

## REPRESENTATIVES OF THE ASSERTION THAT THE PROVISIONS OF FİQH SHOULD BE AMENDED IN THE LATE OTTOMAN EMPIRE: MANSURIZADE SAİD AND MAHMUD ESAD EFFENDİ

*Son Dönem Osmanlı'da Şer'i/Fıkhî Hükümlerin Değişmesi Fikrinin Temsilcileri: Mansurizade Said ve Mahmud Esad Efendi*

### Hadiye ÜNSAL

Dr. Öğr. Üyesi, Ankara Sosyal Bilimler Üniversitesi İslami İlimler Fakültesi Temel İslam Bilimleri Bölümü Tefsir Anabilim Dalı, Ankara, Türkiye

*Assist. Prof., Social Sciences University of Ankara Faculty of Islamic Education Department of Basic Islamic Sciences Department of Hermeneutics, Ankara, Turkey*

hadiye01@hotmail.com | <https://orcid.org/0000-0002-4017-262X>

#### **i** Makale Bilgisi / Article Information:

Makale Türü / Article Type: Araştırma Makalesi / Research Article

Geliş Tarihi / Received: 21.07.2019

Kabul Tarihi / Accepted: 28.10.2019

Yayın Tarihi / Published: 31.12.2019

**” Atıf / Cite as:** Ünsal, Hadiye. “Representatives of the Assertion that the Provisions of Fiqh should be Amended in the Late Ottoman Empire: Mansurizade Said and Mahmud Esad Effendi”. *Mütefekkir* 6/12 (2019): 407-422. <https://doi.org/10.30523/mutefekkir.659184>.

**© Telif / Copyright:** Published by Aksaray Üniversitesi İslami İlimler Fakültesi / Aksaray University Faculty of Islamic Education, 68100, Aksaray, Turkey. Tüm Hakları saklıdır / All rights reserved.

**İntihal / Plagiarism:** Bu çalışma hakem değerlendirmesinden geçmiş, bir intihal yazılımı ile taranmıştır. İntihal yapılmadığı tespit edilmiştir. This article has gone through a peer review process and scanned via a plagiarism software. No plagiarism has been detected.

## REPRESENTATIVES OF THE ASSERTION THAT THE PROVISIONS OF FİQH SHOULD BE AMENDED IN THE LATE OTTOMAN EMPIRE: MANSURIZADE SAİD AND MAHMUD ESAD EFFENDİ

### Abstract

This article investigates how several scholars and intellectuals during the last period of the Ottoman Empire understood and interpreted Qur'anic verses concerning such issues as polygamy, monetary interest, and slavery. This period, known as the Second Constitutional Era (1908-1918) was one of heated debate in which the multifaceted modernization policies of the time spread its way into religious thought. One of the scholars whose views will be mentioned in this paper is Mansurizade Said (b.1864/d.1923), who taught at Dâr al-Funûn (an institution of higher learning in Ottoman Empire) and also was known by the title of "mudarris" (professor), and Mahmud Esad Effendi (b. 1856/d. 1918) who was mostly known by his jurist identity. In this paper, we will give some information about the biographies and scientific activities of the above mentioned scholars, followed by their opinions on the Qur'anic rules.

**Keywords:** Mansurizade Said, Mahmud Esad Effendi, Polygamy, Interest, Slavery.

### Son Dönem Osmanlı'da Şer'î/Fikhî Hükümlerin Değişmesi Fikrinin Temsilcileri: Mansurizade Said ve Mahmud Esad Efendi

#### Öz

Bu çalışma, Osmanlı Devleti'nin son döneminde çok yönlü modernleşme politikalarının hararetle tartışıldığı ve bu tartışmaların dinî alana da yansıdığı II. Meşrutiyet yıllarında (1908-1918) bazı ilim ve fikir adamlarının çok eşlilik, faiz, kölelik gibi konularla ilgili Kur'an ayetlerini ne şekilde anlayıp yorumladıklarına dairdir. Görüşlerini aktaracağımız ilim adamlarından biri Dârü'l-Fünûn'da hocalık yapan ve "müderris" unvanıyla tanınan Mansurizade Said (1864-1923), diğeri daha ziyade hukukçu kimliğiyle öne çıkan Mahmud Esad Efendi'dir (1856-1918). Çalışmada, ilk olarak anılan iki ismin biyografileri ve ilmî faaliyetleri hakkında bilgi verilecek, ardından Kur'an hükümleriyle ilgili çeşitli görüşleri nakledilecektir.

**Anahtar Kelimeler:** Mansurizade Said, Mahmud Esad Efendi, Çok Eşlilik, Faiz, Kölelik.

## INTRODUCTION

As it is known, the 19<sup>th</sup> century was one of the most unfortunate centuries of the Islamic world. The Ottoman Empire, which represented the greatest power of Islam in the world in that century, tried to take measures to preserve its existing power, however, weakened day after day. As the West in those times was victorious to the Islamic world in general and to the Ottoman Empire in particular in many aspects. The Ottoman Empire was in the end of the road, and unfortunately helpless against the military, technical, political, intellectual, cultural and economic developments in Europe. It also happened in the field of ideas, thought and science.

This rather bleak picture led many Muslim scholars and thinkers in important centers of the Islamic world, particularly in India and Egypt, to assess the current situation and identify possible solutions. The idea of benefiting

from the Western experience in the search for a solution, which was expressed by concepts such as reform, *tajdid* and *tajaddud*, mustered a great deal of support. The Ottoman Empire, which had already, to some degree, introduced some Western ideas into the empire following the 1839 Imperial Edict of Gulhane began to further familiarize itself with the political, literary and philosophical works of the Western world.

The focus of this paper is a scholarly interpretation of Qur'anic verses relating to issues such as polygamy, monetary interest and slavery during the last period of the Ottoman Empire, a period known as the Second Constitutional Era (1908-1918). This period saw much heated debate as modernization policies came into contact with religious ideas. The two scholars that are the focus of this study are Mansurizade Said (1864-1923), a teacher at the Dâr al-Funûn (an institute for higher learning), and Mahmud Esad Efendi (1856-1918) who was prominent in the field of judiciary.

