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Analysing The Concept of "Law Gap" From The Perspective of Islamic Law

"Kanun Boşluğu" Kavramının İslam Hukuku Açısından İncelenmesi

Hüseyin OKUR

Doç. Dr., Kocaeli Üniversitesi İlahiyat Fakültesi, İslam Hukuku Anabilim Dalı
Assoc. Prof. Dr., Kocaeli University Faculty of Theology, Department of Islamic Law
huseyin.okur@kocaeli.edu.tr, orcid.org/0000-0003-4285-7478

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Abstract

The law decrees the relations between people and reflects their values. Law provides an environment of peace for people living in a state of society to maintain their existence and brings vitality and order to society. Law is an order that aims to realize justice. The role of the judge is to help the law achieve its purpose in society. The law is essential for society because it serves as a norm of behavior for people. Society is an organism that lives the law; it exists with a constantly changing factual and social reality and is based on this reality. Sometimes there may be gaps in the laws. There are many reasons for this, but the most important factor is social change. Sometimes society plays an active role in changing the law, and sometimes the law causes social change by directly impacting society. For the rules of law to survive and meet the needs of the people who make up society, they must keep pace with changing conditions. In other words, legal rules should adapt to changes in social values and new formations. Otherwise, the emergence of legal gaps will be inevitable. Similarly, law gaps may arise due to the legislator's error, carelessness, sloppiness, or delay. The concept of the legal gap is a concept frequently expressed in positive law. Because while laws play an influential role in a certain period and direct social life, they may lose their effectiveness after a while. The most important reason is that positive law is based on written legal techniques (code civil) such as legislation, decrees, and by-laws. Jurists usually aim to cover all future events with their laws. However, they seldom fully achieve this goal. Islamic law, on the other hand, is mainly based on jurisprudence. Since Islamic law is essentially based on revelation and the structure of ijtihad law (case law), unconscious legal gaps are rarely seen. However, it is still possible to talk about conscious legal gaps in cases where ijtihad has not been carried out or has not yet been realized. This study, which introduces the legal gap in Islamic legal thought, examines whether there is a legal gap in Islamic law, and if so, what kind of legal gap it is, by comparing it with the legal gap in positive law.

Anahtar Kelimeler: Islamic Law, Positive Law, Law, Legal Gap, Law Gap, Ijtihad.

"Kanun Boşluğu" Kavramının İslam Hukuku Açısından İncelenmesi

Öz

Hukuk, insanlar arasındaki ilişkileri düzenler, değerlerini yansıtır. Hukuk, toplum halinde yaşayan kişilerin varlıklarını sürdürebilmeleri için barış ortamını sağlar, topluma dirlik ve düzen getirir. Hukuk, adaleti gerçekleştirmeyi amaçlayan bir düzendir. Hâkimin rolü, hukukun toplumdaki amacına ulaşmasına yardımcı olmaktır. Hukuk, toplum için önemlidir çünkü insanlar için bir davranış normu olarak hizmet eder. Toplum, kanunu yaşayan bir organizmadır; sürekli değişen olgusal ve sosyal bir gerçeklikle vardır ve bu gerçekliğe dayanır. Kanunlar toplumlarla var olur; toplumun olmadığı yerde hukuk da yoktur. Yasalarda bazen boşluklar oluşabilir. Bunun pek çok sebebi vardır ancak en önemli etken sosyal değişimdir. Kimi zaman toplum hukukun değişmesinde etkin rol oynarken kimi zaman da hukuk, toplum üzerinde doğrudan bir etki yaparak toplumsal değişime neden olur. Hukuk kurallarının varlığını sürdürebilmesi ve toplumu oluşturan kişilerin gereksinimlerini karşılayabilmesi için değişen koşullara ayak uydurması gerekir. Diğer bir ifadeyle hukuk kuralları, toplumsal değerlerdeki değişiklikleri ve yeni oluşumlara kendisini uyduracak önlemler almak zorundadır. Aksi takdirde yasal boşlukların ortaya çıkması kaçınılmaz olur. Bunun gibi, yasa koyucunun hatası, dikkatsizliği, özensizliği veya gecikmesi nedeniyle de

kanunlarda boşluklar meydana gelebilmektedir. Yasal boşluk kavramı pozitif hukukta sıklıkla dile getirilen bir kavramdır. Zira kanunlar belli bir zaman diliminde aktif rol oynayıp toplumsal hayatı yönlendirirken bir müddet sonra etki gücünü yitirebilir. Bunun en önemli sebebi pozitif hukukun, yönetmelikler, kararnameler ve tüzükler gibi yazılı hukuk tekniğine dayanmasıdır. Hukukçular genellikle koydukları kanunlarla gelecekte ortaya çıkacak olayların tümünü kapsamasını hedeflerler. Ancak bu hedefe hemen hemen hiçbir zaman tam olarak ulaşamazlar. İslam hukuku ise daha çok içtihat hukukuna dayanmaktadır. İslam hukukun öz itibariyle vahye dayalı olması ve içtihat hukukunun yapısı gereği bilinçsiz yasa boşlukların oluştuğu pek gözlenmez. Ancak buna rağmen yine de içtihadın yapılmadığı veya henüz gerçekleşmediği durumlarda bilinçli yasal boşluklardan söz etmek mümkündür. İslam hukuk düşüncesinde hukuk boşluğu kavramına bir giriş mahiyetinde olan bu çalışmada, İslam hukukunda hukuk boşluğu olup olmadığı, varsa hangi türde olduğu, pozitif hukuktaki kanun boşluğu ile mukayese edilerek incelenecektir.
Keywords: İslam Hukuku, Pozitif Hukuk, Kanun, Hukuk Boşluğu, Yasa Boşluğu, İçtihat.

