

## İJTIHÂD AND A MODERNIST PERSPECTIVE TOWARDS ISLAMIC LAW AND THOUGHT\*

Dr. Saim KAYADİBİ\*\*

### İslam Hukuku ve Düşüncesine Modernist Bir Yaklaşım ve İctihâd

Hayatın bütün yönlerinin sürekli bir değişim ve gelişim sürecinde olması, insanların hukuktan beklentilerini de değiştirmektedir. Böylece bu değişimden hukukçuların temel prensipleri yorumlamalarından kaynaklanan ferî hükümler de nasibini almaktadır. İslam bir hayat nizamı olduğuna göre, şartların değişmesiyle birlikte meydana gelen sorunlara çözüm yolları üretmek için İslam Hukukunun ferî hükümleri de yorumlanabilmektedir. Bu açıdan İctihâd prensibi olası problemlerin çözümünde temsil gücünü elinde tutarak, adalet ve hakkaniyetin gerçekleştirilmesinde hayati bir rol oynamaktadır.

Toplumun ihtiyaçlarının karşılanması için, İslam Hukuku halihazırdaki şartlarla ilişki içerisinde olmalıdır. Gelenek ve kültüre dayanan fer’î hükümler şartların ve zamanın değişmesiyle değişime uğrayabilir. “Zamanın değişmesiyle hükümlerin (*ahkâm*) de değişimi inkâr olunamaz” prensibindeki *ahkâm* kelimesinin açıklanması konunun aydınlatılmasına katkı sağlayacaktır.

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

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\*\* Saim Kayadibi, PhD in Islamic Law, is associated with the University of Durham, School of Gov & Intl. Affairs/ Institute of Middle Eastern and Islamic Studies, United Kingdom, email: skayadibi@yahoo.com

### Introduction:

The concept of *ijtihad* 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 *ijtihad*, new occurrences have inspired the idea of *shar'ah* reform.

This chapter will investigate the kinds of *shar'ah* reform that are related to *ijtihad*, 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,<sup>1</sup> thus, giving aim and direction to the human race.<sup>2</sup> Man is considered as being guided towards certain purposes.<sup>3</sup> 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 Islam<sup>4</sup>. 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)"<sup>5</sup>.

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 *ijtihad*. 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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<sup>1</sup> *Qur'ān*: 16/36; 28/59.

<sup>2</sup> *Qur'ān*: 51/59.

<sup>3</sup> *Qur'ān*: 23/115.

<sup>4</sup> *Qur'ān*: 5/3.

<sup>5</sup> Abū Dāwūd "*Sunnah*", ii, 518. For comments about this ḥadīth see: Turner, Colin "*Müceddidlik ve Bedi'uzzaman*", "*Bediuzzaman ve Tecdir*", p: 65-73, Gelenek Publication, İstanbul, 2002.

the exact role of the principle of *ijtihād* is well-embraced and reactivated through guidance of the *naṣṣ*. 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 (*aḥkām*) vary with the change in the times”<sup>6</sup>. If this principle is clarified, it will shed light on the issue at hand. First we must define *aḥkām* (rulings), and determine whether our principle applies unconditionally to all *aḥkām*, or whether the *aḥkām* in Islamic law are exempted? These questions may lead us to conclude that renewals of *aḥkām* 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 *aḥkām* means.

The investigation of relevant sources<sup>7</sup> should be sufficient to understand the purpose of the principle. It is impossible to deny the fact that the terms of law (*aḥkām*) 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 (*qawāid al-kullīyah*)<sup>8</sup> are inviolate and do not change over time.

In this respect, and according to the explanation of ‘Ali Haydar, the *aḥkām* which change with the times are actually those constructed on customs and traditions only. *Aḥkām* 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.<sup>9</sup> It is also a fact that while general *aḥkām* determined by *naṣṣ* (the *Qur’ān* and the *Sunnah*) could not be changed. However, specific *aḥkām* may eventually be altered. Consequently, the *aḥkām* that vary with time are

<sup>6</sup> This maxim of the law is first met -as far as I am concerned- in Ḥādīmī, Abū Sa‘īd Muḥammad (d.116/1755), “*Manāfi’ al-Daqāyiq fī Sharḥ Majāmi’ al-Ḥaqāyiq*”, Istanbul, 1305, p: 328. Also see: *Al-Majallah al-Aḥkām* clause: 39.

<sup>7</sup> Ḥādīmī, “*Sharḥ Majāmi’*”, p: 328; Mas‘ūd Afandī, “*Mir’āt al-Majallah*”, Istanbul, 1299; Sālim Rustem Bāz, “*Sharḥ al-Majallah*”, Beirut, 1986; Ibn Nujāym, “*Al-Ashbāḥ wa al-Nazāir*”, Istanbul, 1257; ‘Ali Ḥaydār Afandī, “*Durar al-Ḥukkām Sharḥ al-Majallah al-Aḥkām*”, Istanbul, 1314.