This paper goes into the biographical details and scientific activities of these two scholars, followed by their interpretation of Qur'anic rules. In considering the views, their use of style and descriptive style will be focused on rather than a criticism of their opinions on the subject matter. This study does not aim to analyze and debate the views of certain scholars but rather to shed light on the scientific and intellectual environment of the late Ottoman Empire. A general assessment of what issues in the sphere of religion was under discussion during the transition period from the Second Constitutional Era to the Republic of Turkey and the extent to which these discussions were in reconciliation with the *fiqh* tradition will be addressed in the conclusion. In this study, the source-centered review method will be followed.

### 1. MANSURIZADE SAID (B. 1864/D. 1923)

Mansurizade Mehmed Said was born in 1864 in Smyrna/Izmir to Emin Effendi and Celebizade Elmas Zerafet Hanim. The name "Mansurizade" refers to the Mansurizade's, a well-established and influential family of Smyrna. His great-grandfather Mehmet Emin Effendi worked as the *ayan* of Smyrna (a person who was known as regulating the relations between the state and the people in cities and towns in the Ottoman Empire) during the reign (1808-1839) of Sultan Mahmud II (d. 1255/1839).

Mansurizade Said completed his education at Hatuniye Madrasa in Smyrna where he learned Arabic and Persian and specialized in Islamic sciences, in Arabic literature and *fiqh*. Having taught himself, French, Said began to teach at the madrasa where he had previously been a student. He later continued his scientific studies as well as his political activities in Istanbul, becoming a *fiqh* history teacher in the Faculty of Law at Dâr al-Funûn. He died in 1923 in Smyrna.

Mansurizade Said became a member of the Ittihad ve Terakkî Cemiyeti

(The Committee of Union and Progress) for some time following the decision to declare a constitutional government and was elected as a deputy for Saruhan (Manisa) on behalf of The Committee of Union and Progress. He would continue his political career as a deputy from Saruhan and Mentеше in the same party until the end of the First World War.

He served in various official duties; one of which was as the representative for the Ottoman Empire in talks with the Austro-Hungarian government over its annexation of Bosnia and Herzegovina. At one point, he was in consideration for the position of Shaykh al-Islam, (chief religious authority in the Ottoman Empire), but was not appointed. Mansurizade Said was active in legal activities such as the amendment of the Code of Civil Procedure (Usul-i Muhakemat-ı Hukukiyye Kanunu) as well as the 1917 Decree of Family Law (Hukûk-ı Âile Kararnâmesi). He also wrote a series of books and articles on Islamic subjects.<sup>1</sup>

*Keşfu'l-ğita ani'l-Hata, Tatbikât-ı Mecelle, Usûl-i İctihad and Hakikat-i Islâm* are some of the published books of Mansurizade Said. A selection of his articles, most of which are concern Islamic law, are as follows:

“İslâm Kadını: Taaddüd-i Zevcât İslamiyet'te Men Olunabilir” (Women of Islam: Polygamy can be Banned in Islam), *İslâm Mecmuası* 1/8 (1330): pp. 233-238.

“İslâm Kadını: Taaddüd-i Zevcât Münasebetiyle”, *İslâm Mecmuası* 1/9 (1330): 280-284.<sup>2</sup>

“Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair” (Legality is not Part of the Islamic Law), *İslâm Mecmuası* 1/10 (1330): 295-303.<sup>3</sup>

“İctihad Hataları” (İjihad/Jurisprudence Errors), *İslâm Mecmuası* 2/21 (1331): 535-541.<sup>4</sup>

“Kâmûs-ı Felsefe”, (Dictionary of Philosophy), *İslâm Mecmuası* 4/43

<sup>1</sup> Abdullah Kahraman, “Daru'l-Fünûn Hocalarından Mansûrîzâde Mehmed Said ve Klasik Fıkıhın Sınırlarını Zorlayan Bazı Görüşleri”, *Dârülfünûn İlahiyat Sempozyumu 18-19 Kasım 2009 Tebliğleri* (Istanbul, 2010), 405-408. Ayşegül Yılmaz, *Mansûrîzâde Said ve Fikhi Görüşleri* (Master's Thesis, Marmara Üniversitesi, 2003), 7-13.

<sup>2</sup> The articles published in the V and XI volumes were translated into English by M. Şükri Hanioglu. See., Charles Kurzman, *Modernist Islam: 1840-1940* (New York: Oxford University Press, 2002), 188-191. Said wrote some articles with the same title: “İslâm Kadını: Taaddüd-i Zevcât Münasebetiyle”, *İslâm Mecmuası* 1/11 (1330): 325-331; “İslâm Kadını: Taaddüd-i Zevcât Münasebetiyle”, *İslâm Mecmuası* 1/12 (1330): 367-371; “İslâm Kadını: Taaddüd-i Zevcât Münasebetiyle”, *İslâm Mecmuası* 2/13 (1330): 397-403.

<sup>3</sup> Said wrote some articles with the same title: “Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair”, *İslâm Mecmuası* 2/14 (1330): 429-432; “Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair”, *İslâm Mecmuası* 2/24 (1330): 582-588; “Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair”, *İslâm Mecmuası* 2/25 (1330): 599-604.

<sup>4</sup> Said wrote some articles with the same title: “İctihad Hataları”, *İslâm Mecmuası* 2/23 (1331): 564-566; “İctihad Hataları”, *İslâm Mecmuası* 3/26 (1331): 616-619; “İctihad Hataları”, *İslâm Mecmuası* 3/27 (1331): 636-639; “İctihad Hataları”, *İslâm Mecmuası* 3/28 (1331): 647-650.