Extended Abstract

Law is a set of systematic principles and rules that have existed since the earliest societies to ensure social order and justice (Ubi societas, ibi ius) and are strengthened by the sanctions imposed by the authority accepted in that society if they are not followed. Law is a set of systematic principles and rules that have existed since the earliest civilizations to ensure social order and justice (Ubi societas, ibi ius), which are strengthened by the sanctions imposed by the authority accepted in that society if they are not followed. Situations without provision to resolve an action, behavior, or relationship are defined as “Legal Gaps” and "loopholes in the law." In today's legal literature, the " gap " concept is used when there is no provision to resolve any action, behavior, or relationship and cannot be inferred even through interpretation. "Law gap" in case there is a defect (defects of the legal system) in the written legal rules or the rule that will solve the issue is not found among the written sources; In the absence of a provision in both written and unwritten sources in the resolution of a legal dispute, the type of gap encountered is called "legal gap." The concept of the legal gap (vacuum) can also be defined as the failure of the legislator to make a necessary and obligatory regulation by the legal order. To say that there is a legal gap in a subject, that subject must be a subject that the legal order should regulate. The concept of the legal gap (vacuum) can also be defined as the failure of the legislator to make a necessary and obligatory regulation by the legal order. To say that there is a legal gap in a subject, that subject must be a subject that the legal order should regulate. The gap is crossed into two "Law gap" and "Legal gap". The legal vacuum is also divided into two:

Legal Gap in the Code (Intra-legislative legal gap (Intra legem): These are the gaps left in the written sources intentionally and deliberately. In such gaps, a provision in the law can be applied to the concrete case, but this regulation only determines the general lines.

Extra-legal Gap in Law: They are gaps left in written sources unknowingly and unintentionally. These types of gaps are also divided into two on their own.

Covert Gaps in Law: Although there is a rule related to a concrete event in such gaps in the law, this rule has been kept too wide. Such gaps are filled by the judge's interpretation of the concrete event by narrowing it down.

Obvious Gaps in Law: It is a gap that arises when it is evident that there are no applicable written legal rules on a matter that needs to be resolved legally.

In Islamic law, there are two areas that constitute a legal gap. One of them is the area of ibāha, in which the Shari'ah does not have any command or prohibition about what to do or not to do, and the other is the area of maskūt al-anh (the pure silence of legal texts), that is, the area about which the Shari'ah is

silent. Of these two concepts, mubāh refers to the actions that the Shari'ah has left the obligator free to do or not to do. In the narrow sense, maskūt al-anh is defined as "those cases about which the Shāri'ah does not declare any judgement and remains silent" Although the concepts of law/legal vacuum in positive law seem to correspond to the concepts of maskūt-i ahn (the pure silence of legal texts) and mubāh in Islamic law, they are different in nature. This study, which is an introduction to the concept of a legal gap in Islamic legal thought, will examine whether there is a legal gap in Islamic law and, if so, what kind of legal gap it is by comparing it with the legal gap in positive law.

Introduction

Law is a set of systematic principles and rules that have existed since the earliest societies to ensure social order and justice (Ubi societas, ibi ius)[1]and that are strengthened by the sanctions to be imposed by the authority accepted in that society if they are not followed.

The rules of law are the most important of the rules that people who have to live in society consider themselves obliged to abide by. These rules directly regulate the external relations of individuals. For example, the delivery of something sold to the buyer and payment of the sale price by the buyer; punishment of those who steal, kill, or extort; fines for violating traffic rules; disciplinary punishment for students who cheat. In short, the purpose of the rules of law is to protect social life.[2]

In light of the information given, the law can be defined as follows: "Law consists of all the rules that regulate the relations between individuals and individuals in social life, and between individuals and society directly, with material sanctions, that is, rules that must be obeyed."[3]

According to another similar definition, "Law is the set of social rules that regulate the relations of individuals with each other and with society in the life of society and whose observance is supported by public power."[4]

A legal gap may occur if the legislator has not made a regulation that should be made by the legal order on a particular subject. In this case, there is a lack of a legal system or regulation, and uncertainty or confusion may arise in practice. A legal gap may also occur where the primary sources of law are inadequate.

1. The Concept and Types of "Gaps" in Law

Situations without provision to resolve an action, behavior, or relationship are defined as "Legal Gaps" and "loopholes in the law."

In today's legal literature, the concept of "gap" is used for situations where there is no provision to resolve any action, behavior, or relationship and where it cannot be inferred even through interpretation.

[1] Wherever there is a community, there is law.

[2] Necip Bilge, *Hukuk Başlangıcı-Hukukun Temel Kavram ve Kurumları* (Ankara: Turhan Kitabevi, 2007), 12-13.

[3] Turgut Akıntürk, *Medeni Hukuk* (İstanbul: Beta Yayıncılık, 2015), 11.

[4] Bilge, *Hukuk Başlangıcı*, 13.

"Law gap" in case there is a defect (defects of the legal system) in the written legal rules or the rule that will solve the case is not found among the written sources; In the absence of a provision in both written and unwritten sources in the resolution of a legal dispute, the type of gap encountered is called "legal gap."[5]

However, these two definitions are often combined with the "legal gap" concept. A. Aybay/R. Aybay defines the concept of a gap in the law as "the absence or inadequacy of a provision to be applied to a concrete case"[6] Dural and Sarı, on the other hand, define a legal gap as "the absence of a legal regulation that should exist"[7] Dinçkol, on the other hand, defines a legal gap as "a situation where the law, customary law or any other source of law cannot provide an answer to a legal problem."[8]

Therefore, a gap in the law occurs when there is no provision in the written rules of law (statutory law) and customary law, i.e., unwritten rules of law, that can be applied to a concrete case.[9] The judge fills a gap in the law that he/she encounters in a concrete case by creating a law. When resolving a case before a judge, the judge should first look to the law; if there is no provision therein, he should look to the customary law. If there is no provision therein, he should consider himself a legislator and decide accordingly. He will also use the spirit of the law and jurisprudence when filling the gaps in the law, i.e., when acting as a legislator. The judge cannot avoid solving the case before him. Therefore, even if there is no rule to resolve the dispute, he/she has to solve the problem by making a rule. Here, the concepts of legal and legislative/legal vacuum (gap) emerge.

