CHANGE IN THE MODERN PRACTICE OF *IJTIHĀD*

The Case of Islamic Finance

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Abstract

In recent decades, crucial changes in the legal reasoning of Islamic *sharīʿa* resulting from the differing influences of changing social needs, economic factors, and political-legal circumstances have been observed. This paper argues that these changes are particularly visible in the manner in which the major sources of *uṣūl al-fiqh* are utilized, the meanings attached to them and the frequency with which they are utilized in solving distinctly modern problems in the Muslim world. The paper makes this argument in terms of the modern theoretical approaches in Islamic finance by focusing on how a number of classical legal institutions, such as the *ḍarūra*, *maṣlaḥa*, and other foundations of *ijtihād*, have been re-interpreted in a manner that reflects changing socio-economic conditions in the age of globalization. The paper also demonstrates how other classical institutions, such as *madhhab* and the use of classical sources of *uṣūl al-fiqh*, have been radically changed by the (new) theorists of Islamic economics because of changing social and legal circumstances. Thus, for instance, the paper discusses how the *ijtihād* in Islamic finance has been both greatly intensified and partly transformed into a collective enterprise rather than the individual act of a scholar because of increasing complexity in economics and the accompanying specialization and professionalization of *ʿulamāʾ*. The paper ends with a discussion of the possible implications of these changes for the contemporary practice of Islamic finance in the West, as well as in the Muslim world.

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INTRODUCTION

Modernity has had an undeniable impact on Muslim societies. Major transformations have occurred in social, political, economic, and legal fields. Advancements in modern technology have also disrupted traditional ways of life. The classical study of *fiqh* (Islamic jurisprudence) has not been immune to these changes: it has faced new problems and issues. Thus, it should come as no surprise that the field of *ijtihād* (Islamic legal reasoning) has undergone equally profound transformations. In this paper, I will argue that these changes are particularly visible in methodologies of Islamic knowledge. I will demonstrate how the use of the major sources of *uṣūl al-fiqh* (the science of Islamic legal theory) and their meaning have changed in recent decades. I will illustrate this change by examining Islamic finance (IF) as a case largely influenced by recent socio-economic developments.

I will investigate the changes underway in two key areas. First, I will focus on the various features of the modern *ijtihād* practices in the case of IF. Second, I will elaborate on these features by analyzing at more specific concepts related to *ijtihād* and their practice. I will examine the essential concept of the *madhhab* (legal school), and such instruments as the *ḍarūra* (extreme necessity) and *maṣlaḥa* (public interest).[1] I will explain how these institutions have been reinterpreted in ways that reflect changing socio-economic conditions.

More particularly, I will demonstrate how the *ijtihād* has been both greatly intensified and partly transformed into a collective enterprise rather than the individual act of a scholar because of increasing complexity in economics and the accompanying specialization and professionalization of *ʿulamāʾ* (scholars). I will focus on the modern period, beginning with the emergence of IF institutions during the 1970s. I will explain the primary argument using specific ex-

[1] The concept of *maṣlaḥa* refers to both public and individual interest in the terminology of Islamic law. However, to avoid the confusion with the term "interest" in the sense of usuary (*ribā*) I prefer to translate *maṣlaḥa* as "public interest," which is also the common translation in the relevant literature.

amples, such as *waʿd* (promise),[2] *qabḍ* (possession),[3] and *wakāla* (agency),[4] which are related to most forms of Islamic financial contracts.

TRANSFORMATION OF *IJTIHĀD* IN ISLAMIC FINANCE

The modern *ijtihād* process diverges from past legal practices in several key ways:

Socio-economic changes have influenced the direction of *ijtihād*s in Islamic finance. Rapid urbanization, the emergence of the new fast-paced life style, and technological improvements in the 20th century have changed individual life styles and mass consumption habits. Furthermore, as a result of technological improvement and the expansion of international trade, product diversity has become widespread, which has transformed peoples' relationships with goods and property.[5] Consequently, *ijtihād*-related contractual models and

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[2] The issue of a binding promise is a controversial one. Although it has been thoroughly discussed in the context of *murābaḥa,* the *waʿd* is a natural element of other multi-structured transactions (*al-ʿuqūd al-murakkaba*), such as diminishing *mushāraka* and *al-ijāra al-muntahiya bi-l-tamlīk*. At the onset of these contracts, one or two parties must accept and promise to fulfill some responsibilities within the framework of the contract. The primary issue related to *waʿd* is whether contracts are religiously or legally binding.

[3] *Qabḍ* literally means possession. The primary issue with multi-structured contracts is that of to whom the force of possession belongs – the seller or the buyer. This subject is also related to the selling of *maʿdūm* (non-present goods), risk, and official registration.

[4] Modern *wakāla* is used to shorten transactions and to minimize banks' expenses.

[5] Some IF scholars provide examples from former eras to indicate the relationship between changing conditions and changing *ḥukm*s. For example, al-Qaraḍāwī refers to differences between Abū Ḥanīfa and Abū Yūsuf regarding their treatment of *istiṣnāʿ* contracts. Although the former states that promises in *istiṣnāʿ* contracts are not binding on either party, the latter argues that promises are binding if they do not contradict the agreements between the parties (Yūsuf al-Qaraḍāwī, *Bayʿ al-murābaḥa li-l-āmir bi-l-shirāʾ kamā tujrīhi l-maṣārif al-Islāmiyya: Dirāsa fī ḍawʾ al-nuṣūṣ wa-l-qawāʿid al-sharʿiyya* [Cairo: Maktabat Wahba, 1987], 80-81). In addition, al-Qaraḍāwī emphasizes that al-Imām al-Shāfiʿī holds two opinions in this regard – 'old' and 'new,' as usual – and argues that *Imāmayn* (Abū Yūsuf and Muḥammad al-Shaybānī) issued different *fatwā*s than Abū Ḥanīfa for one third of his opinions. The point is that disagreements arise over time based on the context of time and place. Al-Qaraḍāwī further notes that

transactions have become necessary for meeting the requirements of modern society.[6] In this context, al-Zarqā rightly argues that changes made to former *ijtihād*s are the result of two primary societal forces: changes in social structures, life styles, and technology, as well as changes in ethics and manners (*akhlāq*).[7] From this perspective, on the one hand, life-style changes are a result of social and technological developments; on the other hand, issues of ethical significance have become increasingly important in the economy. These changes should be considered during *ijtihād* deliberations. All of these changes have influenced the concept and practice of *ijtihād* in multiple ways, as discussed below.