(1332): 885-888.<sup>5</sup>

“Şeriat ve Kânun” (Shariah and Law), *Dâru'l-Funûn Hukuk Fakültesi Mecmuası* 1/6 (1332): 530-535.<sup>6</sup>

These articles led to a number of angry reactions from conservative Islamist circles of the late Ottoman Empire. Prominent influential scholars of the time such as Babanzade Ahmed Naim (d. 1934) and Izmirli Ismail Hakki (d. 1946) found Mansurizade’s views inappropriate.<sup>7</sup> One view of Mansurizade’s that attracted a great degree of the heated debate was that of ribâ/interest. The further controversy centered on Mansurizade’s opinion that the rule of legality/permmissibility (jawâz) will not be counted as a divine/religious rule. Another issue is his opinion that polygamy can be banned by the public authority, which is related to the claim that legality is not covered by the divine/religious rule.

Mansurizade believes that many laws and rules within the fields of jurisprudence and shariah could, and even should, be amended in accordance with the spirit of the time. The general content of his works titled *Hakikat-i İslâm* (Truth of Islam) and *Usûl-i İctihad* (Principles of Reasoning) concern his ideas regarding the amendment. According to Mansurizade, the famous principle of the Mecelle/Mejelle civil code (article 39) which states, “As times change, rules also change” means that “It is necessary for Islam to change the religious rules in compliance with time.”<sup>8</sup>

Although this rule simply stressed the fact that renewal was inevitable, it met with very strong opposition and resistance based on ignorance and fanaticism.<sup>9</sup> It is necessary to leave the traditional structure of the jurisprudence aside in order to eliminate the mentality that suppresses independent reasoning (*ijtihad*) by obstructing the change according to Mansurizade and to make new juridical laws within the framework of the rules based on the *tabî* (natural law) principles of the shariah.<sup>10</sup>

### 1.1. The Issue of Polygamy

Polygamy has been the subject of much criticism against Islam in modern times. According to classical Islamic scholars, polygamy is a provision

<sup>5</sup> Said wrote some articles with the same title: “Kâmûs-ı Felsefe”, *İslâm Mecmuası* 4/44 (1332): 903-905; “Kâmûs-ı Felsefe”, *İslâm Mecmuası* 4/48 (1332): 963-967; “Kâmûs-ı Felsefe”, *İslâm Mecmuası* 5/49 (1332): 984-986.

<sup>6</sup> He also wrote another article with the same title: Şeriat ve Kânun”, *Dâru'l-Funûn Hukuk Fakültesi Mecmuası* 2/8 (1333): 601-606.

<sup>7</sup> M. Âkif Aydın, *İslâm-Osmanlı Aile Hukuku* (Istanbul: Marmara Üniversitesi İlahiyat Fakültesi Vakfı Yayınları, 1985), 174.

<sup>8</sup> Mansurizade Said, *Hakikat-i İslâm*, publisher: Veliyyuddîn (İzmir: Aydın Vilayeti Matbaası, 1329), 9; Mansurizade Said, *Usûl-i İctihâd*, publisher: Veliyyuddîn (İzmir: Vilayet Matbaası, n. d.), 2.

<sup>9</sup> Said, *Usûl-i İctihâd*, 3.

<sup>10</sup> Kaşif Hamdi Okur, “II. Meşrutiyet Dönemi İslam Hukuku Tartışmalarından Bir Kesit (Mansurizade Said ve Seyid Bey Örneği)”, *Dini Araştırmalar* 2/ 5 (Eylül-Aralık 1999): 275-276.

that can be applied to all times. Since the end of the 19<sup>th</sup> century, the topic of attempting to limit polygamy has been discussed extensively. In these debates, figures such as Mansurizade Said, Celal Nuri (d. 1936), Mehmed Ubeydullah Hatiboğlu (d. 1937) and Mehmet Şemsettin Günaltay (d. 1961) demanded the complete prohibition of polygamy. On the other hand, proponents such as Rashid Rıza (d. 1935), Mehmet Âkif Ersoy (d. 1936), Musa Carullah (d. 1949) and Ahmet Hamdi Akseki (d. 1951) consider monogamy as the basis but advocate polygamy where the necessary conditions have been fulfilled.<sup>11</sup>

Mansurizade was highly critical of polygamy, which is indirectly referred to in the Qur'an (Al-Nisâ 4/3) and is accepted as a divine rule in classical Islamic jurisprudence. The verse on polygamy (Al-Nisâ 4/3) is as follows: "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]."

Mansurizade believes polygamy to be contrary to the spirit of modern time. He saw it as a matter categorized as a permissible act, and does not contain an order or prohibition clause in Islamic law. The public authority has broad powers in all cases where there are no orders and/or prohibitions derived from fundamental religious texts. Hence, the public authority may suspend or abolish the legality of polygamy in accordance with the social and cultural environment of the time.<sup>12</sup> He says:

"Since polygamy is permitted in the Islamic sharia [religious law], Islam cannot refuse to accept polygamy." "In Islam polygamy has to be accepted." "Polygamy is forbidden in other religions and nations, but in Islam its prohibition is not possible." "The religion of Islam is different from other religions in regard to the issue of polygamy. Because of such wrong opinions and beliefs, the Islamic sharia has been subjected to a great deal of criticism on the

<sup>11</sup> İsmail Yalçın, "Günümüz İslam Aile Hukuku Kanunlarında Çok Eşlilik Üzerindeki Sınırlandırmalar", *İnsan ve Toplum Bilimleri Araştırmaları Dergisi* 6/3 (2017): 1710.

<sup>12</sup> See Mansurizade Said, "İslâm Kadını: Taaddüd-i Zevcât İslamiyet'te Men Olunabilir", *İslâm Mecmuası* 1, no. 8 (1330), 234, 236-237.