1.1. Gap in the Law

The concept of a legal gap (vacuum) can also be defined as the failure of the legislator to make a necessary and obligatory regulation by the legal order.[10] To say that there is a legal gap in a subject, that subject must be a subject that the legal order should regulate.

The gap in the law is a different concept from the gap in the provision. If speaking of an intra-provisional gap is possible, a legal requirement can be applied to the concrete case. Still, to be applied, the condition must be completed with extra-provisional elements.[11] In the legal gap (vacuum), as mentioned above, there is a situation in which there is no lawful provision to be applied to the incident at all.

The Reasons for the Loopholes in the Law: Many primary and secondary factors can be mentioned in forming a legal gap. We can list some of them as follows: a) The fact that some laws are almost unenforceable may create a legal gap.

[5] Fatih Bilgili, Ertan Demirkapı, *Hukukun Temel Kavramları* (Bursa: Dora Yayıncılık, 2012), 256.
[6] Aydın Aybay, Rona Aybay, *Hukuka Giriş* (İstanbul: Aybay Yayınları, 2000), 235.
[7] Mustafa Dural, Suat Sarı, *Türk Özel Hukuku* (İstanbul: Filiz Kitabevi, 2004), 1/108.
[8] Abdullah Dinçkol, *Hukuka Giriş* (İstanbul: Der Yayınları, 2007), 271.
[9] Sabahattin Nal, *Hukukun Temel Kavramları* (İstanbul: AUZEF Yayınları, 2010), 79-80.
[10] XIVth Conference of European Constitutional Courts, Türkiye Report on the Questionnaire on the Problems of Legislative Negligence in Constitutional Jurisdiction. see. Conference of European Constitutional Courts (CECC), "reports" (*Date of Last Access: 10.03.2023).* (www.confcoconsteu.org/reports/rep-xiv/report_Turkey_tu.pdf.
[11] Kemal Oğuzman, Nami Barlas, *Medeni Hukuk/Giriş Kaynaklar Temel Kavramlar* (İstanbul: Vedat Kitapçılık, 2012), 91.

b) In the event of a discrepancy between the text of the law and its purpose, a legal gap may occur.

c) Social changes occurring in society may also be a factor in the emergence of a legal gap. Social change refers to the transformations that happen in a community over a certain period. Social change is society's structural, cultural, institutional, and behavioral differentiation. The phenomenon of change and movement may vary according to the intellectual tendencies and ideologies prevalent in every society and at every age. For example, the reckless pollution of the environment by factories is due to the lack of adequate laws on environmental laws or the failure to update existing laws in line with social changes.

d) A gap in the law may occur when a gap or deficiency in a law or regulation (defects of the legal system). In this case, based on existing laws, judicial bodies may use medical knowledge, expert opinions, decisions on similar issues and sources to fill the gap or make a temporary regulation.

e) The negligence or carelessness of the legislator may be a factor in the emergence of a gap in the law, the fact that subsequent legal regulations are contradictory in themselves, and the legislator does not knowingly make regulations.

f) The rules of law created by the legislator must correspond to the realities of society. If the community gives up laws as unviable, absurd, irrational, or simply the product of a prohibitive mentality, it will be inevitable that gaps in the law will arise.

The gap is crossed into two "Law gap" and "Legal gap". The legal vacuum is also divided into two:

1.1.1. Legal Gap in the Code/ Visible Gap (Intra-legislative legal gap (Intra legem)[12]

These are the gaps left in the written sources, intentionally and deliberately. In such gaps, a provision in the law can be applied to the concrete case, but this regulation only determines the general lines. This behavior of the legislator is for the cases where the laws should be shaped according to the time and social conditions. Such gaps are filled by the judge exercising his "discretionary power".

The gaps in the rules arise from the normative character of the law. Therefore, normative gaps (Normative Gaps) occur naturally. Minimizing such gaps can be achieved by making the legal codes general. The rules laid down by legal positivism will always have deficiencies and flaws, significantly when they are not updated for many years.

Gaps in the codes of civil law, in general, are gaps left to the discretion of the judge by the civil code or the law of obligations, which the judge must fill following equity.[13] For example, the condition of "severe incompatibility" in the case of marriage being unsustainable due to "severe incompatibility" is a gap in the rule. Therefore, filling this severe incompatibility is left to the judge's discretion.[14] The law did not determine in which situations the incompatibility and the

[12] Sururi Aktaş, "Pozitif Hukukta Boşluk Kavramı", *EÜHFD*, 0/14 (2010) 14.

[13] Zahit İmre, *Medeni Hukuka Giriş* (İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1980), 175.

[14] İmre, *Medeni Hukuka Giriş*, 175; Yalçın Kavak, *Medeni Hukukun Hakim Tarafından Uygulanması* (İstanbul: Legal Yayıncılık, 2019), 185.

unbearable everyday life would occur. In this example, the gap in the law must be filled by the judge. For example, it is up to the judge to decide whether some situations related to civil life, such as disrespectful behavior of the spouses towards each other, words showing disloyalty, insults, excessive jealousy that makes everyday life unbearable, lack of sexual intercourse of the woman, sexual impotence of the man, not washing, etc. constitute "severe incompatibility".[15]

1.1.2. Extra-legal Gap in Law

They are gaps left in written sources unknowingly and unintentionally. These types of gaps are also divided into two on their own.

