İJTİHÂD AND A MODERNIST PERSPECTIVE TOWARDS ISLAMIC LAW AND THOUGHT*

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İslam Hukuku ve Düşünsesine Modernist Bir Yaklaşım ve İcîthâd

Hayatın bütün yönlerinin sürekli bir değişim ve gelişim sürecinde olması, insanların hukukları beklentilerini de değiştirmektedir. Böylece bu değişim yanında hukukçuların temel prensipleri yorumlamalarından kaynaklanan feri hükümler de nasibini almaktadır. İslam bir hayat nizami olduğu göre, şartların değişimlerle birlikte meydana gelen sorunlara çözüm yolları üretmek için İslam Hukukunun feri hükümleri de yorumlanabilmektedir. Bu açıdan İcîthâd prensibi olan problemlerin çözümünde temsil gücünü elinde tutarak, adalet ve hakkaniyetin gerçeklemesinde hayati bir rol oynamaktadır.

Toplumun ihtiyaçlarının karşılanması için, İslam Hukuku halihazırda şartlara ilişkin içerisinde olmalıdır. Gelenek ve kültüre dayanan fer'i hükümler şartları ve zamanın değişmesiyle değişime uğrayabilir. “Zamanın değişmesiyle hükümlerin (aḥkâm) de değişimi inkâr olunamaz” prensibindeki aḥkâm kelimesinin akllanması konunun aydınlatılmasına katkı sağlayacaktır.

Bu araştırma iki bölümdede incelenectik: ilk bölüm modernist olarak nitelenen yaklaşımların oluşumu ve gelişim devrelerini tarihi bir süreçte ele almak. İkinci bölüm ise son dönemdeki modernist yaklaşımlara özel vurgu yapılarak bu yaklaşımların mahiyeti ortaya konulmaya çalışılacaktır.

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Introduction:

The concept of *ijtihād* is a main mechanism for development of Islamic law. Thus, it has to reactivate its role for the present era. As these *ra’y* and *qiyās* are the supplementary components for *ijtihād*, new occurrences have inspired the idea of *sharī‘ah* reform.

This chapter will investigate the kinds of *sharī‘ah* reform that are related to *ijtihād*, starting from the core foundation of *ijtihad* and leading to its development throughout history.

Times constantly change, and with these changes, human thought evolves. To deal with this man needs to build a social structure in which he is able to live in harmony. As history has revealed, it is the belief of Muslims that God has responded to support this human revolution by sending prophets with revealed laws,¹ thus, giving aim and direction to the human race.² Man is considered as being guided towards certain purposes.³ The evolution of mankind within circumstances that are in constant flux requires that the law of the day has to be assessed and elaborated where and when necessary, to maintain harmony of the social structures.

According to the Qur’ān, the last revelation was named and finalized as Islam⁴. With this in mind as a principle, this research addresses the question of how such finalized and completed document as the Qur’ān would apply to constantly changing social circumstances?

Muslims believe that one must consider all the issues in the light of Divine law. However, while the Qur’ān, with its thousands of verses, both general and specific, appears to be rooted in history, Muslims believe that its teachings are valid for all time. Consequently, they believe that even its most general verses can be understood in the light of new and ever-changing social conditions.

The Prophet alluded to the necessity for change and renewal in the famous Tradition which says: “On the eve of every century, God will send to my community a man who will renew its din (religion)”⁵.

The main purpose of this paper is to define where Islamic law stands with regard to transformation and reform, particularly with reference to the concept of *ijtihād*. Consequently, my hypothesis is to suggest that Islamic law has the capability to deal with past, present, and future issues only when

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¹ Qurʾān: 16:36; 28:59.
² Qurʾān: 51:59.
³ Qurʾān: 23:115.
⁴ Qurʾān: 5:3.
the exact role of the principle of *ijtihād* is well-embraced and reactivated through guidance of the *nāṣṣ*. There is some wrong interpretation of the practices of the Companions. Because of the misunderstanding of the goal of their practices, some scholar made unacceptable inferences from the practice of the Companions.

**The need for reform:**

There is a general legal principle, which underpins renewal, development, reform, transformation, and modification of the rulings of contemporary judicial system namely “It is an accepted fact that the terms of law (*āhkām*) vary with the change in the times”⁶. If this principle is clarified, it will shed light on the issue at hand. First we must define *āhkām* (rulings), and determine whether our principle applies unconditionally to all *āhkām*, or whether the *āhkām* in Islamic law are exempted? These questions may lead us to conclude that renewals of *āhkām* would require changes to the law in general, and thus the argument for reform and renewal would arise. It is also essential to explain what the renewal of *āhkām* means.

The investigation of relevant sources⁷ should be sufficient to understand the purpose of the principle. It is impossible to deny the fact that the terms of law (*āhkām*) vary with changes in times, and it is based on custom and tradition, which are the details of law. As time progresses, circumstances, conditions, expectations and human traditions automatically change. There would thus be unavoidable changes in customary law, which is based on human experience rather than written sources. However, general principles (*qawād al-kulliyah*)⁸ are inviolate and do not change over time.

In this respect, and according to the explanation of ‘Ali Haydar, the *āhkām* which change with the times are actually those constructed on customs and traditions only. *Āhkām* fixed by text are not changeable since the texts are considered to be stronger than custom. It is a fact that it is impossible to build text on superstition, whereas customs often reflected superstition.⁹ It is also a fact that while general *āhkām* determined by *nāṣṣ* (the Qur‘ān and the Sunnah) could not be changed. However, specific *āhkām* may eventually be altered. Consequently, the *āhkām* that vary with time are

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subject to *qiṣṣā* and *maṣlaḥah*, which produce *aḥkām* that are based on *ijtihād*.  