1. Modern *ijtihād* practice has been increasingly shaped by external factors, which have been framed in particular by Western institutions, life styles, and solutions, rather than the internal dynamics of the Muslim world. In the past, interactions among different societies were relatively less intense than they are today; accordingly, Muslims would look for solutions to the problems that arose primarily with regard to their internal conditions and the *ijtihād* process would be practiced within this framework. However, inter-societal interactions have become much more common in the contemporary world, and modern *ijtihād* practice has become increasingly preoccupied with the problems of the Muslim people and institutions that are affected in particular by Western life styles, on the one hand, and with producing alternatives to practical frameworks originally produced in the West, on the other hand. This process naturally involves both positive aspects (such as dynamism) and negative ones (such as precipitancy and lack of originality).

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different opinions were formed by al-Imām Mālik and Aḥmad ibn Ḥanbal when handling identical cases. He then states that these examples reflect a healthy diversity and renewal of *ijtihād* (*Ibid.,* 20-21).

6 For example, financial transaction contracts during pre-modern times were primarily two-party agreements under practically non-existent institutional authority. However, current banking and financial institutions are much more complicated and exert a far greater impact on the formation of *ijtihād* both at individual and institutional levels. Therefore, a new *ijtihād* is required to address issues at the practical level, e.g., in the case of clients' ability to withdraw their capital from banks at any time.

7 Muṣṭafā Aḥmad al-Zarqā, *al-Fiqh al-Islāmī fī thawbihi l-jadīd: al-Madkhal al-fiqhī al-ʿām* (9th edn., Dimashq: Dār al-Fikr, 1967), I, 101-102.

2. Despite the convenience provided by the permissibility (*ibāḥa*) principle, modern scholars (*ʿulamāʾ*) generally do not prefer to produce genuine contracts in IF; instead, they produce contracts based on the modification of old ones found in classical *fiqh*. There are several possible reasons for this preference. First, scholars have a concern for Islamic justification: it is easier for them to refer to existing, more established and famous scholars and to *al-ʿuqūd al-musammāt* (nominate contracts) to prove permissibility and justify rulings. Second, it is more practical to modify and reproduce an old contract because it has already been discussed in great detail in the past. It is also difficult to create and maintain the overall scope of a legal argument without simultaneously introducing competing and often contradictory arguments. Finally, this practice might also be an old habit: previously, Muslim jurists did not produce new contracts such as *bayʿ al-wafāʾ* (the debt guarantee sale), primarily because they did not need to because of relatively slow social change.[8] This practice might have created a path dependency that affects the mindset and practices of contemporary Islamic scholars as well.

3. A third remarkable aspect of contemporary *ijtihād* practices is that although the names of some legal terms and concepts in classical *fiqh*, such as the agency contract (*wakāla*), promise (*waʿd*), and possession *(qabḍ),* have remained the same, their context, function, and even problematic aspects have changed, as they are now part of larger and more complex contracts. Accordingly, scholars apply new arguments to attach new meanings to old matters. Although this practice is partly unavoidable, it also often leads to conceptual confusion and related problems among scholars.

4. An intense use of additional sources of *uṣūl al-fiqh* is one of the most important features of modern *ijtihād* deliberation. Contemporary jurists commonly and very frequently resort to additional sources, such as *maṣlaḥa*, to generate an *ijtihād* under new circumstances when evidence is not readily found in the four fundamental sources of *fiqh* – the *Qurʾān*, *Sunna, ijmāʿ*, and *qiyās*. Although these additional sources are among the classical sources, their utilization

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[8] In fact, al-Qaraḍāwī observes that historically social change was much slower than in today's world where many issues dealt with by scholars have extra dimensions and larger volumes, which is also related to the changing conditions in contemporary societies (al-Qaraḍāwī, *Bayʿ*, 20-21, 34).

has become much more intense and frequent in contemporary practice.

5. The crossroads of *ijtihād* deliberations and disciplines other than *fiqh* (e.g., modern finance, business, and law) have also multiplied. This increase has occurred because contemporary jurists must have a high-level of familiarity with contemporary contractual and transactional business models in IF. For example, a jurist studying new transactional business models (such as *murābaḥa* or *mushāraka*) must consider *fiqh*-related matters such as *waʿd*, *qabḍ*, as well as be knowledgeable regarding contemporary law's stance regarding the matter at hand. The modern *ijtihād* mechanism has a distinct relationship with contemporary law,[9] as there are numerous rules and regulations for virtually everything. If necessary, one may consult a substantial body of jurisprudence regarding new *ḥukm*s and

[9] The following case of banks in the UK is a remarkable example of how to reconcile contradictions between *sharīʿa* and law. "Deposit-takers are regulated and the customer is assured of full repayment as long as the bank remains solvent. A savings account originally proposed by Islamic Bank of Britain (IBB) as a 'deposit' was a profit-and-loss sharing account, or *muḍāraba*, where *sharīʿa* law requires the customer to accept the risk of loss of original capital. This was not consistent with *The Financial Services Authority* (FSA)'s interpretation of the legal definition of a 'deposit,' which requires capital certainty. After extensive discussions, the solution IBB adopted was to say that, legally, its depositors are entitled to full repayment, thus ensuring compliance with FSA requirements. However, customers had the right to turn down deposit protection after the event on religious grounds, and choose instead to be repaid under the *sharīʿa*-compliant risk sharing and loss bearing formula." (Michael Ainley et al., *Islamic Finance in the UK: Regulation and Challenges* [London: The Financial Services Authority, 2007], 14).