1.1.2.1. Covert (Implied) Gaps in Law:[16] Although there is a rule related to a concrete event in such gaps in the law, this rule has been kept too wide. Such gaps are filled by the judge's interpretation of the actual event by narrowing it down.[17] For example, vehicles such as ambulances, fire departments, and police have a passing advantage because they perform "public service" in emergencies. Lawyer AK was fined 1399 liras for exceeding the speed limit on a divided road near the Çay district of Afyonkarahisar while returning to Konya from his trial in Bursa in November 2021, and AK appealed to the Çay Criminal Magistrate's Office, saying that he was conducting a public service. The administrative fine imposed on Lawyer AK, whose objection was accepted by the court, was cancelled because he was performing "public service".[18]

The issuance of decree laws usually fills implicit gaps.

1.1.2.2. Obvious Gaps in Law:[19] It is a gap that arises when it is evident that there are no applicable written legal rules on a matter that needs to be resolved legally. In this case, customary law is considered and given due regard. If there is a provision within customary law that is applicable, it is duly applied.

1.2. Law Gap

Although this concept has not been accepted definitively and has gained tremendous popularity, it is used by some authors. According to the opinion of these authors, if the provision to be applied to an event cannot be found in customary law after looking at the current law, it can be said that there is a legal gap.[20] In the absence of a provision in both written and unwritten sources in resolving a legal dispute, the type of gap encountered is called a "legal gap".

If the judge cannot find a provision in the written sources to resolve the dispute before him, he shall first investigate whether there is a rule of customary law that will help him in this regard.

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[15] Erhan Adal, *Hukukun Temel İlkeleri* (İstanbul: Legal Yayıncılık, 2012), 344.

[16] For the use of the concept, see. Çiğdem Kırca, "Örtülü (Gizli) Boşluk ve Bu Boşluğun Doldurulması Yöntemi Olarak Amaca Uygun Sınırlama (Teleologische Reduktion)", *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 50(1) (2001), 95.

[17] Bülent Köprülü, *Medeni Hukuk* (İstanbul: İstanbul Üniversitesi Hukuk Fakültesi yayınları, 1979), 144; Kemal Oğuzman-Barlas, *Medeni Hukuk*, 285. For the relevant law currently in force, see. Resmi Gazete, Law no. 4004, Date of acceptance: 16.06.1994 (Publication Date:19.06.1994), Number of Official Newspapers: 21965.

[18] Demirören Haber Ajansı (DHA), "Gündem Haberleri" (Erişim 12 Mart 2023).

[19] Kırca, *Örtülü (Gizli) Boşluk ve Bu Boşluğun Doldurulması Yöntemi Olarak Amaca Uygun Sınırlama (Teleologische Reduktion)*, 94.

[20] Arthur Meier-Hayoz, *Berbe Kommentar* (Germany: Verlag stampfli&Cie, 1968), 251-252; Oğuzman-Barlas, *Medeni Hukuk*, 92.

If it finds a rule of customary law appropriate to the concrete case, it will resolve the problem by applying that rule. However, a legal gap will arise if he fails to find an applicable standard law rule. In this case, the judge shall act as a lawmaker, make a rule, and resolve the case according to this rule. The judge calls this the "creation of law". Creating laws and making judgement are different concepts.

In the case of a legal loophole, the judge must resolve the dispute that has come before him by using his authority to create law. In other words, the judge is obliged to act as a legislator to fill the legal gap that has arisen, lay down the rule of law related to that concrete event, and resolve the dispute according to the rule he has established. The judge must observe the principles of abstractness and generality that apply to the law. For this purpose, while balancing the parties' interests in the case, the judge must also consider social interests (conflicts of interest between society and individuals). In addition, the law created by the judge should not contradict the general legal system. Accordingly, the conclusion reached by analogy is part of the interpretation of the law but still serves to fill the gaps in the law.[21]

As a result, we can say that legal gaps are defined as the complete or partial absence of the necessary legal provisions in the current regulations, and legislative gaps are defined as the full or partial absence of the required legal requirements in the legislative act in question.

2. Gap of Law in Islamic Law

In Islam, the legal attribute attached to the actions of the obligations is called "al-Ḥukm (Judgments)". In Islam, Allah is the source of judgements, i.e., the "al-Ḥākim (judge)". In the terminology of usūl, the term "Shāri" is mainly used for this concept. Allah is the real, independent, and primary Shāri (lawgiver), while the Prophet is the symbolic, dependent and secondary Shāri. Since Allah is the source of judgements, there is no judgement except the judgements He has made and no religion except the religion He has sent. The judgements given by the Prophet and the mujtahids (jurists) are not considered separate judgements because they are not independent of the judgements of Allah but are formed in the light of and following them.

Allah's message regarding the actions of the obligation s is called taklīfī judgement. Accordingly, a propositional judgement is when the Shāri's demands the liable to do or not to do an act or leaves him free to do or not to do an action. These judgements are called "taklīfī judgements" because they impose some burdens on people.

If the Shāri's demand for an act to be done is definite and binding, it is called "ijāb"; the result of this demand, i.e., the work of the address, is called "wujūb", and the act to be done is called "wājib". If something is not desired in a definite and binding manner, the request and the result attached to it are called "nadb", and the act is called "mandūb". If Allah (swt) demands that something should not be done in a definite and binding manner, this demand is called "tahrīm", the result of this demand is called "al-hurma/harām", and the prohibited act is called "haram".

If something is demanded not to be done in a definite and non-binding way, this demand and the result of this demand is called "karāha", and the action is called "makrūh". Tahyīr, on the other hand, means leaving the obligation free to do or not to do something. This statement and the result

[21] Gauch Peter, *Vertragsrecht / Nichts*, (Swiss: Stampli Verlag AG, 2021), 207-225.

of this statement are called "ibāha", and the act is called "mubāh".[22] In Islamic law, there are two areas that constitute a legal gap. One of them is the area of ibāha, in which the Shari'ah does not have any command or prohibition about what to do or not to do, and the other is the area of maskūt al-anh, that is, the area about which the Shari'ah is silent.

