

AN APPROACH TO THE POSITION OF ISLAMIC LAW WITH THE CONSIDERATION OF THE REFORM THROUGH THE AIDING FACTORS

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İslam Hukukunun konumuna, reform konseptini deęerlendirerek, yardımcı etmenlerle birlikte bir bakış.

İslam Hukuku ilahi bir karaktere sahip olmasına raęmen ahkâmında insan etkisi göz ardı edilmemektedir. Bu ilahi kaynaklı hukuk sisteminde insan müdahalesine olanak saęlayan bazı etmenler vardır. Bu etmenlerin varlığı İslam hukukunun gelişmesine katkı saęlarken farklı yorumlamalara da neden olmaktadır. Reform konseptine elverişliymiş gibi algılanan onun bu yönleri aslında İslam Hukukunun çok boyutlu sorunları ele alıyor olmasından kaynaklanmaktadır. Gerçekte İslam Hukukunun her çağdaki topluma hitap edebilme, sorunlarını ele alıp yetkin çözümler sunabilme özelliğine sahip olan evrensel boyutu onun karakteristik özelliğini yansıtmaktadır.

Bu arařtırmamız temel olarak İslam Hukukunun reforma uygun olup olmaması, yada hangi konularının reforme edilebileceęi konularından ziyade İslam hukukunun reform karşısındaki durumuna yardımcı etmenlerle birlikte bir bakış sergilemektir. İslam Hukukunun karakteristik özelliklerine deęinerek, onun yorumlanmasında temel faktör oluşturan etmenlerden bahsedilerek ve İslam hukukunun amaçlarının anlaşılmasında özel bir rol alan makâsıd konseptine deęinilecektir.

Definition of reform

Linguistically, reform is defined as “make or become better by the removal of faults and errors”; “the removal of faults or abuses, especially of a moral or political or social kind”; “an enhancement made or suggested”; and “Re-form: form again”.²

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² *The Concise Oxford Dictionary*, first edited by H. W. Fowler and F. G. Fowler. Oxford, 1995, pp. 1154-1155.

A variety of terms is used for the concept of reform, such as *tajdīd* (renewal), *iḥyā'* (revival), modernism, etc. The term reform has always been approached with suspicion, as the Islamic world has usually seen it as a means of western socio-cultural and political infiltration into Islam and the Muslim world. Therefore, in Muslim societies reform is a very much misunderstood concept, and of them provokes negative reactions.

Conservative opposition towards reform stems from the conception that reformist notions are western originated and thus non-Islamic. However another point of view asserts that reformist and revivalist movements are not western originated; as Rahmān indicates, "Claiming such influence would be historical nonsense". Where the confusion lies, Rahmān believes, is that early revivalist movements were unable to express clearly the meaning and function of *ijtihād*, which is why the notion remained misunderstood, and part of the reason why reform was looked upon with suspicion.³

Diagnosing whether Islamic legal structure is open to reform:

Discussions about the concept of reform in Islamic law also bring the question of whether reforms to Islamic law are actually needed?

My argument here is not to determine whether Islamic law is in need of reform or not, or in which subjects of Islamic law there is a need for reforms, rather the question is whether the Islamic legal system is inherently reformable or not.

Scholars have attempted to ask the same question, but have often been misunderstood on account of the definitions they have used. What was need to establish is whether reform means creating a new religion, or simply the renewal of the existent of Islamic law.

According to the *Qur'ān*, God revealed that the religion had been completed and was perfect; "This day I have perfected your religion for you, completed My favour upon you, and have chosen for you Islam as your religion."⁴ There, religion means the ethical principle, faith and worship revealed to all prophets. "He (God) has ordained for you the same religion (Islam) which He ordained for Noah, and that which We have inspired in you (O Muḥammad), and that which We ordained for Abraham, Moses and Jesus saying you should establish religion and make no divisions in it".⁵ In the context of religion, the purpose of establishing the *sharī'ah* is to inculcate in

³ Fazlur Rahmān, "Revival and Reform in Islam", Cambridge History of Islam, D.M. Halt, C.B, Cambridge Uni. Press, Cambridge 1970, p. 45.

⁴ *Qur'ān*: 5/3.

⁵ *Qur'ān*: 42/13.

man those fundamental principles which represent the unalterable character of religion, and which cannot be changed.⁶

Is Islamic law adequate to be applied under any given circumstances and at any given time, or has the valid of Islamic law already expired? God's wisdom required the *sharī'ah* of all prophets to be limited to their era, save for the Prophet Muḥammad (pbuh). The reason that the *sharī'ah* brought by other prophets is limited is that people's state of mind was not ready for eternal *sharī'ah*, so temporary *sharī'ah* was wiser and more beneficial for the people. Because of that, God, did not promise to preserve the previous sacred books or to send wise men to protect their prophet's bequest. Therefore all the other sacred books revealed before the *Qur'ān* have gradually become corrupted, and people have forgotten the genuine messages they were given.⁷

According to the *Qur'ānic* text, however, God guaranteed that the *Qur'ān* should be preserved forever as it was revealed. "Verily We: it is We Who have sent down the *Dhikr* (i.e. the *Qur'ān*) and surely, We will guard it (from corruption)."⁸ Qaradāwī says that the reason why the *Qur'ān* is valid for all humanity is that it is the righteous and the convenient code for all societies, all territories and all circumstances.⁹ "And We have sent you (O Muḥammad) not but as a mercy for the '*Ālamīn* (mankind, *jinn*s and all that exists)"¹⁰, "Say (O Muḥammad) O Mankind! Verily, I am sent to you all as the Messenger of God to whom belongs to the dominion of the heavens and the earth."¹¹ However, having Islam as the last religion and the Prophet as the last Messenger of God brings its difficulties as well. Since no more sacred books or religions are expected, how is the Islamic legal system supposed to adjust itself into ever evolving social cultural circumstances? To this, the *Sunnah* responds with the *ḥadith*, "On the eve of every century, God will send to my community a man who will renew it din (religion)"¹²

According to Ibn Qayyīm the general principles of religion are binding and fixed for mankind until the day of judgement. Particular principles, however, are subject to public interest (*maṣlaḥah*) and the public interest (*maṣlaḥah*) changes as circumstances change.¹³ The *Qur'ān* does promote reforms and new solutions by saying that if man does not know, he should

⁶ Nasafī, 'Abd Allah bin Aḥmad bin Maḥmūd Ḥafīz al-Dīn Ab Al-Baraḳāt Al-Ḥanafī (d.710/1310), *Madārik al-Tanzīl wa Ḥaqāik al-Ta'wīl*, Beirut, V, 401.

⁷ Karadawī Yusuf, *Islam Hukuku: Evrensellik Süreklilik*, tr. By Y. Işıcık and A. Yaman, Istanbul, October 1999, p. 26.

⁸ *Qur'ān*: 15/9.

⁹ Qaradāwī, *ibid*, p. 26.

¹⁰ *Qur'ān*: 21/107

¹¹ *Qur'ān*: 7/158

¹² Abū Dāwūd, "*Sunnah*", ii, 518.

¹³ Ibn al-Qayyim, *Al-Turuq al-Hukmiyyah*, Egypt, 1317, p. 18; Shalabī, *Ta'wīl al-Aḥkam*, Egypt, 1947, p. 318.

go and ask someone who does. As the verses indicates, “So ask the people of the reminder”¹⁴

In Islamic law, there are many areas that are open to personal judgement, where the principles involved are uncertain or speculative (*ẓanni*). Here, uncertainty (*ẓan*) may come from the nature of some texts, which are open to interpretation, which is the case with most of the *Sunnah*. Or uncertainty may come from ambiguity in the meanings of the *Qur’ān* itself. When investigating such texts, what needs to be clarified is the underlying principle of the text; the text should be interpreted according to the circumstances prevailing at a given time, through *ijtihād*.¹⁵

Rahmān’s method of *fiqh* is based on principle that “permanent validity or absolute validity does not belong to a particular principle but to the general principles of the *Qur’ān*”. This view is not new: early jurists such as Abū Ḥanīfah, Mālik and Abū Yūsuf; and later jurists such as Shāṭibī applied the principle actively in their work. All other jurists only acknowledged this principle.¹⁶

According to Hawkings, while some do doubt whether the Islamic system can integrate into contemporary life and produce new laws that would reflect the facts of contemporary life the answer is that in the Islamic legal order, all sorts of potentialities and possibilities exist. Regarding its flexibility towards new developments and issues, Islam is as capable as other legal systems. Therefore, difficulties and problems do not exist because of the Islamic legal system inability to advance, but because of the failure of Muslims to practice it correctly.¹⁷

George Bernard Shaw considered Islam as the only religion that has a revolutionary character and the ability to suit the benefit of the public at any given period.¹⁸

At the International Comparative Law conference held at The Hague in 1937, one of the conclusions was that Islamic law is a legal system which the vitality and capacity to advance.¹⁹ The 1948 International Jurists Congress at The Hague concluded that “because of its flexible structure and the importance, the International Jurists Association should make an effort to promote comparative investigation of Islamic legal system.”²⁰ And In 1950 at the University of Paris, there were a series of conferences called “Islamic Law

¹⁴ *Qur’an*: 21/7.