All aspects of life are subject to constant transformation, and the law is no exception. Muslims believe that Islam is a way of life and consequently the Islamic Law has to be interpreted in such a way that accommodates changing circumstances and solves new problems. It is fair to say that Islamic Law has, in general, been able to evolve over time and provide guidance to the Muslim community rather than restrict itself in a way that hinders evolution. In order to meet the future needs of society, Islamic law has to interact with the circumstances of the present era. This is because the purpose of Islamic law is to maintain justice to secure the good of the community, and avoid evil. Since Muslim society is constantly changing, the rules, which govern it, have to be flexible, and sometimes to change completely. The purpose of *shari'ah* legislation is to respond to man’s ever-changing needs, rather than adopting those needs to suit the rules.

Is Islamic law capable of responding to rapidly and inevitably changing social circumstances, such as women having an active role outside the house and joining the labour force side by side with men? Issues such as this raised questions, which require answers.

Does Islamic law have the revitalizing character to accommodate the changes of modern times, or must it rely on stale and outdated legal rulings as it often has throughout history?

The developments in science and technology have influenced, on a daily basis, the relationship between humankind and the material world, resulting in significant changes in social life. Such development often brings about situations in which Islamic values and beliefs are tested. For example, with advancements in medicine, and the development of new treatments the use of drugs containing intoxicating substances is often unavoidable. Blood transfusions, organ transplants, *invitro* fertilization, and artificial insemination are all new issues, which must somehow be accommodated for by Islamic law. Other contemporary problems include the ambiguity of prayer times in the Arctic circle; the permissibility or otherwise of donning the *ka'ba* while in an aeroplane; how to calculate prayer times

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10 Zarkā, “‘Cağlaşı’” v: 2, p: 643.
15 Sharbasî, “*Yas’al’ānaka*”, 1/604-609, 2/326.
while in space, and so on.\(^{16}\) These problems, many of which are, admittedly, hypothetical, have emerged with the advancement of science and technology, and could not have been foreseen or legislated for by earlier rulings. These issues arise from technical advancements, which present new challenges to the *ahl al-fikr* to respond with practical changes taking place at certain times and thus require flexibility in the interpretation of the *nass* (text). It should always be kept in mind, however, that changes in law involve only practical issues; general principles are inviolate and cannot be altered.\(^ {17}\)

The act of helping others is an example: While the context of help varies according to time and circumstance, the principle of helping others never changes. In brief, the concept does not change but the actions implied by the concept may vary.

Another example is the principle of paying zakāh, which does not change; however, the details, however, such as the things subject to zakāh and the manner in which they are to be paid or collected, are open to change, according to new interpretations that move with the times.\(^ {18}\)

Muslims believe that while all previous divine testaments were subject to alteration and corruption, the testament, i.e. the Qur’an, is now as it was when it was first revealed: God has assured\(^ {19}\) the preservation of His Word from the time of revelation to the Day of Judgment. However, despite the fact that the Qur’an is complete and will not change. It is nevertheless expected that it will be able to act as the source of new and ever-changing rulings.

Since the demise of Muhammad \(\text{pbuh}\), we are not to expect another *sharī'ah*.\(^ {20}\) However, since society is open to change, this change needs to be accommodated for by Islamic law. Thus, the purpose of Islamic law is not to remain static but to move forward.\(^ {21}\)

Consequently, the concept of *ijtihād* has an important role to play in Islamic laws attempt to answer society’s ever-changing needs, while remaining faithful to the unchanging reality of the Qur’an.

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19 Qur’an: 15/9.

20 For completion of the prophecy and new *sharī‘ah*, see: Qur’an: 5/3.

General historical perspective of modernization:

For the last fourteen centuries, discussions about modernization in Islam, from the beginning of the revelations until the present time, have always been alive. In addition, it could be said that Islam itself has come with an inherent propensity for change, having renewed previous divine legal systems with an understanding attuned to the conditions and socio-cultural atmosphere of the time.

The purpose of modernization in Islam is an effort to return religion to its own origins while making it understandable in the socio-cultural context of the modern era. As the well-known scholar in the concept of reform movements Fazlur Rahman puts it, “Islam should be presented in a format that modern individuals can understand.” Therefore, the history of Islamic thought and law with regard to reform may be discussed under two categories:

a- The period of formation and developments of Islamic law,
b- The renewal, revival and reform in the modern era.

a-The period of formation and developments of Islamic law

Inspired by the spirit of Islam, the Prophet (pbuh) and his companions put a significant effort both spiritually and mentally into understanding the sharīah and implementing it throughout the period of wahy (revelation).

After the demise of the Prophet (pbuh), the development and application of Islamic law became the responsibility of the Companions, and the necessity for intellectual and legal studies emerged. It took approximately two and a half centuries for Islamic law to form and eventually the doctrinal and behavioural system became an integral part of the process.22

As Fazlur Rahman points out “the medieval systems of Islamic law worked fairly successfully partly because of the realism shown by the very early generations who took the raw materials for this law from the customs and institutions of the conquered lands, they were modified where and when necessary in the light of the Qur’ān teachings and integrated within that teaching.”23 The first three centuries after the death of the Prophet (pbuh) are

seen on the whole as the era in which the main currents of Islamic legal thinking emerged. All of the main theological and legal schools of thought emerged during that period. I will now try to throw some light on certain aspects of the development of Islamic law during this period by looking at the leading role played by certain personalities, beginning with the Caliph ‘Umar (d.23/644). ‘Umar’s achievements in law led to the renewal in history of Islamic legal thought. ‘Umar showed how the reformist character of Islam could be applied after the death of the Prophet. While he was firmly attached to the basic Qur’anic values, he understood the concept of social change and showed that he had both the will and the ability to make decisions that were required to adjust the sharīḥah in accordance with social change in respect to protect the main goal (maqāsid) of the sharīḥah. However, whatever ‘Umar did some changes or postponement wasn’t a change of the sharīḥah or an alteration of the sharīḥah.