<sup>8</sup> See: Muṣṭafā Aḥmad Zarkā, “*Çağdaş Yaklaşım İslam Hukuku*”, tr. by Servet Armağan, v: 2, pp: 657-667.

<sup>9</sup> ‘Ali Ḥaydar Afandī, “*Durar al-Ḥukkām*”, p: 1/102.

subject to *qiyās* and *maṣlaḥah*, which produce *aḥkām* that are based on *ijtihād*.<sup>10</sup>

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.<sup>11</sup>

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?<sup>12</sup>

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.<sup>13</sup> Blood transfusions,<sup>14</sup> organ transplants,<sup>15</sup> *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 *aḥkām*, or praying, while in an aeroplane; how to calculate prayer times

<sup>10</sup> Zarkā, "Çağdaş" v: 2, p: 643.

<sup>11</sup> Mehmet Saïd Hatipoğlu, "İslām'ın Aktüel Değeri Üzerine", İslami Araştırmalar, Ankara, 1986, no: 1, p: 12.

<sup>12</sup> Karadawi, "İslam Hukuku Evrensellik Süreklilik", pp: 135-136.

<sup>13</sup> Aḥmad Sharbasī, "Yas'alūnaka fī al-Dīni wa al-Ḥayāt", Beirut, 1981, 2/30, 5/93, 6/52; Hayreddin Karaman, "Günün Meseleleri", Gerçek Hayat, İz Yayıncılık, İstanbul, 2003, 1/197.

<sup>14</sup> Abū Sunnah, "Ḥuqūq al-'Ilāj bi naqli damm al-Insān", Majallah al-Majmā' al-Fiqh, nu: 1, 1987. Sharbasī "Yas'alūnaka", 3/135, 460.

<sup>15</sup> Sharbasī, "Yas'alūnaka", 1/604-609, 2/326.

while in space, and so on.<sup>16</sup> 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 *aḥkām* to respond with practical changes taking place at certain times and thus require flexibility in the interpretation of the *naṣṣ* (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.<sup>17</sup>

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.<sup>18</sup>

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<sup>19</sup> 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 (pbuh), we are not to expect another *sharī'ah*.<sup>20</sup> 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.<sup>21</sup>

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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<sup>16</sup> See: "Majallat al-Majmā' al-Fiqh", 1987, no: 3, part: 1, p: 1419-1549; Karaman, "Günün Meseleleri", 1/73-87, for this context see *ḥadīth dajjāl* in Muslim, "Fitān", *ḥadīth* no: 110; Bukhārī, "Tafsīr", 39/3; Abū Dāwūd, "Malāhim", 14; Ibn al-Ḥumām "Fatḥ al-Qadūr", 1/156.

<sup>17</sup> Erdoĝan, "Aḥkāmın Deĝiřmesi", p: 225.

<sup>18</sup> Fazlur Raḥmān, "İslam ve Çaĝdařlık", tr. by Alparslan Açıkgenç, Ankara Okulu Yayınları, 2002, p: 18-19.

<sup>19</sup> *Qur'an*: 15/9

<sup>20</sup> For completion of the prophesy and new *sharī'ah*, see: *Qur'an*: 5/3.

<sup>21</sup> Erdoĝan, "Aḥkāmın Deĝiřmesi", p: 15.

### **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 *sharī'ah* 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.<sup>22</sup>

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."<sup>23</sup> The first three centuries after the death of the Prophet (pbuh) are

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<sup>22</sup> Fazlur Rahmān, "Revival and Reform in Islam", Cambridge History of Islam, D.M. Halt, C.B, Cambridge Uni. Press, Cambridge 1970, see it in "MakalelerIII", p: 35.

<sup>23</sup> Fazlur Rahmān, "Islam and Modernity", the University of Chicago, 1982, p: 2.

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 *sharīah* in accordance with social change in respect to protect the main goal (*maqāṣid*) of the *sharīah*. However, whatever ‘Umar did some changes or postponement wasn’t a change of the *sharīah* or an alteration of the *sharīah*.