¹⁵ Karadawī, *ibid* p. 175; for *qat’iyya* and *zanniyya*, see in Muḥammad Fathī Dirīnī, *Al-Manāhij al-Uṣūliyyah fi al-Ijtihād bi al-Ra’y fi al-Tashrī’ al-Islāmī*, Al-Risālah, Beirut 1418/1997, p. 22.

¹⁶ Fazlur Rahmān, *İslam ve Çağdaşlık*, tr: by Alparslan Açıkgenç, Ankara 2002, p. 33.

¹⁷ Hawkings, *Global siyasetin mahiyeti* cited in Qaradāwī, *Evrensellik*, p. 128.

¹⁸ Bernard Shaw, *The Muslim Review*, March, 1933.

¹⁹ Subkī Sayis and Barbarī, *Tārīkh al-Tāshrī’ al-Islāmī*, p. 353-354, quoted from Qaradāwī, *İslam Hukuku evrensellik sureklilik*, p. 130.

²⁰ Zarkā, *Al-Madkhal al-Fiqh al-‘Ām*, Dimishq 1968, v: 1, p. 245.

week”, where it was declared that Islamic law possesses the strength to respond to all aspects of life and necessities of the modern times.²¹

Islamic law is meaningless without human input, and as such it is inaccurate to call it ‘divine’. Muslim jurists’ interpretations certify the divine principles revealed as applicable. However, it is incorrect to call human interpretations of divine principles secular. If that assumption were true, all Islamic schools of thought would be secular since they are different interpretations of Islam. However, Islamic law can be considered as a produced of Muslim jurists.²²

As Kātip Chalabī (d.1657) explains, even though Islamic law is open to developments and advancements, Muslim people prefer to remain ignorant to progress in the world:

“But many unintelligent people... remained as inert as rocks, frozen in blind imitation of the ancients. Without deliberation, they rejected and repudiated the new sciences. They passed for the learned men, whilst all the time they were ignoramuses, fond of disparaging what they called ‘the philosophical sciences,’ and knowing nothing of the earth or the sky. The admonition ‘Have they not contemplated the Kingdom of Heaven and Earth?’ *Qur’ān*, (7:185) made no impression on them; they thought, “contemplating the world and the firmament’ meant staring at them like a cow.”²³

Diagnosing the adequate and inadequate characteristics of Islamic law for reforms

Characteristics of Islamic law that are conducive to reform:

Some Islamic rulings which are connected to a certain reason (*‘illah*) may change depending on the time and the territory, but all others remain the same. In the *Qur’ān*, the *‘illah* behind a ruling is usually given. For example an alcohol and gambling: “Satan wants only to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the

²¹ Ibid , v: 1, pp. 245-246.

²² Fazlur Rahman, “*Islamic Modernism: its Scope, Method and Alternatives*”, IJMES, 1 1970, pp. 317-333, see in “Makaleler III”, p. 80.

²³ Kātip Chalabī, *Balance of Truth* (Engl. Transl. From Turkish by G. L. Lewis), London 1957, 25. quoted from Raḥmān, *Islam*, London, 1966, p.187,

remembrance of God and form prayer.”²⁴ The reason behind the prohibition of alcohol and gambling is also explained in the text, as they would cause hostility and hatred among people.

In the *Qur’ān* both reason for, and the wisdom behind, rulings are indicated.²⁵ Because of this the majority of Muslim scholars reached the conclusion that “the reality of the text is justification (*ta’līl*)” and the importance of the rulings are about what they are referring to and their qualification rather than their simple exteriors.²⁶

Muslim scholars also take the *Qur’ān’s* general principles the current time and place, and factors²⁷ into consideration when interpreting *naṣṣ*.

Particular principles are improvable with regard to the time-place principle. These are also related to the evolution of traditions and customs. Abū Yūsuf (d.182/798) founded a principle based on this, which is a highly significant issue for all Muslim jurists. For him, the measurements (*waznī*) of commodities which are subject to interest must be established in accordance with contemporary traditions.²⁸ During a given period of time, people may adopt new forms of measurement, redefining the old rules.

Much later, Fazlur Rahman emphasises the “*Model Tashrī*”²⁹ principle. He divides the existing *naṣṣ* into two different categories as “legislative essence” and “factual legislation” and he adds:

“In the *Qur’ān*, the legislative essence is related with human principles such as freedom and responsibility, which have been reformed as new legislations; the factual legislation on the other hand is related with actual human practices as a common example to the legislation sources.”³⁰

²⁴ *Qur’ān*: 5/91.

²⁵ Ibn al-Qayyim, *I’lām al-Muwaqqi’in min Rabb al-‘Ālamīn* (edt: : ‘Abd al-Raḥmān al-Wakīl), Cairo, i, 196; Shalabi Muḥammad Muṣṭafā, “*Ta’līl al-Aḥkām ‘Arḍ wa Taḥlīl li-Ṭarīqat al-Ta’līl wa Taṭawwurātihā fī ‘Uṣūr al-Ijtihād wa al-Taqlīd*”, Egypt, 1947, p. 14; Ibn ‘Āshūr, Muḥammad Ṭāhir (d.1973), “*Maqāṣid al-Sharī‘ah al-Islāmīyyah*” (Islam Hukuk Felsefesi, Gaye Problemi), Ragbet, translated by Vecdi Akyüz-Mehmet Erdoğan, Istanbul, 1999, pp.14, 89, 105-107.

²⁶ Ibid.

²⁷ Shāṭibī, Abū Ishāq Ibrāhīm bin Mūsa Al-Ghirmāṭī (d.790/1388), *Al-Muwāfaqāt fī-Uṣūl al-Sharī‘ah*, translated into Turkish *İslami ilimler metodolojisi* by Mehmet Erdoğan, İz yayıncılık, Istanbul 1999, III, 409; İ. Kafı Dönmez, “İslam Hukukunda Müctehidin Naslar Karşısındaki Durumu”, *MUIFD*, Istanbul 1986, 35.

²⁸ Dabbūsī, Dabbūsī, Abu Zayd ‘Abd Allah, ‘Ubayd Allah b. ‘Umar bin ‘Iysā (d.430/1039), *Kitāb Ta’sīs al-Nazar*, edt. Muṣṭafā Muḥammad al-Qubbānī, Beirut, 77; Ibn ‘Abd al-Dīn, Muḥammad Amīn (d.1252/1836), “*Radd al-Mukhṭār ‘alā al-Durar al-Mukhṭār*”, Beirut, 1979, IV, 251, 252; Abū Sunnah, Aḥmad Fahmī, *Al-‘Urf wa al-‘Adah fī-Ra’y al-Fuqahā*, Cairo 1947, 62, 141; Zarkā, *Al-Medkhal*, pp. 891, 905, 910; Karaman, *Mukayeseli İslam Hukuku*, Nesil yayınları, Istanbul, 1991, II, 216; Karaman, *İslām Hükukunda İctihad*, MUIFV, Istanbul, 1996, 31; Fahreddin Atar, *Fikah Uṣūl*, MUIFY, Istanbul, 1996, 90.

²⁹ Dönmez, “*İslam Hukukunda Müctehidin Naṣar Karşısındaki Durumu*”, 45.

³⁰ Raḥmān, *İslam*, 47-48.

In the translator's introduction to the Turkish edition of Rahman's Islam the translator identifies the main aim of Islam as the creation of a world in which religious and moral values are in power:

“Since the *Qur'ān* has a world view which strongly depends upon religion and moral values, it is expected to create a society where these principles are in power. For this reason, the *Qur'ān* includes some judicial principles alongside the religious and moral ones. The *Qur'ān* anticipates a social structure in which people earn their living through honest labouring, alcohol, gambling and interest do not exist, there is no ethnic and racial discrimination which are against the *Tawhīd* principle; people are true believers as well as morally mature. For example, the *Qur'ān* provides the possibility of action in which it is allowed to cut off the hand of the thief, if it is truly proven that he is found guilty of theft. At this point Rahman asks this crucial question is it the only precaution, to cut off one's hand in order to prevent the act of theft? Alternatively, is it possible to think about other forms of preventing methods in terms of reaching the main aims of the rulings? In other words, are we going to be considered as an outsider in Islam if we think that “chopping off the hands” has belonged to the structural conditions of a given society and we claim that the eternal aim overrules the literal meaning, and we establish our legislation according to this understanding? According to Rahmān the answer of this question is “No”.”³¹

Fazlur Rahmān said that when interpreting the *Qur'ān* in a contemporary way, one must pay attention and be sincere. He went on saying “one must not aim to make the *Qur'ān* express one's own ideas”³².

Delay is one method of maintaining temporary *maṣlaḥah*, as when the Prophet banned the punishment of chopping off the hands. Ibn al-Qayyīm comments on this issue: “Even though chopping off the hands is a punish-

³¹ Rahman, *Islam*, translator's introduction: IX-X.

