from, but are simple raw materials.

Freeing maddhabs from templates that constrain them and facing the canonical texts once again might be beneficial, and even necessary, for the purposes of reconstruction, as it is impossible to build new structures from the debris of existing structures. In this respect, it may be easier to undertake this matter by examining the canonical texts. This is especially true if we consider canonical texts as resources for the systems we will create, instead of just adopting them as systems by themselves. Because, as Caliph Ali said, the Quran plainly exists, and people make it speak. Anyone who looks within it searches for answers in line with their own needs. That's why, Caliph Ali said to Ibn Abbas, whom he sent to discuss with the Kharijites, "Do not try to bring them evidence from the Quran, because they can turn the evidence you bring to their advantage. Rather, bring them evidence regarding your applications (sunnah)".²⁴

However, this approach might cause chaotic results. In order to minimize this, it is necessary to avoid absolutizing the canonical texts and to consider them within their own contexts, and to refer to the criteria of the maqasid when necessary. In addition, it is necessary to continue this activity without ignoring

²³ This sentence was spoken by Prof. Dr. Necmettin Erbakan at the Adil Duzen Conference held for academy members at Istanbul Berr Hotel on 04.01.1992.

²⁴ Muhammad Ibn Sa'd, *aṭ-Ṭabaqāt al-Kabīr* (Mütemmimü's-sahâbe et-tabaqatü'l-hâmise), Critical ed. Muhammad b. Sâmîl es-Sülemî (Tâif: Mektebetü's-Siddîk, 1414/1993), 1/181; Muhammad b. Ali aṣ-Şawkanî, *Fath al-Qadîr* (Dîmeşk: Dârü İbn Kesîr-Beyrut: Dârü'l-Kelîmî't-Tayyîb, 1414), 1/14.

the traditions, especially in order to determine the context and to follow the course of change. Besides, chaos will emerge in all processes that involve construction. Some people will dig, while others construct or destroy. But, at the end of this whole process, the construction is completed, and the workshops are removed, the site is cleaned, and unnecessary things are thrown away. This creates the possibility for people to dwell therein. Through this possibility, that place becomes the center of life when the will to move there occurs.

After 1926, an environment of chaos has emerged, which was like the first two centuries. In such environments, there is an opportunity for everyone to speak their minds. Criteria such as whether the speaker is competent or not or whether the words are accepted by the people are ignored. These studies are not limited to the matters regarding canonical texts. Especially in the contexts of the canonical texts, there is an urgent need for ijthads regarding comprehension, interpretation and updates.

In the face of these activities that will be carried out in a process in accordance with the nature of fiqh, history shall do whatever it does best and sift those ijthads that are multiplying and proliferating, and, in the end, it will flush down the drain for those ones that can be considered as nonsense. In this process, those who find ground in life will somehow survive. It is irrelevant whether these are considered bi'dah (innovation) when compared to those that existed in the past. In essence, traditions continue their existence with the innovations they produce within themselves. This is just as necessary as the sun maintaining its brightness with continuous explosions.

Conclusion

In conclusion, we can speak thusly: The essence of Islam is changeless, and there are religious, practical and moral institutions that keep this essence standing, as well as provisions regarding these institutions. On the other hand, in order to ensure its vitality, its institutions are in need of constant renewal (tadjdid), just as how cells in human body regenerate over time. When these two features cannot be sustained together, either the Islamic law will completely metamorphose in a way that it cannot be called Islamic law anymore or it will become frozen and cannot exist in parallel to life. Life will continue down its path, and Islam and its rules will be left to the wayside, functionless.

The survival of the perfected Islamic Shari'a until doomsday will be ensured by the hands of the ulama. If, instead of undertaking this burden, the ulama starts to believe that the problem will handle itself by attributing Islam and its sources such empty so-called lofty distinctions such as universality or state that there are no problems in this present situation, this then will be akin

to Israelites saying to Prophet Moses²⁵ "You and your god can go and fight, we will remain right here". Their role, instead, is to take responsibility and fight this battle that was placed under their responsibility.

If updating is indeed a problem, then it is a problem of today. It is not possible to meet this need with answers from the past.

"The old state is impossible: either embrace a new state or be destroyed!"

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²⁵ al-Mâ'ida 5/24 (قَالُوا يَا مُوسَى إِنَّا لَن نَدْخُلُهَا أَبَدًا مَا دَامُوا فِيهَا فَادْهَبْ أَنْتَ وَرَبُّكَ فَقَاتِلَا إِنَّا هَهُنَا قَاعِدُونَ). *Israelites said, "O Moses! As long as they are there, we will never go in there. Go ahead, you and your Lord, and fight! We will be sitting right here."*