"Let us then set out a truth which is accepted by the founders of all the [four Sunni] schools of law and by the jurists at large, one which cannot conceivably be doubted, since it stems, as I will explain, from a revealed text. It is this: the verse "obey God and the Messenger and those in authority among you" [Al-Nisâ 4/59] commands absolute obedience to the authorities. This verse states that the authorities should be obeyed regardless of what they order or prohibit. Since the verse does not mention any restriction concerning the matters in which the authorities should be obeyed, it follows that, as explained in the relevant science, this is an ordinance of unrestricted application, and it is thus to be understood that it is obligatory to obey the authorities in whatever they order or prohibit. Thus the ordinance we learn from this verse is unrestricted and unconditional." Mansurizade Sa'id, "The Muslim Woman: Polygamy Can Be Prohibited in Islam", trans. M. Şükri Hanioglu, ed., Charles Kurzman, in *Modernist Islam: 1840-1940* (New York: Oxford University Press, 2002), 189.

part of Europeans and civilized peoples in general. They imagine that medieval savagery still prevails in the Islamic world as a result of the sharia. Islamic attempts to counter this veritable flood of negative comments serve only to strengthen the slander, calumny, and baseless accusations directed against the sharia. These antagonists have been carrying on their hostile propaganda on the basis of their belief that the sharia contains a legal doctrine regarding polygamy. Meanwhile, those who defend Islam, seeking to preserve this doctrine, never cease to speak of the advantages of polygamy and to maintain that it is in accordance with reason. The disputes continue to no purpose, because not one of the defenders of Islam has set out the true position: that there is no preferred doctrine in the sharia regarding polygamy, that it is an issue left to the discretion of the rulers, that Islam in no way hinders the prohibition of polygamy, and that polygamy is not an issue which raises difficulties from the viewpoint of the sharia, or needs extensive discussion.<sup>13</sup>

In Article 38 of the 1917 Decree of Family Law, to which Mansurizade made important contributions, significant limitations were imposed on the practice of polygamy. According to this article, which was framed by using the *Hanbali fiqh*, the woman had the right to expect her husband to remain monogamous during the marriage, and if he married a second wife, the first or second wife must be divorced.<sup>14</sup>

Mansurizade's thesis on polygamy is based on two fundamental principles; these being the issue of legality/permissibility (*jawâz*) and the power of the public authority in this area.<sup>15</sup> Later on, he wrote independent articles with many tackling these issues in detail. In his article, "Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair" (Legality is not Part of Islamic Law), he described legality as a concept in which there is neither necessity nor prohibition: "If something is said to be permissible, it does not mean anything except that it has no obligation and prohibition." In the same article, he continues: "it is permissible to travel" means that "there is no necessity and prohibition in traveling."<sup>16</sup>

Mansurizade Said addresses the regulation of the law by the public authorities in two articles titled "Şeriat ve Kânun (Shariah and Law)."<sup>17</sup> He draws attention to the relationship between religious and legal judgements when examining the issue of law and shariah. No distinction exists between the two in terms of intention and purpose; while legal judgements are made

<sup>13</sup> Sa'id, "The Muslim Woman: Polygamy Can Be Prohibited in Islam", 188.

<sup>14</sup> Kahraman, "Darul-Fünûn Hocalarından Mansûrîzâde Mehmed Said ve Klasik Fıkhın Sınırlarını Zorlayan Bazı Görüşleri", 406.

<sup>15</sup> Sa'id, "The Muslim Woman: Polygamy Can Be Prohibited in Islam", 189.

<sup>16</sup> Mansurizade Said, "Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair", *İslâm Mecmuası* 1/10 (1330): 298-299.

<sup>17</sup> Mansurizade Said, "Şeriat ve Kânun", *Dârülfünun Hukuk Fakültesi Mecmuası* 1/6 (1332): 530-535; Mansurizade Said, "Şeriat ve Kânun", *Dârülfünun Hukuk Fakültesi Mecmuası* 2/8 (1333): 601-606.

through the combined power of the law, religious judgements are not.<sup>18</sup>

According to Mansurizade Said, law and shariah are separate things. Law does not include such rituals which can be found in shariah, and it does not need to include the judgments of the shariah. Thus, law and shariah are not the same. Had the law been taken from religious rulings, it would not still be shariah. The law is nothing but the will of the public authority. It cannot have any other nature, and the law cannot be called shariah or vice versa. What can be determined is whether the law is in accordance with or contrary to shariah.<sup>19</sup>

In his second article titled “Şeriat ve Kânun (Shariah and Law)”, Mansurizade states: “Shariah is the religious rules prescribed by Allah while law is the judgments of those entrusted with authority (*ulu'l amr*). Every government is in need of self-regulation of its laws. This is the natural right of a government and it is imperative. Government administration is not possible without laws. Both the Prophet of Allah and Rightly Guided Khalifs run the state with their own laws when necessary because they could not confine themselves to religion and shariah alone. Religion and shariah did not prevent them from making law. Religion/shariah and law are different from each other. Their status and goals are different. Neither shariah can fully fulfill the role of law, nor does the law reach the level of shariah.”<sup>20</sup>

Mansurizade Said provides an account of certain practices of Khalifa Umar in order to support his claim. According to Umar it is permissible to provide *zakah* to any of the eight categories of people mentioned in the verse 9/60. Therefore, the rule of shariah regarding new converts (*muallaf al-qulûb*) is only a matter of legality (permissibility). The Prophet used his authority in the field of permissibility and defined all that is legally permissible to be a rule, which is why it was permissible religiously but binding legally in Prophet Muhammad’s time to give *zakah* to new converts. However, during the caliphate of Umar, this rule changed. New converts were exempted from *zakah* and it was religiously permissible but legally forbidden to provide new converts with *zakah*. There is no doubt that this was not part of shariah; but it only functioned as a rule like that of the Prophet’s budget regulation. This rule was consistent with shariah like the Prophet’s regulation because both rules used the principle of permissibility while one enforced what was religiously permissible, other prohibited it.<sup>21</sup>

If the practice of Umar is evaluated as shariah -not as law-, it will lead to

<sup>18</sup> Said, “Şeriat ve Kânun”, 531.

<sup>19</sup> Said, “Şeriat ve Kânun”, 531-532; Okur, “II. Meşrutiyet Dönemi İslam Hukuku Tartışmalarından Bir Kesit”, 270.

<sup>20</sup> Said, “Şeriat ve Kânun”, 2/8 (1333): 601.