³² Rahman, “*İslami Çatışma*”, *İslami Araştırmalar Magazine* p. 318.

ment set by God, the Prophet delayed this punishment exceptionally when war was in progress as the offender might join the pagans out of anger and spite, and that would offend God more.³³

Another important point is that the time-place factor in the *Qur'ān* ensures the application of general principles, and maintains temporary public benefits (*maṣlaḥah muaqqat*); the delay mechanism does not mean that the punishment is abolished. If a similar event occurs again, the suspended punishment would be carried out. Another example is that although the principle of giving gifts in order to 'bring hearts together for Islām' (*muallafāt al-qulūb*) was abolished by 'Umar suggesting that the principle was now over, it was re-activated by 'Umar b. 'Abd al-'Azīz.³⁴

Ease and Tolerance (*musāmaḥah*):³⁵

Islam in essence declares itself to be on the side of ease and tolerance: "God intends for you ease, and He does not want to make things difficult for you."³⁶ It also claims to want to avoid difficulties "God does not want to place you in difficult, but He wants to purify you, and to complete His Favour on you that you may be thankful."³⁷ The *sharī'ah* in general avoided 'heavy burdens' from the beginning; this includes the codes revealed before Islam, "He releases them from their heavy burdens (of Allah's Covenant), and from the fetters (bindings) that were upon them."³⁸ As commentator and practitioner of the *sharī'ah*, the Prophet wished ease for his people: "Make it easy not difficult, make it cherished not hated."³⁹ As 'Ai'shah confirmed, "when the Prophet had to choose between two things, he would surely prefer the easier."⁴⁰ In the words of the *Qur'ān*, "God wishes to lighten (the burden) for you; and man was created weak."⁴¹

Dihlawī echoes this

³³ Qaradāwī, *Eevrensellik*, p. 57.

³⁴ Karaman, *İctihād*, 96; Shalabi, *Ta'īl*, 87; Regarding 'Umar's ijtihād and their real purposes see: Saffet Köse, "Hz. Ömer'in Bazı Uygulamaları Bağlamında Ahkâmın Değişmesi Tartışmalarına Bir Bakış", *Journal of Islamic Law Studies*, issue: 7, April 2006 pp. 13-50.

³⁵ Ibn 'Āshūr, "*Maqāṣid*", p. 123; also see in: M. Rāshid Rizā, *Yusuf al-Islām wa Usūl al-Tashrī'*, Egypt 1928.

³⁶ *Qur'ān*: 2/185.

³⁷ *Qur'ān*: 5/6.

³⁸ *Qur'ān*: 7/157; and see: Shāṭibī, *Muwāfaqāt*, i. 304.

³⁹ Bukhārī, "İlim", 11; Muslim, "Jihād", 4; Abū Dāwūd, "Adab", 17; for more in this, see: Suyūṭī, Jalāl al-Dīn 'Abd al-Raḥmān bin abī Bakr bin Muḥammad bin Sābiq al-Dīn al-Khudayrī Al- Suyūṭī (d. 911/1505), "*Al-Ashbāh wa al-Nazāir*", edited by Muḥammad Ḥusain Muḥammad H. Ismā'īl, Dār al-Kutub al-İlmiyyah, Beirut, 1422/2001, p.84; Ibn Nujāym, Zayn al-'Abid al-Dīn b. Ibrāhīm al-Shāhīr (d.970/1562), *Al-Ashbāh wa al-Nazāir*, Dār al-Kutub al-İlmiyyah, Beirut 1985, pp. 118-119; Muḥammad Khuḍarī (d.1927), "*Tārīkh Tashrī' al-Islāmī*", translated into Turkish: Ḥaydar Ḥatipoglu, Kahraman yayınlari, Istanbul, 1974, p. 18.

⁴⁰ Bukhārī, "Manāqib", 23; Muslim "Faḍāil", 77-78.

⁴¹ *Qur'ān*: 4/28.

“Therefore, whenever a revealed law (*sharī‘ah*) is in the making, then, at that time God, the Sublime, looks at the habits or customs (*‘urf*) of people. Whatever is harmful among their habits, these are then to be avoided. Whatever good habits are evident, they are to be left in their original condition.”⁴²

The founding fathers of Islamic law (*salaf-i ṣāliḥ*) deemed the principle of ease to be fundamental, and as long as it was not indicated by certain text, they avoided making judgements such as “this is *ḥarām*” (forbidden) or “that is *ḥalāl*” (permissible), instead their expressions were “I do not find that likeable, or I find that particularly dislikeable”.⁴³ The principle of ease tolerance must prevail as long as they do not become a threat to the purposes of the *sharī‘ah*.⁴⁴

Also there is an important institution in Islamic law as legal loopholes (*ḥıla-i shar‘īyyah*):⁴⁵ This institution is one of the developments originated from the principle in order to be an aid to the removal of legal obstacles. The main point of the legal loophole is to reach a solution when stagnation has occurred about particular issue. As Shāṭibī says, “As God rendered some things prohibited or permitted without giving any reason such as fasting or the payment of interest. God also gave reasons why He prohibited or permitted some issues such as making *zakāh* (tax) obligatory or benefiting from usurped commodities prohibited. If one can find an acceptable reason to make what is obligatory, non obligatory, and to make the prohibited look permissible that is called a loophole.”⁴⁶

The principle of necessity (*darūrah*) also developed in connection with the principle of ease and tolerance. It originated from the desire to avoid hardship and to secure ease. A clause from the *Majallah* explains this principle: “Necessity renders prohibited things permissible”.⁴⁷ In addition to this, the indulgence (*rukḥṣah*) is also a vital principle to make difficulties

⁴² Dihlawī, “*Fuyūḍ*”, see in Fazlur Rahmān, *Revival and Reform in Islam*, Cambridge History of Islam, D.M. Halt, C.B.Cambridge Uni. Press, Cambridge 1970, p. 181.

⁴³ Shāṭibī, *Muwāfaqāt*, iii. 142; Qaradāwī, *Al-Ḥalāl wa al-Ḥaram fī al-Islām*, Cairo, 1976, pp. 26-27.

⁴⁴ See more about the concept of ease and tolerance: Yusuf al-Qaradawī, Kolay ve Çağdaş bir Fıkha Doğru, tr. by Abdullah Kahraman, *Journal of Islamic Law Studies*, issue: 3, year 2004, pp. 55-75

⁴⁵ For the *ḥıla-i shar‘īyyah*, see: Abu Zahrah, Muḥammad (d.1395/1974), *Abū Ḥanīfah*, Translated into Turkish by: Osman Keskiöğlü, 3rd ed. Ankara, Diyanet yayınları, 1999, pp. 446-468; Mutafā Baktır, *İslam Hukukunda Zarūret Hali*, Ankara, Akçağ yayınları, pp. 153-164; Ibn al-Qayyīm, “*Ighāsāt al-Lahfān min masāyidi al-Shaiṭān*”, ed: Majdī Fathī al-Sayyīd, Cairo, 1310, iii, 107-417; Karaman, *İslām Hukuk Tarihi*”, İz Yayıncılık, İstanbul, 1999, pp. 77-78; Shāṭibī, *Muwāfaqāt*”, ii, 380-390.

⁴⁶ Shāṭibī, *Muwāfaqāt*”, ii. 378-380. see more about legal loopholes: Saffet Köse, *İslam Hukukunda Kanuna Karşı Hile*, Birleşik Yayıncılık, İstanbul 1996.

⁴⁷ Al-Majallah: clause: 21

easy. According to Shāṭibī, this occurs from the fact of avoiding hardships and difficulties. In actual fact, necessity (*ḍarūrah*) is a general principle,⁴⁸ and indulgence (*rukḥṣah*) occurs because of it.⁴⁹

The Universality of Islam:

1- The meaning of universality here refers to Islam is not belonging to a particular period,⁵⁰ thanks to what Muslims believe is its divine characteristic. Islam is seen as the last testament the completion of all.

“And this (submission to Islam,) was enjoined by Abraham upon his sons and by Jacob, (saying), “O my sons! God has chosen for you the (true) religion, then die not except in the faith of Islam (as Muslims Islamic Monotheism).”⁵¹

“And We have sent down to you (O Muḥammad) the Book (this *Qur’ān*) in truth, confirming the Scripture that came before it and *Muḥaymun* (trustworthy in highness and a witness) over it (old Scriptures). Therefore, judge among them by what God has revealed, and do not follow their inclinations, diverging away from the truth that has come to you. To each among you, We have prescribed a law and a clear way. If God had willed, He would have made you one nation, but that (He) may test you in what He has given you; so compete in good deeds. The return of you (all) is to God; then He will inform you about that in which you used to differ.”⁵²

Islam was revealed as a system for life for the present and the future.⁵³ In order to respond to the requirements of every era, a legal system must possess universal values so it would have qualifications to implement itself, and only a legal system with divine and thus timeless characteristics is adequate for such a role.

⁴⁸ Shāṭibī, *Muwāfaqāt*, i, 93.

⁴⁹ Ibn ‘Āshūr, *Maqāṣid al-Sharī‘ah*, 173.

⁵⁰ Erdoĝan, *Aḥkāmın Degiřnesi*, İstanbul, M.Ü.İ.F.V. yayınları, p. 61

⁵¹ *Qur’ān*: 2/132.

⁵² *Qur’ān*: 5/48.

⁵³ Qaradāwī, *Al-Khaṣā’iṣ al-Āmmah li al-Islām*, Beirut 1985, 105-107.