I have to emphasise on a point that some researchers insist on that ‘Umar’s practices on some rulings were an alteration of sharīḥah. For example: the case of granting zakat for those whose hearts are to be reconciled, which was mentioned in the Qur’an24; the punishment of cutting hand25; not distributing the land of Egypt and Syria for to those who participated the war26; and the case of husband’s initiating the triple talāq (divorce). However, all these examples are not a kind of example which indicate an alteration of the sharīḥah.27 I suppose, ‘Umar’s judgements on these cases were misunderstood by some scholars.

In fact, ‘Umar played a significant role in achieving the underlying objectives of Islamic law.28 For example, he inspired the establishment of a markaz al-‘ilm which is equivalent to a modern-day “centre of excellence”, in the city of Kufah. In a short period of time, the city of Kufah became a cradle of juristic activities. ‘Umar appointed ‘Abdullah b. Mas‘ūd (d.32/652) to the city of Kufah as an educationalist. This appointment led to the development of a legal school of thought based on the primary of personal legal opinion or ra’y.29

24 Qur’an: 9/60
25 Qur’an: 5/38
26 See the verses about the spoils of war and booty Qur’an: 8/1,41; Qur’an: 59/6-9
28 For ‘Umar’s social and political life, his caliphate, military strategies, administrative roles, and his reforms etc. see: Shibli Nu’mānī, “‘Umar the Great the second Caliph of Islam”, tr. by Muḥammad Saleem, printed at Ashraf press, Lahore, Pakistan, 1962, v: 2.
29 Nu’mānī, “‘Umar” v: 2, pp: 125-133.
‘Umar took the first steps towards institutionalising the council (shūrah) system, which played a vitally important part in dealing with social problems. He appointed a board to the council consisting of six people from whom he excluded members of his own tribe. The members of the council committee were from the Hāshim and Umayyad clans. Each member of the board had to take an oath not to favour members of his tribe since such nepotism would threaten the future of the system, which was conceived as means of distributing justice without malice or favour. The basis of ‘Umar’s ijtihād was to help the public in their day-to-day life by removing any difficulties, so that the objectives purpose of the sharīah might be accomplished. When ‘Umar’s ijtihād is studied,30 it is obvious that his established reforms were recognised by the sharīah; however, ‘Umar did not attempt to alter the obligatory jārî principles.

The Qurʾān and the Sunnah are not based only on obligatory commands; some of the rules exist in the form of recommendations and requests. An authorised individual (‘ulu al-amr) can attempt to alter non-obligatory rules only. However, attempting to alter obligatory rules and prohibitions is considered destructive to religion.

“Any decision taken by the authorised person (‘ulu al-amr) makes his orders obligatory jārî and whatever he decides to ban becomes prohibited (haram). However, as the rulings of the ‘ulu al-amr are restricted within the time of his reign those rulings are likely to be temporary. In addition the ‘ulu al-amr’s interference in obligatory rulings jārî must be continued only to postponing or bringing these forward under certain circumstances.”31

There are different historical views as to whether Kufah or Medina is the cradle of Islamic thought. ‘Ali b. Abi Ṭalib’s third son Muḥammad b. Ḥanafi founded a school of thought in the city of Medina which was far more advanced than that of Ḥasan al-Ḍaṣrī, although this is often overlooked or underestimated. The school of thought in Medina was founded much earlier than the one in Baṣrī, and had an enormous impact on many important and remarkable people such as Wāsil b. ‘Atā and Abū Ḥanīfah.32

Abū Ḥanīfah systemised the principle of personal legal opinion (ra’y) which has its roots in the studies made by Ibn Mas‘ūd (d.52/653). The significant feature of the Kufah school is emphasis on the principles of ra’y and qiyyās, which they suggested, should be resorted to when nass was not available. Their assertion that the practise of ijtihād was preferable to a ruling based on a weak hadīth can also be traced back to Ibn Mas‘ūd. One of

31 Orhan Çeker, verbally given information by him at the University of Selçuk dated on 29.03.04 in Konya/ Turkey.
Ibn Mas‘ūd’s well known sayings is, “When one of you has to give a ruling, you have Allah’s book to look into; and when you cannot find it in Allah’s book, then resort to the Prophet’s Sunnah; and when you cannot find it in either of them, then look to the judgement of wise men. If you are still unable to find it, then resort to your own opinion (ra’y). Finally if you are still unable to make a judgement, then abandon the post.” 33 It is also known that Ibn Mas‘ūd said, “If the judgement is true, it is from God; if it is wrong, then it is from me and the devil. And God and His Prophet are exempt from such judgement”.34

Ibn Mas‘ūd stayed in Kūfah more than ten years and is considered as a founder of the Kūfan school of thought. His thought a wide variety of students from various backgrounds and had a huge impact on the intellectuals of Kūfah. It was Ibn Mas‘ūd more than anyone who gave the people of Kūfah and understanding of ijtihād based on qiyās and ra’y.35

The Prophet’s (pbuh) wife ‘Ā’ishah (d.58/679) was one of the outstanding female jurists (mujtahidah faqihah) who deeply influenced the Companions (Ṣahabah) and the Successors (Tabi’in). One of her contributions to the renewal of Islamic thought is the notion of hadīth criticism (naqd). Testing the hadīth against the text of the Qur’ān to establish the validity of hadīth was one of her techniques;36 she also possessed an exceptional understanding of opinion (ra’y), analogy (qiyyās), textual criticism (naqd al-matn), application of the hadīth, juristic preference (istihsān), and other various principles of Islamic law (uṣūl al-fiqh).37