<sup>21</sup> Said, “Şeriat ve Kânun”, 602-603.

serious problems in terms of methodology. In this case, the problem of abrogation will come to exist, and “The verse has been abrogated with a ban that took place on ijtiḥad of Umar.” must be said (...)<sup>22</sup>

Finally, it should be noted under this title that Mansurizade is not the first author to state that polygamy can be restricted or banned by the head of the state. Celal Nuri, a prominent journalist, and politician of the Constitutional and Republican era argues in his work named *Kadınlarımız* (Our Women) that in Islam monogamy is preferable and the khalifa is authorized to ban polygamy.<sup>23</sup>

## 1.2. The Issue of Ribā (Interest)

The literal meaning of ribā is to grow, to increase, to rise, to swell, to nurture.<sup>24</sup> In the fiqh literature, ribā refers to a surplus over a loan that is arisen after a certain period of time or gaining excess from money lending when it is not repaid at maturity. Although there is a consensus among scholars that ribā/interest is prohibited in Islam, some authors have excluded some types of interest from this prohibition. The first objection against the classical stance regarding interest in the Islamic World was made by Abd al-Azîz b. Halîl Çâvîş (d. 1929) in 1908 in Egypt. The authors, such as Rashid Riza and Fazlur Rahman (d. 1988), also differ from the classical view on interest.<sup>25</sup>

Ribā is condemned and forbidden in several passages in the Qur’an.<sup>26</sup> Numerous traditions forbid ribā without defining it more closely; the Prophet is said to have uttered this prohibition at his farewell pilgrimage. Ribā is one of the gravest sins. All who take part in transactions involving ribā are cursed, the guilty are threatened with hell, various kinds of punishment are described; in this world also, gains from ribā will bring no good. In spite of all this, tradition foresees that ribā will prevail.<sup>27</sup>

Mansurizade wrote a number of articles under the title of “İçtiḥad Hataları” (Ijtiḥad Errors) in *İslâm Mecmuası*. In one of these articles, he brought a different approach to the question of ribā/interest. According to Said, money transactions with interest in Islamic sharia is not prohibited in an absolute sense. What is forbidden is only to make more money by selling money. If it is not in the form of selling money, but through leasing it, it would not be forbidden. What is prohibited by religious law is selling money with more

<sup>22</sup> Said, “Şeriat ve Kânun”, 602-603.

<sup>23</sup> Yılmaz, “Mansûrizâde Said ve Fıkhî Görüşleri”, 89.

<sup>24</sup> Fazlur Rahman, “Ribâ and Interest”, *Islamic Studies* 3/1 (1964): 1-2.

<sup>25</sup> İsmail Özsoy, “Faiz”, *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 1995), 12: 110, 122-123.

<sup>26</sup> See. Al-Rûm 30/39; Al-Baqara 2/275-280; Âl-İmrân 3/130; Al-Nisâ 4/161.

<sup>27</sup> Joseph Schacht, “Ribâ”, *Encyclopedia of Islam*, ed. M. Houtsma, T. W. Arnold, R. Basset, R. Hartmann, [https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-1/\\*-SIM\\_3700](https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-1/*-SIM_3700).

money, not leasing it.<sup>28</sup>

According to Mansurizade it is possible to consider the buying and selling of money for a certain price and a certain period of time as leasing. Then the question of “What is the difference between selling money and leasing it?” may arise. It can be explained as follows: “If a lot of money is taken without taking the amount of money and term into consideration because the borrower desperately needs it, then it means that money is sold in exchange for an excessive amount of money. But receiving a reasonable amount of extra money considering the amount and term would be leasing.”<sup>29</sup>

Therefore, Mansurizade regards usury as “selling money with money” and identifies it with the *riba* that the primary religious sources forbid. On the other hand, he claims that interest, which is the renting of money, is legitimate in Islam as understood from his following statements: “In Islamic law, *riba* is usury. However, interest is not forbidden in an absolute sense. Interests designated by law are not prohibited in shariah. Because it is nothing more than money’s rent as long as it is specified according to the amount of money and term of the transaction.”<sup>30</sup>

## 2. MAHMUD ESAD EFFENDI (B. 1856/D. 1918)

Mahmud Esad Effendi from Seydişehir, a district of Konya, was born in Istanbul in 1856 or 1857. His father Güzelzâde Emin Effendi taught a number of jurists. Mahmud Esad was first educated in Seydişehir and Konya before moving to Istanbul in the 1870s. There he learned religion and theology from Elbasanlı Abdülkerim Effendi at Fatih Madrasah and also studied traditional sciences there. In 1881 he became *dersiam* (a title used for professors who had the authority to give courses open to public in the mosques and madrasahs). He learned logic, the positive sciences (maths, physics, chemistry, and astronomy), *kalam*, hadiths, *tafsir*, *fiqh*, and jurisprudence.

During his education in Istanbul, he began teaching the positive sciences both in Fatih madrasa and a military administrative school. In 1886, he completed his education at the Faculty of Law of Istanbul Dâr al-Funûn. At the Faculty of Law, he had taken lessons from Hasan Fehmi Pasha (public international law), Munif Mehmed Pasha (philosophy of law), and Gabriel Norandukyan Effendi (national law). He served in a number of government offices before becoming the deputy representative of Isparta in 1915. While working as a deputy, he led the committee responsible for preparing the Decree of Family Law (Hukûk-ı Âile Kararnâmesi) in 1917. He also was a permanent

<sup>28</sup> Mansurizade Said, “İçtihad Hataları”, *İslâm Mecmuası* 3/28 (1331): 649.

<sup>29</sup> Okur, “II. Meşrutiyet Dönemi İslam Hukuku Tartışmalarından Bir Kesit”, 273-274.

<sup>30</sup> Said, “İçtihad Hataları”, 650; Okur, “II. Meşrutiyet Dönemi İslam Hukuku Tartışmalarından Bir Kesit”, 273-274.

member of Société Académique d'Historie Internationale. He gave great importance towards the education of girls and took part in the establishment of İnnâs Dâr al-Funûn (a 3-year institution of higher education established in Istanbul in 1914-1915 school year for women to have higher education in the Ottoman Empire). Notable students of Mahmud Esad include Ebululâ Mardin (d. 1957) and Ömer Nasuhi Bilmen (d. 1971).