2- As a juridical system for all humanity. “And we have not sent you (O Muḥammad) except as a giver of glad tidings and a warning to all mankind, but most of men know not.”⁵⁴ Since the Prophet was sent for all humanity, therefore Islamic law is a legal system for all of mankind. Muḥammad is seen as a mercy for the universe and a guide for all humanity. Islam is not for particular territories or societies; on the contrary it is for all, whether black or white, ‘Arab or non-‘Arab, in the East or in the West, regardless of their social structure, Islam is theirs as they are human.⁵⁵

The Islamic legal system is sent for universal purposes and the nature of human beings requires them to have equal rights to live regardless of their colour, physical appearances, their race and nations. In regard to this issue the *Qur’an* has numerous verses: ⁵⁶ “God intends for you ease, and He does not want to make things difficult for you”⁵⁷, “God likes not mischief”⁵⁸, “And there is (a saving of) life for you in (*al-Qiṣāṣ* the law of equality in punishment)”⁵⁹ “Your blood, your possession and your honour are *ḥarām* (prohibited) to one another.”⁶⁰, “When much of it result intoxication, the less of it is also *ḥarām*”⁶¹, “Harm is neither inflicted nor reciprocated in Islam”⁶², “You are all from Adam”.⁶³

Ibn ‘Āshūr emphasises the belief that Islam offers the same values for people in no matter which era they live. they had lived. He also stressed on Islam’s capability to integrate into different societies without bringing them difficulties and to reform these societies through implementing Islamic rulings.⁶⁴

3-Fundamental human rights and equality⁶⁵: This is a result of Islam’s general and universal characteristics “The believers are nothing else than brothers”⁶⁶. In their nature all humans are created equal; this is one of the fundamentals of Islam, and Islam considers all humans as equal, therefore all humans are assumed as equal because of their nature in the context of a legal system. “You are all from Adam”⁶⁷. Freedom⁶⁸ is one of the natural

⁵⁴ *Qur’an*: 34/28.

⁵⁵ Qaradāwī, *İslam Hukuku evrensellik süreklilik*, p. 37.

⁵⁶ Ibn ‘Āshūr, *Maqāṣid*, p. 94.

⁵⁷ *Qur’an*: 2/185.

⁵⁸ *Qur’an*: 2/205.

⁵⁹ *Qur’an*: 2/179

⁶⁰ Bukhārī, “Hudūd”, 9; Muslim, “Hajj”, 147.

⁶¹ Abū Dāwūd, “Ashribah”, 5; Tirmīzī, “Ashribah”, 3.

⁶² Mālik, *Muwattā’*, “Qaḍā”, 26.

⁶³ *Khutbah al-Wadā* (last ceremony): see in Ḥamidullah Muḥammad, *İslam Peygamberi*, İstanbul 1980.

⁶⁴ Ibn ‘Āshūr, *Maqāṣid*, p. 98.

⁶⁵ For equality, see: Karaman, *Mukayeseli İslam Hukuku*, Nesil yayınları, İstanbul, 1991, i, 111-113; ‘Abd al-Wāhid Wāfi, *Huquq al-İnsān fi al-İslām*, Cairo 1979.

⁶⁶ *Qur’an*: 49/10

⁶⁷ *Khutbah al-Wadā* (last ceremony): ibid.

⁶⁸ For freedom, see: Munci Kapani, *İnsan Haklarının Uluslararası Boyutları*, İstanbul 1987, 106-119; Karaman, *Mukayeseli*, i, 113-118; Wāfi, *Huquq al-İnsān*, p. 195-251.

(*fiḥr*) rights and it cannot be transferred to anyone as ‘Umar said, “How dare you enslave people while their mothers gave birth to them freely.”⁶⁹

Fazlur Rahmān stresses on two main points in order to ensure that the Islamic legal system Islamic institutions function properly: “First one must move from the concrete case treatments of the *Qur’ān* taking the necessary and relevant social conditions of that time into account to the general principle upon which the entire teaching converges. Secondly, from this general level there must be a movement back to specific legislation, taking into account the necessary and relevant social conditions now obtaining”.⁷⁰

The Māliki jurist Shāṭibī (d.1388) advised Muslims that investigating the notion of certainty should not be practised through looking into particular verses, but it should be sought in the *Qur’ān* as a whole, as that is the only logical method. He also pointed out that eternal validity does not belong to a particular solution in the *Qur’ān* but that characteristic only belongs to the general principles.⁷¹

Furthermore, the principle of flexibility is one of the most crucial concepts of Islam as this principle allows changes and thinking through different dimensions in order to reach a solution for newly emerging challenges.

The meaning of flexibility must be clarified. The unchangeable characteristic of Islam can not be thought of separately from the principal of eternal validity. The concept of flexibility ensures the inalterable core’s adjustment to variable circumstances.⁷² The concept of flexibility does not mean a loss of dignity and decency of the inalterable essence of the Islamic legal system. On the contrary, the concept of flexibility shows the does indicate capability of Islamic law to face new challenges and address new issues in the legal system. The implementation of law is not limited to a single method as it is constantly developing. It has the capability to address and respond to the new and unknown issues and difficulties of all eras.⁷³ The most important fact necessitating flexibility is the need to accomplish the purposes of the *Shārī’*.

The Companions and their followers were the first people to take causes and circumstances beyond the text into consideration when implementing laws. As soon as they realized that certain *ḥadīth* were referring to a particular incident during the Prophet’s time, and that these circumstances were no longer existent, they avoided practicing these *ḥadīth* via their literal

⁶⁹ Ibn ‘Ashūr *Maqāṣid*, pp. 107-108.

⁷⁰ Rahmān, *Islām and Modernity*, p. 20.

⁷¹ Shāṭibī, *Muwāfaqāt*, v: 1, pp. 13-14.

⁷² Erdoĝan, “*Ahkamın Deĝiřmesi*”, p. 37.

⁷³ Qaradāwī, *Islām Hukuku evrensellik süreklilik*, p. 40; Zarkā, *Madkhal*, p. 1/149; Sawa Pasha, “*Islām Hukuku Nazarıyatı*”, translated by Baha Arkan, Ankara 1965, ii, 358.

meanings.⁷⁴ It is very important to analyze the causes behind the text in order to understand what it really means and refers to, thus rendering the text applicable to later eras. It is obvious that the text has never been changed or transformed; however, the understanding and interpretation of the *naṣṣ* has been subject to transformation, so that they could become rulings for what was new and unknown. Accurate understanding and interpretation of *naṣṣ* requires serious work and certain conditions. Knowledge of linguistics, history, sociology, and awareness of the *Shārī's* purposes are essential elements when interpreting *naṣṣ* into a situation other than what is literally indicated.⁷⁵

Qualities of Islamic Law not conducive to reform:

In the Islamic legal system there are some areas where imposing reforms would neither be right nor acceptable. Imposing *ijtihād* on these issues is not allowed as it might imply a change to the fundamentals of religion. Such areas can be identified by *muḥkam* verses and these are the fundamentals which gave rise to definite rulings. As these rulings are obvious, clear and identified, even two jurists cannot have disagreement over them because they are fixed by the *Qur'ān* and the *Sunnah Mutawātur* (successive tradition). For examples: obligatory prayers; *zakāt*; fasting; pilgrimage; the ban on adultery, interest, intoxicating substances and gambling, and son on.⁷⁶

However, even though divine wisdom may lead Muslims to observe the general wisdom in the *sharī'ah*, it may not be enough to reveal the cause (*'illah*) underlining each of the rulings. However, Muslims argue that is simply due to the fact that as humans we are not mature enough to see the wisdom behind those rulings. There are rulings, the wisdom of which our minds are not capable enough to realize. In such cases, man can do nothing but obey.⁷⁷ An example would be: "Menstruating women are not obliged to make amends for their missed *ṣalāt* (prayers) but they are obliged to make amends for their missed fasting".⁷⁸

Similarly, it is pointless to question the issue of nullification of *wuḍū* (ablution). According to Shāfi'ī, for example, the *wuḍū* becomes null when one touches his sexual organs, or touches a woman who is not *maḥram*; but in order to renew the *wuḍū*, the ritual must be repeated rather than cleaning

⁷⁴ Qaradāwī, *Evrensellik*, p. 180.

⁷⁵ For this, see: Shalabī, *Ta'ūl*; Shāṭibī, *Muwāfaqāt*; Būṭī, *Ḍarwābi' al-Maṣālah*; Abū Sunnah, *Al-'Urf*.

⁷⁶ Qaradāwī, *Evrensellik*, pp. 41, 174. also see: Maudūdī, *Islamic law and constitution*, Islamic publications Ltd Lahore, translated by Khurshīd Aḥmad, 1960, p. 60.

⁷⁷ Shāṭibī, *Muwāfaqāt*, ii. 308.

⁷⁸ Bukhārī, "Ṣawm", 41; Āmidī, *Iḥkām*, iv, 274; Ibn Āshūr, *Maqāṣid*, 44

the parts of the body that came in contact.⁷⁹ Even though urinating nulls the *wuḍūʿ*, again the whole ritual must be repeated to renew it, but the ritual itself does not include washing the penis. In other words, such rituals cannot be understood rationally. If it were a matter of reason, rubbing underneath the *khuf* (black leather boots) would be much more logical when performing the *wuḍūʿ*, rather than over the *khuf* as is the case.⁸⁰

The unquestionable issues of the *sharīʿah* can be generalized under the categories of *ʿibādāt*, penalties, *kaffārāt* (penances) and proportions of inheritance.⁸¹

Since human nature is seen as unchangeable, there is no reason or need to change regulations regarding to the relationship between God and his subjects, or in *ʿibādāt* (worshiping) and *iʿtiqād* (belief): Muslims believe that it is obligatory to preserve these under all circumstances in every era. Every kind of reform relating to *ʿibādāt* is categorised as an innovation (*bidʿah*) that is excluded from Islam.⁸²

Also, authorization of *ḥalāl* and *ḥarām* belongs only to God⁸³; rendering *ḥalāl* as *ḥarām* and vice-versa is strictly forbidden.⁸⁴

The purpose of the Islamic legal system is not to create reasons to consent and obey to so-called advancements in society, but to avoid wrongdoings. Since Islam is not a social construct, it is not in a position to transform itself for the sale of any particular society or set of historical circumstances. On the contrary, societies are expected to hold on to Islam and transform their circumstances accordingly in order to perfect their way of life. The Islamic legal system always has the last word because, as Muslims believe, it is the word of God. However, this should not make people mute and motionless before Islam, because Islam allows people to have a unique role in interpreting the text in order to derive new rulings which can respond to new issues.