From these two concepts, mubāh refers to the actions that the Shari' frees the taxpayer to do or not to do. Shāri' (Allah) does not ask the obligation to do or not do. The Shāri'ah neither requires the taxpayer to do nor to abandon them. Likewise, "mubāh" is the permission to act within the permitted limits, subject to the perpetrator's will. In this respect, mubāh is partially similar to the "Legal Gap in the Code (Intra legem)" because the fact that mubāh is an area left free for the obligator and that the Shāri'ah does not intervene in the choice of the obligator has been likened to the absence of a ruling on the relevant issue.

However, whether the circle of mubāh is mental or Islamic, scholars have also debated Shāri'ah. The outcome of this debate is whether the intellect determines the permissible area or whether the Shari'ah determines it. According to the most of the Islamic jurists, this permitted area, which is left free, is the area of sharī'ah "ibāha" since it is in the category of "taklīfī" provisions. In other words, according to Islamic law, the mubāh (allowed) circle is an area where a person is free to do or not to do, but it is not irresponsibility; it is the control of freedom. In other words, since life does not accept a vacuum, the legislator filled the void caused by a margin with mubāh. Therefore, although the mubāh area is an area of freedom for the payer, it is considered within the halāl circle. In this respect, mubāh is not a state of nullity, i.e., the absence of law, but an area where what is permitted by law can be freely committed. Even if mubāh appears to be a field of neutrality in terms of terminology, its lot of action is sharia-defined.

As for the judgements that the Shāri'ah has silenced about a matter, Islamic jurists have debated this concept. Maskūt al-anh (the pure silence of legal texts) means a situation or an issue about which there is silence. In the narrow sense, maskūt al-anh is defined as "those cases about which the Shāri'ah does not declare any judgement and remains silent".[23] However, some jurists do not accept the theory of an area outside the permissible area, i.e., where the Shāri'ah is silent. For example, the representatives of the Zāhirite school, 'Ali ibn Dawud and Ibn Hazm and their followers, claimed that the Qur'an contains all religious rulings, both in name and in words, and that inferences outside of their explicit declarative proofs are invalid. According to Ibn Hazm, there is nothing that Allah and His Messenger have not commanded. Therefore, everything about which there is neither a prohibition nor a command falls into the category of mubāh. It is not permissible to make mubāh halal or haram. Allah has permitted its judgement for every event in the world, whether it is ijāb (obligatory), tahrīm (prohibition), or ibāha (allow).

[22] Abū Hāmid Muhammad b. Muhammad al-Ghazālī, *el-Müstaṣfâ fī 'ilmi'l-uṣûl*, ed. Muhammad Abdussalam Abdussafati (Beirut: Dâru al-Kütübi al-Ilmiyya, 1993) 1/210-211.

[23] see. Muharrem Önder, *İslam Fıkıh Usulünde Sükutun Delaleti*, (İstanbul: Mana Yayınları, 2013), 83.

For this reason, an event cannot occur that does not have a provision in the Qur'an and Sunnah."[24] This is the general approach of the Zāhirī jurists to the issue. According to them, matters about which there is no evidence are included in the scope of ibāha.

According to Islamic jurists, the Shāri's silence on a matter does not mean the nullity of the case. In general terms, the circle of maskūt al-anh (the pure silence of legal texts) is the silence of the Shāri'ah on some issues, without forgetfulness, due to his wisdom and mercy, by not declaring any judgement. Since there should be no subject or act in Islam devoid of a Sharī'ah ruling, determining the appropriate Sharī'ah ruling in matters about which no specific legislation has been declared has been entrusted to the mujtahid scholars of the ummah.[25] Therefore, the provisions defined as maskūt al-anh (the pure silence of legal texts) and about which the Sharī'ah has not made a statement are not in the category of forgotten, omitted or incomplete legal gaps as in positive law. In this regard, the Messenger of Allah narrated, "Verily Allah the Almighty has laid down religious obligations (farā'id), so do not neglect them. He has set boundaries, so do not overstep them. He has prohibited some things, so do not violate them; about some things, He was silent, out of compassion for you, not forgetfulness, so seek not after them"[26]. The hadith indicates that legal acts without declaration are not left incomplete because the legislator forgets them.

Since there is a vast area for ijtihad (independent reasoning/ case law) in Islam and ijtihad is encouraged and approved by the Qur'an and the Sunnah, all matters about which there is no nass (Qur'an and the Sunnah) are considered to be matters reserved for ijtihad (case law). Since this area is mainly related to the social sphere, the fact that the ruling on these issues has not been determined indicates that these issues may have different rulings according to ijtihad (case law). Thus, new provisions can be determined within the framework of general principles for new problems that occur with social change. Therefore, the recourse to secondary sources such as ijmā, istihsān, istislāh, the word of the Companions, custom, and even umūm al-balwā can be perceived as a reflection of the effort of Islamic law to adapt to changing and developing social conditions."[27]

As a result, what is meant by maskūt al-anh is the judgements whose rulings could not be determined by the evidence such as the Qur'an and the Sunnah and the evidence such as qiyas (analogy), ijmā (consensus of jurist), istihsān (prefence), masālih al-mursalah (public interest), istishāb and custom.

The existence of an area of maskūt al-anh in the Qur'an and Sunnah has led some contemporary studies to liken this situation to the principle of legal vacuum in modern legal literature. The main problem at this point is the wrong comparison of the structure of Islamic law and the structure of positive legal systems. Therefore, this is a kind of false syllogism (qiyas maa'l-

[24] Abū Muḥammad ʻAlī ibn Aḥmad Ibn Ḥazm, *Mulakhkhaṣ Ibṭāl al-qiyās wa-al-raʾy wāl istḥsān wa-al-taqlīd*, ed. Saʻīd al-Afghānī (Dimashq: Maṭbaʻat Jāmiʻat Dimashq, 1960), 36-38.