I have to emphasise on a point that some researchers insist on that ‘Umar’s practices on some rulings were an alteration of *sharīah*. For example: the case of granting zakat for those whose hearts are to be reconciled, which was mentioned in the Qur’an<sup>24</sup>; the punishment of cutting hand<sup>25</sup>; not distributing the land of Egypt and Syria for to those who participated the war<sup>26</sup>; and the case of husband’s initiating the triple talâq (divorce). However, all these examples are not a kind of example which indicate an alteration of the *sharīah*.<sup>27</sup> 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.<sup>28</sup> 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*.<sup>29</sup>

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<sup>24</sup> *Qur’an*: 9/60

<sup>25</sup> *Qur’an*: 5/38

<sup>26</sup> See the verses about the spoils of war and booty *Qur’an*: 8/1,41 ; *Qur’an*: 59/6-9

<sup>27</sup> See discussions about ‘Umar’s judgement and their real purposes: 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.

<sup>28</sup> For ‘Umar’s social and political life, his caliphate, military strategies, administrative roles, and his reforms etc. see: Shibli Nu‘mānī, “*Omar the Great the second Caliph of Islam*”, tr. by Muḥammed Saleem, printed at Ashraf press, Lahore, Pakistan, 1962, v: 2.

<sup>29</sup> Nu‘mānī, “*Omar*” 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,<sup>30</sup> it is obvious that his established reforms were recognised by the *sharīah*; however, 'Umar did not attempt to alter the obligatory (*farḍ*) principles.

The *Qur'ān* 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 (*farḍ*) and whatever he decides to ban becomes prohibited (*ḥarām*). 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 (*farḍ*) must be continued only to postponing or bringing these forward under certain circumstances."<sup>31</sup>

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

Abū Ḥanīfah systemised the principle of personal legal opinion (*ra'y*) which has its roots in the studies made by Ibn Mas'ūd (d.32/653). The significant feature of the Kūfah school is emphasis on the principles of *ra'y* and *qiyās*, which they suggested, should be resorted to when *naṣṣ* was not available. Their assertion that the practise of *ijtihād* was preferable to a ruling based on a weak *ḥadīth* can also be traced back to Ibn Mas'ūd. One of

<sup>30</sup> Nu'mānī, "*Omar*" v: 2.

<sup>31</sup> Orhan Çeker, verbally given information by him at the University of Selçuk dated on 29.03.04 in Konya/ Turkey.

<sup>32</sup> Nashshār, "*İslamda felsefi düşüncenin doğuşu*", tr. by Osman Tunç, ist, 1999, v: 1, pp: 323-326.

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."<sup>33</sup> 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".<sup>34</sup>

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*.<sup>35</sup>

The Prophet's (pbuh) wife 'Āi'shah (d.58/679) was one of the outstanding female jurists (*mujtahidah faqīhah*) who deeply influenced the Companions (*Ṣaḥābah*) and the Successors (*Ṭabi'īn*). One of her contributions to the renewal of Islamic thought is the notion of *ḥadīth* criticism (*naqd*). Testing the *ḥadīth* against the text of the *Qur'ān* to establish the validity of *ḥadīth* was one of her techniques;<sup>36</sup> she also possessed an exceptional understanding of opinion (*ra'y*), analogy (*qiyās*), textual criticism (*naqd al-matn*), application of the *ḥadīth*, juristic preference (*istiḥsān*), and other various principles of Islamic law (*uṣūl al-fiqh*).<sup>37</sup>

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.<sup>38</sup>

<sup>33</sup> Ibn al-Qayyīm, "*I'lām*", I, p: 63.

<sup>34</sup> İsmail Cerrahoğlu, DIA, ii, p: 117; Ibn al-Qayyīm, "*I'lām*", i, p: 81.

<sup>35</sup> Aras, "Ḥammād ve Fikhi Görüşleri", pp: 53-56.

<sup>36</sup> In this context many books have been with the title *istidrāk* (to reform, to correct), eldest book known is al-Baghdādī's (d.498/1096) book which is called "*Istidrāk al-Umm al-Mu'minin 'Ai'shah 'alā al-Ṣaḥābah*" see: Hatipoğlu, M. S. "*Hz. Aişe'nin Ḥadis Tenkitçiliği*", 1973, XIX, pp: 59-74.

<sup>37</sup> Hatipoğlu, *ibid*.

<sup>38</sup> Eliaçık R. I. "*İslamın Yenilikçileri*", v: 1, p: 144.

Abū Ḥanīfah's (d.150/767)<sup>39</sup> modernist spirit was inspired by Ibrahīm al-Nakhāī (d.95/713) and Ḥammād b. Sulaymān (d.120/730). Nakhāī, 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 (*Tābi'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.<sup>40</sup>

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 (*istiḥsān*).<sup>41</sup>

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'an*, 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.<sup>42</sup>

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 *ḥadīth* 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.