Additionally, the following *fatwā* concerning *Recommendations and Resolutions of the First Conference of Islamic Banks* is very interesting in terms of the relationship between *fatwā* and law:

"This promise [*murābaḥa*], according to *fatwā*s of the Mālikī school of jurisprudence, is enforceable by law while other schools of *fiqh* see that it is *sharīʿa* binding. What is *sharīʿa* compatible can be enforced by law if it is necessary and if it is possible for the courts to intervene. The wording of contracts in such transactions need *sharīʿa* technical accuracy, and might need the issuance of law (Act) in Islamic countries, to make them enforceable through courts."

(http://www.albaraka.com/media/pdf/Research-Studies/RSMR-200706201-EN.pdf, p. 268, *fatwā* no. 8) (accessed 10 November 2011).

contracts that do not contradict prevailing laws. When these *ḥukm*s and contracts are incompatible with existing laws, it is important to apply *ḍarūra* to resolve any remaining contradictions.

6. A common assumption among IF scholars is that the field of *muʿāmalāt* falls within the realm of *ẓanniyyāt* (the rulings whose meanings are open to interpretation), which for the most part, consists of flexible *ḥukm*s (rulings),[10] with the exception of *ribā* and *zakāt*. That is to say, most issues of IF are addressed within the field of *ijtihād*. Because urgent solutions are often needed for practical problems in this field, previously less favorable (*shādhdh*) opinions are easily adopted with reference to broad notions such as justice but without regard to their specific contexts. It has thus become a common practice among modern scholars to selectively refer to classical *fiqh* to render new *ijtihād*s.[11] However, some scholars, such as al-Qaraḍāwī, remain critical of the practice of relying too heavily on old rulings to formulate new *ḥukm*s, as today's *ʿulamāʾ* are entitled to derive new *ijtihād*.[12]

7. As I have argued elsewhere,[13] although the debates on economic provisions in the classical *fiqh* literature primarily address relatively simple and monophasic transactions among actual persons in a Muslim society, today, these provisions are directly applied to large, impersonal institutions in predominantly non-Islamic institutional contexts. I often observe the deployment of a contract recognized by

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[10] See Muḥammad ʿAbd al-Ḥalīm ʿUmar, "al-Tafāṣīl al-ʿamaliyya li-ʿaqd al-murābaḥa fī l-niẓām al-maṣrafī al-Islāmī," in *Khuṭṭat al-istithmār fī l-bunūk al-Islāmiyya: al-Jawānib al-taṭbīqiyya wa-l-qaḍāyā wa-l-mushkilāt* (Amman: al-Majmaʿ al-Malikī li-Buḥūth al-Ḥaḍāra al-Islāmiyya, 1987), 178.

[11] This tendency is particularly visible in the production of modern contract models. For instance, the *murābaḥa* as applied in contemporary practice is mainly based on a case discussed in al-Shāfiʿī's *al-Umm*. (In fact, Miṣri has emphasized that the *murābaḥa* is an old contract type, rather than a brand new one. See Rafīq Yūnus al-Miṣrī, "Bayʿ al-murābaḥa li-l-āmir bi-l-shirāʾ fī l-maṣārif al-Islāmiyya," *Majallat Majmaʿ al-Fiqh al-Islāmī* 5/2 (1988), 1142-1143. Likewise, such selective appropriation of classical elements is also evident in the fact that the modern leasing model is based on the *ijāra*, and partnership models on the *mushāraka* in the classical *fiqh*.

[12] For example, see al-Qaraḍāwī, *Bayʿ*, 21, 32.

[13] İsmail Cebeci, "Integrating Social *Maslahah* into Islamic Finance," *Accounting Research Journal* 25/3 (2012), 174.

Islamic *fiqh* as part of a modern transaction, with no attention to its legal and social context. For example, *wakāla*, which is recognized by *fiqh*, is frequently used in modern financial transactions so that one of the parties can avoid the risk engendered by the transaction. The logic behind this application of traditional transaction mechanisms to modern, capitalist markets is a superficial one that ignores the intellectual and historical backgrounds of both Islamic and modern-capitalist structures. In both theory and practice, such an endeavor has produced a synthetic amalgam of very different parts rather than a compact whole. This mixture of pre-capitalist and capitalist elements thus lacks cohesion and a social perspective because the elements of *fiqh* are sought primarily as a potential source of Islamic justification for modern financial mechanisms. In other words, the academic/scholarly endeavors that focus on Islamic finance invoke Islamic law only in so far as it provides modern mechanisms with strictly legal provisions by abstracting them from their social contexts.

8. It is remarkable that the form and content of the IF literature have become much closer to that of *fatwā* (legal opinion) texts than of *fiqh* texts because of a concern for practical reasons and a need for immediate solutions. The idea of consulting *jawāz* (permission) on matters related to IF and the legitimization of some modern finance solutions have become common practice in the field. Moreover, adoption of the dichotomous approach ("*ḥalāl-ḥarām*," "*jāʾiz*-not *jāʾiz*") of modern law ("do's and don'ts") and the use of technical and micro legal approaches have abandoned the consideration of valuable *ḥukm*s, such as *mandūb* (the recommended), *makrūḥ* (the repugnant), and ethical values, during the deliberative process.[14] In fact, it is now possible to discuss the "micro-*mujtahid*" as a professional technician. Such a purely technical approach and agent may lead scholars to ignore the social-moral aspects and long-term implications of their *fatwā*s.

9. *Ijtihād* deliberations have thus begun to be viewed as tools for developing Islamic counterparts of Western institutions and therefore taken on an ideological meaning as well. Muslim scholars have argued that *ijtihād* aids Muslims in providing solutions to modern

[14] For a parallel argument, see Kilian Bälz, *Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law* (Cambridge, MA: Islamic Legal Studies Program Harvard Law School, 2008), 12-13.

problems within the boundaries of the religion. For example, before Islamic banking was launched, leading Islamic figures such as al-Mawdūdī and Ḥasan al-Bannā had written about Islamic economic institutions. However, they were concerned that any possible failure of such institutions would weaken the idea of the universality and viability of Islam itself.