[25] Muharrem Önder, *İslam Fıkıh Usulünde Sükutun Delaleti*, 9.

[26] Abū al-Hasan 'Alī b. 'Umar b. 'Aḥmad al-Dārakutnī, *al-Sunan*, (Beirut: Dāru al-Marifa, 1966), "Rada'" 26 (no: 4445); Abū Bakr Ahmad b. al-Husayn b. 'Alī al-Bayhaqakī, *al-Sunan al-kubrā*, ed. Abdullah b. 'Abd al-Muhsin al-Turkī (Cairo: Dar al-Bukhus wa'd-Dirasati al-Islamiyya, 2011), 19/617 (no: 19757); Abū al-Qāṣim Musnid al-Dunya Suleimān b. Ahmad b. Ayyūb al-Tabarānī, *al-Mu'jam al-kabīr*, ed. Hamdi b. 'Abd al-Majid al-Salafi (Mosul: Mektebat al-Ulûm wa al-Hikam, 1983), 22/221.

[27] Şirin Gül, "Toplumsal Değişim ve İslam Hukuku", *Yakın Doğu Üniversitesi İlahiyat Fakültesi Dergisi* 5/1 (2019), 36.

fāriq. This is since Islamic law is primarily jurisprudential (case law). The contrasted legal systems, particularly in continental Europe, and when the law gap is noted, are generally based on written law (civil law).

In Islamic law, in addition to the provisions set out in the Qur'an and hadiths, the judge's own interpretations and case law are also recognised as sources of law. In Islamic law, Ijtihad law (case law) allows judges, based on their thoughts and judgements, to resolve issues that are not found in the law or are unclear. Therefore, ijtihad law contributes to the flexibility and adaptability of Islamic law.

Gaps, deficiencies in the laws or the silence of the legislator on a matter due to the lack of text means that there is no judgement to be rendered by the judge on the dispute submitted to the judge. Even in a case or a matter of jurisprudence or in the absence of the principles of Islamic law or custom, the judge must find a just solution. No court can refrain from ruling on the pretext of the law's ambiguity or the text's absence or incompleteness, and no jurist (mujtahid) can leave a matter unresolved.

The law cannot be all-encompassing, and the legislator cannot envisage resolving every issue. Therefore, the judge should try to reach a just outcome. One of the essential texts showing that written laws cannot contain everything is the dialogue between the Prophet and Muādh b. Jabal.

Muādh excelled in Fiqh and the Qur'an, so much so that Muhammad always said, "The most learned man of my nation in halal and haram is Muādh ibn Jabal."

When the Messenger of Allah sent him to Yemen, he asked, "How will you give a judgment or settle a dispute?" Muādh ibn Jabal answered, "I will refer to the Qur'an." Rasulullah asked, "What will you do if you do not find the decree you seek in the Qur'an?" Muādh ibn Jabal answered, "I will refer to the Prophet's Sunnah." Rasulullah asked, "But what will you do if you do not find a decree even in the Sunnah?" Muādh ibn Jabal readily answered, "I will be judged between mankind by resorting to juristic reasoning (ijtihad/ case law) to the best of my power."[28]

Although the concepts of law/legal vacuum in positive law seem to correspond to the concepts of maskūt-i ahn and mubāh in Islamic law, they are different in nature. There are several reasons for this:

Firstly: The reasons for the existence of silent rulings in Islamic jurisprudence are based on the principles of maslahah, such as removing difficulty and ease and leaving room for new solutions for new events that arise with the change of time and changing conditions. In fact, "Believers! Do not ask questions about matters which, if explained, would cause you distress"[29] In the commentary of the verse, Ibn 'Ashoor, after stating that the rulings will be binding if they are explained, states

[28] Abū Dāwūd Suleimān b. al-Ash'as b. Ishāq al-Sijistānī al-Azdī, *al-Sunan* (Beirut: Dāru al-Kitāb al-Arabī, ts.), "Aqdiyeh", 11; Abū ʿĪsā Muhammad b. ʿĪsā b. Sawra (Yazīd) al-Tirmidhī, *al-Jāmiʿ al-ṣaḥīḥ*, ed. Aḥmad Muhammad Shāqir (Beirut: Dā Ihyāʾi al-Turāsi al-ʿArabī, ts.), "Ahkām", 3.

[29] al-Ma'idah 5/101-102.

that if they are not described, the situations that may change with the change of time will remain fixed and this will cause great trouble for the society.[30]

Secondly: In Islamic jurisprudence, the authority of ijtihad (case law) has not been requested to preach law on all silent judgements. In other words, not all quiet decisions may be suitable for ijtihad.

Thirdly: Even if the authority of ijtihad is requested to judge on a matter of maskūt al-anh due to public need and public interest, the decision must be based on the evidence of the Shari'ah by the general principles of Islamic law.

As Kahraman notes, the Qur'an, for various reasons, did not lay down the judgement of everything that concerns the life of the society. In other words, the divine will deliberately be left legal gaps in the Book it revealed, even for the community of that day.[31]

If we exclude the areas where ijtihad (case law) is not permissible in Islamic law, most of the maskūt al-anh issues are areas where ijtihad is possible or actual.

On the other hand, if we start from the assumption that it may be correct to characterise the provisions of maskūt al-anh as a gap in the law, the new provisions to be promulgated in these areas will still be shar Sharī'ah law in the sense that they will be formed by referring to the Qur'an and Sunnah. This shows that the modern notion of a legal gap does not fully coincide with the field of maskūt al-anh in Islamic law. Because Islamic law is primarily based on the law of ijtihad (case law), in other words, a significant part of the laws were developed by mujtahids and judges on the axis of the Qur'an and Sunnah. The field of ijtihad in Islam is not based solely on custom, as in other common law legal systems. Ijtihad in Islamic law is primarily considered and formed within the framework of the principles of the Qur'an and Sunnah.