<sup>39</sup> For more about Abū Ḥanīfah, see: Muṣṭafa Uzunpostalcı, "Ebu Hanīfe, Hayatı ve İslam fikhındaki Yeri", SÜ Sosyal Bilimler Enstitüsü, 1986; Ibn Nadīm, "Al-Fihrist", pp: 255-256; Ibn Ḥallikān, "Walāyat al-'Āyān", v: 2, pp: 163-164; Abū Zahrah, "Mezhepler Tarihi", v: 2, pp: 207-250; Haythamī, "Al-Ḥayāt al-Ḥisān", p: 41; Mevdūdī, "İslam Düşüncesini Tarihi", edited by M. M. Sharīf, v: 2, pp: 301-333; Ḥusayin b. 'Ali Saymerī (d.436/1045), "Akhbār Abū Ḥanīfah wa Asḥābuh", Beirut, 1985.

<sup>40</sup> Aras, "Ḥammād ve Fikhi Görüşleri", pp:63-106.

<sup>41</sup> For Abū Ḥanīfah and the concept of *istiḥsān*, see Saim Kayadibi, "Doctrine of *istiḥsān* (Juristic Preference) in Islamic Law", first published by Tablet Yayınları, Konya, June 2007.

<sup>42</sup> Abū Zahrah, "Abū Ḥanīfah", p: 342, also see: Uzunpostalcı, "Ebu Hanīfe" DIA, X, 136; Mevdūdī "İslam düşüncesini Tarihi", v: 2, p: 310.

It is clear that juristic discretion enjoys both divine and prophetic sanction, as the *ḥadīth* of Mu‘ādh demonstrates.<sup>43</sup> Abū Ḥanīfah made *istihsān* and *qiyās* 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 *shari‘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 *maṣlaḥah* 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 *‘ibādāt* (worshiping) and those general principle of law already determined and deemed inviolate. According to Tūfī, *maṣlaḥah* is activated through the method of *takhṣīs* (particularization) and *bāy‘ān* (exposition) to prevent the possible contradiction between *maṣlaḥah* and the other two principles, *naṣṣ* (text) and *ijmā‘* (consensus).<sup>44</sup> Tūfī cites the *ḥadīth* “No harm shall be inflicted or reciprocated in Islam”<sup>45</sup> in order to explain why the concept of *maṣlaḥah* is stronger than all other *shar‘ī* principles, although this does not necessarily mean the downgrading of *naṣṣ* and *ijmā‘*. Tūfī agrees that it is obvious that in the process of the first creation, in the hereafter, and in the continuation of life, God considers the *maṣlaḥah* to be of paramount importance to human beings; how, then, could it be possible to ignore *maṣlaḥah* 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 *maṣlaḥah* be considered. It is impossible to ignore *maṣlaḥah*. Tūfī continues, and even when *naṣṣ*, *ijmā‘* and other *shar‘ī* principles contradict it *maṣlaḥah* becomes the main source of law through the methods of *takhṣīs* (particularization) and *bāy‘ān* (exposition).<sup>46</sup>

While Tūfī was expounding and developing the concept of *maṣlaḥah* 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

<sup>43</sup> Abū Dāwūd, *Sunan* iii, 1019 *ḥadīth* no:3585,

<sup>44</sup> Tūfī, “*Risālah*”, pp: 46-48. About Tūfī and the Concept of *maṣlaḥah* see: Saim Kayadibi: “Al-Tūfī- Centred Approach to al-Maslahah al-Mursalah (Public Interest) in Islamic Law”, *Journal of Islamic Law Studies*, issue: 10, year: April 2007, pp: 71-96

<sup>45</sup> Ibn Mājah, “*Sunan*”, ii, 784, *ḥadīth* no: 2340; Shāḥibī, “*Al-Muwāfaqāt*”, iii, p:17.

<sup>46</sup> Koca, “*İslam Hukukunda Maslahat ı Mursalah*”, v: 1, no:1, pp: 93-122; Rashīd Riza, “*Al-Manār*”, Cairo, 1909, v: 9, no: 10; Mevlüt Uyanık, “*Qur‘ān ın Tarihsel ve Evrensel Okunuşu*”, Ankara, 1997, p: 219; Eliaçık, “*İslam ın Yenilikçileri*”, v:2, p: 53; Khallaf, “*Maṣader*” pp: 105-144.

agricultural economy to trade economy, rapid urbanization, close relationships with the Spanish Christians, and the jurists' fear of gradual loss of power,<sup>47</sup> 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 Shāṭibī (d.790/1388) who is arguably the most significant, elaborating as he did upon the key concept of *maqāṣid al-sharīah* (objectives of the divine law).<sup>48</sup> New problems and dilemmas were viewed within the framework of *maqāṣid al-sharīah* and a new *ijtihād* was formulated to cover everything connected to transactions (*mu'āmalāt*); *'ibādāt*, however, remained excluded.<sup>49</sup>

According to Shāṭibī, it is possible through induction to uncover the main objective of the *Shārīf*, which is the attainment of benefit for mankind. The objectives on *'ibādāt* (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*.<sup>50</sup>

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 *sharīah*. For Ibn Taymiyyah, a society consciously applying the *sharīah* is a truly Muslim society. However, in order to apply the *sharīah* 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 *sharīah*. 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.<sup>51</sup>

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<sup>47</sup> M. Khālid Masood, "Islamic Legal Philosophy", , International Islamic Publishers Delhi, 1989, pp: 67-75.