Ibn Abbās (d.68/687) was another outstanding scholar of the early period. His exegesis of the Qur‘ān is one of the most significant contributions made to early Muslim scholarship. Exegesis (Tafsīr) is an important factor in return, which can be approved only if it has a connection with the Qur‘ān. Sa‘īd ibn Jubayr (d.95/777) is known as the first dedicated exegete and he said “Whoever does not seek interpretation (Tafsīr) is like a blind Bedouin”; this opinion eventually became a pillar of Islamic thought.38

36 In this context many books have been with the title istidrāk (to reform, to correct), eldest book known is al-Baghdādi’s (d.498/1096) book which is called “Istidrāk al-Umm al-Mu‘minīn ‘A‘ishah ‘islā al-Ṣahābah” see: Hatipoğlu, M. S. “Hz. Ai‘ṣe’nin Hikâyesi Tefsirileri”, 1973, XIX, pp: 59-74.
37 Hatipoğlu, ibid.
Abū Ḥanīfah’s (d.150/767)\textsuperscript{39} modernist spirit was inspired by İbrahim al-Nakhāṣ (d.95/713) and Ḥammād b. Sulaymān (d.120/730). Nakhāṣ, who lived in the city of Kūfah, initiated the idea of personal legal opinion (ra'y) and opinion of thought, he became a bridge between the Companions (Ṣaḥābah) and their successors (Ṭabī‘īn), including his student Ḥammād b. Sulaymān who later became the teacher of Abū Ḥanīfah.

As much as Ḥammād b. Sulaymān remained loyal to the general principles of Islam he also stressed the indispensability of reason ('aql) that must always be interconnected with law by demonstrating the importance of analogy (qiyās), opinion (ra'y) and the functions of rationality in his works. Such matters he addressed during his works include emphasis on issues relating to equality in marriage and women giving testimony in court as a witness.\textsuperscript{40}

With Abū Ḥanīfah acting upon personal freedom of opinion in Islamic law the school of ra'y in Islamic thought reached its peak, and he made an enormous contribution to the developments of Islamic law by using the principle of juristic preference (istiṣna).\textsuperscript{41}

Abū Ḥanīfah’s support for ra'y-based ijtihād eventually became one of the fundamental factors in the development of Islamic law. Whilst performing his ijtihād, Abū Ḥanīfah always resorted first to the Qur’ān, then to the Sunnah, then the rulings of Abū Bakr, ‘Umar, Uthmān and ‘Ali, and finally to the rulings of other Companions. If he still could not reach an acceptable conclusion then would resort qiyās based on his own opinion.\textsuperscript{42}

Abū Ḥanīfah’s understanding of the law is about dealing with rules suitable for contemporary life rather than referring to old rulings, despite the fact that his contemporaries constantly criticised him claiming that he did not give adequate credit to naṣṣ, or that he ignored hadith and gave judgement based on his own whim or personal motives. The fact is, however, that rational thought process are necessary to uncover the real meanings and objectives of naṣṣ and this is possible only through the used of the intellect. The use of intellect should not be confused with making arbitrary judgements.


\textsuperscript{40} Aras, “Ḥammād ve Fikhi Görüşleri”, pp:63-106.

\textsuperscript{41} For Abū Ḥanīfah and the concept of istiṣna, see Saim Kayadibi, “Doctrine of istiṣna (Jurisprudential Preference) in Islamic Law”, first published by Tablet Yayınları, Konya, June 2007.

It is clear that juristic discretion enjoys both divine and prophetic sanction, as the *ḥadīth* of Muḥammad demonstrates.⁴³ Abū Ḥanīfah made *istihsān* and *qiyyās* essential to *uṣūl al-fiqh*, allowing society the freedom and flexibility with which to function and progress healthily, in line with the objectives of the *sharī'ah*. All of these memorable contributions added to the dynamics of Islamic thought throughout the history.

Later on, outstanding scholars made further efforts to develop the Islamic juridical system even under difficult political situations when the Islamic world faced the calamity of the Mongol invasion (1258). The Ḥanbali scholar Najm al-Dīn al-Tūfī (d.719/1316) took the concept of *maṣlahah* to the furthest extent ever known. He emphasised the importance of the concept and considered it suitable for applications in all areas of social life and human relations, apart from 'ibād (worshiping) and those general principle of law already determined and deemed inviolate. According to Tūfī, *maṣlahah* is activated through the method of *takhṣīṣ* (particularization) and *bāyān* (exposition) to prevent the possible contradiction between *maṣlahah* and the other two principles, *nass* (text) and *ijmāʿ* (consensus).⁴⁴ Tūfī cites the *ḥadīth* “No harm shall be inflicted or reciprocated in Islam”⁴⁵ in order to explain why the concept of *maṣlahah* is stronger than all other *sharī'ah* principles, although this does not necessarily mean the downgrading of *nass* and *ijmāʿ*. Tūfī argues that it is obvious that in the process of the first creation, in the hereafter, and in the continuation of life, God considers the *maṣlahah* to be of paramount importance to human beings; how, then, could it be possible to ignore *maṣlahah* as a principle of law? Given that the central objective of law is to protect the five essential values, namely religion, life, intellect, lineage, and property, it becomes even more crucial that *maṣlahah* be considered. It is impossible to ignore *maṣlahah*. Tūfī continues, and even when *nass*, *ijmāʿ* and other *sharī'ah* principles contradict it *maṣlahah* becomes the main source of law through the methods of *takhṣīṣ* (particularization) and *bāyān* (exposition).⁴⁶