However, since the activity of ijtihad is not established by the lawmaker himself, i.e. Allah and the Prophet, the binding force of the judgements obtained through ijtihad will not be as definitive as the Qur'an and the Sunnah because the mujtahid is not a true legislator. Since the mujtahid has a margin of error, it has been concluded that the decisions of ijtihad in Islam are presumptive and, therefore, ijtihad is not binding.[32] Because Islamic law may vary according to geographies, which is what should be the law case. In addition, Islamic law is influenced by local traditions and develops over time. For this reason, ijtihad and fatwas are advisory rather than binding. However, if a political authority turns these case-law decisions into law, state power will guarantee their binding force.

Despite all this, if we are to characterise a "gap in the law" in some areas where the Shari'ah is silent, we will see the following portrait:

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[30] Muhammad al-Tāhir b. Muhammad b. Muhammad al-Tāhir al-Tūnusī Ibn Ashur, *al-Tahrīr wa't-tanwīr* (Beirut: Messesat al-Tārīhi al-Arabī, 2000), 5/230.

[31] Abdullah Kahraman, Mostafa Ahmad ez-Zerka, *Hadislerin anlaşılmasında Aklın ve Fıkhın Rolü* (İstanbul: Rağbet Yayınları, 2017), 12.

[32] Abū Bakr Ahmad b. 'Alī al-Rāzī al-Jassās, *al-Fusūl fi al-usūl*, ed. Ujayl Jāsim al-Nashamī (Kuwait: Vizāret al-Awqāf, 1985), 4/11; Abū al-Hasan Sayf al-Dīn al-Āmidī, *al-Ihkām fī usūli al-akhkām*, ed. Abdurrezzāq Afīfī (Beirut: al-Maktaba al-Islamī, ts.), 4/162.

2.1. Intra-legislative legal gap (Intra legem) in Islamic Law

As we have mentioned, in Islamic jurisprudence, intra-rule gaps can generally occur either in the form of ibāha or maskūt al-anh. However, it is impossible to consider every ibāha or maskūt al-anh as a gap in the rule.

For the provisions that are silent about, the definition of "the provisions that the Shari'ah has not mentioned[33] in the law without any forgetfulness" is based on the principle that it is a convenience for people.[34]

In this respect, it is possible to evaluate the provisions not mentioned in the laws, both in the form of ibāha and maskūt al-anh, in the category of gaps left in the written sources intentionally and deliberately. In such gaps, a provision in the law can be applied to the concrete case, but this regulation only determines the general outlines.

In such cases, the discovery of the law is through ijtihad. Ijtihad is not a judgement out of nothing but a revelation of an existing assessment. In other words, ijtihad is the application of the current review, which has a general character to what does not exist and what is similar. This process is generally called syllogism in Islamic law. One of the most common methods used to fill the gaps in Islamic law is the principle of istislāh. This method, also known as maslahah, refers to the process of determining the ruling of a jurisprudential issue that does not fall within the scope of the texts (Qur'an and Sunnah) or cannot be connected to an event regulated in the texts (Qur'an and Sunnah) by analogy, according to the general principles of Islamic law. Istislāh is one of the secondary evidence in the usūl al-fiqh, which is used to fill the conscious gaps left by the evidence other than the four Sharī'ah evidence (i.e., the Book, Sunnah, ijmā and qiyas) that are intended to determine the direct and indirect scope of the evidence.[35] Istislāh has become extremely important in the indirect fiqh procedure, as it allows the establishment of a balance between the rules of law and social decency, the principles and objectives of the texts (Qur'an and Sunnah), the public interest to be observed together and solutions to be produced in harmony with this. Istislāh or maslahah is a principle based on prioritising the public interest. This principle aims at the claims that there is evidence that the Shari' look into account when making judgements. Since the Shāri considers these, the mujtahid should also consider these kinds of benefits when determining the ruling of a matter. Such as the preservation of property, intellect, life, progeny, and religion are of this type. The Shāri aimed to preserve these while laying down many judgements. For example, Allah has made jihad and worship legitimate for the protection of religion, the short sentence for the protection of life, the punishment for drinking for the protection of the mind, the punishment for theft for the protection of property, and the punishment for the crime of adultery for the protection of progeny.

2.2. Extra-legal Gaps in Islamic Law

An illegal gap is described as "gaps left in written sources intentionally or unintentionally" under positive law. In terms of Islamic law, this description appears to be problematic. Because the

[33] Daraqutnī, "Rada" 26; Bayhaqī, *al-Sunan al-kubra*, nr. 19509.

[34] Muharrem Önder, *İslam Fıkıh Usulünde Sükutun Delaleti*, 9.

[35] Şükrü Özen, "İstislah", *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, (İstanbul: TDV Yayınları, 2001), 23/383-388.

Qur'an indicates that the religion is complete and nothing is missing.[36] According to Islam, religion is a set of rules that regulate human beings' relations with Allah, other human beings and beings, and direct their lives and be the basis of their behavior concerning them. In this respect, Islam as a religion is not only a set of principles that regulate people's worship but also a set of rules that regulate all legal rules and moral virtues regarding the happiness of human beings in this world and the hereafter. However, with new conquests and commercial activities, the Islamic society became acquainted with different cultures and faced new events they had not seen in their local communities. In addition, Muslims faced a tremendous administrative problem with the Prophet's death. Sometime after the Qur'an's textualisation process, especially from the tābiin (the generation after the sahābah) period, contextual ambiguities emerged, and the issue of which context of the verses should be taken as a basis was reflected in ijtihad. The same applies to hadiths.