<sup>48</sup> Masood, "Islamic Legal Philosophy", p: 103.

<sup>49</sup> Ibid p: 281

<sup>50</sup> Masood, ibid, pp: 237,263.

<sup>51</sup> Rahmān, "Revival", see in: "MakalelerIII", p: 40.

### **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 18<sup>th</sup> century with the outstanding scholar Dihlawī (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 *sharīah* reform.<sup>52</sup>

The spread of Dihlawī'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.<sup>53</sup> Dihlawī continued Shāṭibī's line with regard to *maṣlaḥah* and *maqāṣid al-sharīah*.<sup>54</sup> He also claimed that the door of *ijtihād* was never closed and that blind imitation must be abandoned.<sup>55</sup>

Ibn Taymiyyah's revivalist movement was reawakened centuries later in northern Africa by the Sanūsīs<sup>56</sup> and in western Africa by the Fūlānīs<sup>57</sup>; similar revivalist movements also took place in India.

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<sup>52</sup> Sayyid Qutub, "*İslam toplumuna doġru*", tr. by Ahmed Pakalın, İslamoġlu, İstanbul, 1988, pp: 63-66.

<sup>53</sup> Rahmān, "*İslam*", p: 280.

<sup>54</sup> Dihlawī, "*Hujjat Allah al-Bālighah*", tr. by Mehmet Erdoġan, İz yayinlari, İstanbul, 1994, v: 1, p: 9.

<sup>55</sup> Dihlawī, "*Iqd al-Jid*", (*İctihad, taklid ve telifk üzerine dört risale*), tr. by Hayreddin Karaman, İstanbul, 2000, pp: 159, 160, 123-180.

<sup>56</sup> Sanūsī movement: The founder of this movement is Muḥammad b. 'Ali al-Sanūsī (d.1859); it is not an independent Sūfī sect an offshoot of the Idrīsī sect. In North Africa it became a enormously powerful movement politically and religiously. See: Kadir Özköse, "*Muḥammed Sanūsī Hayati, Eserleri, Hareketi*", İnsan yayinlari, 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. Afghani 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.<sup>58</sup> According to Afghānī, the door of *ijtihād* is always open, and whoever possesses the required qualifications may practice it.<sup>59</sup>

Sayyid Aḥmad 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.<sup>60</sup> 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.<sup>61</sup> The most fundamental values of Islam are constructed upon monotheism and ethics. In this manner, the religion and the *sharīah* are very different; hence, the perfect one is not the *sharīah* but the religion itself. Since there is no concept of a final *sharīah*, 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 *ḥadīth* must be in accordance with the *Qur'ān* and the laws of nature, otherwise they will not be recognized as the Prophet's *ḥadīth*.

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<sup>57</sup> Fūlānī movement: This movement was led by Othmān b. Fudī (Osman dan Fodio) (b.1754), Muḥammad Bello (b.1781) and 'Abd Allah b. Fudī (b.1766). After Othman b. Fudī the movement was continued by his son Muḥammad Bello as the Sokoto Caliphate, See: Hiskett, Mervyn, "The Sword of Truth- the Life and Times of the Shehu Usman Dan Fodio", New York 1973; Smith, 'Abd Allah "The Islamic Revolutions of the 19<sup>th</sup> Century", Journal of the Historical Society of Nigeria", ii, 1961, p: 176.; İsmail Hakkı Göksoy, "Fūlāniler" in TDV İslam Ansiklopedisi, İstanbul 1996, v: 13, pp: 215, 216.

<sup>58</sup> Rahman, "Revival", see in "MakalelerIII" p: 46.

<sup>59</sup> Karaman, "Gerçek İslam'da birlik", Nesil yayınları; p: 34; Mājid Fakhri, "İslam Felsefesi Tarihi", tr. by Kasım Turhan, İstanbul, 1992, p: 304; for more on this see: Jamāl al-Dīn Afghānī: Samarrāi Ḥasib "Dini Modernizmin Üç Şovalesi", Bedir publication, İstanbul, 1998.

<sup>60</sup> Aḥmed 'Azīz "Hindistanda kültür çalıřmaları", tr. by Latif Boyacı, İstanbul, 1995, p:84-85.