Mahmud Esad's civil service in Izmir lasted fifteen years. Statements of his years spent in Izmir may contribute towards his perception of the Western world:

"Izmir has a big impact on my professional and personal life. When I went to Izmir as an officer, I found myself in a different world. There is a society in Izmir. Minds are modern, trade is progressive. I found a European setting here and always had contact with gentlemen educated in a European manner. These helped me to have a broad perspective. When I returned to Istanbul, I felt that I wasn't old Mahmud Esad."<sup>31</sup>

Mahmud Esad, who died in Istanbul in 1918, made translations from French, English, and German and closely followed scientific activities and ideological movements of the West in the late 19<sup>th</sup> century and early 20<sup>th</sup> century. As a prolific author, he wrote and published across a broad range of subjects. Among works of history *Târîh-i İslâm* and *Târîh-i Dîn-i İslâm* deserve mention; while in law, his notable works include *Ferâidü'l-Ferâiz*, *Şerh-i Kânûn-ı Cezâ*, *Usûl-i Fıkıh*, *Telhîs-i Usûl-i Fıkıh*, *Taaddüd-i Zevcât*, *Hukûk-ı Duvel*, *Kitâbü'n-Nikâh ve't-Talâk*, *Târîh-i İlm-i Hukûk*. He is also known for his *Şeriat-ı İslâmiyye ve Mister Karlayl [Carlyle]* and for his articles in the *Sırât-ı Mustakîm* journal.<sup>32</sup>

The first chapter of Mahmud Esad's book *Şeriat-ı İslâmiyye ve Mister Karlayl [Carlyle]* (This book was written to correct some of the mistakes in *On Heroes, Hero-Worship, and The Heroic in History* by Thomas Carlyle (d. 1855), a Scottish historian, philosopher and essayist.) is titled "First Orientalists." According to Esad, though the views of orientalist (a term for Western writers who wrote about Islam and the East) may be distorted, continue to serve the Truth with or without intent as they introduce Islam to others, and therefore their work is praiseworthy.<sup>33</sup>

<sup>31</sup> Hasan Basri Erk, *Meşhur Türk Hukukçuları* (no broadcast place, 1958), 358-359; Uğur Dinç, "Doğu'dan 'Doğu Bilimi'ne Bir Bakış: Mahmud Esad Efendi'nin *Şeriat-ı İslâmiyye* ve Mister Carlyle Adlı Eserindeki Oryantalizm Algısı", *Uluslararası Sosyal Araştırmalar Dergisi* 9/44 (Haziran 2016): 432-433.

<sup>32</sup> Ali Erdoğan, "Seydişehir", *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (İstanbul: TDV Yayınları, 2009), 37: 25-27; Mahmud Esad, *İki Cihan Devleti Arasında Hz. Muhammed*, ed. Seyfettin Erşahin (Ankara: Otto Yayınları, 2017), 53; Murtaza Köse, "Osmanlı Son Dönem Hukukçularından Seydişehirli Mahmud Esad'ın Hayatı, Eserleri ve İlmî Kişiliği", *İslam Hukuku Araştırmaları Dergisi* 2 (2003): 207-211; Emre Altıntaş, *Mahmud Esad Seydişehir'in Fıkıh Düşüncesi* (Master's Thesis, Marmara Üniversitesi, 2010), 8-29.

<sup>33</sup> Dinç, "Doğu'dan 'Doğu Bilimi'ne Bir Bakış", 435.

Mahmud Esad, like Mansurizade, was of the opinion that religious law and Islamic jurisprudence can and should change according to time and place. Following words of him are noteworthy:

“Even the penal law in the Qur’an with its rules and restraints are based on customs and traditions. As these customs and traditions change over time, the relevant laws also change and the old ones are replaced with new ones.”<sup>34</sup> This view of Mahmud Esad can be found in classical *fiqh* literature. For instance, Imam Abû Yusuf’s (d. 182/798, student of Abû Hanifah) view of “religious rule based on customs” is in line with this position. At this point, it should be noted that Abû Yusuf has interpreted the *nass* with the custom on the matter of *ribâ*.<sup>35</sup>

### 2.1. The Issue of Slavery

One of the issues discussed in the context of Islam and the Qur’an in the modern era is the question of slavery. Many verses in the Qur’an refer to slaves and concubines. While in some of these verses, the status of the slaves is mentioned indirectly, some others point to the emancipation of slaves as the atonement of sins and the virtue in setting the slaves free. However, no verse mentions the abolition of slavery.<sup>36</sup> The fact that the Qur’an recognized/approved the institution of slavery is generally explained as follows: Since slavery had a settled and well accepted position in the ancient civilizations when Islam was born, it did not abolish it unilaterally and definitively, but it paved the way for its disappearance in time.<sup>37</sup>

Mahmud Esad Effendi is particularly noted for his views on Islamic *fiqh* and slavery. Both the Qur’an and the hadith tradition contain various rules in relation to both slavery and concubinage. None of the rules discuss the prohibition of slavery, but rather maintenance of the practice. Mahmud Esad did not, however, share this opinion. He argued that captivity law and slavery existed in all ancient communities and that the time in which Islam first emerged, captivity law and slavery was common among the Arab tribes. Consequently, Islamic law did not abolish slavery but rather limited the activity, obstructed it, and made it somewhat more difficult to practice. Islamic law retained prisoners of war among all forms of captivities, but removed others, such as the imprisonment of a man for debt. Accordingly, it is not possible to enact a law of bondage due to indebtedness and any other obligation.<sup>38</sup>

<sup>34</sup> Mahmud Esad Efendi, *Tarih-i İlm-i Hukuk* (Ankara: Yetkin Yayınları, 2012), 210.