10. Another remarkable feature of *ijtihād* in the field of IF is the frequent use of collective *ijtihād* (*ijtihād jamāʿī*) deliberations. This use occurs because of highly technical and complicated subject matter that usually requires an academic background. In addition to their Islamic dimension, most IF subjects address financial and legal disciplines as well. Moreover, problems related to IF constitute the majority of modern collective *ijtihād*.[15] This factor also facilitates the creation of multiple, hybrid backgrounds in terms of nationality and ethnicity, *madhhab,* academic discipline, and cultural influences for *fatwā*s. For the first time in Islamic history, scholars from disciplines other than *fiqh* also play significant roles in the *ijtihād* process. Consequently, the study of modern *ijtihād* with regard to IF has thus far been the most comprehensive, large-scale, and interdisciplinary study of *ijtihād*. Furthermore, *ijtihād* deliberation has become more frequent, with increasing numbers of *fatwā*s in the modern practice of *fiqh al-muʿāmalāt* (the Islamic jurisprudence of transactions), particularly in the field of IF, in comparison with pre-modern times due to much larger number of scholars and institutions involved in this practice as well as the increasing complexity of social and economic life, and more intense and faster nature of social change in modern times, as discussed above.

11. Finally, the composition and profile of *fatwā* authorities have undergone some changes as well. In this context, commercial institutions – in addition to the *muftī*s and official bodies – have become deeply intertwined with the *fatwā* mechanism for the first time.[16] For example, note the introduction ('production,' in a sense) of the new

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[15] For example, The International Islamic Fiqh Academy made 174 resolutions between 1985-2007, 82 of which are directly related to Islamic economics and Islamic finance (http://www.fiqhacademy.org.sa [accessed 22 December 2011]).

[16] Some of the committees of Islamic Banks currently work similarly to *fatwā* institutions: For example, Albaraka provides 140 *fatwā*s (512 pages) on the *murābaḥa* on its website only. See http://www.albaraka.com/media/pdf/Research-Studies/RSMR-200706201-EN.pdf (accessed 10 November 2011).

"*mujtahid* class" by the Sharīʿa Boards.[17] Moreover, the audience of the *fatwā* has expanded as well. In theory, the *fatwā* was considered to be a decision concerning the individual with regard to particular matters and to influence a relatively narrower circle, but today, every Muslim becomes subject to the implications of the *fatwā* immediately after it has been announced.

FACTORS INFLUENCING THE TRANSFORMATION OF *IJTIHĀD*

Recent socio-economic changes have also led to the transformation of more specific elements of the *ijtihād* process, such as the *madhhab* (legal school) and *ḍarūra*. Below, I will examine how general changes to this process are reflected at more specific levels as well. I argue that both the perception of *fiqh* concepts and their practice have rapidly changed in recent decades.

Changes in the Perception of the *Madhhab*

During the several centuries leading up to the modern period a person's *madhhab* identity (belonging to a *madhhab*) was very strong in the Muslim world.[18] Solutions to problems were generally

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[17] For an analysis of *sharīʿa* scholars and related board positions, see Murat Ünal, *The Small World of Islamic Finance: Shariah Scholars and Governance – A Network Analytic Perspective v. 6.0*, http://www.funds-at-work.com/fileadmin/downloads/ShariaNetwork_by_Funds_at_Work_AG.pdf (accessed 20 December 2011). For Sharīʿa Boards, also see Walid Hegazy, "*Fatwa*s and the Fate of Islamic Finance: A Critique of the Practice of *Fatwa* in Contemporary Islamic Financial Markets," in S. Nazim Ali (ed.), *Islamic Finance: Current Legal and Regulatory Issues* (Cambridge, MA: Harvard Law School, Islamic Legal Studies Program [ILSP], Islamic Finance Project, 2005), 133-149; Aly Khorshid, "Adding Social Responsibility and Accountability to the Mandate of Shariʿa Advisory Boards," in S. Nazim Ali (ed.), *Building Bridges Across Financial Communities: The Global Financial Crisis, Social Responsibility, and Faith-Based Finance* (Cambridge, MA: Harvard Law School, Islamic Legal Studies Program [ILSP], Islamic Finance Project, 2012), 83-101.

[18] It should be emphasized that the *madhhab* as an institution has not been perceived by Muslims as a uniform entity throughout the Islamic history as its understanding (and practice) has varied in different regions and time periods. For instance, while a more analytical view of the *madhhab* dominated in the early periods, loyalty to a single *madhhab* was more common among both scholars and the general public in the later periods. For an examination of the concept of

limited to one's *madhhab*[19] and to the hierarchy within each *madhhab*, particularly with regard to the transmission of narrations of legal opinions (*aqwāl*). *Fiqh* books were generally written in accordance with a specific *madhhab*.[20] Thus, references on a subject were attributed to the researcher's own *madhhab* sources and opinions. Referring to other *madhhab*s was rare and regarded as a last option.

This perception of *madhhab* has changed in the modern world,[21] the *madhhab* identity has been transformed into a flexible structure, particularly in the *muʿāmalāt*. New social conditions, interaction among people from several *madhhab*s, and difficult problems in complex modern life situations have played an important role in this change. Thus, the practices of addressing economic-financial issues in accordance with one specific *madhhab* and formulating *ḥukm*s with regard to it have almost disappeared.[22] Now, I find new *ḥukm*s based on a combination of opinions adopted from different *madhhab*s and independent opinions. The modern perception of *madhhab* does not imply a set of legal precepts and practices isolated from each other, but it offers a valuable source consisting of different

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madhhab and its evolution in early Islamic legal history, see Eyyup Said Kaya, *Mezheblerin Teşekkülünden Sonra Fıkhî İstidlâl* [*Legal Reasoning after the Formation of Madhhabs*] (PhD dissertation; Istanbul: Marmara University, 2001), 19-29, 42-48, 56-64; see also idem., "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century," in Peri Bearman, Rudolph Peters, and Frank E. Vogel (eds.), *The Islamic School of Law: Evolution, Devolution, and Progress* (Cambridge, MA: Harvard Law School, Islamic Legal Studies Program [ILSP], 2005), 26 ff.