<sup>61</sup> *Qur'ān*: 30/30.

Consequently, the number of *mutawātur ḥadīth* does not exceed ten, and there is no concept of *nāskh* (abrogation) in the *Qur'ān*. Furthermore, interpretation of *sharīah* 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.<sup>62</sup>

Another outstanding personality of Islamic revivalism is Muḥammad 'Abduh (d.1905). 'Abduh was deeply influenced by his master Afghānī's ideas and by Sayyid Aḥmad Khān's method of *ijtihād* based on culture and education. He rejected imitation (*taqlīd*) and he insisted on returning to long-forgotten methods such as *istihān*, and practicing new *ijtihād* by using reason and intellect, to address new circumstances and situations. According to 'Abduh, *ijtihād* is not being encouraged because it represents any particular school of thought, but rather because 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.<sup>63</sup>

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 Tanzīmāt (1839). These Tanzīmāt included, among other things, the law of merchants (1850), a penal code (1858), maritime trade law (1868), and civil law (*Majallah*) (1869-1879). 'Abdulḥamīd II was declared a constitutional monarch in the 1876 and the first written constitution was adopted. During the next three decades, the Tanzīmāt reforms were applied and improved.<sup>64</sup> The agenda of that period was based mainly on the *majallah al-aḥkām*<sup>65</sup> prepared by Jawdat Pasha (1823-95), one of the leading founding members of the Nizāmiyah courts.<sup>66</sup>

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

<sup>62</sup> M. M. Abd al-Ḥamid Sharif, "İslam Düşüncesini Tarihi", İstanbul, 1992, v: 4, pp: 386-390.

<sup>63</sup> 'Abduh, "Risalah al-Tawhīd", p: 104; Zeki İşcan, "Muḥammed 'Abduh'un Dini ve Siyasi Görüşleri", Dergah, İstanbul, 1998, p: 149-167; Karaman, "Gerçek İslam'da Birlik" p: 82; for more about Muḥammad 'Abduh, see: H. Malcolm Kerr, "Islamic Reform, the political and legal theories of Muḥammad 'Abduh and Rāshid Riḍā", University of California Press, USA, 1966; Watt, "Islamic Fundamentalism and Modernity", p: 51.

<sup>64</sup> Birişik, "Hint Altı Kıtasında Düşünce ve Tefsir Ekolleri", p: 42-43.; Taha Akyol, "İran'da ve Osmanlı'da Mezhep ve Devlet", Milliyet, 1999, iv, p: 193;

<sup>65</sup> *Al-Majallah al-Aḥkām*: The Ottoman courts manual.

<sup>66</sup> Ahmet Cevdet Paşa, "Tazākīr", Tatimmah, publisher Cavid Baysun, TTK basımevi, Ankara, 1986, pp: 85-91.

<sup>67</sup> Cevdet, "Tazākīr", Tatimmah, pp: 85-91; Akyol, "Medine'den Lozana", p: 39.

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.<sup>68</sup>

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 *sharīah* courts<sup>69</sup> 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.<sup>70</sup>

Another significant reformer was Aḥmad Hilmī (1865/1914), a true defender of the theory of *ijtihād*.<sup>71</sup> 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 *Majallah*, which was based on Ḥanafī jurisprudence, should be reconsidered.<sup>72</sup>

Hamdi Yazir (1878/1942) also expressed his strong belief in the importance of revivalism. In support of his claim, he quoted the Prophet's (pbuh) *ḥadīth*,<sup>73</sup> "On the eve of every century, God will send to my community a man who will renew it din (religion)"<sup>74</sup>. Ismā'il Ḥaqqī (Izmirlī) (1868/1946)<sup>75</sup> 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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<sup>68</sup> Ibid. 51.

<sup>69</sup> Ibid, p: 35.

<sup>70</sup> Ibid p: 37.

<sup>71</sup> Ismā'il Kara, "*Türkiye'de İslamcılık Döüncesi*", v: 1, p: 14, Risale, İstanbul, 1986.

<sup>72</sup> Sayyid Bay, "*Uṣūl*", pp: 163-330, 1917; Kara, ibid, pp: 221-228.

<sup>73</sup> Meḥmet Aydın, "*Elmalılı'da Teceddüd Fikri*", İslam Felsefesi Yazıları, Ufuk, İstanbul, 2000, p: 188; Kara, ibid, v: 1 p: 425.

<sup>74</sup> Abū Dāwūd, "*Sunnah*", ii, 518. For the comment of this *ḥadīth* see: Turner, "*Müceddidlik*", pp: 65-73.