<sup>35</sup> See. Emrullah Dumru, “Ebu Yusuf’un ‘Örfe Dayalı Nassın Örf Değiştğinde Değişebilirliğine’ İlişkin Görüşünün Tespit ve Tetkiki”, *İslam Hukuku Araştırmaları Dergisi* no: 28 (2016): 81-116.

<sup>36</sup> See Al-Nisâ 4/25, 92; Al-Mâidah 5/89; Al-Nûr 24/31-32; Al-Mujâdila 58/3; Al-Balad 90/11-13.

<sup>37</sup> M. Akif Aydın-Muhammed Hamidullah, “Köle”, *Türkiye Diyanet Vakfı İslâm Ansiklopedisi* (Ankara: TDV Yayınları, 2002), 26: 238.

<sup>38</sup> Mahmud Esad, *Tarih-i İlm-i Hukuk*, 232.

On the contrary, anyone who is in war with the Muslims and who is actually fighting and who does not take refuge to an *eman* (the security of life and property were given to a foreigner who wants to enter to the Islamic country or surrender to the Islamic army) owner can be captured. Since the law between nations and states at the time when Islam was born was basically based on war and at the same time there were innumerable reasons for animosity and hostility, nations and states fighting each other imposed captivity law. They also exercised the exchange of captives during the ceasefire. They also released captives in exchange for ransom. So, captivity would end or the party holding the prisoners would either kill or forgive them. And if they spared the captives' lives they would either employ or sell them. Moreover, captivity was transferred from father to son.<sup>39</sup>

In the following centuries, government and politics changed, so the law based on the principle of war was replaced by the law based on the principle of peace. As a result, historical developments such as the peaceful ending of wars and return of captives to their homeland, have made the captivity and slavery law in Islamic shariah ineffective. Hence, the existence of slaves in the Ottoman territory was inconceivable because liberty was accepted as a basic human right under the constitution (*Kanun-i Esasî*). As such, religious rules concerning slavery have now lost ground for practice.<sup>40</sup>

As can be seen, Mahmud Esad says in the last sentence that there is no ground for the application of the judgement related to slavery, so the provisions on this subject have been costed to history.

## 2.2. The Issue of Theft and Cutting of the Hand

One of the crimes with a very certain punishment in the Qur'an is theft.

In the 38th verse of the Surah Al-Maidah, it is said, "Cut off the hands of the male and/or female thief." In *fiqh* tradition, some restrictions apply to the punishment of hand-cutting have been mentioned with reference to certain hadiths and also judgements and practices of a companion like Umar. However, at the same time, in classical Islamic jurisprudence there is no doubt that this Qur'anic rule is for all time.

In the modern era, some researchers argue that the punishment for theft mentioned in verse 38 of the Surah al-Maidah does not always have to be enforced and it is possible to apply an alternative deterrent punishment for it.<sup>41</sup>

<sup>39</sup> Mahmud Esad, *Tarih-i İlm-i Hukuk*, 232-233.

<sup>40</sup> Mahmud Esad, *Tarih-i İlm-i Hukuk*, 233.

<sup>41</sup> See. Fazlur Rahman, *İslâm*, trs. Mehmed Dağ-Mehmet Aydın (Ankara: Ankara Okulu Yayınları, 2004), 14-15 (preface by translators); Roger Garaudy, "Şeriat Nedir?", trs. Salih Akdemir, *İslâmiyât (Şeriat Dosyası)* 1/4 (1998): 22.

Mahmud Esad opposes the classical view in *fiqh* regarding theft and cutting off the hand. In his own words, “In the modern era, an Ottoman judge who tries to cut the thief’s hand off, except for some cases where the ancient custom about theft remains the same, would not actually do anything other than cutting the veins of the Islamic state off.”<sup>42</sup>

### EVALUATION AND CONCLUSION

Although the process of Ottoman modernization began with its military, it quickly spread to other fields, such as politics, administration, education, social order and law, and eventually to religion. The 1917 Decree of Family Law contains a series of radical changes and innovations, especially with regard to women’s social status, marriage, and family law and gender roles, when compared with the classical *fiqh* tradition. It is necessary to submit the fact that the cognitive horizon that created this decree is progressive as a mentality.

Mansurizade Said and Mahmud Esad’s views on the field of *fiqh* can be located within the context of religious manifestations of Ottoman modernization that date back to the Tanzimat Reforms (political reforms made in 1839). They are one of the representatives of the assertion that the provisions of *fiqh* (ahqâm) should be amended in the late Ottoman Empire.

The views and interpretations of Mansurizade Said and Mahmud Esad Effendi may be seen as reviving the spirit/institution of *ijtihad*. Indeed, the idea of reviving the spirit of *ijtihad* has been adopted by many scholars in the recent Islamic World. In fact, scholars such as Syed Ahmad Khan (d. 1898), Muhammad Abduh (d. 1905), R. Riza, Muhammad Iqbal (d. 1938), Musa Jârullah Bigiev (d. 1949) have emphasized the importance of *ijtihad*.

On the other hand, in today’s Turkey, Mansurizade Said and Mahmud Esad’s views closely resemble discussions about the Qur’an and historicity attributed to Fazlur Rahman (d. 1988). This is also true for the views of scholars such as Ali Suavi (d. 1878), Ziya Gokalp (d. 1924), Seyyid Bey (d. 1925) who lived in the last period of the Ottoman Empire.<sup>43</sup>

The views of Mansurizade Said and Mahmud Esad Effendi that we mentioned in essence/in brief, may be seen in exact and of course can be criticised. Their views can also be evaluated as a result of the defeat of the Islamic world against the West. It can be said that they adopt an apologetic language as to polygamy, interest, slavery, social order and legal issues.

It can be said that Mansurizade’s views are relatively closer to the modernist perspective compared to Mahmud Esad. It is still controversial whether modernization (Westernization) or *ihya*, reform, and *tajdid* are at

<sup>42</sup> Mahmud Esad, *Tarih-i İlm-i Hukuk*, 210.