19 For example, *Majallat al-aḥkām al-ʿadliyya* (1876) and the latest Ottoman *fatwā*s (see *Jarīda-i ʿIlmiyya* [1914-1922]) were based on *the Ḥanafī madhhab*. There were only a few *fatwā*s given on a *madhhab* other than Ḥanafī in the late Ottoman era. (See İsmail Cebeci, Ceride-i İlmiyye *Fetvaları* [*Fatwās of* Jarīda-i ʿIlmiyya] [Istanbul: Klasik Yayınları, 2009], 112 [*fatwā* 579; *Jarīda-i ʿIlmiyya* 5/48, 1478]).

20 For example, al-Marghīnānī's *al-Hidāya*, al-Nawawī's *Minhāj al-ṭālibīn*, *Mukhtaṣar* al-Khalīl, and *Mukhtaṣar* al-Khiraqī, which belong to four primary *madhhab*s, were taught in many old madrasas for centuries.

21 For al-Zarqā's explanation of modern evolution of *madhhab*s, see *al-Fiqh al-Islāmī*, I, 206-207, 209-210.

22 As an example, see *The International Islamic Fiqh Academy* resolutions (http://www.fiqhacademy.org.sa (accessed 22 December 2011).

legal traditions. Contrary to traditional *fiqh*, modern scholars pay less attention to the hierarchical order of opinions within a certain *madhhab*. Preferring the opinion of an ordinary *mujtahid* [23] to that of a leading *imām* of the *madhhab* is more common among modern *fiqh* scholars. It is common for scholars who claim to belong to the same *madhhab* to have different opinions on certain issues.

Parallel to this development, the issue of *talfīq* (combining the opinions of two or more *mujtahid*s on a legal issue) has gained a more flexible meaning, particularly in the *muʿāmalāt*; although some researchers note that there is *talfīq* in some new *ḥukm*s, the majority opinion holds that if the new *ḥukm* is based on evidence and not the application of *taqlīd* (following the authoritative opinion), this kind of *talfīq* would be considered acceptable.[24] The issue of promise (*waʿd*) is an appropriate example for this discussion. Some scholars state that although the *murābaḥa* contract was built on al-Shāfiʿī's opinion, the binding promise was received from Mālik. Furthermore, the integration of the binding promise into other composite models, such as the *al-ijāra al-muntahiya bi-l-tamlīk*, could also be included in this category. For this model has been produced in its current form by adding new features and conditions to its classical form. A third example in this context is the hybrid *ṣukūk*: it, too, has been formed with the integration of different kinds of contracts derived from the classical *fiqh*. For instance, Hashim Kamali has pointed out that the investment *ṣukūk* in particular consists of the *murābaḥa* and the *istiṣnāʿ* as well as investment, all three of which in fact refer to separate contract models.[25] Finally, as Vogel has demonstrated, the fact

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[23] For example, in the context of *waʿd*, modern scholars refer to such early *ʿulamāʾ* (*salaf*) as ʿUmar ibn ʿAbd al-ʿAzīz, Ibn Shubruma, Isḥāq ibn Rāhūya, and some companions (*aṣḥāb*) and followers (*ṭābiʿūn*) (see ʿAṭiyya Fayyāḍ, *al-Taṭbīqāt al-maṣrafiyya li-bayʿ al-murābaḥa fī dawʾ al-fiqh al-Islāmī* [Cairo: Dār al-Nashr li-l-Jāmiʿāt, 1999], 73-74).

[24] See Fayyāḍ, *al-Taṭbīqāt*, 105; Aḥmad Sālim ʿAbd Allāh Mulḥim, *Bayʿ al-murābaḥa wa-taṭbīqātuhā fī l-maṣārif al-Islāmiyya* (Amman: Dār al-Thaqāfa, 2005), 178, 196. As Kamali argues, *talfīq* "can be an innovative instrument, or one that can be squarely placed under rubric of imitation and *taqlīd*, depending on its component segments and its outcome." (see Mohammad Hashim Kamali, "A Shariʿah Analysis of Issues in Islamic Leasing," *Journal of King Abdulaziz University: Islamic Economics* 20/1 [2007], 19).

[25] Kamali, "A Shariʿah Analysis of Issues in Islamic Leasing," 18-19.

that the *istiṣnāʿ* contract, which is essentially a classical Ḥanafī model, is combined with the *ʿarbūn* (down payment) that is considered *jāʾiz* in the Ḥanbalī tradition, in contemporary practice is also an example of the application of *talfīq* in IF.

As a result, there are significant elements other than *madhhab*, such as the academic background of the scholar, social conditions, and political context and accordingly, the principles he prioritizes, such as *maṣlaḥa* or *ḍarūra*, have become important factors in the *ijtihād* process in IF. Trans-*madhhab* and inter-*madhhab* practices are more common in modern IF and in the field of *muʿāmalāt* in general. Although traditional *madhhab* sources are cited very often, I argue that *madhhab* is a very valuable resource but no longer the key to or determining factor in approaching legal issues and IF.

Changes in the Perception of the *Ḍarūra* (Extreme Necessity)

In classical *fiqh*, the *ḍarūra* was resorted to for specific subjects and in certain examples, such as eating pork or drinking wine in the case of starvation risk. However, in the modern period, it has become one of the primary principles used to introduce new *ḥukm*s in IF and has been granted high importance by modern scholars.[26] Thus, there is a close connection between changes in *ijtihād* and the use of *ḍarūra* in modern IF. For instance, Vogel and Hayes observe that

> Scholars in Islamic finance and banking … have issued fatwās (opinions) allowing Islamic banks to deposit funds in interest-bearing accounts, particularly in foreign countries, because these banks have no alternative investments at the necessary maturities. Typically, however, they place conditions on such fatwās, such as requiring that the unlawful be used for religiously meritorious purposes such as charity, training, or research.[27]

Ḍarūra is closely related to some specifically modern difficulties. The most significant factors of introducing *ḍarūra*-based *ijtihād* include the following:

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[26] As an example, see the *fatwā* of the *European Council for Fatwa and Research* on mortgage: www.e-cfr.org/data/cat30072008114456.doc (accessed 06 August 2012) (*fatwā* 26).