We can briefly mention the reasons for the disputes that emerged during the compilation process of Islamic law as follows:

a. Different interpretations of some words and sentences in the Qur'an and Sunnah.

b. To use the word in both literal and figurative sense.

c. The combination and interpretation of verses and hadiths on the same subject in different ways.

d. Reasons related to the hadith: Whether the hadith is known or not, its degree of authenticity, the measure of authenticity, its interpretation, and its reconciliation with conflicting evidence.

e. Differences in jurisprudential knowledge, method, and strength.

f. The impact of the natural and social environment.

These and similar reasons formed the criteria of preference between the opinions transmitted from the Sahāba and the tābiʿūn, as well as the principles of the ijtihad procedures to be followed to solve newly emerging issues.

Implied Gap in Islamic Law: In such gaps, although there is a rule in the law regarding the concrete case, this rule is kept too broad. In Islamic law, one of the most tangible examples of an implicit gap outside the rules is the al-hīlah al-sharʿīyah (unlawful gap). This term has similar meanings to the term "loophole in the law". What is also meant by the term "loophole in the law" is that people have laws, contracts, etc., a law that allows n to legally refrain from doing something that they intended to do, a contract, etc. It is a mistake in the way it is written. There is a transition or escape from one law to another in such gaps. While some of this genre is legal, some are "Lawlessness in the appearance of the law" tour. This means that a behavior seemingly per the law contradicts the law. That is, it is used in cases where an action follows the law but, in reality, has consequences contrary to the law.

Mandatory legal rules are violated in this type of cheating against the law. For example, if a person who wants to receive interest from a lender sells his goods to him on credit for one hundred

[36] "This day i have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion." al-Mâidah 5/3.

thousand Turkish liras and buys the same goods in cash for seventy-five thousand liras, this is cheating. Here, a result (interest taking) has been obtained hidden behind two shopping transactions that comply with the law in terms of shape, contrary to the purpose of the legitimacy of the shopping, and this transaction has been made to achieve that purpose. The most crucial element of cheating against the law is the intention to cheat. Specific reasons lead people to illegal acts of al-hīlah al-sharʿīyah (unlawful gap). These are expressed as legal deficiencies, political pressures, and social causes. One of the leading legal reasons for cheating in Islamic law is that the Islamic legal system does not have a structural problem. Because the Islamic legal system does not allow cheating, because of the institution of ijtihad and the general rules available for each subject, it would not be correct to consider cheating in Islam as a gap in the law. At the very least, when looking for an escape from an existing law, it would be appropriate to call it fitting it into a legal case again.

Obvious Gaps in Islamic Law: It is a gap that arises when it is evident that there are no applicable written legal rules on a matter that needs to be resolved legally. In a favourable legal system, such legal gaps are caused by the legislator's error, carelessness or delay. Such a characterization would not be correct for Islamic law because the general principles of Islamic law and its structure's ijtihad character (case law) will not allow a wholly null and void area to be left empty in the legal field. Because according to the prevailing understanding in the Islamic scientific tradition, Muslim societies must educate scholars with the ijtihad license. Because ijtihad is fard-i kifāyah, and if no one has reached the degree of ijtihad in a century, all Muslims will be responsible in the sight of Allah.

There is no other legal system in the world with theories of obtaining judgment as advanced as Islamic law. Islamic law has a significantly developed legal idea. Islamic law as a legal theory has a more developed legal system than continental European law based on Roman law, Roman law, and Anglo-Saxon law. In some areas, such as interpretation and reasoning, Islamic law is even more advanced and sophisticated than them. Regarding theoretical richness, the books of jurisprudence are never inferior to the books of legal methodology in the West; on the contrary, they are more than them. Therefore, even if there is a legal gap in Islamic law, this gap will be filled quickly thanks to the jurisprudential structure. The legal methodology of Islamic law has developed so much that throughout history, it has not been observed that a judge has failed at the point of resolving a matter based on a reason, such as the inadequacy of interpretation methods.

Result

The law decrees the relations between people. It reflects the values of society. The role of the judge is to help the law achieve its purpose in society. The law of society is a living organism. It is based on a constantly changing factual and social reality. The change in a community is sometimes violent and easily identifiable. The process of change in laws can be subtle and gradual, often taking place over a longer span of time, and cannot be noticed within a short period of time. Laws are intricately connected to societies, as they are shaped by and exist within them. There is no law where there is no society. Changes in laws sometimes precede social change. However, in most cases, the law difference results from a change in social reality.

No matter how advanced a legal system is, it can rarely keep pace with societal socioeconomic changes. Hence, it must be constantly reviewed to modernise and update its provisions. Reviewing and reforming the legal system is essential to keep it practical and functioning. Despite these reforms, some areas/situations are not adequately covered by existing legislation. Such uncovered areas/situations are referred to as legal gaps.

Similarly, in Islamic law, there may also be legal gaps. However, there is a fundamental difference between the two. In positive law, factors such as the forgetfulness of the legislator are mentioned among the reasons for the gaps. In contrast, in Islamic law, it is declared by Allah that the existing legal gaps are not due to forgetfulness or error. For this reason, legal gaps in Islamic law are left by the Shāri himself to benefit people. In this respect, the essential basis for legal gaps in Islamic law is to leave gaps that will respond to the needs of the progressing and changing times and the needs of societies accordingly and to provide room for manoeuvre. These gaps have been filled with custom and maslahah and the general purposes of the Shari'ah to respond to the needs of the societies. In this respect, in Islamic law, legal gaps are deliberately left by the Shari to meet the needs of the people. These gaps left consciously in Islamic law are filled with ijtihad (case law) techniques used to make laws. Therefore, the places seen as gaps in Islamic law are filled with the laws obtained by the law-making regulation methods. This results from the ijtihad (case law) characteristic nature of Islamic law.

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