<sup>43</sup> Cf. Okur, “II. Meşrutiyet Dönemi İslam Hukuku Tartışmalarından Bir Kesit”, 284.

the center of the idea that provisions of fiqh should be amended.

Nevertheless, it cannot be denied that the opinions and evaluations of both Mansurizade and his opponents, like Izmirli Ismail Hakki, were the result of very deep cultural richness (scientific knowledge) and intellectual level.

## BIBLIOGRAPHY

- Altıntaş, Emre. *Mahmud Esad Seydişehirî'nin Fıkıh Düşüncesi*. Master's Thesis, Marmara Üniversitesi, 2010.
- Aydın, M. Âkif. *İslâm-Osmanlı Aile Hukuku*. İstanbul: Marmara Üniversitesi İlahiyat Fakültesi Vakfı Yayınları, 1985.
- Aydın, M. Akif - Hamidullah, Muhammed. "Köle." *Türkiye Diyanet Vakfı İslâm Ansiklopedisi*. 26: 237-246. Ankara: TDV Yayınları, 2002.
- Dinç, Uğur. "Doğu'dan 'Doğu Bilimi'ne Bir Bakış: Mahmud Esad Efendi'nin Şeriat-ı İslâmiyye ve Mister Carlyle Adlı Eserindeki Oryantalizm Algısı". *Uluslararası Sosyal Araştırmalar Dergisi* 9/44 (Haziran 2016): 431-442.
- Dumru, Dumru, "Ebu Yusuf'un 'Örfe Dayalı Nassın Örf Değiştiğinde Değişebilirliğine' İlişkin Görüşünün Tespit ve Tetkiki". *İslam Hukuku Araştırmaları Dergisi* 28 (2016): 81-116.
- Erdoğan, Ali. "Seydişehirî." *Türkiye Diyanet Vakfı İslâm Ansiklopedisi*. 37: 25-27. İstanbul: TDV Yayınları, 2009.
- Erk, Hasan Basri. *Meşhur Türk Hukukçuları*. (no broadcast place, 1958).
- Fazlur Rahman. "Ribâ and Interest". *Islamic Studies* 3/1 (1964): 1-43.
- Fazlur Rahman, *İslâm*. Trs. Mehmed Dağ - Mehmet Aydın. Ankara: Ankara Okulu Yayınları, 2004.
- Garaudy, Roger. "Şeriat Nedir?". Trans. Salih Akdemir. *İslâmiyyât* (Şeriat Dosyası) 1/4 (1998).
- Kahraman, Abdullah. "Darul-Fünûn Hocalarından Mansûrifzâde Mehmed Said ve Klasik Fıkıhın Sınırlarını Zorlayan Bazı Görüşleri." *Dârülfünûn İlahiyat Sempozyumu 18-19 Kasım 2009 Tebliğleri*. İstanbul, 2010.
- Köse, Murtaza. "Osmanlı Son Dönem Hukukçularından Seydişehirli Mahmud Esad'ın Hayatı, Eserleri ve İlmî Kişiliği". *İslam Hukuku Araştırmaları Dergisi* 2 (2003): 207-217.
- Kurzban, Charles. *Modernist Islam: 1840-1940*. New York: Oxford University Press, 2002.
- Mahmud Esad Efendi. *Tarih-i İlm-i Hukuk*. Ankara: Yetkin Yayınları, 2012.
- Mahmud Esad Efendi. *İki Cihan Devleti Arasında Hz. Muhammed*. ed. Seyfettin Erşahin. Ankara: Otto Yayınları, 2017.
- Okur, Kaşif Hamdi. "II. Meşrutiyet Dönemi İslam Hukuku Tartışmalarından Bir Kesit (Mansurizade Said ve Seyid Bey Örneği)". *Dini Araştırmalar* 2/ 5 (Eylül-Aralık 1999): 255-285.
- Özsoy, İsmail. "Faiz". *Türkiye Diyanet Vakfı İslâm Ansiklopedisi*. 12: 110-126. İstanbul: TDV Yayınları, 1995.
- Said, Mansurizade. *Hakikat-i İslâm*. Publisher: Veliyyuddîn. İzmir: Aydın Vilayeti Matbaası, 1329.
- Said, Mansurizade. *Usûl-i İctihâd*, publisher: Veliyyuddîn İzmir: Vilayet Matbaası, n.d.
- Said, Mansurizade. "Cevâzın Ahkâm-ı Şeriyeden Olmadığına Dair". *İslâm Mecmuası* 1/10 (1330): 295-303.

- Said, Mansurizade. "İçtihad Hataları". *İslâm Mecmuası* 3/28 (1331): 647-650.
- Said, Mansurizade. "Şeriat ve Kânun". *Dâru'l-Funûn Hukuk Fakültesi Mecmuası* 1/6 (1332): 530-535.
- Said, Mansurizade. "Şeriat ve Kânun". *Dâru'l-Funûn Hukuk Fakültesi Mecmuası* 2/8 (1333): 601-606.
- Said, Mansurizade. "İslâm Kadını: Taaddüd-i Zevcât İslamiyet'te Men Olunabilir". *İslâm Mecmuası* 1/8 (1330): 233-238.
- Said, Mansurizade. "The Muslim Woman: Polygamy Can Be Prohibited in Islam". Trans. M. Şükri Hanioglu. Ed. Charles Kurzman. *Modernist Islam: 1840-1940*. New York: Oxford University Press, 2002.
- Schacht, Joseph. "Ribā". *Encyclopedia of Islam*. Ed. M. Houtsma, T. W. Arnold, R. Basset, R. Hartmann, [https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-1/\\*-SIM\\_3700](https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-1/*-SIM_3700).
- Yalçın, İsmail "Günümüz İslam Aile Hukuku Kanunlarında Çok Eşlilik Üzerindeki Sınırlandırmalar". *İnsan ve Toplum Bilimleri Araştırmaları Dergisi* 6/3 (2017): 1707-1725.
- Yılmaz, Ayşegül. *Mansûrîzâde Said ve Fıkhî Görüşleri*. Master's Thesis, Marmara Üniversitesi, 2003.