[27] Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (The Hague: Kluwer Law International, 1998), 38-39.

- Legal obstructions: in some countries, the legal framework regulating the activities of IF institutions entails obstructions (such as banking law and the double tax issue), which is one of the most important reasons for *ḍarūra*.[28]

- Market conditions, economic obligations,[29] and severe competition.

- Modern commercial custom (*ʿurf*): Particularly international commercial practice, which is difficult to change.

- Difficulties related to the structure of Islamic Banks (e.g., the quality and quantity of personnel).

- Difficulties arising from the banking system (e.g., clients might take their money at any time).

- Problems arising from clients (e.g., ethical problems).

In applying the principle of *ḍarūra*, modern scholars commonly refer to three legal maxims: *al-ḥāja tunazzalu manzilat al-ḍarūra khāṣṣatan kānat aw-ʿāmmatan* (Need, whether of a public or private nature, is treated as an extreme necessity – *Majalla,* article no. 32), *al-Ḍarūrāt tubīḥ al-maḥẓūrāt* (Necessity makes the unlawful lawful – *Majalla*, article no. 21), and *al-Mashaqqa tajlib al-taysīr* (Hardship begets facility – *Majalla,* article no. 17).

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[28] For example, there is a double tax problem during sale transactions in many countries, such as Turkey. Also see Necdet Şensoy, "Müzâkere (Ahmet Tabakoğlu'nun "İslâm İktisadı Metodolojisi" Başlıklı Tebliği Üzerine) [Discussion (On the Paper "The Methodology of Islamic Economics" by Ahmet Tabakoğlu)]," in *İslâmî İlimlerde Metodoloji (Usûl) Mes'elesi 2* [*The Problem of Methodology (Uṣūl) in Islamic Sciences 2*] (Istanbul: Ensar Neşriyat, 2005), 1254-1255; Jamāl ʿAṭiyya, "al-Jawānib al-qānūniyya li-taṭbīq ʿaqd al-murābaḥa," *Majallat Jāmiʿat al-Malik ʿAbd al-ʿAzīz: al-Iqtiṣād al-Islāmī* 2/1 (1990), 136.

[29] For instance, Abū Sulaymān argues that the Majmaʿ al-Fiqh al-Islāmī's resolution on the binding promise in the *murābaḥa* (see *Majallat Majmaʿ al-Fiqh al-Islāmī* 5/2 [1988], 1599-1600) is based on the *ḍarūra* principle, as this is required for the safety and welfare of commercial and financial transactions, and that the resolution fits the legal maxim "Harm must be eliminated" (see ʿAbd al-Wahhāb Ibrāhīm Abū Sulaymān, *Fiqh al-ḍarūra wa-taṭbīqātuhā l-muʿāṣira: Āfāq wa-abʿād* [Jeddah: Al-Bank al-Islāmī li-l-Tanmiya, al-Maʿhad al-Islāmī li-l-Buḥūth wa-l-Tadrīb, 2002], 141). A similar, *ḍarūra*-based viewpoint is often applied in rulings on modern financial transactions that involve possession (*qabḍ*)-related issues.

As a result of this application, some financial issues, which had not been considered *jāʾiz* earlier, began to be considered *jāʾiz*.[30] Likewise, there are other issues, on which no *ḥukm* had previously been given, which could easily be considered *jāʾiz* today. To be certain, these changes have been possible because of the use of *ḍarūra*. Additionally, the extent of *ḍarūra* is changeable and has been gradually expanding, which implies a further integration of IF into the capitalist market system.

Furthermore, that there is a goal of complying with religious precepts in financial transactions suggests the existence of what might be called an "intellectual *ḍarūra*": a general *ḍarūra* concept that applies to all modern problems dominates and frames the scholars' mindset to such a degree that in the modern *ijtihād* in IF, this *ḍarūra* perspective – openly or latently – occupies a central space in legal reasoning, as it is considered to characterize modern socio-economic conditions and to be applied to all matters rather than specific cases. Its necessity is often taken for granted without due consideration and is thus overused in IF matters.

Changes in the Perception of *Maṣlaḥa*

The idea of *maṣlaḥa* (public interest) has been an important element of the *ijtihād* process in modern IF.[31] Its centrality is clearly visible in some *ḥukm*s, such as those regarding binding promises[32] and nominal possession (*al-qabḍ al-ḥukmī*)[33] in IF. In particular, those who accept a binding promise emphasize that some contracts, such as *salam* (forward sale with immediate payment), *istiṣnāʿ* (manufac-

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30 See Abū Sulaymān, *Fiqh al-ḍarūra,* 138.

31 For the frequent use of *maṣlaḥa* and *maqāṣid* in modern transactions, see, ʿAbd al-Nāṣir Mūsā ʿAbd al-Raḥmān Abū l-Baṣal, "Manhaj al-fatwā fī aḥkām al-muʿāmalāt al-muʿāṣira," *Abḥāth al-Yarmūk* 18/2B (2002), 474-476.

32 For example, Sāmī Ḥammūd expresses that there is a relationship between the *maṣlaḥa* of people and the binding promise in *murābaḥa*. (Ḥammūd, "Bayʿ al-murābaḥa li-l-āmir bi-l-shirāʾ," *Majallat Majmaʿ al-Fiqh al-Islāmī* 5/2 [1988], 1107). Additionally, a similar opinion was expressed at The Second Conference of Islamic Banks (Kuwait, 1983).