While Tūfī was expounding and developing the concept of *maṣlahah* in Baghdad at the same time, developments on the western fringes of the Muslim world were inspiring similar responses to newly emerging legal questions. The growth of Mediterranean trade, the transformation from

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⁴³ Abū Dāwūd, Sunan iii, 1019 Ḥadīth no:3585.
agricultural economy to trade economy, rapid urbanization, close relationships with the Spanish Christians, and the jurists’ fear of gradual loss of power, engendered a whole new set of issues and problems for Andalusia society. Consequently, the scholars of Andalusia had to form a new way of thinking in order to address these new issues in Islamic law. As the existing provisions of fiqh were not enough to accommodate these new problems, a new juristic philosophy was unavoidable. Of all of the scholars achieve in the new juristic endeavours, it was Shāṭībī (d.790/1388) who is arguably the most significant, elaborating as he did upon the key concept of maqāṣīd al-sharī‘ah (objectives of the divine law). New problems and dilemmas were viewed within the framework of maqāṣīd al-sharī‘ah and a new ijtiḥād was formulated to cover everything connected to transactions (mu‘āmalāt); ibād, however, remained excluded.

According to Shāṭībī, it is possible through induction to uncover the main objective of the Shari‘ah, which is the attainment of benefit for mankind. The objectives on ibād (worship) have to be obeyed without question; all other rulings, however, should be interpreted in the light of maṣlaḥah, and innovation should be restricted only to the area of mu‘āmalāt.

In the fourteenth century, revivalist and reformist efforts became visible with the appearance of Ibn Taymiyyah (d.728/1328). The essence of his message was not man’s duty on earth is to discover God’s will and to conduct his affairs according to it. God’s will is clearly indicated in the Qur‘ān and is elaborated upon in the Prophet’s Sunnah. God’s will is enshrined in the sharī‘ah. For Ibn Taymiyyah, a society consciously applying the sharī‘ah is a truly Muslim society. However, in order to apply the sharī‘ah in a Muslim community, certain institutions must be formed the most significant of these being the state. And no state is sacred unless it is based on the precepts of the sharī‘ah. As Ibn Taymiyyah’s message does not focus on the individual but rather is based on the existence of communities, he is insistent on communal wisdom and communal justice rather than individual benefit. In the eighteenth and nineteenth centuries, the rapidly escalating reformist movements in the Muslim world exhibited the same characteristics.

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48 Masood, "Islamic Legal Philosophy", p: 103.
49 Ibid p: 281
50 Masood, ibid, pp: 237,263.
b-The renewal, revival and reform in the modern era:

For the purpose of this study, the modern era—as far as modernization is concerned—may be seen as having begun in the early 18th century with the outstanding scholar Dihlawi (d.1776). The most significant characteristics of this period are the invasion and colonization of the Muslim world and its concomitant loss of power and importance.

The modern era maybe studied under two main categories:

1) Period of formation  2) Period of development

1-The period of formation: this is a long period that spans from the collapse of the Muslim world in general to that of the Ottoman Empire in particular; from the independence of the Muslim world to the early years of the Islamic Revolution in Iran (1979).

The modernist movement of this particular period coincides with the re-evaluation of the role of *ijtihād* provoked by the tensions that had arisen as a result of the acknowledgement of the Qur’an as an unchanging text, together with consideration of the need to find solutions to new juristic problems. It was also in response to the claim that the Muslim world’s apparent backwardness and stagnation—in comparison to the newly emerging Europe—was a result of its inability- or unwillingness- to countenance legal change and *sharī'ah* reform.52

The spread of Dihlawi’s revivalist ideas, both in the Indian continent and in other parts of the Muslim world, reflects the great efforts he put into reassessing and interpreting Islam through subjecting it to a comprehensive synthesis of new juristic methods and ideas.53 Dihlawi continued Shāfi‘i’s line with regard to *mašâlāh* and *maqāṣid al-sharī’ah*.54 He also claimed that the door of *ijtihād* was never closed and that blind imitation must be abandoned.55

Ibn Taymiyyah’s revivalist movement was reawakened centuries later in northern Africa by the Sanūsī56 and in western Africa by the Fūlānī57; similar revivalist movements also took place in India.

56 Sanūsī movement: The founder of this movement is Muḥammad b. ‘Ali al-Sanūsī (d.1859); it is not an independent Sūfī sect but an offshoot of the Idrīsī sect. In North Africa it became an enormously powerful movement politically and religiously. See: Kadir Özköse, “*Muḥammad Sanūsī Hayatı, Eserleri, Hareketi*”, İnsan yayınları, İstanbul, 2000.
In nineteenth century, the issues revival and modernism were apparent as a reaction to the encouragement of western thought. For example, Jamāl al-Dīn Afghānī (1839/1897) made an effort to bring the Muslim world’s attention to the negative effects of western political and intellectual dominance. He called on the Muslim world to rescuing itself from this alien influence, and called for a collective effort in order to revivify *ijtihād* and thus reawaken and restore the Islamic order. Afghānī was a defender of the oppressed and the poor and in order to defend them used not only Islamic values, but also pre-Islamic and western values to bring the under classes of the population to a certain level of understanding, so that they might be equipped to defend their selves against the move malign western influences. According to Afghānī, the door of *ijtihād* is always open, and whoever possesses the required qualifications may practice it.