<sup>75</sup> Izmirlī, "*Sebilurrahād*", no: 297, pp: 190-195, no: 293, p: 129-132; Kara, ibid, v: 2, pp: 98-104.

smoothing out of differences among the four schools of thought, with little impact on wider society as a whole.<sup>76</sup>

One of the revivalists of this period is Muḥammad Iqbāl (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.<sup>77</sup> According to Iqbāl, 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 Iqbāl, communities occupying the centre stage of an active world should be dynamic. The fundamental principle in Islam that maintains this dynamism is *ijtihād*.<sup>78</sup> The *ḥadīth* of Mu‘adh ibn Jabal<sup>79</sup> is in fact a genuine lesson for people of this time.<sup>80</sup> Iqbāl insists on approaching legal problems with the spirit of ‘Umar and with the ability of critical and free thought.<sup>81</sup> He strongly emphasised that a new legal order in the field of transactions (*mu‘āmalāt*) must be subject to change and transformation. However, worship (*‘ibādāt*) must remain fixed. Therefore, he developed a new philosophical concept called “permanent transformation”, with *‘ibādāt* and religious obligations remaining inviolate, while transactions (*mu‘āmalāt*) are open to change.<sup>82</sup>

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

In the 1970s, Khomeinī (1902/1989) developed the concept of “*walāyati faqīh*” which foreshadowed the rise of hierocratic rule in Iran.<sup>85</sup> 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 Mutaḥḥarī (1921/1979) and Sharī‘ati (1933/1977); it continues today with the likes of ‘Abd al-Karīm

<sup>76</sup> Ibid, p: 51.

<sup>77</sup> Iqbāl, “Islam’da Dini Düşüncenin Yeniden Doğuşu”, p: 19.

<sup>78</sup> Ibid, p: 202.

<sup>79</sup> Abū Dāwūd, “Sunan” iii, 1019 *ḥadīth* no: 3585.

<sup>80</sup> Iqbāl, ibid, pp: 202,203.

<sup>81</sup> Ibid, pp: 228-229.

<sup>82</sup> Jāwid Iqbāl, “Uluslararası Muḥammed Iqbal Sempozyumu Bildirileri, Muḥammed Iqbal Kitabı”, IBBKDY, İstanbul, 1997, p: 18-25.

<sup>83</sup> Celālizāde, “Bed‘iuzzaman”, p: 76.

<sup>84</sup> Said Nursi, “Sözler”, Yeni Asya Neşriyat, İstanbul, January 1998, p: 442.

<sup>85</sup> *Wilāyat al-faqīh* (a theory of rule by the jurist): This Shī‘ite theory formulated largely by the Ayatullah Khomeinī, who claimed that the political power has to be in the hands of a jurist *faqīh*, who rule in the name of the Hidden Imam. Khomeinī’s fundamental theory is that Jurists are appointed by Imams, Imāms by Prophets, and Prophets by God. While the Hidden Imam is in occultation, a just *mujtahid faqīh* leads the government on behalf of the Mahdī until he returns. See: Ismāīl Safā Üstün, “Humeyni’den Hamaney’e İran İslam Cumhuriyeti Yönetim Biçimi”, Birleşik, İstanbul, 1999, p: 25; Chibli Mallat, “The Renewal of Islamic law”, Cambridge University Press, 1993.

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 “*walāyati faqīh*” is to maintain the general principles of the *sharī'ah* and investigate whether it is being applied appropriately.<sup>86</sup>

Sharī'ati (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.<sup>87</sup> The principle of *ijtihād* must be reactivated and should not be restricted to one period of time or set of particular circumstances.<sup>88</sup> According to Sharī'ati, closing the door of *ijtihād* would be a catastrophe. He considered Afghānī and 'Abduh as the leaders of revivalism and contemporary Islamic reawakening.<sup>89</sup>

## 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.<sup>90</sup>

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

<sup>86</sup> Ayatullah Mutahharī, “*İslam Devrimi*”, Pınar, İstanbul, 1981, pp: 62-63, 119-121.

<sup>87</sup> 'Ali Sharī'atī (d.1977), “*Öze Dönüş*”, tr. by Kerim Güney, Kitabevi, İstanbul, 1999, pp: 38-41.

<sup>88</sup> Sharī'atī, “*Ne Yapmalı*”, tr. by Muḥammad Hizbullah, Birleşik, İstanbul, 1995, pp: 95-105.

<sup>89</sup> Sharī'atī, “*Yarının Tarihine Bakış*”, tr. by Orhan Pekin, Ejder, Said Okumuş, Birleşik, İstanbul, 1998, p: 148.

<sup>90</sup> Rahmān, “*Revival*” *ibid*, p: 47; An alternative perspective on the polity of the Muslim world in the 20<sup>th</sup> century can be seen in four stages in: Ahmet Davutoglu, “*Civilizational Transformation and the Muslim World*”, Mahir Publications, Kuala Lumpur, 1994, p: 105-113.