33 Ḥaṭṭāb argues that nominal possession *(al-qabḍ al-ḥukmī)* is more suitable for *maṣlaḥa* of the bank and the client. See Kamāl Tawfīq Muḥammad al-Ḥaṭṭāb, "al-Qabḍ wa-l-ilzām bi-l-waʿd fī ʿaqd al-murābaḥa li-l-āmir bi-l-shirāʾ fī l-fiqh al-Islāmī," *Muʾta li-l-buḥūth wa-l-dirāsāt* 15/1 (2000), 233-259.

turing contract), *muzāyada* (bidding), *jiʿāla* (reward), and *bayʿ al-wafāʾ* (debt guarantee sale), were accepted on the base of *maṣlaḥa* and *istiḥsān* (juristic preference).[34]

The possibility of an Islamic life for individuals and communities is associated with a sustainable model of the economy based on Islamic precepts. It is argued that such a system is possible with the help of the *maṣlaḥa* principle in *fiqh*. The researchers who prioritize *maṣlaḥa* primarily address the issues surrounding permissibility (*ibāḥa*), facilitation (*taysīr*), and the possibility of new *ijtihād*s. They also argue that rulings may change with time and changes in social necessity.

Scholars focusing on the practical aspects of IF, such as those serving on the *fatwā* committees of Islamic Banks, are more interested in the idea of *maṣlaḥa* because they need immediate solutions. Additionally, some scholars make note of the relationship between *maṣlaḥa* and *al-ḍarūriyyāt al-khamsa* (the five essentials).[35]

Use of Other *Ijtihād* Instruments

Other factors have influenced modern *ijtihād* practice in IF, particularly the use of *sadd al-dharāʾiʿ*, the Qurʾān and Sunna, *al-qawāʿid al-fiqhiyya*, and *ʿurf*. A number of Muslim scholars have emphasized the use of the principle of *sadd al-dharāʾiʿ* (blocking the means to evil) in their rulings on transactions in modern IF.[36] Those who prioritize the *sadd al-dharāʾiʿ* (which is based on *iḥtiyāṭ*/precaution) believe that the legal solutions based on *maṣlaḥa* – although they might be *jāʾiz* in themselves – operate on a danger-

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[34] For example, for *jiʿāla*, see al-Qaraḍāwī, *Bayʿ*, 77.

[35] Mulḥim emphasizes the relationship between *maṣlaḥa* and *al-ḍarūriyyāt al-khamsa* and argues that if the promise is not legally binding for the client, the bank would face enormous harm and that a promise that is made legally binding is more appropriate because it is more suitable for *maṣlaḥa* and the stability of financial transactions. Such a promise is also more suitable for the protection of the *five essentials* (religion, life, intellect, lineage or honor, and property), which is the primary function of the *maṣlaḥa*. However, in the case of the non-binding promise, all or some of the *maṣāliḥ* might be lost, resulting in *mafsada* (harm) (See Mulḥim, *Bayʿ*, 552).

[36] See, e.g., al-Miṣrī, *Bayʿ al-murābaḥa li-l-āmir bi-l-shirāʾ fī l-maṣārif al-Islāmiyya* (Beirut: Muʾassasat al-Risāla, 1996); Muḥammad Sulaymān al-Ashqar, *Bayʿ al-murābaḥa kamā tujrīhi l-maṣārif al-Islāmiyya* (Amman: Dār al-Nafāʾis, 1983).

ous terrain, as they might be easily used for impermissible transactions. The basic concern of those who are motivated regarding the *sadd al-dharāʾiʿ* is the transformation of transactions into paper work and the possibility of transforming IF into an interest rate mechanism. However, I observe that the principle of the *sadd al-dharāʾiʿ* has been less popular than *maṣlaḥa*-based reasoning among IF scholars, as the former is stricter and therefore less practical for application in real economic life.

Second, it is remarkable that direct references to the Qurʾān and Sunna have been gradually diminished in legal reasoning in modern IF. The primary causes of this decrease include the absence of some new issues in these sources and the presence of multiple structures in new problems, which require more complex reasoning. Instead, modern scholars make many more references to the views of *madhhab*s and *mujtahid*s. In addition to whether the subject matter is directly covered by the fundamental texts, in particular, researchers who emphasize *maṣlaḥa* may prefer to review the original text of the *ḥadīth* (e.g., regarding the *qabḍ*) and highlight the various interpretations of it and may use it in complex transactions.[37]

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[37] I can cite two examples to demonstrate that many rulings by modern scholars are built directly upon not Qurʾānic verses and prophetic traditions but on rational principles derived from them. First, there are three verses on the 'promise,' including the following:

"O you who have believed, why do you say what you do not do? Great is hatred in the sight of Allah that you say what you do not do."

(يَا أَيُّهَا الَّذِينَ آمَنُوا لِمَ تَقُولُونَ مَا لَا تَفْعَلُونَ , كَبُرَ مَقْتًا عِندَ اللَّهِ أَن تَقُولُوا مَا لَا تَفْعَلُونَ) (Q 61:2-3)

"O you who have believed, fulfill [all] contracts." (يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ) (Q 5:1).

"And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned." (وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْؤُولاً) (Q 17:34).

Modern scholars often disagree regarding the interpretation of these promise-related verses, particularly concerning their relationship to legally binding transactions. Second, they disagree on the nature and scope of the ban on "possession" that is mentioned in a number of prophetic ḥadīths; e.g., "The Prophet (pbuh) stated the following: 'Whoever bought food, he should not sell it before possessing it.'"

(نهى رسول الله ان يبيع الرجل طعاما حتي يستوفيه) (al-Bukhārī, "al-Buyūʿ," 54, 55; Muslim, "al-Buyūʿ," 30, 35, 36; Abū Dāwūd, "al-Buyūʿ," 65). These disagreements are the

Third, although the *al-qawāʿid al-fiqhiyya* (the legal maxims) have not been used to a great extent in IF discussions, some researchers – from time to time – have applied them to support their views. The *qawāʿid* do not have precedence over other evidence, and they usually utilize general rules rather than specific rules (*ḍawābiṭ*). Naturally, the scholars who emphasize the *ḍarūra* and *maṣlaḥa* refer to legal maxims regarding permissibility, such as "The general rule in financial transactions is permissibility (*ibāḥa*)" and "Financial transactions are based on the seeking of reasons and *maṣāliḥ*." Conversely, those who resort to the *qawāʿid* do so to avoid doubtful situations referring to the following legal maxims such as "The best is to keep away from unlawful things" and "Whatever is conducive to the *ḥarām* is itself *ḥarām*."