Sayyid Ahmad Khān (1817-98), an outstanding personality of nineteenth century, was an inheritor of the revivalist movement. His approach to the interpretation of the Qur’ān did not have any significant differences from that of the Mu’tazilites. He claimed there was no *naskh* (abrogation) in the Qur’ān and his ideas on social reform had similarities with Afghānī and Abduh. He also maintained the claim of many other scholars who came before him that the door of *ijtihād* was open. All adequately qualified Muslims must assess the issues of their period according to circumstances and the time. There are fundamentally unalterable values of religion; these values are invariable, however, the circumstances differ. The most fundamental values of Islam are constructed upon monotheism and ethics. In this manner, the religion and the *sharī‘ah* are very different; hence, the perfect one is not the *sharī‘ah* but the religion itself. Since there is no concept of a final *sharī‘ah*, investigating Muslim’s problems in their own time and environment and under the light of fundamental Islamic values is an unavoidable duty for believers. According to Khān, the Prophet’s *hadith* must be in accordance with the Qur’ān and the laws of nature, otherwise they will not be recognized as the Prophet’s *hadith*.

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61 Qur’ān: 30:30.
Consequently, the number of mutawāṭur ḥadīth does not exceed ten, and there is no concept of nāṣkh (abrogation) in the Qur'ān. Furthermore, interpretation of sharṭḥ cannot be restricted to the four schools of jurisprudences, and the ruling of previous jurists are not binding at all times; after all, they are human and thus fallible.62

Another outstanding personality of Islamic revivalism is Muḥammad ʿAbduh (d.1905). ʿAbduh was deeply influenced by his master Afghānī’s ideas and by Sayyīd Aḥmad Khān’s method of ḫṭḥāl based on culture and education. He rejected imitation (taqlīd) and he insisted on returning to long-forgotten methods such as istḥārān, and practicing new ḫṭḥāl by using reason and intellect, to address new circumstances and situations. According to ʿAbduh, ḫṭḥāl is not being encouraged because it represents any particular school of thought, but rather it is supported by strong evidences and is genuine. Every Muslim has a right to understand the message of God and the teachings of His Prophet (pbuh) by simply looking into the Qur’ān and the Sunnah. In order to understand God’s Word, Muslims should be equipped with the relevant and required information.63

New developments and discoveries in the world also prompted the Ottoman Empire to search improvement, resulting in a series of reformist, movements especially after the declaration to establish the Tanzimāt (1839). These Tanzimāt included, among other things, the law of merchants (1850), a penal code (1858), maritime trade law (1868), and civil law (Majallah) (1869-1879). ʿAbdulhamid II was declared a constitutional monarch in the 1876 and the first written constitution was adopted. During the next three decades, the Tanzimāt reforms were applied and improved.64 The agenda of that period was based mainly on the majallah al-aštān65 prepared by Jawdat Pasha (1823-95), one of the leading founding members of the Nizāmiyyah courts.66

According to Jawdat Pasha, when injustices abound and existing institutions such as courts and ḫṭḥāl are insufficient, one must establish new rulings in order to provide solutions to restore order. Thus establishing new courts became a priority.67 The main reason for reforms was the

65 Al-Majallah al-Aštān: The Ottoman courts manual.
inadequacy of existing traditional fiqh, both in term of content, fatwā (legal opinion) and method of trial on the one hand, and the need to produce a code of civil law that would be strong enough to meet the challenges posed by the rival western civil law on the other hand.68

There were three kinds of courts in the Ottoman state. One of them was for foreign nationals living in the Ottoman Empire and was called the consulate court. The other two were for the subjects of the Ottoman Empire: the sharī'ah courts69 for Muslim subjects and the church courts for non-Muslim subjects. As the relations between Muslims and non-Muslims were increasing, especially at the commercial and social levels, how to address legal issues between the two was increasingly becoming a problem. As a solution, the Ottoman Empire established mixed trade courts in 1848; they had 14 members, half Muslim and half non-Muslim.70

Another significant reformer was Aḥmad Hilmī (1865/1914), a true defender of the theory of ijtihād.71 Similarly, Sayyid Bey (1873/1924) strongly believed that the genuine reasons behind the Muslim world’s problems were imitation (taqlīd), ignorance, inexperience and extreme sectarianism. He also suggested that the Majallaḥ, which was based on Ḥanafi jurisprudence, should be reconsidered.72

Hamdi Yazır (1878/1942) also expressed his strong belief in the importance of revivalism. In support of his claim, he quoted the Prophet’s (pbuh) ḥadīth,73 “On the eve of every century, God will send to my community a man who will renew it din (religion)”74. İsmā‘īl Hāqqî (Izmirli) (1868/1946)75 was also an important representative of modernism.

By the second half of the twentieth century, Islamic revivalism and reform entered an era of regression. Intellectuals such as Muḥammad ‘Abduh (1845/1905), S. A. Khan (1817/1898) and Sayyid Amīr ‘Ali (d.1928) had established a very strong base for Islamic modernism. However, the movement began deteriorate as it was put on the defensive in the wake of the spread of secular westernization. Most of these reforms resulted only in the

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68 Ibid. 51.
69 Ibid, p: 35.
70 Ibid p: 37.
smoothing out of differences among the four schools of thought, with little impact on wider society as a whole.76

One of the revivalists of this period is Muḥammad Iqbal (1873/1938). The basis of his claims was that the intellect and the heart working together would allow an object to realise its aims. Worldly life would be obtained with the intellect while eternal life would be obtained with the heart.77 According to Iqbal, continuity and transformation go hand in hand. Absolute reality maintains continuity while transformation and movement are one of the greater signs of God on earth. According to Iqbal, communities occupying the centre stage of an active world should be dynamic. The fundamental principle in Islam that maintains this dynamism is ḫādīḥ.78 The ḫādīḥ of Mu‘adh ibn Jabal79 is in fact a genuine lesson for people of this time.80 Iqbal insists on approaching legal problems with the spirit of ‘Umar and with the ability of critical and free thought.81 He strongly emphasised that a new legal order in the field of transactions (mu‘āmalāt) must be subject to change and transformation. However, worship (iḥād) must remain fixed. Therefore, he developed a new philosophical concept called “permanent transformation”, with iḥād and religious obligations remaining inviolate, while transactions (mu‘āmalāt) are open to change.82