⁷⁹ It is a controversial subject. According to Ḥanafī scholars, touching a woman or a sexual organ does not nullify ablution.

⁸⁰ Ibn ʿAbd al-Shakūr, *Musallam*, ii, 315.

⁸¹ For more in this see: Shāṭibī, *Al-Iʿtisām*, Beirut, ii, 132; *Muwāfaqāt*, ii, 300; Ibn al-Qayyim, *Ighāsāt al-Lahfān*, i, 488; Suyūṭī, *Al-Ashbāh*, 421-422; ʿAbd al-Wahhāb Khallāf (d.1376/1956), “*Maṣāder al-Tashrī al-Islāmī fī mā lā Naṣṣah fihī*”, Dār al-Qalam, Kuwait, 1993, 26; Abū Zahrah, *Abū Ḥanīfah*, 333; Shalabī, *Taʿlīl*, 296, 322; Ibn ʿAshūr, *Maqāṣid*, 109; Dirīnī, *Manāhij al-Uṣūliyyah*, 20.

⁸² Shāṭibī, “*Iʿtisām*”, ii, 135; Khallāf, “*Uṣūl*”, 200.

⁸³ *Qurʾān*: 6/119; 42/21; 10/59; 16/116.

⁸⁴ Qaradāwī, *Al-Ḥalal wa al-Ḥarām*, 24; Karaman, *Günlük Yaṣantımızda Helaller ve Haramlar*, Istanbul 1982, 17.

The immutable aspect of Islamic law:

Divine Law:

While the rulings of the Islamic legal system are considered by many to be inalterable because of its divine character, in reality it is only the rulings regarding worship which must remain unaltered and unquestioned: to change these would be seen as an attempt to change the religion.

One fallacy, encouraged to an extent by decades of western cultural imperialism, is that Islamic law is not open to reform because of its divine origins. That's why they assumed that it has a static character which can not be developed. Their claim is that a divine law cannot be renewed by men, and thus can never address or respond to new issues.⁸⁵

Religion cannot be reformed according to the whim of humans but can only be changed by God. Muslims believe that people do not have the capacity to live without guidance from God, both for the affairs of this world and the next⁸⁶:

“And when Our Clear Verses are recited unto them, those who hope not for their meeting with Us, say: Bring us a *Qur'ān* other than this, or change it “say (O Muḥammad): It is not for me to change it on my own accord; I only follow that which is revealed unto me. Verily, I fear if I were to disobey my Lord, the torment of the Great Day (i.e. the Day of Resurrection)”.⁸⁷

Islam can accommodate all times and territories and has a divine purpose.⁸⁸ The purpose of religion is to establish and maintain the perfect relationship between God and his subjects.⁸⁹ Since Islam, as Muslims believe, is the last and the most preserved religion, its purpose is to maintain monotheism and maintain justice on earth:

“O you who believe! Stand out firmly for justice, as witnesses to *Allah*; even though it be against yourselves, or your parents, or your kin, be he rich or poor, *Allah* is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you may avoid

⁸⁵ A critical analysis for this attribution see: Saffet Köse, *Çağdaş İhtiyaçlar ve İslam Hukuku*, Rağbet Yayınları, İstanbul 2004, pp. 9-42.

⁸⁶ Qaradāwī, *ibid.* p. 39; Erdoğan, *İslam Hukukunda Ahkâmın Değişmesi*, p. 20.

⁸⁷ *Qur'an*: 10/15.

⁸⁸ Erdoğan, *İslam Hukukunda Ahkâmın Değişmesi*, p. 25-29.

⁸⁹ *Qur'an*: 84/6.

justice, and if you distort your witness or refuse to give it, verily, *Allah* is Ever Well Acquainted with what you do”.⁹⁰

For the creation of a moral society, all the rulings that the Islamic legal system possesses are intended to preserve the triple system of monotheism, justice and morality. No one has a choice whether to accept, refuse or change God’s *shari‘ah* and its rulings

“It is not for a believer, man or woman, when God and His Messenger have decreed a matter that they should have any option in their decision. And whoever disobeys God and His Messenger, he has indeed strayed in a plain error.”⁹¹

The religion is also seen as perfected: “This day, I have perfected your religion for you, completed My Favour upon you, and have chosen for you Islam as your religion.”⁹² The institution of prophecy ended with Muḥammed:

“Muḥammed is not the father of any man among you, but he is the Messenger of God, and the Last (end) of the Prophets⁹³ and God is Ever All Aware of everything.”⁹⁴ “And whosoever does not judge by what God has revealed, such are the *kāfirūn* (i.e. disbelievers-of a lesser degree as they do not act on God Laws)”⁹⁵, “And whosoever does not judge by what *Allah* has revealed, such are the *ālimūn* (polytheists and wrong doers- of a lesser degree)”⁹⁶, “And whosoever does not judge by what *Allah* has revealed (then) such (people) are the *Fāsiqūn* (the rebellious i.e. disobedient (of a lesser degree) to *Allah*.”⁹⁷

Surely, Islamic law is a divine law⁹⁸ in terms of its original source, which is the *Qur’ān*. Muslims believe that the *Qur’ān* is incomparable to

⁹⁰ *Qur’ān*: 4/135.

⁹¹ *Qur’ān*: 33/36.

⁹² *Qur’ān*: 5/3.

⁹³ According to Abū Hurairah God’s Messenger said, “My similitude in comparison with the other Prophets before me is that of a man who has built a house nicely and beautifully, except for a place of one brick in a corner. The people go round about it and wonder at its beauty, but say: ‘Would that this brick be put in its place!’ So I am that brick, and I am the last (end) of the Prophets.”(Ṣaḥīḥ Al-Bukhārī, v: 4, *ḥadīth* no: 735).

⁹⁴ *Qur’ān*: 33/40.

⁹⁵ *Qur’ān*: 5/44.

⁹⁶ *Qur’ān*: 5/45.

⁹⁷ *Qur’ān*: 5/47.

⁹⁸ Qaradāwī: *ibid*, p. 35; Erdoğan: *ibid*, p. 20.

works of human legislation. Islamic law is sent by God, He knows His subjects well, as is aware of what they need. He does not discriminate one race over another, one territory over another, as the creator of all He creates all, His subjects are equal in their nature regardless of who they are, what they look like, where they live.

“Should not He Who have created
Know? And he is the Most Kind and courteous
(to His slaves) All Aware (of everything)”⁹⁹
“This is a Book which We have revealed unto
you (O Muḥammed) in order that you might
lead mankind out of darkness into light by
their Lord’s Leave to the Path of the All-
Mighty, the Owner of all praise.”¹⁰⁰

The second source of Islamic law is the *Sunnah*, which is based on *wahy* (revelation) and aims to explain the *Qur’ān*: “Nor does he speak of (his own) desire. It is only an Inspiration that is inspired.”¹⁰¹

The fact that sources of Islamic law are divine bestows upon it an inalterable characteristic; even the Prophet who delivered the divine message was unable to change the *Qur’ān*’s rulings: “Say (O Muḥammed): it is not for me to change it on my own accord; I only follow that which is revealed unto me. Verily, I fear if I were to disobey my Lord, the torment of the Great Day (i.e. the Day of resurrection)”¹⁰². Moreover, what was not made possible for the Prophet would surely not be possible for anyone else: “And the Word of your Lord has been fulfilled in truth and in justice. None can change His Words. And He is the All-Hearer, the All-Knower.”¹⁰³ Also, God promises to protect the divine revelation until eternity: “Verily We: it is We Who have sent down the *Dhikr* (i.e. the *Qur’ān*) and surely, We will guard it (from corruption).”¹⁰⁴

Without doubt, Muslims believe that these verses guarantee the religion will not be changed, but rather that it will be protected and preserved as it was revealed. However, the concept of *sharī’ah* is different from the concept of religion and they should not be confused.

⁹⁹ *Qur’ān*: 67/14.

¹⁰⁰ *Qur’ān*: 14/1.

¹⁰¹ *Qur’ān*: 53/3-4.

¹⁰² *Qur’ān*: 10/15.

¹⁰³ *Qur’ān*: 6/115.

¹⁰⁴ *Qur’ān*: 15/9.