Finally, new forms of *ʿurf* (custom) that are different from premodern ones have developed as a result of new economic transactions and commercial practices. For example, it is observed that a new *ʿurf* is associated with foreign trade mechanisms, and rights and responsibilities they entail. For example, Ḥammād states that complex contracts are more suitable for modern trade and banking customs.[38] Likewise, some of those who prefer the legally binding promise in IF argue that modern commercial customs, practices, and institutions do not allow for non-binding promises, and therefore, that the former is more suitable for existing laws, customs, and market conditions and does not violate the major Islamic principles.[39] However, despite all these considerations, *ʿurf* is not a primary source, but it is used instead as a piece of evidence supporting the primary argument in modern *ijtihād* practice.

CONCLUSION

Parallel to the expansion and increase in the volume of commercial and economic activities in contemporary societies, Islamic Finance (IF) has transformed into a significant and dynamic field for

principal factors influencing the utilization of Qurʾānic verses and prophetic traditions in modern IF.

[38] See Nazīh Ḥammād, *al-ʿUqūd al-murakkaba fī l-fiqh al-Islāmī: Dirāsa taʾṣīliyya li-l-manẓūmāt al-ʿaqdiyya al-mustaḥdatha* (Dimashq: Dār al-Qalam & Beirut: al-Dār al-Shāmiyya, 2005), 50.

[39] See Fayyāḍ, *al-Taṭbīqāt,* 69-70; ʿUmar, "al-Tafāṣīl al-ʿamaliyya …," 188-191.

intellectual and *ijtihād*-related activities. In this context, modern Islamic economics (IE) has emerged as an important area in which the rapid pace of contemporary social and economic changes can be observed, and scholarly efforts and methods of reasoning in the field of modern Islamic law can be examined. In particular, IF and IE are significant loci of modern scholarship that allow for the investigation of how *fiqh*-centered approaches and concepts such as the *ijtihād* have been changed in the contemporary world.

I have argued in this paper that the modern *ijtihād* process bears significant differences from the traditional patterns of *ijtihād,* and that modern IF is an area in which this difference is most evident. I have demonstrated that socio-economic developments play a very important role with regard to these differences, which involve fundamental changes in a number of central concepts of *fiqh*, such as the *madhhab*, *maṣlaḥa*, and *ḍarūra*. Moreover, the content and functions of these concepts have also undergone a process of change in the course of modern *ijtihād* practice. These elements have thus come to have different meanings in different contexts.

We observe that although such *ijtihād* methods as *ḍarūra*, *sadd al-dharāʾiʿ*, *ʿurf*, and *maṣlaḥa* were also resorted to in the classical *fiqh*, the practice of producing rulings based on these concepts have become much more frequent and intense in the contemporary world due to rapid changes in social life and technology. I have thus argued that though the above-mentioned methods are found in the classical literature on the methodology of Islamic jurisprudence, and formed the bases of many rulings particularly in the Ḥanafī school, today they have become the main basis of *ijtihād* practice, particularly in the case of IF.

I have also demonstrated that although scholars often emphasize the permissibility (*ibāḥa)* principle, new *ijtihād*s are generally based on a modification of classical sources and opinions rather than the generation of brand new opinions. This is despite the fact that many jurists, such as al-Qaraḍāwī, emphasize the widely accepted notion that the field of *muʿāmalāt* exists within the domain of *ẓanniyyāt,* which consists of flexible *ḥukms*. They therefore claim that this field should be open to new *ijtihād* activity, to which general *fiqh* rules should be applicable.

On the other hand, we also observe that whether IF scholars are interested in the practical aspects of a financial ruling (e.g., if they are

on an 'Islamic' bank's *Sharīʿa Board*) influences the production of *ḥukm*s in this field. For example, those close to the practice of IF tend to draw on such practical principles as the *ḍarūra* and *maṣlaḥa* because they are often in a position to develop particular solutions to practical problems. 'Theorists,' on the other hand, tend to generate sharper opinions, often in the form of either total rejection of a solution or the offer of alternative solutions, which are not always easily applicable in the real-life economy. The latter group can be said to be producing rulings according to their understanding of "ideal Islamic economics."[40] Although this group's *ijtihād* methods often take the form of movement from sources or evidence to cases, 'practitioners' tend to transition from practical cases to sources and evidence. Furthermore, these processes often involve an intertwining of the predominance of *maṣlaḥa* with a series of assumptions regarding transition periods, gradual adaptation, and a lack of experience in the modern economy.

In this context, I have examined a number of changes in the process of modern *ijtihād*, such as the increasing shaping of modern *ijtihād* practice by external factors, which are framed in particular by Western institutions; changes in the context and functions of legal terms and concepts in classical *fiqh*; an intense use of additional sources of *uṣūl al-fiqh*; increasing inter-disciplinarization of *ijtihād* deliberations, along with the integration of modern finance, business, and law into *fiqh*; the deployment of a contract recognized by Islamic *fiqh* as part of a modern transaction, characterized by a lack of attention to its legal and social context; the transformation of the form and content of the IF literature into a series of *fatwā* texts rather than *fiqh* texts; *ijtihād* deliberations' partial adoption of an ideological character; the frequent use of collective *ijtihād* (*ijtihād jamāʿī*) deliberations; and changes in the composition and profile of *fatwā* authorities. I have also observed a decline in the use of alternative *ijtihād* instruments, including the *sadd al-dharāʾiʿ*, *al-qawāʿid al-fiqhiyya*, and *ʿurf*, as well as the Qurʾān and Sunna.

With regard to the practice of *ijtihād* within the field of IF, these changes will most likely intensify. Therefore, because of changes in

[40] For these concepts, see Ahmet Tabakoğlu, *İslâm İktisadı: Toplu Makaleler II* [*Islamic Economics: A Collection of Articles II*] (Istanbul: Kitabevi Yayınları, 2005), 125.

social and economic conditions and technological developments that are already in full swing, further developments within this field should not be surprising.

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