Sa‘īd Nursī (b.1876-d.1960), another important revivalist, had almost identical ideas.83 Nursī also claimed that the door of ḫādīḥ is always open.84

In the 1970s, Khomeinī (1902/1989) developed the concept of “walāyati faqīh” which foreshadowed the rise of hierocratic rule in Iran.85 Moreover, in 1979 his Islamic revolution overturned the Pahlawī dynasty with the tremendous support of the people and established an Islamic Republic. Revivalism in the Shī‘ah tradition continued with Mutaḥārī (1921/1979) and Shārāṭī (1933/1977); it continues today with the likes of ‘Abd al-Karīm

76 Ibid, p: 51.
79 Abī Dāwūd, “Sunan” iii, 1019 ḫādīḥ no: 3585.
80 Iqbal, ibid, pp: 202,203.
85 Wilāyāt al-faqīh (a theory of rule by the jurist): This Shi‘ite theory formulated largely by the Ayatullah Khomeinī, who claimed that the political power has to in the hands of a jurist faqīḥ, who rule in the name of the Hidden Imam. Khomeinī’s fundamental theory is that Jurists are appointed by Imams, Imams by Prophets, and Prophets by God. While the Hidden Imam is in occultation, a just mujtahid faqīḥ leads the government on behalf of the Mahdi until he returns. See: İsmail Safi Üstün, “Humeyni’den Hamaney’e Iran İslam Cumhuriyeti Yönetsim Biçimi”, Birleşik, İstanbul, 1999, p: 25; Chibli Mallat, “The Renewal of Islamic law”, Cambridge University Press, 1993.
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Soroush (b.1945), Shabestari (b.1936) and Mohsen Kadivar (b.1959). According to the Shī‘ah, the principle of *ijtihād* must function in accordance with changing circumstances and must be responsibility of Muslim scholars. There is a need for a *mujtahid* in every era and the purpose of “*wāliyyati faqīh*” is to maintain the general principles of the *sharī‘ah* and investigate whether it is being applied appropriately.86

Sharī‘atī (1933/1977) represents another dimension of revivalist with his call for a return to the original Islam. He rejected blind or cultural adherence to religion, citing outdated quasi-religious superstition as the main reason for the backwardness of the Muslim world.87 The principle of *ijtihād* must be reactivated and should not be restricted to one period of time or set of particular circumstances.88 According to Sharī‘atī, closing the door of *ijtihād* would be a catastrophe. He considered Afghānī and ‘Abduh as the leaders of revivalism and contemporary Islamic reawakening.89

2-The Period of development:

This particular period i.e. from WW2 to the present day, evolved from the experiences of the previous phase and took on a more overtly revivalist character. The most important characteristic of this period is the effort made by many Muslim reformists to regain the material power and prestige that once belonged to the Muslim world. The call was now for a collaborative *ijtihād* which would inspiration both revivalism and modernisation. The pro-modernist movement’s collaborative efforts were directed at purifying Islam and eradicating currents such as extreme *sufism*, in order to prepare common ground to work on.90

One of the outstanding intellectuals of this period is Fazlur Rahman (b:1919, d:1988).91 His reformist and revivalist technique could be

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91 Fazlur Rahman was born on September 21, 1919 to the Malak family in the Hazārah district in pre-partition India, now part of Pakistan. He died on July 26, 1988 in Chicago, Illinois. He studied with his father, Mawlānā Shī b al-Dīn, a graduate from the famous Indian seminary Dār al-‘Ullām Deaband, which provided him with a background in traditional Islamic knowledge with a special emphasis on Law (*fiqh*), dialectical theology (*ilm al-Kalam*), prophetic traditions (*ḥadīth*), exegesis (*tafsīr*), logic (*mantiq*), and philosophy (*falsafah*). He graduated from Punjab University in Lahore in 1940 in ‘Arabic and later acquired an M.A. degree in 1942. He completed his PhD degree on Ibn Sinā’s psychology at Oxford University in 1940. He thought Persian and Islamic Studies at Durham University from 1950 to 1958. Appointed first as a visiting professor at the Central of Islamic Research in Pakistan, later he became director
summarised as follows. First, there should be a critical analysis of Islamic tradition and of how that tradition was formed. The fundamental principles of Islam, and the socio-economic and political circumstances under which they developed, must also be analysed. The next task is to determine how these fundamental principles may be conveyed throughout time.92

According to Fazlur Rahman, the Qur’an should be the central criterion, and its general principles, values and long term purposes must be determined and systemised. Later, these principles and purposes must be formulated. So they can be made understandable by contemporary society and applicable to current issue and problems. In other words, the principles and purposes of the Qur’an should be integrated into present circumstances.93 His main objective was the discovery of the fundamental principles of Islam and the formulation of these principles into conveyable propositions for present circumstances, allowing those principles to retain their permanence.