<sup>91</sup> 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'āb al-Dīn, a graduate from the famous Indian seminary Dār al-'Ulūm 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 Sīnā's psychology at Oxford University in 1949. 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.<sup>92</sup>

According to Fazlur Rahman, the *Qur'ān* 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'ān* should be integrated into present circumstances.<sup>93</sup> 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'ān*, 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.”<sup>94</sup>

Islamic revivalism in the past fifty years has also found its voice with Shiī personalities such as Najafabādī<sup>95</sup>, Faḍlallah<sup>96</sup>, ‘Abd al-Karīm Soroush<sup>97</sup>, and Sunnī ideologues such as Turābī<sup>98</sup>, Ghannouchi<sup>99</sup>, ‘Ammāra<sup>100</sup>, Ḥasan

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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 Ebrāhīm Moosa, One World publications, oxford 2000.

<sup>92</sup>Tamara Sonn, “*Fazlur Rahman’s Islamic Methodology*”, *The Muslim World*, 1991, v: 81, p: 212-230. See: in Fazlur Rahman, “*Makaleler I*”, tr. by Adil Çiftçi, p:8.

<sup>93</sup>Rahman, “*Islam and Modernity*”, p: 13.

<sup>94</sup>Ibid, p: 5.

<sup>95</sup>According to him *Walyati Faqīh* has to be completely based on the power of the people. Dominance should be held by the majority. See: Ayatullah Şāliḥī Najafabādī, “*Velayeti Fakih; Hukumeti Salihan*”, muassaseai Hudamāti Farhangi Resa, 1984, p: 67.

<sup>96</sup>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□I Allah, “*İslami Söylem ve Gelecek*”, Pınar, İstanbul, 2000, pp: 26, 48-50.

<sup>97</sup>See: ‘Abd al-Karim Soroush: “*Maksimum ve Minimum Din*”, tr. by Yasin Demirkan, *Fece DoĖru Magazin*, November, December 1999, 4/37-38-39.

<sup>98</sup>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: Ḥasan Turābī, “*İslami Döşöncenin İhyası*”, tr. by Sefer Turan, Adem Yerinde, Ekin, İstanbul, 1997, 66-81.

Ḥanafī<sup>101</sup>, Jābirī<sup>102</sup>, *Qaradāwī* and in Turkey, Hayreddin Karaman<sup>103</sup> 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 sectarianism. 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."<sup>104</sup>

### 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

<sup>99</sup> According to him, the concept of renewal in Islam is possible to activate the principle of *ijtihād* and avoid *taqlīd* (imitation). He points out that life is also based on evolution and cultures are too. See: Rāshid al-Ghannūshī, "*İslami Yöneli*", Bir, İstanbul, 1987, p: 28-32.

<sup>100</sup> He is one of the contemporary thinkers of the *Mu'tazilah* school of thought. He was born in Egypt in 1932.

<sup>101</sup> Like his predecessors, he is a proponent of *ijtihād* and *ta'wīl* (interpretation) which he claims are to the main purposes of *sharī'ah* (*maqāṣid al-sharī'ah*). The existence of *sharī'ah* is to clarify the rulings discovered by human intellect. Therefore, *ijtihād* in that context means to make balance between the *sharī'ah* and nature. See: Ḥasan Ḥanafī, "*Otoriteriyenligin Epistemolojik, ontolojik, Ahlaki, Siyasi ve Tarihi Kökleri*", tr. by İlhāmī Güler, *İslamiyat Dergisi*, Ankara, April-June, 1999, pp: 29-30, v: 2, no: 2.

<sup>102</sup> See: Muḥammad 'Abīd al-Jābirī, "*Takwīn al-'Aql al-'Arabī-'Arap Aklının oluşumu*", tr. by İbrahim Akbaba, İz, İstanbul, 1997, p: 73-74, 133.

<sup>103</sup> For more about his life, see: "Journal of Islamic law Studies", issue: 3, Mehir Vakfı, Konya, June, 2004.

<sup>104</sup> Qaradāwī, "İslam Hukuku evrensellik süreklilik", p: 136.

rulings. These issues arise from technical advancements which present new challenges to the *aḥkām* to respond with practical changes taking place at certain times and thus require a flexibility in the interpretation of the *naṣṣ* (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 *sharīah* in accordance with social change. However the implementations of 'Umar<sup>105</sup> for Islamic law has to be understood in a way which deal with the purpose of the *sharīah*. It is not considered as an alteration of the *sharīah*.

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<sup>105</sup> See: Saffet Köse, *ibid*.

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