The perfected Religion:

“This day, I have perfected your religion for you, completed My Favour upon you, and have chosen for you Islam as your religion.”¹⁰⁵

Shāṭibī (d.790/1388) gives arguably the best explanation of what is meant by ‘perfected religion’. “The purpose of perfection in the verse is about general principles but not a particular principle. The concepts of *darūriyyāt*, *ḥājjiyyāt* and their *taḥsīniyyāt* (perfection) are well explained. Sometimes, it is based on the *ijtihād* principle, it might be essential to deal in some particular matters by implementing general principles. Performing *ijtihād* is verified in the *Qur’ān* and the *Sunnah* and so *ijtihād* must be performed in order to render Islam beneficial and precise. Therefore, there is a role retained for *ijtihād* in the *sharī‘ah* and *ijtihād* is only possible for the issues that have no references in the text. It is an impossible task to locate all particular issues in the verses, since particular issues are endless and cannot be listed or numbered. The meaning of perfected religion in the verse can be identified as; all the general principles which might be needed for any particular issues are available in the *Qur’ān*.”¹⁰⁶

The *Qur’ān* is not expected to include and explain every single rule; if this were the case, it would be never ending: “And if all the trees on the earth were pens and the sea (were ink wherewith to write), with seven seas behind it to add to its (supply), yet the Words of God would not be exhausted. Verily, God is All-Mighty, All-Wise.”¹⁰⁷

Qurtūbī (d.760/1359), one of the greatest interpreters of the *Qur’ān*, agrees that the ‘perfected religion’ verse is referring to general rulings and principles. For example, with the performance of *ḥajj* as the fifth pillar of Islām, the five pillars of Islām are completed. It is interesting to note that the ‘perfected religion’ verse was revealed when the Prophet was visiting ‘Arafāt.¹⁰⁸ When the *ḥadīth* “Islām is established on five fundamentals.”¹⁰⁹ is taken into consideration along side the verse, it will again become clear that the verse is referring to the completion of *‘ibādāt*. Another *ḥadīth* of the Prophet asserts that: “Whatsoever is not included in our task (religion) is completely rejected”.¹¹⁰ The meaning behind “not included” is related to innovations (*bid‘ah*) of the religion. Investigation of the *ḥadīth* of Mu‘adh¹¹¹

¹⁰⁵ *Qur’ān*: 5/3.

¹⁰⁶ Shāṭibī, *Al-I‘tiṣām*, v: 1, p. 305; *Muwāfaqāt*, v: 1, p. 32, 77.

¹⁰⁷ *Qur’ān*: 31/27; 18/109.

¹⁰⁸ Abū ‘Abd Allah Muḥammad b. Aḥmad Qurtūbī (d.760/1359), *Al-Jāmi‘ li Aḥkām al-Qur’ān*, Dār al-ihyā al-Turās al-‘Arabī, Beirut 1967.

¹⁰⁹ Bukhārī, “Īmān”, 1,2, Muslim, “Īmān”, 19- 22.

¹¹⁰ Shāṭibī, *Al-I‘tiṣām*, i, 46.

¹¹¹ Abū Dāwūd, Abū Dāwūd Sulaymān bin al-Ash‘ās (d.275/888), “*Sunan*” tr. Aḥmad Ḥasan, Lahore: Muḥammad Ashraf, 1984, iii. 1019 *ḥadīth* no: 3585.

and many other *ḥadith* would indicate that the institution of *ijtihād* is encouraged¹¹², with the exemption of *ijtihād* which is related to *‘ibādāt*.

Religion was perfected as humanity reached a certain degree of maturity to be able to continue without prophets. The last Prophet set all the standards and values for humanity so they could work out their destiny for themselves.¹¹³ In the *mujaddid ḥadith* it is implied that *mujaddids* will perform *ijtihād* to reform the religion instead of having new prophets sent: “On the eve of every century, God will send to my community a man who will renew it din (religion)”¹¹⁴.

The characteristic of inner unity and coherence:

According to the *Qur’ān*, Islamic law has a unified character, and hence whoever tries to favour one verse over the other would be challenged by the *Qur’ān* itself.

“Then do you believe in a part of the Scripture and reject the rest? Then what is the recompense of those who do so among you, except disgrace in the life of this world, and on the Day of Resurrection, they shall be consigned to the most grievous torment. And God is not unaware of what you do.”¹¹⁵

The contents of the *Qur’ān* are of course not limited to *‘ibādāt*; the *Qur’ān* includes rulings for social order, *mu‘āmalāt* (transactions), *‘uqūbāt* (punishment), matrimonial issues, administrative law, and so on. Islamic law neither separates earthly life from the hereafter, nor restricts itself to faith, *‘ibādāt*, or moral teaching.¹¹⁶

Man is considered as one unit rather than being divided into components such as body, soul, emotions, and so on: life is assessed as a whole, just like an individual.¹¹⁷ In connection with this ‘Umar b. ‘Abd al-‘Azīz, in his written declaration said; “Execution of penalties is not any different to practising *‘ibādāt* such as prayers and religious tax”.¹¹⁸

The promotion of worship:

In the creed of Islam the purpose of creating mankind and all other creations is that they worship God. “And I (God) created not the *jinn*s and

¹¹² Bukhārī, “I’tiṣām”, 21; Muslim, “‘Aqdiyyah”, 15; Ibn Mājah, “Aḥkām”, 3.

¹¹³ Rahman, *Islām*, 278.

¹¹⁴ Abū Dāwūd, “Sunnah”, ii, 518.

¹¹⁵ *Qur’ān*: ii, 85; also see: 4/150-151.

¹¹⁶ Bahiy, *Al-Islām fī Ḥallī Mashākil al-Mujtama‘āt al-Islāmiyyah al-Mu‘āsirah*, Cairo 1981, 13; Kawtharī, *Makālāt*, Cairo 1388, p. 88, 1388.

¹¹⁷ Qaradāwī, *Khaṣā‘is*, 108.

¹¹⁸ Ibn Sa‘d, Muḥammad (d.230/844), *Al-Ṭabaqāt al-Kubrā*, Beirut 1957, v, 378.

men except they should worship Me (Alone)”¹¹⁹. Therefore, one of the main purposes of Islam is to enable all humans to be good worshipers of God. To this end, God bestowed free will. “There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path.”¹²⁰ He gave man the opportunity to choose right from wrong.

“And verily, We have sent among every Ummah (community, nation) a Messenger (proclaiming): Worship God (Alone), and avoid (or keep away from) *Tāghut* (all false deities etc. i.e. do not worship *Tāghut* besides God).”¹²¹

Aids to the reforms of Islamic law:

Ijtihād:

It is a well known phenomenon that the first use of *ijtihād* was during the time of the Prophet (pbuh), as can be seen in the *ḥadīth* of *Mu’adh*¹²². It was continued by the Companions who were presumably in a better position than most to understand the purpose of the religion, provide and deliver responses and solutions for various problems thus serving the purposes of the *sharī’ah*.¹²³

This brings us to the contentious issue so-called ‘gate of *ijtihād*’, which many believe was closed in the 11th century. A decision on whether this gate is open or not is connected directly to the future of reform. In general, the consensus of modern Muslim scholars is that the gate of *ijtihād* is open.¹²⁴

Ijtihād is a necessity at all times. Since *naṣṣ* does not consist of everything that has happened since the revelation, or everything that will happen, it is vital to interpret *naṣṣ* accordingly with the issues and aspects of contemporary periods. If *naṣṣ* was to include rulings on all the aspects of the world, there would be an excess of information which would be impossible to materialize, document and recite.¹²⁵ Elaborating the rules of jurisprudence (*Qawā’id al-Fiqhīyyah*) would help to give exact solutions through which

¹¹⁹ *Qur’ān*: 51/56.

¹²⁰ *Qur’ān*: 2/256.

¹²¹ *Qur’ān*: 16/36.

¹²² Abū Dāwūd, *Sunan*, iii, 1019 ḥadīth no: 3585.

¹²³ Qaradāwī, *Evrensellik*, p. 15.

¹²⁴ For example, at the Congress of Islamic Research, held in Cairo in 1964, eighty-two delegates from forty countries expressed the belief that *ijtihād* and benefiting all from all the Islamic school of jurisprudence are necessary, and that their necessity has been accepted by the authority of Islamic law. See in “*Mu’tamar al-Awwal li Majmā’ al-Buḥūs al-Islāmiyyah*”, p. 393-395, by the management of Al-Azhar University, Cairo 1964.

¹²⁵ *Qur’ān*: 31/27; 18/109.

jurists attempt to derive new rulings based on their interpretation of the sources, and those rulings themselves.¹²⁶

Another aid to reform is the existence of political structures and the authority given to rules by the *sharī'ah* to implement it. Islamic law gives authority to perform *ijtihād* to Muslim leaders, jurists, judges and the other related officials. What is prohibited to Muslim rulers is to divert from certain legal rulings or to alienate themselves from the main purpose of the *sharī'ah* by opposing the clear indication of *naṣṣ* in order to further their own ambitions or desires. The focal point is their obligation not to contradict the Islamic principles and *naṣṣ*.¹²⁷

The concept of *maqāṣid al-sharī'ah* (purposes or objectives of Islamic law):

The concept of *maqāṣid al-sharī'ah*, as it has been recently called *falsafah al-tashrī'* can be defined as the purpose of the rule maker for normative regulations and the benefits anticipated from these.¹²⁸ This concept could be assessed under the principle of *maṣāliḥ al-mursalah*.