According to Rahman, the fundamental principle of Islamic law is *ijtihād*. The main goal of *ijtihād* is to realize the general purposes of the Qur’an, which is valid for all times, even though its details may change. Rahman describes the process of interpretation as “a double movement, from the present situation to the Qur’ānic times, then back to the present.”94

Islamic revivalism in the past fifty years has also found its voice with Shi‘i personalities such as Najafābādī95, Faḍlallāh96, ‘Abd al-Karīm Soroush97, and Sunnī ideologues such as Turābī98, Ghannouchi99, ‘Ammāra100, Hasan

over a seven year period from 1961 to 1968. As director of the Institute he also served on the Advisory Council of Islamic Ideology, a supreme policy making body. After a short while as visiting professor at the University of California, Los Angeles, he was appointed as professor of Islamic thought at the University of Chicago in the fall of 1969. He continued his work till his death on July 26 1988. See: Fazlur Rahman, “Revival and Reform in Islam”, pp: 1-3, edited and with an introduction by Ebrahim Moosa, One World publications, Oxford 2000.


94 Ibid, p: 5.

95 According to him Wa‘yati Faqīh has to be completely based on the power of the people. Dominance should be held by the majority. See: Ayaṭallāh Šāhī Najafābādī, “Velayet-i Fakih; Hukumet-i Salih,” muassasai Hulāmāni Farhangi Resa, 1984, p: 67.

96 According to him, Islamists should use the language of the present time. His method is that one should be inspired by the past, but move to the future with a renewed form. In addition, he saw the need for renewing Islamic intellectuality and activating the establishment of *ijtihād*. See: M. usain Fa 1 Allah, “İslami Söylem ve Gelecek”, Pınar, İstanbul, 2000, pp: 26, 48-50.


98 According to him the traditional methodology does not completely respond to our contemporary needs, therefore, a new methodology is immediately required. The institution of *ijtihād* should renew previous juristic principles. These should be renewed constantly in the light of the main objectives of Islam. See: Hasan Turābī, “İslami Düşüncenin İlyası”, tr. by Selçur Turan, Adem Yerinde, Ekin, Istanbul, 1997, 66-81.
Hanafi, Jabirī, Qaradāwī and in Turkey, Hayreddin Karaman who undertook the challenge to bring the Muslim world into the modern era. Qaradāwī’s great emphasis is on the return of Islamic law to its original function. He passionately defended the principle that Islamic law must be developed in accordance with necessities of the modern era. According to Qaradāwī, the first requirement was to re-open the gate of ijtihād, returning to the path of the founding fathers and liberating ourselves from the burden of fanaticism and sectarism. As he said, “There is no evidence, either God’s Book or Prophet’s Sunnah, that we should be loyal to a particular school of jurisprudence.”

Conclusion:
Islam is a religion which is not only confined to a certain time or a nation, however it is a universal religion which comprehends all over the time from the past to the future; from human beings to jinn and all the exists. Therefore, Islamic law has a special role to solve the problems occurred though the expectations of life. Of course, we know that all aspects of life are subject to constant transformation, and the present law, which is interpreted by jurists, is no exception. As Islam is a way of life, in order to meet the future needs of society, Islamic law has to interact with the circumstances of the present era to solve new problems. The purpose of the shari‘ah legislation is to respond to man’s ever-changing needs that are not contradict to the purpose of the shari‘ah.

As we have seen that, the Islamic law has the revitalizing character to accommodate the changes of modern times. Many scholars emphasised throughout the history that Islam is a universal religion and its rulings must give responses to the problems. Of course, these problems, many of which are, admittedly, hypothetical, have emerged with the advancement of science and technology, and could not have been foreseen or legislated for by earlier

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99 According to him, the concept of renewal in Islam is possible to activate the principle of ijtihād and avoid taqfiḍ (imitation). He points out that life is also based on evolution and cultures are too. See: Râshîd al-Ghamîshî, “İslami Yönleri”, Bir, İstanbul, 1987, p: 28-32.
100 He is one of the contemporary thinkers of the Mu’tazilah school of thought. He was born in Egypt in 1932.
101 Like his predecessors, he is a proponent of ijtihād and ta‘wīl (interpretation) which he claims are to the main purposes of shari‘ah (maqāṣid al-shari‘ah). The existence of shari‘ah is to clarify the rulings discovered by human intellect. Therefore, ijtihād in that context means to make balance between the shari‘ah and nature. See: Hasan Hanafi, “Otoriteriyenliğin Epistemolojik, ontolojik, Ahlaki, Siyasî ve Tarihi Kökleri”, tr. by İlhami Göler, İslamiyet Dergisi, Ankara, April-June, 1999, pp: 29-30, v: 2, no: 2.
rulings. These issues arise from technical advancements which present new challenges to the *aِthَâr* to respond with practical changes taking place at certain times and thus require a flexibility in the interpretation of the *nâs* (text). It should always be kept in mind, however, that changes in law involve only practical issues; general principles are inviolate and cannot be altered.

It should again be emphasised here that the purpose of modernization in Islam is an effort to return religion to its own origins while making it understandable in the socio-cultural context of the modern era. As the well-known scholar in the concept of reform movements Fazlur Rahman puts it, “Islam should be presented in a format that modern individuals can understand.” It should not be interpreted solely for the sake of modern individual.

After the demise of the Prophet, the development and application of Islamic law became the responsibility of the Companions, and the necessity for intellectual and legal studies emerged. For this responsibility given to the caliphs or the other Companions such as, Abu Bakr, ‘Umar, Abdullah ibn ‘Umar etc. made a significant contribution to the Islamic law and thought. Especially, ‘Umar showed how the modernist character of Islam could be applied after the death of the Prophet. While he was firmly attached to the basic Qur’anic values, he understood the concept of social change and showed that he had both the will and the ability to make decisions that were required to regulate the *sharâh* in accordance with social change. However the implementations of ‘Umar105 for Islamic law has to be understood in a way which deal with the purpose of the *sharâh*. It is not considered as an alteration of the *sharâh*.

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