There is no doubt that all the divine rulings that govern the affairs of this world and the universe have purposes, and that these are the purposes that *Shārī'* (lawgiver) wishes us to accomplish. It is supported by the belief that the *Shārī'* did not create anything without purpose. "We created not the heavens and the earth and all that is between them for a (mere) play"¹²⁹, "Did you think that We had created you in play (without any purpose), and that you would not be brought back to Us?"¹³⁰

Understanding the purposes of the *sharī'ah* is an indispensable qualification for a *mujtahid* in order to perform *ijtihād*. Imām Mālik (d.179/795) regards *istiḥsān* as a purpose-centred method interpretation; in his estimation, "*Istiḥsān* represents nine-tenth of human knowledge".¹³¹

Ibn 'Āshūr opines that "Realizing *maqāṣid al-sharī'ah* rescues people from narrow mindedness and literalism. The *maqāṣid al-sharī'ah* leads to undiscovered horizons through eternal principles, and the essence and true meaning of Islam. To discover the true spirit of *maqāṣid al-sharī'ah* is to distinguish the earthly from the divine, the temporary from the permanent, the alterable from the inalterable and the particular from the general. If man

¹²⁶ Suyuti, *Al-Ashbah*; Ibn Najim, *Al-Ashbah*.

¹²⁷ Qaradāwī, *Evrensellik*, pp. 42-43.

¹²⁸ Raysūnī, *Nazariyyāt al-Maqāṣid 'inda al-Imām al-Shāḥibī'*, the IIIT, Maryland USA, 1995, p. 17.

¹²⁹ *Qur'ān*: 21/16.

¹³⁰ *Qur'ān*: 23/105.

¹³¹ Shāḥibī, *Muwāfaqāt*, iv, 208.

does this the light of Islam will shine again upon the people and peace and wellbeing will be brought to our stressful world.”¹³²

A historical approach to the concept of *maqāṣid*:

The concept of *maqāṣid* emerged in the 3rd century a.h; Ḥakīm al-Tirmīzī has the first person in the written literature to use the concept¹³³, followed by Imām Abū Maṣṣūr *al-Māturīdī* (d.333/944).¹³⁴ It should be noted that Juwaynī (d.478/1085) was the first person to actually attempt an evaluation of *maqāṣid* and *maṣlaḥah*.¹³⁵

According to Juwaynī, “Whoever is unable to realize the purposes and wisdoms behind the orders and prohibitions of *Shārī‘* cannot be considered wise.”¹³⁶ Juwaynī led the organization of *maqāṣid* (general principles aimed to be achieved by Islamic law) into five categories in order to make them as easily understandable as possible. He was also one of the first jurists to refer to some of the five fundamental principles (religion, life, intellect, lineage, property) of *sharī‘ah* called *ḍarūriyyāt*.¹³⁷

Another exemplary personality who expounded on the concept of *maqāṣid* is Juwaynī’s student Ghazālī (d.505/1111). He divided rulings into the main categories of *mu‘allal* (justifiable) and *ghayri mu‘allal* (unjustifiable). He converted his tutor’s categorisation of *maqāṣid* from five to three, namely *ḍarūriyyāt*, *ḥājīyyāt* and *taḥsīniyyāt* and later, in relation to these three, he brought the concept of *takmilāt* onto the agenda too.¹³⁸

Other significant jurists who discussed the concept of *maqāṣid al-sharī‘ah* were; Fakh al-Dīn al-Rāzī (d.606/1209), Sayf al-Dīn al-Āmidī (d.631/1233), Ibn al-Ḥājjib (d.646/1249) and ‘Izz b. ‘Abd al-Salām (d.660/1262) who is known as “master of the scholars”.¹³⁹ Also Shihāb al-Dīn al-Qarāfī (d.685/1286), Najm al-Dīn al-Tūfī (d.716/1316) are very well-known names as their opinions on *maṣlaḥah* were outside the traditional frame.¹⁴⁰

According to al-Tūfī, as the *Shārī‘*’s primary purpose is “Obtaining *maṣlaḥah* and removing evils” therefore this principle must be applied to customs (*ādāt*) and transactions (*mu‘āmalāt*), even when *naṣṣ* and *ijmā‘*

¹³² Ibn ‘Āshūr, *Maqāṣid*, p. introduction (Hayreddin Karaman), translated by Mehmet Erdoğan-Vecdi Akyüz, Rağbet, Istanbul 1999.

¹³³ Raysūnī, *Nazariyyāt al-Maqāṣid*, p. 26.

¹³⁴ *ibid*, p. 29.

¹³⁵ *Ibid*

¹³⁶ Juwaynī, *Al-Talkhīṣfi Uṣūl al-Fiqh*, ed: ‘Abd Allah b. Jawlim, an-Nibālī Shabbi Aḥmad al-‘Umarī, Beirut, 1996, v: 1, p. 206.

¹³⁷ Juwaynī, *Al-Burḥān*, v: 2, p. 747.

¹³⁸ Ghazālī, Abu Ḥāmid Muḥammad ibn Muḥammad (d.505/1111), *Al-Mustaṣā‘ min ‘Ilm al-Uṣūl*, Al-Maktabah al-Tijāriyyah Cairo 1356/1937, v: 1, p. 286.

¹³⁹ Masood M. Khālīd, *Islamic Legal Philosophy*, International Islamic Publishers Delhi, 1989, p. 157.

¹⁴⁰ Koca, *İslam Hukukunda Maṣlaḥat’ı Mursele* *ibid*.

contradict them.¹⁴¹ There is no objection when *naṣṣ* and *ijmā'* accommodate *maṣlaḥah*. However, when *naṣṣ* and *ijmā'* contradict *maṣlaḥah*, then priority should be given to *maṣlaḥah* that can be applied by restriction (*takhṣiṣ*) of *naṣṣ* and *ijmā'* or in the form of declaration (*bayān*); thus it would never imply nullifying *naṣṣ* and *ijmā'* or having them excluded from the process. Giving more priority to the *Sunnah* because of its explanatory nature rather than to the *Qur'an* would be a good example here.¹⁴²

Later, Ibn Taymiyyah (d.728/1328), Ibn al-Qayyim (d.751/1350) and Ibrāhīm al-Shāṭibī (d.790/1388) all reassessed the concept of *maqāṣid* with a new and systemized method; Dihlawī (d.1176/1762) also reassessed *maṣlaḥah* and reform. Dihlawī passionately argued that “Whoever does not understand the purposes of *shar'ī* rulings and whoever insists that these rulings do not include any *maṣlaḥah* has not benefited from knowledge or wisdom. This person should shed tears for his own situation rather expect praise...”¹⁴³, Ṭāhir b. 'Āshūr (d.1293/1973) is one of the most recent scholars to have dealt with the issue, making a great contribution with his work “*Maqāṣid al-Sharī'ah al-Islāmiyyah*”.¹⁴⁴

Shāṭibī made efforts into ensuring that the door was open for everyone to understand the wisdom and subtlety of Islamic law.¹⁴⁵ Muḥammad Fāḍil b. 'Āshūr comments on Shāṭibī's *Muwāfaqāt* by declaring that “With this book, Shāṭibī actually constructed a pyramid erected to the sky in terms of Islamic culture. He succeeded in something that his ancestors simply did not bother to deal with, and he discovered evidences and methods which guaranteed the everlasting permanence and purity of the religion. Those who made an effort to uncover the subtlety of the religion became key personalities. The importance of Shāṭibī's work has found more resonance during the re-awakening of the Islamic world from its long sleep, when religious rulings contradicted the requirements of contemporary life, especially in current and previous centuries. In this context, Shāṭibī's *Muwāfaqāt* is a real saviour.”¹⁴⁶

The contemporary scholar 'Alall Fāsī emphasises the importance of *maqāṣid al-sharī'ah* for performing *ijtihād*: “*Maqāṣid al-sharī'ah* is an eternal source for the fields related to legislation and jurisdiction and it is not outside of the Islamic law; rather it is a source which is at the very heart Islamic law. It is also not a complicated concept like the ‘law of nature’ which

¹⁴¹ Masood, *ibid*, p. 165.

¹⁴² Najm al-Dīn Ṭūfī Sulaymān bin Abu al-Qawey bin 'Abd al-Karīm Abu al-'Abbās Ḥanbalī (d.716/1316), *Al-Ta'yīn fī Sharḥ al-'Arba'in*, edited by Aḥmad H. Muḥammad Osman, Beirut, 1988, p. 238.

¹⁴³ Dihlawī, Shaḥ Walī Allah, (d.1176/1776), *Hujjah Allah al-Bāligha*, Delhi 1954, v: 1, p. 29, 130.

¹⁴⁴ Ibn 'Āshūr, *Maqāṣid al-Sharī'at al-Islāmiyyah*, Tunus, 1366.

¹⁴⁵ Raysūnī, *Nazarīyyāt*, p. 351.

¹⁴⁶ Ibn 'Āshūr, Muḥammad F. , *'Ālam al-Fiqr al-Islāmī' fī Tārīkh al-Maghrib al-'Arabī*, p. 76, Tunus, quoted from Raysūnī, *Nazarīyyāt*, pp. 352-353.

is not certifiable in terms of its purpose and borders...when necessary *maqāṣid* may even be effective for a matter resolved by *naṣṣ*.”¹⁴⁷

According to Ibn Rushd, *shar‘ī* sources are a matter for juristic thought. Seen from this angle, the *istiḥsān* of Ḥanafī and the *istiṣḥāb* of Mālikī complements each other. It is important not to accept one and deny the other purely on sectarian grounds; in order to reach a solution any of them may be used as long as they do not contradict general principles. *Istiḥsān* takes *maṣlaḥah* and justice into consideration when delivering a ruling, and jurists supposedly have a better awareness of the *Shārī‘*s purposes when superficial meanings of the rulings are likely to induce injustice and are authorised and qualified to change such rulings to more just, fair and specific ones. However, this should never be done by arbitrarily determining *maṣlaḥah*. Even though the *sharī‘ah* provides direct information regarding to all rulings, when superficial meanings of the rulings are contradictory they must be interpreted according to *naṣṣ*.¹⁴⁸

Ibn ‘Āshūr recommends *ijtihād* when *naṣṣ* and *qiyās* are silent on an issue, in order to offer solutions to particular matters. He claimed that “Jurists’ need of *maqāṣid* is obvious for such situations, because they have the responsibility to maintain continuity of the rulings given by Islam for generations and eras after the Prophet.”¹⁴⁹

Moreover, scholars have established standards and principles in order to set the criteria that would determine the *Shārī‘*s purposes, orders and prohibitions.¹⁵⁰ There is a concept of means (*wasāil*) related to *maqāṣid al-sharī‘ah* and they are the main instruments in order to achieve *maqāṣid*.¹⁵¹ Purposes and means must be assessed together; in other words, the means depend on the ends. “Once the purpose is dismissed then there is no means to pay attention.”¹⁵² As is written in *al-Majallah al-Aḥkām*, “If the principle fails, the accessory also fails”.¹⁵³

The fundamental issue is to determine the *Shārī‘*s purposes first. For Māturīdī, unalterable monotheist religion is just like rainwater falling from the sky: it takes a shape only when it hits the earth. There it can become a river, a muddy pool, or a flood, too, in how the water takes shapes. Different social structures and cultures require different laws to accommodate their

¹⁴⁷ ‘Alalī Fāsī, *Maqāṣid al-Sharī‘ah al-Islāmīyah wa-Maqārimuhā*, Matba‘ah al-Risālah, al-Maghrib 1979, pp. 51-52.

¹⁴⁸ Ibn Rushd, Abū Walīd Muḥammad b. Aḥmad b. Muḥammad, al-Qurtubī al-Mālikī (d. 520/1126), *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, Dār al-Ma‘rifah, Beirut, v: 1, pp. 136, 137, v: 2, pp. 154, 246.

¹⁴⁹ Ibn ‘Āshūr, *Maqāṣid*, pp. 15-16.

¹⁵⁰ For this criteria and principles, see: Būṭī, *Dawābiṭ*, pp. 115-118; Ḥādimī, *Al-Ijtihād*, pp. 23-24; Ghazālī, *Al-Mustaṣā*, p. 179.

¹⁵¹ Ibn ‘Abd al-Salām *Qawā‘id*, i. 104; Qarāfī, *Furūq*, ii. 23; Ibn ‘Āshūr, *Maqāṣid*, 207.

¹⁵² Qarāfī, *Furūq*, ii. 33.

¹⁵³ *Al-Majallah al-Aḥkām*: clause: 50.

needs. The essence of the *sharī'ah* that was revealed to the Prophets is always the same because it is revealed from the same origin. The *sharī'ah* has two aspects: the divine and the human. The divine aspect looks to revelation (*wahy*) and the *Sunnah* (tradition) which cannot be altered. However, their interpretation will change according to different situations and conditions. The human aspect of the *sharī'ah* is the accumulation over time of rulings given by jurists after interpreting the sources in accordance with reason and the needs of the age. Evolution is possible at any time according to new occurrences and situations.

In general, the purpose of the *sharī'ah* is to maintain the social structure and to secure the *maṣlaḥah* in order to prevent evil.¹⁵⁴ Therefore, one of the main duties of the Prophets is to make efforts to establish justice and maintain it: "And Moses said to his brother Aaron: Replace me among my people, act in the Right Way and follow not the way of the *mufsidūn* (mischief-makers)"¹⁵⁵.

Conclusion:

Since the time of the Prophet (pbuh), the derivation of rules to solve the obstacles and problems created by social life has taken place in the light of the *Qur'ān*, the *Sunnah* and through the use of *ijtihād*. The process of performing *ijtihād* was misunderstood by some scholars. This concept was usually evaluated in a wrong context and thus it was regarded as reform in Islamic law. For development of Islamic law not only the term *ijtihād* was emphasized but also various other terms were used, such as personal judgment (*ra'y*), *fiqh* (giving *fatwa*), inference (*istidlāl*), analogy (*qiyās*), deduction (*istinbāt*), juristic preference (*istiḥsān*)¹⁵⁶ to name a few. This concept (*istiḥsān*) especially removes obstacles occurred on the way of performing *ijtihād*, because whoever performs *istiḥsān* does not rely solely on personal opinions. Rather *istiḥsān* is one's use of discretion and common sense to effect the *Shārī's* general objectives. For example, if a rule of analogy causes evil,¹⁵⁷ then the departure from analogy is necessary and *istiḥsān* is applied to remove the evil.¹⁵⁸ However, a clear understanding of the concept of *maqāṣid* is a prerequisite before applying *istiḥsān* and other methods. Briefly, "*Istiḥsān* is a complete understanding of the entire Islamic scheme of life and a complete grasp of the spirit of Islam."¹⁵⁹ It is therefore

¹⁵⁴ Ibn 'Āshūr, *Maqāṣid*, p. 119.

¹⁵⁵ *Qur'ān*: 7/142; 7/85; 24/55.

¹⁵⁶ See more about the concept of *istiḥsān*: Saim Kayadibi, "Doctrine of *istiḥsān* (Juristic Preference) in Islamic Law", first published by Tablet Yayınları, Konya, June 2007.

¹⁵⁷ Shāṭibī, *Muwāfaqāt*, 2, p. 233.

¹⁵⁸ *Ibid.* v. 4, p. 206.

¹⁵⁹ Maudūdī, Abu al-'Alā, "*Islamic Law and Constitution*", Islamic publications Ltd Lahore, translated by Khurshid Aḥmad, 1960, p. 63.

my conviction that the concept of *maqāṣid* has a vital role in arriving at appropriate solutions to problems that arise overt.

We can after diagnosing Islamic legal structure conclude that reforms to Islamic law are not actually needed. However, as Qaradāwī emphasised that the areas that are open to personal judgement, where the principles involved are uncertain or speculative (*ẓanni*) and if there is uncertainty (*ẓan*) may come from the nature of some texts, which are open to interpretation, which is the case with most of the *Sunnah*. Or uncertainty may come from ambiguity in the meanings of the *Qur'ān* itself. When investigating such texts, what needs to be clarified is the underlying principle of the text; the text should be interpreted according to the circumstances prevailing at a given time, through *ijtihād*.

I have tried to discover whether Islamic law has the ability to evaluate the contemporary issues. Muslim community either collectively or individually needs *ijtihād* to deduce rulings on issues that may arise over the course of time. These are vital as long as human beings exist.

Nevertheless, according to Rahman, the factors behind the failures of reformers in their endeavours are that they have not evaluated these matters more thoroughly. In a very simple example –polygamy- reformers try to show that Islam in reality does not allow polygamy at all, and while doing this they make statements that completely contradict historical fact, and sometimes give explanations that falsify the *Qur'an*. Whereas it would have been more reasonable had they presented their position as follows: the *Qur'an* has given permission for polygamy, however, the *Qur'an* has put restrictions and conditions on it which tend to suggest that monogamy is in fact more suitable to human nature than polygamy. Therefore, the eternal objective of the *Qur'an* is towards monogamy.¹⁶⁰

This is one part of the problem; the other part is centred on how Islamic law will deal with contemporary problems irrespective of the types of law- public law, criminal law, matrimonial law and so on. The custody of children after a divorce is one example. Another issue is the fact that the marriage of a non-Muslim man (Christian or Jewish) to a Muslim woman is prohibited, but a Muslim man may marry a Christian or Jewish woman.¹⁶¹ And Islamic banking has never played a significant role in the development of the financial life of the Muslim community, the method of *ijtihād* enables Muslims who are not allowed to benefit from any form of interest, freedom in the context of finance and investment in the area of commerce.

¹⁶⁰ Rahman, *Revival*, ibid, p. 56.

¹⁶¹ See the discussion about such marriages; 'Abdullahi Ahmed An-Na'im: Kurzman Charles, "Liberal Islam", Oxford University press, 1998, pp. 231-232; Nihat Dalgın, "The Marriage of Muslim Woman with a Non-Muslim Man According to the Islamic Law", *Journal of Islamic Law Studies*, issue: 2, year 2003, pp. 131-156

In order to give adequate solutions to the new problems, methodological aspects have to be used in order to provide answer for the problem at hand. Eventually, competency comes to the agenda and has to be harmonized with the light of divine and intellectual standards.

Ijtihād plays a primary and residual role that connects more strongly the textual proof with the *maqāṣid al-sharī'ah*. The primary and principle role of *ijtihād* is to ensure harmony between textual proof and the *maqāṣid* through the provision of alternative evidence in the textual proof which should be examined with the goal of the *sharī'ah* and neither one could be read in separation from the other in the field of *mu'āmalāt*. Therefore, the concept of *maqāṣid* comes to the agenda and it has to be consistent in its detailed meaning.